

# **Key words: Sex workers' rights, criminalization of sex work and HIV /AIDS in Kenya**

## **Introduction**

This report has been submitted by the Kenya sex workers alliance(KESWA) on behalf of the Kenyan sex workers. KESWA is the umbrella network for sex worker led groups and community based organisations in the country

## **Executive Summary**

1. This report discusses challenges faced by sex workers in Kenya in accessing, exercising and realizing their human rights including but not limited to, sexual and reproductive health rights. The report analyses the criminalization of some aspects of sex work in the country and how this further fuels stigma and discrimination towards sex workers, to the extent that it leads to negative attitudes by health workers towards sex workers, compromising the sex workers' ability to access sexual and reproductive health services.
2. Using the criminalization of some aspects of sex work, the police often raid clubs, brothels and sex work hotspots and arrest sex workers arbitrarily. When the sex workers are arrested by the police, they are beaten, their phones and money are confiscated (stolen) by the police. They are also raped by the police themselves, often without using condoms, which puts the sex workers at a high risk of contracting sexually transmitted infections, including HIV, and could lead to the sex workers having unplanned and unwanted pregnancies. When the sex workers are locked up, those living positive and are on treatment, miss taking their medication and this further violates their right to the highest attainable standard of health.
3. While progress has been made on strengthening efforts to eliminate HIV and AIDS amongst sex workers, little progress has been made by the government to overhaul the legal system to eliminate stigma and discrimination. In the previous UPR cycles there has been no recommendations in regards to HIV/AIDS and sex workers rights
4. This report puts forward a number of recommendations regarding the decriminalization of all

aspects of voluntary sex work, strengthening of health systems and health service delivery, empowering marginalized groups such as sex workers, and building capacity of the police and health personnel to respect and protect the rights of sex workers.

5. The following are some of the relevant changes that the government has made:

5.1. Strengthening efforts aimed at eliminating HIV and AIDS, and cooperate with WHO in this regard. The government has strengthened the efforts aimed at eliminating HIV

and AIDS through adopting a multisectoral approach where all the sectors (public, private and civil society) have a role to play in the HIV and AIDS national response. The government

has also strengthened the National AIDS Control Council (NACC) as a national coordinating body in charge of making HIV/AIDS related policies. The government also developed the Kenya AIDS Strategic Framework (KASF) that has been very crucial in implementing matters HIV/AIDS and monitoring the progress within the country.<sup>1</sup> What is lacking is for the government to increase its domestic funding towards the HIV and AIDS response as currently most of the resources that are used for HIV and AIDS in the country are from donors and the resources for HIV treatment are also from donors, which is not sustainable in the long term as Kenya transitions from a low income country to a middle income country.

5.2. The government has not yet overhauled the legal system to ensure compliance of the Constitution and all other domestic laws and policies with international human rights obligations and standards. The government is yet to amend and/or repeal all legal provisions, including customary law that criminalise sex work. As a result of this, there is still a lot of stigma, discrimination and human rights violations

5.3. The government has not developed and strengthened appropriate legislative measures to address the issue of sexual abuse and exploitation, and as a result of this, the country experiences increased incidents of sexual abuse and exploitation especially towards children and other marginalized groups such as female sex workers. Perpetrators of sexual abuse and exploitation are not promptly prosecuted as cases continue to drag in the courts, and where convictions are secured the sentences and punishments are too lenient to deter other would-be perpetrators. As such, cases of sexual abuse and exploitation are on the increase in the country.

5.4. Undertake more effective measures to address the problems of impunity and violence against women and girls, including strengthening of law enforcement and the judicial system and intensive media and education programmes aimed at increasing public

awareness and sensitivities on the rights of women. No measures have been put in place to address the problems of impunity and violence against women and girls. The law enforcement and judicial systems have not helped to reduce stigma and discrimination towards sex workers; sex workers are denied sexual and reproductive rights; and the police who violate sex workers' rights with impunity have not faced any justice.

## **Background**

6. There is no law penalizing the sale of sexual services in Kenya, but some aspects of sex work are criminalized, such as *'Living on the proceeds of sex work'*.<sup>ii</sup> There are some laws that relate to sex work which are archaic and use very vague language such as the Penal Code provisions which are open to wide interpretation and abuse, and their implementation negatively and disproportionately affects sex workers.
7. The Constitution of Kenya, which is the supreme Law of the Land<sup>iii</sup> and the Health Act all emphasize equality and the importance of delivering services without discrimination and guaranteeing human rights.

## **Problem identification**

8. Some aspects of sex work are criminalized such as *'Living on the proceeds of sex work'*. Even though this law was intended to protect sex workers from being forced into sex work, as well as preventing individuals from running brothels, there many cases and incidents where, when the police invade brothels, they do not arrest the brothel owners but rather the sex workers portraying criminalisation of poverty and classism as the brothel owners give them hefty bribes. This makes the sex workers live in constant fear of the police.
9. The police use the Penal Code provisions to harass and arbitrarily arrest sex workers. The police also violate the rights of the sex workers with impunity. There is a lot of power abuse that is done by the police towards sex workers in the name of the Penal Code. For instance, the police and county askaris' use these laws to arrest sex workers, obstruct their work, harass them, or even beat them up. The by-laws in the counties are given effect and power by the state law. Once sex workers are arrested and are in police custody, the police confiscate their cell phones and money or steal any valuables that they find on the person. Sex workers are forced to pay a fee may be on a weekly basis to avoid being arrested. In some instances the police rape the sex workers, often without condoms, thereby exposing them to sexually transmitted infections, including HIV, and unwanted pregnancies.

11. Government health facilities are not accessible and friendly to sex workers. Some government health facilities have made commendable improvements in handling issues of sex workers but most of them are those that are still stigmatising. Although the Constitution of Kenya and the Health Act, emphasize on equality and the importance of delivering services without discrimination and guaranteeing human rights, health workers violate sex workers' rights to equality, non-discrimination and health by not treating them in a confidential, respectful and non-judgmental manner, and sometimes actually denying

health services. Health workers for instance will shout at a sex worker in the presence of all other patients, disclose their health conditions to third parties without their consent, and publicly state that they would rather spend their energy, efforts and drugs on 'real people' and not sex workers.

12. Maternal health care for sex workers is a component that has been neglected for so long. Female sex workers have not been counted as mothers who need special attention during pregnancy and after delivery. For instance it is common for sex workers to go to work until they are almost due and immediately after they have given birth they go back in order to fend for their other children. The criminalisation of sex work has contributed greatly to this as sex workers do not have the ability to negotiate for a higher pay so they can save to use during this time and thus they have to leave their kids unattended at times and they may not even be able to form a mother and child bond. This makes sex workers lose their children to social service as they are accused of child neglect. Sex work in Kenya is heavily stigmatized and discriminated. As a result, sex workers operate and live discreetly, making them harder to reach with essential health services and information.

13. Antiretroviral therapy adherence is low among sex workers since, by the nature of their job, sex workers are very mobile but also often miss taking their antiretroviral treatment when they have been arrested and locked up by the police.

14. Sex workers also face challenges with some of their clients who, after a sexual encounter, do not give them the full amount agreed. Some clients refuse to use condoms, and others actually beat and steal from sex workers. The clients do this because most of them believe sex workers are lesser beings but most importantly they know sex workers will have nowhere to complain and even if they complain, their complaints will not be taken seriously by the law enforcers.

15. The police, health workers and sex workers themselves are not aware of the laws and policies that protect the sex workers' rights since knowledge of human rights is generally low in Kenya

and not much effort has been by the government put into increasing awareness on human rights in general and rights of sex workers in particular this role was left isolated for non governmental organisations.

16. The Constitution of Kenya provides for the right to fair labour practices including fair remuneration and reasonable working conditions. Article 11(c) of the CEDAW treaty further provides that women have a right to choose their profession and employment. Article 11 (e) provides for the right to social security particularly in cases of retirement, unemployment and sickness. In Kenya, no such rights exist for sex work. The sex industry is criminalized under various municipal and administrative laws that drive sex workers from legal redress and deprive them of safe working conditions. Sex workers are denied the protection advanced under the employment legislation that covers other sectors and other industries, and thus cannot access health benefits, parental and family leave, retirement plans or vacation pay, nor do they have recourse when discriminated against or unfairly dismissed from employment.

### **Recommendations for action**

- 17. The state should decriminalize sex work and all related activities as a necessary measure to guarantee sex workers' right to work in our chosen occupation, to safe labour practices, and a safer working environment with less or no violence.**
- 18. The Government of Kenya should establish policies for state organs and state officials to deal with discrimination against sex workers by state-actors, in particular law enforcement officers.**
- 19. The State should come up with measures to ensure that sex workers have equal access to government services, including police protection.**
- 20. The State should develop affirmative action programmes to address the disadvantage that sex workers face due to past or current engagement due to past or current engagement sex work.**
- 21. The State should implement measures to ensure that sex workers participate fully in the formulation of legislation, policies and programmes that are directly linked to sex work.**
- 22. The State should prohibit the use of condoms and other protective items as evidence in court against sex workers.**
- 23. The State should conduct sensitization training for the police and health care providers.**
- 24. Recommended the state to develop training programme for media professional to enable positive reporting on sex workers and to reduce harmful stereotyping towards sex**

workers.

25. **The State should sensitize the judiciary and the establishment of a tribunal to sex worker issues to deal with discrimination. The members of the tribunal should also be sensitized to handle matters of sex workers fairly and without any discrimination or bias.**
26. **The State should prohibit mandatory HIV and STI testing of sex workers following arrest.**
27. **The State should decriminalize of transmission of HIV.**
28. **The State should Strengthen the Kenya National Human Rights commission (KNHRC), the National Gender & Equality Commission (NGEC) and Commission on Administrative Justice (CAJ) to investigate and respond to complaints on sex workers human rights violations by State and non- state actors.**

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<sup>i</sup> <https://nacc.or.ke/kenya-aids-strategic-framework-kasf/> this document is set to be reviewed this year and be inclusive of transgender and intersex issues

<sup>ii</sup> <http://www.kenyalaw.org/lex/actview.xql?actid=CAP.%2063> Woman living on earnings of prostitution or aiding, etc., prostitution 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 a manner as to show that she is aiding, abetting or compelling her prostitution with any person, or generally, is guilty of a felony.

<sup>iii</sup> <http://www.kenyalaw.org/lex/actview.xql?actid=Const2010> Article 43 (1a) Every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care