

## Introduction

1. This submission by the Girls Not Brides Kenya National Partnership (GNB Kenya) on the Universal Periodic Review (UPR) 4<sup>th</sup> cycle in Kenya provides an overview of the progress, challenges, and recommendations regarding Child marriage and Female Genital Mutilation/Cutting (FGM/C) in Kenya since the previous UPR 3<sup>rd</sup> cycle. This submission is made following interactive discussions consultations with GNB Kenya member organizations together with representatives from Government ministries, departments and agencies to take stock of progress on the implementation of the 3<sup>rd</sup> cycle UPR recommendations to Kenya on ending FGM/C and child marriage. These sessions took place between June -July 2024.
2. This submission focuses on 2 key issues:
  - i. **Policy barriers and lack of data to track Child marriages.**
  - ii. **Policy and legislative gaps in addressing prevalence of Female Genital Mutilation/Cutting (FGM/C).**
3. Child marriage and Female genital mutilation (FGM/C) are a global problem that impedes the development, wellbeing and life options of affected individuals, their families and communities at large. Child marriage and FGM/C are a human rights abuse .and manifestations of deeply rooted gender inequalities, social norms and poverty. The United Nations Convention on the Rights of the Child (UNCRC) Article 24 3 calls upon state parties to take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children. The number of women and girls at risk of being cut or subjected to early and or forced marriage is alarming and that is why Target 5.3 of the Sustainable Development Goals SDG 5 seeks to eliminate all harmful practices, such as child marriage and FGM/C, by the year 2030.

### Issue 1 Policy barriers and lack of data to track Child marriages

4. Kenya is home to over 4 million child brides; 1 in 4 young women were married or in union in childhood. 1.1 million were married or in union before the age of 15 while 4.2 million were married or in union before the age of 18 years.<sup>1</sup> This creates a situation where child marriage flourishes unchecked. The consequences of child marriage are devastating. Girls forced into marriage are more likely to experience teenage pregnancy, drop out of school, and face increased violence, HIV infection, and maternal and child mortality. Their health suffers from reproductive complications, and their economic opportunities are severely limited, hindering both their own well-being and national development. Young women and girls also face limited access to sexual reproductive information and services.
5. National Action Plan to End Child Marriage: The Government of Kenya has yet to finalize and implement a draft national action plan on ending child marriage in Kenya in

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<sup>1</sup> UNICEF: Child marriage in Eastern and Southern Africa. A statistical overview and reflections on ending the practice. <https://data.unicef.org/topic/child-protection/child-marriage/>

line with recommendations made to Kenya during the 3<sup>rd</sup> UPR cycle in 2020 (recommendations Nos 142.33 - Canada and 142.34 – Norway),<sup>2</sup> which it accepted. The State Department for Gender developed a draft action plan to end child marriage in 2020. However, after concerns were raised on whether or not this was within their mandate - or that of the Directorate of Children's Services - the draft was referred back to the Inter-Ministerial Committee on Harmful Cultural Practices. The Directorate of Children's Services is currently spearheading the development of a draft national strategic framework for preventing and responding to child marriage, female genital mutilation and other harmful practices which is still a work in progress.

6. Restricted access to sexual and reproductive health and rights: Girls forced into marriage are more likely to experience teenage pregnancy, drop out of school, and face increased violence, HIV infection, and maternal and child mortality. Their health suffers from reproductive complications. Despite the above, the National Reproductive Health Policy 2022-2032 excludes young women and girls below the age of 18 from accessing or receiving critical reproductive health care services or information and imposes unreasonable requirements on parental consent prior to the provision of reproductive health services all of which will constitute additional barriers for adolescents and young people attaining the highest standard of health. Access to SRH services are critical to ensuring young women/ adolescent girls can access treatment for STIs, to prevent pregnancies, and to ensure pregnant adolescent girls/ young women, as well as young mothers, have full access to maternal, newborn and child healthcare.
7. Lack of data: There is a lack of updated national and county specific statistics on child marriage to inform programmatic and legal interventions. For instance, in the 2022 Kenya Demographic Health survey, there was no data on child marriage prevalence in the counties, yet similar statistics were available for other harmful cultural practices such as FGM and teenage pregnancy. There is need to conduct surveys on a frequent basis to provide the much-needed up-to-date data on child marriages that can allow for detailed within country analysis, especially at the county level. The objectives of these surveys would be to examine community members' knowledge, beliefs, attitudes and practices associated with child marriage, assess changes in social norms associated with child marriage and provide recommendations for targeted interventions.

### **Summary of the existing legal and policy framework**

8. Article 53 (1) (d) of the Constitution of Kenya 2010 provides that every child has the rights to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment<sup>3</sup>. The enactment into law of the Children Act 2022 was a significant milestone in ensuring children continue to enjoy their rights

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<sup>2</sup> Report of the Working Group on the Universal Periodic Review, Kenya 15 June–3 July 2020: <https://undocs.org/A/HRC/44/9>

<sup>3</sup> <https://klrc.go.ke/index.php/constitution-of-kenya/113-chapter-four-the-bill-of-rights/part-3-specific-application-of-rights/219-53-children>

and strengthening the legal framework against child marriage. Section 23 provides that “(1) No person shall subject a child to— (c) child marriage; Other legal child marriage prohibitions are included in the 2014 Marriage Act. Section 2 of the Act defines a child as “an individual who has not attained the age of eighteen years”; Section 4 provides that “A person shall not marry unless that person has attained the age of eighteen years”, whereas Section 87 states that “Any person who marries a person who is below the minimum age commits an offence and shall on conviction be liable to imprisonment for a term not exceeding five years or a fine not exceeding one million shillings or to both.”

9. There are significant barriers and challenges in the legal enforcement of laws prohibiting child marriage. These include inadequate knowledge of the laws and their requirements by the general public; victims’ difficulties in reporting perpetrators of child marriage; community members’ fear of attack and retaliation and hence reluctance to testify in court on cases of child marriage; and lack of human and financial resources to enable the enforcement of laws.<sup>4</sup>

### **Progress since the last UPR review**

10. During the 3<sup>rd</sup> UPR cycle in 2020, Kenya committed to the finalization and implementation of the draft national action plan on ending child marriage in the implementation of three recommendations namely 142.33: Canada, 142.34: Norway, 142.35: Chile in addition to 142.115: made by Spain on implementing the strategy to eradicate forced child marriage. These recommendations have not been implemented. The Government has not taken any steps to finalize and implement the draft national action plan.
11. Recommendations 142.107: continue efforts to eradicate all harmful practices against women and girls, including female genital mutilation and child, early and forced marriage, and to combat violence against women, including by enhancing access to justice (Italy); 142.117: adopt the necessary measures aimed at eliminating harmful practices, such as child and forced marriage, female genital mutilation and others (Ukraine). As stated in paragraph 10 above, these recommendations have not been implemented with reference to child marriage because the draft national action plan is still pending.
12. Recommendation 142.54: redouble efforts to provide training to medical, security and justice professionals on the application of its criminal law punishing harmful practices such as child, early and forced marriage, female genital mutilation, and girl “beading” (Brazil); this recommendation is in the process of being implemented because capacity building of duty bearers on gender based violence has been done at sub-county level in 7 counties: Nairobi, Kitui, Kilifi, Narok, Homabay, Kwale and Turkana<sup>5</sup>.
13. Recommendation 142.97: continue efforts to end female genital mutilation and harmful practices such as child marriage, in close collaboration with civil society (Austria). This

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<sup>4</sup> [Baseline Study Report on Female Genital Mutilation Cutting and Child Marriage.pdf \(unicef.org\)](#)

<sup>5</sup> [ThirdCycleMid-term\\_Kenya.pdf \(ohchr.org\)](#)

recommendation has been implemented. Civil society organizations are part of the National Committee on Ending Harmful Practices and are working in close collaboration with the Directorate of Children's Services in the development of a draft national strategic framework for preventing and responding to child marriage, female genital mutilation and other harmful practices.

### **Recommendations**

14. The Government of Kenya should finalize and implement the National Action Plan towards ending Child Marriage in Kenya backed by dedicated and sufficient multi-year funding allocated under the Government budget.
15. The Government of Kenya should continue efforts to provide training to medical, security and justice professionals on the application of its criminal law punishing harmful practices such as child, early and forced marriage.
16. The Government of Kenya should undertake periodic research to collect data on and address county specific prevalence and drivers of child marriage and create a central repository of information on the prevalence of child marriage and girls at risk.
17. The Government of Kenya should review and address legal, policy, and structural barriers that hinder access to sexual and reproductive health information and services for women and young girls, including through the removal of parental consent and age restrictions from the National Reproductive Health Policy 2022-2032.

### **Policy and legislative gaps in addressing prevalence of Female Genital Mutilation/Cutting (FGM/C).**

18. Figures obtained from the 2022 Kenya Demographic Health Survey indicate that whereas national prevalence of FGM/C has dropped from 38% in 1998 to 21% in 2014 and 15% in 2022, progress has been uneven, with very high prevalence in some counties, notably Wajir 97%, Mandera 96%, Marsabit 83%, Garissa 83%, Samburu 76%, Isiolo 66%, Tana River 60%, Narok 51%, and West Pokot 44%.<sup>6</sup>
19. There have been numerous successes in Anti-FGM efforts in Kenya including the passage of the Prohibition of FGM Act of 2011<sup>7</sup>, Sessional paper No.3 of 2019 on the National Policy for the eradication of FGM<sup>8</sup>, awareness raising, and increased dialogue, which are thought to have reduced the prevalence of FGM. However, there are also emerging challenges such as some families and communities performing FGM in secret, for instance by doing so at night, across a national border, at a non-typical time of year (outside the 'circumcision season' in December/ January), or by cutting girls at a younger

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<sup>6</sup> 2022 Kenya Demographic Health Survey

<sup>7</sup> [Prohibition of Female Genital Mutilation Act 32 of 2011.pdf \(kenyalaw.org\)](https://kenyalaw.org/kenya-law-library/prohibition-of-female-genital-mutilation-act-32-of-2011)

<sup>8</sup> <https://gender.go.ke/wp-content/uploads/2019/10/NATIONAL-POLICY-FOR-THE-ERADICATION-OF-FEMALE-GENITAL-MUTILATION-.pdf>

age so they are not able to report (refer to Annex 1: Review of the Prohibition of Female Genital Mutilation (FGM) Act of 2011 – Draft report).

20. Continued prevalence is also tied to gaps in laws and policies and emerging challenges in enforcing them. In 2017, a medical practitioner petitioned the Constitutional Court of Kenya for declarations that the government through the Prohibition of FGM Act of 2011 violated the rights of women to choose to practice FGM, which, the petitioner considered to be a particular aspect of their culture. In 2021, the Constitutional Court dismissed the petition in favour of the Government of Kenya and made recommendations that the Attorney General should forward proposals to the National Assembly to consider amendments to section 19 of the Prohibition of FGM Act, with a view to prohibiting all harmful practices of FGM and closing legal loopholes as set out in the judgment.<sup>9</sup> However, gaps in the law still persist, as explained further in the section below.

### **Summary of the existing legal and policy framework**

21. Kenya has criminalized FGM through the Constitution of Kenya (2010), the Prohibition of Female Genital Mutilation Act (2011) and the Children’s Act (2022). However, gaps have been identified in the Prohibition of Female Genital Mutilation Act 2011 (refer to Annex 1: Review of the Prohibition of Female Genital Mutilation (FGM) Act of 2011 – Draft report). These include:
- Section 2 of the Prohibition of FGM Act of 2011 does not fully capture all types of FGM/C. The Act only provides for 3 types. The definition of FGM needs to be reviewed to include type IV FGM.
  - Under Section 4 of the Act, there are several stakeholders involved in the fight against FGM, yet they are not part of the Anti-FGM Board<sup>10</sup> e.g. the Ministry of Interior, Ministry of Social Protection.
  - Under Section 19, the definition of medical practitioner is restricted to only medical doctors. Medical evidence /examination from “medical practitioners” that do not meet the strict definition of “medical doctors/officers” is therefore not covered, including from clinical officers, and nutritionists as defined by the Ministry of Health.
  - Section 19 of the Act does not provide different types of sentencing for different types of FGM. There is need to have proportionality in sentencing that reflects the gravity of the procedure for each type of FGM/C.
  - Section 20A presumes that FGM/C is always conducted by a third party and omits the offence of mutilation of one’s own genitalia.

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<sup>9</sup> <https://kenyalaw.org/caselaw/cases/view/209223/>: Constitutional Petition No. 244 of 2019 – “*Dr. Tatu Kamau Vs Attorney General*”,

<sup>10</sup> <https://www.antifgmboard.go.ke/> The Anti-Female Genital Mutilation Board (herein after referred to as “the Board”) is a semi-autonomous government agency that was established in December 2013.

### Progress since the last UPR review

22. During the 3<sup>rd</sup> Cycle review, in 2020, Kenya accepted 23 recommendations made by peer states<sup>11</sup> towards ending FGM/C.
23. GNB Kenya national partnership believes that recommendations 142.54: Brazil, 142.64: India, 142.95: Zimbabwe, 142.96: Angola, 142.97: Austria, 142.98: Belgium, 142.99: Burkina Faso, 142.101: Cape Verde, 142.102: Eritrea, 142.103: France, 142.104: Georgia, 142.105: Ghana, 142.107: Italy, 142.108: Maldives, 142.110: Nepal, 142.111: New Zealand, 142.112: Costa Rica, 142.114: Senegal, 142.115: Spain, 142.116: Sweden, 142.117: Ukraine and 142.133: Afghanistan have been partially implemented due to ongoing implementation of sensitization and other programmes, including policy and legislation on FGM/C listed below in paragraph 24.
24. Positive developments include<sup>12</sup>;
- the establishment of vibrant youth networks across all the 22 FGM hotspot counties. This was actualized by launching Youth Anti-FGM networks and University and Colleges conferences.
  - high level engagement with cultural leaders, elder and Islamic scholars.
  - the establishment of 22 County Anti FGM Steering Committees whose role is to coordinate Anti-FGM campaigns in those counties.
  - the development of a manual for training Anti-FGM champions (2022).
  - the publication of a manual for the eradication of medicalization of FGM (2021),
  - male engagement guidelines launched and published in 2022,
  - tool kit for journalists and editors for reporting on FGM developed and launched in 2021,
  - launch of Youth Anti FGM networks in all the 22 FGM hotspot counties,
  - launch of cross-border Anti FGM action plan which targets Kenya, Uganda, Tanzania, Somalia and Ethiopia in 2021.

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<sup>11</sup> <https://undocs.org/A/HRC/44/9> 142.54: Brazil, 142.64: India, 142.95: Zimbabwe, 142.96: Angola, 142.97: Austria, 142.98: Belgium, 142.99 and 142.100: Burkina Faso, 142.101: Cape Verde, 142.102: Eritrea, 142.103: France, 142.104: Georgia, 142.105: Ghana, 142.107: Italy, 142.108: Maldives, 142.110: Nepal, 142.111: New Zealand, 142.112: Costa Rica, 142.114: Senegal, 142.115: Spain, 142.116: Sweden, 142.117: Ukraine, 142.133: Afghanistan.

<sup>12</sup> Report of the Auditor General on the Anti-Female Genital Mutilation Board for the Year ended 30<sup>th</sup> June 2022.

[http://www.parliament.go.ke/sites/default/files/2023-04/Report%20of%20the%20Auditor%20-%20General%20on%20Anti-%20Female%20Genital%20Mutilation%20Board%20for%20the%20Year%20Ended%2030%20June%202022\\_compressed.pdf](http://www.parliament.go.ke/sites/default/files/2023-04/Report%20of%20the%20Auditor%20-%20General%20on%20Anti-%20Female%20Genital%20Mutilation%20Board%20for%20the%20Year%20Ended%2030%20June%202022_compressed.pdf)

<sup>13</sup> [Documentaries – Ministry of Public Service, Performance and Delivery Management \(psyg.go.ke/documents-2/\)](https://psyg.go.ke/documents-2/): Samburu Elders Declaration to end FGM

- Kisima declaration of the Samburu Elders to end FGM (2021)<sup>13</sup>. On county-specific action plans and policies, Tharaka Nithi launched a GBV Policy in 2022; Garissa County launched a Gender Policy in April, 2022 while Narok, Garissa, Wajir, Migori, Kisii and Tana River counties adopted costed action plans to end FGM.
- The number of cases of female genital mutilation reported, prosecuted and convicted increased from 2020 to 2023. During the 2020/2021 financial year, 580 cases were reported, prosecuted and convicted by the Office of the Director of Public Prosecutions, compared with 515 cases and 741 cases during the 2021/2022 and 2022/2023 financial years<sup>14</sup>.
- the Anti Female Genital Mutilation Board sensitized close to 24,000 duty bearers and resource persons on the negative effects of female genital mutilation and on the Prohibition of Female Genital Mutilation Act 2011. The duty bearers sensitized include 300 medical practitioners, 60 judicial officers, 700 police officers, 4,400 National Government Administration Officers, and 18,540 community members and other resource persons<sup>15</sup>.

**Recommendations:**

25. The Government of Kenya should amend the Prohibition of FGM Act 2011 with a view to prohibiting all harmful practices of FGM and closing the gaps in the law under Sections 2, 4, 19, 20A, 21, 22, 23, 27, 27B, 28 (1), (2), and 29 as set out in the judgment of Constitutional Petition 244 of 2019.
26. The Government of Kenya should support hotspot counties to develop fully-costed policies and strategies towards ending FGM with specific reference to West Pokot, Bungoma, Baringo, Elgeyo Marakwet, Bomet, Taita Taveta, Embu, Meru and Laikipia.

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<sup>13</sup> [Documentaries – Ministry of Public Service, Performance and Delivery Management \(psychology.go.ke/documents-2/\)](https://psychology.go.ke/documents-2/): Samburu Elders Declaration to end FGM

<sup>14</sup> [KNCHR 3RD CYCLE UNIVERSAL PERIODIC REVIEW \(UPR\) MID-TERM REPORT \(ohchr.org\)](https://www.ohchr.org/en/press-releases/2023/04/kenya-3rd-cycle-universal-periodic-review-upr-mid-term-report)

<sup>15</sup> [KNCHR 3RD CYCLE UNIVERSAL PERIODIC REVIEW \(UPR\) MID-TERM REPORT \(ohchr.org\)](https://www.ohchr.org/en/press-releases/2023/04/kenya-3rd-cycle-universal-periodic-review-upr-mid-term-report)