

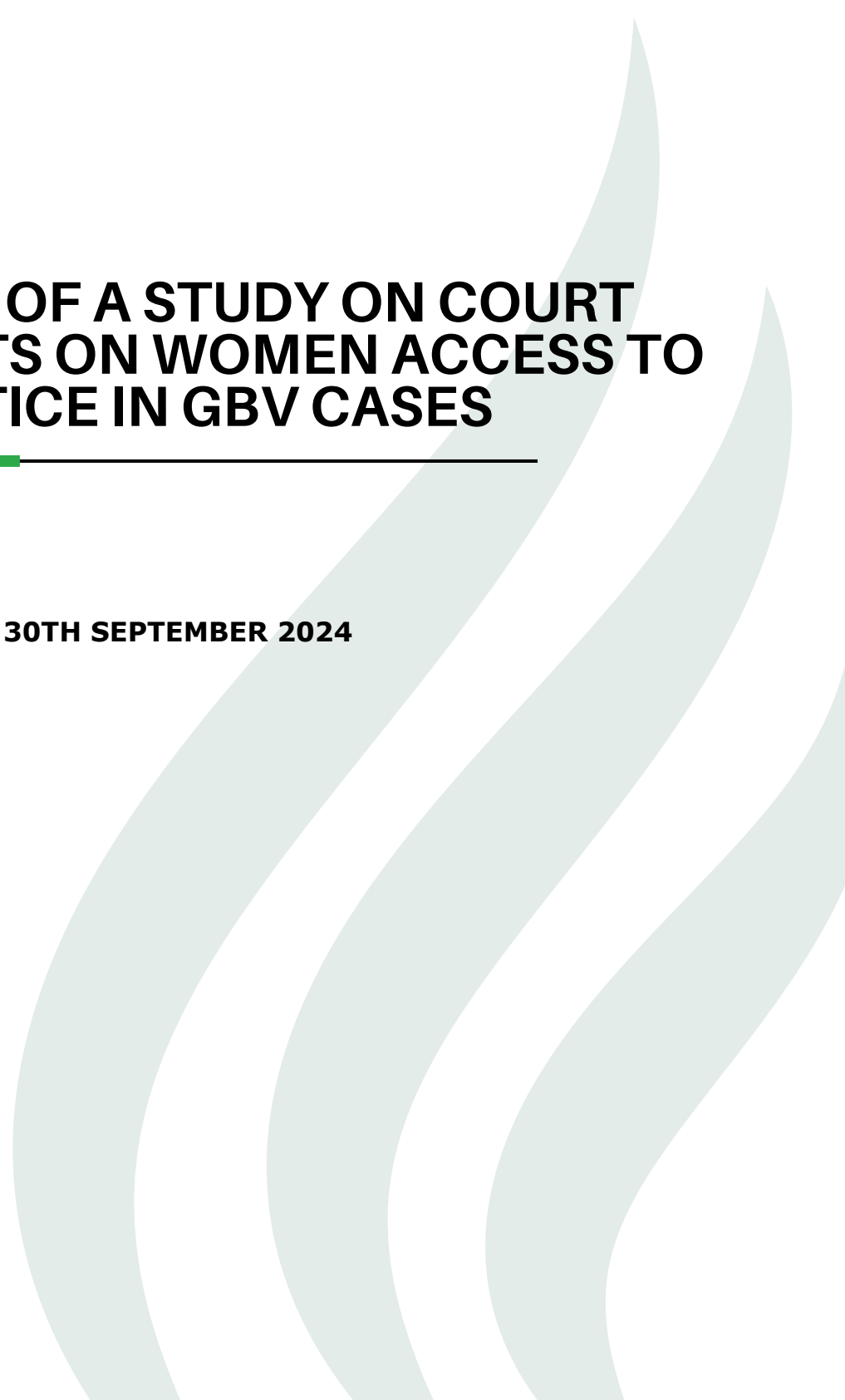
# FINDINGS OF A STUDY ON COURT JUDGEMENTS ON WOMEN ACCESS TO JUSTICE IN GBV CASES

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**30TH SEPTEMBER 2024**

## **Uganda**

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# FOREWORD

On behalf of Avocats Sans Frontières (ASF) Uganda, it is my pleasure to present this comprehensive study titled “Findings of a study on court judgements on women access to justice in GBV cases”. This report, supported by the Royal Embassy of the Netherlands, is a cornerstone of the “From Access to Equality (FATE): Empowering Women to Access Justice in Uganda” project.

This study reflects ASF’s commitment to advancing justice and equity for women in Uganda, particularly in addressing the challenges posed by Gender-Based Violence. Drawing on an in-depth analysis of 88 court judgments spanning Uganda's judicial hierarchy, alongside community and stakeholder insights, the report highlights both significant progress and persistent gaps in ensuring justice for women.

We are encouraged by the strides made in delivering gender-sensitive judgments, supported by progressive legal frameworks and judicial activism. However, the findings underscore the urgent need for continued advocacy, legislative reforms, and systemic changes to address the barriers that impede justice for women and perpetuate harmful stereotypes and practices.

The recommendations outlined in this report are intended to guide policymakers, judicial officers, legal practitioners, and all stakeholders working towards an equitable justice system. It is our hope that these insights will catalyze meaningful action to strengthen policies, improve legal aid, and foster coordinated responses to Gender-Based Violence.

As ASF Uganda, we reaffirm our dedication to empowering women to access justice, advocating for their rights, and supporting the creation of a society where justice and equality prevail.

**Irene Winnie Anying**

*Country Director*

*Avocats Sans Frontières (ASF) Uganda*

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## Acronyms

A2J:	Access to Justice
CEDAW:	Convention on the Elimination of all Forms of Discrimination against Women
ComEDAW:	Committee on Elimination of Discrimination against Women
DEVAW:	<u>Declaration on the Elimination of Violence Against Women</u>
DV:	Domestic Violence
FGM:	Female Genital Mutilation
GBB:	Gender Bench Book; Women's Access to Justice in Uganda, 2016
GBV:	Gender-based Violence
ICD:	International Crimes Division of the High Court
LRA:	Lord's Resistance Army
PPTA:	Prevention and Prohibition of Trafficking in Persons Act
PQD:	Political Question Doctrine
SGBV:	Sexual Gender Based Violence

## Definition of Key Terms

**Access to justice:** The ability of any person, regardless of income or classification, to use the legal system to advocate for themselves and assert their rights.

**Affirmative action:** A policy, programme or measure that seeks to redress past discrimination through active measures to ensure equal opportunity and positive outcomes in all spheres of life.

**Aggravated defilement:** Performing a sexual act on a person below fourteen years of age by a person in authority over the victim at the material time of the act, or where the offender is infected with HIV/AIDS, is a parent or guardian, is a serial offender or where the victim is a person with disability. Person in position of authority” means any person who is charged with any duty or responsibility for the health, welfare, or supervision of a minor or any person for any length of time.

**Defilement:** Performing a sexual act with another person who is below the age of eighteen.

**Discrimination:** Any distinction, exclusion or restriction which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise of an individual’s human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

**Domestic violence:** Any act or omission which harms, injures or endangers the health, safety, life, limb or well-being of the victim, whether mental or physical, including physical, sexual, economic, physiological, verbal, or emotional abuse. It also includes acts or omissions that harass, harms, injure or endangers the victim with a view to coercing him or her or any other person related to him or her to meet any unlawful demand for any property or valuable security; has the effect of threatening the victim or any person related to the victim by any conduct mentioned in this definition paragraph or otherwise injures or causes harm, whether physical or mental, to the victim.

**Equality:** The state of being equal in terms of enjoyment of rights, treatment, quantity or value, access to opportunities and outcomes, including resources.

**Equity:** The provision of fairness and justice in the distribution of benefits and responsibilities.

**GBV:** Acts perpetrated against women, men, girls and boys on the basis of their sex which cause or could cause them physical, sexual, psychological, emotional or economic harm, including the threat to take such acts, or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed or other forms of conflict.

**Gender blind:** Inability to distinguish between the sexes or having the quality of ignoring gender.

**Gender Equality:** Gender equality is the equal valuing by society of the similarities and the differences of men and women, boys and girls, and the roles they play from an economic, social, cultural and political development perspective.

**Gender Equity:** Means “fairness of treatment for women and men, according to their respective needs, including the equal treatment or treatment considered equivalent in terms of rights, benefits, obligations and opportunities”.

**Gender stereotypes:** Common beliefs about characteristics, traits, responsibilities, and activity domains that are deemed appropriate for women, men, girls and boys based on their conventional roles both in the private and public spheres.

**Girl:** A female below the age of eighteen years.

**Human rights:** Entitlements and freedoms that every human being has by virtue of being human. We are born with them; they may be limited in certain circumstances but they cannot be taken away.

**Human trafficking:** The recruitment, transportation, harbouring or receipt of persons, by means of threat, abuse of power, position of vulnerability, force or other forms of coercion, abduction, fraud or deception to achieve the consent of a person having control over another person for the purpose of amongst other things, sexual and financial exploitation.

**Rape:** Unlawful carnal knowledge of a woman, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, commits the felony termed rape.

**Sexual act:** Penetration of the vagina, mouth or anus, however slight, of any person by a sexual organ or the unlawful use of any object or organ by a person on another person's sexual organ.



## List of cases reviewed

### Supreme Court

1. Aharikundira Yustina Vs. Uganda, [2018] The Supreme Court of Uganda (UGSC) 49 (3 December 2018).
2. Akbar Hussein Godi Vs. Uganda, [2015] UGSC 17.
3. Badru Mwindu Vs. Uganda, Supreme Court Criminal Appeal (SCCA) No. 15 of 1997
4. Christopher Martin Madrama Izama Vs. Attorney General (AG), SCCA No. 01 of 2016.
5. Julius Rwabinumi Vs. Hope Bahimbisomwe, SCCA No. 10 of 2009.
6. Kiwalabye Vs. Uganda, SCCA No. 143 of 2007.
7. Kooky Sharma Vs. Uganda, SCCA No. 44 of 2000.
8. Kyetegereka George Vs. Uganda, [12010] Court of Appeal of Uganda (UGCA) 110.

### Constitutional Court

1. Aboneka Micheal Vs. Watoto Church, Constitutional Petition No.019 of 2018.
2. CEHURD & 3 Others. Vs. The AG, Constitutional Appeal No.1 of 2013.
3. Centre for Domestic Violence Prevention & Ors Vs. AG, Constitutional Petition No. 13 of 2014.
4. Foundation for Human Rights Initiative (FHRI), Legal Aid Service Providers Network Uganda (LAPSNET), Vs. AG and the Electoral Commission, Constitutional Petition No.39 of 2017.
5. Joyce Nakacwa Vs. AG & Others, Constitutional Petition 2/2001.
6. Law and Advocacy for Women in Uganda Vs. AG, Constitutional Petition No. 13 of 2005.
7. MIFUMI (U) Ltd and 12 others Vs. AG and Kenneth Kakuru, Constitutional Petition No. 12 of 2007
8. Uganda Association of Women Lawyers (FIDA) & 5 Others Vs. AG, Constitutional Petition No. 2 of 2003.

### Court of Appeal

1. Abot Richard Vs. Uganda, Criminal Appeal (CA) No. 190 of 2004.
2. Adamu Mubiru Vs. Uganda, CA No. 47 of 1997.
3. Adong Simon and 2 others Vs. Opolot David, High Court Civil Appeal No. 46 of 2013.
4. Agaba Job Vs. Uganda, Criminal Appeal No. 230 of 2003.
5. Ambayo Joseph Waligo Vs. Aseruka Jackline, Civil Appeal No. 0100 of 2015.
6. Bizimana Vs. Uganda, Court of Appeal Criminal Appeal No. 143 of 2010.
7. Byaruhanga Lozio Vs. Uganda, Criminal Appeal No. 168 of 2009.
8. Ebiju & Anor Vs. Echodu, Civil Appeal No. 43 of 2012, [17 December 2015].
9. Ederema Tomasi Vs. Uganda, CACA No. 203/2019.
10. Emeju Juventine Vs. Uganda, CACA No. 095 of 2014.
11. Kato Sula Vs. Uganda, Court of Appeal Criminal Appeal No. 30 of 1999.
12. Kawuli Vs. Uganda, Court of Appeal Criminal Appeal No.60 of 2013.
13. Kitembo Patrick Vs. Uganda, Criminal Appeal No. 441 of 2014.
14. Lubanga Vs. Uganda, Criminal Appeal No. 124 of 2009.
15. Lukwago Vs. Uganda, Criminal. Appeal No. 36 of 2010.
16. Negulu Milly Eva Vs. Dr. Serugga Solomon, Civil Appeal No. 103 of 2013 [2014] UGHCCD 64
17. Ninsiima Vs. Uganda, Crim. Appeal No. 180 of 2010.
18. Ntambale Fred Vs. Uganda, Criminal Appeal No. 0177 of 2009.
19. Omuroni Vs. Uganda, Criminal Appeal No. 2 of. 2000.
20. Otema Vs. Uganda, C.A. Cr. Appeal No. 155 of 2008.
21. Tumusime Vs. Uganda, Criminal Appeal No. 006 of 2022.
22. Uwihayimaana Molly Vs. Uganda, Court of Appeal Criminal Appeal No. 103 of 2009 [2015].

## High court

1. Annette Yosaa & 4 Ors Vs. Ambassador Idule Amoko & AG, HC Misc. Cause No. 41 of 2023.
2. Baramureba James Vs. Kabakonjo Abwooli & 6 Ors, HCCS No. 20 of 2013.
3. Best Kemigisa Vs. Mabel Komuntale, Civil Suit No. 5 of 1998.
4. Birungi Nicholas Vs. Kakyio Pamela, HCCA 32 of 2022.
5. BPs Vs. CS, Civil Appeal No. 6222 – 6223 of 2010.
6. C & 11 Others Vs. Attorney General & Uganda Veterans Development Ltd, High Court Civil Suits No. 278, 280, 283, 284, 285, 286, 289, 290, 291, 292, 293, 296 of 2013) [2020] UGHCCD 55 (14 April 2020) at Kampala.
7. Catherine Alak Aleku Vs. Jackson Leku, High Court Divorce Cause No. 8 of 2009.
8. Centre for Health, Human Rights and Development & Others Vs. Nakaseke District Local Administration, Civil Suit 111 of 2012.
9. Edward Mulindwa Vs. Sarah Kalanda, Misc. Application No. 763 of 1996.
10. Haji Musa Kigongo Vs. Olive Kigongo, HC CS. No. 295 of 2015.
11. Hajji Buruhan Ssenkumba Vs. Umu Kuruthum Nanteza, Divorce Cause No. 012 of 2020.
12. Igeme Katagwa Vs. Anna Sarah Nalwoga, Divorce Cause No. 100 of 2022.
13. Joy Kiggundu Vs. Horace Awori, [2001-2005] HCB 122.
14. Kagga Vs. Kagga, High Court. Divorce Cause No. 11 of 2005.
15. Kagimu Vs. Kagimu, (2001-2005) 3 HCB 100.
16. Kazooba David Guma Vs. Mugisha Patricia, Civil Misc. Application No. 004 of 2024.
17. Lugwaro Aber Brenda Vs. Karema Edward, Family Cause No. 67 of 2021.
18. Magoba Editor Vs. Tusker Mattresses (U) Ltd, Industrial Court Labour Dispute Reference No. 243 of 2015.
19. Matter of Adoption of Mark Kakembo, Family Cause No. 169 of 2014.
20. Mayambala Vs. Mayambala, High Court Divorce Cause No. 3 of 1998.
21. Muruhura Sam Vs. Kyarimpa Winnie, Nabasa Vicent & Mushaba Sajja, HCT-05-CV-CR-0011-2023.
22. Nassazi Racheal Vs. George Musoma Walugembe, Divorce Cause No. 75 of 2020.
23. Oringi Elia Vs. Uganda, Miscellaneous Criminal Application No. 0011 of 2016.
24. Paul Kaggwa Vs. Jackeline Muteter, High Court Matrimonial Cause No. 23 of 2005.
25. Twijukye Fred Vs. Tugusimirize, Divorce Cause No. 028 of 2021.

## High court

26. Uganda Vs. Aballa Walter, Criminal Sessions Case No. 0204 of 2015.
27. Uganda Vs. Abulejo Godfrey, Criminal Sessions Case No. 0058 Of 2016.
28. Uganda Vs. Apio Agnes, High Court Criminal Session Case No. 0123 of 2014.
29. Uganda Vs. Awokenimungu, Criminal Case No. 0186 of 2014.
30. Uganda Vs. Bongomin Kennedy, Criminal Session Case No. 194 of 2011.
31. Uganda Vs. Byarugaba, High Court Criminal Session Case No.361 of 2013.
32. Uganda Vs. Jacqueline Uwera Nsenga, High Court Criminal Session Case No. 013 of 2013.
33. Uganda Vs. Kamuhanda Emmanuel, HCT-01-CR-SC-0024 OF 2012.
34. Uganda Vs. Karenga Abdu, Criminal Session No. 0292 of 2016.
35. Uganda Vs. Kusemererwa Julius, High Court Criminal Session Case No.15 of 2014.
36. Uganda Vs. Kwoyelo Thomas alias Latoni, High Court (International Crimes Division) HCT-00-ICD-SC-02 of 2010 at Gulu.
37. Uganda Vs. Lomoe, Criminal Case No. 109 of 2016.
38. Uganda Vs. Lydia Draru, HCT-00-CR-SC-0404 of 2010.
39. Uganda Vs. Malik Junior, International Crimes Division HCT-00-ICD-SC-0003-2021.
40. Uganda Vs. NA, MSK-CR-AA-132/2013.
41. Uganda Vs. Nakalyango Grace and Another, High Court Criminal Case No. 452 of 2010.
42. Uganda Vs. Ntihabose Benon, Criminal Session Case N. 77 of 2010.
43. Uganda Vs. Olupot Francis, H.C. Cr. S.C. No. 066 of 2008.
44. Uganda Vs. Peter Matovu, Criminal Session Case No. 146 of 2001.
45. Uganda Vs. Susan Kigula, HCT-00-CR- SC-0115-2011.
46. Uganda Vs. Tukwasibwe Junior, International Crimes Division HCT-00-ICD-0009-2022.
47. Uganda Vs. Tumwesigye ziraba, High Court Criminal Case No. 092.
48. Uganda Vs. Umar Londroma, Criminal Session Case No. 0089 of 2015.
49. Uganda Vs. Umutoni Annet, International Crimes Division HCT- 00- ICD-CR -SC- NO. 003 of 2014.
50. Uganda Vs. Yiga Hamidu & Or, Criminal Session Case 005 of 2002.

## Executive Summary

This report presents findings of a comprehensive study on court judgments related to access to justice (A2J) for women in Uganda, with particular focus on Gender-Based Violence (GBV) cases from 1995 to 2024. The Study was commissioned by Avocats Sans Frontières (ASF) with support from the Royal Embassy of the Netherlands. Implemented under the “From Access to Equality (FATE): Empowering women to access justice in Uganda Project.” The study sought to analyze the legal and policy issues related to A2J for women, with a particular focus on GBV cases intended to inform strategic advocacy at different levels. The study was undertaken over a period of 30 days.

This report provides a background and general overview to women’s A2J with specific attention to GBV. It covers the methodology for executing the assignment, presents findings, policy and legal issues and makes recommendations to different stakeholders. This report is supplemented by an issue paper of legal and policy concerns emerging from the respective judgments reviewed, and provides actionable recommendations to different stakeholders. A Frequently Asked Questions (FAQs) document has also been developed addressing key procedural and substantive questions on women’s A2J in GBV cases.

The findings cover consultations at national and sub-national levels. . At the sub-national level, the findings of this report covers 7 districts; (Gulu, Lamwo, Jinja, Mbale, Soroti, Moroto and Masindi) out of the 11 FATE project’s focus districts. A cross-sectional mixed methods approach was adopted using qualitative and quantitative data collection methods. Qualitative data approaches included 5 Key Informant Interviews (KIIs) with female respondents at the national level and 2 Focus Group Discussions (FGDs) at the community level (in Lamwo and Masindi districts) with a total of 15 participants (9 female and 6 male). Thematic content analysis was used for the qualitative data while descriptive statistical analysis was performed for quantitative data. A total of 88 cases of both criminal and a civil nature were examined. Of the total number of cases reviewed, eight judgments were from the Supreme Court, 22 Court of Appeal, eight Constitutional Court and 50 from the High Court. At the High Court level judgments were sourced from Kampala, Soroti, Gulu, Arua, Fort Portal, Kabale, Moroto, Jinja, Masaka, Lira and Mbale circuits.

We find that following the promulgation of the 1995 Constitution of the Republic of Uganda, there has been increased protection of the dignity of women and girls, rejection of practices that are harmful as well as recognition of the unique status and maternal functions of women. Laws that were enacted before the promulgation of the 1995 Constitution as well as practices that violate rights of women have been denounced by the Courts and amendments to such laws have followed.

With regard to the prosecution and adjudication of GBV cases, Uganda has no statutory definition of GBV although this challenge is not unique to Uganda. It is generally accepted that the term GBV has evolved from the term Violence Against Women (VAW). Uganda’s Policy on the Elimination of GBV defines GBV to refer to physical, sexual, economic or psychological violations which are subjected to individuals and/or a group of persons based on social expectations of men and women. A number of cases therefore that are potentially GBV and SGBV cases tend to fall under other offences such as murder, trafficking and aggravated robbery etc. Hence the on-going advocacy to clarify the GBV definition.

In relation to prosecution of offences against and by women, the Courts must be lauded for gender-responsive decisions; for instance, recognizing that sexual assault can be proved without the testimony of the victim. The International Crimes Division (ICD) has also made several useful declarations regarding sexual gender-based violence (SGBV) in conflict settings. For instance, the finding that the engendered nature offences of rape and other forms of sexual violence disproportionately affect women and girls, particularly during armed conflict. It has also relied on the Geneva Conventions to find that offences of violence to life, outrage against personal dignity, and torture as a crime against humanity, may be manifested by rape. Overall, the judiciary is delivering gender-sensitive judgments. In this regard, it has been aided by a progressive legal and policy framework as well as judicial activism, extensive gender training and specialized expertise. However, the legislature has been slow in recognizing the plight of women and girls. For instance, it has been slow in filling the voids created by judicial precedents. Related, the Marriage and Divorce Bill which aims to reform and consolidate the law relating to marriage, separation, and divorce and provides for recognized types of marriages, marital rights, grounds for breakdown of marriage, and rights of parties has been inoperative since 2009. Other legal and policy reforms such as; enactment of the Sexual Offences Bill will among others address new forms of sexual violence, exploitation and provide clear guidance on the definitions of GBV and SGBV.

Adopting a National Legal Aid Law is a crucial step in addressing the issue of limited A2J by indigent persons including women. The existing reparation for survivors of defilement provided for under the PCA should be broadened to include other sexual offences.

Witnesses play a fundamental role in the criminal justice system and enhancing A2J for survivors of GBV. However, there are no comprehensive laws and policies on witness protection in Uganda. Often times, prosecutors do not know what to do when they are faced with threatened victims and witnesses who need protection. Presently ODPP uses administrative arrangements to protect witnesses on an ad hoc basis in collaboration with the Uganda Police Force. Enacting a Witness Protection Law is vital in the pursuit of justice in Uganda.

The Judiciary through the Judicial Training Institute (JTI) has developed several knowledge materials on GBV and needs to continue delivering specialized gender training and refresher courses for judicial officials. Justice institutions, for instance the Office Director of Public Prosecutions (ODPP) as well Uganda Police Force (UPF) need to strengthen their commitments in clapping down on VAWGs in as far as preferring the most appropriate charges, timely investigation and prosecution of cases as well as taking preventive actions against the perpetrators.

There is a need for stakeholders to engage in public campaigns aimed at denouncing VAW as well as educating the general public about the ills of oppressive practices against women. Stakeholders should galvanize efforts to create safe spaces, for instance shelters for women and girls that are at the risk of facing violence.

# 1. Introduction

## 1.1. Introduction

The Declaration on the Elimination of Violence Against Women (DEVAW) defines "violence against women" as any act of GBV that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.<sup>[1]</sup> However, there is no universally accepted definition of GBV. In this study, we are guided by this broader conceptualization of VAW to define GBV but adopt the definition of GBV used in the Gender Bench Book.<sup>[2]</sup> This is because the GBB was developed for judges, magistrates, and all other

Judicial office holders to use and refer to in adjudicating GBV cases in Uganda. In this context, the definition of GBV contained in the GBB provides guidance to judicial functions. The definition of GBV used under this study is set out above in the definitions of common terms used.

## 1.2. Background and context

### 1.2.1. Access to Justice

Access to justice demands that justice systems, services and institutions must be fair, accountable, accessible and able to deliver quality justice services for all, especially the most marginalized and furthest behind.<sup>[4]</sup> Access to justice is thus defined as the ability of individuals and businesses to seek and obtain a just resolution of legal problems through a wide range of legal and justice services. These services include; legal information, counsel and formal representation, (e.g. courts) as well as alternative dispute resolution, and enforcement mechanisms.<sup>[4]</sup> It is therefore a core element of the rule of law and an essential prerequisite for the protection and promotion of all human rights. The absence of which, means that people are unable to have their voices heard, exercise their rights, challenge discrimination or hold decision-makers accountable.

Access to justice plays a pivotal role in the fight to end GBV. A coordinated and integrated justice response leads to the conviction of perpetrators, contributing to the safety and well-being of survivors and preventing re-victimization. At the same time, there are many obstacles that hinder A2J: stereotypes and prejudices in society as well as lack of information about rights and the legal framework, availability and accessibility of legal aid, limited specialized training on eliminating GBV for judicial officers, prosecutors and police officers, and uncoordinated responses. All these leading to re-victimization and decreased trust in the justice system.<sup>[5]</sup> It is an essential and empowering aspect of a survivor's healing process. Justice institutions therefore have a vital role to play in a coordinated response to ending GBV by enforcing laws and other rules of behaviour that protect women and girls from violence and punish perpetrators.

Access to justice, especially for those who have experienced GBV, is upheld in several legal frameworks, statutory structures and institutions at international, regional and national levels.

[1] Art.1 Declaration on the Elimination of Violence against Women, 1993.

[2] The Judiciary of Uganda, The Gender Bench Book: Women's Access to Justice in Uganda, endorsed in 2016 by then Chief Justice Hon. Justice Bart M. Katureebe accessed at <https://ulii.org/akn/ug/doc/handbook/2016-09-01/the-gender-benchbook-womens-access-to-justice-in-uganda/eng@2016-09-01> An updated version of the bench book has been recently prepared by the judiciary "The National SGBV Bench Book for Uganda, First Edition, 2022".

[3] United Nations Development Program (UNDP), available at; <https://www.undp.org/justice/access-to-justice> .

[4] Government at a glance, 2021; Organization of Economic Development available at; <https://www.oecd-ilibrary.org/docserver/8b8c48af-en.pdf?expires=1725431155&id=id&accname=guest&checksum=87687F7F41ABF7A4DFB46A0004DB8F02>

[5] Public discussion on access to justice for survivors of GBV, UNDP, November 29, 2022, available at:

<https://www.undp.org/moldova/press-releases/public-discussion-access-justice-survivors-gender-based-violence>



### **1.2.2. Gender Based Violence**

The terms GBV, DV, and VAW convey similar concepts and are often used interchangeably. The United Nations' definition of GBV is, "any act of GBV that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women whether occurring in public or private life." Gender-based violence is an issue that affects every single person either personally or by acquaintance. This violence often goes unseen, untreated, and unchecked. Gender-based violence is a somewhat more inclusive term than VAW as it could include violence against men, provided the violence stems from a man's gender identity or presentation.<sup>[6]</sup>

### **1.2.3. Forms of GBV**

Violence looks different in each situation. Each type of violence can be experienced in isolation, or, as is more often the case, simultaneously. All forms of violence (sexual violence, physical violence, economic and psychological violence) are harmful and carry dangerous consequences for survivors.

### **1.2.4. Sexual Violence**

Sexual violence is defined as, "any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, directed against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work." Sexual violence is prevalent everywhere (World Health Organization [WHO]).

### **1.2.5. Physical Violence**

Physical violence is "the intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment, or deprivation" (WHO).

### **1.2.6. Psychological Violence (also commonly known as emotional or mental violence)**

Psychological violence is any harmful behaviour that is not physical, such as verbal abuse, intimidation, manipulation, degradation, and humiliation. Stalking, economic abuse where one partner controls the other's income or access to necessary expenses, and isolation from friends or family are some psychologically abusive behaviours. Psychological abuse often happens over a period of time in which the survivor may lose their sense of individuality, dignity, or self-worth potentially resulting in dependency on a partner for feelings of self-worth, or otherwise creating an environment where the victim lives in fear. Victims of psychological violence may develop anxiety, depression, suicidal thoughts or behaviours, and post-traumatic stress disorder (PTSD). Psychological violence can be difficult or impossible for outsiders to see, but that does not mean it is less harmful or not real. It almost always accompanies sexual and physical violence.

## **1.3 Objectives of the Study**

The main objective of the assignment was to analyze the legal and policy issues related to access to justice for women with a particular focus on GBV cases to inform strategic advocacy at different levels.

### **Specific Objectives**

1. To analyze the interpretation of the legal framework related to court judgements in GBV cases. (Revised) Under this objective key legislative, policy and practice developments since 1995 in the adjudication of GBV cases were reviewed.
2. Identify trends, patterns, and gaps in the adjudication of these cases.
3. To identify policy and advocacy issues emerging from the respective judgements.

[6] What is Gender-Based Violence (GBV)? United Nations Population Fund (UNFPA), available at; <https://www.usaforunfpa.org/what-is-gender-based-violence-gbv/>

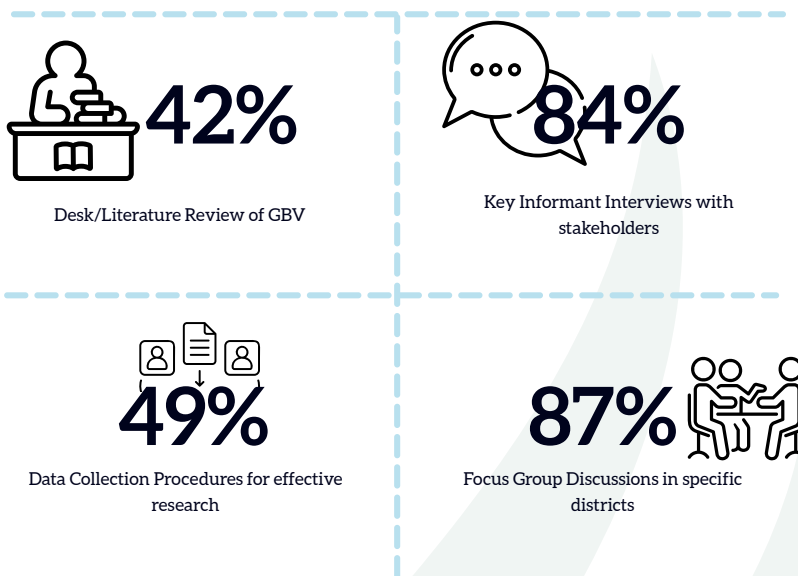
## 2. Methodology

### 2.1. Study Design

This study employed a mixed-method approach to analyzing both qualitative and quantitative data, primarily through conducting a comprehensive desk review of available judgments. Data from multiple sources was integrated to gain a comprehensive understanding of the subject, draw valid conclusions, and make relevant recommendations regarding the study. Key trends and patterns were developed in reviewing available literature.

### 2.2. Data collection methods

**Desk/Literature Review:** This report relies mainly on desk review as the primary data collection method. This involved a structural and operational review of GBV-related literature, including GBV policies, strategies, laws reports by partners and justice actors in recognizing the study context, background, and objectives. Following this, a review of 88 GBV-related judgements from the Supreme Court, Court of Appeal which doubles as the Constitutional Court and the High Court was undertaken. The judgements were sampled and reviewed until data



Saturation, and when identified codes and themes were fully exemplified in the data. The review ensured coverage of 11 out of the 24 high court circuits and FATE project areas.

**Key Informant Interviews:** This report relies mainly on desk review as the primary data collection method. This involved a structural and operational review of GBV-related literature, including GBV policies, strategies, laws reports by partners and justice actors in recognizing the study context, background, and objectives. Following this, a review of 88 GBV-related judgements from the Supreme Court, Court of Appeal which doubles as the Constitutional Court and the High Court was undertaken. The judgements were sampled and reviewed until data Saturation, and when identified codes and themes were fully exemplified in the data. The review ensured coverage of 11 out of the 24 high court circuits and FATE project areas.

**Focus Group Discussions:** To get further insight on women's A2J in GBV cases at the sub national/community level, two FDGs with 15 carefully identified respondents from Lamwo and Masindi districts were conducted. Participants were drawn from ASF's community-based mediators (paralegals). The community-based mediators conduct legal counseling, mediation in minor GBV cases, training, and community sensitization. Given the available resources and time the deliberations were moderated virtually.

### 2.3. Data collection procedures

The lead Consultant/Team Leader led data collection activities supported by the Associate Consultant, Monitoring and Evaluation (M&E) resource person and Legal Research Assistant. The consulting team also worked closely with the ASF's designee. The team provided an introductory letter to the targeted respondents.



## **2.4. Data analysis**

Themes were developed for the analysis of qualitative data through an inductive approach. We searched across data sets to identify and describe repeated patterns. Typical quotes have been recorded and included in the report to emphasize the responses given without losing the original context of the meaning.

## **2.5. Validation of the report**

We will create a study report by combining input from all stakeholders. This report will be sent to ASF for review and comment. Following that, we will present the report at a validation meeting to receive additional input. ASF will select and invite participants to the validation meeting as well as fund it.

## **2.6. Ethical considerations**

The Consulting Team respected the protection and confidentiality of data and the related code of conduct for research. The following ethical considerations were strictly followed; independence and impartiality; credibility; honesty and integrity; accountability; confidentiality; respect for dignity and diversity; avoidance of harm; accuracy, completeness and reliability; and transparency. The consulting team respected the ethical principles of; commitment to “do no harm” approach, respect for cultural norms, and commitment to an inclusive approach ensuring access to/participation of women, men, refugees and host communities, PWDs, elderly persons and confidentiality and anonymity of interviewees

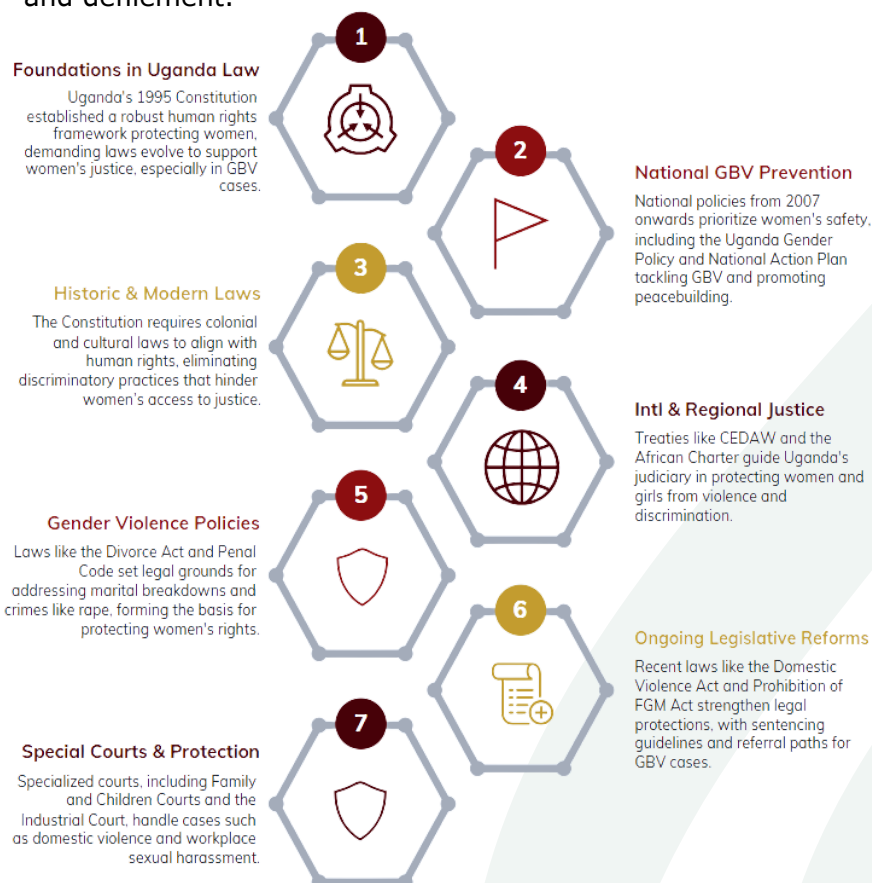
## **2.7. Study limitations**

Limited time: This assignment was executed in 30 days. This strict timeline posed challenges to conducting desk review given the broad nature of the subject. The Consulting Team faced some impediments in securing appointments with key respondents. Government officials routinely requested that the Consulting Team seek authorization from their superiors to participate in the study. In many cases, many of the respondents were not available at a short notice. We, however, used virtual tools and telephone interviews where appropriate to save time. The consultants also worked concurrently on deliverables to ensure the assignment was completed within the planned time.

## 3. Findings

### 3.1. Overview of key legislative, policy and practice developments related to women's A2J with a particular focus on GBV cases

- The promulgation of the Constitution of Republic of Uganda 1995 (the Constitution), ushered in a new human rights regime in Uganda.<sup>[7]</sup> With regard to women and girls, the Constitution introduced a human rights promotion and protection framework that includes rights of women, affirmative action, and prohibition from discrimination. In this regard, many laws, for instance, those that were enacted during the colonial epoch as well as societal and cultural norms that promote harmful stereotypes and discriminatory practices against females, to mention some of the obstacles to accessing justice for women, are required to comply with the human rights framework introduced by the Constitution.
- **The Divorce Act, Cap.144** was enacted in 1904, during colonial rule. It has its origins in the Matrimonial Causes Act of 1857 of England. The Matrimonial Causes Act also had its roots in the Common Law of England whereby a valid marriage could only be terminated by the death of one of the parties to it or by a divorce decree pronounced by a competent Court. The Divorce Act prescribes grounds for divorce, provides a framework for recognized marriages and protection orders for the distribution of property following the breakdown of a marriage, among other issues.
- Similar to the Divorce Act, the **Penal Code Act Cap.120** was enacted during the colonial era in 1950. It has been amended several times, most recently in 2014. It contains offences such as rape and defilement.



- In 2009 the Prevention of Trafficking in Persons Act Cap.131 was passed. It creates offences related to trafficking in persons and punishments for offenders as well as regime for protecting victims and other related matters.
- The Children Act, (The Children Act 2016 as amended consolidates all laws.....) was passed in 1997. This Act consolidates all the laws relating to children and provides for the care, protection and maintenance of children. It further establishes a family Court for children and makes special provisions for children charged with offences.

- Age of eighteen years and above have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution. The Court observed that women and men have equal rights to practice their culture; women just like men cannot be assimilated in someone else's culture unless they expressly consent; court hence allowed the deceased to be buried at her ancestral home instead of the husband's home.

- The Industrial Court was established under the **Labor Disputes (Arbitration and Settlement) Act Cap 227**. The Court's jurisdiction ambit are labor disputes for instance, allegations of sexual harassment at work.
- **The National Action Plan on Women**, which set out priorities in peacebuilding, conflict resolution and the rights of women and girls to live free from violence was developed by the Ministry of Gender Labor and Social Development in 2007. It constitutes a part of a broader national strategic framework on the advancement of women and girls. In the same year, the **Uganda Gender Policy** was adopted. **The National Policy on Elimination of Gender Based Violence in Uganda** (2016), and **the Guidelines for Establishment and Management of Gender Based Violence Shelters in Uganda** were developed.
- In 2017 a **National Male Involvement Strategy for the Prevention and Response to GBV in Uganda** was developed. This Strategy notes that the prevalence, complexity and the social acceptance of GBV has generated the recognition that the prevention and response to GBV requires broad community participation and particularly the participation of men and boys.
- In 2010, **the Domestic Violence Act Cap.123** was passed to provide for the protection and relief of victims of DV; to punish perpetrators of DV and to provide for the procedure and guidelines to be followed by the Court in relation to the protection and compensation of victims of DV. This law also provides for the jurisdiction of Courts to enforce their orders; and it empowers the Family and Children Court to handle cases of DV and related matters. In 2011 the Domestic Violence Regulations were adopted to implement this Act.
- **The International Crimes Court Act Cap.14**, allows the High Court, ICD to try crimes against humanity, international crimes and Genocide. In this regard, it gives effect to the Rome Statute of the International Criminal Court, 1998.
- In 2010, Uganda also enacted the **Prohibition of Female Genital Mutilation Act Cap.133**. The Act criminalizes the practice of FGM, establishes a duty to report persons engaged in FGM and prescribes penalties for persons engaged in FGM.
- **The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions** were issued in 2013. They provide a framework for sentencing to ensure the effective and just dispensation of justice and to provide consistency in sentencing. In 2013, the National Referral Pathway for Prevention and Response to Gender Based Violence Cases in Uganda was passed.
- There are a number of international and regional frameworks which set out agreed norms and standards in regard to the protection of women and girls against violence that have guided the judicial officers in adjudicating GBV cases. These include the Convention on the **Elimination of All Forms of Discrimination against Women, 1979 (CEDAW)**; **Vienna Declaration and Platform for Action 1993**; **Declaration on the Elimination of Violence Against Women, 1993**; **Beijing Platform and Declaration for Action 1995**; **Agenda 2030 and Sustainable Development Goals, 2015 (SDGs)**, **Convention on the Rights of the Child, 1989**; **the African Charter on Human and Peoples' Rights, 1981**; and **the African Charter on the Rights and Welfare of the Child, 1990**.

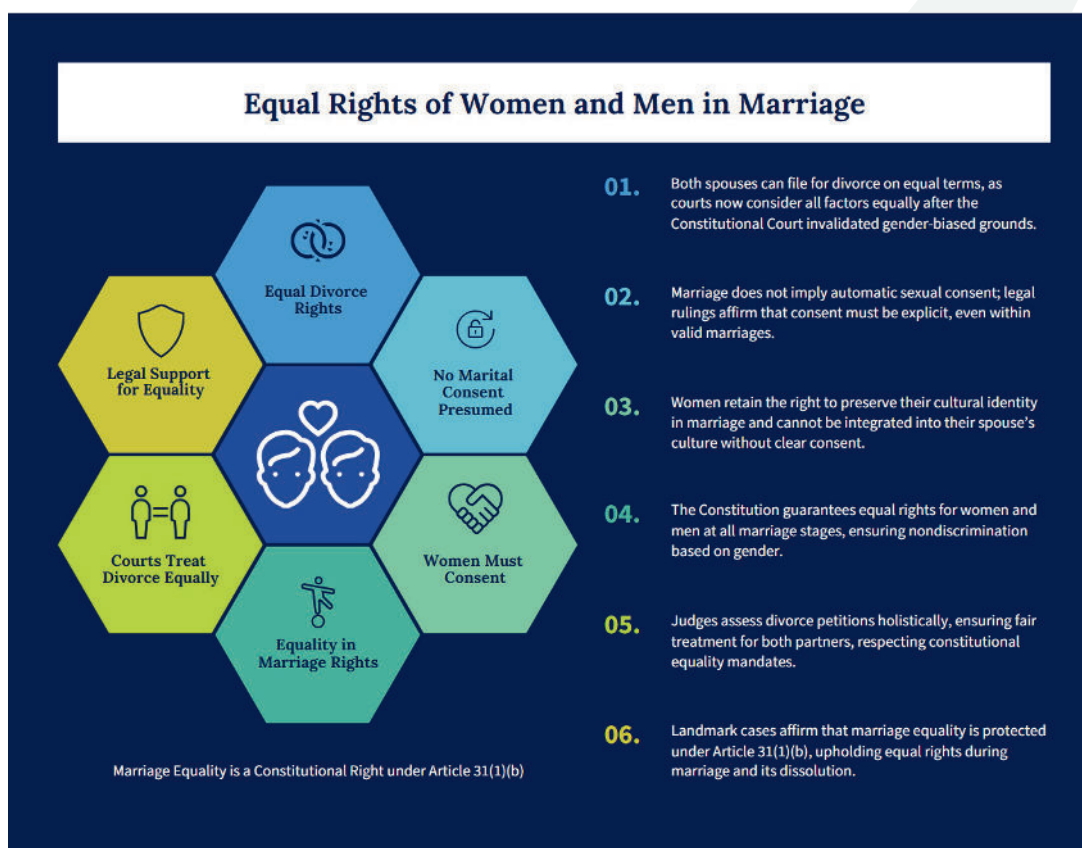
[7] The Constitution of the Republic of Uganda, 1995 came into force on 8 October 1995.

## 3.2. Practice developments

In another effort to improve standards for adjudicating GBV cases, the Judiciary adopted the Gender Bench Book (GBB) in 2016, and recently the National SGBV Bench Book for Uganda.<sup>[8]</sup> The GBB is purposed to assist judicial officers in handling cases involving gender issues such as sexual offences, child marriage, and inheritance rights. The SGBV Bench Book is aimed at enhancing the gender responsiveness of judicial officers to provide gender sensitive processes in the courtroom and give equitable judgements. Ultimately the SGBV Bench Book will enhance women's A2J -and particularly contribute to the effective implementation and enforcement of women's rights in Uganda. prison aimed at reducing the waiting time to hearing.

To address the escalating cases of GBV, the Judiciary with the Justice Law and Order Sector through the support of the United Nations Population Fund and other partners started in 2018 to convene GBV Court sessions. These sessions have been held both in the High Courts and the Chief Magistrates Courts in the selected 14 districts of Luwero, Bundibudyo, Kiryadongo, Kotido, Kapchorwa Gulu, Arua, Kiboga, Jinja, Iganga, Nakapiripirit, Apac, Tororo and Amuria. Some of the notable achievements of the SGBV special sessions over the years has been fast tracking over 3,000 SGBV cases, and ODPP attaining a conviction rate of 80% at the end of the 5<sup>th</sup> Phase of the special sessions from 60% at the commencement of the special sessions. The SGBV Post Phase 6 Session Review of April 2023 however revealed a reduction in the conviction rates from SGBV cases by 10%.<sup>[9]</sup> Another innovation in practice permits Registrars to review the "first in first out" principle in cause-listing for women awaiting trial in prison aimed at reducing the waiting time to hearing.

## 4. Analysis of court decisions; emerging trends, policies and gaps in the adjudication of GBV Cases



[8] The Judiciary of Uganda; "The National SGBV Bench Book for Uganda, First Edition, 2022"

[9] The JLOS Bulletin: Special Edition on SGBV: June 2023. Accessed at: <https://drive.google.com/file/d/1Cw9JZwjhTJUfgf2NoOckgD7cov9A2F8/view>

#### **4.1 Human rights of women and girls**

##### **1 Women and men have equal rights at and in marriage, during marriage, and at its dissolution.**

###### **a) Women and men can seek divorce from the Courts on equal grounds.**

Section 4 of the Divorce Act, Cap.249 provided different grounds for divorce for women and men. The Constitutional Court in the case of **Uganda Association of Women Lawyers (FIDA) & 5 Others Vs. Attorney General**,<sup>[10]</sup> declared section 4 of the Divorce Act unconstitutional noting that it offended the right to equal rights at marriage, during marriage, and at its dissolution as protected by Article 31(1)(b) of the Constitution. The Court affirmed the constitutional prohibition of discrimination on the basis of sex. The legislature is yet to fill the gap created by the Constitutional Court's decision. Courts have since this decision looked at the facts in totality to determine whether a marriage has irretrievably broken down. It is sufficient for either spouse to allege one ground for divorce set out in Section 4 of the Divorce Act for a petition or cross petition to succeed.

###### **b) There is no presumption of sexual consent, even where a man and woman are validly married.**

The High Court in the case of **Uganda Vs. Yiga Hamidu & Ors**,<sup>[11]</sup> dismissed the defense of mistaken fact provided for under section 9(1) of the Penal Code. The provision states that "9(1) *A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he or she believed to exist.*" The accused had argued that he had sex with the complainant honestly believing that she was his wife. He had paid dowry to the victim's parents who took the victim forcibly to the accused. The victim resisted the accused's sexual advance but with the help of his friends, he subdued her and had sex with her.

###### **c) Women cannot be assimilated into a man's culture by virtue of a marriage unless they expressly consent.**

In **Annette Yosaa & 4 Ors Vs. Ambassador Idule Amoko & Attorney General**,<sup>[12]</sup> the High Court took cognizance of Article 31(1) of the Constitution. This provision provides that men and women of the age of eighteen years and above have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution. The Court observed that women and men have equal rights to practice their culture; women just like men cannot be assimilated in someone else's culture unless they expressly consent; court hence allowed the deceased to be buried at her ancestral home instead of the husband's home.

[10] I Constitutional Petition No. 2 of 2003

[11] Criminal Session Case 005 of 2002

[12] HC Misc. Cause No. 41 of 2023.



## **2. Right to equality and freedom from discrimination, right to form a family and the right to privacy.**

### ***a) Women and girls who voluntarily subscribe to membership of institutions, accept the discriminatory practices of those institutions.***

In the case of **Aboneka Michael Vs. Watoto Church**,<sup>[13]</sup> the petitioner challenged the Marriage Guidelines of Watoto Church that stipulated mandatory requirements to provide a letter of blessing from the bride's parents or guardians but not the groom, before entering into a marriage and required all couples that intend to marry to attend a pastor's interview/interaction with the aim for the pastor to assess if the couple is fit or not fit to marry. The petitioner argued that these guidelines were unconstitutional and contrary to the right to equality and freedom from discrimination, the right to form a family and the right to privacy guaranteed by the Constitution. The petitioner further contended that these mandatory requirements undermine the dignity, welfare, interest, and status of women and in this regard also amounts to a contravention of the rights of women protected by the Constitution. The Constitutional Court found that the impugned guidelines only applied to members of Watoto Church and they do not affect any one that has not voluntarily agreed to them. The Court dismissed the petition, noting that couples have many other worship centers where they can choose to conduct their marriage.

### ***b) Laws that provide different rights to men and women on entering and during marriage are discriminatory.***

In the case of **Law and Advocacy for Women in Uganda Vs. Attorney General**,<sup>[14]</sup> the Constitutional Court examined the provision of the Penal Code provision that created the crime of adultery for married women but not for married men. Under section 154 of the Penal Code, a married man commits no criminal offense when he has sexual intercourse with an unmarried sex partner. However, a married woman commits a criminal offence when she has sexual intercourse with any other man not being her husband. The Court held that the law was discriminatory, violating Constitutional provisions on the right to equality and the right to dignity and protection from inhuman treatment.

## **3. The right to protection from deprivation of property.**

### ***a) A married spouse can own property alone or in association with others. Property individually owned cannot be treated as matrimonial property during divorce.***

In **Julius Rwabinumi Vs. Hope Bahimbisomwe**,<sup>[15]</sup> the appellant challenged the decision of the Court of Appeal that property belonging to either spouse becomes matrimonial property upon the exchange of marriage vows. The Supreme Court reversed that decision and held that a married spouse is free to own personal individual property alone or in association with others under Article 26 of the Constitution and that such property individually owned cannot be treated as matrimonial property during divorce. It is only matrimonial property that may be equally divided and shared to the extent possible and practicable at divorce.

### ***b) The doctrine or principle of equality of parties does not translate to equal proprietary entitlement.***

The Court of Appeal provided guidance of the scope of Article 31 (1) of the Constitution in the divorce cause of **Ambayo Joseph Waligo Vs. Aseruka Jackline**,<sup>[16]</sup> in as far as it relates to the distribution of property on dissolution of a marriage. According to Justice Christopher Gashirabake "the Constitution declares that marriage is a partnership of equals. ...that all things being equal, and both parties having made equal effort towards the acquisition, preservation or improvement of family property, the process of determining entitlement may lead to a distribution of 50:50 or thereabouts. That is not to say, however, that as a matter of doctrine or principle, equality of parties translates to equal proprietary entitlement."

[13] Constitutional Petition No.019 of 2018.

[14] Constitutional Petition No. 13 of 2005.

[15] Supreme Court Civil Appeal No. 10 of 2009.

In **Julius Rwabinumi Vs. Hope Bahimbisomwe**,<sup>[17]</sup> Justice Kisaakye expounded *"In my view The Constitution of Uganda (1995), while recognizing the right to equality of men and women in marriage and its dissolution, also reserved the constitutional right of individuals, be they married or not to own property either individually or in association with others under Article 26 (1) of The Constitution of Uganda (1995). This means that even in the context of marriage the right to own property individually is preserved by our constitution as is the right of an individual to own property in association with others who may include a spouse, children, siblings or even business partners. If indeed the framers of our Constitution had wanted to take away the right of married persons to own separate property in their individual names, they would have explicitly said so."*

**c) Custom that denies widows' proprietary rights in land held under customary tenure is discriminatory.**

In the case of **Ebiju & Anor Vs. Echodu**,<sup>[18]</sup> the Court held that, with respect to customary tenure, although section 27 of the Land Act Cap. 227 as amended permits the taking of decisions in accordance with customs, traditions and practices of the concerned community, such decisions must not deny women access to ownership, occupation or use. Lady Justice Wolayo added that; *"a custom that denies widows proprietary rights in land held under customary tenure is discriminatory."*

**d) An applicant for a protection order based on the use of land must demonstrate a claim or legal interest in the land.**

In **Muruhura Sam Vs. Kyarimpa Winnie, Nabasa Vicent & Mushaba Sajja**,<sup>[19]</sup> the applicant sought to challenge the finding of the Magistrate Court that a land dispute between the applicant and his wife was a domestic violence matter. The law in section 12 of the Domestic Violence Act, states that a court may issue a protection order where the court is satisfied that an act of domestic violence has been committed, is threatened or is being committed by the perpetrator. This imposes a duty on the court to ensure that an act of domestic violence has been committed, is threatened or is being committed by the perpetrator. Justice Nshimye Allan Paul found that *"In order to seek a protection order under the Domestic Violence Act 2010, based on the use of land, the applicant should have some form of legal ownership or claim to the land."*

**4. Protection on women's rights, considering their unique status and natural maternal functions in society.**

**a) Recognition of women's maternal functions in exercising their right to vote**

The petitioners in the case of Foundation for Human Rights Initiatives, Legal Aid Service Providers Network Uganda Vs. Attorney General and the Electoral Commission,<sup>[20]</sup> argued among other issues that the amendments to the Local Government Act, to allow for local government and administrative units to hold elections without ballot boxes and to line up between 7am and 8pm to vote, violates the rights of women protected by Article 33 of the Constitution in as far as it fails to take into account their unique status and natural maternal functions and therefore disenfranchises them. The petitioner also contented Uganda is a signatory to the CEDAW which requires the state to take appropriate measures to ensure that women and men are on equal terms with men in respect of the right to vote in elections, and as such, the government was in violation of its international obligations under this legal instrument by passing the contested amendments. The Constitutional Court held that the time provided for in the amendment to the Local Government Act allows any person, including women to vote and lining up did not violate the unique status and natural maternal functions of women or Uganda's obligations under the CEDAW.

[16] Civil Appeal No.0100 of 2015.

[17] Civil Appeal No.10 of 2009.

[18] Civil Appeal No. 43 of 2012, [17 December 2015] at Soroti.

[19] HCT-05-CV-CR-0011-2023.

[20] Constitutional Petition No.39 of 2017.

### **b) Women's right to health**

In the case of **Centre for Health, Human Rights and Development & Others Vs. Nakaseke District Local Administration**,<sup>[21]</sup> the plaintiffs brought this action on behalf of the deceased who died at the defendant's hospital due to the lack of emergency obstetric care. The plaintiffs argued that the deceased had an obstructed labour condition but did not receive the appropriate medical care and attention due to the absence of a doctor assigned to her. Following a visit to the hospital, Justice Kabito held that the deceased's right to basic medical care as a woman had been violated as well as the rights of the child.

## **5. Right to affirmative action in favor of marginalized groups.**

### **a) The custom of refund of bride price devalues the worth, respect and dignity of a woman.**

In **MIFUMI (U) Ltd and 12 others Vs. Attorney General and Kenneth Kakuru**,<sup>[22]</sup> the Supreme Court held that the customary practice of refunding bride price as a condition precedent to a valid dissolution of marriage violated several rights guaranteed by the Constitution including the right to family life, right to affirmative action in favor of marginalized groups as well as rights of women. In the words of Justice Jotham Tumwesigye *"Most ethnic groups in Uganda, apart from the Baganda ethnic group, practice the custom of refund of bride price at the dissolution of customary marriage... In my considered view, the custom of refund of bride price devalues the worth, respect and dignity of a woman. I do not see any redeeming feature in it."* However, this decision has been said to be an area where women continue to suffer emotional and psychological violence because men insist that they are still married due to non-refund of dowry. The question is: how is a customary marriage dissolved post Mifumi case? And how widely has this decision been disseminated?<sup>[23]</sup>

### **b) The scope of affirmative action granted by the 1995 Constitution allows for exceptions to be made in favor of women.**

In the case of **Christopher Martin Madrama Izama Vs. Attorney General**,<sup>[24]</sup> the Court observed that *"It is correct that women public servants who resign from the public service on account of either getting married or simply on account of marriage are eligible to be considered for a pension notwithstanding that they have not attained the minimum threshold of forty-five years of age or ten years' service. This is indeed different treatment to other classes of public servants including the male public servants who may leave for the same reason or other reasons and female public servants who may resign for other reasons."* The Court further held that: *"Different treatment accorded to female public officers who resign on account of marriage may be in recognition of the unique status and natural maternal functions of women in our society together with the desire to protect the family which is noted in the National Objectives of State Policy 19 to be the natural and basic unit of society and is entitled to protection by society and the state."*

[21] Civil Suit 111 of 2012.

[22] Constitutional Petition No. 12 of 2007.

[23] The search for justice by victims of SBGV, Presentation at the 20th Annual Judges Conference, Speke Resort Munyonyo by Hon Lady Justice Henrietta Wolayo, Judge High Court of Uganda on 24<sup>th</sup> January 2018. Available at <https://www.judiciary.go.ug/files/downloads/The%20Search%20for%20Justice%20by%20Victims%20of%20Sexual%20and%20Gender%20Based%20Violence%20by%20Hon.%20Lady%20Justice%20Wolayo%20FINAL..pdf>

[24] SC Appeal No. 01 of 2016.



## **6. Right to privacy.**

### **a) Legislation that seeks to protect public morals, women and girls must be clearly defined and must seek to achieve a legitimate purpose to avoid violating their right to privacy.**

Following the enactment of the Anti-Pornography Act; several women were undressed in public in Kampala, Iganga and Mbale districts. Some women were also detained by the police, and others were charged with indecent dressing before the Magistrate. Aggrieved by the effect of this law on women and girls, the petitioner complained to the Constitutional Court in the case of **Centre for Domestic Violence Prevention & Ors Vs. Attorney General**.<sup>[25]</sup> The petitioners contended among other issues, that the definition of pornography in this law to mean “any representation through publication, exhibition, cinematography, indecent show, information technology or by whatever means, of a person engaged in real or stimulated explicit sexual activities or any representation of the sexual parts of a person for primarily sexual excitement” is vague in violation of Article 28(12) of the Constitution that requires that all offences and their penalties must be clearly defined. The Court agreed with the petitioner and found that the objective of the impugned provision was not clear. According to the Court, the Attorney General did not provide any evidence of the harm that would result to society, if publication, exhibition, or other representation of images of sexual parts of the human body or sexual activities primarily for sexual excitement was not prohibited. Thus, the Court declared the offending provision unconstitutional and thus null as well as void.

## **7. Right to protection from discrimination.**

### **a) The requirement to corroborate allegations of sexual assault cases is discriminatory against women and unconstitutional.**

In the case of **Uganda Vs. Peter Matovu**,<sup>[26]</sup> the High Court relied on CEDAW to find the legal requirement that an allegation of sexual assault must be corroborated, discriminatory to women. Justice Lugayizi opined “Women are by far the most frequent victims of sexual offences and therefore it is inconsistent with Uganda’s international obligations to impose a legal requirement that allegations of sexual assault against women must be corroborated. Court has not come across any empirical data or basis for the belief that women are greater liars than men or for that matter, that they are more likely to tell a lie than to tell the truth in matters concerning sexual allegations. For that matter both the belief and resultant rule have no logical basis.”

### **b) The custom and practice of female genital mutilation (FGM) is discriminatory, violates rights of women and it is unconstitutional.**

The Constitutional Court in the case of **Law and Advocacy for Women in Uganda Vs. Attorney General**,<sup>[27]</sup> examined the Constitutionality of the custom and practice of FGM. The Court found that the practice was unconstitutional and declared it null and void. It quoted in detail the United Nations Inter-Agency Statement on Eliminating Female Genital Mutilation.

## **8. Succession Rights of Women and Girls.**

### **a) A wife can inherit the estate of her deceased husband for her benefit and their children.**

In the case of **Best Kemigisa Vs. Mabel Komuntale**,<sup>[28]</sup> the High Court resolved the question of whether a wife can inherit her husband’s estate. Justice J.B. Katutsi held that “As a general matter, a widow is entitled to apply to Court to grant letters of administration to administer the estate of her late husband for the benefit of her children and herself and under the law she has first priority especially when the children are minors.” The Justice opined, “I protest against the claim that we should remain chained to medieval conceptions and cling to customs which would ignore reality by refusing people like the plaintiff a grant of letters of administration to administer the estates of their late husbands for the benefit of their children and themselves. A legal system ought to be able to march with the changing conditions fitting it into aspirations of the people, which it is supposed to safeguard and serve. Fortunately, I read nothing in our law which compels Courts to follow blind and backward-looking customs.”

[25] Constitutional Petition No. 13 of 2014.

[26] Criminal Session Case No. 146 of 2001.

[27] Constitutional Petition No.8 of 2007.

[28] Civil Suit No. 5 of 1998.

In **Adong Simon and 2 others Vs. Opolot David**,<sup>[29]</sup> the respondent sued the appellants for trespass to land. The basis of his claim was that he holds letters of administration to the estate of his late mother Alupo Faith from whom he derives title. The substantive issue was whether the respondents acquired land by outright purchase or through inheritance from her late husband. While resolving the issue of whether the respondent's mother inherited part of the land from her late husband, Judge Henrietta Wolayo held that *"a widow has a right to dispose of the land she inherited from her deceased husband as surviving spouse in light of Article 31 (1) of the Constitution that confers on men and women equal rights at marriage, during marriage and at its dissolution."*

## 4.2. Adjudication of matrimonial cases

### 1. Recognition of non-monetary contributions during marriage.

The High Court in the divorce cause of **Twijukye Fred Vs. Tugusimirize Annet**,<sup>[30]</sup> defined non-monetary contribution during marriage to include preparing of food, organizing children for school and generally enhancing the welfare of the family. The Court found that this amounted to a substantial indirect contribution to the property and thus allowed a spouse a share of the matrimonial home on dissolution of the marriage.

**Property acquired before marriage and property acquired in the sole name of a spouse may constitute matrimonial property if it is utilized as family property, or used to derive sustenance for the family.**



a) In the divorce cause of **Ambayo Joseph Warigo Vs. Aseruka Jacqueline**,<sup>[31]</sup> the Court of Appeal found that the fact that property was acquired before the parties were formally married, and the property purchase agreement being written in the sole names of the appellant did not by themselves disqualify the contested property from being treated in the same manner as a matrimonial property.

### **b) Contribution to matrimonial property is not limited to financial contribution**

In the case of **Paul Kaggwa Vs. Jackeline Muteter**,<sup>[32]</sup> Justice Mwangusya provided guidance on the nature of contribution spouses make to a matrimonial property. He stated that

*"There seems to be no contention that at the termination of a marriage, including cohabitation, neither spouse walks off the marriage empty-handed. This is in recognition of the fact that each of the spouses makes a contribution towards acquisition of matrimonial property and this contribution is not necessarily financial."*



In **Kagga Vs. Kagga**,<sup>[1]</sup> the High Court applied the established principle which recognizes each spouse's contribution to acquisition of property. This contribution may be direct, where the contribution is monetary or indirect where a spouse offers domestic service. According to the Court *"When distributing the property of a divorced couple, it is immaterial that one of the spouses was not as financially endowed as the other as this case clearly showed that while the first respondent was the financial muscle behind all the wealth acquired, the contribution of the petitioner is no less important than that made by the respondent."*

[30] Divorce Cause No.028 of 2021.

[31] Civil Appeal No.0100 of 2015.

[32] High Court Matrimonial Cause No. 23 of 2005.

[33] High Court. Divorce Cause No. 11 of 2005.

***c) Homes that were mortgaged by husbands prior to the enactment of the Land Act, 1998; can be sold by husbands, thereby dispossessing wives and their children.***

In the case of **Edward Mulindwa Vs. Sarah Kalanda**,<sup>[34]</sup> the respondent lodged a caveat on a property which her husband was the registered proprietor in order to prevent its sale. The applicant sought to remove the caveat as purchaser of the property and the respondent challenged the sale on the grounds that she, her husband, and their 14 children lived in a house situated on the said property; the house had been completed by the couple; it was subject to a mortgage which the respondent pursued; and that applicant sold the family home fraudulently. Lady Justice C. Byamugisha held that the respondent did not disclose the nature of her interest in the land and how it arose and whether this interest was capable of being registered as a charge on the land, when her husband was still alive. Consequently, the Court held that the matters deposed to by the respondent were insufficient to create a legal or equitable estate or interest in the house entitling her to lodge a caveat on the property.

***d) Quantification of shares in the matrimonial home.***

In some other cases, Courts awarded a higher percentage share either in the matrimonial home or in some other properties. For example, in **Mayambala Vs. Mayambala**,<sup>[35]</sup> the wife's interest in the matrimonial home was established at a 70% share.

In the divorce cause of **Hajji Buruhan Ssenkumba Vs. Umu Kuruthum Nanteza**,<sup>[36]</sup> the unwaged domestic activities of the wife were recognized. This case also speaks to the Constitutional recognition of equality in marriage and during dissolution of matrimonial property recognizing the right to an equal share in matrimonial property. The Court also employed the principle of affirmative action enshrined by the Constitution in favor of the respondent who had given a non-monetary contribution towards matrimonial property. She received a share of 30% in the matrimonial home.

***e) Applications for divorce must be filled in the country of domicile of the applicant.***

In the case of **Joy Kiggundu Vs Horace Awori**,<sup>[37]</sup> a Uganda-based wife had been separated from her husband who lived in their matrimonial home in Kenya. She was denied a hearing when she filed for divorce in the High Court of Uganda at Kampala on the grounds that the Court had no jurisdiction under section 1 of the Divorce Act, since her domicile was in Kenya.

***f) Courts may order for judicial separation of a legally recognized marriage.***

In **Catherine Alak Aleku Vs. Jackson Leku**,<sup>[38]</sup> on trial, the petitioner and appellant requested the Court that their marriage be dissolved on the grounds of adultery, frequent desertion and cruelty or a decree for judicial separation be granted in the alternative. However, the trial Court held that she had failed to prove the ground of cruelty. She appealed against this decision. It was proved in Court that the respondent was quarrelsome, aggressive and threatened to beat his wife. That the wife's heart condition deteriorated as a result. Judge Faith Mwendha set aside the judgment of the lower Court and held that *"definitely the health of the appellant was in danger as it was a well-known fact that she had a heart problem. If she had a heart problem coupled with the ill treatment of the respondent which included fighting and pushing her, there is no doubt that he was subjecting her to torture, cruel and inhuman treatment."* The Appellant was granted the relief of judicial separation and the consequential remedies sought in the petition.

[35] High Court Divorce Cause No. 3 of 1998.

[36] Divorce Cause No. 012 of 2020.

[37] [2001-2005] HCB 122.

[38] High Court Divorce Cause No. 8 of 2009 (24 February 2010) at Nakawa.

### 4.3. Gender-stereotypes and outlawed customary practices

#### 1. The Welfare Principle

The “Welfare Principle” requires that when making custody-related decisions, the best interests of the child is the first and paramount consideration. Greater emphasis must be put on the financial contribution that the husband is more likely to provide. In the **Matter of Adoption of Mark Kakembo**,<sup>[39]</sup> the Court noted that the tendency is to place greater emphasis on financial contributions rather than non-financial contributions. Husbands are more likely to work outside the home and earn an income more than the wife.

#### ***a) The culture/practices of chasing women in the name of marriage or to forcibly have sex with them is demeaning to women, a crime as well as unconstitutional.***

In the case of **Uganda Vs. Lomoe**,<sup>[40]</sup> the Court condemned the culture of forcefully chasing, abducting and raping girls and woman to make them wives. According to the Court *“It is a brutal and backward culture promoting violence against women. Nobody and no one’s daughter, sister or mother deserves being raped in the name of marriage. This vice of cultural rape is a resilient, pervasive and persistent culture promoting gender stereotypes”*.

In the case of **Uganda Vs. Byarugaba**,<sup>[41]</sup> the accused requested for sex from the complainant in exchange for money which the complainant refused. The accused and two other men then assaulted her, tied a piece of cloth around her face, lifted and whisked her off to the home of the accused and he raped her. She reported the case to Police, and Police referred her for medical examination and she discovered that the accused had infected her with HIV. The trial Judge Moses Kazibwe Kawumiheld that *“...Before I take leave of this case, I wish to observe that what the accused purported to do has roots in one of the old forms of initiating marriage negotiations among some of the communities in Uganda. The practice is known as ‘okunegura’ or ‘okwetika’. The girl would be kidnapped and carried to the potential suitor’s home. An emissary would then be sent for marriage negotiations with her parents. This practice is unconstitutional, illegal and abominable. It has no place in the modern world and should be shunned. Women have full rights to their bodies and have the choice as to when and with whom they may want to have sexual intercourse. They should not first be raped before marriage negotiations commence. I find the accused guilty of the offence of rape under Sections 123 and 124 of the Penal Code Act. I accordingly convict him.”*

#### ***b) Rape is demeaning and it traumatizes women as well as children who witness it.***

In **Uganda Vs. Tumwesigye ziraba**,<sup>[42]</sup> Judge Godfrey Namundi denounced rape describing it as *“a demeaning act as against the victim who will be traumatized the rest of her life. The circumstances in which the offence was committed are also so bad that the children who saw the victim being raped will remain traumatized. The convict is a young man who can get consensual sex without attacking helpless old women. He has been on remand for 3 years. I take that into consideration. A sentence of 12 years imprisonment is appropriate and it is so imposed.”*

### 4.4. Prosecution of offences involving violence by and against women and girls

#### 1. Aggravated trafficking in persons and defilement

The ICD has the jurisdiction to hear the cases of aggravated trafficking in persons under the Prevention

[39] Family Cause No. 169 of 2014 at Kampala. The “Welfare Principle” requires that when making custody-related decisions, the best interests of the child forms the first and paramount consideration

[40] Criminal Case No. 109 of 2016, in the High Court of Moroto.

[41] High Court Criminal Session Case No.361 of 2013 (15 August 2017) at Kabale.

[42] High Court Criminal Case No. 092 of 2011 (3 December 2013) at Jinja.



in Trafficking of Persons Act, and defilement under the Penal Code Act. In the case of **Uganda Vs. Tukwasibwe Junior**,<sup>[43]</sup> the accused challenged, among other issues, the jurisdiction of the High Court International Crimes Division to entertain his trial. The accused person was charged with 13 counts of aggravated trafficking in persons under the Prevention of Trafficking in Persons Act, and defilement under the Penal Code Act, and he was committed for trial to the High Court at Kabale. The Court held that the High Court International Crimes Division was created as a specialized division of the High Court and clothed with unlimited jurisdiction to try any of the offences relating to, and named under Paragraph 6 of High Court International Crimes Division Practice Directions, 2011, which are committed within and outside the territory of Uganda. These include any offences relating to genocide, crimes against humanity, war crimes, terrorism, human trafficking, piracy, and any other international crime as may be provided for under the PCA Code Act, Geneva Convention Act, International Criminal Court Act, or under any other penal enactments.

***a) Consent of the victim or their family does not exonerate the accused of human trafficking.***

Justice Susan Okalany in the case of **Uganda Vs. Malik Junior**,<sup>[44]</sup> dismissed the accused's defense that the victim had consented to move in with him and her parents were aware of their relationship. The accused was charged with trafficking after he took into his home a girl aged 17 years who had run away from her home. The accused repeatedly had sex with her for several months. When he found out that she was pregnant, he threw her out of his home.

***b) A conviction of a sexual assault can be secured without the testimony of the victim.***

In **Badru Mwindu Vs. Uganda**,<sup>[45]</sup> the Supreme Court upheld the appellant's conviction of defilement in the absence of the victim's evidence. The victim did not testify since she was out of the country with her father for treatment, following the sexual assault on her which implied that the prosecution evidence against the appellant was purely circumstantial.

In **Omuroni Vs. Uganda**,<sup>[46]</sup> the victim did not testify and the trial court relied on the evidence of two people. The first witness was the victim's father who had found the appellant in his house with the victim on the fateful night though he escaped and fled but he managed to chase and arrest him. The second witness was a retired nurse who had examined the victim a day after the alleged act. Neither the victim nor the doctor who had subsequently examined the victim and prepared a medical report testified. The trial Court convicted the appellant of defilement on the basis of the evidence of the two witnesses and the medical report and sentenced him to 10 years' imprisonment. The appellant unsuccessfully appealed to the Court of Appeal after which he appealed to the Supreme Court on two grounds namely, that the Court of Appeal erred in upholding a conviction on insufficient and false evidence, and that the Court erred when it failed to draw adverse inference from failure by the prosecution to produce the victim in Court. The doctor who examined her and her mother testified in Court. The Supreme Court in dismissing the appeal held that *"The evidence was circumstantial as the victim who would have given direct evidence as the only eye witness, did not testify, but nonetheless constituted sufficient proof of the offence of which the appellant was convicted, as it was amply corroborated by independent evidence. Although the victim did not testify, evidence that the victim accused the appellant of having had sexual intercourse with her, was admissible as the accusation was made contemporaneously with the offence and therefore, was part of res gestae and is an exception to the hearsay rule."*

***c) Sexual violence, in a conflict is a grave breach of the Geneva Conventions and as a crime against humanity, SGBV Offences.***

The engendered nature of offences of rape and other forms of sexual violence disproportionately affect

[43] International Crimes Division HCT-00-ICD-0009-2022.

[44] International Crimes Division HCT-00-ICD-SC-0003-2021.

[45] SCCA No. 15 of 1997.

[46] Criminal Appeal No. 2 of. 2000.

women and girls, particularly during armed conflict. The offences of violence to life, outrage against personal dignity, torture as a crime against humanity, maybe manifested by rape. Rape is a crime against humanity. Enslavement as a crime against humanity since sexual control could be the means by which to carry out enslavement.

In **Uganda Vs. Kwoyelo Thomas alias Latoni**,<sup>[47]</sup> the Court observed that offences of rape and other forms of sexual violence, solely or disproportionately affect women and girls, particularly during armed conflict, hence their gendered nature. The Court found that *“sexual assault is something more than a simple act of violence, it is an assault upon human dignity. The perpetrator must have intended to commit the act concerned while aware that the act would humiliate, degrade or violate the dignity of the victim. The victim need not personally be aware of the existence of the humiliation or degradation or other violation. The offence is centered around the right of persons not to be seen as sexual subjects and the right to experience fulfilment and self-worth in sexual interactions. Inherent in the act of rape is serious humiliation, degradation or a serious attack on the human dignity of the victim which very often have the most long-lasting psychological consequences for victims, including feelings of shame and degradation of selfhood. It strikes at a woman’s power and autonomy, seeks to degrade and destroy her; its goal is domination and dehumanization. It is an unlawful invasion of the body, mind and spirit of the victim; the very existence of the victim as a person.”*

**d) Any penetration however slight, amounts to defilement.**

In **Adamu Mubiru Vs. Uganda**,<sup>[48]</sup> the Court of Appeal held that however slight the penetration may be, it will suffice to sustain a conviction for the offence of defilement.

**e) Forced sexual intercourse between a married couple amounts to rape.**

In the case of **Uganda Vs. Yiga Hamidu & Ors**,<sup>[49]</sup> the accused in his defense against the charge of rape argued that he had sexual intercourse with the complainant, honestly believing that she was his wife since he had paid bride price to the complainant’s parents. The accused had visited the complainant’s parents and gave them money, without the knowledge or approval of the complainant. The complainant was taken to the accused’s home by her parents where the accused physically restrained her with the help of his friends and had sex with her. The High Court found that no customary or any other form of marriage ever took place and the accused had only visited the complainant’s parents’ home. Justice Musoke-Kibuuka opined that *“No sane person who regards any woman as his wife would wish to have her exposed to such shame as A1 put the complainant in this case by inviting two men to hold her while he was having sexual intercourse with her....No husband would lock up his loving bride in his bedroom like a prisoner of war on the first day of their marriage. In my humble view, even if it was true that A1 and the complainant had been customarily or otherwise truly married and were, therefore husband and wife, or even if it was true that A1 honestly believed that the complainant was his customarily wedded wife, still the facts and circumstances of this case would render A1 guilty of rape.”*

**f) Forced sexual intercourse with a woman is rape, while with a girl it is defilement.**

In **Uganda Vs. Kusemererwa Julius**,<sup>[50]</sup> Justice Batema decried the practice of the Director of Public Prosecution (DPP) to prefer charges of rape where the assaulted girl is above 14 years of age or where the accused uses excessive force to subdue the victim into sexual intercourse. According to Justice Batema *“The DPP can only prefer charges whose ingredients are best supported by the evidence on the police file. Rape is clearly rape of a woman capable of giving consent, withdrawing consent or refusing to consent to sexual intercourse. In the context of the current Penal Code provisions in Uganda, a girl is a minor who is incapable of consenting to sex and cannot therefore be raped. Technically speaking, rape*

[47] High Court (International Crimes Division) HCT-00-ICD-SC-02 of 2010 at Gulu.

[48] CA No. 47 of 1997.

[49] Criminal Session Case 005 of 2002.

[50] High Court Criminal Session Case No.15 of 2014 at Fort Portal.

ceased to apply to girls in 1990 and was replaced with provisions of defilement. Going by the 2007 amendments to the Penal Code the two offences are distinct, distinguishable by the age element, criminal jurisdiction and the difference in the prescribed punishments."

**g) Past acts of domestic violence do not contribute to the defense of battered women syndrome but may indicate malice aforethought.**

In **Uganda Vs. Jacqueline Uwera Nsenga**,<sup>[51]</sup> the High Court considered the past acts of violence against the accused as forming the bedrock of malice aforethought but not contributing to the defense of battered women syndrome. Justice Duncan Gaswaga found that *"An accumulation of these elements over a long period of ten years resulted in the formation of a tinderbox, which constituted the bedrock of the accused's intention or malice aforethought to kill the husband."*

**h) Accumulated anger is a serious mitigating factor in sentencing.**

Section 193 of the PCA which defines provocation should be amended to reflect gendered equalities in domestic violence. The High Court in **Uganda Vs. Kamuhanda Emmanuel**,<sup>[52]</sup> was tasked to determine if accumulated anger arising from repeated acts of domestic violence, and more so when they are committed with impunity, was a partial defense to homicides and other crimes committed against a perpetrator of domestic violence. The Court found that indeed, accumulated anger was very serious mitigating factor in sentencing. The Court also called for an amendment of section 193 of the PCA which defines provocation. In the Court's view, this provision is blind to the gendered inequalities in domestic violence.

Section 193 of the PCA defines provocation to mean and include, except as stated in subsections (3) to (5), any wrongful act or insult of such a nature as to be likely—when done or offered to an ordinary person; or when done or offered in the presence of an ordinary person to another person who is under his or her immediate care; or to whom he or she stands in a conjugal, parental, filial or fraternal relation, or in the relation of master and servant, to deprive him or her of the power of self-control and to induce him or her to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered. When such an act or insult is done or offered by one person to another; or in the presence of another to a person who is under the immediate care of that other; or to whom that other stands in any such relation as aforesaid, the former is said to give to that other provocation for an assault. A lawful act is not provocation to any person for an assault. An act which a person does in consequence of incitement given by another person in order to induce him or her to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault. An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.

In **Uganda Vs. NA**,<sup>[53]</sup> an 18-year-old girl killed her father after he had subjected her and her siblings to a history of sexual abuse and impregnated her. The accused's reports of the abuse to her mother and relatives fell on deaf ears. At trial, the accused pleaded guilty to the offence and was convicted. Realizing that a harsh sentence would not serve justice in the circumstances, the Court exercised its discretion and gave the accused a lenient sentence because, although she was before Court as a perpetrator of violence, her violent act was in reaction to the extreme abuse she suffered at the hands of the deceased. In arriving at an appropriate sentence, the judge placed this case within a broader context recognizing that 'her violence' was not an exclusively legal issue. The trial judge noted that *"whereas the convict had committed an unlawful act, she had for all intents and purposes been the victim in the circumstances. Though the deceased had a moral obligation to protect the convict, he had instead continually abused her, thereby transforming from protector to perpetrator."*

[51] High Court Criminal Session Case No. 013 of 2013.

[52] HCT-01-CR-SC-0024 OF 2012.

[53] MSK-CR-AA-132/2013, High Court of Uganda at Masaka.

Justice Batema in the case of **Uganda Vs. Kamuhanda Emmanuel**,<sup>[54]</sup> reinterpreted the concept of provocation in light of GBV and in doing so overturned the old reasoning on provocation that one provoked must react in the heat of passion. In this case, the accused was charged with the murder of his father who had for many years inflicted violence on their mother. The accused had for a long time warned his father to stop acting violently towards their mother, but this went unheeded. The accused attacked his father after his last act of abuse. Justice Batema declared that *"The gendered power relations in domestic violence can no longer be ignored in our principles of criminal law and in criminology in general,"* The Justice mitigated the accused's sentence to only 2 years noting that the murder arose from "accumulated anger in domestic violence."

***i) A court should be slow to grant bail to a person accused of an offence committed in the context of domestic violence, unless it is satisfied that the person poses no danger to victims or witnesses when released on bail.***

Justice Stephen Mubiru in the case of **Oringi Elia Vs. Uganda**,<sup>[55]</sup> provides guidance on the factors that Courts must consider in assessing applications for bail in domestic violence cases. The Justice opined that *"It is neither possible to require the accused not go to a specific place, for example his home where the complainants may be living, nor to prevent the accused from communicating with any of the prosecution witnesses before the trial. In my view, in the absence of proof of exceptional circumstances, a Court should be slow to grant bail to a person accused of an offence committed in the context of domestic violence unless satisfied that the person poses no danger to victims or witnesses when released on bail. Release of the person on bail should only be made where the Court is satisfied that such release is not likely to adversely affect the safety, wellbeing and interests of an affected person or witness considering the complexities of family violence, and the degree of risk to which victims and witnesses can be potentially exposed."*

***j) An allegation of sexual assault must not be corroborated in order for it to succeed.***

In **Bizimana Vs. Uganda**,<sup>[56]</sup> the victim alleged that she was raped at her home by the appellant during the early hours on the night. At the time, her home was lit by a tadoba (a paraffin-fueled candle). When the Appellant was arrested, and charged, he raised the defence of alibi, which the trial judge rejected, convicted him of rape and sentenced him to eighteen years' imprisonment. He appealed against the decision on the grounds that the circumstances of the alleged incident were insufficient to lead to a reliable identification. That the alleged incident took place at night when the victim was bending, and that the light from the tadoba would have been insufficiently bright. He also contended that the sentence imposed was manifestly excessive. The Court of Appeal confirmed the accused's guilt, noted that the trial judge correctly warned himself about the dangers of convicting on evidence of a single identifying witness without corroboration when conditions do not favour correct identification, since the victim knew the accused well and there was light from the tadoba. This was sufficient to identify the perpetrator. However, the sentence was reduced to 15 years imprisonment.

## ***4.5. Sentencing range for crimes committed by and against Women and Girls.***

***a) Courts must be consistent when handing down sentences for similar crimes.***

The Supreme Court in **Aharikundira Yustina Vs. Uganda**,<sup>[57]</sup> guided that it is the duty of this Court while dealing with appeals regarding sentencing to ensure consistency with cases that have similar facts. Consistency is a vital principle of a sentencing regime. It is deeply rooted in the rule of law and requires that laws be applied with equality and without unjustifiable differencing.

[54] HCT-01-CR-SC-0024 of 2012.

[55] Miscellaneous Criminal Application No. 0011 of 2016.

[56] Court of Appeal Criminal Appeal No. 143 of 2010 (18 December 2014) at Fort Portal.

[57] [2018] UGSC 49 (3 December 2018).



In total 27 cases were studied to appreciate the sentencing ranges in GBV cases. The sentencing ranges of cases sampled<sup>[58]</sup> under the study was from; 2 years to 25 years in rape cases, 8 years to 14 years (defilement), 8 years to 30 years (murder) and manslaughter 2 years to 14 years. Of the cases sampled, the Court of Appeal and/or Supreme Court confirmed/upheld the High Court sentence in 6 cases (representing 22.2%) of aggravated defilement, defilement and murder. While sentences were reduced in 7 cases (representing 26%).

The Sentencing Guidelines<sup>[59]</sup> provide; ranges of 30 years to death in capital offences including (murder, rape and aggravated defilement). The sentencing range for defilement (simple attempted and permitting defilement) is 3 years to life imprisonment.

The Guidelines were developed in 2013 and are due for review. "There is a trend for the Court of Appeal to reduce sentences. There needs to be some deterrent minimum sentences set and this should apply in the particular circumstance of each case. Sentencing is not within the same ranges – there are wide ranges." [Respondents KIIs]

#### **4.6. Adjudication of Cohabitee Disputes**

##### ***a) Unmarried partners can acquire interest in a home.***

In the case of **Haji Musa Kigongo Vs. Olive Kigongo**,<sup>[60]</sup> despite the absence of a valid marriage, the Court took into consideration the time that the respondent had cohabited with the petitioner and the fact that she had sired children with him and held that the respondent had acquired an interest in the home. Thus, the Court recognized the rights of women under cohabitation.

In **Baramureba James Vs. Kabakonjo Abwooli & 6 Ors**,<sup>[61]</sup> the Court took a wider interpretation of the word 'spouse' while interpreting Section 38 A (1), (2), (3) of the Land (Amendment) as well cognizant of the time that the 1<sup>st</sup> defendant had spent with the plaintiff and even sired children with him and considered their relationship as equivalent to a marriage. The Court ruled that the 1<sup>st</sup> defendant was entitled to give or deny her consent to the sale by the plaintiff thus also protecting her right to the family property.

##### ***b) The parent who has been caring for the child after the breakdown of the relationship is more likely to be granted custody of the child by the court.***

In the case of **Birungi Nicholas Vs. Kakyo Pamela**,<sup>[62]</sup> the High Court was tasked to determine if the parent who was caring for the child after the breakdown of a cohabitee relationship was best suited to be granted custody of the child. The Court held that in the absence of compelling reasons, the parent who has been involved in the life of the child and who has been looking after the child after separation should retain custody of the same in event of separation of parents. This is because such a parent understands better the needs and weaknesses of such a child and the child would not struggle getting accustomed to a different environment than the one he or she has been used to. Financial position and or economic situation of the parent, political aspirations and influence in society should not be overriding factors. The other parent of means can be ordered to continue paying maintenance while the child is in the custody of the other parent.

[58] See Annex 2 to this report for the cases sampled.

[59] Constitution (Sentencing for Courts of Judicature) (Practice) Directions, 2013. Available at <https://www.judiciary.go.ug/files/downloads/Sentencing%20Guidelines.pdf>

[60] HC CS. No. 295 of 2015.

[61] HCCS No. 20 of 2013.

[62] HCCA 32 of 2022.

## 4.7. Customary Marriages

### **a) Failure to register a customary marriage does not invalidate it.**

In **Negulu Milly Eva Vs. Dr. Serugga Solomon**,<sup>[63]</sup> Justice Godfrey Namundi held that failure to register a customary marriage does not necessarily invalidate it. The Justice added that one can consider himself/herself customarily married once the customary ceremonies of the community/ tribe have been performed.

## 4.8. Custody Disputes

### **a) Best interest of the child takes precedence over the interests of the biological parents, adoptive parent(s) or anyone else.**

In the case of **Kagimu Vs. Kagimu**,<sup>[64]</sup> the Court found that the cardinal principle in determining to whom to grant custody of a child is the welfare of the child as enshrined in section 3 of the Children Act. In dealing with children of tender years, custody of such children should be granted to their mothers. Section 3 of the Children Act provides that *"the welfare of the child shall be of paramount consideration whenever the State, a Court, a tribunal, a local authority, or any person determines the question with respect to the upbringing of the child, the administration of a child's property, or the application of any income arising from that administration"*. The law requires the focus to be placed on the best interest of the child, rather than the interests of the biological parent(s), adoptive parent(s) or anyone else.

### **b) Courts will consider the financial, emotional and physical capabilities of the parents when determining the most suitable parent to be awarded custody of the child.**

Judge Celia Nagawa provided guidance on the factors that the Court should take in account when determining the parent that should be granted custody of the child following the breakdown of the relationship in the case of **Lugwaro Aber Brenda Vs. Karema Edward**,<sup>[65]</sup> the judge opined that *"In all child custody cases, the Court is required to determine whether the parent is capable of caring for the child. This evaluation comprises financial, emotional, and physical considerations."*

## 4.9. Paternity Disputes

### **a) A DNA Paternity test is a clearer and more concrete process of proving paternity.**

The High Court in the case of **Kazooba David Guma Vs. Mugisha Patricia**,<sup>[66]</sup> pronounced itself on the precise and the most appropriate process of proving paternity. Justice Vicent Wagoma declared that *"the position of a certified copy of the entry into the register of birth of the name of the father and mother as being conclusive proof of parentage no longer holds in legal contestations. Science asserts that DNA is nearly 100% accurate at determining paternity. A DNA paternity test is a clearer and more concrete process of proving paternity than witness testimonies and statements in the register."*

### **b) When making an order for a DNA test a Court must consider if the application for an order is in good faith.**

Justice Ketra itariisibwa Katunguka further noted in **BPs Vs. CS**,<sup>[67]</sup> that Courts have held that in exercising their discretionary power to grant or not to grant the relief (DNA testing), they should be convinced that the application is made in good faith, and that it is not actuated or designed to economically exploit or embarrass or is otherwise an abuse of the process of Court.

[63] Civil Appeal No. 103 of 2013 [2014] UGHCCD 64 (30 April 2014) at Jinja.

[64] (2001-2005) 3 HCB 100.

[65] Family Cause No. 67 of 2021.

[66] Civil Misc. Application No. 004 of 2024.

[67] Civil Appeal No. 6222 – 6223 of 2010.

#### **4.10. Quantification of Payments of Child Maintenance**

##### **a) Both parents have an equal duty to provide care for their children.**

The High Court found in the case of **Nassazi Racheal Vs. George Musoma Walugembe**,<sup>[68]</sup> that both parents have an equal duty to provide care for their children and ordered that each party should contribute 50% to the maintenance of the children; including among others; education, feeding, clothing, medical care, and shelter.

In **Igeme Katagwa Vs. Anna Sarah Nalwoga**,<sup>[69]</sup> Lady Justice Celia Nagawa provided guidance on the Constitutional obligation of parents to care for their children. Justice Nagawa explained that Article 31(4) of the Constitution of the Republic of Uganda 1995 (as amended) stipulates the duty of parents to provide and care for their children. This duty presupposes equal responsibility.

#### **4.11. Sexual Harrassment at Work**

##### **a) Disciplinary proceedings must be fair.**

In **Magoba Editor Vs. Tusker Mattresses (U) Ltd**,<sup>[70]</sup> the claimant was an employee of the respondent company. She claimed that the Assistant Manager of the respondent consistently committed sexual harassment against her; including sending her seductive messages, forcefully touching her breasts, and asking her to engage in sexual intercourse at work. She rejected his advances. She complained to the Manager who set up a disciplinary committee. Both the claimant and the alleged perpetrator of sexual harassment were given one-day's leave to allow for the investigations to be concluded but before the investigations were concluded, the claimant's employment was terminated. The Court held that *"the disciplinary hearing in our view was not meant to prove any charges against the claimant but to establish whether she had been sexually harassed as she alleged. As it turned out, the disciplinary hearing seemed to suggest that the claimant was the one on trial and this is the reason that the typed record was fundamentally different from the original ink record. It is our considered view that this fundamental difference makes the result of the hearing inconsequential and the finding that the termination was illegal and unfair inevitable."*

#### **4.12. Labour Externalisation, Ill-treatment of Workers and Human Trafficking**

In the case of **C & 11 Others Vs. Attorney General & Uganda Veterans Development Ltd**,<sup>[71]</sup> the Government of Uganda licensed Uganda Veterans Development Ltd under the Externalization of Labour Program to source and formally find Ugandans job abroad. The plaintiffs were airlifted to Baghdad and while there they were informed that their job description was housemaids for USD 200 per month without allowances. When the plaintiffs called an officer of the Uganda Veterans Development Ltd in Uganda to inquire more about their job description, they were informed that they had to do the work allocated to them. The plaintiffs protested and on doing so were threatened, beaten and their passports taken away. They were subjected to hard and forced labour, slavery, servitude, sexual harassment and abuse, torture, cruel and inhuman degrading treatment, as well as non-payment of wages. They sued the defendants. Judge Sekaana Musa held that *"...adverts were run on radio inviting potential employees and the plaintiffs responded. Indeed, one of the plaintiffs stated that they were about 145 applicants"*

[68] Divorce Cause No.75 of 2020

[69] Divorce Cause No. 100 of 2022.

[70] Industrial Court Labour Dispute Reference No. 243 of 2015) (27 November 2020) at Kampala.

[71] High Court Civil Suits No.278,280,283,284,285,286,289,290,291,292,293,296 of 2013) [2020] UGHCCD 55 (14 April 2020) at Kampala.

*and indeed, they all went to Iraq. We cannot take a complaint of a few of them who were mistreated by the employers to conclude that all the 145 were trafficked. It is absurd that the plaintiffs went through heinous ordeal of torture, sexual harassment or rape, long working hours and generally mistreatment. All the above notwithstanding, the plaintiffs were never trafficked but rather suffered in new employment in Iraq, which they voluntarily sought to be employed..."*

## **5. Conclusions and Policy Recommendations**

### **5.1. Conclusions**

Jurisprudence relating to A2J with a special focus on GBV indicates that since 1995, specifically following with the promulgation of the Constitution, there has been increased protection of the dignity of women and girls, rejection of practices that are harmful as well recognition of the unique status and maternal functions of women. Laws that were enacted before the promulgation of the 1995 Constitution as well as practices that violate rights of women have been denounced by the Courts. There is a mixed judicial approach to recognizing the special status of women and girls in society, on one hand the Constitutional Court has found that the government does not have to make special arrangements to facilitate women's right to vote and on the other hand the Courts have found that women benefit from preferential treatment under the Constitutional affirmative action protection because of their unique status.

Courts have also recognized the non-monetary contribution of women in the matrimonial settings to include preparing of food, organizing children for school and generally enhancing the welfare of the family. The courts have found this contribution amounts to a substantial indirect contribution to the property and thus allowed a spouse a share of the matrimonial home on dissolution of the marriage. Matrimonial property includes property individually acquired before marriage by the parties thereto; and property in the sole name of one member of a couple unless the contrary is proved. Property acquired before marriage maybe excluded from the definition of matrimonial property where the parties to the marriage have not chosen to call it home or where the other spouse has not made any contribution to its maintenance and preservation or where such property is inherited

With regard to the prosecution of GBV, Uganda has no statutory definition of GBV although this challenge is not unique to Uganda. It is generally accepted that the term GBV has evolved from the term violence against women (VAW). Uganda's Policy on the Elimination of GBV defines GBV to refer to physical, sexual, economic or psychological violations which are subjected to individuals and/or a group of persons based on social expectations of men and women. A number of cases therefore that are potentially GBV and SGBV cases tend to fall under other offences such as murder and aggravated robbery etc. Hence the on-going advocacy to clarify the definition for GBV.

Some gender stereotypes persist. For instance, the Courts have held that the “Welfare Principle” requires that when making custody-related decisions, the best interest of the child is the first and paramount consideration. In this context, emphasis must be placed on all circumstances pertaining to the child’s welfare. Progressively, Courts have denounced the culture/practice of chasing women in the name of marriage or to forcibly have sex with them as demeaning to women.

With regard to prosecution for offences against and by women the Courts must be lauded for gender-responsive decisions; for instance, recognizing that sexual assault can be proved without the testimony of the victim. The High Court International Crimes Division has also made several useful declarations regarding SGB in conflict settings. For instance, the finding that the engendered nature of offences of rape and other forms of sexual violence disproportionately affect women and girls, particularly during armed conflict. It has also relied on the Geneva Conventions to find that offences of violence to life, outrage against personal dignity, and torture as a crime against humanity, may be manifested by rape.

There is inconsistency in sentencing of persons convicted of offences against and by women. Courts take into consideration both mitigating and aggravating factors when handing down sentences. For instance, it is the position of the law that accumulated anger amounts to a mitigating factor, while a history of abuse or violence will be considered an aggravating factor in sentencing. Courts generally find that women and girls are more of victims than intentional perpetrators of domestic violence.

## 6. Policy Recommendations

1. Enact the Divorce and Marriage Act, which aims to reform and consolidate the law relating to marriage, separation, and divorce and provides for recognized types of marriages, marital rights, grounds for breakdown of marriage, and rights of parties.
- 2.2. Guidelines on what a spouse should be given in case of divorce should be streamlined. This should entail basics on what should be paid to a spouse for unpaid carework.
3. Enact a sexual offences law that provides clear guidance on the definitions of gender-based violence and sexual gender-based violence.
4. Review the Gender Bench Book to ensure that it reflects new gender-responsive jurisprudence and popularize it among judicial officers.
5. The Judicial Training Institute should include in its curriculum training on adjudicating cases with gender-lenses.
6. Stakeholders should establish safe spaces for women, girls, and men at the risk of violence, for instance refuges.
7. The Director of Public Prosecution should prefer the strongest charges against perpetrators of violence against women and girls.
8. Stakeholders should engage in campaigns to educate the public against sexual violence, including the rights and remedies available to the victims.

## 7. Annexes

### 1. References

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## 2. Sentencing ranges in cases sampled

Case Citation	Nature of case/offence	Brief facts	Sentence
High Court International Crimes Division <b>Uganda Vs. Umutoni Annet, HCT-00- ICD-CR -SC- NO. 003 of 2014.</b>	Child trafficking. Trafficking in persons.	The accused was convicted of trafficking young girls.	On the count of aggravated child trafficking 8 years and 5 years on the count of trafficking in persons.
High Court <b>Uganda Vs. Karengi Abdu, Criminal Session No. 0292 of 2016.</b>	Rape.	A serial rapist who raped a woman repeatedly through the night and was HIV positive but the victim fortunately was not infected.	A 25 years and 5 months' imprisonment sentence.
High Court <b>Uganda Vs. Awokenimungu, Criminal Case No. 0186 of 2014.</b>	Rape.	Serial rapist who raped a woman.	of 22 years and 5 months.
Court of Appeal <b>Otema Vs. Uganda, C.A. Cr. Appeal No. 155 of 2008.</b>	Rape.	36-year-old convicted of rape.	The trial Court sentenced him to 13 years. The Court of Appeal reduced the sentence to 7 years.
High Court <b>Uganda Vs. Olupot Francis, H.C. Cr. S.C. No. 066 of 2008.</b>	Rape.	Convict of rape.	Sentenced to 2 years imprisonment.

Case Citation	Nature of case/offence	Brief facts	Sentence
Court of Appeal <b>Agaba Job Vs. Uganda, Criminal Appeal No. 230 of 2003.</b>	Defilement.	For defilement of a 6-year-old girl in respect of an appellant who was convicted on his own plea of guilty.	10 years imprisonment.
Court of Appeal <b>Richard Abot Vs. Uganda, Criminal Appeal No. 190 of 2004.</b>	Defilement.	For an appellant who was convicted of the offence defilement of a 13-year-old girl but had spent 3 years on remand before sentencing.	8 years' imprisonment.
Court of Appeal <b>Byaruhanga Lozio Vs. Uganda, Criminal Appeal No. 168 of 2009.</b>	Defilement.	For an appellate who defiled the neighbor's daughter.	The trial Court sentenced him to 14 years. The Court of Appeal upheld the sentence.
Court of Appeal <b>Ntambale Fred Vs. Uganda, Criminal Appeal No. 0177 of 2009.</b>	Defilement.	For an appellant who defiled his daughter.	The trial Court sentenced him for 14 years. The Court of Appeal upheld his sentence.
Court of Appeal <b>Kato Sula Vs. Uganda, Criminal Appeal No. 30 of 1999.</b>	Defilement.	For an accused of defilement.	The Court of Appeal confirmed the sentence of 8 years.



Case Citation	Nature of case/offence	Brief facts	Sentence
Court of Appeal <b>Uwihayimaana Molly Vs Uganda, Criminal Appeal No. 103 of 2009 [2015]</b> at Kampala (Appeal against Sentence of the High Court of Uganda at Kabale).	Murder.	For an appellant whose husband tried to strangle her and she killed him.	The trial Court sentenced her to death. The Court of Appeal substituted the sentence with that of 30 years.
Supreme Court <b>Kiwalabye Vs. Uganda, Criminal Appeal No. 143 of 2007.</b>	Murder.	For the appellant who murdered his wife by stabbing.	The trial Court sentenced him to 30 years. The Supreme Court confirmed the sentence.
Supreme Court <b>Kyetegereka George Vs. Uganda, [2010] UGCA 110.</b>	Murder.	For an appellant who stabbed his wife to death.	The trial Court sentenced him to 30 years. The Supreme Court confirmed the sentence.
Supreme Court <b>Akbar Hussein Godi Vs. Uganda, [2015] UGSC 17.</b>	Murder.	For an appellant who murdered his wife.	The trial Court sentenced him to 25 years. The Court of Appeal affirmed. The Supreme Court confirmed the sentence.

Case Citation	Nature of case/offence	Brief facts	Sentence
High Court <b>Uganda Vs. Apio Agnes, Criminal Session Case No. 0123 of 2014</b> at Lira.	Murder.	For an accused who pleaded guilty to killing her husband with whom she had started cohabiting while she was 15 years old and he had infected her with HIV.	The trial Court sentenced her to community service of 240 hours.
Supreme Court <b>Uganda Vs. Susan Kigula, HCT-00-CR- SC-0115-2011.</b>	Murder.	For a convict who murdered her husband.	The trial Court sentenced her to death. The Supreme Court reduced the sentence to 20 years.
Court of Appeal <b>Kawuli Vs. Uganda, Criminal Appeal No.60 of 2013</b> (8 April 2024) at Mbale (Arising from High Court Criminal Session Case No.0107 of 2012 at Mbale).	Murder.	For a convict who pleaded guilty to killing his wife.	The trial Court sentenced him to 18 years. The Court of Appeal reduced his sentence to 5 years and 8 months.
Court of Appeal <b>Emeju Juventine Vs. Uganda, Criminal Appeal No. 095 of 2014.</b>	Murder.	For an appellant who killed his wife with an axe.	The trial Court sentenced him to 23 years. The Court of Appeal reduced the sentence to 18 years.
High Court <b>Uganda Vs. Bongomin Kennedy, Criminal Session Case No. 194 of 2011.</b>	Murder.	For an accused who murdered his wife.	Imprisonment for 30 years.

Case Citation	Nature of case/offence	Brief facts	Sentence
High Court <b>Uganda Vs. Umar Londroma, Criminal Session Case No. 0089 of 2015.</b>	Murder.	For a 60-year-old convict who killed his wife.	A sentence of 30 years imprisonment.
High Court <b>Uganda Vs. Nakalyango Grace and Another, Criminal Case No. 452 of 2010 at Nakawa.</b>	Murder.	For a convict who alongside another murdered her husband.	The accused was sentenced to 30 years. The co-accused got 25 years.
High Court <b>Uganda Vs. Ntihabose Benon, Criminal Session Case No. 77 of 2010.</b>	Murder.	For an accused who killed his wife.	A sentence of 30 years imprisonment.
High Court <b>Uganda Vs. Aballa Walter, Criminal Sessions Case No. 0204 of 2015.</b>	Murder.	For a 37- year-old convict who killed his wife who he found having sex with another man in the neighborhood.	A sentence of 8 years imprisonment.
High Court <b>Uganda Vs. Abulejo Godfrey, Criminal Sessions Case No. 0058 Of 2016.</b>	Manslaughter.	For a convict who violently pushed his wife trying to stop a fight between her and her co-wife. She died as a result.	The trial Court sentenced him to 2 years and 6 months.
Supreme Court <b>Uganda Vs. Lydia Draru, HCT-00-CR-SC-0404 of 2010.</b>	Manslaughter.	For a convict who killed her husband.	A sentence of 14 years imprisonment.



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