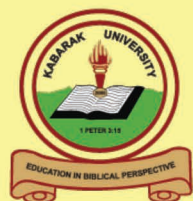


Journal of Law and Ethics

Volume 3, 2018

A peer-reviewed publication of the
Centre for Jurisprudence & Constitutional Studies
Kabarak University School of Law



Challenges in Litigating under Kenya's Protection from Domestic Violence Act 2015

Rahab Wakuraya Mureithi*

Abstract

The Protection against Domestic Violence Act (2015) was enacted to specifically cater for the needs of the victims of domestic violence. It addresses all forms of domestic relationships and places the duty to ensure the protection of victims on the government. However, the law is practically ineffective in its daily applicability to victims of domestic violence. Some of the shortcomings of this Act are in the wording while others are in its conflicts with the prevailing procedural and constitutional realities in daily practice. This paper looks at some of these challenges from the point of view of a legal practitioner who has tried to use it in Kenya's Magistrates' Courts.

1.0 Introduction

Many human right scholars have categorized domestic violence as a specific human rights violation.¹ In order to locate it within the raft of violations of human

* Rahab Wakuraya Mureithi is an Advocate of the High Court of Kenya in active practice and the acting Head of Department, Private Law at Kabarak University Law School. She is currently a PhD candidate at Rhodes University, South Africa. She can be reached at rahabwakuraya@gmail.com.

¹ See Thomas D,Q , Beasley ,E,M. (1993) 'Domestic Violence as a Human Rights Issue' Human Rights Quarterly, Vol. 15, No. 1 (Feb., 1993), pp. 36-62, <www2.warwick.ac.uk/study/csde/gsp/eportfolio/directory/pg/archive/asrjac/research/thesis/762650.pdf> accessed on 1st December, 2016. See

rights, there are some scholars who have suggested that it compares, in terms of its gravity, with torture or terrorism.² The European Court of Human Rights has held states responsible for violation of the right to life in cases of domestic violence where state organs, such as the police, failed to act to effectively protect victims of domestic violence.³ The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) Committee has expounded that gender-based violence against women does not only amount to discrimination, but also violates the right to life, the right to be protected from torture and inhuman and degrading treatment, the right to equal protection of the law, the right to liberty and security of the person, the right to the highest attainable standards of mental and physical health among others.⁴ If domestic violence is a violation of human rights, then, the state cannot escape its duty to protect, promote, and fulfil it just as it is obligated for other human rights.

In Kenya, this position has been upheld in the case of *CK and Others v Commissioner of Police and Others*⁵ where the court found that the respondents, who were the police, the Director of Public Prosecutions and the state, to have breached their duty to protect vulnerable groups from gender based violence. The court specifically faulted the respondents for failing to ensure criminal consequence through proper and effective investigation and prosecution of crimes, thereby, creating a culture of impunity. The judge stated that “...this to me makes the respondents responsible for the physical and psychological harms inflicted by the perpetrators.”⁶

Domestic violence is rampant in Kenya. According to Aura, about 39% of Kenyan women have experienced some form of sexual or gender-based violence since they were 15 years and that marital violence, which is part of domestic

also Rafferty, Yvonne (2013). International Dimensions of Discrimination and Violence against Girls: A Human Rights Perspective, *Journal Of International Women Studies*, 14(1) 1-23, <<http://vc.bridgew.edu/cgi/viewcontent.cgi?article=1648&context=jiws>> accessed on 1st December, 2016.

² Pain, R. 2014 ‘Everyday Terrorism : Connecting Domestic Violence And Global Terrorism.’, *Journal on Progress in Human Geography*:. 38 (4).pp. 1-550,<<http://dro.dur.ac.uk/12511/1/12511.pdf>> accessed on 1st December, 2016.

³ *Opuz v Turkey* and *Ketrova v Slovakia* are some of the cases which the European court has found respective states to have violated the right to life as enshrined in article 2 of the European Convention on human rights because of inadequate response by the police to reports of domestic violence. Full cases available at <<http://hudoc.echr.coe.int/eng?i=001-92945> and <http://hudoc.echr.coe.int/eng-press?i=003-2013708-2124711>> respectively, accessed on 1st December, 2016.

⁴ CEDAW Committee (1992) General Comment No. 19, <www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> accessed on 1st December, 2016.

⁵ Petition No. 8 of 2012 [2013] eKLR.

⁶ Justice J. A Makau in *CK and Others v Commissioner of Police and Others* [2013] eKLR.

violence, makes up the majority of the cases reported.⁷ Adebayo posits that the forms of domestic violence are varied, ranging from physical violence, threats of physical violence, emotional and psychological abuse, sexual abuse and economic deprivation among others.⁸ While studies have concentrated on domestic violence against women, many men also suffer domestic violence.⁹ There have been quite a number of media reports of an increase in domestic violence against men in Kenya.¹⁰

The journey towards having a law addressing domestic violence in Kenya finally bore fruit through the enactment of the Protection against Domestic Violence Act (PDVA).¹¹ Efforts to get the bill through the legislative processes had started as far back as 2007 with successive parliaments failing to enact the law until 2015.

The coming into force of the PDVA is a major victory for those who fight for women's and children's rights in Kenya. Before it was passed, some instances of domestic violence were addressed through provisions of the Penal Code. Specifically, a victim of domestic violence had to report the matter to the police and the police would charge the alleged perpetrator with the penal provision most-suited to the facts of the case. For instance, many cases of physical violence would fall under assaults while other cases involving sexual violence would fall under the Sexual Offences Act (SOA).¹² This approach was found to be inadequate for many reasons.

Firstly, the Penal Code and the Sexual Offences Act did not provide for all the forms of domestic violence.¹³ That meant that other harmful forms of domestic violence could not be prosecuted. Secondly, this approach was unsuccessful because

⁷ Aura R.A 'Situational Analysis and the Legal Framework on Sexual and Gender-Based Violence in Kenya: Challenges and Opportunities' Kenya Law Review, <<http://kenyalaw.org/kl/index.php?id=4512>> accessed on 1st December, 2016.

⁸ See Siemieniuk, R. A. C.; Krentz, H. B.; Gish, J. A.; Gill, M. J. (2010). "Domestic Violence Screening: Prevalence and Outcomes in a Canadian HIV Population". *AIDS Patient Care and STDs* 24(12): 763–770.

⁹ Adebayo, A. A. 'Domestic Violence against Men: Balancing the Gender Issues in Nigeria' *American Journal of Sociological Research* 2014, 4(1): 14-19.

¹⁰ See Thatiah J, 'Nairobi men suffer most domestic abuse as Western tops in violence against women' 2015, <www.nation.co.ke/newsplex/Nairobi-men-suffer-domestic-abuse/2718262-2815948-2bsxy8/index.html> accessed on 1st December, 2016.

¹¹ Act No. 2 of 2015. This Act was assented to by the president on the 14th of May 2015 and commenced on 4th June 2016.

¹² Section 250 of the Penal Code, Cap 63 Laws of Kenya and Sexual Offences Act, Cap 62A respectively.

¹³ For instance, harassment, intimidation, verbal and psychological abuse and economic deprivation among others.

it did not account for the reality of the domestic context of domestic violence.¹⁴ For married couples, the alternative way to deal with domestic violence was to use it as a ground for divorce.¹⁵ While this may have catered for the married individuals who were willing to dissolve their marriages, it did not cater for the victims in other domestic relationships and was unavailable for those unwilling to dissolve the marriage relationship. The fact that the available ways to deal with domestic violence were so limited made them unsuitable for persons who had a desire to preserve the domestic relationships that they had with the perpetrators.¹⁶ There are reports of many victims who withdrew their cases while they were still in court mainly because of pressure from other family members and sometimes because of a desire to repair the relationship especially where the domestic situation was one of spouses.¹⁷ Thirdly, the existing law was ineffective in protecting the victim from the perpetrator. The offences were bailable so that sometimes the accused person would continue to cohabit with, or have easy access to the complainant as the case continued in court. There were no provisions for safe accommodation for victims of domestic violence or provisions for rehabilitation of perpetrators.

The attitude of law enforcement officers and the society at large towards domestic violence was also not conducive. There were reports of women being turned back at police stations “to resolve the family matter at home” when they went to report incidences of domestic violence.¹⁸ A man who had been subjected to domestic violence would never dare to report the matter to the police because of the likelihood of stigmatization.¹⁹ The high standard of proof required for criminal cases also posed a barrier in prosecuting perpetrators of domestic violence as in many cases, domestic violence happens in the most intimate of settings. In most cases, it would be the complainant’s word against the accused person’s.

The rationale behind the enactment of the PDVA was, therefore, to provide an alternative way to deal with domestic violence that recognizes the intricacies

¹⁴ For instance, in the case of violence between spouses or close family members, the lack of protection order would expose the victim to the perpetrator even after charges have already been preferred.

¹⁵ See Sections 66(2) (b), 69(b), 70(e) of the Marriage Act No.4 of 2014.

¹⁶ Trochu- Grasso, C *et al* ‘Situation of Violence against Women and Children in Kenya: Implementation of the UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Alternative report to the UN Committee Against Torture’ (2009) World Organisation Against Torture (OMCT), www.omct.org/files/2005/09/3070/alt_report_on_violence_against_women_children_kenya.pdf accessed on 1st December, 2016.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ See Lewis A. and Saratakos, S. ‘Domestic Violence and the Male Victim’ *Nuance* no. 3, December 2001.

of the domestic relationship between the complainant and the accused person; addresses the attitude of public servants and the public at large; does not have criminal penalties except for instances of contempt; and which provided better remedies tailored to the needs of the victims. The PDVA has been lauded as having all these qualities. Over a year after its enactment, this paper takes a look at the first attempts at litigating under it drawing from the author's own experience and experiences of other advocates with an aim of establishing whether this law meets the ends it was meant for.

2.0 Kenya's Obligations with Respect to Domestic Violence

International jurisprudence has established the doctrine of due diligence in assessing state responsibility, especially, in regard to violence against women. The Declaration on the Elimination of Violence against Women urges states to 'exercise due diligence to prevent, investigate, and in accordance with national legislation, punish acts of violence against women, whether those acts are perpetuated by the state or by private persons.'²⁰ The CEDAW Committee in General Comment 19 stated that 'states may be held responsible for private acts if they fail to act with due diligence to prevent violation of human rights or to investigate and punish acts of violence.'²¹ The due diligence standard, in a nutshell, requires that the states should prevent acts of violence, protect the victims of violence, investigate and prosecute instances of violence, punish perpetrators and provide redress for victims.²² In *A.T v. Hungary*,²³ Hungary was ordered to provide reparation to A.T. proportionate to the physical and mental harm she had undergone and to the gravity of the violations of her rights because it failed to act with due diligence to prevent acts of violence or to investigate and punish and provide compensation. The due diligence standard has been applied by courts in Kenya. For instance, in *CK and Others v Commissioner of Police and Others*²⁴ the court declared that the inaction by the state to properly investigate and prosecute sexual offences against children amounted to violation of the petitioner's fundamental rights.²⁵

²⁰ Article 4(c) Declaration on the Elimination of Violence Against Women, (1993).

²¹ CEDAW General Recommendation 19, U.N. Doc. A/47/38 (1992).

²² Special Rapporteur on Violence Against Women, The Due Diligence Standard as a Tool for the Elimination of Violence Against Women, 35, U.N. Doc. E/CN.4/2006/61 (2006).

²³ *A.T. v. Hungary* (2003), CEDAW Committee Communication no.2/2003.

²⁴ [2013] eKLR.

²⁵ Supra Note 5.

The Constitution of Kenya (2010) has provided for a Bill of Rights that is quite elaborate. What is noteworthy about the bill of rights is that it not only recognizes the State as the duty-bearer for the rights and freedoms of Kenyans, but also individuals.²⁶ For that reason, both private individuals and State bodies are required to fulfil their part in upholding the bill of rights.²⁷ There are instances where individuals have been held liable for their own actions that violated the rights of other persons and consequently have been required to compensate the victims of the violations. In *Purity Kanana Kinoti v Republic*,²⁸ for instance, the court found that an accused person's rights had been violated by a police officer in his individual capacity. The police officer was compelled to compensate the victim.²⁹

The concept of horizontal application of the bill of rights is one that has gained acceptance in Kenya's constitutional environment. It is now accepted by courts and a number of legal scholars that the 2010 constitution provides for horizontal application of human rights.³⁰ Courts have been increasingly making pronouncements affirming the horizontal application of the Bill of Rights.³¹ Many courts feel that what now remains is to determine the extent to which horizontal application may apply and that this can only be determined on a case by case basis.³²

The 2010 constitution makes it a duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the bill of rights.³³ Part of the state's duty is to protect right-holders from violations actions by third parties including individual natural persons.³⁴ This could be done by ensuring that there are adequate legal remedies available for victims of violations of human rights by private persons. In order to meet this obligation, legislation

²⁶ Article 20(1), Constitution of Kenya. 2010.

²⁷ Mbondenyei, M.K , Ambani J.O. *The New Constitutional Law of Kenya; Principles, Government and Human Rights*. 2012. Claripress. Nairobi.

²⁸ [2011] EKL.R.

²⁹ Ibid.

³⁰ There are scholars however who do not agree with this position. See Okubasu, D. M. 'Rights Discourse Devoid of Foundation? Provoking Maurice Oduor(s) in Reply to Walter Khobe's Pontification on Horizontal Application' *The Kabarak University Journal of Law and Ethics* Vol 1(2014):91.

³¹ There is an emerging trend of constitutional courts enforcing horizontal application of the bill of rights. Examples of these cases are *Isaac Ngugi v Nairobi Hospital and 3 others* [2013] eKLR, *Mwangi Stephen Mureithi v Daniel Toroitich Arap Moi* [2011] eKLR, *Mike Rubia and Another v Moses Mwangi and 2 Others* [2014] eKLR.

³² See *Isaac Ngugi v Nairobi Hospital and 3 Others* [2013] eKLR, *Law Society of Kenya v Betty Sungura Nyabuto and Another*. Petition no. 21 of 2010.

³³ Article 21(1), Constitution of Kenya 2010.

³⁴ Chirwa, D.M. 'The Horizontal Application of Constitutional Rights in a Comparative Perspective' (2006) 10(2) *Law, Democracy and Development* 21-48.

put in place must be usable by the public and the judiciary to ensure effective remedies.³⁵

The 2010 Constitution³⁶ gave all international instruments ratified by Kenya the force of law.³⁷ This means that Kenya is bound by the provisions of the Convention on the Elimination of all forms of Discrimination against women (CEDAW), the Declaration on the Elimination of Violence against Women, (DEVAW) and many other conventions and treaties which prohibit domestic violence.³⁸ This also means that the established due diligence standard is applicable in assessing and measuring the actions of the state in protecting victims of domestic violence, investigating and punishing perpetrators, and providing for compensation for the victims.³⁹ These standards provide an important tool for analysing the effectiveness of the PDVA in executing the state's responsibility with respect to domestic violence.

3.0 The Protection against Domestic Violence Act 2015

At this stage, it is important to provide an analysis of the PDVA. As stated before in this paper, the passing of the PDVA has been lauded as a definite step towards dealing effectively with domestic violence. The PDVA was a fulfilment of Kenya's obligation under international law to adopt a legislation that contains the widest possible definition of acts of violence and relationships within which domestic violence occurs. The legislation adopted under this obligation is also required to provide for a complaints mechanism and reliefs for those who make such complaints, as well as mechanisms for support for the victim, training of judicial officers and the police and also programmes for perpetrators.⁴⁰

³⁵ The decision of the Inter American Court in *Velázquez Rodríguez v Honduras*, 1988. Series C. no. 4, which has become of great influence for human rights discourse stated that 'when a state allows private persons or groups to act freely and with impunity to the detriment of the rights recognized it would be in clear violation of its obligation to protect the human rights of its citizens'.

³⁶ Article 2(6).

³⁷ Article 2(6) of the Constitution of Kenya states: 'Any treaty or convention ratified by Kenya shall form part of the Law of Kenya under this constitution'

³⁸ The Universal Declaration of Human Rights, the International Convention on Civil and Political Rights, the International Convention on Economic Social and Cultural Rights, the Beijing Declaration and Platform for Action, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the African Charter on Human and People's Rights, the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, the African Charter on the Rights of the Child are some of the treaties and conventions that bind Kenya and have an implication on some aspects of domestic violence and Kenya has ratified all these.

³⁹ Supra Note 20.

⁴⁰ Baraza, N 'An analysis of the 2015 Kenya's Protection Against Domestic violence Act(PDVA) 2015' *Kenya Law Review* Vol5:1 May 2016.

The PDVA is unique because it centralises the needs and requirements of the victims of domestic violence. Its preamble clearly states that it is enacted to “provide for the protection and relief of victims of domestic violence; to provide for the protection of a spouse and any children or other dependant persons and to provide for matters connected thereto or incidental therewith.”⁴¹ This being its main objective, it is safe to say that this Act can only be deemed to be effective if victims and dependants of victims of domestic violence can easily use it to obtain protection from perpetrators. It should be noted that this Act does not bar an applicant from instituting criminal proceedings against the perpetrator.⁴²

3.1 The Meaning of Domestic Violence under the PDVA

The first part of the PDVA is dedicated to definitions. Of importance to any person who wishes to use this Act to get reliefs in court is the definition of domestic violence. The Act defines domestic violence in three parts. First, it defines violence, then, it defines domestic violence, and finally defines the term domestic relationship. The term violence is defined in section 3 of the PDVA to include abuse that include child marriage, female genital mutilation, forced marriage, forced wife inheritance, interference from widows, sexual violence within marriage, virginity testing and widow cleansing.⁴³ Through this provision, the PDVA clearly shows the desire of the drafters of the law to categorise harmful cultural practices, especially against women as domestic violence. It is, therefore, correct to state that this law is meant to provide protection against harmful cultural practices. While this is laudable, it presents some problems when it comes to litigation.

The PDVA also defines violence to include acts such as damage to property, defilement, hindering applicant access to facilities, economic abuse, emotional or psychological abuse, forcible entry, harassment, incest, intimidation, physical abuse, sexual abuse, verbal abuse and any other act that may cause harm to the safety, health and well-being of the person.⁴⁴ Domestic violence is defined as violence as described above, or the threat of such violence by a person who has or had a domestic relationship with the victim.⁴⁵ It is important to note that the Act

⁴¹ Preamble, Protection Against Domestic Violence Act (2015).

⁴² Section 15(2) PDVA.

⁴³ Protection Against Domestic Violence Act 2015, Section 3(1) (a)(i) to (viii).

⁴⁴ Ibid, Section 3(1) (b) to (n).

⁴⁵ Section 3(2).

recognizes both a single act and a pattern of behaviour, even when these acts when considered in isolation may appear to be minor or trivial.⁴⁶

The third part of the definition of domestic violence involves the definition of the domestic relationship. This is crucial to litigations under the Act as it delineates who the potential perpetrator could be. It is the distinguishing factor between normal run-of-the-mill criminals and the special ones who fall under this Act. The perpetrators here must have at some point enjoyed a domestic relationship with the victim. According to the definition, a person is in a domestic relationship with another if these people are married, have previously been married, are living in the same household, are members of a family member, are engaged to be married or have previously been engaged, have a child together, or enjoy a close personal relationship.⁴⁷

In the definition of the domestic relationship, the Act has provided guidance as to who may not be regarded as being in a domestic relationship with a complainant. These include persons who are connected to the complainant only through a landlord-tenant relationship, employer-employee relationship or simply because they occupy the same dwelling house.⁴⁸ This criterion is also used to describe who may not be considered as sharing a household for the purposes of creating a domestic relationship⁴⁹ or a close personal relationship.⁵⁰

As to determining what a close personal relationship is, the drafters provided some guidance to the courts, which were in no way restrictive as to what to consider when determining that there exists a close personal relationship between the litigants before it. The court may consider the nature and intensity of the relationship, that is, the time spent together, the place or places where this time is spent and the manner in which the time is spent.⁵¹

The advocate who gets instructions to litigate on the PDVA meets his/her first challenge in this complex system of definitions of domestic violence. According to this law, domestic violence can be anything that causes harm to the safety, health and well-being of the complainant, and from anyone who has a close personal relationship with the complainant. This definition is wide enough to satisfy Kenya's

⁴⁶ Section 3(4).

⁴⁷ Section 4(1).

⁴⁸ Section 4(2)(b).

⁴⁹ Section 4(2) (a).

⁵⁰ Section 4(3).

⁵¹ Section 4(4).

international obligations with respect to domestic violence but creates challenges for the victim of domestic violence who steps into an advocate's office for help.

The first challenge would be to show that 'violence' as envisioned in the PDVA did, in fact, occur. Domestic violence is one of those phenomena that are well known and identifiable when one comes across them but difficult to pinpoint and fit into a neat box that can be elucidated before a court of law. The nature of domestic violence is that it is so fluid that from a single set of facts, one complainant can have at least half of all the aspects of violence happening. Studies have shown that in a single case of domestic violence, there might exist, many of the specific aspects of violence described in section 3 of the PDVA. For instance, in one transaction of domestic violence, there can be instances of physical abuse, sexual abuse, psychological and emotional abuse, intimidation, harassment, and so on.

While the PDVA has specifically provided for the definition of domestic violence in section 3(2), this paper posits that this definition is complex because it is a combination of the definition of 'domestic relationship' and of 'violence.' The definitions of these two terms in the PDVA encompass a large number of specific actions and have included exemptions of certain relationships and actions. For example, an applicant may approach the court for protection orders against her boyfriend. The applicant will have to aver that the respondent is in a domestic relationship with her because he is her boyfriend. Since this kind of relationship is not certified by the government, the applicant will not have a document such as a marriage certificate which would have been *prima facie* evidence of a domestic relationship. For this reason, it is unlikely that the court would issue interim protection orders. It is expected that in response, the respondent may deny the domestic relationship. The applicant might have to call witnesses to convince the court that there exists a domestic relationship. The respondent will enjoy the same right. All these proceedings will only ascertain a portion of the definition of domestic violence. The applicant will still have to prove the aspect of violence.

Violence has been defined to include economic abuse. Economic abuse has been interpreted to include the unreasonable deprivation of economic or financial resources to which an applicant is entitled, or which the applicant requires.⁵² This means that not only will the applicant be under an obligation to prove that they were entitled to the specific economic resource in issue, but they must also prove that the deprivation was unreasonable, and that the person who allegedly deprived them was not only in a domestic relationship with the applicant, but was also

⁵² Section 2 Par 11(a).

under an obligation to satisfy the entitlement by the applicant. The court will also have to distinguish between a normal argument over money and unreasonable deprivation.

One of the best ways to do this would be to develop such a distinction through successive pronouncements of the courts. Unfortunately, this law is to be litigated before the Resident Magistrate's Courts.⁵³ On the one hand, this is a great advantage because of the accessibility of the Magistrate's Court as compared to superior courts.⁵⁴ On the other hand, this poses a big disadvantage because the Resident Magistrate's Courts are the lowest courts in the land and are, therefore, unable to make law through binding precedent. This means that the development of these definitions through interpretation by the courts of law would be stunted and would have to rely on the relatively few cases that might end up in the High Court by way of appeal.

Wide definitions are good for international instruments and constitutional provisions as these provide a framework within which laws may be made to ensure practical implementation of the aspirations of the constitutional provisions. A municipal law that is to be litigated at the lowest level of the judiciary cannot afford to be vague. Even if an action alleged by the applicant is not disputed, the applicant remains with the burden of proof to establish that the action amounts to domestic violence. The applicant has to show that the action is not only injurious to his or her health, safety and well-being, but also that the relationship with the respondent falls within a definition of a domestic relationship. This particular law is one that is meant to protect the victim from harm or threat of harm from a person who is very close to them both spatially and emotionally. An order of protection anchored on this law should be available as quickly as possible. With such a wide, fluid and complex definition, the possibility of success is threatened when the applicant shoulders the burden to prove numerous aspects of the basic definitions.

3.2 The Protection Order under the PDVA

The main relief available under the PDVA is the protection order. The protection order has been interpreted by the Act to be the final order made by the

⁵³ Section 24(1).

⁵⁴ Kenya has undergone an ambitious court expansion programme which has witnessed an increase in numbers of judicial officers and an increase in infrastructure. There are around 116 court stations in all the 47 counties in Kenya. See the breakdown at <www.judiciary.go.ke/portal/page/all-courts> accessed on 1st December, 2016.

court with respect to a domestic violence application.⁵⁵ There are two kinds of protection orders described in the Act. One of them is the final protection order under section 13 while the other is the interim protection order under section 12.⁵⁶ For one to qualify for the interim order, one must show, on a *prima facie*, basis that any delay that might be caused by proceedings on notice might result in a risk of harm or undue hardship to the applicant or child.⁵⁷ If the court is not satisfied that a *prima facie* case exists, the court is required to issue a notice to the respondent to show cause why a protection order should not be made against him or her.⁵⁸ An interim protection order once issued remains in force until it is replaced by a protection order or varied or revoked by a competent court.⁵⁹ An interim protection order contains the contents described in section 19.⁶⁰ Noncompliance with protection orders is considered an offence and attracts a fine of Ksh.100, 000 or a jail term of twelve months or both.⁶¹

According to section 19(1) of the PDVA, a protection order may direct a respondent not to physically or sexually abuse or threaten to abuse the applicant or the protected person, damage any property belonging to the applicant, engage in behaviour which constitutes verbal, emotional or psychological abuse of the applicant, engage in economic abuse of the protected person or engage in customary or cultural rights that constitute abuse to the protected person.⁶² The Act envisions that the protection order shall have a condition that the respondent shall, unless with the express consent of the protected person be restrained from watching or loitering around the applicants' home or place of employment or business. The protection order is also supposed to restrain the respondent from stalking or accosting the protected person, entering or remaining in any land or building occupied by the protected person, or making any other contact with the protected person.⁶³

⁵⁵ Section 2 par 25 of the PDVA states as follows: "protection order" means the final order made by the court in a matter concerning domestic violence.

⁵⁶ Section 12(1) states: 'An interim protection order may be made on an application without notice and outside ordinary court hours or on a day which is not an ordinary court day, if the court is satisfied that delay would be caused by proceedings on notice or might entail —

(a) a risk of harm; or

(b) undue hardship to the applicant or child of the applicant's family.

⁵⁷ Ibid.

⁵⁸ Section 12(5) PDVA.

⁵⁹ Ibid.

⁶⁰ Section 12(3) PDVA.

⁶¹ Section 22, PDVA.

⁶² Section 19(1) (a) – (g) PDVA.

⁶³ Section 19(2) PDVA.

The protection order may also include orders excluding the respondent from premises shared with the protected person, regardless of the interest that the respondent may have in the property.⁶⁴ This is, obviously, a grievous affront to the fundamental right to property guaranteed under article 40(2) of the constitution⁶⁵ and limited only by the same constitution which has provided an exception to the right to property based on the mode of acquisition of the property.⁶⁶ The acquisition of a property must be determined to have been illegal by a competent court of law. As it is, Magistrate's Courts have no jurisdictions to determine land matters, not even if it is a question of access to land.⁶⁷

Even though the Act specifically states that exclusion orders under the PDVA do not affect the interest in that land, this assurance is not enough to guarantee that the rights of the interest holder will not be violated because protection of the right to property includes the protection of both the interest and enjoyment of the property.⁶⁸ It should be noted, however, that the court is required to issue an exclusion order only as a last resort where there is no other way of securing the personal safety of the protected person and that this order may be revoked as soon as an alternative residence is availed.⁶⁹ These provisions are, nevertheless, likely to be successfully challenged because the Resident Magistrate's Courts do not have jurisdiction to handle matters related to land.

Other contents of protection orders include allowing access by the applicant to premises in order for them to pick their belongings, allowing access to the dwelling place and reasonable facilities and a direction that a respondent does or refrains from doing certain acts that the court may deem necessary or desirable for

⁶⁴ Section 19(3)(a) states "...grant to any protected person the right of exclusive occupation of the shared residence or specified part thereof by excluding the respondent from the shared residence or the specified part thereof, regardless of whether the shared residence is solely owned or leased by the respondent or jointly owned or leased by the parties.

⁶⁵ Article 40(2) of the constitution of Kenya states 'Parliament shall not enact a law that permits the state or any person-

- a. To arbitrarily deprive a person of property of any description or any interest in or right over any property of any description; or
- b. To limit, or in any way restrict the enjoyment of any right under this article on any of the grounds specified or contemplated in article 27(4).

⁶⁶ Article 40(6) of the constitution of Kenya states: 'the rights under this article do not extend to any property that has been found to have been unlawfully acquired'.

⁶⁷ Article 162 (2) (b) of the constitution establishes the Environment and Lands Court whose mandate is to hear and determine disputes relating to 'the environment and the use, occupation of, and title to land'.

⁶⁸ Section 19(6) of the PDVA.

⁶⁹ Ibid, Section 19(7).

the well-being of the applicant or a dependent of the applicant. In addition to the exclusion orders, the courts may also issue orders regarding maintenance of the applicant and any child of the respondent and also award temporary custody of any child or dependant of the respondent to any person or institution and regulate access by the respondent to such a child or dependent.⁷⁰

It is clear from the contents of protection orders that they require a huge effort to enforce. The possibilities of the ingredients of each order are basically limitless in terms of what a court may direct. For instance, apart from pre-emptive arrest, how would orders which direct a respondent not to psychologically abuse an applicant be carried out, especially, where the parties share the same dwelling house? Because the protection orders envisioned in the PDVA purport to guide the conduct of personal relationships, they become impossible to police and enforce, much like orders for the restoration of conjugal rights, which are impossible to enforce. When the orders become impossible to enforce, then the law meant to protect the victims becomes useless.

Protection orders have serious repercussions for respondents, ranging from barring access to premises to severing contacts between the respondent and members of his family. For that reason, the experience of the author shows that courts are reluctant to issue interim protection orders without first hearing the respondents. Unfortunately, for some cases of domestic violence, failure to get interim orders in the first instance would render the whole exercise futile for the applicant.

In one of the cases attempted in Nakuru Law Courts, the applicant came to the author complaining of continuous physical, emotional and psychological abuse by her husband. The applicant and her husband were both members of the disciplined forces and shared a house. The respondent's violent tendencies had increased so much so that he was now confronting the applicant at her work station and physically assaulting her. Eventually, the applicant had to run away from her home and her work station leaving behind her young children and personal belongings.

She then instructed the author to specifically get an interim protection order to allow her to access her state-assigned house and her children, and to restrain her husband from entering their dwelling house or going to her workstation. This interim protection order would have enabled her to save her job. Unfortunately,

⁷⁰ See section 19(5) of the PDVA.

because of the fact that she ran away from her home, she did not have any concrete information about her children, her residence or work station. The magistrate could not issue interim orders without a *prima facie* case. He directed that the pleadings be served and gave a date for *inter partes* hearing. The client was so devastated by the failure to secure an interim relief that she abandoned the case and went back to work and her house where the violence continued. Eventually, the husband was transferred to a different station giving the applicant some relief.

The objective of the PDVA is to protect victims of domestic violence. The category of victims who seek an interim order under certificate of urgency usually would not have enough evidence to prove, on a *prima facie* basis, that, firstly, violence had occurred, secondly, that it was meted by the respondent and, thirdly, that the respondent is in a domestic relationship with the applicant. This is because, this category of victims leave their homes in circumstances that do not allow them to take along documents to support their cases. On the other hand, because of the potential adverse effects of a protection order on a respondent, the court cannot afford to compromise on the standards for a *prima facie* case in issuing interim protection orders. As such, this law that was meant to protect victims fails in this respect.

3.3 Procedural Challenges under the PDVA

From the very outset, it is important to note that the PDVA has not provided for any procedural guidelines in applying for a protection order with respect to the form of application. The only provision as to the procedure for application provides that an application for protection order should be lodged in court.⁷¹ The finer details have been left to the Rules Committee that is established under Section 81 of the Civil Procedure Act⁷² to provide for rules and timelines.⁷³ At present, more than a year after the coming into force of the PDVA, there are no rules that have been passed to guide the procedure for obtaining a protection order. Due to the novelty of this type of legislation, the lack of rules provides fertile ground for litigation on matters that are unrelated to the substance of the application. Article 159(2) of the Constitution guides judicial officers not to unnecessarily rely on

⁷¹ Section 24(2) states: "An application for a protection order shall be lodged with the court and, where directed by the court shall — (a) be supported by the affidavit of any person who can depone to matters which are relevant to the application; and (b) require the police, a social worker, probation officer, medical practitioner, children officer or other appropriate person or authority to investigate the acts or omissions of the domestic violence and forward findings directly to court as may be directed by the Court".

⁷² Civil Procedure Act, Cap 21 Laws of Kenya.

⁷³ Section 34 PDVA.

procedural technicalities when adjudicating matters and, therefore, provides some form of protection.⁷⁴ This protection, however, is only used in court when there is already a challenge to the procedure used by the applicant. It does not protect against litigation over technicalities, it only protects from adverse rulings and judgments based solely on technicalities. After all, decisions like *Raila Odinga v the IEBC and Others*⁷⁵ which interpreted article 159(2) seems to emphasise that this provision calls upon judicial officer to balance the need for proper procedures and the substance of the case.⁷⁶ As such, article 159(2) does not automatically waive adherence to procedural prescriptions. A court has to determine that it applies. This usually happens after some litigation.

In the cases handled by this author, she moved the court through a Miscellaneous Application under certificate of urgency. The application was in the nature of a Notice of Motion and on its face, the Motion prayed for both interim and final orders of protection. The application was supported by an affidavit sworn by the applicant. Opposing counsel in one of the cases bitterly opposed the chosen mode of moving the court insisting that there must be a Complaint accompanying the Notice of Motion. Had the applicant in the matter not chosen to abandon the cause of action, a lot of time would have been spent litigating on the correct form of application in the circumstances. This, of course, would not only divert judicial time to determinations of technicalities, but would also delay the determination of the application.

The PDVA is, however, not totally devoid of other aspects of procedure. The Act has provided for the person with locus to make an application. This includes the victim himself or through an advocate. If the person involved is a child or is incapable of making an application, the application may be made through a representative who may be court-appointed.⁷⁷ It has provided that an application for protection orders shall be made before a Resident Magistrate.⁷⁸ The hearing of the application is required to be in camera.⁷⁹ The court is given the power to call

⁷⁴ Article 159(2) of the constitution states “justice shall be administered without undue regard to procedural technicalities.”

⁷⁵ [2013] eKLR.

⁷⁶ In *Raila Odinga vs. the I.E.B.C. & Others* (2013) eKLR, the Supreme Court said that article 159 (2) (d) of the constitution simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court. See also *Joshua Mutoto Werunga v Joyce Namunyak - Returning Officer, Endebe & 2 Others* [2013] eKLR.

⁷⁷ Section 9.

⁷⁸ Section 24(1) of the PDVA.

⁷⁹ Section 28.

for evidence both during the hearing in the first instance and during an appeal.⁸⁰ Appeals lie to the High Court, and an appellant is required to file an appeal within 30 days.⁸¹ The High Court or the court issuing the protection order may upon receiving an application, issue a stay pending the appeal.

3.4 Other Challenges for Users of the PDVA

The biggest challenge with this Act, indeed, is the unpreparedness of all actors involved to deal with it. There is a glaring lack of awareness of this law among the public, the courts and advocates. This is especially disadvantageous considering the fact that the Act imposes positive duties on agencies such as the police and the county governments. As a result, litigating on this law is especially frustrating for the applicant's advocate who sometimes has to deal with untenable situations. For instance, in one of the briefs handled by this author for protection orders, the court found that the application for interim protection orders did not meet the required threshold and, therefore, abstained from issuing the interim orders. The law clearly directs courts to issue a 'notice to show cause' why protection orders should not be issued upon determining that it cannot issue interim orders.⁸² The court directed the applicant to serve the respondent with the pleadings. This, of course, presented more delays as the respondent prayed for time to put in his written response. A 'notice to show cause' would have ensured that the respondent appeared in court and made verbal or written representation.

Considering the high rates of domestic violence in the country, one would expect that this law would have been used more frequently by the public. The low uptake of the law may be an indication of a lack of awareness of what the Act entails.

Another challenge is the fact that this law demands quite a huge amount of resources to be fully implemented. These resources would go into building of shelters, training and awareness programs for the numerous duty-bearers including the public at large. The Act also provides for counselling services which would require the hiring of counsellors.⁸³

⁸⁰ Section 29.

⁸¹ Section 30(1).

⁸² This is provided for in section 12(5) of the PDVA which states: "Where an application is made under this section and the court is satisfied *prima facie* that the respondent has committed, is committing or threatening to commit an act of domestic violence but that the circumstances do not justify or require the issue of an interim protection order, the court may issue a notice requiring the respondent to show cause why a protection order should not be made.

⁸³ Counselling services are provided for under section 14 of the PDVA.

4.0 Conclusion and Recommendations

The Protection against Domestic Violence Act has the main objective of providing protection for victims of domestic violence. As domestic violence presents a danger to the life and health of the victim, it is important that the legislation be usable with the greatest ease. Unfortunately, this law is complex, vague, and presents a situation where obtaining an interim order is difficult. The law has too many points to be proved by the applicant that getting a final protection order can only come after protracted litigation. As it is, therefore, this is a law that presents more problems in litigation than the pre-existing legislative framework with little chances of obtaining the desired orders, especially at the interim stage.

It should be noted that this law, if fully implemented, has the potential of having an impact in the society in the fight against domestic violence. An analysis of countries where similar legislation exists showed a seven percent decrease in the likelihood of experiencing domestic violence compared to jurisdictions without such legislation.⁸⁴ The study also shows that each successive year that the law continues to be in place witnesses a 2 per cent decrease in prevalence of domestic violence.⁸⁵ These figures translate to thousands of lives per year being saved. It would be a tragedy if this law was rendered unusable especially for the victims.

The law, however, is designed to work best in a specific environment. This environment should have trained police and judicial staff, counselling and other support services, a simple and effective procedure and a public that is aware of the presence of the law. On the basis of the foregoing discussions, this paper makes the following recommendations:

Firstly, there is need for the state to invest in training of judicial officers, police and counsellors on this Act. This Act, for instance, has created positive duties for the police and how they are supposed to act when they receive a report.⁸⁶ Protection orders are different from other orders in terms of their content and, therefore, their enforcement has to be different. Proper training of the police would be important in enforcement of protection orders. Resident Magistrates also need to be trained on their duties and their roles as prescribed in this law. A domestic violence matter cannot be treated as any other civil matter. According to Justice

⁸⁴ Klugman, J., et al. 'Women's Voice & Agency: Empowering Women and Girls for Shared Prosperity' (2014), Washington, DC: World Bank.

⁸⁵ Ibid.

⁸⁶ Section 6.

Makau, courts have a role to play in realizing the state's responsibility to eliminate violence against women.⁸⁷

This role includes ensuring that human rights commitments are implemented, ensuring accountability for human rights violations, protection of vulnerable groups and informing the legal system's response to gender based violence.⁸⁸ Apart from these roles, the PDVA specifies other roles that are to be played by magistrates in certain circumstances such as when an application is made on behalf of victims who cannot make the application themselves.⁸⁹ It would be helpful, both to the magistrates and litigants if rules that are clear and simple are developed and publicized so that remedies under this law are accessible to victims of domestic violence even without legal representation.

This law is meant for the protection of victims. The state should invest heavily in public awareness so that those who need protection orders are able to apply for them. The more it is litigated and tested in court, the more it would be refined and fine-tuned and its effectiveness enhanced. It is also imperative that the state invests in the physical and institutional infrastructure and personnel prescribed by the law. This is because, as it is, there are certain kinds of orders that cannot be made simply because there are no facilities to implement them such as counselling services.

Public awareness on the PDVA is not enough, there is need to deal with the underlying causes of domestic violence. Public education should be targeted against the prevailing patriarchal beliefs that encourage and justify domestic violence. It should be noted that judicial officers, police and other actors are also people who may be under the influence of customary beliefs and may hold certain attitudes towards domestic violence. These attitudes may affect the implementation of the Act. It is important that the key actors prescribed by this Act are targeted for education on harmfulness of some traditional views. Harmful traditional practices, such as wife inheritance, female genital mutilation and others should also be discouraged and condemned.

⁸⁷ Makau, J. A 'Role of Judges in Realizing States' Responsibility to Eliminate Violence against Women: Perspectives from *CK and Others v Commissioner of Police and Others* Meru Petition No. 8 of 2012.' *Kenya Law Review* (2016) Vol 5(1) pp. 97.

⁸⁸ Ibid.

⁸⁹ See section 8 and 9, PDVA.