FEATURE

Language-Conscious Interpretative Approaches to Sexual and Reproductive Rights Claw-backs in Kenya

Maina Nyabuti

Introduction

Kenya's human rights corpus robustly safeguards sexual and reproductive health rights (SRHR). The Constitution of Kenya (2010), together with ratified international and regional human rights instruments as well as relevant statutes, judicial precedents, and policies, safeguards SRHR. Article 2(5) and (6) of the Constitution incorporate it as part of Kenya's laws. Article 19(3)(b) of the Constitution also recognises other rights, including SRHR, conferred by other laws. Additionally, the Bill of Rights implicitly protects SRHR through interrelated rights, such as access to abortion services, dignity, non-discrimination, privacy, conscience, and expression. Significantly, article 43(1)(a) of the Constitution explicitly safeguards the right to the highest attainable health standards, which includes reproductive healthcare services.

Kenya's framing of reproductive health care as a 'stand-alone' right departs from other constitutions in Africa, where SRHR safeguards lie within the gamut of interrelated rights. It also marks a major shift from the traditional framing of SRHR as a subset of rights (the 1968 Proclamation of Tehran). Indeed, this framing transforms Kenya's Bill of Rights into a progressive and transformative charter, paralleling section 27(a) of South Africa's Constitution and article 14 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), both of which clearly and explicitly embed reproductive health-care rights and SRHR, respectively.

However, despite these constitutional safeguards, sexual and gender minorities still experience sexual and reproductive health-care (SRH) constraints in expressing their sexual orientation, sexual characteristics and gender identities (SOGIESC) because their same-sexual conduct is criminalised and their sexualities lack full legal recognition. This facilitates their harassment by state officers, familial and societal stigma, expulsion from learning institutions, exposure to blackmail, extortion and sexuality-based violence, and poor access to SRH services (KNHRC 2012: 21, 41).

Moreover, women and girls experience insurmountable SRH constraints in accessing contraceptives and safe abortion services. Ziraba et al. (2015: 2) link high maternal mortalities in Kenya to complications arising from unsafe abortion. Of the country's 362 maternal deaths per 100,000 live births (KNBS 2015: 329), approximately 17 per cent of them result from unsafe abortions (Mutua et al. 2018: 2). A recent study reveals that maternal deaths have increased to 530 per 100,000 live births (IAHO & WHO 2023: 2).

Adolescent children also experience SRH constraints, including sexual violence and abuse, high rates of sexually transmitted infections (STI) and diseases, unintended pregnancies, and lack of full access to contraceptives and SRH information (Nyabuti 2024: 32–41). Approximately 33 per cent of adolescents are sexually active but 52 per cent of them have unmet family-planning needs, while 50 per cent lack sufficient information on SRH information (Sidze et al. 2017).

The persistence of SRH constraints despite Kenya's progressive legal framework warrants this research article. Most studies have recommended remedies based on SRH constraints' causative factors, such as socio-religious and political factors. Some have framed remedies after finding SRHR-specific laws absent or finding that existing laws contravene SRHR. Others have fashioned remedies based on the legal gaps within the SRHR laws. Few or none have examined how the language of laws can constrain SRHR. The law in this context includes the Constitution, statutes and judicial decisions.

This article thus critically examines whether the language in which progressive SRHR laws are framed and constructed constrains their realisation. After sampling some laws on access to abortion and on sexual and gender minorities and adolescent sexuality, it finds that sometimes language can claw back SRHR. The article then considers 'language-conscious' interpretative approaches for addressing language deficiencies with a view to achieving the maximum realisation of SRHR.

Access to abortion services

The abortion clause was contentious during Kenya's constitution-making process. Some opposed the 2010 Constitution on the grounds that it provides carte blanche to abortion services for women (Mwai 2017: 2). Indeed, article 26(4) of the Constitution states as follows: '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.'

Unlike the 1969 Constitution (repealed), which was silent on abortion, the 2010 Constitution, in article 26(4), safeguards women's right to access abortion services. However, its language contains deficiencies that claw back on the right's maximum enjoyment. Accessing abortion is all about women's agency and their autonomy over their bodies, yet article 26(4)'s language seems negative, restrictive and conditional.

In particular, it frames access to abortion as an exception to a non-permissibility rule. It also predicates access to abortion over 'the mother is in danger' circumstances, which are, again, determined by trained health professionals. It places trained health professionals at the centre of women's access to abortion as the authorising agents. This takes away women's agency and autonomy. Arguably, 'authorisation' is not the same as 'advice'. While a health professional's advice is necessary, it should not replace the woman's agency in accessing abortion services.

Article 26(4)'s language also appears to equate foetal life with that of a pregnant woman, thus suggesting that both have the same status and rights. If a foetus of a few weeks cannot feel pain or suffer before 26 weeks (Wise, 1997: 1112), I would suggest that a foetal life cannot be equated with the mother's life, particularly in its early weeks. In conclusion, article 26(4) of the Constitution uses language that acts as a claw-back on women's access to abortion rights to the fullest extent possible.

Nevertheless, Kenya's courts have promoted access to abortion rights by adopting 'language-conscious' hermeneutics to negotiate through article 26(4)'s claw-backs. In 2013, when the government arbitrarily withdrew *Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya*, which had been formulated to liberalise and expand access to safe abortion beyond article 26(4)'s claw-backs, the decision was challenged before the High Court in the Fida & others v AG & others case.

Here, the court fashioned 'language-conscious' interpretative approaches to expand access to abortion services. It appreciated that article 26(4) of the Constitution frames abortion as unlawful and only permits it as an exception (paras 303–304, 354). The court then adopted a 'language-conscious' interpretation to eliminate the abortion claw-backs. It profiled the language 'emergency treatment', 'life and health of a mother' and 'permitted by other laws' (para 311) and construed the phrases liberally to promote

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the full realisation of abortion rights. For instance, 'mother's health' was construed to include physical, emotional, mental and psychological dimensions (para 362), while 'emergency treatment' was construed as situations calling for necessary immediate measures by nurses and clinical officers to prevent death or a worsening medical situation (paras 356, 358). Finally, the court construed 'permissibility by other laws' to include victims of sexual offences, which include rape, defilement, and incest, as entitled to abortion services (para 372).

In another case, PAK & another v AG & 3 others, the High Court ordered Parliament to review sections 158, 159 and 160 of the Penal Code that criminalise access to and procuring of abortion services (para 85) to conform to article 26(4)'s permitted grounds for abortion. It was 'language-conscious' when it observed that the problem of article 26(4) is equating a pregnant woman's life with continued foetal development, thus making it the single-greatest impediment to medical abortion services (para 52). It then negotiated this language-based constraint by interpreting the interrelated rights of dignity and privacy as anchoring women's autonomy and agency to access abortion services (paras 53–70).

Yet despite finding sections 158–160 of the Penal Code in violation of article 26(4) of the Constitution as well as reproductive rights (paras 101–123), the court slid into claw-back language by being unclear as to whether the sections stood annulled or remained operational (para 164).

The Children Act (2022) has introduced further claw-back language that, if unchecked, could conflict with women's rights to access abortion. Section 2 of Act defines age as the actual chronological age of the child from conception. This definition treats a foetus as a child, and its language connotes that a 'child' in the womb enjoys children's rights. Citing the provision, Macharia (2023: 46–47) advocates for 'unborn child' rights protection. This effectively elevates the foetus's life to the same level as that of the pregnant mother. It contradicts the *PAK decision* and progressive comparative jurisprudence.

In this regard, Nepal's Supreme Court has reasoned that the unborn owes its existence to the mother and thus that its interests cannot supersede the mother's physical and mental well-being (*Lakshmi Dhikta v Nepal*). South Africa's Constitutional Court has stressed that the foetus cannot be treated as an individual (*Christian Lawyers Association of SA and Others v Minister of Health and Others*).

Gender and sexual minorities

Sections 162, 163 and 165 of the Penal Code (anti-sodomy laws) criminalise expressions of non-normative SOGIESC. During the constitution-making process, some delegates opposed same-sex expressions, describing them as 'Western values' and against 'public morality', while others framed same-sex expressions as part of societally evolving ideas (CKRC Report 2003: 22, 130 & 247). This culminated in a recommendation to 'outlaw same-sex marriages' but it lacked unanimous support (CKRC Final Report 2005: 119, 401 & 402).

Apparently, the contentions on same-sex expressions came up in the drafting of the 2010 Constitution. Some drafters rejected the inclusion of gay rights for fear of public rejection, while a number of Kenyans opposed the 2010 Constitution because it promoted gay rights (Orago et al. 2022: 133, 124). I thus infer that the contentions relating to same-sex expressions reached some sort of compromise. For instance, article 45(2) of the Constitution evidently departs from the recommendation to 'outlaw same-sex marriages'. It states that 'every adult has the right to marry a person of the opposite sex, based on the free consent of the parties'. Its language shows the signs of a compromise that, on the one hand, recognises only opposite-sex marriages but, on the other, deliberately avoids outlawing same-sex ones.

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With this in mind, I argue that a 'language-conscious' interpretation needs to appreciate article 45(2)'s 'language of compromise', which does not outlaw same-sex marriages. It is different, for instance, to an amendment introduced to article 31(2a) of the Ugandan Constitution to explicitly prohibit same-sex marriages. In this regard, I fault the *EG & 7 others v Attorney General* decision, in which the High Court declined to decriminalise anti-sodomy laws, relying as it did on article 45(2) of the Constitution while connoting that it outlaws same-sex marriages. The court failed to appreciate article 45(2)'s 'language of compromise' that deliberately avoids outlawing same-sex marriages. A 'language-conscious' interpretation utilises the positive language aspects of SRHR legal provisions to eliminate claw-backs.

Moreover, the Constitution contains a progressive Bill of Rights that safeguards the rights to non-discrimination, dignity, privacy, conscience, and expression (articles 27, 28, 31, 32 and 33) and, thanks to the interrelationship of these rights, promotes sexual and gender minority rights. Jurisprudence inspired by 'language-conscious' interpretations combs out SRHR constraints to promote sex and gender minorities' rights through interrelated sexual rights. For instance, the constraining language in article 27(4) of the Constitution is its failure to list 'sexual orientation and gender identity' as non-discrimination grounds. However, in adopting a 'language-conscious' approach, the Supreme Court in *NGOs Co-ordination Board v EG & 4 others* relied on the words 'including' and 'or' in the clause to read 'sexual orientation' into the prohibited list of non-discrimination grounds. It thereby promoted the maximum enjoyment of rights to non-discrimination and association for sexual and gender minorities.

Comparatively, in the *Toonen v Australia* decision, the Human Rights Committee construed non-discrimination and privacy rights under articles 2, 18 and 26 of the International Covenant on Civil and Political Rights (ICCPR), which Kenya has ratified, in such a way as to decriminalise Tasmanian anti-sodomy laws. The High Court of Antigua and Barbuda also expanded the language and meaning of freedom of expression to encompass the sexual choices of consenting adults (*Orden David & Women Against Rape Inc v AG, 2022: para 80*), while its St. Christopher and Nevis counterpart expanded expression rights to include having sexual intercourse (*Jamal Jeffers & others v AG,2022: para 76*). Finally, the High Court of Botswana in *LM v the Attorney General* (2019) held that criminalising the only mode of sexual expression for sexual minorities through anti-sodomy laws deprives them of their self-worth, thus infringing their right to dignity (paras 129–165).

Seen in this light, the language of article 45(2) of the Constitution needs to be appreciated in the context of these interrelated rights as well as their comparative jurisprudence in order to warrant a review of Kenya's anti-sodomy laws with a view to promoting sexual and gender minority rights.

In *COI & another v Resident Magistrate Kwale Court & 4 others* (2018), Kenya's Court of Appeal held that forced anal examinations of suspects to fish out forensic evidence for sodomy charges violate their dignity and privacy rights. It overturned the High Court decision that had affirmed such examinations by stating (in para 47) that

> (n)either the mouth nor the anus is a sexual organ. However, if modern man and woman have discovered that these orifices may be employed or substituted for sexual organs, then medical science or the purveyors of this new knowledge will have to discover or invent new methods of accessing those other parts of the human body even if not for purposes of medical forensic evidence, but also curative medical examination.

The High Court's language here not only constrains the SRHR of sexual and gender minorities but also reeks of homophobia. Such judicial 'language-unconsciousness' or insensitivity appears as well in other decisions on sexual and gender minorities. In 2014, the High Court delivered a progressive decision that ordered the removal of gender mark and a change of name for a transgender applicant (*Audrey Mbugua v KNEC, 2013*). It highlighted the healthcare challenges of transgender people and not only linked health rights to human dignity but also presented such persons as human beings whose values and identities are violated when they are humiliated and dehumanised (paras 7, 11). Despite these progressive pronouncements, the court exhibited bouts of constraining language.

From the outset, it adopted a tone of disdain towards the transwoman applicant by stressing that 'although the Applicant has presented himself as a female, I will for the purposes of this application refer to the Applicant as a male' (para 2). The court also employed

language that pathologises transgender persons, describing them as people with 'the misfortune to be born with physical characteristics which are congruent but whose self-belief is incongruent' (para 7, emphasis added). By comparison, the South African court avoided this kind of language while safeguarding the SRHR rights of transgender persons in prison (*September v Subramoney NO and Others, 2019*).

In *R.M. v Attorney General & 4 others* – a 2010 case that upheld intersex persons' right not to be subjected to inhumane and degrading treatment by being forced to expose their genitalia publicly to prison authorities – the High Court of Kenya backslid into the language of constraint. Throughout the judgment, it adopted, endorsed, and defined intersex genitalia as 'ambiguous'. It should be noted that the petitioners who approached these courts did so as victims of SRHR violations as well as on behalf of other sexual and gender minorities. The homo/transphobic and pathologising language thus revictimises them and constrains them from seeking court remedies.

Kenya's progressive statutes addressing sexual and gender minorities issues also contain language of constraint. One such statute is the Persons Deprived of Liberty Act (2014), which defines an intersex person as 'a person certified by a competent medical practitioner to have both male and female reproductive organs' (section 2). This definitional language not only pathologises them but also constrains their full legal recognition by conditioning their intersex state on ascertainment and certification by medical practitioners. It fails to construct and frame intersex as a natural state of being. If for purposes of designation of prison or custody facilities, the issue should be dealt with by procedural laws, regulations, and policies rather than via a substantive provision that defines who an intersex person is by predicating their identity on medical certification. This language dehumanises and deprives them of dignity.

The Children Act seems to have rectified this language constraint. It defines intersex children as children

> with a congenital condition, [in] which the biological sex characteristics cannot be exclusively categorised in the common binary of female or male due to inherent and mixed anatomical, hormonal, gonadal or chromosomal patterns, which could be apparent prior to, at birth, in childhood, puberty or adulthood (section 2).

It further safeguards their SRHR rights in regard to, for instance, registration and documentation, separate detention facilities, and 'stand-alone' children intersex rights (sections 7, 16, 21, 26, 64 and 6th schedule).

While protecting intersex children from harmful cultural practices, however, the statute adopts language that constrains the agency of a child with evolved capacities to participate in decisions about organ change or removal (section 23f). It makes this conditional based on the recommendation of a medical geneticist, language that erases the child's voice. An SRHR 'language-conscious' interpretation should ensure that the voice of the child with evolved capacity is audible. In comparative jurisprudence, the Colombia Constitutional Court has stressed the need for child consent rather than exclusive parental consent, and I add medical geneticist recommendation in corrective surgery for intersex children (Legal Grounds III 2017: 13).

Adolescent sexuality

One area that exhibits the language of SRHR constraint is that of the protection of adolescents from sexual violence and abuse. The Sexual Offences Act (2006), enacted to protect them from sexual abuse, criminalises sexual conduct with children regardless of consent and provides for deterrent punishment to offenders (sections 8–11). It thus adopts absolutist language that criminalises adolescents' consensual sexual activities.

Adolescent children technically fall within the age bracket of 10 to 19 years. So, if an 18- or 19-year-old adolescent engages in consensual sexual conduct with a 16-year-old adolescent, he or she can be charged with defilement or an indecent act and, if found guilty, be liable for minimum imprisonment of 15 years. Similarly, the language of the statute does not protect adolescents from prosecution if they are than 18 years of age and engage in consensual sex. In other words, the language in section 8 of the Sexual Offences Act erects constraints in realising adolescent SRHR.

In *CKW v Attorney General & another* (2014) decision, the High Court endorsed the criminalisation of adolescents' consensual sex (para 73) and affirmed

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prosecuting an adolescent boy (14 years) as the accused while making the adolescent girl (12 years) with whom he was engaging in consensual sex with as the victim (para 59). The court claimed that the relevant section aims at 'achieving a worthy or important societal goal of protecting children from engaging in premature sexual conduct' (paras 95–99). It hence failed to appreciate that the section's language is gender-neutral and that setting up the adolescent boy for prosecution and framing the girl as a victim was discriminatory, given that their sexual activities were consensual. Significantly, the court failed to appreciate the bigger picture – namely that exposing adolescents to the criminal justice system, especially when they do not repeat offenders, does them more harm than good.

In *Wambui v Republic* (2019), a three-judge Court of Appeal bench decried the high numbers of young men in prison (para 41) as the unfair consequence of uncritical enforcement of the Sexual Offences Act (para 1). Although the judges did not disclose whether these young men were adolescents or not, they highlighted the harmful effects of section 8 of the Act's inflexible language. The court thus recommended a review of the age of sexual consent for adolescents. Increasingly, courts such as in the POO v Director General of Public Prosecutions and another and SNN v Republic cases have started categorising consensual sex cases between adolescents within age difference of two-to-three years as 'Romeo and Juliet' cases so as to avoid punitive sentences and provide them with care and protection.

Comparative lessons from South Africa provide insights. In *Teddy Bear Clinic for Abused Children & Another v Minister of Justice and Constitutional Development & another* (2013), the Constitutional Court declared the criminalisation of adolescent consensual sex as unconstitutional. The South African parliament then decriminalised consensual sex between adolescents aged 12–16 years as well as consensual sex between adolescents with a two-year age difference (Essack & Toohey 2018: 85).

It must be appreciated that the aim of SRHR laws on adolescent sexuality is to protect adolescents and ensure that they experience positive sexual development, as opposed to leaving them vulnerable to abuse. In this regard, judicial language that constructs adolescents as adults, as in the case of *Martin Charo v Republic* (2016), equally deprives them of their SRHR and increases their vulnerability to sexual abuse. Instead of protecting the adolescent sexual abuse victim from adults, the court constructed them as 'adults' and as naughty and not deserving legal protection (paras 24, 25). It stated, '[w]here the child behaves like an adult and willingly sneaks into men's houses for purposes of having sex, the court ought to treat such a child as a grown-up who knows what she is doing'.

Another area rife with the language of constraint is adolescent access to reproductive healthcare information and services. Section 16 of the Children Act safeguards children's right to reproductive healthcare services. However, it introduces a proviso that 'reproductive health services to children shall be subject to the express consent of the parent or guardian'. The introduction of mandatory third-party authorisation and parental consent is a claw-back that constrains adolescents with evolved capacities from accessing reproductive healthcare services. While parental authority is necessary in children's affairs such as access to contraceptives and the elimination of parental control erodes parental rights, the use of such absolutist language is fraught with danger.

In comparative jurisprudence, the decision in the English case, *Gillick v West Norfolk and another* (1984) developed a flexible approach worthy of consideration. First, a health provider must start from the premise that parental authority is necessary for an adolescent patient who wants access to reproductive healthcare

services, with the exception of emergency situations, court orders, or where there is evidence of parental neglect or abandonment. Secondly, if there is no parental authority (outside exceptions), the healthcare provider must explain to the adolescent patient the need to involve the parent. Thirdly, if the patient declines to involve parents for consent, the healthcare provider shall make a clinical judgment on whether to allow the patient to access the sexual and reproductive healthcare service, particularly where the patient may engage in sexual activity with negative outcomes.

I do not advocate for a copy-paste application of this approach to the Kenyan context. My argument is that 'language-conscious' interpretations of the proviso ought to consider permissive circumstances beyond the absolutist language claw-backing adolescents with evolved capacities and those with irresponsible or negligent parents from accessing reproductive healthcare services.

With respect to access to reproductive health-care information, section 16(4) of the Children Act also introduces the phrase 'age-appropriateness' in relation to access to reproductive health-care information and services. This language conforms with the principle of evolving capacity, which does not introduce age caps to children's participation in decision-making and consent, but rather, it is determined according to their level of maturity. A language-conscious interpretation of the section permits reproductive healthcare providers to allow adolescents to access appropriate information depending on their individual level of maturity (Coughlin 2018: 138).

Conclusion

The article sought to demonstrate that sometimes language in laws constrains the realisation of SRHR. It sampled some laws on access to abortion, on gender and sexual minorities, and on adolescent sexuality to demonstrate how such claw-back language works. It pointed out that the constitutional clause on access to abortion is laced with constraining language and that this calls for a 'language-conscious' interpretation to promote abortion rights. The article also argued that the Constitution employs the 'language of compromise' in not outlawing same-sex marriages and that this fact should be leveraged to expand the rights of sexual and gender minorities and review anti-sodomy laws.

Finally, it drew attention to the absolutist and protectionist language of the Sexual Offences Act. This criminalises adolescent consensual sex and exposes adolescents to the harms of the criminal justice system, all of which are antithetical to their SRHR and positive sexual development. In addition, the article pointed out the claw-backs in the Children Act that constrain adolescents' right to access reproductive healthcare information and services. The article also noted several examples of judicial language that not only constrain the realisation of SRHR but also revictimise sexual abuse victims and hinder gender and sexual minorities from approaching courts for justice.

The article thus demonstrates the need for 'language-conscious' interpretations and remedies that address constraining language in laws and help ensure the maximum realisation of SRHR.

Maina Nyabuti is a prosecution counsel in the Office of Director of Public Prosecutions, Kenya. *He writes in his personal capacity.*

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