Universal Periodic Review of Kenya
49th Session
Joint Stakeholders Submission By:

Network for Adolescents and Youth of Africa
The Network for Adolescent and Youth of Africa (NAYA) is a youth-led regional advocacy network. NAYA aims at enhancing the capacity of youth advocates, young people, youth led organisations and policy makers to undertake Sexual and Reproductive Health and Rights (SRHR) advocacy at international, regional, national and counties in Kenya to improve the quality, affordability and accessibility of health including SRHR information and services.
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Right Here Right Now Kenya
The Right Here, Right Now Kenya (RHRN-KE) is a platform of 15 Civil Society Organizations founded in 2016, with an aim of improving the protection, respect and fulfilment of the sexual and reproductive health and rights (SRHR) of young people.

and the **Sexual Rights Initiative**
The Sexual Rights Initiative is a coalition of national and regional organisations based in Canada, India, Egypt, and Argentina that work together to advance human rights related to gender and sexuality at the United Nations.
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Key words: Youth-friendly sexual and reproductive health services; access to safe and legal abortion; comprehensive sexuality education; meaningful and inclusive youth participation in decision making

Introduction

1. This stakeholder report is a collaborative effort by the Network for Adolescents and Youth of Africa, Right Here Right Now Kenya, and the Sexual Rights Initiative. The report covers the period from 2020- 2024 and discusses progress as well as gaps in access to comprehensive sexual and reproductive health and rights in Kenya.
2. This submission focuses on four key issues:
    a. Inadequate meaningful participation of young people and civil society In policy making
    b. Inadequate access to comprehensive sexuality education by young people
    c. Inadequate Access to Comprehensive Youth-Friendly Sexual and Reproductive Health Services
    d. High Maternal Mortality and Morbidity from Unsafe Abortion
3. These four issues are mutually interlinked and combine to deny adolescents and young people their fundamental rights. There is evidence that sexuality education increases young people's knowledge and improves their attitudes related to SRHR and behaviours with positive effects including delay of sexual debut, decrease in sexual partners, reduced sexual risk taking and use of condoms and contraception.
4. Inadequate access to comprehensive sexuality education therefore limits young people's ability to make informed choices, with devastating consequences to their sexual and reproductive well-being. Low age of sexual debut contributes to high rates of sexually transmitted infections including HIV/AIDS, adolescent pregnancies, unsafe abortions and risks of maternal mortality and morbidity. These consequences are exacerbated by inadequate access to comprehensive youth-friendly sexual and reproductive health services where adolescents and young people can access non-judgmental services that respond to their needs. There is clear evidence that meaningful and inclusive youth participation is key to achieving Sexual and Reproductive Health and Rights (SRHR) program outcomes, as young people contribute to the development of policies and programmes that are relevant to their needs and tailored to their realities, as well as enjoy their ownership.
5. In Kenya the age of sexual debut for adolescents and young people is low, making them susceptible to adolescent pregnancies, unsafe abortion, and sexually transmitted infections, including HIV/AIDS. According to data compiled by the National Council for Population and Development and UN agencies[1], 8% of women and 19% of men aged 15-24 had their first sexual intercourse before the age 15. Unfortunately, there is very limited data gathered by or funded by Kenya on adolescent and youth sexual and reproductive health, to inform evidence-based decision making and monitor progress, and so there is a reliance on third state data.
6. The Constitution of Kenya in Article 27 (4) guarantees individuals the right to not be discriminated against, directly or indirectly, on any grounds. However, there still exists major stigma and discrimination leading to denial of services, or sometimes fear of seeking

[1]https://www.unicef.org/kenya/media/4176/file/Situation%20Analysis%20of%20Kenyan%20Adolescent%20FINAL.pdf.pdf

reproductive health care services. Sexual and gender minorities[2] particularly face major discrimination, stigma, violence, human rights violations, and criminalization from state and non-state actors and agencies. According to UNAIDS[3], Key populations including sex workers, gay men and men who have sex with men, transgender people, people who inject drugs, and people in prisons and other enclosed settings accounted for 70% of new HIV infections, mostly due to inadequate access to non-judgmental, safe, effective, and high quality HIV services.

7. During its last review, Kenya received a total of 319 recommendations, accepting 263 while noting 56 recommendations. All the recommendations on the theme of sexual and reproductive health and rights, including decriminalising consensual same sex conduct and ensuring access to sexual and reproductive services in conjunction with abortion were noted despite the dire situation of sexual and reproductive health and rights in Kenya.
8. Many of these themes have also been addressed through recommendations and concluding observations issued to Kenya by other international and regional treaty bodies and human rights mechanisms. These themes remain of critical importance and, as this report will show, the situation has in some instances even further deteriorated, with negative consequences for rights holders.

Policy context

9. According to Article 43 (1) (a) of the Constitution of Kenya 2010, every person has the right to the highest attainable standard of health, which includes the right to healthcare services-including reproductive health care. The Health Act 2017 is the overarching Act of parliament adopted to realise the constitutional provision of the right to the highest attainable standard of healthcare. The Health Policy 2014-2030 provides for inclusive and non-discriminatory health services for all Kenyans.
10. There is no specific legislative framework on Sexual and Reproductive Health and Rights in Kenya. Attempts to develop a Reproductive Health Act in Kenya have been met with resistance and have subsequently been thwarted. There is a Family Reproductive Health Bill that is currently in the second reading in Parliament that has not enjoyed political support.
11. There are several pertinent policies impacting adolescent access to youth-friendly sexual and reproductive health services in Kenya. In 2015, the Ministry of Health launched the National Adolescent Sexual and Reproductive Health Policy 2015[4] to enhance the sexual reproductive health status of adolescents in Kenya and contribute towards realisation of their full potential in national development.
12. In line with this policy, the National Adolescent and Youth Friendly Services Guidelines 2016[5] were developed to give effect to the National Adolescent Sexual and Reproductive Health Policy 2015, with the goal of improving availability, accessibility, acceptability and use of quality sexual and reproductive health services by adolescents and youth. The National Guidelines for Adolescent and Youth Friendly Services in Kenya defines adolescent and youth-friendly services as services that appeal and are respectful to adolescents and youth,

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[2] https://nglhrc.com//wp-content/uploads/2022/05/IDAHOBITSTATEMENT.pdf

[3] https://www.unaids.org/sites/default/files/media_asset/new-hiv-infections-data-among-key-populations-proportions_en.pdf

[4] https://www.popcouncil.org/uploads/pdfs/2015STEPUP_KenyaNationalAdolSRHPolicy.pdf

[5] https://www.k4health.org/toolkits/kenya-health/national-guidelines-provision-adolescent-youth-friendly-services-yfs-kenya

are provided in a non-judgmental and considerate manner, and have service delivery points in an environment where adolescents and youth can obtain health services they need with the support of community members. Further, the Guideline lists key characteristics of youth-friendly services as equitable, accessible, acceptable, appropriate and effective.

13. The National Reproductive Health Policy 2022– 2032 was developed by the government to ensure universal Reproductive Health coverage and equitable access to all persons in need and requiring reproductive healthcare. The Policy was developed to replace the National Reproductive Health Policy 2007, which had lapsed.
14. The National Reproductive Health Policy 2022– 2032 and its predecessor the National Reproductive Health Policy 2007[6] was developed to ensure universal reproductive health coverage and equitable access for all Kenyans, whereas the National Adolescent Sexual and Reproductive Health Policy 2015 was developed to ensure services for adolescents and young people due to their unique reproductive health needs.
15. Whereas the National Reproductive Health Policy 2022- 2032 is complementary to all existing policies on reproductive health including the National Adolescent Sexual and Reproductive Health Policy 2015, it is the primary reference document on matters concerning Reproductive Health in Kenya.

Inadequate meaningful participation of young people and civil society in policy and decision making

16. We regret that Kenya did not receive any recommendations on the meaningful participation of young people and civil society in policy and decision making, during the last review.
17. The Constitution of Kenya 2010 stresses the centrality of public participation[7], as a key inalienable human right, as a duty of a citizen and obligation of those involved in decision making. It discards the long-held belief that citizens are but subjects, and elevates them as equal partners in decision making on all issues. The Public Finance Management Act, 2012 and the County Government's Act 2012 further provide for public participation in all key processes, including Policy formulation. Kenya also has international obligations on ensuring the meaningful participation of youth and children as a state party to the Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, and the African Youth Charter.
18. International and regional Treaty bodies have provided recommendations on strengthening meaningful and inclusive youth participation in decision making processes and in governance. In its Concluding Observations and Recommendations to Kenya, in the Second Periodic Review, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) called on Kenya to put in systems and structures, and ensure budgetary allocations to facilitate the participation of children, including children with disabilities, in governance at both levels of government.
19. Kenya is a youthful country, with approximately 75% of its population falling within the range of 18-35 years. Despite their huge numbers, young people's participation in decision making processes and in leadership is hindered by several factors. These include systemic barriers such as the lack of policies and frameworks that define the threshold for effective public participation, and meaningful and inclusive youth participation in particular, the tokenisation of youth participation regarding it as a policy and legal requirement rather than a crucial

[6] https://scorecard.prb.org/wp-content/uploads/2018/05/National-Reproductive-Health-Policy-2007-Kenya.pdf
[7] See articles 1(2), 10(2), 35, 69(1)(d), 118, 174(c) and (d), 184(1)(c), 196, 201(a) and 232(1)(d) and articles 53 and 53 on the rights of children and youth respectively

process which benefits all tying into inadequate public information on opportunities for engagement. Other barriers include budgetary constraints, as well as cultural beliefs and norms that consider older citizens as inherently wiser[8]. An analysis of the 2022[9] General Elections reveals that of the 1882 elective positions, youth below 35 years secured only 335 positions (9%), with minimal higher-level positions.

20. In 2022, with limited engagement of adolescents, young people and civil society, the Ministry initiated a review process for the National Adolescent Sexual and Reproductive Health Policy 2015. The Policy development process has been shrouded in secrecy with drafts not being availed for public participation contrary to the Kenya Constitution[10] 2010.
21. The Ministry has changed the name of the Policy to National Adolescent and Young People Reproductive Health Policy. From the Policy name and the contents therein, the Policy excludes sexual health and rights. The previous Policy also included progressive principles such as responsiveness to varying sexual and reproductive health needs of adolescents in provision of care, and the provision of holistic and integrated adolescent sexual and reproductive health information and services through multi-pronged and multi-sectoral approaches that are effective and efficient in reaching adolescents with information and services. These have been excluded from the final draft of the revised Policy. The 2015 Policy also recognised key populations including men who have sex with men, injecting drug users and sex workers, whilst these marginalised and vulnerable groups have been largely excluded in the provision of reproductive health services. The draft Policy also imposes parental consent before accessing services, and limited contraception access for unmarried adolescents and young people.
22. The premature revision of the Policy before its intended lapse is not an action in isolation. It is part of a trend of interventions and actions that roll back adolescent and young people's rights to comprehensive sexual and reproductive health and rights as provided by Article 43 (1) (a) in the Constitution and the Health Act 2017. This action was preceded and succeeded by the withdrawal from the Eastern and Southern Africa (ESA) Ministerial Commitment on Comprehensive Sexuality Education, a regional framework on comprehensive sexuality education and youth-friendly services, and the development and launch of the problematic National Reproductive Health Policy 2022– 2032 as explained below.
23. There was inadequate engagement of key actors including civil society and young people in the development process of the National Reproductive Health Policy 2022– 2032 and copies of the policy were not made available for public scrutiny and participation as required by the Kenya Constitution 2010[11].
24. The Policy that was passed offends Article 43 (1) a of the Constitution of Kenya, which guarantees every person the right to the highest attainable standard of health, which includes the right to healthcare services- including reproductive healthcare, by excluding certain populations, particularly adolescents, young women and girls below the age of eighteen, from accessing or receiving critical reproductive healthcare services or information. The Policy insistence on parental consent before the provision of reproductive health

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[8] https://undp-kenya.medium.com/why-youth-participation-in-government-affairs-and-processes-is-important-f8d50d069adf

[9] ***https://static1.squarespace.com/static/5c27c93f1aef1d60b29781f9/t/666333bbae35f065383c9929/1717777347964/Summarized+Youth+analysis+of+the+General+election+%286%29.pdf***

[10] See articles 1(2), 10(2), 35, 69(1)(d), 118, 174(c) and (d), 184(1)(c), 196, 201(a) and 232(1)(d) http://www.kenyalaw.org/lex/actview.xql?actid=Const2010

[11] See articles 1(2), 10(2), 35, 69(1)(d), 118, 174(c) and (d), 184(1)(c), 196, 201(a) and 232(1)(d) http://www.kenyalaw.org/lex/actview.xql?actid=Const2010

services deters adolescents and young people from accessing services due to fear of breach of privacy and confidentiality. There is evidence[12] that requiring parental consent to access services infringes on young people's rights to sexual and reproductive health services[13]

25. Kenya civil society organisations wrote a joint petition to the Ministry of Health calling on them not to launch the Policy due to the lack of substantive public participation and its non-adherence to the right to the Constitutional provisions on the right of all, including adolescents and young people, to access the highest attainable standard of healthcare. The Policy was finalised and launched despite the petition.
26. Civil society organisations moved to the High Court[14] in Nairobi to challenge the legality of the National Reproductive Health Policy 2022-2032 due to procedural and substantive issues including the inadequate public participation in the development process.

Inadequate access to comprehensive sexuality education

27. During the last cycle Universal Periodic Review of Kenya (Third Cycle), Kenya noted recommendation[15] 144.52 by Iceland to 'Adopt and implement curricula on age-appropriate comprehensive sexuality education, including information about issues of violence, that is provided throughout schooling.'[16] Since the review, Kenya is yet to develop and implement a curriculum on age-appropriate sexuality education with devastating effects on adolescents and young people.
28. The right to access education and information is guaranteed by the Kenya Constitution 2010. Article 43 (1) (f) guarantees every person the right to education, Article 35 provides for the right to access to information held by the state or another person that is required for the exercise or protection of any right or fundamental freedom, while articles 53 and 55 provide for the rights of children to access to free and compulsory basic education and for youth to access relevant education and training.
29. A number of policies provide for comprehensive sexuality education[17], but the main policy that guides the realisation of health in education health is the Kenya School Health Policy 2018[18]. It also includes the policy statement that the Ministry of Education and the Ministry of Health, in collaboration with other stakeholders, shall equip learners with values and skills to enable them to access education, live a healthy life and deal with challenges of day-to-day life. The Policy has Guidelines and is complementary to other existing policies and frameworks in Kenya for enhancing good health as part of basic education.
30. The Kenya School Health Guidelines 2018 were developed to ensure the effective realisation of the National School Health Policy and to describe a set of actions by which the implementing stakeholders of the policy would demonstrate and guide their work. One of the strategies of the Guidelines is to equip learners with age-appropriate sexual reproductive

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[12] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6307515/

[13] https://aphrc.org/wp-content/uploads/2022/10/Age-consent-evidence-brief.pdf

[14] https://www.kelinkenya.org/key-legal-test-court-set-to-hear-challenge-against-national-reproductive-health-policy-2022-2032/

[15] https://www.ohchr.org/en/hr-bodies/upr/ke-index

[16] Source of Position: A/HRC/44/9 - Para.144

[17] See the Kenya School Health Implementation Guidelines 2018, the Education Sector Policy on HIV/AIDS 2013, the National Adolescent Sexual and Reproductive Health Policy 2015, the National Adolescent and Youth Friendly Services Guidelines 2016 among other policies provide for provision of accurate and evidence-based human sexuality education to adolescents and young people in school

[18] https://ncdak.org/wp-content/uploads/2021/08/School-Health-Policy-DFH-MOH-26.06.18.pdf

health information to help them deal with vulnerabilities associated with adolescence/ puberty. Specifically, the Ministries of Health and Education committed to create awareness about adolescence and the ways of coping with associated changes as well as to provide age-appropriate sexuality education and life skills to support a smooth transition from childhood to adolescence, equip learners with adequate knowledge and skills to make informed decisions and to avoid situations that would lead to adolescent pregnancy, defilement, rape, incest, sodomy and inter-generational relations, to organize monthly health talks to provide learners with sexual reproductive health information and link schools to nearby health facilities for sexual reproductive health talks, and to integrate age-appropriate information on sexuality and sexual reproductive health into the school curriculum.

31. The Education Sector Policy[19] on HIV/AIDS 2013 specifically recognizes the role of comprehensive sexuality education in fostering informed choices by adolescents and young people. The Policy makes provision for accurate age-appropriate information on comprehensive sexuality education, developing guidelines for age-appropriate comprehensive sexuality education for all levels and developing an age-appropriate comprehensive curriculum on sexuality education for educators as key strategies to improve the wellbeing of learners and foster positive sexual attitudes and behaviours.
32. The National Adolescent and Youth Friendly Services Guidelines 2016 provides four key models of providing adolescent and youth-friendly SRHR services and information including sexuality education, namely the clinic-based model (at the health facilities), school-based model, community-based models and virtual-based models.
33. Despite these policies, the Ministry of Education is yet to integrate comprehensive sexuality education into the school curriculum, thereby denying young people the opportunity to make informed choices about their sexuality, with disastrous effects on adolescents and young people. The absence of a curriculum has forced civil society organisations and other non-state actors to step in and provide comprehensive sexuality education in schools, in communities and through virtual-based models. Even though CSOs implementing CSE have made efforts to offer similar contents covering a range of SRHR topics, it is clear that they are guided by many different curricula developed by various stakeholders implementing AYSRH programmes in the country[20].
34. In 2023, Kenya withdrew from the Eastern and Southern Africa (ESA) Ministerial Commitment on Comprehensive Sexuality Education, a regional framework it had committed to alongside other African countries to ensure quality comprehensive sexuality education and youth-friendly sexual and reproductive health services in the Eastern and Southern Africa region. There was no official reason given for withdrawal from the ESA commitment. However public statements[21] by the Ministry of Health demonstrate unease with the commitment and the perception that the commitment provides for adolescents to learn about and to access contraceptives. This is also a part of a larger trend on a policy shift on deprioritizing SRHR and clawing back on sexual and reproductive health and rights of adolescents and young people.

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[19] https://healtheducationresources.unesco.org/sites/default/files/resources/Kenya_Education_Sector_Policy_on_HIV_and_AIDS.pdf

[20] https://csakenya.org/wp-content/uploads/CSE-IMPLEMLEMENTATION-IN-KENYA-FINAL.pdf

[21] https://nation.africa/kenya/health/alarm-as-kenya-pulls-out-of-regional-accord-on-teen-sex-education-4237324

Inadequate access to comprehensive, youth-friendly, sexual and reproductive health services

35. During the last Universal Periodic Review of Kenya (Third Cycle), Kenya accepted Recommendation 142.202 by Portugal to "Review all legal, policy and structural barriers that impede the provision of sexual and reproductive health services, in particular against adolescent girls, young women and members of key populations more vulnerable to HIV, and implement comprehensive human rights-based programmes in this area."
36. Recommendations 144.23 by Malta to, "Enact a reproductive health law to provide a human rights-based legal framework for young people's sexual and reproductive health" and recommendation 144.24 by Belgium to "Enact a reproductive health law to provide a human rights-based legal framework for young people's sexual and reproductive health" were noted by Kenya.
37. Whilst there have been reviews, including of key policies such as the National Adolescent Sexual and Reproductive Health Policy 2015 and the National Reproductive Health Policy 2007, the Eastern and Southern Africa (ESA) Ministerial Commitment on Comprehensive Sexuality Education 2013, these reviews have instead erected additional barriers for adolescents in accessing sexual and reproductive health and rights services by omitting sexual health and rights from key policies, imposing parental consent guidelines and ultimately failing to renew the ESA Commitment. Access to SRHR services and information for key populations have also been significantly impacted with the reviews due to lack of recognition of their additional vulnerabilities and marginalisation. Kenya is yet to enact a reproductive health law to provide a human rights-based legal framework for young people's sexual and reproductive health.
38. According to the World Health Organization[22], many young people regard health services as not meeting their needs and distrust them. They avoid such services altogether or seek help from them only when they are desperate. For health services to address the needs of young people, services should be in the right place, available at the right time, at the right price (affordable or free) and delivered in the right style to be acceptable to them.
39. There is limited data on the situation of adolescent and youth-friendly services in Kenya with the last national survey with indicators on public health facilities providing comprehensive youth-friendly services being the Kenya Service Availability and Readiness Assessment Measure[23] 2013, which revealed that only one out of ten public health facilities provide comprehensive youth-friendly services.
40. We know that there are still major gaps that impede access to comprehensive SRHR services and information such as structural and systemic barriers. Laws and policies that require parental or partner consent, distance from facilities, costs of services and/or transportation, long wait times for services, inconvenient hours and lack of necessary commodities at health facilities have a significantly negative impact on access for young people.
41. There are also significant socio-cultural barriers such as restrictive norms that frown on discussing sexuality and which devalue adolescents and young people's thoughts and feelings, as well as stigma around adolescent and youth sexuality, inequitable or harmful gender norms that promote and manifest through harmful practices including child marriage, gender-based violence and a patriarchal system that values boys over girls, discrimination and judgement of adolescents by communities, families, partners, and providers for seeking

[22] http://www.who.int/maternal_child_adolescent/documents/fch_cah_02_14/en/
[23] http://apps.who.int/healthinfo/systems/datacatalog/index.php/catalog/42

SRHR services and information, and individual barriers, such as young people's limited or incorrect knowledge of SRH, including myths and misconceptions around contraception; limited self-efficacy and individual agency; limited ability to navigate internalised social and gender norms; and limited information about what SRH services are available and where to seek services.

42. Adolescents and young people are affected by experienced stigma from instances where they have been discriminated against or treated negatively by others such as health workers, family members or law enforcement while seeking SRHR services and information. This includes rejection by partners, family and peers, experiences of physical, verbal or emotional abuse because of accessing services that make them seem as already sexually active in conservative settings, anticipated (or perceived) stigma where they fear how others will react to them if found accessing SRHR services, internalised stigma when adolescents and young people unconsciously or emotionally absorb stigmatising messages or negative stereotypes and come to believe that they apply to themselves, and intersecting stigma which stems from existing prejudices and inequalities. Groups who are already marginalised due to factors such as sexual orientation and gender identity, HIV/AIDs status, and sex workers face greater stigma and greater consequences of stigma.
43. While Kenya is a signatory to the Abuja Declaration, in which African nations committed to allocating a minimum budget of 15% to health, Kenya's budgetary allocation to health has not met this minimum. The 2023/2024 budget allocates KES 141.2 billion (USD 973.7 million) to the health sector, which represents 11% of its total budget, thereby falling short of the 15% target. The health budget is also prone to reallocation and severe budget[24] cuts, which have had a major impact on sexual and reproductive health and rights.

High maternal mortality and morbidity from unsafe abortion

44. During the third cycle review, Kenya noted the following recommendations:
    - 144.51 Immediately implement the High Court judgement in Petition No. 266 of 2015 by reinstating the standards and guidelines on reducing maternal mortality and morbidity related to unsafe abortion and the training curriculum for medical professionals in public hospitals (Netherlands);
45. Kenya is yet to implement the judgement, and the Standards and Guidelines is still not operational. The lack of Standards and Guidelines has continued to create an environment where service providers are afraid of providing abortion services as provided by Article 26(4). There is very limited data on abortion incidences and prevalences as well maternal mortalities and morbidities in Kenya. The last national survey[25] on Incidences and Complications of Unsafe Abortion was published in 2013.
46. Article 26(4) of the Constitution of Kenya, 2010 states that abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law. This Article criminalises abortion outside the parameters provided, and is substantiated by articles 158, 159, 160 and 228 of the Kenya Penal Code Cap 63 which criminalise abortions, and places jail terms of up to 14 years for women seeking abortion services, and service providers providing abortion services.

[24] https://www.bmj.com/content/385/bmj.q1154
[25] https://www.guttmacher.org/sites/default/files/pdfs/pubs/abortion-in-Kenya.pdf

47. The Kenya Health Act 2017[26] defines a trained health professional as someone with formal medical training at the proficiency level of a medical officer, a nurse, a midwife, or a clinical officer who has been educated and trained to proficiency in the skills needed to manage pregnancy-related complications in women, and who has a valid licence from the recognized regulatory authorities to carry out that procedure. The Health Act 2017 further provides for the right to emergency medical treatment, which includes access to treatment by a trained health professional for conditions occurring during pregnancy. This includes abnormal pregnancy conditions, such as ectopic, abdominal, and molar pregnancy, or any medical condition exacerbated by the pregnancy to such an extent that the life or health of the mother is threatened. However, the Act regards such cases as notifiable conditions thereby putting women in need of emergency care in a precarious and impossible situation where they have to provide notification for pregnancy-related emergencies.
48. There is currently no law in place to ensure the realisation of Article (26) 4 of the Constitution[27], which provides for access to safe and legal abortion, as well as mitigating the magnitude of unsafe abortion in Kenya. Efforts to develop a Bill which incorporates the right to safe and legal abortion have been unsuccessful, while the Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya was developed by the Ministry of Health, together with key stakeholders, and utilised for the provision of quality comprehensive abortion care but ultimately procedurally withdrawn. The only other guidelines in place that provide some grounds for access to safe abortion services are the Ministry of Health National Guidelines on Management of Sexual Violence 2014 which inter alia, recognises that one of the rights that a survivor of sexual violence has is the right to termination of pregnancy and post-abortion care.
49. Kenya is a party to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, commonly known as the Maputo Protocol, which provides for women's rights in Africa including the right to medical abortion. Whereas Kenya acceded to the Protocol with a reservation on Article 14(2)(c) which called on state parties to take appropriate measures to protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus, the reservation has been since declared null and void by the High Court[28] in Nairobi and thus cannot be used to deny[29] girls and young women their rights. The judgement averred that while Kenya made a reservation to Article 14 (2)(c) of the Maputo Protocol, it is instructive that the words of the Article mirror in some respects the words used in the Constitution thus making the reservation null and void.
50. The judiciary has been crucial in expounding upon the remit of reproductive rights in Kenya, and in Petition E009 of 2020[30], PAK and Salim Mohammed vs the Attorney General and 3 others, the High Court ruled that Parliament should enact an abortion law and public policy framework in terms of article 26(4) of the Constitution. In this case, a 17-year-old student, PAK went to a clinic in September 2019 after experiencing complications in her pregnancy, including severe pain and bleeding. There, she received care from Salim Mohammed, a

[26] https://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/HealthActNo.21of2017.pdf
[27] http://kenyalaw.org/kl/index.php?id=398
[28] http://kenyalaw.org/caselaw/cases/view/175490/
[29] https://www.knchr.org/Portals/0/Final%20KNCHR%20Advisory%20on%20removal%20of%20reservation%20under%20Article%2014%20%282%29%20%28c%29%20of%20the%20Maputo%20Protocol.pdf
[30] http://kenyalaw.org/caselaw/cases/view/231489

registered Clinical Officer who found out that PAK had experienced a spontaneous abortion and performed an emergency manual vacuum evacuation.

51. The police stormed the clinic, confiscated medical records and arrested both Salim and PAK. PAK was forced to undergo a medical examination at the county hospital and charged with procuring abortion contrary to section 159 of the Penal Code, while Mohammed was charged with procuring abortion contrary to section 158 of the Penal Code and supplying drugs to procure abortion contrary to section 160 of the Penal Code. The High Court quashed decisions by the lower Magistrate Court that had found Salim guilty of providing abortion and reiterated that abortion care is a fundamental right under the Constitution of Kenya. It held further that arbitrary arrests and prosecution of patients and healthcare providers seeking or offering such services is illegal, and that protecting access to abortion impacts vital Constitutional values, including dignity, autonomy, equality, and bodily integrity, and that criminalising abortion under the penal code without the Constitutional statutory framework is an impairment to the enjoyment of women's reproductive rights.
52. The case of PAK and Salim Mohammed vs the Attorney General and 3 others addresses key issues that are at the crux of an ambiguous and contradictory legal environment with regards to the right to abortion. Two of the major issues for determination were:
    - Whether sections 154, 159, and 160 of the Penal Code that criminalised abortion were inconsistent with article 26(4) of the Constitution and unconstitutional.
    - Whether the lack of access to safe abortion services was a violation of the right to privacy, life, the highest attainable standard of physical and mental health, and freedom from torture, inhuman and degrading treatment and punishment.

53. The Court ruled that forcing someone to carry an unwanted pregnancy to term or forcing them to seek out an unsafe abortion, is a violation of their human rights, including the rights to privacy and bodily autonomy. The court also ruled that restrictive abortion laws coupled with a lack of effective laws giving effect to article 26(4) of the Constitution, exposes women and girls to mental and physical health risks that are often associated with unsafe abortion, and stigmatises women and girls who seek abortion thereby violating their right to life and the right to highest attainable standards of health. On the legality and constitutionality of sections 154, 159, and 160 of the Penal Code, the Court mostly deferred the issue to Parliament to fast-track legislation that provides for access to safe abortion for women in Kenya and to actualize the provisions of article 26(4) of the Constitution.
54. The Judiciary has made critical determinations through the above cases on the right to reproductive health in Kenya, the legality of safe abortion in Kenya and the role of parliament in ensuring the right to the highest attainable standard of health, including reproductive health, is realised. The government of Kenya however, is yet to implement any of the cases.

RECOMMENDATIONS FOR ACTION

We call on Kenya to:

1) Implement the judgement in Petition E009 of 2022 of the High Court of Kenya, PAK and Salim Mohammed vs the Attorney General and 3 others, which affirmed the right to abortion under the Constitution.
2) Repeal Cap. 63 Articles 158, 159,160, and 228 of the Penal Code that criminalise women seeking abortions and abortion providers.

3) Withdraw the reservation on Maputo protocol section 14(2)(c) to ensure the right to the highest standard of healthcare.
4) Review the National Reproductive Health Policy 2022-2030 to address the exclusion of adolescents and young people from accessing SRHR services and information.
5) Recall the National Adolescent and Young People Reproductive Health Policy which limits the constitutionally guaranteed right to reproductive health, and to fully implement the National Adolescent Sexual and Reproductive Health Policy 2015.
6) Implement the judgement in Petition No 266 of 2015 inter alia to reinstate the 2012 Standards and Guidelines on Reducing Maternal Mortality and Morbidity from Unsafe Abortions and the Training Curriculum for medical professionals in public hospitals.
7) Enact a Reproductive Health Law to provide a human rights-based legal framework for young people's sexual and reproductive health and include the right to access safe and legal abortion.
8) Increase the budgetary allocation to health to at least 15% as per the Abuja Declaration.
9) Integrate comprehensive sexuality education in the school curriculum.
10) Put in place a joint framework for the coordination and implementation of comprehensive sexuality education between the Ministry of Education and the Ministry of Health.
11) Repeal Sections 162, 163, and 165 of the Penal Code and decriminalise consensual same-sex conduct between adults.
12) Remove all legal, policy, and structural barriers that impede the provision of sexual and reproductive health services, in particular against adolescent girls, young women, and members of key populations more vulnerable to HIV, and implement comprehensive human rights-based programmes in this area.
13) Strengthen the meaningful and inclusive participation of young people in decision-making processes.
14) Collect and analyse disaggregated data on sexual and reproductive health indicators for informed decision-making.