

# Decriminalisation of sex work in Kenya<sup>1</sup>



The Kenyan Constitution<sup>2</sup> recognises universal human rights possessed by every human being and enforceable in law. But sex workers in Kenya have their human rights grossly violated on a daily basis<sup>3</sup>. Criminalisation of sex work is directly linked to these rights abuses<sup>4</sup>. This is why decriminalisation of sex work is backed by major human rights organisations including Human Rights Watch<sup>5</sup> and Amnesty International<sup>6</sup>.

## CONTRADICTION 1: The Penal Code and County by-Laws

Different laws criminalise sex work in Kenya. The Penal Code is the national legal framework which criminalises sex work and delineates the legal space within which the 47 counties can develop by-laws regarding sex work. The regulation of sex work on a county level differs per county, but can never contradict the Penal Code. The differences per county relate to the wordings of the by-laws deployed to arrest sex workers, but they do not differ with regard to the criminal status of sex work. Despite the fact that the Penal Code overrides the County By-Laws, it is hardly, if ever, used to arrest sex workers. Most sex workers are arrested by police and taken to court on the basis of County by-Laws.

THE PENAL CODE, sections 153 & 154, Cap 63<sup>7</sup>.

*What is criminal?*

1. Every male person who (a) knowingly lives wholly or in part on the earnings of prostitution; or (b) in any public place persistently solicits or importunes for immoral purposes, is guilty of a felony.
2. Where a male person is proved to live with or to be habitually in the company of a prostitute or is proved to have exercised control, direction or influence over the movements of a prostitute in such a manner as to show that he is aiding, abetting or compelling her prostitution with any other person, he shall unless he satisfies the court to the contrary be deemed to be knowingly living on the earnings of prostitution.
3. Every woman who knowingly lives wholly or in part on the earnings of prostitution, or who is proved to have, for the purpose of gain, exercised control, direction or influence over the movements of a prostitute in such manner as to show that she is aiding, abetting or compelling her prostitution with any person, is guilty of a felony.

EXAMPLE OF A COUNTY BY-LAW: Nairobi County

The Nairobi 'City by-Laws' state under 'General Nuisance' that "loitering, importuning or attempting to procure a female/male for prostitution purpose"<sup>8</sup> is an offense.

### A police officer:

*"You don't break the law when you have sex, the act itself, but when you get money, yes. No one has been charged yet with living of proceeds, it is very hard to prove. Most prostitutes are arrested for loitering for immoral purposes. When they are taken to court, they just say yes and pay 500 Kenyan Shillings. If they say no it means a long court case and a lot of money, which they don't have. It is very illogical because it costs a lot of money to arrest a sex worker. The police officer, the vehicle, the court people, the judge, everything needs money and the court only gets 500 Kenyan Shillings. For economic purposes alone we should legalize sex work."*

### Daughty Amarula from the Africa Sex Workers Alliance:

*"Our laws [in Kenya] say something very weird. What that essentially means is that it is not me to be punished but a person benefiting from the money I got through sex work. That school I paid fees to, my landlord and any other person who got my money. How do you prove that this person got money through prostitution? You have to catch them in the act. How often do the police find women in sexual acts?"<sup>9</sup>*

### What is the impact of criminalisation?<sup>10</sup>

- Sex workers fear arrest and suffer extra-judicial abuse on a daily basis from both the city council police and the general police.
- The everyday harassment by police includes rape, violence and being made to pay bribes<sup>11</sup>. Some have to give up to 50% of their earnings to police to avoid jail time.
- Sex workers must hide from the police and are reluctant to report crimes, making them extremely vulnerable to violence from clients and other members of the public.
- Unequal power relations and the threat of violence limits sex workers' ability to negotiate condom use.
- Sex workers face discrimination and barriers to services, including health services.

**Fact 1:** In October 2015, seven sex workers were murdered in the span of 10 days<sup>12</sup>. The Kenya Sex Workers Alliance (KESWA) estimates that at least 40 sex workers are murdered every month across the country<sup>13</sup>.

**Fact 2:** Late November 2015, 300 sex workers were arrested by police in Kisii and forced to take HIV tests with the intention of charging the ones who would be found positive with 'spreading HIV'<sup>14</sup>.

**Fact 3:** In the year 2013, 79% of sex workers in Mombasa experienced extreme sexual violence, including gang rape and forced unprotected sex, besides being arrested and placed in detention<sup>15</sup>.

## CONTRADICTION 2: The Penal Code, the County by-Laws and the Bill of Rights

The legitimacy of criminalising sex work, by the Penal Code and the County by-Laws, is widely questioned<sup>16</sup> in relationship to the new Constitution of Kenya 2010. According to this, the Bill of Rights of the new constitution supersedes the Penal Codes and all County By-laws.

- Article 21(1) and (2) of the new constitution specify that it is the fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms of every citizen.
- Specifically, article 43 (1) (a) provides that every Kenyan citizen has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.
- Ample evidence<sup>17</sup> shows that the criminal status of sex work, as stipulated by the Penal Code and County by-Laws, impedes access to health care for sex workers in Kenya<sup>18 19</sup>.

## CONTRADICTION 3: The Penal Code and Health Care Laws

The right to proper health care for all citizens is re-affirmed in The Health Care Bill of 2012<sup>20</sup>:

Section (3).

- (c) to protect, respect, promote and fulfil the rights of all persons living in Kenya to the progressive realization of their right to the highest attainable standard of health, including reproductive health care and the right to emergency medical treatment;
- (d) to guarantee the people of Kenya an environment that is not harmful to their health;
- (e) to protect, respect, promote and fulfil the rights of children to basic nutrition and health care services contemplated in Articles 43(1) (c) and 53(1)(c) of the Constitution; and
- (f) to protect, respect, promote and fulfil the rights of vulnerable groups as defined in Article 21 of the Constitution in all matters regarding health.

And in the Kenya Health Policy 2012- 2030<sup>21</sup>:

*"The Policy aims to attain the right to health as outlined in the Constitution of Kenya 2010. To attain this, the Policy seeks to employ a human rights based approach in health care delivery. This means that the Policy will integrate*

human rights norms and principles in the design, implementation, monitoring, and evaluation of health interventions and programs. These include human dignity, attention to the needs and rights of vulnerable groups, and an emphasis on ensuring that health systems are made accessible to all.”

The goal of these two health frameworks is thus attaining the highest possible health standards for all Kenyan citizens in a manner responsive to the population needs and through a human rights based approach. This establishes a policy focus on prioritizing the needs of vulnerable and marginalized groups in the provision of health care. That this focus also includes sex workers, despite the criminal status of sex work, is evidenced by the different strategic frameworks by the Ministry of Health that aim to eradicate barriers to health services for sex workers by including sex workers in effective HIV programming and recognising their human rights<sup>22,23</sup>.

### Stigma is one of the main barriers to health care.

Previous experiences – and fear – of stigma pushes many sex workers to delay or avoid health services. A recent study on stigma and utilisation of health care services in Kenya reveals that 90 % of both male and female sex workers reported that they needed health services of some kind in the 12 months preceding the study (which was conducted early 2015). Of these respondents, roughly the same percentage of men (48%) and women (49%) reported that they avoided health services when needed, while more men (73%) than women (55%) reported delaying seeking health services<sup>24</sup>.

## CONTRADICTION 4: Government Health Interventions and Police Practices

One arm of the government provides condoms for free to sex workers as part of health services for vulnerable groups, while another arm of the government uses the same condoms as 'evidence' for arrest.

### Open Society writes in a report:

*“While many sex workers use the word ‘arrest’ to describe being deprived of their liberty, in fact it appears that often condom possession is used by police as a pretext for detaining sex workers without cause and holding them in custody without filing any formal charges or obtaining a warrant for arrest.[...] Police leverage the threat of arrest on the grounds of condom possession to extort sex workers and sexually exploit them.”*<sup>25</sup>

## The difference between legalisation and decriminalisation of sex work<sup>25,26</sup>

### Legalisation

- Sex work is regarded as a legal occupation but is subject to special laws and regulations, which still violate basic human rights, impedes access to health care and perpetuates violence.
- The state creates and sustains various controls over sex workers, which are greater than controls over people in other forms of employment.
- Restrictions can include: working only in defined areas; working only in licensed brothels; registering with government; undergoing regular health tests.

All this involves a lot of government money and work, whereas the Kenyan state and the 47 counties are overburdened as it is. This framework also does not take into account the human rights of sex workers, for it still casts their work as illegal when it does not meet the stipulated legal conditions. This continues to make them vulnerable to violence by police and clients.

### Decriminalisation<sup>27</sup>

It is the only approach to sex work based on the human rights of sex workers, and designed around policy measures that sex workers have demanded.

- Criminal sanctions surrounding sex work are removed, as are most special regulations.
- Brothels and individual sex workers can operate as ordinary businesses responsible to comply with all regulations (i.e. hygiene, fire) like any other business.
- Collective working is specifically allowed and encouraged.
- Sex workers can work without fearing arrests and police harassment.
- Laws are established and enforced protecting sex workers from special risks
- Underage sex work, forced labour and sexual coercion remain criminalised.

### What would the impact of decriminalisation be in Kenya?

- The stigma attached to sex work would be reduced.
- Sex workers are more likely to report crimes to the police.
- Sex workers and general public will be less vulnerable to HIV and STI's due to better access to health facilities.
- Sexual violence would be reduced.
- Sex workers are less vulnerable to exploitation by brothel managers and are able to refuse services to clients
- Costs to the state of law enforcement and regulation would be reduced.
- Brothel managers who hire underage sex workers would be successfully prosecuted.
- Sex workers can pay taxes and receive the same rights as any other tax paying citizen.
- Sex workers have the right to speak out;
  - \* Sex workers who work in brothels or for agencies will be better able to demand their rights under labour law, and the enforcement of work contracts.
  - \* Sex workers would be able to organise openly and/or unionise to fight for their rights and advocate for their needs within the community.

Decriminalisation of sex work is built on a harm reduction model (public health and crime). It would allow for a cooperative relationship between sex workers and health practitioners to increase access to health services catering for their needs. Also, it would enable sex workers to work together with the state (police) to reduce violence. Decriminalisation of sex work would resolve the contradictions presently existing in the Kenya legislations. The Bill of Rights and the Constitution would be upheld and enforced for sex workers, transforming them from “problems”, “deviants”, or “victims” to full-fledged citizens. All this will build the dignity of sex workers, the great majority of who are women.

<sup>1</sup> This brief was developed by Dr. Naomi van Staple and Dr. Lorraine Nencel as part of the research on economic empowerment and sex work in Kenya and Ethiopia, funded by the WOTRO Science for Global Development in The Hague. The text of this policy brief is partly inspired by the policy briefs by the coalition for the decriminalisation of sex work in South Africa, see also Asijiki.org.za.

<sup>2</sup> Government of Kenya (2010) Constitution of Kenya, 2010. Available at: <http://kenyalaw.org/kl/index.php?id=398>

<sup>3</sup> FIDA (2008) Documenting Human Rights Violations of Sex Workers in Kenya. A study conducted in Nairobi, Kisumu, Busia, Nanyuki, Mombasa and Malindi. Nairobi: FIDA Kenya. Available at: [https://www.opensocietyfoundations.org/sites/default/files/fida\\_20081201.pdf](https://www.opensocietyfoundations.org/sites/default/files/fida_20081201.pdf)

<sup>4</sup> WHO UNFPA, UNAIDS, World Bank & UNDP (2013) Implementing comprehensive HIV/STI programmes with sex workers: practical approaches from collaborative interventions. ‘Chapter 2: Addressing Violence against Sex Workers.’ Available at: [http://www.who.int/hiv/pub/sti/sex\\_worker\\_implementation/swit\\_chpt2.pdf](http://www.who.int/hiv/pub/sti/sex_worker_implementation/swit_chpt2.pdf)

<sup>5</sup> NSWP (2014) Human Rights Watch Supports Push for Decriminalising Voluntary Sex Work by Adults. Available at: <http://www.nswp.org/news-story/human-rights-watch-supports-push-decriminalising-voluntary-sex-work-adults>

<sup>6</sup> Murphy, Catherine (2015) Sex Workers’ Rights are Human Rights. Available at: <https://www.amnesty.org/en/latest/news/2015/08/sex-workers-rights-are-human-rights/>

<sup>7</sup> Laws of Kenya (2014) Penal Code Chapter 63. National Council for Law Reporting. Available at: <http://www.kenyalaw.org/8181/exist/kenyalaw/actview.xql?actid=CAP.63.2063>

<sup>8</sup> Nairobi City By-Law, available at: <http://www.nairobi.go.ke/assets/Documents/CITY-BYLAWS.pdf>

<sup>9</sup> Mutambo, Aggrey (2013) ‘Sex workers seek State recognition.’ Daily Nation. Available at: <http://mobile.nation.co.ke/news/Sex-workers-seek-State-recognition-/1950946/1962036/-/format/xhtml/item/1/-/171ub2k/-/index.html>

<sup>10</sup> UN Report. (2010). Report of the special rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Human Rights Council, Fourteenth session Agenda item 3. Geneva: UNHRC.

<sup>11</sup> Standard Media (2014) Sex for freedom: The ‘quickie’ way out for women out of Nairobi’s cold jail cells. Available at: <http://www.jambonews.com/sex-for-freedom-the-quickie-way-out-for-women-out-of-nairobis-cold-jail-cells/>

<sup>12</sup> Regional Correspondent Africa (2015) Sex workers protest murders in Kenya. Available at: <http://www.nswp.org/news/sex-workers-protest-murders-kenya>

<sup>13</sup> KESWA (2015) Sex workers write to president Kenyatta over Nakuru killings. Available at: <http://citizentv.co.ke/news/sex-workers-write-to-president-kenyatta-over-nakuru-killings-102953/>

<sup>14</sup> Abuga, Erick (2015) 300 prostitutes arrested, tested for HIV/AIDS in Kisii town. Available at: <http://www.standardmedia.co.ke/article/2000183140/300-prostitutes-arrested-tested-for-hiv-aids-in-kisii-town>

<sup>15</sup> Pack AP, L’Engle K, Mwarogo P & N Kingola. Intimate partner violence against female sex workers in Mombasa, Kenya. *Cult Health Sex* 2014; 16(3): 217-230.

<sup>16</sup> KNCHR (2012) Realising Sexual and Reproductive Health Rights in Kenya: A Myth or a Reality? A Report of the Public Inquiry into Violations of Sexual and Reproductive Health Rights in Kenya. Nairobi: KNCHR. Available at: [http://www.knchr.org/portals/0/reports/reproductive\\_health\\_report.pdf](http://www.knchr.org/portals/0/reports/reproductive_health_report.pdf)

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<sup>18</sup> Richter, Marliese (2013) Characteristics, sexual behaviour and access to health care services for sex workers in South Africa and Kenya. PhD Thesis, available at: <http://icrhh.org/sites/default/files/PhD%20thesis%20Marlise%20Richter%209%20June%202013%20monograph%20final.pdf>

<sup>19</sup> Matata, Lydia (2014) ‘Kenya: Gender-Based Violence Against Sex Workers and Its Implications On HIV and Aids.’ *The Star*. Available at: <http://allafrica.com/stories/201411260915.html>

<sup>20</sup> Government of Kenya (2012) The Health Act, 2012. Available at: <http://www.africahealthwatch.org/wp-content/uploads/2014/07/health-bill-20121.pdf>

<sup>21</sup> Ministry of Medical Services and Ministry of Public Health and Sanitation (2012) Kenya Health policy 2012-2030. Available at: <https://www.healthresearchweb.org/files/KenyaHealthpolicyfinalversion.pdf>

<sup>22</sup> Ministry of Health (2014) Kenya HIV Prevention Revolution Road Map. Countdown to 2030. Available at: <http://www.nacc.or.ke/images/documents/Final.pdf>

<sup>23</sup> Ministry of Health (2014) Kenya Aids Strategic Framework 2014/2015-2018/2019. Available at: [http://www.nacc.or.ke/images/KASF\\_F\\_web\\_compressed.pdf](http://www.nacc.or.ke/images/KASF_F_web_compressed.pdf)

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<sup>25</sup> Open Society Foundation (2012) Criminalizing Condoms: How policing practices put sex workers and HIV services at risk in Kenya, Namibia, Russia, South Africa, The United States and Zimbabwe. Available at: <https://www.opensocietyfoundations.org/sites/default/files/criminalizing-condoms-20120717.pdf>

<sup>26</sup> Peters, Dean. (2015) Sex work and the law. Available at: <http://asijiki.org.za/assets/sex-work-and-the-law-draft-2.pdf>

<sup>27</sup> UNAIDS (2014) The Gap Report. Chapter 6: Sex Workers. Available at: [http://www.unaids.org/sites/default/files/media\\_asset/06\\_Sexworkers.pdf](http://www.unaids.org/sites/default/files/media_asset/06_Sexworkers.pdf)

<sup>28</sup> Open Society Foundations (2015). “10 reasons to decriminalize sex work”. Available: <https://www.opensocietyfoundations.org/sites/default/files/decriminalize-sex-work-20120713.pdf>