

Kenya - Dr Tatu Kamau v. Attorney General (2021)

On a knife-edge: Defending Kenya's Anti-FGM law against constitutional challenge

In 2017, a constitutional petition was filed in Kenya's High Court that threatened to roll back the significant progress made in protecting women and girls from FGM. A Kenyan doctor challenged the constitutionality of the Prohibition of Female Genital Mutilation Act, 2011 (the Anti-FGM Act), claiming that it violated the rights of adult women to personal choice, bodily autonomy and cultural identity. The petitioner sought to legitimise the practice of medicalised FGM, arguing it should be permitted under the guise of consent. The implications of the case were profound. If successful, the challenge would weaken one of the most progressive anti-FGM laws on the continent and undermine Kenya's human rights obligations under Article 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol).

Recognising the far-reaching impact of the case, Equality Now intervened as an Interested Party alongside a range of other partners (there were a total of 10 interested parties and two *amici curiae* who joined the case).¹ The petition was not only a direct threat to legal protections for women and girls against FGM, but also a broader challenge to the framing of FGM as a human rights violation. The arguments on legitimising medicalised FGM on the use of bodily autonomy also reflect increasing trends globally towards using similar arguments to defend FGM.

"It sought to introduce medicalisation... if it weren't defended, it would have swayed people to say, oh, actually, it's about harm reduction and consent, it's ok, let's go for it." - **Esther Waweru, Senior Legal Advisor, Legal Equality, Equality Now & co-counsel for Equality Now**

Legal coordination and strategy

Equality Now played a central role in coordinating both the legal and media and communications responses. It spearheaded legal and advocacy strategies, working alongside a broad spectrum of partners (that included the Office of the Attorney General, the Office of the Director of Public Prosecutions, the Anti-FGM Board, as well as multiple civil society organisations). Equality Now took strategic leadership to shape legal arguments, convene strategic meetings, and identify key thematic areas, ensuring that all elements of the law and issues raised in the petition were robustly defended. Equality Now's leadership role was bolstered by its longstanding involvement in Kenya's national Multi-Agency Task Force on FGM, where it was already recognised as a technical partner

¹ The interested parties in the case were: Equality Now, National Gender & Equality Commission, Federation of Women Lawyers (FIDA-K), Samburu Girls Foundation, Msichana Empowerment Kuria, Kenya Women's Parliamentary Association (KEWOPA), Center for Rights Education and Awareness (CREAW), Men for the Equality of Men and Women, Amref Health Africa, John Kiplangat arap Koech. *Amici Curiae* were Katiba Institute, KELIN and ISLA.

by the Anti-FGM Board. This pre-existing relationship helped build trust and enabled smoother coordination with state actors, including the Office of the Attorney General.

The cooperation orchestrated a coordinated litigation strategy, distributing responsibilities according to each partner's strengths.

"We brought everyone to work together... We identified each partner's strengths and made sure all legal grounds were covered." - **Esther Waweru, Senior Legal Advisor, Legal Equality, Equality Now & co-counsel for Equality Now**

Despite the strength of the alliance, several challenges emerged behind the scenes. In the early stages, coordination between actors was limited, and midway through the case, one partner organisation withdrew from the process, contributing to delays. Efforts were eventually harmonised through joint meetings and shared messaging strategies.

Equality Now also had to navigate debate amongst the litigation partners about how far to go in critiquing the law itself. During legal preparations, there was discussion about the weaknesses in the FGM Act, particularly the provision under Section 19 on reporting of FGM cases, which was being used to criminalise survivors rather than the cutters or community leaders.

Initially, the Court raised the inadequacies in the current law during the proceedings, prompting the legal team to respond by referencing the legislative intent of the law and submitting affidavits from stakeholders, including members of the Kenya Women's Parliamentary Association (KEWOPA), who had been involved in the drafting of the Anti-FGM Act. This strategy enabled them to validate the law's origins and purpose without opening the door to broader constitutional critique that could have derailed the case.

It was also true that, initially, some lawyers in the wider legal team were less comfortable with the issues this case covered and were hesitant to use precise anatomical terms (such as "vagina" or "clitoris") in their submissions, for example. Equality Now responded by organising capacity-building sessions and preparatory meetings to ensure all team members could present their arguments confidently and effectively.

Expert witnesses played a vital role in the proceedings. The legal team facilitated testimony from medical professionals, including obstetricians and gynaecologists, to outline the physical and psychological harms of FGM, even when performed in clinical settings. This testimony was instrumental in refuting claims that medicalised FGM could be safe.

To support expert medical testimony, the team introduced visual aids into the courtroom, that is, one of only two medical training models of female genitalia in Kenya, to demonstrate different types of FGM, what they would look like, and the long-term impacts of each type of FGM on a survivor's life. This proved to be a powerful strategy that appeared to resonate with the judges in the case, who clearly appreciated the visual illustrations and explanations provided by the medical experts who used the model.

The legal team also presented survivor testimonies (some through in-camera hearings or sworn affidavits) to demonstrate the lived experiences and enduring trauma caused by FGM. Safeguarding was a core priority throughout the legal process, noting the vulnerability of survivors to further harm or trauma through their participation in the case. First and foremost, survivors gave their informed consent to participate in the case and were then offered group counselling and supported by dedicated psychosocial staff.

Communications and public engagement

Equality Now developed a comprehensive media and communications strategy at the outset of the litigation process, recognising that the case would be fought both in the courtroom and in the public sphere. Survivor voices were centred in media messaging to reinforce the human rights violations at stake. Journalists received training to support them in covering the case sensitively and accurately. Their training was further supported by a media toolkit and study tours. Survivors and civil society partners were featured on national television and radio, while press releases and social media campaigns amplified messages in support of preserving the Anti-FGM Act. Communications efforts focused on maintaining the visibility of the case, countering misinformation, and reframing the narrative to emphasise the rights and health of women and girls in Kenya over cultural relativism.

“#DontTouchFGMLaw didn’t just trend nationwide – the media ran with it, and it grew a life of its own.” – **Sarah Wambui Ndonga, former Communications Lead, Africa Office, Equality Now.**

Media engagement initially presented challenges within the litigation team. At times, there were delays in endorsing joint public statements, leading to frustration among partners and lost opportunities. Despite the complexities of coordinating multiple organisations in a fast-moving media environment, these tensions were largely managed. As a result, sustained public engagement through the media helped ensure that the narrative around the case remained focused on survivors and firmly grounded in a human rights framework.

Media coverage was monitored to ensure a careful response. During one of the hearings, a media house published a video segment that was so offensive to survivors and contained derogatory language, prompting complaints from partners to the Kenya Media Council. As a result, the media house was forced to take it down. After the judgment, one of the media houses that had been trained to report on the case later published a significant segment that was sympathetic to the petitioner, which was a huge disappointment. On the other hand, there were also several positive mainstream media interviews with leading TV and radio stations. Overall, media monitoring helped maintain message control and continue to uphold a survivor-centred narrative after the verdict.

The judgment

In 2021, the High Court of Kenya delivered its judgment, dismissing the petition in its entirety. The Court upheld the constitutionality of the Anti-FGM Act, ruling that FGM in all its forms - including so-called “consensual” or

medicalised FGM - constitutes a human rights violation.² The judgment also reinforced Kenya's legal obligations under its domestic laws, the Constitution, and the Anti-FGM Act, as well as international human rights instruments, such as the Maputo Protocol.

The Court also acknowledged areas for future legal reform, recommending that the Government improve the law, including through more comprehensive definitions in the Act, prohibiting all forms of FGM, and tightening applicable exceptions. In doing so, the Court preserved the integrity of the legal framework in Kenya and provided a crucial precedent for the region.

Outcomes and reflections

This case demonstrated the power of coordinated strategic litigation to uphold women's rights. It also underscored the importance of combining legal action with public engagement, particularly strategies that centred survivor voices and challenged the narrative that medicalised FGM is a less harmful or more acceptable form of the practice.

"This case proved that CSOs and the government can work together – even in court. It also showed that litigation only wins when the public is with you and your advocacy outlives the verdict." – **Sarah Wambui Ndonga, former Communications Lead, Africa Office, Equality Now.**

It should also be noted that Kenya's constitutional and legal framework is notably supportive of strategic litigation. Provisions in Kenyan law that allow individuals or organisations to bring or intervene in cases in the public interest without the need for direct personal harm opened the door for Equality Now and partners to intervene effectively. Kenyan courts have become increasingly receptive to such litigation, including participation by civil society and acceptance of *amici curiae*.

While the judgment marked a significant legal victory, challenges remain. The implementation of the Anti-FGM Act remains uneven across regions, and misconceptions about FGM (including enduring support for it under the guise of tradition or cultural identity) persist within Kenyan society. The recommendations in the judgment towards the amendment of the Anti-FGM law are yet to be implemented. This case underscores the importance of ongoing advocacy, enhanced support systems for survivors, and increased investment in public education to address and transform harmful social and cultural norms. All of which are essential to ensuring that legal protections translate into real-world protection for women and girls from FGM.

"Implementation of the judgment remains a great challenge with the government dragging its feet on amending the Anti-FGM Act, though four years have passed since the High Court issued the judgment. The Court has given specific guidance on the need to amend and strengthen the Anti-FGM law, and this needs to be acted upon urgently." – **Sofia Rajab, Managing Partner - Leteipan & Associates (Lead counsel representing Equality Now before the High Court of Kenya)**

2 Dr Tatu Kamau v Attorney General & Others [2021] KEHC 450 (KLR), <https://kenyalaw.org/caselaw/cases/view/209223/>

While the case marked a legal success, it was noted that follow-up coordination among the parties in the case that came together for the case has been limited, underscoring the need to build in sustained, cross-organisational planning and funding that continues beyond the case when undertaking strategic litigation alongside partners to maximise the benefits of working in coalition.

“After the ruling, our energy died down. We needed a shared plan to sustain the momentum we had created.” – **Sarah Wambui, former Communications Lead, Africa Office, Equality Now.**

Conclusion

The intervention of Equality Now and partners in this landmark case in Kenya safeguarded one of the most comprehensive anti-FGM legal frameworks in Africa. The case reaffirmed that framing FGM as a matter of choice, right to culture, or harm reduction cannot override the fundamental rights of women and girls. It also reinforced the value of strategic partnerships, survivor-centred advocacy, feminist legal expertise, and the pivotal role of sustained, sensitive, rights-focused media engagement in shaping public understanding, countering harmful narratives, and amplifying survivor voices to build wider support for legal and social change.

In the face of a concerted challenge, Kenyan CSOs held the line, ensuring that the Anti-FGM Act in Kenya not only remained intact but was strengthened as a beacon of progress across the continent.

Equality Now would like to acknowledge all the interested parties in the Constitutional Petition 244 of 2019 whose invaluable contribution led to the successful defense for the Anti-FGM Act; the Equality Commission, Federation of Women Lawyers (FIDA Kenya), Samburu Girls Foundation, Msichana Empowerment Kuria, Kenya Women's Parliamentary Association (KEWOPA), Centre for Rights Education and Awareness (CREAW), Men for Equality Between Men and Women, AMREF Health Africa in Kenya, Katiba Institute, KELIN, and ISLA.



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