



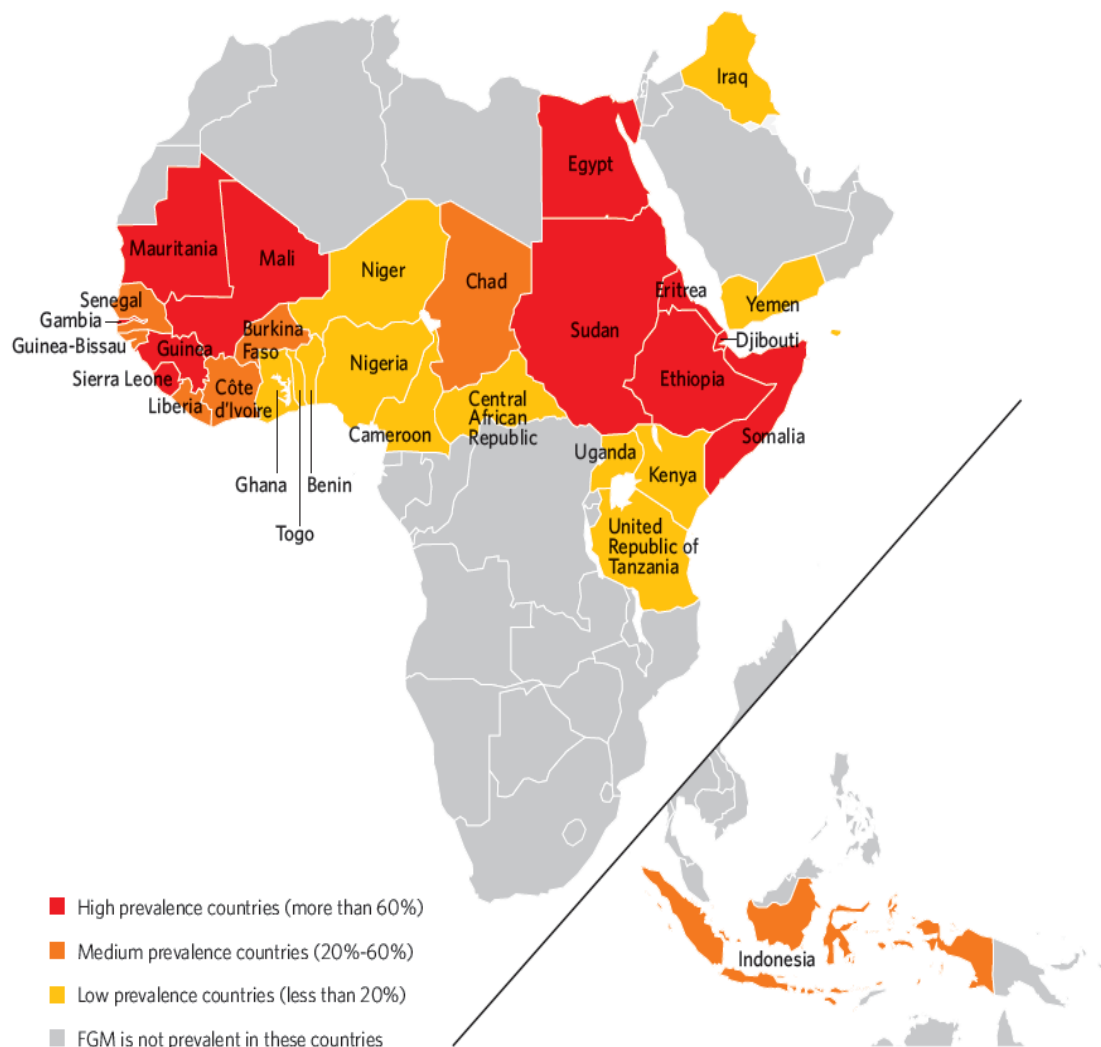
## Responses to the constitutional arguments about the need to protect and promote FGM as a community's right to cultural expression for consenting adults: the Kenya example

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# FGM IN KENYA



- National prevalence: 21% among age 15-49
- Prevalence increases with age: 11.4% in 15-19 and 40.9% in 45-49 year olds
- More in rural (25.9%) than urban (13.8%)
- Communities most affected:
  - Somali (93.6%)
  - Samburu (86.0%)
  - Kisii (84.4%)
  - Maasai (77.9%)

# Legal Framework on FGM in Kenya



- Anti-FGM Act – 2011
  - Defines FGM using WHO language
  - Outlaws performance of FGM, including medicalized FGM
  - Outlaws aiding, abetting, and arranging for FGM in-country or across-borders
  - Failure to report is illegal
  - Mocking or bullying a woman because she has not undergone FGM disallowed
  - Sets up Anti-FGM Board to oversee implementation
- Anti-FGM Act complemented by:
  - Children Act
  - Sexual Offenses Act

# Medical Doctor Undertakes FGM Public Interest Litigation

- Legal basis of the case: **Supremacy of the Constitution of Kenya:**
  - Invalidation and nullification of inconsistent laws
  - Freedom from discrimination/ gender inequality
  - Protection of national values and principles of governance
  - Promotes right to dignity of persons
  - Upholds right to choose and pursue cultural destinies
  - Guarantees freedom of conscience, religion, belief and opinion;
  - Right to participate in cultural life of choice

## Right to Culture Argument by Petitioner

- Petitioner contends that:
- Law definition of FGM which she refers to as ‘female circumcision’ – presupposes ***‘malice and intention to incapacitate and destroy’***
- FGM - a national heritage – misrepresentation of FGM as violent and dangerous
- Constitution provides for right to culture - no superiority of cultures; all cultural beliefs equal
- Prohibition of FGM violates Art. 18 & 22 UDHR
- Imperialist imposition of different views as inhibitive to the liberty to practice any culture relevant to a society

## Right to Non-Discrimination Argument by Petitioner

- Male vs 'female circumcision' – male circumcision promoted, female circumcision outlawed
- Female circumcisers denied training – discriminated on basis of sex
- Female circumcisers portrayed as dangerous persons
- Freedom from discrimination for consenting adult women - right to practice culture denied
  - Discrimination offends Kenyan constitution



## SRH Arguments by Petitioner

- FGM non-inhibitive on biological and reproductive functions of women
- Prohibition of medicalization of FGM- a violation of constitutional right to access highest attainable standards of health
- No correlation between 'female circumcision' and mental health
- Medicalize FGM to make it safer; train of medical workers to perform FGM

## Other Rights Arguments by Petitioner

- Rights of consenting adult women violated by denying them *'their cultural claim to respect and acceptance from loved ones and elders'*
- FGM law disregards women's right to consent to procedures
- FGM law violates right to freedom of thought, conscience, belief, opinion & religion
- Entire FGM law set up to infringe upon fundamental rights
- Anti-FGM Board an illegality ab initio – set up to promote an illegality
- FGM law disregards national values and principles of governance under the Kenyan constitution



## Reliefs Sought by the Petitioner

- Declaration that the enactment of the FGM law amounts to a contravention of several articles in the Constitution of Kenya (19,27,32,44)
- Declaration that several articles are unconstitutional and invalid (5, 19, 20, and 21)
- Declaration that the FGM law is entirely untenable and constitutionally invalid owing to the violation of the various provisions of the constitution
- Declaration that the Anti-FGM Board is illegal and created without the authority of law
- Any other relief
- Costs of the suit

# SUMMARY OF PETITIONER'S ISSUES

**CONSENT**

**CULTURE**

**EQUALITY/  
NON DISCRIMINATION**

**MEDICALIZATION  
'SAFE FGM'**

**DEFINITION OF  
FGM**  
  
***MALE VS FEMALE***  
**CIRCUMCISION**

**RIGHTS AND  
LIMITATION OF  
RIGHTS**

# Parties in the Case

❖ **Petitioner** – Dr Tatu Kamau, a medical doctor

❖ **Respondents** - 1. Attorney General      2. Anti-FGM Board    3. Director of Public Prosecution

❖ **Interested Parties**

- Amref Health Africa
- Equality Now
- Federation of Women Lawyers
- Msichana Empowerment Kuria
- Men for the Equality of Men and Women
- CREAW
- National Gender and Equality Commission
- Samburu Girls Foundation
- Kenya Women's Parliamentary Association (KEWOPA)
- Kiplangat Arap Koech

❖ **Amicus Curiae**

1. Katiba Institute
2. KELIN & ISLA

Respondents have held three expert conferences: medical, community and legal to develop responses to the petition

## Respondents' responses to the Petition

- On culture:
  - Forty out of the 43 Kenyan communities perform FGM but have different cultural beliefs around it
  - Petitioner does not mention the community culture she refers to
  - Petitioner uses medical and rights arguments and not cultural arguments to justify FGM; this in itself contravenes the cultures purports to supports

# Respondents' responses to the Petition

- On culture – there are constitutional limitations
  - Constitution of Kenya: Art. 24:1
    - A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors,....
  - Constitution of Kenya: Art 25
    - Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—
      - a) freedom from torture and cruel, inhuman or degrading treatment or punishment;.....

## Respondents' responses to the Petition

- On whether FGM is a dangerous practice
  - Yes scientific evidence of medical consequences of FGM
- On promotion of male and not female circumcision
  - There are known and documented medical benefits of male circumcision
- On issues of consent
  - It is impossible to have individual consent in a community sanctioned cultural practice

## Respondents' responses to the Petition

- On definition of male circumcision Vs FGM
  - Male circumcision always removes the fore-skin
  - Male circumcision does not interfere with the glans; severe forms of FGM are equivalent to excision of penile shaft, interfering with function thereafter, hence the term mutilation
- On issue of medicalization
  - Medical ethics prohibit performance of scientifically proven dangerous procedures
  - Genital surgery for medical reasons has medical benefits, cannot be compared to FGM



## Moving Forward

- Judge of High Court ruled that the case is weighty and touches on constitutional matters
- Referred the case to the Chief Justice
- Chief Justice is to set up three judge bench to hear the case
- Need for global support to prevent wrong precedence