

LEGAL LITERACY FOR SEX WORKERS IN KENYA:

A TRAINING MANUAL FOR KESWA
PARALEGALS



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SAFEGUARDING LEGAL RIGHTS FOR SEX WORKERS

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The practical experience gained with this tool is extremely important for the continued application of this manual. We would therefore welcome all users to send their comments and suggestions for improvements during periodic reviews.

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A high-resolution image of a human hand, palm facing forward, with a vibrant red color. The skin texture is visible, showing fine lines and creases. The hand is positioned centrally against a plain white background. Overlaid on the palm is the text 'ONLY RIGHTS CAN STOP WRONGS' in a bold, white, sans-serif font. The text is arranged in three lines: 'ONLY RIGHTS' on the top line, 'CAN STOP' on the middle line, and 'WRONGS' on the bottom line. The lighting is even, highlighting the contours of the hand and the fingers.

**ONLY RIGHTS
CAN STOP
WRONGS**

INTRODUCTION

1.0

Sex work refers to the consensual exchange of sexual services between adults for money or goods. The trade involves female, male, or transgender individuals, and can be undertaken in a variety of venues, such as working as escorts, from private homes, in strip clubs, in brothels, and seeking clients in public locations. Prostitution is the term used by Kenyan law to describe the exchange of sexual activity for monetary payment.

The Kenya Most At Risk Population National estimation consensus report 2013 conducted by NASCOP estimates the size female sex workers in Kenya to be around 133,675.

Sex workers are identified Key Populations, along with men who have sex with men and people who inject drugs are identified as Key Populations within the HIV response. They are socially marginalized, often criminalized and face a range of human rights abuses that increase their vulnerability to HIV infection. Sex workers in Kenya face violence and human rights violations from clients, law enforcement officials, health care service providers and the larger part of the society as a result of stigma, discrimination and negative perceptions associated with sex work. Criminalization of sex work restricts the rights of a sex worker to access the formal justice system and limits their access to quality affordable legal services. Sex workers also experience numerous challenges in their access to health care services. The National HIV and AIDS Stigma and Discrimination Index Report recommends creating awareness of existence of legal frameworks and institutions, that promote access to social justice and strengthening mechanisms of legal redress and speedy justice. Legal empowerment of sex workers will enable them address human rights violations; ultimately ensuring they are able to access both the legal and health services that they require.

Community paralegals play an essential role in assisting communities in accessing justice. Their role is to inform people of their rights under the law; to help them to assert and obtain those rights; to negotiate on their behalf; and where necessary, to contact a lawyer if they face difficulties or challenges. Accessing justice for sex workers goes beyond access to the courts and law enforcement; community paralegals would be particularly beneficial to individuals seeking guidance on legal issues that need not escalate to the police or courts. Alternatives for dispute settlement should be considered before litigation.

Adequate training is essential for paralegals to keep them updated with relevant laws and changes in legal provisions and procedures. KESWA has developed this training manual as a tool to scale up quality, affordable and timely legal services to the community if sex workers in Kenya.

1.2 Purpose of this Manual

The broad objective of this manual is to standardize and enhance human rights knowledge and legal awareness on key issues impacting on the rights of sex workers in Kenya. This manual seeks to provide all-inclusive training to community paralegals to assist peers in resolving everyday issues, identify right violations, assist when they are confronted by potential rights abuses and seek redress where their rights have been abused.

The Training Manual is intended to be a practical and flexible instructional training document. Each module can stand alone or be used in whole or part, depending on the target training audience and can be adapted to specific situations depending on the needs of trainees. The manual will enhance both community paralegals' skills and legal knowledge, thereby providing a better quality and uniform standard of service provided to poor and vulnerable communities. However, a five-day training program is essential for effective delivery of the complete curriculum.

1.3 Who can use this manual?

It is to be used by the Kenya Sex Workers Alliance (KESWA) to provide basic legal information to identified paralegals who will offer legal 'first aid' to victims of human rights violations. It is structured in such a way that the trainees and other CBOs implementing interventions for sex workers.

1.4 How to use the manual

Trainers will use the manual as reference material in training other members of the target group or simply use it as a reference book while offering legal advice as part of their work. KESWA has links to legal practitioners who are sensitized to offer specialized services to key populations. Users can contact KESWA for referral to a collaborating lawyer for additional legal support where necessary.

1.5 Methodology

The overall methodology will be very practical and participatory. Various teaching and learning methods will be used including lectures, small group discussions, case studies, and demonstrations.

1.6 What do paralegals need to know?

Law in itself is quite broad. Unlike lawyers who have to know every single aspect pertaining to their area of practice, community paralegals only need to know that which is important to them and the communities they serve - hence the "need to know concept" informed the modules contained in this manual. The manual ensures that paralegals are trained on what is important to them and not burdening them with bulky complicated legal knowledge that is irrelevant or inapplicable to them. The modules are informed by evidence-based legal issues documented in various publications as significantly affecting sex workers in Kenya.



UNDERSTANDING THE CONCEPT OF PARALEGALS

2.0

2.1 Who is a Paralegal?

A paralegal is a community-based individual who has basic knowledge of law and its procedures, and has the necessary motivation, attitudes and skills to:

- i) conduct educational programmes to bring disadvantaged people to the awareness of their rights; inspire and support people to enable them demand their rights;
- ii) give advice and help solve basic legal and social problems at community level;
- iii) assist in securing health and essential services through reconciliation in matters of dispute;
- iv) conduct preliminary investigations in cases which need to be referred to a lawyer;

- v) assist the lawyer with written statements, required evidence and other information relevant to the case.

2.2 What are the roles of a paralegal?

As a trained paralegal, you will be expected to perform the following functions:

- i. Human Rights education and Awareness Raising on the Law:** creating awareness among people about their rights, as well as imparting information on specific laws concerning them
- ii. Legal Advice:** helping people in your community to understand the nature of the problems they face and to enable them to think of realistic solutions to these problems
- iii. Resolving Disputes:** encouraging community members to settle their disagreements amongst themselves. Paralegals help community members solve problems through techniques that encourage resolution without necessarily going to court.
- iv. Providing local solutions:** providing immediate or initial and practical solutions in emergency situations
- v. Organizing collective action and advocacy:** working with relevant advocacy groups to bring the problems faced by sex workers and others in their communities to the attention of policy makers
- vi. Networking:** Establishes links with other organizations, groups and individuals in order to generate support for the problems faced by the community he or she is assisting
- vii. Identifying, Monitoring and Documenting cases:** Paralegals provide a useful resource in the identification of human rights violations. Paralegals can support in the investigation and follow-up of reported cases supporting organizations as well as law enforcement officers. Finally, they work as a link between the community and lawyers, where required.

2.3 What skills are required by a community paralegal?

A competent paralegal should have the following skills in order to succeed in performing their tasks:

- i. Legal skills:** Paralegals must have some basic knowledge of the various aspects of the law affecting the community they serve.
- ii. Reading and Writing skills:** A paralegal should be able to read and write clearly so that they can be able to take notes when talking with clients to document cases and develop reports of activities they are involved in. They should also be able to quickly learn how to prepare and review basic legal documents.
- iii. Communication skills:** Paralegals must present their messages in a simple manner which can be understood by others particularly those in the community they serve. They

should be able to communicate both orally such as during a meeting or phone call, or in writing in a brief, letter, or email.

iv. Counseling skills: A paralegal must be in a position to provide sound advice and proper counseling, to enable the community or an individual to deal with a problem through a particular course of action.

v. Negotiating skills: Paralegals may be called upon to negotiate with authorities for and on behalf of community members concerning problems they face

vi. Basic Computer and Technology skills: As a KESWA paralegal based at community level, you will need to keep in touch with KESWA on a regular basis to share information on activities, cases, access and share documents. One will need to know how to read, write and send emails sometimes with documents and pictures from the field. This may also be done using mobile applications and use of social media platforms.

vii. People Skills: Community paralegals will always be dealing with people. This requires that you are not only comfortable around people of various characters but also able to make sure those people feel comfortable around you. As a paralegal working mostly with sex workers, you must be very knowledgeable of their street language, culture and lifestyle so that your solutions are realistic and do not expose them to increased risk.

viii. Analysis and problem-solving skills: A good paralegal should have good logic skills (proper reasoning and clear-headed judgment) to analyze arguments and be able solve problems in a quick and efficient manner that is acceptable to those involved.

2.4 How should a paralegal conduct themselves while performing their duties?

Ethics describes the conduct and proper behavior that is required of a paralegal in performing their duties. Proper conduct required of a community paralegal includes:

i. Proper identification: A paralegal must always remember that he/she is not a lawyer and as such cannot undertake work that entirely requires a qualified lawyer or advocate. A paralegal must therefore never misrepresent himself or herself as lawyer or advocate.

ii. Maintain Confidentiality: A paralegal should be able to keep information about the client private. Client information must never be discussed with a third party unless there is need for such disclosure and you have permission from the client.

iii. Be Impartial: A paralegal must always be neutral and independent while solving disagreements. As a paralegal you should avoid handling cases in which you have a personal direct interest so as not to run the risk of taking sides. Where there is risk of bias, the matter can be referred to another paralegal.

iv. Promote Fairness and Justice: Always be fair in your decisions. Do not apply your personal beliefs and emotions

in the decisions you make or advice that you give. The basis of your decisions should be to encourage fair and just outcomes for those involved. All actions should be informed by the correct legal position

v. Be willing and able to volunteer: Paralegals are largely volunteers who use the training and skills provided to them to benefit their peers and communities free of charge.

2.5 How will paralegals be useful to the sex-workers' communities in Kenya?

Developments in the HIV response that introduce new concepts (such as targeted interventions for key population), differing from those by which most people are used, may sometimes result in considerable resistance. This may result in numerous violations against sex workers within the communities they live. This makes it difficult for sex workers to demand their rights. The Constitution of Kenya, 2010 contains a broad bill of rights that can be applied to safeguard the rights of sex workers. Paralegals will provide targeted rights education and legal awareness to challenge outdated legal and social practices that hinder effective HIV, SRHR and other public health interventions for sex workers in Kenya.

For the community of sex worker, paralegals will offer many distinct advantages, including the following:

- Community-based paralegals among sex workers can focus on the justice needs of the entire community that they live in
- Community-based paralegals among sex workers will help resolve issues much faster and with minimal costs
- Community-based paralegals will have specific knowledge and better understanding of the challenges that reflect widespread injustices or human rights violations among the community they serve
- They will provide tailored solutions to legal problems (some of which do not require involvement with the formal justice system) by applying creative strategies

Paralegals who will often be identified from well-respected and trusted community peer-educators provide an efficient sustainable means of incorporating rights awareness as a component of holistic service delivery within peer-led initiatives for sex workers in Kenya.

Exercise

Identify the possible challenges that you may experience as paralegals providing services mainly to sex workers in your area. Try to propose ways in which you and others can work around or overcome these challenges.

BASICS OF THE LEGAL SYSTEM IN KENYA

3.0

3.1 What is Law?

Laws are the rules and regulations that guide the conduct a particular society. The legal system refers to the mechanism in which those laws are understood, interpreted, applied and enforced. The legal system in Kenya consists of the following:

(1) **The Constitution** – In Kenya, the Constitution of Kenya 2010 is the supreme law of the land. This means that it is the highest and most important law in Kenya. It sets out how the country should run, outlines the rights of the people and the role of the government and other institutions in the country.

(2) **National and County Laws** – The Fourth Schedule of the Constitution of Kenya 2010, describes the separate powers and functions of the National and County governments. Law-making power is exercised at these two levels for the specified powers and functions.

At national level, law making is conducted by Parliament consists of the National Assembly and the Senate. The legislative process through which bills become law involves one or both houses of the Parliament, depending on the issue under consideration. Bills not affecting the function of county governments are considered only in the National Assembly. This is because the primary function of the Senate is to protect the interests of the county governments within the national government. At county level, each of the 47 counties has a County Assembly, which may make any laws that are necessary for the County.

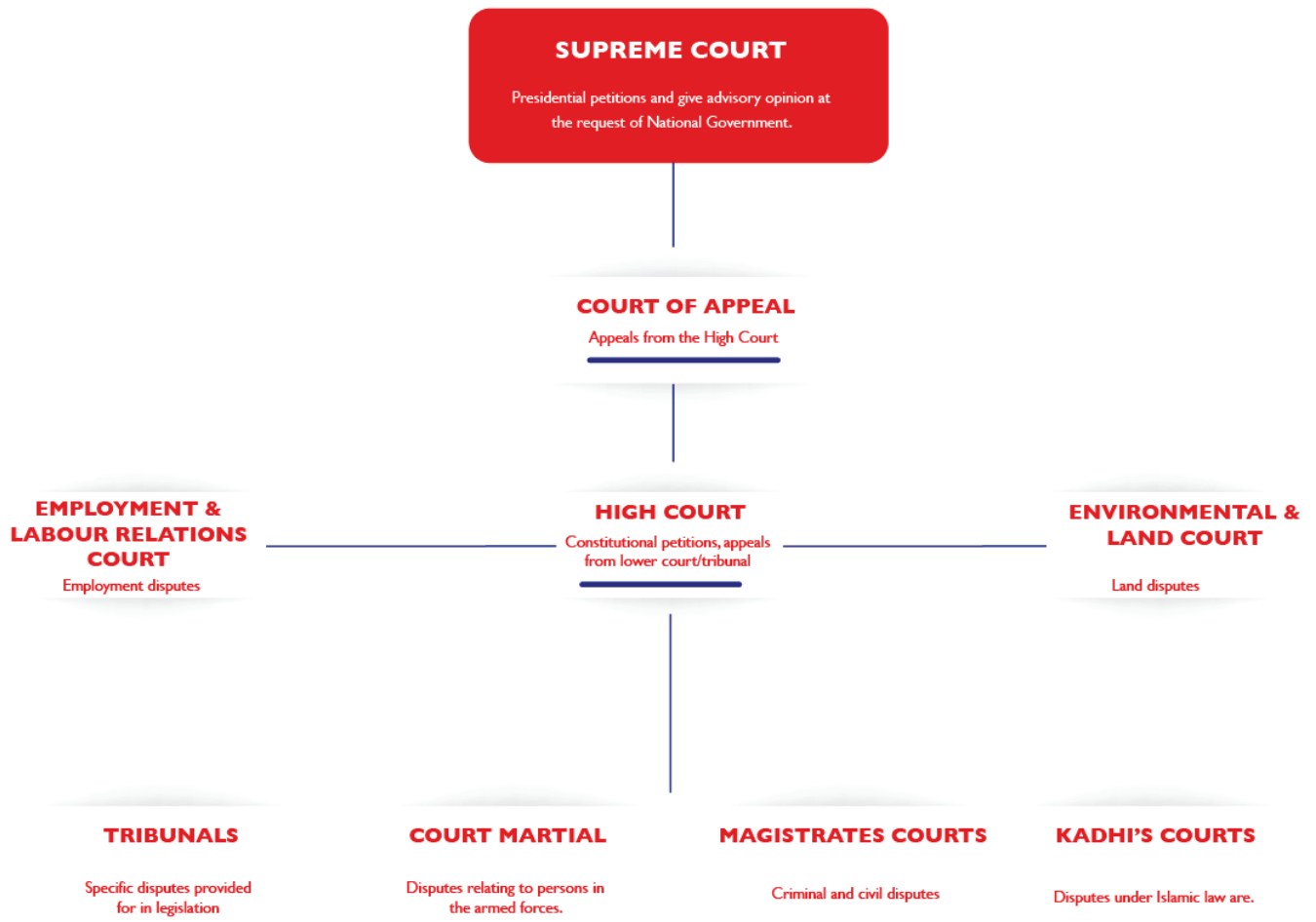
Summary of the law making process

When a law is being developed, it starts off at a draft stage where it is referred to as a bill. It goes through various stages where it is debated upon and revised for accuracy. Once finalized and passed by parliament, the approval of the president and his signature makes it law and it is thereafter called a Law/Statute. Nothing can be included in an Act of Parliament that contravenes (disregards) what is written in the Constitution.

Public participation is a Constitutional requirement of the law making process in Kenya. It is crucial for the community of sex workers to get involved in the law making process on issues that directly affect them at both National and County level.

(3) **The courts** –The system of courts in Kenya; referred to as the judiciary, has the role of interpreting and applying laws. The nature of the case ultimately determines where a case will be filed and heard.

The main differences are summarized in the table below:



(4) **Personal/Customary laws**– These originate from religious and cultural practices. They regulate relationships between members of that particular community or religious group.

Examples of religious practices: the seventh day Adventists right to worship on Saturday, the Muslim right to fast, etc.

Examples of cultural practice: rites of passage ceremonies like circumcision, the dowry (bride-price) ceremonies, etc. Just like formal laws, any customary practices that contravene (disregards) what is written in the Constitution are invalid.

3.2 What determines how the law is applied?

It is very important to identify the nature of the issue you are dealing with. The legal system in Kenya is generally divided into two types of cases; civil and criminal.

Criminal cases are crimes against the state, and thus are prosecuted by the government against the offense committed. In such a proceeding, the State prosecutes a person for committing a crime on behalf of a member or members of the public.

Civil cases, on the other hand, generally are considered disputes between people or businesses related to something that's owed and is limited to an agreement or understanding or a duty owed between themselves.

| CIVIL CASES | CRIMINAL CASES |
|--|--|
| Are disagreements an individual, an organization, a company or a corporation against another about something or a duty owed | Is an offense against the state, or crime against society therefore must first be reported at the nearest police station |
| Is filed in court by the person who has been wronged, and the person has the duty to prove their case | Is filed in court by the government and it is their duty to prove the case on behalf of the person who has been wronged |
| The party complaining is called the plaintiff and the party responding is called the respondent | The case is filed by a prosecutor against an accused person; referred to as defendant. However, children accused of a crime are called Minor offenders |
| Children involved in civil cases have to be represented by an adult who is their guardian. | A child who is involved in a criminal case on suspicion of committing a crime is referred to as a minor offender. |
| The object of civil law is to right a wrong; the wrongdoer is not punished, he only suffers so much harm as is necessary to make good the wrong he has done to another. The person who has suffered gets a definite benefit from the decision. | The main object of criminal law is to punish the wrongdoer; to discourage him and others not to commit same or similar crimes, to reform him if possible and perhaps to satisfy the public sense that wrongdoing ought to face punishment. |
| The main object of criminal law is to punish the wrongdoer; to discourage him and others not to commit same or similar crimes, to reform him if possible and perhaps to satisfy the public sense that wrongdoing ought to face punishment. | Punishment is much harsher in criminal cases and could involve jail time and fines paid to court. Depending on the seriousness, offences are either felonies (attract sentences of more than one year imprisonment) or misdemeanors (attract sentences of less than one year). |
| In proving a civil case, it just has to be determined that it seems more likely that something happened or didn't happen | A criminal case involves proof of the case beyond reasonable doubt. The prosecutor must prove that the offence was committed but also that the person had the intention to commit the offence. |

3.3 As I serve my community, what do I need to know about the law?

The legal system in Kenya regulates both our private and public lives. Ignorance of the law is not a defense is a legal saying that means every citizen has a duty to know and understand the laws and every person's obligation to obey them. It is important that a paralegal is able to determine whether a complaint requires the involvement of the police or other authority and whether they are able to assist disagreeing parties arrive at a solution that is acceptable to both. As a paralegal, you cannot be involved in or encourage any act that is against the law. If you are uncertain whether any action is a violation of the law, take the time and effort to consult with a KESWA lawyer.



Excercise

Try to identify some common disagreements that happen between sex workers at community level. Classify these into civil and criminal cases explaining your reasons

OVERVIEW OF HUMAN RIGHTS

4.0



4.1 What are Human Rights and why are they important?

Human rights are defined as universal legal guarantees protecting individuals and groups against actions by States (Governments), which interfere with fundamental freedoms and human dignity. This means that human rights are basic rights that every one of us is entitled to simply because we are human beings. Human Rights set minimum standards on how individuals and institutions should treat people. They tell both the state (national and local government and government officials) and non-state actors (individuals, companies, institutions including health facilities) what they can do, what they can't do and what they should do.

Human rights are important as they:

- Allow every human being to reach his or her full potential
- Recognize that every person is entitled to be treated with respect
- Allow different countries and people to live together peacefully
- Improve human well-being, and
- Protect people from the power of the state (and sometimes from the power of other institutions or organizations).

4.2 Are human rights different from legal rights?

A legal right is a right established in that can be defended in a country's courts. Legal rights differ from one society to another and depend on many factors, including specific procedures and processes. A human right is a universal right that everyone has simply because they are human. However, human rights are not always protected by the laws of a country (that is, they are not always legal rights) and so they can't always be enforced by a court of law. By specifically recognizing human rights, the Constitution of Kenya 2010 made it easier for direct enforcement in court expanding their enjoyment by all Kenyans.

4.3 What are the Characteristics and Principles of human rights?

Some of the important characteristics of human rights are as follows:

a. Universal: Belong to everyone and are applied throughout the world. Human rights respected in one country will also be respected in other countries around the world.

b. Inherent: We are born with these rights by the mere fact that we are human. They do not have to be bought, earned or inherited; they belong to people simply because they are human.

c. Inalienable: They exist no matter what happens and are not to be taken away (we cannot give them up; when they

are being violated-we can claim entitlement and demand for the right).

d. Equality: Human rights recognise that all humans are born free and are equal in dignity and rights.

e. Inter-related and Interdependent: All rights are equally important. They are inter-linked and depend on each other. The realization of one right often depends on acknowledging and realizing other rights.

f. Indivisible: All rights form a whole and cannot be divided; no right is more important than any other right. The right to life cannot be fully enjoyed without the right to food, security and many other rights.

4.4 Where do human rights come from?

Human rights are not new. The idea that all humans have certain basic or natural rights has been around since the earliest times. Early ideas of human rights can be found in:

i) The world’s religions: For example, ideas of equality are found in Christianity and in Hinduism. In the Bible it says “There is no such thing as Jew and Greek, slave and free man, male and female: for you are all one person in Christ Jesus” (Galatians 3; 28). In Hinduism the whole world is seen as one family.

ii) The struggle for political freedom: For example, early advocacy (actions aimed at change) for the abolition of slavery were based on the idea that all people were equal

and entitled to dignity and respect.

iii) International agreements: Since time immemorial, states and peoples have entered into formal relationships with each other. International agreements are agreements between states that impose mutual obligations on these states on the manner in which they treat all individuals within their control.

What is the UDHR?

The Universal Declaration on Human Rights (UDHR) is the earliest comprehensive human rights instrument adopted by the international community; it was adopted by the United Nations General Assembly on December 10th 1948. It includes 30 articles (sections) protecting Civil and political rights, Economic, social and cultural rights, and Fundamental freedoms. It aims establish a common standard for all peoples and all nations and encourages countries to achieve these rights for all people.

4.5 What are the principles of human rights?

Key principles are the values that are relevant in ensuring that people’s rights are respected. These same principles of human rights should be applied in your work as a community paralegal. The following are some principles of human rights discussed:

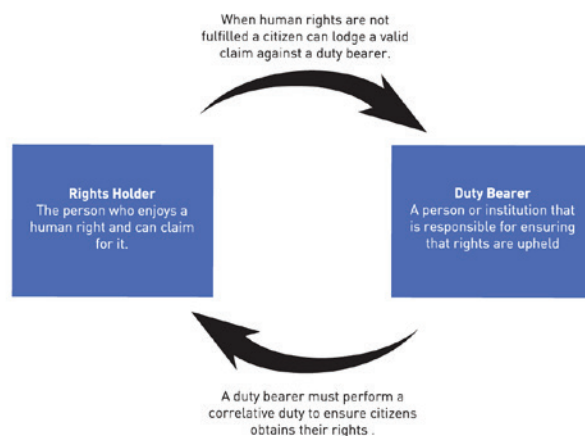
| PRINCIPLE | EXPLANATION |
|--------------------------------------|--|
| Universality | They are universal because everyone is born with and possesses the same rights, regardless of where they live, their gender or race, or their religious, cultural or ethnic background |
| Inalienability | Inalienable because people's rights can never be taken away. |
| Indivisibility | Human rights have equal status, and cannot be positioned in a hierarchical order. Denial of one right invariably impedes enjoyment of other rights. |
| Interdependence and Interrelatedness | The fulfillment of one right often depends, wholly or in part, upon the fulfillment of others. |
| Equality and Non-discrimination | All individuals are equal as human beings, hence should enjoy human rights equally without any kind of discrimination. |
| Participation and Inclusion: | All people have the right to participate in and access decision-making processes that affect their lives and wellbeing. |
| Accountability | States and other duty-bearers are answerable for the observance of human rights. |
| Best Interest | This principle applies mostly when dealing with children issues; it requires that in any matter involving the rights of a child, the decision made should be informed by what is in the best interest of that child. |
| Equality and Non-discrimination | All individuals are equal as human beings, hence should enjoy human rights equally without any kind of discrimination. |

4.6 How are human rights realized?

Human rights define people as rights-holders and states as duty-bearers. The Rights Holder is the person who is entitled to a human right and can claim for it. The Duty Bearer is the person responsible to ensure that these rights are satisfied. I

In most cases the government is the ultimate duty bearer, but there may be more than one duty bearers.

The flow chart below will help you understand the concept discussed above:



| VALID CLAIM | RIGHTS HOLD | DUTY BEARER | CORRELATIVE DUTY |
|--------------------------------------|-------------|-----------------------|---|
| Right to Free Primary Education | Student | Ministry of Education | Curriculum development Training and Employment of teachers |
| | | Ministry of Finance | Budgetary allocation to the education sector and for building schools |
| | | Ministry of Planning | Infrastructure and Planning |
| | | Teachers | Teaching |
| | | Chief | Ensure all children in the village go to school |
| | | Parents | Provide for the children; food, uniform, books, etc |
| | | Police | Maintain security |
| Right to quality primary health care | ? | ? | ? |

Exercise:

This concept can also be illustrated in the table below. Go through the example given and completed try and complete the table inserting the rights holder, duty bearer and correlative duty. The valid claim has been provided:

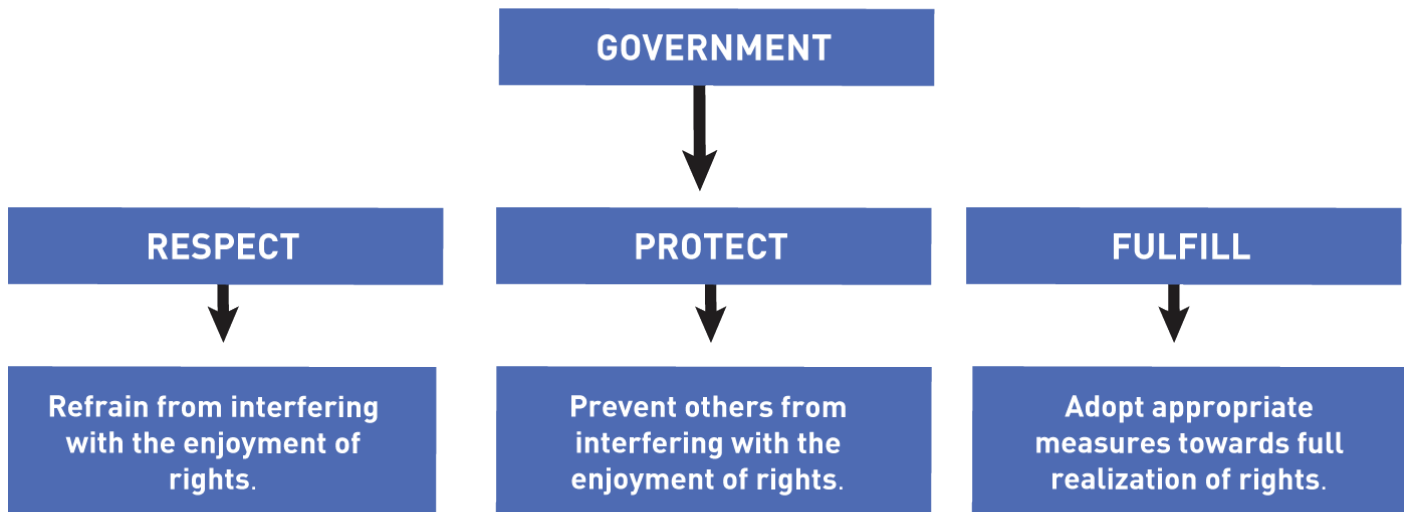


**HUMAN RIGHTS
SHOULD BE
RESPECTED**

4.7 What are the obligations of Government in relation to human rights?

The key role of the Government is the implementation of human rights. To this end the Government has three responsibilities in ensuring that citizens enjoy the rights.

See flow chart below:



A human right cannot be taken away but by law some rights can be limited. Such limitation must however be reasonable and justifiable. Limitation of rights may occur where it is necessary to safeguard the rights of another, to protect national security, for public safety, etc.

Now discuss whether or not the limitations in the scenarios below are justifiable:

- I. Imprisonment of a man found guilty of sexually assaulting a child
- II. Your school has told you that your child who is Muslim cannot wear a hijab to school
- III. Forceful eviction of squatters from government owned

land they have lived in for many generations to allow for expansion of the road network
IV. A ban imposed by a governor on loitering at night within the central business districts

In our enjoyment of individual human rights we must always respect the rights of others. Certain restraints are therefore put in place to ensure that your rights do not violate the rights of another and harmony prevails in society. However it is important to note that every right has a matching responsibility. If you want to have your rights met, you need to behave in a way that allows the state to meet your rights and to allow others to have their rights met as well.

Individual assignment

Each person shall find a story, pictures from newspaper and online articles that relate to sex workers. An opportunity will be given to each person to discuss whether it involves a human rights violation. If so, identify the duty bearer/s and discuss the specific duties they need to perform to ensure the enjoyment of that right.



**NOTHING
FOR US
WITHOUT US**

Exercise

A patient in need of medical services must understand that if they want the health care worker to provide proper medical care, they need to give the correct information. So, in order to have their right to access health care met, they have a responsibility to share medical information that is needed for treatment as well as adhere fully to medication and advice given.

When the government or any other duty bearer fails to respect, observe, protect, promote and fulfil human rights it results in Human rights violation.

UNDERSTANDING THE LINK BETWEEN HUMAN RIGHTS, HEALTH AND SEX WORK IN KENYA

5.0

5.1 Are human rights recognized in Kenya?

Human rights are recognised in Kenya and are specifically provided for very broadly under the Bill of Rights (Chapter 4) in the Constitution of Kenya (2010). This chapter is regarded as one of the most progressive provisions of the Kenyan Constitution as it guarantees fundamental rights for all persons. Sex workers are human beings and entitled to the full enjoyment of human rights just like any other person in Kenya. The rights provided in the Constitution therefore provide numerous opportunities for sex workers including those living with and at high risk of HIV to demand respect and protection of their human rights.

- Below is a table that demonstrates how the rights of sex workers can be advanced by human rights provisions in the Constitution:

| NATURE OF RIGHT IN THE CONSTITUTION | EXPERIENCE OF VIOLATION DOCUMENTED | RELEVANCE IN PROTECTION OF RIGHTS FOR SEXWORKERS |
|--|---|---|
| Right to equality and Non discrimination | "They said that I was careless and irresponsible that's why I got infected. They had refused to attend to me and I was in so much pain. The doctor refused to take me to theatre saying that he can never touch a person with HIV he also said that he is very sure that the child I am caring is also positive." | Creates an obligation to ensure that all persons are treated equally and prohibits discrimination on the basis of gender, health status, marital status, dress, among other grounds. This provision can be used to demand equality and challenge discrimination against sex workers based on their HIV status. |
| Freedom from cruel, Inhumane and degrading treatment | "After a friend who was housing me discovered I was taking ARV's she told me to be sleeping on the bathroom floor to avoid infecting her. I would wake up at 4am in the morning to disinfect the place before she could use the bathroom. As days went by I was feeding from a potty because her plates were not to be used by me." | Prohibits demeaning and ill-treatment of people. This provision could be useful in challenging the manner in which female sex workers are treated as a result of either their HIV status or affiliation with sex work. |
| Right to privacy | "I was paraded to be shown to the other inmates that I was a sex worker with HIV. He went along to say, 'hawa ndio wanasambaza magonjwa.' (These are the people infecting others with HIV)." | Relevant in ensuring that information about a person's HIV status is kept confidential and is not released by anyone without permission. Provision is helpful in addressing mandatory HIV testing and forced disclosure of HIV. |

| NATURE OF RIGHT IN THE CONSTITUTION | EXPERIENCE OF VIOLATION DOCUMENTED | RELEVANCE IN PROTECTION OF RIGHTS FOR SEXWORKERS |
|---|--|--|
| Freedom of movement | <p>"I was arrested in 2011 after a job and 2013 while coming out of the club. During these normal police raids, they ambush us while going home after closing the pub around 11pm at night. I just find a land cruiser with police in a dark alley and they arrested me claiming 'naranda raanda'. (I was loitering)"</p> | <p>Allows all persons to move freely without unnecessary restrictions. This provision has been useful in efforts to challenge unlawful arrests for the offense of loitering which is often misused to harass sex workers.</p> |
| Right to the highest attainable standard of healthcare | <p>"The nurse in charge started asking me some petty questions instead of helping me. She asked when were you raped and at what time? Then I told her that I was raped at 11.00 pm as I was from my usual job and the incident happened for almost 5 hours. Then she asked me which kind of job at that time of the night? I told her that I am a sex worker and I was coming from that job. The nurse started shouting at me calling me names like 'Malaya' (prostitute) and declined to help claiming I was lying I was raped yet that was my job. When I asked about PEP, she told me it was not for people like me and ordered me to leave."</p> | <p>Just like all other persons, sex workers have a right to access health services of high quality and suited to their specific needs. This provision can be used to advocate for the government to ensure high standards of care for all. Promotion of an environment that encourages uptake of services including ensuring sex workers are not predisposed to higher risk of HIV and those living with HIV receive the necessary services to manage the condition and reduce risk to others.</p> |
| Rights of persons detained, held in custody or imprisoned | <p>"I was once arrested by night police raid [Musako in kikamba]. I was put in a Police cell and those days the law was not as it is today you could be locked in cells for more than a week without being taken to court. I stayed in the cell for three days negotiating for my bail since none of my family members knew of my arrest."</p> | <p>Sex workers detained, in custody of imprisoned are entitled to all the national interventions and health services laid out in Kenya for HIV prevention, testing, treatment and care. This provision can be used to advocate for interventions for protection from HIV exposure as a result of rape of sex workers and access to HIV treatment for those living with HIV and detained, in custody or imprisoned.</p> |

Group Work:

With the assistance of your facilitator, refer to the provisions of the bill of rights in the Constitution. Can you think of some experiences by sex workers that go against the rights and discuss how legal knowledge and human rights empowerment on these rights can help strengthen the overall wellbeing of sex workers?

- *Right to life*
- *The right to dignity*
- *Freedom from slavery and forced labour*
- *Right of privacy*
- *Right to health*
- *Right of movement*
- *Right to fair hearing*
- *Right of administration of justice*
- *Right to association*
- *Right to fair Hearing*
- *Right to Administrative justice*
- *Right to vote and participate in any elective post*

It is also very important to note that Article 2(5) of the Constitution of Kenya (2010) provides that 'general rules of international law shall form part of the law of Kenya' while article 2(6) states that 'any treaty or convention ratified by Kenya shall form part of the law of Kenya'. For each human rights treaty, there is an enforcement mechanism to ensure governments comply with their obligations. Enforcement generally takes place through two forms: individual complaints and periodic government reports to international bodies.

Kenya is a signatory to various international and regional instruments that secure human rights that can advance the wellbeing of sex workers. Some of them include:

| INSTRUMENT | ABOUT |
|---|--|
| United declaration on Human Rights (UDHR) | This is the earliest human rights instrument which was adopted by the United Nations General Assembly in 1948. It includes 30 articles protecting Civil and political rights, Economic, social and cultural rights, and Fundamental freedoms. Articles 25(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family |
| International covenant on Civil and political Rights (ICCPR) | This Covenant came into place in the year 1976. The covenant contains 53 Articles protecting both civil and political rights which including the right to life, freedom of religion, freedom of speech, freedom of assembly. |
| International covenant on economic, social and Cultural Rights (ICESCR) | The covenant that came into place in 1976, contains 33 Articles protecting Economic, Social, and Cultural rights. |

| INSTRUMENT | ABOUT |
|---|--|
| International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) | <p>Article 5</p> <p>States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law</p> |
| The convention on the Elimination of Discrimination against women (CEDAW) | <p>The instrument adopted in 1979 contains 30 Articles which majorly upholds the rights of women by prohibits them from all form of discrimination. It further imposing a duty on the state to come up with certain measures. Example establishing a tribunal to deal with matters of discrimination against women.</p> <p>Article 12</p> <p>States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.</p> |
| Covenant on the Rights of Children (CRC) | <p>It became operational in 1990. It contains 41 Articles which uphold the Rights of children.</p> <p>Article 24</p> <p>States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.</p> |
| Convention Against Torture (CAT) | <p>This instrument became operational in the year 1987. It seeks to prohibit torture and other cruel, inhuman or degrading treatment or punishment throughout the world.</p> |
| United Nations Labour Organization (ILO) | Article 7(2) |
| Convention | <p>The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit.</p> |
| Beijing platform for action | <p>Women have the right to the enjoyment of the highest attainable standard of physical and mental health.</p> |

5.2 Is Health a human right and how does it promote the overall well-being of sex workers?

Article 43 of the Constitution guarantees the right to the highest attainable standard of health including reproductive health. The same Article also states that a person shall not be denied emergency medical treatment. This means that a

hospital is not supposed to turn down patient that requires emergency treatment. Hospitals that do so violate persons' right to emergency treatment. To this end the declaration demands that all governments should formulate national policies, strategies and plans of action to launch and sustain primary health care as part of a comprehensive national health system and in coordination with other sectors.

Further, numerous international standards are also applicable to health. According to the Declaration of Alma Atta, Primary health care is essential health care based on practical, scientifically sound and socially acceptable methods and technology made universally accessible to individuals and families in the community through their full participation and at a cost that the community and country can afford to maintain at every stage of their development in the spirit of self-reliance and self-determination.

Are you aware of any other international instruments that specifically provide for the right to health? (Refer to earlier discussions)

5.3 What is the link between human rights, HIV and sex work?

Lack of respect for human rights fuels the spread and exacerbates the impact of HIV. HIV undermines progress in the realization of human rights for persons living with HIV and those at higher risk, like sex workers. The spread of HIV and its impact are worsened in situations where human rights are not respected, protected and promoted. The HIV epidemic causes human rights violations and at the same time is driven by human rights violations.

Increased Vulnerability

- Groups unable to realize their civil, political, economic, social and cultural are more vulnerable to contracting the HIV.

Discrimination and stigma

- Because of their presumed or known HIV status, stigmatisation and discrimination obstructs access to treatment and may affect other related rights.

Impedes an effective response

- An environment where human rights are not respected drives some populations underground. This inhibits access to HIV-related services, commodities and research.

5.4 What factors affect the enjoyment of human rights by sex workers?

Despite that fact that sex workers are entitled to all human rights, there are certain factors that affect their enjoyment of these rights namely:-

Criminalization – Laws that criminalize sexual conduct relating to sex work, have adverse effects on the enjoyment of human rights by sex workers and specifically the right to health. Fear of judgement and punishment can deter sex workers from seeking out and gaining access to essential health services.

Violence - A lot of sex workers face violence in Kenya, this can be blamed to the laws that criminalize sex work. Despite being physically and sexually assault by clients, Sex workers are unwilling report such matters to the police as they do not get any help. As a matter of fact, they end up being more violated by the police when they report. Sex workers are further arrested and harassed by police officers who demand for bribes from them despite their low earnings.

Stigma and discrimination – Sex workers are unable to access the highest standards of health in the facilities due to stigma and discrimination that they face from the health care attendants. This drives sex workers underground leaving them with no place to seek for health services.

Poverty- poverty is one of the major factors that affect the enjoyment of the rights by sex workers. Once arrested, sex workers require the services of lawyers, but because they cannot afford such services, they lack access to justice.

Ignorance – There is a lot of ignorance on the part of sex workers regarding their human rights and the application of the law. Hence, the law is often misinterpreted to the disadvantage of sex workers and favourable laws are rarely enforced in favour of sex workers to address injustice against them. Can you think of any other factors that affect the enjoyment of human rights by sex workers in your community?

5.5 What is involved in documenting human rights violations and why is this useful?

Documentation in this case refers to a process of strategic and systematic gathering of information on violations against sex workers. This process involves determining what information is needed, establishing appropriate means for acquiring it; recording the discovered information, organizing and storing this information in appropriate forms to make them more accessible; and actually providing the documents to users who need the information.

Information on human rights violations to be documented may include cases/incidences reported to the organization directly or through continuous monitoring of the environment, testimonies from members during forums/ meetings, data collected through research and studies, media reports, etc.

All over the world, human rights activists use stories to influence changes in law, policy and practice by different people that advance the cause of human rights. Information documented can be used to inform intervention; the documentation can demonstrate the extent or scope of the problem and establish a pattern of abuse sufficient to warrant intervention by appropriate duty bearers. Documented information can be used to hold offenders accountable and can inform advocacy initiatives. In some cases, documenting violations and exposing them to the public can on its own put an end to abusive practices. It is therefore important for people who document violations to be clear about what specific changes they seek, and to be realistic about what they are capable of changing.

It is not always easy to document human rights violations and paralegals must be prepared to address various challenges during this process. The information collected can place the individual at risk of harm, some information may be exaggerated or even made-up, information may fall into the wrong hands and end up being misused.

Useful Tips For Conducting An Interview

- Do not ask difficult questions at the beginning of an interview
- Do not express your opinions during the interview
- Do not ask leading questions (give an indication of the desired answer)
- Use simple direct language and always be polite
- Do not interrupt when the response is being provided
- Always get permission before conducting an interview including express consent to write and record the information. Write your notes openly so that the interviewee can see - this builds trust
- Get as much detail as possible during the interview as this will be useful to double-check the information for credibility before using it
- Respect the right to privacy and do not force anyone to answer questions they don't feel comfortable to

5.6 What action can be taken to enforce health related human rights for sex workers in Kenya?

1) Enforcement in court - In Kenya all constitutional matters including those touching on violation of human rights are referred to the High court. The high court has the power to receive cases on human right violations. The process begins with a constitutional petition being filed in court together with other documents, which prove the violation. The court hears the matter and upon being satisfied that a person's health right has been violated, provides an appropriate remedy for the problem.

2) Reporting to relevant Constitutional Institutions –

Relevant Constitutional institutions are mandated with the protection of human rights. The office of the ombudsman is also known as the commission on administrative justice (CAJ). This office has the powers to receive complaint against people working in public service including health care providers and law enforcement officers. Once a complaint is made, the institution lodges investigations and upon being satisfied that a public officer in the performance of a public duty has violated a person's rights, it can make appropriate recommendation against that officer.

The National Gender & Equality Commission is another relevant commission. It is tasked with receiving complaints particularly based on gender related issues. Example is when a person is turned down or mishandled by a health care provider because of their real or perceived gender, such a person can report to NGECE who in turn carry out investigations and give appropriate recommendation to address the issue with most cases being compensating the aggrieved party.

3) Community and Policy advocacy - Advocacy is targeted action to create support for or positive change in law, policy and actions in order to improve the situation for groups of individuals who share similar problems. Advocacy actions may include:

- Educational Actions – educating ourselves and others on an issue that needs to be addressed, Challenging attitudes
- Political Action - Addressing policy-makers to influence them to consult with and include the concerned populations when making policies decisions, addressing law-makers to lobby for and supports fulfilment of human rights for sex workers, addressing public officials on the enforcement of laws and policies that respect and protect the human rights, etc.
- Legal Action – participating in advocacy for review and repeal of negative law

Exercise

Discuss some factors that hinder the full enjoyment of human rights and discuss what can be done to address these challenges for sex workers in your community?

UNDERSTANDING HIV RELATED RIGHTS

6.0

6.1 What are HIV-related rights?

As already discussed in earlier chapters, promotion and protection of human rights is central to the response to HIV. Denying the rights of people living with HIV, and those affected by the epidemic, imperils not only their well being, but also life itself. Vulnerability to HIV infection and to its impact feeds on violations of human rights, including discrimination and violations, which create and sustain poverty. In turn, HIV causes human rights violations, such as further discrimination and violence. HIV status is now recognized as a prohibited ground of discrimination. Further the right to health has been increasingly defined and now explicitly includes the availability and accessibility of HIV prevention, treatment, care and support for children and adults.

'HIV-related rights' is a term devised to underscore the need for people living with HIV to have the same rights that apply to other all other citizens. Through the provisions in the Constitution of Kenya, HIV legislation and policy, Kenya has committed to protecting human rights of PLHIV.

6.2 Is there law in Kenya that protects the rights of people living with and affected by HIV?

6.2.1 Constitution

Just like all other Kenyans, PLHIV are entitled to all the rights guaranteed in the Constitution. In Chapter 5, you had comprehensive discussions on the provisions of the Constitution and how these protect the rights of PLHIV and prevent human rights abuses as captured below:

| CONSTITUTIONAL PROTECTION | EXAMPLES OF ABUSE PROTECTED FROM |
|--|--|
| Respect for Personal Dignity of Sex Workers | Indecent searches Insults |
| Right to the highest attainable standard of healthcare | Denial of treatment Stigma & Discrimination by health service providers |
| Protection from Torture | Physical, verbal and sexual violence by police |
| Right to work | Arbitrary arrests & police harassment creating a dangerous work environment (ILO has recommended that sex work be recognized as an occupation so that it can be regulated and sex workers protected) |

| CONSTITUTIONAL PROTECTION | EXAMPLES OF ABUSE PROTECTED FROM |
|---|--|
| Freedom of Movement | Being arrested on the pretext of loitering or being out “too late” when there is no curfew |
| Protection from Discrimination | Being arrested on the basis of how you dress/look; police targeting to arrest only women |
| Access to Justice | Arbitrary arrests and unlawful detention |
| Laws inconsistent with the Constitution | County laws & former municipal bylaws that criminalize prostitution in vague terms |
| Right to Privacy | Testing a person for HIV without their informed consent Disclosure of a person's HIV status without consent |
| Rights of Children | Neglect of parental responsibility of children |

6.3 HIV and AIDS prevention and Control Act 2006(HAPCA)

The HIV and AIDS prevention and Control Act seeks to comprehensively address all the legal aspects of HIV. The law contains a series of protective provisions some of which explicitly protect the rights of people living with HIV and others that create an enabling environment for the HIV response. The provisions of HAPCA generally:

- i. **Obligates the government to provide HIV and AIDS education**
- ii. **Addresses the issue of safe practices and procedures to be adopted at the healthcare facilities**
- iii. **Provide the appropriate procedures for HIV testing and sharing of HIV test results**
- iv. **Prohibits specific actions which constitute discriminatory acts**
- v. **Establishes the HIV (Equity) tribunal to determine complaints arising out of any breach of HAPCA**

6.4 What are some of the rights relating to HIV?

Some specific rights to be considered in the context of HIV are discussed below:

6.3.1 HIV related discrimination

HIV related discrimination involves treating someone differently or denying them their rights based on actual or perceived HIV infection. The act outlaws discriminatory acts in the workplace, schools, public services, insurance services, health institutions, burial services and travelling. It provides that PLHIV can take legal action against discriminatory acts based on their status.

6.3.2 Informed Consent

The law requires that healthcare providers obtain informed

consent prior to Testing for HIV, Conducting HIV related biomedical research on any person and before disclosing the HIV results of a patient to third parties.

Valid consent for this purpose refers to permission given without any force, fraud or threat and with full knowledge and understanding of the medical and social consequences of that action. Valid consent can only be given by a person who is above the age of 18 years, of sound mind and understanding. Where a person does not meet these criteria the consent obtained is invalid.

However:

Where a person is a minor, then the consent of the parent or the legal guardian of the Child has to be sought.

Some categories of children are legally permitted to give consent directly on their own behalf. Such consent must be in writing. This includes:

- *A child who is married,*
- *A child who is pregnant,*
- *A child who is already a parent, and*
- *A child who is engaged in behaviour that puts him or her at risk of contracting HIV.*

If the person has a disability that affects their capacity to give consent, a legal guardian, a partner, a parent or an adult child of that person can give consent on their behalf.

6.3.3 HIV Testing

The law prohibits compulsory HIV testing. The HAPCA specifically prohibits compulsory testing for purposes of employment, marriage, admission into an educational institution, travelling, provision of health care, insurance



under the following strict conditions:

- *With the written consent of the patient*
- *If the person has died, with the written consent of their partner or personal representative*
- *By an order of the court, where such information is directly relevant to the proceedings*

6.4 Are people under legal duty to disclose their HIV status?

When a person tests HIV positive, the medical practitioner should talk to them about the importance of disclosing their status to their sexual partner. Are you aware of any benefits of this?

According to sec 24 of HAPCA, besides taking all reasonable precautions to protect others from infection, a person who is aware that they are HIV positive also have a legal duty to inform in advance any sexual contact or person with whom they share needles of their HIV status. This legal provision aims to deter intentional transmission of HIV and was based on the belief that there are people who have, may and will engage in irresponsible behavior intended at deliberately infecting others with HIV. The same section further provides that a medical practitioner who is responsible for the treatment of a person and who becomes aware that the person has not disclosed their HIV status as required by law may inform any sexual contact of that person. Following a successful court case challenging the constitutionality of this requirement in the law, this section was declared unconstitutional due to the fact that it did not specify who a sexual partner was and the time duration within which a person was required to make such a disclosure.

However, it is important to note that, the Sexual Offences Act and the Public Health Act also contains provisions criminalizing intentional transmission of sexually transmitted infections. This upholds the obligation of disclosure and reasonable care on the part of PLHIV. Intentional transmission of an STI is therefore a criminal offence under Kenyan law. The law provides that if all efforts to encourage a patient to disclose their HIV status to their sexual partner fail, and if it is determined that they are placing their sexual partner and other people at risk, the HAPCA allows the health care provider responsible for the care of that person to disclose their status to the persons at risk.

It is our role to empower people on the health and legal consequences of non-disclosure and encourage open discussions to address any challenges they are facing. There are different options for assistance with safe HIV disclosure.

cover and any other services. The act also makes pre and post-test counselling a requirement during the conduct on an HIV test.

However:

Where a person is donating tissue or blood these provisions are not a strict requirement

Where a person has been charged of a sexual offence, an order of the court can force a suspect to have an HIV test conducted, usually for the purpose of supporting a sexually related charge against them

6.3.4 Confidentiality of HIV results

In respect of the right to privacy, the results of a person's HIV test are legally regarded as confidential. The health care provider must keep all information obtained from the patient private. The health service provider who conducted the test is only permitted to disclose this information to the patient directly (or any other person who was by law allowed to consent for the test to be conducted). A health care workers can share HIV related results with another provider who is directly involved in the patient's treatment.

HIV results of a patient can be disclosed to third parties

6.5 If HIV related rights are violated, what action can be taken?

The HIV (Equity) Tribunal is established to ensure the protection of human rights in the context of HIV as provided under the HAPCA. This is the first and only HIV-specific judicial body in the world. The seven members of the tribunal are comprised of legal experts, medical practitioners and social experts with specialized skills and knowledge on HIV (maintains representation of PLHIV).

An advocate can help to file a complaint, but the tribunal allows individuals to submit their own cases through simple letters. There is no cost involved in filing a complaint at this tribunal. The tribunal pays particular attention to issues of privacy and confidentiality in its handling of complaints. Hearings at the tribunal are held in camera and complainants have the option to withhold names and other personal details in order to protect their privacy. When a complaint is filed at the tribunal, the case is assessed to ensure that

the issues fall within the tribunal's authority and thereafter admitted for hearing. Only those directly involved in a case can attend the session.

Where the tribunal finds that a violation of the provisions of HAPCA has occurred, a decision is made in favour of the complainant and appropriate relief is determined, including, financial compensation. The persons in whose favour the damages and costs are awarded can apply for a certificate from the tribunal stating the amount of the damages or costs. The beneficiary then files the certificate in the High Court, after which it is considered an order of the High Court and is thereafter executed.

HIV related cases that do not directly involve violation of the provisions in the HAPCA, may be referred to High Court, Employment Court, Rent Tribunal or Children's court; depending on the nature of the disagreement. A paralegal should be able to discuss available options upon consultation with a KESWA advocate when necessary.

Exercise

Case Study:

Atoti; a seasonal sex worker in your area, has also been working as a waitress for the last two (2) years with Aziz Caterers who run a number of restaurants in your Nikaia area. Last year she received the employee of the year award for being voted the best waitress by the clients that led to her promotion to Supervisor. She has been sick on three (3) occasions in the last four (4) months and the last time she was coughing a lot. Upon returning from a sick leave two weeks ago, the restaurant manager Ms. Mbio informed her that she has been assigned specific utensils because other staff had raised concerns about her health. He further explained that in the interest of the restaurant staff and customers, she was required to go to the company doctor. She was given a sealed envelope that she presented at the clinic. She was asked to provide some blood and urine samples. Dr. Siaya then gave her some cough syrup, vitamin C supplements and some painkillers and asked her to take a lot of warm water. Atoti went back to work and two (2) days later, she was summoned to the manager's office where she found the human resource officer and the manager waiting for her. She was informed by the general manager that the company had decided to terminate her employment since 'she was not fit to work at the restaurant', in accordance with her employment contract. She was paid one month's salary in lieu of notice and terminated. Atoti asked why the company had come to this conclusion yet she was the longest serving employee with a very good record. The general manager asked her if the doctor had not informed her of her situation, then casually said "your condition will place our clients and staff at risk!" As she left the office, one of the kitchen staff picked her clothes and handbag from her cabinet, threw them at her and told that she could keep the uniform she was wearing. Atoti has come to seek advice from you since she is aware that you serve as a community paralegal.

Task:

Apply your human rights and legal knowledge of HAPCA to analyse the situation and:

- 1) Identify human rights violations against Atoti
- 2) Discuss specific provisions of the HAPCA that have been violated
- 3) Draft a letter of complaint to the tribunal with regard to this case, highlighting the relevant issues and identifying against whom that complaints are being made

UNDERSTANDING HIV RELATED RIGHTS THE LEGAL POSITION RELATING TO SEX WORK IN KENYA

7.0

7.1 What is legally referred to as sex work?

Sex work is legally referred to in Kenyan laws as 'Prostitution'.

Prostitution can be defined as the practice of engaging in sexual activity with someone for payment either in form of money or other kinds of favours. Prostitution is generally regarded as a crime of morality by those who do not adhere to accepted sexual and other behavioural norms. Many have argued that the concept of criminalizing prostitution has resulted in marginalization of a category of women making them vulnerable to exploitation and human rights abuses. The terms 'sex work' has been coined by sex workers themselves to redefine commercial sex, as an income-generating activity or form of employment for women and men. As such it can be considered along with other forms of economic activity.

Kenyan law does not formally recognise sex work as work. As you will be discussing in this chapter, the law contains provisions that criminalize activities relating to prostitution but not the act of prostitution specifically.



7.2 What sex work related activities are criminalized in Kenya?

The Penal Code is the main law in Kenya that makes provisions on offences and proposes penalties for convictions. In section 151 to 156, the Penal Code contains provisions that outlaw activities relating to sex work. The law touches on the following:

- *Detention of females for immoral purposes Section 151;*
- *Male person living on the earnings of prostitution or soliciting Section 153;*
- *Woman living on earnings of prostitution or aiding, abetting or compelling an individual to engage in sex work Section 154;*
- *Procedure for entry and search of premises used for prostitution Section 155; and*
- *Running a brothel Section 156*

The Sexual Offences Act also contains provisions on prostitution. The act focuses on third parties and generally outlaws the “exploitation of prostitution”; this means that it is illegal to encourage someone to do sex work or receive financial benefits from another person’s sex work. It also focuses on the exploitation of prostitution such as actions compelling anyone including a child or person with mental disabilities into sexual intercourse for gainful purposes.

Some County laws (formerly Municipal bylaws under General Nuisance bylaw) outlaw loitering for immoral purposes, importuning for prostitution and indecent exposure and form the basis of arrest of sex workers by county officials.

7.3 What other laws directly affects sex workers in Kenya?

Beside the Constitution of Kenya, there are national laws, some of which provide a supportive framework by ensuring provision of services to sex workers and protection from violence and human rights violations, while others pose a hindrance. These include:

i. The Health Act -The law seeks to safeguard access to health care services for vulnerable groups. It obliges Kenya to address the health needs of vulnerable groups, and mandates the provision of emergency and specialized care. The Act is beneficial in HIV as it provides better protection of the right to privacy. The law demands maintenance of confidentiality of one’s health status and requires informed consent for the provision of a specified health service. Finally, the law guarantees reproductive health rights for all persons including right to safe, effective, affordable and acceptable family planning services.

ii. Public Health Act -This law governs the way services are

rendered in health facilities and it imposes an obligation on all health institutions to take reasonable measures to prevent and deal with preventable, infectious or communicable diseases. In this way the Ministry of Health can be able to develop strong policies to advance the right to health for sex workers and programs to deliver health information and services to them.

Provisions of the Act have also been used to compel forced medical examination including the enforcement of forced HIV testing of sex workers. Section 43 and 44 of the Act make it mandatory for any person suffering from any venereal disease to consult a medical practitioner and be treated until completely cured. It criminalizes non-compliance with the provisions. Sections 27 and 28 touch on TB treatment, care and prevention, which is an issue that greatly affects PLHIV. It gives the public health officer the authority to remove and request for the isolation of persons who have been exposed to infection or may be in the incubation stage of an infectious disease. The two sections have in the past been used to unconstitutionally incarcerate tuberculosis (TB) patients for “failure to adhere” to TB treatment.

iii. Sexual Offences Act – This Act seeks to safeguard vulnerable persons from sexual exploitation. It criminalizes acts resulting in and associated with rape, defilement, indecent acts, sexual harassment, incest, child prostitution and pornography. Stiff penalties are provided upon conviction for sexual offences.

iv. The Narcotic Drugs and Psychotropic Substances Act - The objective of the act is to make provisions with respect to the control of the possession of, and trafficking in, narcotic drugs and psychotropic substances. In particular, Section 5(1), (b) & (d) of the Act criminalizes anyone found in any premises used for drug use. The section also criminalizes possession of appliances used in the administration of drugs. These provisions pose a challenge to the effective implementation of the plan to address HIV prevention and treatment as part of a comprehensive national program of care and treatment of injecting drug users (IDUs) in Kenya. Law enforcement officers have arrested and charged outreach workers who have been assigned the duty of providing the IDUs with the clean syringes and needles. This affects the delivery of services to IDUs as these raids keep interveners away from the drug dens and IDUs from the centres providing essential HIV services to them.

7.4 If arrested on a criminal charge relating to sex work, does a suspect have any rights?

The rights of an arrested person are provided in Article 49 of the Constitution and will be discussed in detail under Chapter 11.



How did laws relating to sex work come about in Kenya?

Prostitution is commonly spoken of as the oldest profession in the world. From available writings, the history of laws relating to prostitution in Kenya dates back to the colonial period. The declaration of Nairobi as the capital city of Kenya attracted many men and women in search of work. In the 1920s, construction in the town resulted in a high demand for unskilled labor. On arrival to Nairobi, they found a new set of challenges. The influx of migrants into Nairobi and the limited housing options created a housing shortage. Further, the quality of housing units for Africans was very poor. Informal settlements close to the town emerged as attractive housing and employment options. Many who came to the city were men who had left their wives and children in the rural areas. With so many people in the city seeking for comfort of home, sex workers filled this vacuum by providing them with shelter, food and sexual compliments in exchange of a reasonable sum. The emergence of transactional sex resulted in an alarmingly high number of syphilis cases in Kenya and attitudes began to harden against prostitution. The outbreak of syphilis and other sexually transmitted diseases caused this change in attitude and caused the government to enact laws outlawing activities relating to prostitution in Kenya. As such activities such as living on the earnings of prostitution, running brothels, etc. became outlawed.





Exercise

As discussed County Assemblies have law making powers and can legislate on issues such as control of public nuisance, pornography and public entertainment. Can you think of some negative impacts of these laws that you can use to convince the members of your county assembly against passing laws likely to further criminalize sex work.

BASICS OF CIVIL PROCEDURE

8.0

8.1 What is civil procedure?

Civil procedure sets out the rules and standards that courts follow when deciding cases between private persons. Unlike a criminal matter, in most civil suits the court will award the party damages, which is monetary compensation, or give orders. Different claims will go to different courts depending on the issue and the harm suffered by the claiming party.

8.2 Who can institute civil proceedings?

Any private person may institute a civil suit against another private person. Under Kenyan law, a private person may be an individual or a Company, which can sue and be sued in its own name. There are two main parties in civil proceedings are known as Plaintiff (a person who initiates a claim against another) and defendant (a person accused by another of a civil wrong). The type of civil case will depend on the legal facts presented by the claimant.

8.3 What is the procedure for starting a civil case?

➤ The first step in civil proceedings after determining the validity of a claim is to write a demand letter to the defendant. A demand letter should let the other party know the claim being made against them. It should contain a detailed description of the cause of disagreement and what the demands are. A reasonable time period should be provided for the party to reply to the letter. Demand letters are normally drafted by advocates to ensure its validity and that all the legal issues have been captured. The purpose of a demand letter is to present an opportunity for the parties to settle the matter out of court.

➤ How the defendant replies to the demand letter will determine whether there is a need to proceed with the matter through a court process. Should the reply be in favour of your client, then negotiations can begin and the matter can be settled out of court. Should the reply be negative, the claimant will then need to prepare for court.

8.4 What is the general court procedure for a civil case?

➤ **Preparation and filing of plaintiff's pleadings:**
There are several documents that can be used to institute a civil matter in court. The most common way is through a Plaint. An advocate will usually advise and prepare the relevant documents. It is these documents that are referred



to as pleadings. Whichever document is used to institute the matter in court, it should explain all the relevant facts relating to the allegations and the remedies the Plaintiff is seeking from the defendant. All pleadings must include an affidavit signed by the complainant confirming the truth of the accusations. Once ready, several copies of the plaint are presented to the court registry for assessment of filing fees. Once payment is made, the matter is filed in court.

➤ **Service and preparation of Defence:** Once filed, the plaint must be served upon the defendant. The Defendant is then given time to prepare a document known as a Defence. The defence contains a response to all the allegations made and should similarly be filed in court and served upon the

Plaintiff. The matter will then come before court for both sides to confirm that they have presented each other with all the necessary documents. The court will then assign a date for the hearing.

➤ **Trial:** During the hearing, the Plaintiff begins by presenting their case and has the burden of proof. In civil cases unlike criminal, the burden of proof is on a balance of probability meaning that the court will rule in favour of the one who best presents their case. The defendant will then be given an opportunity to defend himself or herself and produce evidence. Once both parties have presented their case, the court will issue a judgment in favour of the party that produced evidence that best supported their case.

8.5 Examples of Civil Disputes

| Examples of Civil Disputes | Details | Court |
|--------------------------------------|--|---|
| Violations of HIV-related rights | Any matters arising from breach of the HIV and AIDS Prevention and Control Act are to be heard and determined by the Equity Tribunal. Any person can approach the tribunal for redress without having an advocate present. The process at the tribunal is simple and they award parties damages in monetary form. | HIV and AIDS Tribunal |
| Disputes between Landlord and Tenant | Matters relating to disputes between landlord and tenants are provided for under the Rent Restriction Act and the Landlord and Tenant (shops, hotels and catering establishments) Act. Violations such as increase of rent without proper notice, eviction of a tenant without proper cause and notice or failure by the landlord or tenant to honour their duties as under the law are presented before specific Tribunals. For any matters that are brought before the Tribunal, the complainant does not need an advocate to be present. The processes at the tribunal are very friendly and a party can lodge a complaint on their own as guided by the rules of the Tribunal. The Tribunal may award damages or give an order depending on the nature of the claim. | Residential Homes - Rent Restriction Tribunal |

| Examples of Civil Disputes | Details | Court |
|----------------------------|--|---------------------------------------|
| Employment disputes | The Employment Act governs matters relating to employment. Any dispute relating to wages/payments, unfair termination from employment, violations of employment rights, breach of employment contracts, etc. Such matters are presented before court and one must have an advocate present. | Employment and Labour Relations Court |
| Marriage disputes | Marriage in Kenya is recognized as duly registered union between two consenting adults of the opposite sex. The laws that govern marriages in Kenya are the Marriage Act, 2014 and the Matrimonial Property Act. They make provisions relating to matters of monogamous and polygamous marriages, separation, divorce, custody of children, and maintenance of spouses and children. Matters relating to division on matrimonial property are also decided under these laws. One requires an advocate to file the necessary documents relating to the above matters. | High Court |

Exercise

Group work: Having discussed the basics of civil procedure, your role as a paralegal will involve providing legal guidance and basic advice to clients.

1. Discuss what kind of evidence you would advise a client to obtain in support of the allegations raised in relating to:
 - a) Unlawful eviction from residence
 - b) Discrimination in Employment
 - c) Medical Negligence
2. Identify any other way in which you are expected to support the client as a community paralegal.

*NO MORE
IMPUNITY*



CHILDREN

9.0

9.1 What are children's rights?

Because children are still developing, both physically and mentally, they are not considered capable of handling the same rights as mature adults. However, children have some inherent legal rights as soon as they are born, and they obtain some additional rights as they grow.

The Convention on the Rights of the Child (CRC) of 1989 defines a child as any human person who has not reached the age of eighteen years. The United Nations Convention on the Rights of the Child (CRC or UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC) set out the civil, political, economic, social, health and cultural rights of children.

The inherent rights of children are as follows:

- Inherent right to life - The Government and the family have the responsibility of ensuring the survival and development of every child.
- Right to parental care-Every child has the right to live with and be cared for by his/her parents.
- Right to Education - Every child is entitled to free and compulsory primary education the provision of which shall be the responsibility of the Government and the parents.



- Right to religious education - Every child has a right to religious education. Parents have the responsibility of providing children with appropriate guidance in religious education.
- Right to health care - Every child has a right to health and medical care of which parents and the Government shall have the responsibility of providing for.
- Protection from child labour and armed conflict – Every child shall be protected from economic exploitation and any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.
- Children should also not be recruited in armed conflict or take part in hostilities - Where armed conflict occurs, respect for and protection and care of children shall be maintained in accordance with the law.
- Right to Name and Nationality – Every child has a right to a name and nationality. Where a child is deprived of his identity, the Government shall provide appropriate assistance and protection with a view to establishing his or her identity.
- Right of Children with disabilities to be treated with dignity - Every child with a disability has a right to be treated with dignity, and to be given appropriate medical treatment, special care and education.
- Protection from child abuse – Every child is entitled to protection from physical, psychological, sexual, neglect and any other form of exploitation including sale, trafficking or abduction by any person.
- Protection from harmful cultural rites – No child should be subjected to female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.
- Protection from the sexual exploitation – All children shall be protected from sexual exploitation, prostitution, inducement or coercion to engage in any sexual activity and exposure to pornographic materials.
- Protection from drugs – Every child shall be protected from the use of all drugs and from being used in their production, trafficking or distribution.
- Leisure and recreation – A child has the right to leisure, play and to participate in cultural and artistic activities.
- Torture and deprivation of liberty – No child shall be subjected to torture, cruel treatment or punishment, unlawful arrest or deprivation of liberty.
- Right to privacy – Every child has a right to privacy subject to parental guidance

The Children's Act governs all the laws relating to the care

9.2 What laws provide for the rights of children in Kenya?

In Kenya, the rights of children are recognized under Article 53 of the Constitution makes the following specific provisions for children:

Every child has the right

- (a) to a name and nationality from birth.
- (b) to free and compulsory basic education.
- (c) to basic nutrition, shelter and health care.
- (d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and

- punishment, and hazardous or exploitative labour
- (e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.
- (f) not to be detained, except as a measure of last resort, and when detained:-
- (i) to be held for the shortest appropriate period of time; and
- (ii). separate from adults and in conditions that take account of the child's sex and age.

and protection of children. It defines the responsibilities and rights of parents. It makes provision for the establishment of Children's Courts and the appointment of welfare officers. It regulates the establishment of places of safety, orphanages and the rights of orphans and sets out the laws for their adoption. It also provides for the contribution of certain people towards maintenance.

The Sexual Offences Act contains provisions that protect children from sexual offences including defilement,

indecent acts, trafficking, sex tourisms, child prostitution and pornography. This Act provides harsh penalties and prescribes the minimum and maximum sentences. This means the court cannot prescribe a punishment lower than that prescribed under the Act for each offence. The law does not allow for settlement agreements between the victim, their victim's family and the accused – as is allowed in other laws.

The Penal Code protects children and creates punishable

offences in relation to acts and omissions, which amount to child abuse. These include:

- Sexual abuse: Offences outlined in the Penal Code include incest (both by males and females) and unnatural offences.
- Physical Abuse: Offences include common assault, assault occasioning actual bodily harm and grievous bodily harm.
- Other offences that protect the lives of children include concealment of birth, killing of the unborn, procurement of an abortion etc.

The Penal Code also sets an age below which a child cannot be held to be criminally responsible even when they have committed a crime. This is known as the age of criminal responsibility.

The age of criminal responsibility in Kenya is eight (8) years. This means that if a child of less than eight years performs an act or omission, which by law is defined as a crime, he or she cannot be charged in a court of law for that offence. Even for children between 8 and 12 years, the court must still establish whether the child understood the consequences of his/her actions. Further, this law also provides that children below 12 years cannot be charged with an offence of sexual nature.

The evidence Act contains provisions that ensure in cases of child sexual abuse, where the child is the victim; corroboration of the child's evidence is not a requirement. Where in a criminal case involving a sexual offense the only evidence is that of a child of tender years who is the alleged victim of the offence, the court will allow the evidence of that child and can proceed to convict the accused person on the basis only of that evidence, where the court is satisfied that the child is telling the truth.

It is important to note that "the best interest of the child" is a human rights principle that generally guides all matters relating to children. "Best interests principle" requires all persons and authorities to, in all actions or measures directed at the child, consider the best interests of the child as a primary consideration.

9.3 Who is allowed to care for a child?

A child's parents; whether they are married to each other or not, are equally responsible for the care of their child. Where the parents are not together, custody of a child below the age of 9 years is generally given to the mother unless there are reasons to show that the mother is not fit to take custody of the child. Parental responsibilities include:-

shelter and clothing

2. Duty to provide medical care

3. Duty to education and guide the child

4. Duty to protect the child from neglect, discrimination and abuse

5. Right to determine the name of the child

6. Right appoint a guardian in respect of the child

7. Right to deal with the property of the child for their benefit

8. Right to arrange or restrict the emigration of the child from Kenya

9. Right to arrange for the burial or cremation of the child

Additionally, parents can allow other persons to provide care to their children e.g. to teachers when they are in school. Apart from the parents of a child, only maternity homes, hospitals, places of safety and children's homes are allowed to receive and care for a child. Even if a person thinks that it is in the child's best interest to remove him or her from the parents, there are legal procedures to be followed by a policeman, social worker or person officially authorised by a Children's Court, if they believe that the child is in need of care.

9.4 When is a child in need of care and protection?

All children in Kenya are potentially at risk of violence, exploitation and abuse; however, some groups are more vulnerable than others due to their gender, social status or geographical location. Children without parental care lack the protective environment and supervision that adult care normally provides. Children in large families may also lack parental attention and can become victims of neglect.

Court can grant orders for the protection of children to ensure that their welfare is enhanced. These are children who include;

- Orphaned or have been abandoned or are destitute;

- Parents have been imprisoned;

- Homeless or are beggars;

- Prevented from receiving an education;

- A female child subjected to FGM or early marriage or children exposed to harmful cultural practices;

- A child exposed to domestic violence;

- Who is pregnant;

- Who is terminally ill or whose parents are terminally ill or who has a disability;

- Who have been sexually abused;

- Who are exposed to child labor.

9.5 Who is responsible for child protection in Kenya?

The Department of Children's Services, established under

1. Duty to maintain the child by providing adequate diet,

the Children's Act, is the main institution charged with the responsibility of safeguarding the welfare of children in the country.

The Act also establishes Children's Courts to hear the following matters:

- *Civil cases concerning parental responsibility, custody and maintenance, guardianship, children in need of care and protection and granting judicial orders for the protection of children.*
- *Criminal cases of children who are in conflict with the law or child offenders except where a child is charged with murder or is jointly charged with an adult(s).*
- *Other offences against people who have been cruel or neglectful of their children and any other offences outlined in the Children's Act.*

Given that issues of children are broad, different government agencies are responsible for children with regard to their various mandates for example:

- the Ministry of Education is in charge of overall provision of quality education for all children living in the country
- the Ministry of Health provides health services, creates an enabling environment, regulates, and sets standards and policy for health service delivery to children

9.6 Sexually exploited Children who sell sex

Commercial sexual exploitation of children is a serious violation of children's rights. The ways in which children become victims of commercial sexual exploitation has changed over the years; becoming even more difficult to detect and effectively address. "Survival sex" (exchange for sexual activity for basic necessities such as shelter, food or money) among adolescents is a growing concern in the sexual exploitation of children in Kenya. This trend eliminates the archaic belief that sexually exploited children are always under the control of a third party. Children younger than 18 years who sell sex, irrespective of the reason, are considered

under the law to be sexually exploited children.

A recent research study conducted by KESWA has shown that criminalization of prostitution increases the vulnerability of sexually exploited adolescents who sell sex to violence. This prevents them from fully benefiting from favorable child protection laws and policies aimed at facilitating their access to health services and legal services.

Sex workers have a critical role to play in enhancing the protection of these vulnerable children from violence and ensuring they have access to services and legal support to address injustice. Paralegals trained to offer sex-worker friendly legal services can provide an invaluable resource for sexually exploited adolescents who sell sex. Their technical insight and success in mobilizing uptake of services among hard to reach populations can aid in informing and implementing effective interventions. Organizations may consider integrating their services to ensure that:

- Interventions by sex worker-led organizations can identify sexually exploited adolescents who sell sex and link them to existing social services;
- Community outreach activities incorporate legal awareness and child rights empowerment for protection of children from sexual exploitation;
- Community programmes encourage dialogue on risk factors of sexual exploitation including specific sessions targeting children of sex workers. These sessions should equip participants with life skills to resist negative peer pressure;
- Sex worker-led organizations can monitor and report discrimination and other violations against sexually exploited adolescents who sell sex in service provision.

It is imperative to ensure that both adult sex workers and sexually exploited adolescents who sell sex are fully engaged in all aspects of strategy development, planning and implementation of violence prevention and response programs to effectively address their specific needs.

Exercise

During your regular outreach at Tumaini IDP camp, you come across Asha a class two pupil who appears to be patiently waiting outside the tent where she lives with her mother. When asked why she was standing there she replies in a low tone "Mama is working inside, if you want to see her you must come back later." You recognize Asha as a daughter of a sex worker who is well known to you. You find out from some neighbours that when the rest of the children are busy doing their homework after they get back from school, Asha has no choice but to wait for her mother to finish attending to her clients. Given the opportunity to talk to Asha's Mother, act out how you would handle this informal meeting, the concerns you would raise and the legal implications of her actions that you would point out in an effort to resolve this issue.

BASICS ON PROPERTY RIGHTS IN KENYA

10.0

Economic empowerment of sex workers is important in efforts towards poverty alleviation and can ultimately mitigate the exploitation and violence associated with their work. Acquisition of property can provide good investment as well as source of income for sex workers. Basic knowledge on property rights is important.

10.1 Buying movable and immovable property

Article 65 of the Constitution of Kenya guarantees the right of every person, either individually or in association with others, to acquire and own property of any description in any part of Kenya.

Property is either movable or immovable. Movable property is any property that is capable of being moved from one place to another and immovable property on the other hand is property that cannot be moved from one place to another. The process of buying movable and immovable property is more or less the same. However, when it comes to buying immovable property, e.g. land, there are more legal requirements that need to be fulfilled.

10.1.1 Land transactions

The parties to a land transaction are referred to as a buyer/Purchaser and a seller/Vendor. The first process would be for the buyer to identify the land that they want to buy. After identifying a suitable property, the buyer should obtain a copy of the title and conduct a search at the land offices. Search results will show details of the land including the registered owner, the acreage as well as any existing disputes relating to the land. A search at the land offices will reveal any amounts owed to the county government.

Identify a local surveyor who will assist with verification of the physical location of the land and the property boundaries. The two parties will negotiate and agree on a sum referred to as the purchase price. Where the owner of the land is married or has children, it is wise to ensure they are aware of and agree to the transaction. The buyer's advocate will then draft a sale agreement for consideration and signing by both parties outlining the agreed price, mode of payment and obligations of both parties.

The seller should get an independent advocate to review the agreement on their behalf. The buyer is thereafter expected to deposit an agreed percentage of the purchase price (usually 10%) with the seller to show commitment. Both parties will sign the agreement and it becomes binding on each one of them. Consent from the land control board should also be obtained permitting the transaction. Once the balance of the purchase price is paid, the seller signs the transfer forms and provides the seller with all the documents required to change ownership of the land in the name of

the buyer. The buyer will be required to pay mandatory charges including stamp duty assessed at a percentage of the valuation (the market value of the property as determined by a government valuer) of the land. A new title will then be issued in the name of the new owner. Purchase of other immovable properties such as houses is generally similar.

10.2 Making a valid Gift

A gift involves property given willingly to someone without requiring them to make any sought of payment. A person giving a gift is called a donor while the one receiving the gift is called the donee. In order for a gift to be legally effective, three requirements must be met:

1. The donor must of their own free will have the intention of giving the gift to the donee
2. The donor must deliver the gift to the donee (transfer of physical possession)
3. The donee must accept the gift

Property including real estate, stocks, bonds, equipment, livestock or cash can be transferred by way of gift.

10.3 Matrimonial property

As mentioned in Chapter 8, each party to a marriage is entitled to a share in property acquired during the marriage. The law that governs matrimonial property in Kenya is called the Matrimonial property Act. This Act is only applicable where there is a valid legally recognized union between the spouses. Matrimonial property refers to any property that is acquired by a husband and a wife whether in both their names or not and includes;

- (a) the matrimonial home or homes (property that is owned or leased by one or both spouses and occupied by the spouses as their family home);
- (b) household goods and effects in the matrimonial home or homes; or
- (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

Where matrimonial property is registered in both the names of the husband and wife, then the spouses share an equal right to the property. However, where such property is only registered to one spouse, upon divorce, the other party is only entitled to an interest in the property according to their contribution towards its acquisition. "Contribution" can either be monetary and non-monetary and includes—

Example: Ted and Ruth are husband and wife. Ted is a banker and his wife Ruth is a teacher. They each contribute Five hundred thousand each towards buying a plot of land in Githurai and registered it in his name. Upon the birth of their 2 children, Ted asked Ruth to quit her job which she did relentlessly. Ted bought a family home in Buruburu for his wife and kid's though again it is registered in his name.

Ruth has been responsible for all domestic affairs in the home. She ensured it is clean and necessary repairs are attended to. She planted a beautiful garden just outside their home, painted and decorated the house, which substantially increases the value of the house. After a while, things did not work out between the both of them and they sought for a divorce. Question is what is the extent of Ruth's interest in the matrimonial property?

(a) domestic work and management of the matrimonial home; (b) child care; (c) companionship; (d) management of family business or property; and (e) farm work

10.4 Inheritance and Succession

Inheritance is the process of passing property to an individual upon death. In Kenya the law of succession provides the mechanism by which property devolves from its deceased owner to the people he/she left behind usually his/her dependents (a dependent is a person who relies on another, especially a family member, for financial support).

There are two types of succession; where a person/deceased dies having written a will (legally referred to as testate succession) or where they die without writing a will (intestate succession). Property is normally divided depending on whether the deceased dies with a will (Testate succession) or whether they die without a will (Intestate succession).

10.4.1 How is property distributed under testate succession

A will is a legal declaration of how a person would want his property to be divided among his family and friends upon his death. There are two types of wills; an oral will and a written will. An oral will is a will made orally and is witnessed by two people. The verbal declaration made in form of an oral will is only valid if the maker dies within 3 months of making it. A written will is usually in writing. For it to be valid it must be signed by the maker and witnessed by two other people. A will usually include the name of the person who is supposed to fulfill the wishes of the deceased person. That person is called an executor.

Before the executor divides the property as specified in the will, they are required to go to court and get a grant of probate that gives them the power to deal with the property according to the wishes of the deceased. Once the executor is done distributing the property he is then required to file documents in court stating that he has fulfilled the wishes of the deceased and distributed all the property in accordance with the will. If a will does not include all beneficiaries and dependents of the deceased person, there is a risk that the will can be challenged in court and if successful result in its cancellation.

10.4.2 How is property distributed under intestate succession?

Here, the deceased does not leave instructions regarding

how they wish their property to be shared among the dependants. In such a case, either a spouse or a child can apply to court to be appointed as the administrator of the property of the deceased. The court will then grant letters of administration, which give them the power to distribute property according to the rules of intestacy, which are:

1. Where the deceased leaves a Sur-viving Spouse and child/children: the spouse is entitled to personal effects and household effects of the deceased include the utensils and furniture. The spouse is entitled to a life interest in the other property; holding it in trust for the children until they are 18 in which case the property will be divided equally among all of them regardless of sex. Where the surviving spouse is the wife and she gets married, she is no longer entitled to the life interest. However, if the surviving spouse is a husband; if he remarries, he will still be entitled to the life interest until his demise.

Where the deceased had more than one wife and children, the wives shall be entitled to both the Personal, house hold effect and a life interest in the net intestate estate. This means that if each wife was living in their own house, the personal effects of the husband and the house hold effects in that house will go to that wife. In case the wives were living under the same roof, then the properties will be divided among the wives equally. With regards to other properties, the law provides that property will divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit in that house.

2. Where the deceased leaves behind a spouse but no children: Where the deceased leaves a spouse but no children, the spouse shall be entitled to; the personal and household effects of the deceased; a life interest in the whole of the remainder estate and 20% of the residue or 10,000/= Kenya shillings - whichever is higher.

3. Where the deceased leaves children only: the estate is supposed to be shared equally among the kids.

4. Where the deceased leaves no spouse or children: the property will be inherited in the following order of priority – father; mother; brothers /sisters, half brothers /half sister to the sixth degree of descendant.

5. Where the spouse leaves no survivors behind: the estate of deceased usually devolves to the state.



Exercise

Each participant is required to write a one page sample will. Once finished, go through it to evaluate whether the following key components are captured:

- o Detailed identify of the person writing the will
- o A list of properties of the testator and their specific identification/description
- o A list of beneficiaries which includes immediate dependants
- o An executor is identified
- o The will is dated and signed and witnessed appropriately

ADDRESSING VIOLENCE AGAINST SEX WORKERS

11.0

11.1 What is violence?

Violence is defined by the World Health Organization (WHO) as the intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community that results or has a high likelihood of resulting in injury, death, sexual or psychological harm, mal-development (affects their normal development) or deprivation (denial) of liberty.

Violence is also about the abuse of power, where unequal power relationships lead to exploitation of the 'powerless' (whether real or perceived). Ultimately, un-empowered people have fewer choices and are therefore more vulnerable to abuse. For sex workers, violence is often a manifestation of the stigma and discrimination they experience. In our society, sex work is highly stigmatized and sex workers are often subjected to blame, labelling, disapproval and discriminatory treatment.

The Committee on the Elimination of Discrimination against Women (CEDAW) affirms that violence against women is a "violation of their internationally recognized human rights" and "a form of discrimination" that "nullified their right to freedom, security and life." Government is required to identify and end customs and practices that perpetuate violence against women. It urged them to conduct public education, create safe havens, institute counselling and rehabilitation programmes for victims, sensitize law-enforcement officials and draft relevant laws to protect ALL women against ALL kinds of violence.

11.2 What forms of violence do sex workers in Kenya often experience?

When we see stories of violence against sex workers, we often aren't told that a sexual assault happened. Most assumptions are



the same: 'that it's not sexual assault if a person sometimes accepts payment for sex. That you can't rape a sex worker you're paying. That the sex worker asked for it.'

The fact is that sex workers are often made more vulnerable to violence through cultural, legal and economic oppression. Yet because of criminalization and stigmatization, sex workers are often unlikely to report the violence they experience.

I. Physical violence:

Being subjected to physical force that can potentially cause death, injury or harm. It includes, but is not limited to: choking, slapping, shoving, punching, kicking, dragging, biting, shaking, poking, hair-pulling, threatening one with an object/weapon and physically restraining a person.

II. Sexual violence:

Rape, gang rape, sexual harassment, being physically forced or psychologically intimidated to engage in sex or subjected to sex acts against one's own free will.

III. Emotional or psychological violence:

Being insulted (e.g. called derogatory names) or made to feel bad about oneself; being humiliated; repeated shouting, inducing fear through intimidating words or gestures; destruction of possessions.

Other Human-rights violations that should be considered in conjunction with violence against sex workers are:

- **Blackmail and extortion**
- **Denial of food and other basic necessities**
- **being refused or cheated of payment or money that is due to the person**
- **forced consumption of drugs or alcohol**
- **being arbitrarily stopped, subjected to invasive body searches or detained by police**
- **Being arbitrarily detained or incarcerated in police stations without due process**
- **being arrested or threatened with arrest with no legal basis**
- **being refused or denied health-care services**
- **being subjected to coercive health procedures such as forced STI and HIV testing, sterilization, abortions**
- **being publicly shamed or degraded (e.g. stripped, chained, spat upon, put behind bars)**

In addition to the above, sex workers face stigma and discrimination as a manifestation of gender inequality and power imbalances. This also applies to male and transgender sex workers who do not conform to gender and heterosexual norms, either because of their feminine appearance or the way they express their sexuality. Inconsistent condom use or lack of condom use, leading to an increased risk of STI and

HIV infection can also be categorized under the range of violations they face. This stigma and discrimination can also prevent sex workers from accessing HIV information and vital health services.

It is also important to note that there are various contexts within which these violations can occur:

- Workplace violence in establishments where sex work takes place (e.g. brothels, bars, hotels).
- Violence from intimate partners and family members
- Violence by perpetrators at large or in public spaces
- Organized non-state violence
- State Violence

I 1.3 Are there laws in Kenya that protect sex workers from violence?

There are several legal provisions that deal with violence in Kenya.

1) Penal code

The Penal Code makes extensive provisions in relations to various punishable offences. Sex workers can file police complaints at the police station against clients and other perpetrators of physical violence against them.

2) Sexual Offences Act

This law provides very stiff penalties for sexual offenders in Kenya, which was informed by evidence demonstrating the rise in gender-based violence and sexual violence. Complaints involving rape and other sexual offences can be reported to the police station. It is advised to specifically utilize the gender desk for assistance in filing sensitive complaints in this regard.

3) Protection Against Domestic Violence Act

This Act is particularly useful in protecting sex workers who may be experiencing violent relationships with close family members in their home. Domestic violence is described as the act of violence against a person living in one's household especially from an immediate member of the family. The law acknowledges numerous types of violence including, verbal abuse, harassment, sexual violence in a marriage, incest, intimidation, stalking, emotional and physical abuse even traditional activities like 'cleansing' of widows and forceful wife inheritance.

Anyone who has been abused or feels likely to be abused can now apply for a protection order that will prevent the abuser from contacting the victim. If after an abuser violates a protection order, they will have committed an offence that attracts a fine of Kshs.100,000 or imprisonment for not more than 12 months and if the judge deems it fit, both.

AS PART OF THE GUIDELINES ON VIOLENCE PREVENTION, NASCOP RECOMMENDS THAT ORGANIZATIONS PROGRAMMING FOR KEY POPULATIONS SET UP, OPERATE AND MAINTAIN HOTLINES AND HELP LINES FOR USE BY PROGRAMME BENEFICIARIES.

Additionally, damage to property can also be compensated at a rate determined by the courts. The abuser will also cover the cost of treatment, loss of earnings as result of the injuries. If the victim can no longer live with the abuser, the latter will foot any costs incurred while the victim sets up in another house and will continue to rent and any other expenses. The law also protects children who suffer psychological trauma in abusive homes. Abuse against children in this case includes them watching or hearing their parents fight or see their mother being beaten up.

11.4 What action can a sex worker take to prevent incidences of violence?

Safety planning should be encouraged for all sex workers.

| SAFETY PLANNING FOR SEX WORKERS | |
|---------------------------------|--|
| What? | How? |
| Environment Employment disputes | <ul style="list-style-type: none"> - Know your work area intimately, including all the safe places and potential risky areas. - Know all exits and potential escape routes. Ensure their accessibility at all times, do not let a client get in between you and your escape route. - Always take down the car registration number, color and make. - Try to check the boot of the car and the back seats before you climb in. - Don't lean into the car when negotiating with a client— if he means trouble, he can hurt you. |
| Food and Drinks | <ul style="list-style-type: none"> - Open drinks yourself or have them opened in front of you. Serve yourself if you have to. - Make sure the client is happy to drink from the same |
| Raising Alarm | <ul style="list-style-type: none"> - Have a personal alarm or whistle with you. Ensure it is easily accessible at all times. - If you have a phone, program an emergency contact on speed dial. |
| Clothing | <ul style="list-style-type: none"> - Wear simple clothing that is easy to get into if you need to leave in a hurry. - Have few clothing items to keep track of and that will not be easy to grab if you need to leave quickly. - Ensure your clothes cannot be used against you, for example as a "straight-jacket". - Keep this in mind as you think about jewelry too. - Do not wear anything expensive/flashy so as not to make yourself a target for mugging. |
| Support System | <ul style="list-style-type: none"> - Establish a "buddy" system by working in threes or twos. Ensure that someone is constantly aware of your whereabouts. Develop a plan so that in case of an emergency there are clear action steps and emergency contacts. - Develop a code that you can use to alert each other of any distress. - Have the others note down details like car registration numbers etc. |

Sex workers are encouraged through their networks to maintain and share lists or reports of aggressors with each other. These lists could include physical descriptions of perpetrators and vehicles involved. Reporting sheets can be made available online (WhatsApp) or at safe spaces (Sex Workers Outreach Program - SWOP Clinics) so that they know to avoid potentially dangerous individuals.

Promoting workplace security by negotiating with owners and managers of sex establishments to protect sex workers from perpetrators of violence. This could be as easy as displaying a hotline number for easy use by those in danger. Paralegals can create safe spaces that allow sex workers to come together and discuss common legal issues and problems they face, including violence, and develop and exchange practical solutions.

11.5 What action should be taken as part of violence response?

Responding to survivors should ensure that the services and support provided reduce the harmful after-effects of violence and prevent further injury, trauma, and harm. This should include action to: assist/support the survivor; seek appropriate consequences to the perpetrator and restore/maintain security for the survivor.

With the above in mind, response, then, should involve the following sectors:

1. Health care – physical injury, emergency contraception, treatment of STIs, Post Exposure Prophylaxis (where relevant)
2. Psychosocial/psychological services – emotional support and counseling
3. Rehabilitation and reintegration – skills training, income generation programs
4. Law Enforcement & Victim Protection - file complaint, seek protection orders, collection of evidence and identify witnesses
5. Legal support – guidance on court process, follow up of case in court

All sectors mentioned must work in collaboration with one another to ensure that the survivors receive comprehensive care and justice. It is vital to note that not all survivors need—or want—all of this help. As a paralegal, you have to ensure that those affected are aware of and are linked to services. It is up to the survivor to use the options that are available.

There are three important and crucial guiding principles while responding to violence:

| GUIDING PRINCIPLES | |
|--------------------|---|
| What? | How? |
| Safety | <ul style="list-style-type: none"> - Ensuring the safety and security of the survivor should be the primary priority for all actors, at all times. - Remember that the survivor may be frightened and may need assurance of her safety. - In all cases, ensure that s/he is not at risk of further harm by the perpetrator or by other members of the community. - If necessary, ask for assistance from the police or other authorities. - Be aware of the safety and security of the people who are helping the survivor; such as family, friends, or social workers, and health care staff. |
| Confidentiality | <ul style="list-style-type: none"> - Ensuring the safety and security of the survivor should be the primary priority for all actors, at all times. - Remember that the survivor may be frightened and may need assurance of her safety. - In all cases, ensure that s/he is not at risk of further harm by the perpetrator or by other members of the community. - If necessary, ask for assistance from the police or other authorities. - Be aware of the safety and security of the people who are helping the survivor; such as family, friends, or social workers, and health care staff |

GUIDING PRINCIPLES

What?

How?

Support System

All actions taken will be guided by respect for the choices, wishes, rights, and dignity of the survivor.

Some examples:

- Conduct interviews and examinations in private settings and with same-sex translators, whenever possible.
- Be a good listener. Maintain a non-judgmental manner. Be patient; do not press for more information if the survivor is not ready to speak about her experience.
- Ask survivors only relevant questions. The prior sexual history or status of virginity of the survivor is not an issue and should not be discussed.
- Avoid requiring the survivor to repeat her story in multiple interviews.
- Do not laugh or show any disrespect for the individual or her culture, family, or situation

11.6 Providing basic counseling to survivors of violence

Counseling is a process, organized in a series of steps, which aims to help people cope better with situations they are facing. This involves helping the individual to understand their emotions and feelings and to help them make positive choices and decisions.

Counseling plays a major role in helping a survivor of violence calm down and ensures they are able to explain their experience. To the paralegal, this can provide a good opportunity to advise on appropriate step to take and options available to them. Through basic counseling one can assist people to reduce initial distress resulting from a difficult situation, and to encourage short and long-term adaptive behavior.

There are three major needs that have to be addressed when responding to a survivor of violence/trauma. These are: the need to feel safe; the need to express their emotions and the need to know what comes next. The counselor's

interventions should be geared to addressing these needs. The tasks for the paralegal involve:

- Assessment of the situation to note the nature of the violence
- Offering information regarding the services available to them
- Assisting the client to express their concerns and fears as well as offering encouragement and motivation
- Providing referrals and assisting in the development of a plan of action

In offering support, the principle of doing "good" and "not doing harm" should inform any action. The following fundamental principles should be adhered to:

1. Ensure that the survivor gives an informed consent to any process
2. Always act in the best interests of your client
3. Do no harm to the survivor; and do not put them at risk
4. Encourage the survivor to access available services including accessing justice.

Exercise

Group Work: Discuss the following statements to differentiate facts and myths relating to violence against sex workers:

- i. Sex workers set themselves up for violence.
- ii. Anti-prostitution laws and social attitudes fuel violence against sex workers.
- iii. Sex workers are victims and survivors of childhood sexual abuse.
- iv. Many sex workers are alcoholics and drug addicts.
- v. Circumstances prevent sex workers from finding alternative means of earning a living, no matter how much they would like to.
- vi. Arresting sex workers will keep them off the street and safe from violence.



BASICS OF CRIMINAL PROCEDURE IN KENYA

12.0



12.1 What is criminal procedure?

Sex workers are often subjected to arrest and criminal prosecution. It is important that they are empowered with proper knowledge on criminal procedure to ensure procedural compliance by authorities.

Criminal procedure refers to the process through which the State prosecutes a person suspected of committing an offence, on behalf of a complainant (the person who was wronged). Although the crime is committed against an individual, this action is viewed as a wrong against the entire society - the complainant, through law enforcement agencies such as the police, informs the State of the wrongful conduct and the state then seeks to punish the wrongdoer.

When someone contacts the police to make a report of a crime this is called an initial report. An initial report will cover the basic facts of what has happened. You may be expected to give details of the offence, your contact details and the name of the suspect, if you know this. This report is recorded in the occurrence book and the complainant issued with an OB Number that indicates the date and time the report was made and is a form of acknowledgement that this has been documented. The police are required to assess the information, and if what has been reported is a criminal offence, they begin making enquiries - usually by contacting the victim and other witnesses to ask them to make witness statements on facts relating to the case. Where necessary, they may also visit the scene of the crime. Once a suspect is identified, an arrest is made, marking the beginning of criminal procedure that has several stages:

- Arrest
- Charges
- Plea
- Trial
- Judgment
- Sentence

12.2 Who can make an arrest and how is an arrest made?

Under the law, several people have the power to arrest a suspect:

- Citizen:** A citizen can arrest a person who commits a serious offence in his/her presence. Upon such arrest, the citizen must immediately transfer the suspect to the nearest police custody. Failure to do so would amount to unlawful detention.
- Magistrate/Chief:** Similar to citizens, a magistrate or area chief has powers to arrest a person who commits a crime in his/her presence, and within his area of jurisdiction. On



effecting the arrest, the magistrate has to hand over the suspect to the police.

iii. Police: The Law gives the Police the widest powers of arrest. A police officer can arrest any person who:

- a. commits a serious offence in his presence;*
- b. obstructs him during his work;*
- c. tries to escape from lawful custody;*
- d. is suspected of having committed a serious offence;*
- e. is suspected to have stolen property; or*
- f. has a warrant of arrest issued against him.*

iv. The court: A warrant may be issued by court for the arrest of a person:

- a. Who has not abided by the conditions of bond/bail*
- b. who did not appear before the court when required to*

To ensure that the rights of a suspect are not unduly violated, the law outlines the following rules regulating arrests:

- i. The person carrying out the arrest must clearly identify himself. If a police officer, he is required to produce his police ID card.
- ii. The person carrying out the arrest must inform the suspect of the reasons for his arrest, whether or not the suspect asks for such reasons.
- iii. The arresting person should only may touch, confine or put handcuffs on the suspect if the suspect is uncooperative - does not wilfully submit to the arrest or tries to run away.
- iv. The law allows the person arresting to search the suspect, document and place in safe custody all articles taken from

the suspect.

- v. The person effecting arrest is only allowed to use reasonable force to prevent escape or avoid imminent danger to life.

12.3 Does an arrested person have any legal rights?

Yes. Article 49 of the Constitution states that an arrested person has several rights including:

- the right to be informed the reason of the arrest
- the right to communicate with an advocate, and other persons whose assistance is necessary
- the right to not to be compelled to make any confession or admission that could be used in evidence against the person

There are instances where the police will be required to obtain a warrant before a search or arrest is effected (should you require such confirmation, you can consult a KESWA advocate).

During lawful detention in police custody, the suspect may record statements, whether during the inquiry or after the police have preferred charges against him. Such statements must be made voluntarily. The law does not allow confessions made in police custody. Please note that the police cannot use such confessions in evidence against the suspect in court. While in police detention, the suspect is entitled to police bond, which may be free or cash-based. Where it is cash-based, the money is to act as security that the suspect will not disappear and will be available when required by the police. In granting the bond, the officer in charge of the police station where the suspect is detained has to take into consideration the gravity of the offence. An official receipt must be issued to reflect this so that the amount can later be claimed.

The law does not allow a suspect to be detained indefinitely by the police. Generally, where a person is arrested, they are entitled to be arraigned in court within twenty-four (24) hours, unless there are reasonable grounds that make it impossible. However, in cases of capital offences (any criminal charge which is punishable by death), the suspect can be detained for up to fourteen (14) days. While in custody, your lawyer may visit you as much as he/she needs to. However, family and friends may only visit between 6am and 6pm and these visits are supervised.

If your rights are not respected during the arrest, you should make a complaint to the officer commanding the police station (OCS). If the police have injured you, you may make a claim in court for compensation – you can contact a KESWA advocate or a local human rights organization for

assistance with this.

Useful Tips when arrested:

- Keep calm and do not resist arrest
- Make sure someone next to you knows of your arrest, where you are being taken and where possible notes down who is arresting you (name/description) or the transportation vehicle details
- Give your proper name, address and identification details
- Be polite when speaking to the police officer
- Ask for a relative or a friend to be informed that you have been arrested, and if you are under 18 years old, inform the police that you are a minor and require a guardian to be present at the police station
- Ask to make a phone call to your lawyer or a relative or friend
- Do not make or sign any written statement and do not confess to something you have not done
- Always keep notes to document everything (this may be relevant at a later time)

12.4 What is the procedure in court for criminal cases?

12.4.1 Plea taking

When you are brought before the court, the charge and the details of the offence will be read in court. The accused will then be required to respond by saying "guilty" or "not guilty" – this response is called your plea.

If you say "guilty," you have admitted that you committed the crime. The prosecuting lawyer will state the facts of the crime again. If you do not disagree with the facts, you will be determined guilty by the court (convicted) and punished accordingly. The punishment is called a sentence. If you disagree with the facts or disagree with being guilty, then the court is required to change the plea to "not guilty." Anything you say in court will be recorded.

If you say "not guilty," you will be given a date when you must come back to court for a trial. The trial will determine if you are guilty or innocent of the charges against you. It is the choice of the court to grant bond/bail (conditional release of a suspect by the deposit of some form of property or money pledged to a court on the understanding that the suspect will return for trial), which may be cash-based or bond (usually given in less serious crimes and does not involve money being directly deposited. Bond requires that you make a written promise that if you do not show up in court). Sometimes the court may require a surety (A surety is a person who agrees to act on behalf of the defendant and ensure he honors his agreement. He becomes liable to the court if the defendant fails to attend court). The accused person MUST come back to court on the agreed date; otherwise the court will give an order to have them

arrested. If you come back to court on all the days that you are required, this money will be given back to you, even if you are eventually found to be guilty.

Where bail is not granted, the accused will be sent to a remand prison until the trial. Where the accused is in remand, mentions will be set every 14 days during which the accused can at request for reduction of bail amount, change their plea, request a hearing date to be set and even request for witness statements to be used during the trial.

Please note that the accused person has a right to understand what is happening in court. This means that the court may speak in English or Kiswahili. If the accused does not understand any of these languages, the court will provide an interpreter in the preferred language free of charge.

12.4.2 Trial

Any person charged with a criminal offence must be given a fair trial within a reasonable time. In reality, this does not happen because of poor investigations, lack of prosecution witnesses, and understaffed judiciary. If the trial is taking unreasonably too long this should be brought to the court's attention.

According to the Children's Act 2001, cases involving child offenders should take a maximum of 3 months from the date the plea is taken to its conclusion or be dismissed. For cases before superior court, the maximum time of trial should be 12 months and during that time the child should not be kept in detention for more than 6 months without bail.

A trial has two sides; the prosecution and the defence. The trial commences with the prosecution presenting its case, by giving evidence against the accused. Witnesses will be called to present the court with facts against the accused regarding the alleged crime. This is referred to as examination-in-chief. The accused will have the right to ask questions of each of the prosecution witnesses. The questions should try to challenge the information the witness has presented to



court. This is called cross-examination. The prosecution is then again allowed to ask more questions to clarify or strengthen issues that have been challenged during the cross-examination. This is re-examination.

At the end of the prosecution case, where the evidence is not strong enough to support the allegations against the accused, the court will find there is no case to answer and the case will be dismissed and the accused set free of the charges and allowed to go home unconditionally. This is called an acquittal.

However, if the evidence is strong, the judge/magistrate will decide that the accused has a case to answer and he/she will be required to respond. This process gives the accused the right to present their defence and call witnesses. A similar process occurs where the defence will ask witness's questions for examination-in-chief and after the prosecution has the chance to do the cross-examination questions followed again by re-examination questions by the defence. Even if the defence has no witnesses, the court will want to hear what happened regarding the alleged offence. The accused in this instance will have three options:

- i. If the accused feels any more information will hurt their case, they can choose to keep quiet
- ii. The accused can choose to give unsworn evidence if they do not want to be cross-examined or have their information challenged
- iii. Where the accused chooses to give sworn evidence, they can be cross-examined by the prosecution. If you give evidence which is later discovered to be a lie, you can be found guilty of perjury; an offence that can result in a six months prison sentence.

12.4.3 Judgement and Sentencing

At any time before the court delivers its judgment, the prosecution is entitled to withdraw the charges against the accused. Where the charges are withdrawn before the accused is put on the defence, subsequent proceedings can be instituted again for the same matter. However, where the case is withdrawn after the defence case has begun, the matter comes to an end and the accused cannot be charged again in respect of the same matter.

In the end, the court is required to weigh the evidence of the accused against that of the prosecution, with a view to determine guilt or innocence. To convict the accused, the court will have to satisfy itself, beyond any shadow of doubt,

that the accused actually committed the offence charged. Otherwise, any doubt will have to be resolved in favour of the accused.

Before sentencing, the convicted person will be allowed to explain his/her circumstances and ask the judge/magistrate for a lesser punishment

Useful Tip: The accused should NOT argue their innocence but rather present a convincing reason for the court to show mercy. (E.g. it is the first time you have committed a crime, you are the only one who has a job in your family or are a single parent with young children, you are very sorry and regret your actions, etc.)

Depending on the nature of the offence with which he was charged, the convict may face any or a combination of penalties: imprisonment; fine; community service order; and probation. In addition to the time spent in prison, when the court feels that your sentence should be more serious than the punishment given in the law because you were particularly hateful or cruel in your acts, the court can order the convicted person to also do hard labour. However, please note that corporal punishment (caning/ beating a person) was abolished in Kenya and is against the law. When you are charged with and found guilty of murder, treason, robbery with violence or trying to rob using violence, the court may order punishment by death.

If the accused is aggrieved with his/her conviction or any sentence passed by the trial court, the accused is entitled to appeal against the same within fourteen (14) days. If you are convicted (guilty) of a crime, you have the right to appeal your conviction or your sentence. If you plead guilty, you may only appeal your sentence, not your conviction.

While in prison, you may have a right to remission. This is shortening your time in prison because of good behaviour. Feel free to discuss this option with a KESWA advocate when necessary.

12.5 Can an accused person represent himself or herself in court?

Yes. It is better to have a qualified professional representing an accused in criminal proceedings. However, the services of an advocate are not always accessible or affordable. As trained paralegals you cannot represent a person in a criminal court but you can help them effectively represent themselves.

Exercise

Group Work: In your paralegal work, you identify a case of a sex worker who undergoes regular physical assault at the hand of a client known to them. Identify your role in supporting the client access medical and legal support.

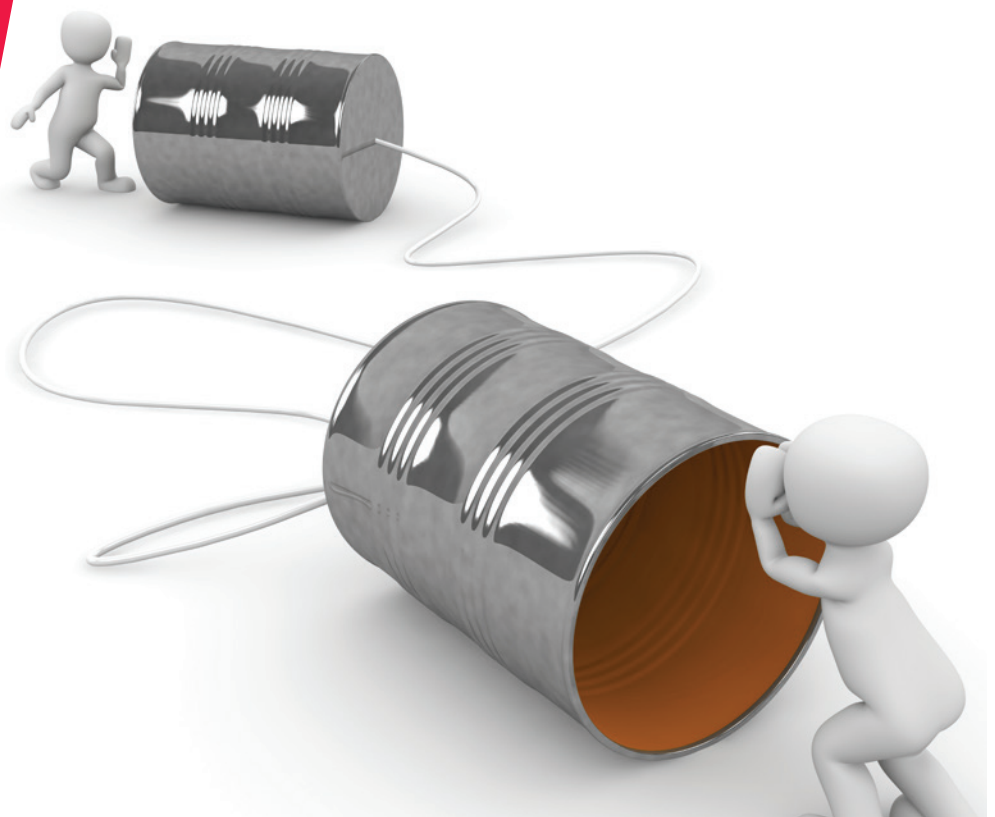
COMMUNICATION SKILLS

I 3.0

Part of the required expertise for paralegals relates to effective communication skills. The content of the experiences of sex workers and more so survivors of violence is sensitive, and for various reasons difficult to express, the paralegal needs special skills to facilitate communication about the experiences. This communication must address individual needs and concerns of the clients in culturally appropriate ways. Possessing the adequate skills to communicate effectively ensures that one can engage with other service providers and professionals aptly.

Demonstration of basic communication skills requires the ability to:

1. Model appropriate behavior by: Using appropriate, accurate and non-judgmental language; Practicing active listening and attending to client concerns (including non-verbal behavior/body language); Paraphrasing (reframing) what clients say to ensure a mutual understanding; Focusing a client's confusion and assisting them to structure their thoughts/expressions/feelings
2. Ask open-ended questions to seek information and give positive reinforcement
3. Describe client rights and confidentiality in clear language
4. Elicit, document and appropriately use client responses to improve service delivery
5. Use written and visual materials that convey information clearly and respectfully to clients
6. Speak and present information effectively to small and large groups of clients and/or colleagues to promote awareness on certain issues.



13.1 The Interview Process

- *When carrying out an interview with a client, one should observe the United Nations Guiding Principles of Response as follows:*
 - *Ensure the safety of the victim at all times.*
 - *Respect the confidentiality of the affected person(s) and their families at all times.*
 - *Respect the wishes, rights, and dignity of the client when making any decision on the most appropriate course of action to prevent or respond to an incident, while also bearing in mind the safety of individual and the wider community.*
 - *Ensure non-discrimination in the provision of services.*

Some general guidelines on conducting an interview are outlined in the table below.

| GUIDING PRINCIPLES | |
|---|--|
| Do | Dont's |
| Protect the survivor from a repeat attack. Support System | Force the survivor to return home alone. |
| Ensure the survivor is able to protect her/himself if s/he returns home alone. | Force the survivor to return to her/his home if the perpetrator may be nearby. |
| Develop a safety plan for the survivor and identify safe havens for her/him. | Force the survivor to report details s/he feels will threaten their safety, if disclosed. |
| CONFIDENTIALITY | |
| Do | Dont's |
| Ensure privacy. | Disclose confidential information in general conversation. |
| Conduct interview and exam in a closed room. | Make the survivor tell her/his story in a public area. |
| Obtain the survivor's permission to share confidential information with proper agencies. | |
| RESPECT | |
| Do | Dont's |
| Show compassion and patience. | Belittle or judge the survivor for any reason. |
| Treat the survivor with dignity. | Ask inappropriate or unnecessary questions. |
| Respect the survivor's individual coping mechanisms. | Make the survivor repeat painful parts of her/his story numerous times. |
| NON-DISCRIMINATION | |
| Do | Dont's |
| Treat all survivors as victims of violent, life-threatening attacks in need of social support and medical, psychological, and legal services. | Turn a survivor away, refuse to treat a survivor, or fail to take a survivor seriously for any reason. |

It is especially important to obtain informed consent before proceeding to get information from a client. Informed consent is best viewed as a process rather than simply signing a form or providing verbal permission. Signing a consent form may not always be appropriate, such as when the survivor is illiterate or if signing the form would pose a risk to the survivor's safety. The paralegal is responsible to ensure the client understands each aspect of the process. The client must be informed of the anticipated course of the interview and any activities that follow the interview; benefits and risks of participation; the right to decline, refuse, or stop the interview at any time; and that refusal to participate will not affect their right to access health care or legal proceedings. The information should be easily comprehensible and the client should have a clear appreciation and understanding of the facts, implications, and future consequences. Common elements of an interview include a greeting, role identification, rapport building, fact-finding questioning, clarification of detail, time for the interviewee to ask questions of the interviewer, and closing the interview.

When greeting the survivor, the interviewer should be polite and nonjudgmental and use the name of the survivor. The interviewer is expected to introduce her/himself and her/his role and explain what will occur during the course

of the interview and why. The interviewer explains that s/he will take notes, while making an appropriate amount of eye contact with the survivor. Interviewers should speak in plain language and avoid technical terms and jargon. Interviews begin with open-ended questions, such as: "Please tell me what happened"; "And then what happened?"

After the client has an opportunity to tell her/his story, it will likely be necessary for the interviewer to clarify details with open-ended or closed-ended questions. Interviewers should avoid questions that begin with "why" since these questions are irrelevant to the purpose of the interview and often make the interviewees feel defensive. Clients may have questions for the interviewer, such as whether the information will be kept confidential or whether survivors will have to go to court. Interviewers should address questions to the best of their knowledge and as honestly as possible. Interviewers should provide survivors with as much time as possible to ask questions or address any concerns survivors may have. When closing the interview, the interviewer should confirm that the survivor feels safe to leave and reassure the survivor of confidentiality. Survivors should be made aware of common reactions to violence and trauma and opportunities for follow up and referrals to psychosocial professionals for further evaluation and care.

Exercise

Role Play: After reviewing key concepts relevant to interviewing clients, participants can practice and demonstrate interview techniques and the components of a successful interview. Other participants should try and identify appropriate and inappropriate questions and styles.



14.0

14.1 What is Mediation?

[illegible]

Understanding the mediation process

| It is About.... | It is not about.... |
|--|--|
| <ul style="list-style-type: none"> • finding a compromise that gets you the best deal possible • influencing the outcome • persuading the other side to think again, to re-visit their views • effective communication and appreciating that in order to persuade, you must find a way to ensure that your opponent listens • being on 'receive' as well as 'transmit' • understanding that those on the other side will not change their position unless they believe it is in their interests to change their position | <ul style="list-style-type: none"> • getting a deal no matter what the cost • trampling on the other side's position • trying to force the other side to move position by threats of defeat, total destruction or humiliation (as opposed to the use of logic and reason) • losing sight of the alternatives to settlement if, on balance, the only available deal is sub-optimal • throwing yourself on the mercy of the process and hoping for the best • trying to agree on every issue between the parties for possible solutions. |

14.2 What is the role of the mediator?

A paralegal may act as a mediator in a dispute involving peers or members in their community and will have the following roles:

- Manage the process of mediation and sets the tone of the mediation;
- Unlock fixed positions by the parties by providing useful information and relevant facts;
- Provide an effective voice for each party – understands and explains each person's position;
- Encourage each party to propose possible ways to resolve the problem;
- Point out statements by the parties that could offend and

inflame an already difficult situation;

- Help make potential solutions manageable; and
- Break deadlock between the parties by helping them realize the risks involved if the matter escalates.

14.3 Why opt for mediation over litigation?

Although mediation is a means of seeking resolution of disputes involving conflicting views or interests, the mediation process is significantly different from legal actions. The end result in successful mediation does not consist of "winners" and "losers," but of parties who have carefully examined and defined set of issues and have come to an agreeable solution.

| Mediation | Litigation |
|---|--------------------------------------|
| Resolved by disputants | Resolved by the courts determination |
| Solves the dispute | Determines rights |
| Seeks to preserve the relationship | Aims at proclaiming rights |
| Mediation process are extremely private | Can be open to the public |

Some advantages of mediation over litigation are

1. Quicker: Mediation typically only takes days or weeks (or in very complex cases possibly months), whereas lawsuits typically take months or years. When parties want to get on with their lives, mediation allows a more reasonable timetable for resolving a dispute.
2. Less expensive: Mediation is vastly less expensive than a typical lawsuit. Employing a mediator costs significantly less than employing a lawyer, and combined with the much quicker turnaround, you'll be paying less money over a shorter period of time.

3. Less formal: The informality of mediation allows the parties to be more engaged than they would be in a court-driven process with an abundance of rules and procedures designed to separate the parties. Accordingly, since the mediator deals directly with the parties, the mediator can focus the attention of the parties upon their needs and interests rather than on their stated positions.

4. Confidential: Unlike court cases, which are public, mediation is typically confidential, which means there are no records and any evidence introduced during mediation cannot be used later or revealed.

5. Mutually Satisfactory Outcomes: Parties are generally more satisfied with solutions that have been mutually agreed upon, as opposed to solutions that are imposed by a third party decision-maker.

6. High Rate of Compliance: Parties who have reached their own agreement in mediation are also generally more likely to follow through and comply with its terms than those whose resolution has been imposed by a third party decision-maker.

7. Comprehensive and Customized Agreements: Mediated settlements are able to address both legal and extra-legal issues. Mediated agreements often cover procedural and psychological issues that are not necessarily susceptible to legal determination. The parties can tailor their settlement to their particular situation.

8. Personal Empowerment: People who negotiate their own settlements often feel more powerful than those who use surrogate advocates, such as lawyers, to represent them. Mediation negotiations can provide a forum for learning about and exercising personal power or influence.

9. Preservation of an Ongoing Relationship or Termination of a Relationship in a More Amicable Way: One of the most overlooked benefits of mediation is that it can help preserve relationships, business and personal, that would likely be destroyed through years of litigation. Because it is a collaborative, rather than adversarial process, and because mediation isn't inherently a win/lose process, important relationships can often be saved

10. Agreements that are better than Simple Compromises or Win/Lose Outcomes: Interest-based mediated negotiations can result in settlements that are more satisfactory to all parties than simple compromise decisions.

11. It brings efficiency and structure to a negotiation:

- it encourages a real focus on the problem
- meaningful information exchanges are encouraged

- the future as well as the past is discussed, with an emphasis on a forward looking approach to resolution
- there is a focus on true interests of the parties not simply rights based remedies

14.4 Are there any disadvantages of mediation?

The biggest weakness of agreement reached under mediation is that they are not legally binding. Either of the parties may decide not to comply with the agreement and the party who changed their mind and bring the dispute into litigation.

14.5 What does the process of mediation involve?

Power in negotiation is derived from the ability to persuade those with whom negotiations are taking place to think again. Proper preparation raises the level of that ability. A well prepared party will have greater success in persuading those on the other side that they should think again about the strengths and weaknesses of their case, about their attitude to risk, about their ability to endure conflict and about the alternatives to settlement.



In preparation for mediation processes parties should think about:

- what they want;
- financial and other goals;
- the strengths of their cases and how they will explain them;
- the problems with their case and how they will deal with them;
- the problems with their opponent's case and how they will exploit them;
- the key benefits of being in the same building as your opponent for a day;
- Obstacles to settlement (incomplete knowledge, unrealistic opponent, etc.) and how they will overcome them.

Guidance on mediation process:

1. Parties choose mediator:

A mediator is an independent third party who is appointed by the parties to help them attempt to negotiate a solution. Among other things, the mediator explains and interprets to the participants the ground rules and procedural details. He chairs the joint mediation sessions. He arranges, if needed, various kinds of resource assistance for either or both sides. He is a neutral, experienced professional.

2. Pre-mediation preparation meetings:

In preparation for the mediation meetings, position statements are discussed and where possible written. This

provides an introduction to the dispute for the mediator and can set the agenda for the mediation in terms of the issues that need to be discussed.

3. Mediation Hearings

Private meeting between the mediator and each of the parties then takes place. Sessions are usually 15 to 20 minutes. There is no fixed agenda and they discuss the issues they have and what they would wish to address in the joint meetings.

Following these private meetings, opening joint session begin. The mediator should establish clear ground rules of the mediation to be agreed upon by both parties - confidentiality, privilege, mutual respect, etc. The mediator will then invite each side in turn to give a short account of their current position. This is a very important opportunity for the parties. Each party should explain how they see the dispute and offer their view as to what needs to be addressed throughout the day if progress is to be made. These opening comments might contain questions that the other side are invited to consider. In mediation, parties must seek to persuade their opponents to think again about their case and approach to settlement.

4. Settlement proposals and agreement:

When it comes to settlement proposals, the mediator might encourage parties to make offers directly to one another. A draft settlement agreement developed by the mediator outlining the agreement arrived at can help achieve commitment by both parties.

Exercise

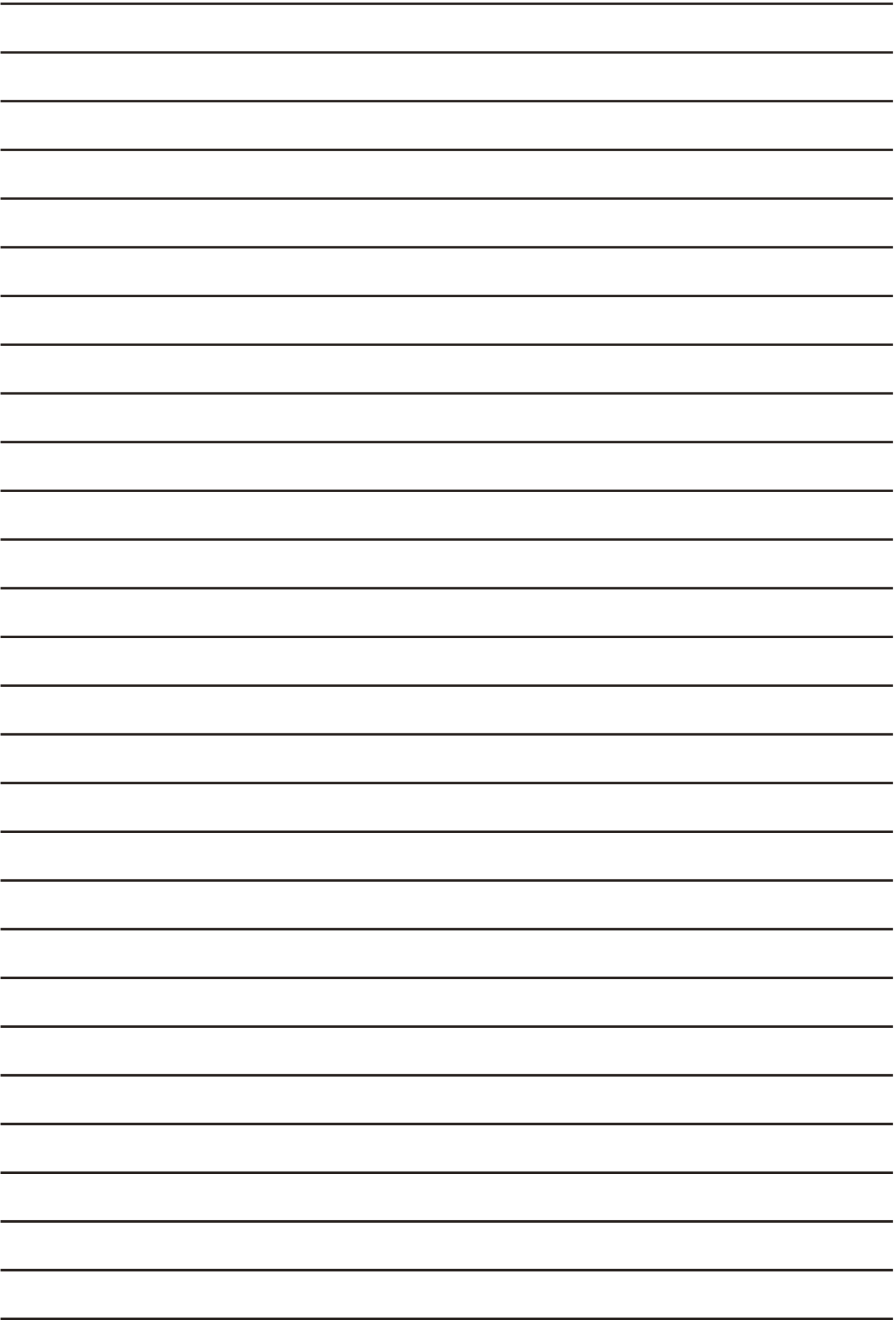
The supervisor of a drop in centre in your area has referred a dispute between one of her employees (a peer educator) and a client who occasionally accesses services at the facility. The client has raised a complaint accusing the employee of engaged in inappropriate, suggestive, and provocative language and other behaviours toward her each time she comes to collect commodities from the facility. She specifically alleges that:

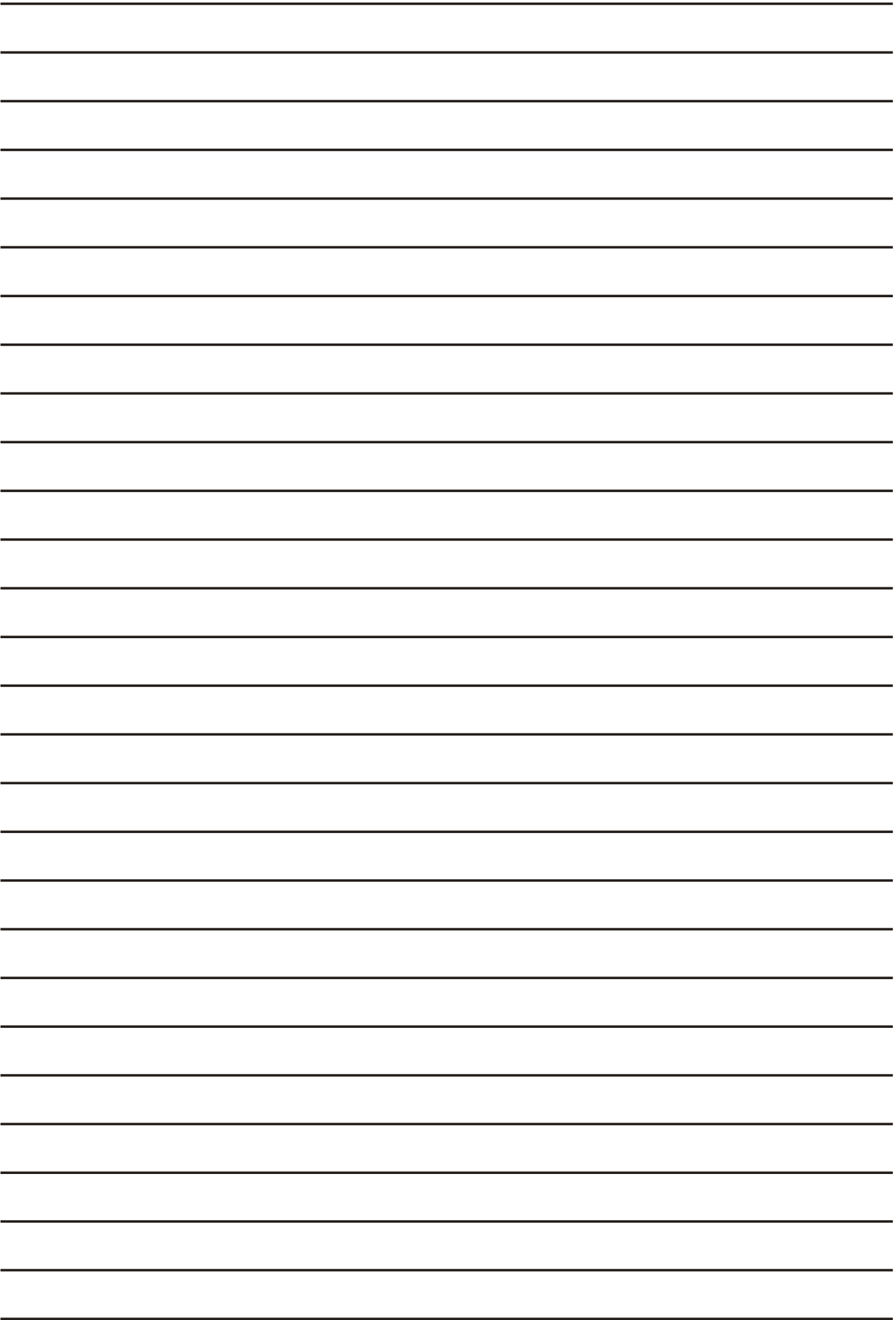
- 1) He always ensures that no-one else is allowed to attend to her except him;
- 2) He always asks her personal questions about her clientele, where and how she conducts her business; and
- 3) He uses vulgar sexual language with her and even touches her inappropriately

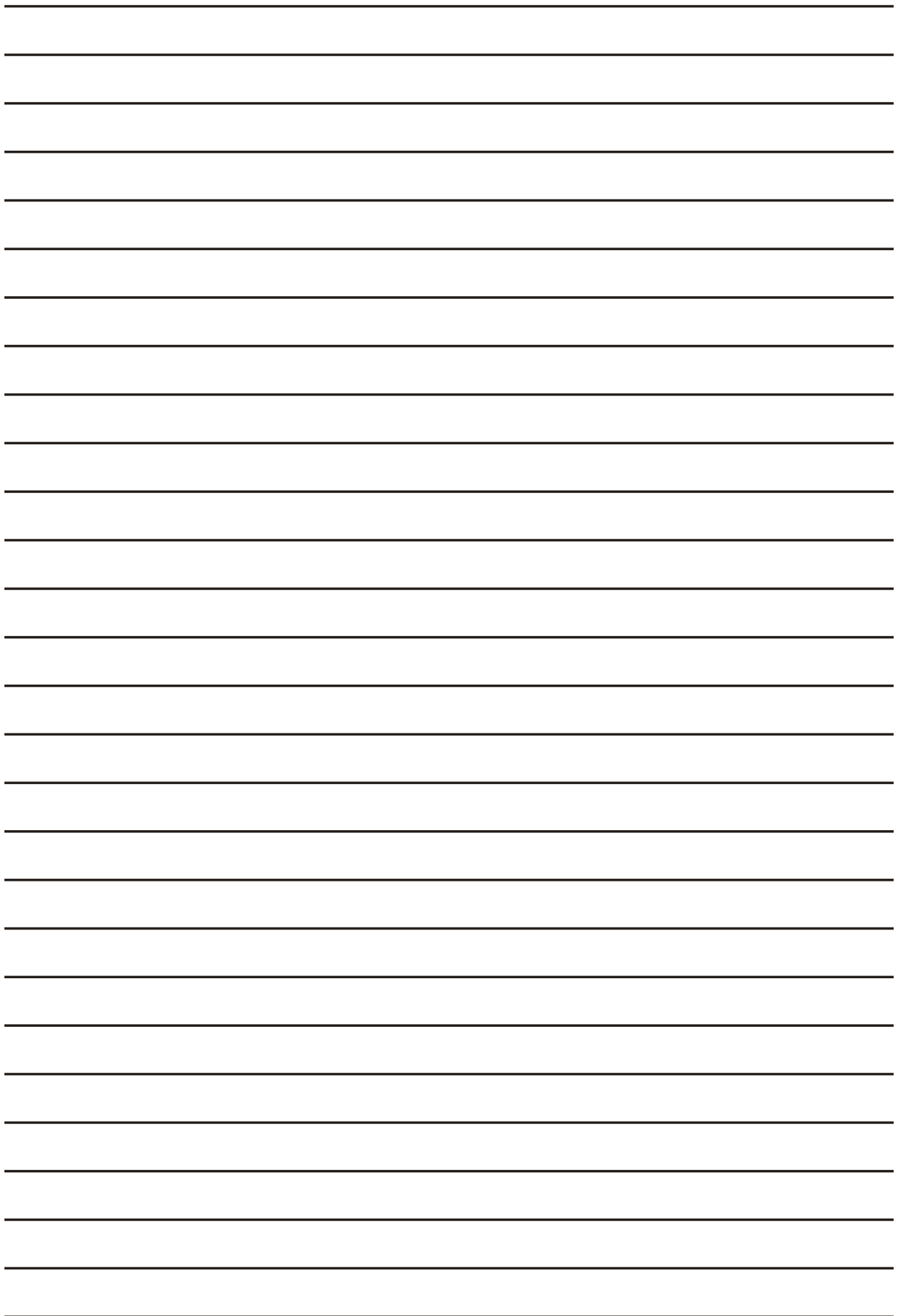
The accused employee disputed the allegations from the outset, stating that:

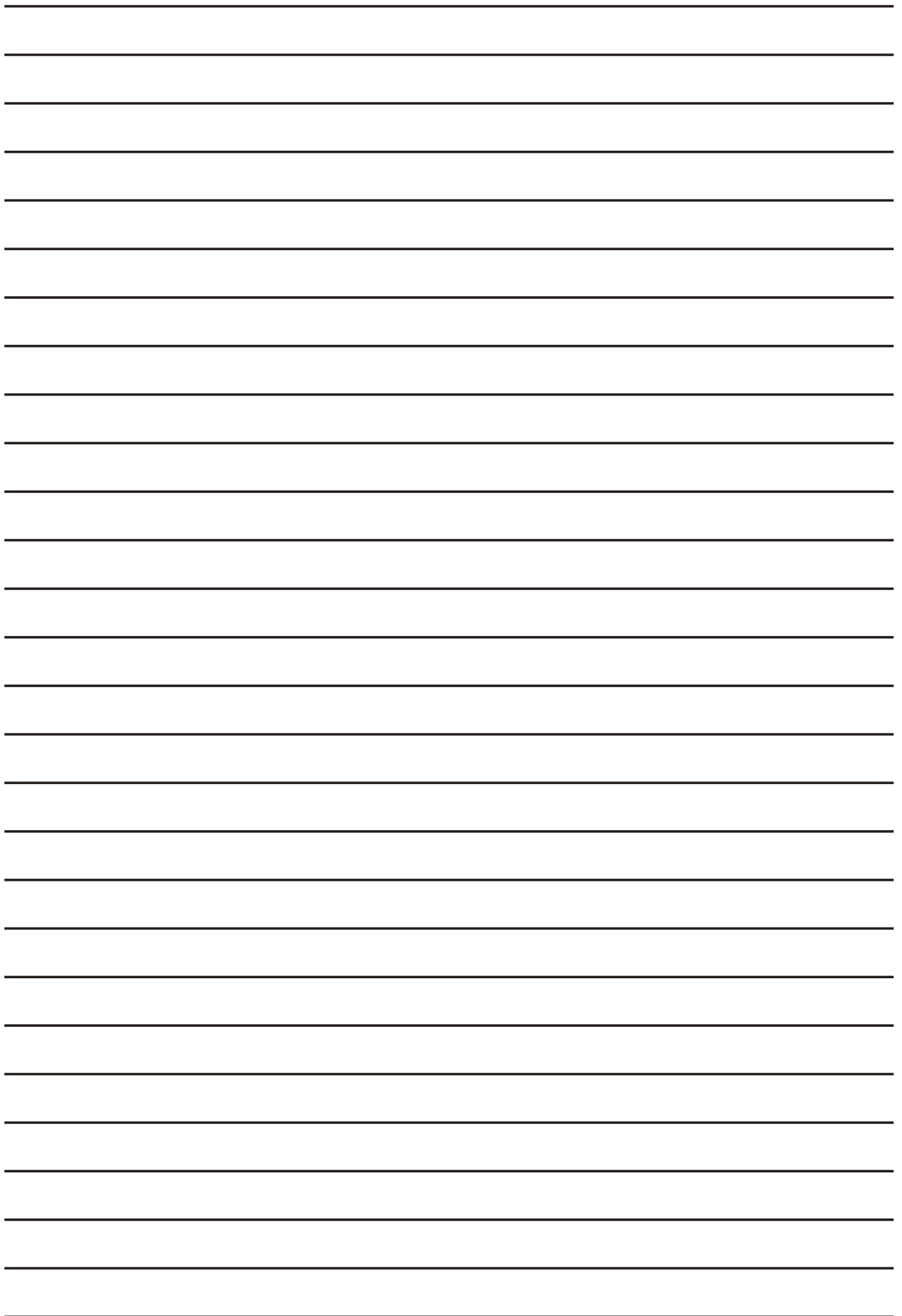
- 1) his behaviour was no different from the behaviour of many co-workers
- 2) allegations against him had been grossly exaggerated and in some cases fabricated altogether; and
- 3) in his opinion, the allegations had less to do with his behaviour toward the client and more to do with an on going conflict between them based on a demand by the client to be given preferential treatment.

The facility supervisor is keen to have the parties resolve the matter amicably as the issue could threaten donor support to the program. Prepare a position paper and organize a mediation session between the two parties to help them resolve the matter.











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