



MOBILE COURT POLICY

WHEREAS WOJAM is a trust duly registered under the Trustee Incorporation Act and is a grouping of female and male judicial officers whose mission is to bring the law and the courts to the people thereby demystifying the court processes. This results in enhanced access to justice for all through the promotion of the awareness of the relevance of the law;

NOTING that WOJAM, Women Lawyers Association and the Gender Justice Unit came together as a consortium under the banner Women Justice Consortium to implement a project under the Spotlight Initiative so as to improve access and delivery of formal justice in rural communities by bringing courts closer to the communities in a comprehensive way that ensures a victim-centred and gender transformative approach;

RECOGNIZING that there is need for the magistrate courts to strategically position themselves in order to achieve gender sensitive court room management where gender sensitive language is used and also where gender stereotypes and biases are confronted.

RECOGNISING that the project intends to achieve its targets thus handling and closing four Hundred (400) cases during the given project period. Therefore requiring efficiency and effectiveness in the execution of the mobile courts.

COGNIZANCE that project interventions need to strengthen coordination and collaboration of key justice actors in the provision of justice to victims of gender based violence i.e. the police, the social welfare department, Health and other CSO's

NOW, THEREFORE EVERY JUDICIAL OFFICER OR JUDICIAL STAFF MEMBER HERETO AGREE AS FOLLOWS-

Article 1
Mobile Court Sessions

- 1.1 A cause list in the Annex 1 shall be duly submitted to Mobile Courts Coordinator on a preceding Wednesday before a mobile court session in the following week.
- 1.2 The said cause list in Article 1 shall be duly signed by the WOJAM District Magistrate to ensure it is processed by the WOJAM Programming Team.
- 1.3 Every mobile court session shall -
 - 1.3.1 handle eight (8) cases per week and that ensure that they are closed;
 - 1.3.2 each magistrate shall ensure a minimum of two (2) cases per day; and
 - 1.3.3 the 5th day of the session shall be reserved for judgment writing and delivery.
- 1.4 Case Returns shall be filed every week, monthly and quarterly as in Annex 2.
- 1.5 Case returns shall be signed by District Supervisors should be submitted on Saturday following completion of a mobile court session.

Article 2
Mobile Court Standards

- 2.1 All mobile court participants shall ensure that mobile courts are conducted in line with the Minimum Gender Based Violence Guidelines for the Judiciary in Annex 3.
- 2.2 Every case shall only be funded once under a mobile court session and an adjourned case must be included in the following submitted cause lists.
- 2.3 A judicial officer shall ensure adjournments are managed and adjourned cases shall not be funded again but must be concluded.
- 2.4 An unapproved and not submitted on time cause list shall not be funded.
- 2.5 A district magistrate participating in mobile courts shall not be funded for their cause lists if they have not liquidated and submitted the necessary documentation to the Project Account Officer by Saturday before the next mobile court session.
- 2.6 Ad hoc, monthly or quarterly supervision visits will be conducted to all mobile court circuits to ensure compliance to the set policy and mobile court guidelines /standards.
- 2.7 All cases conducted under this project shall be reviewed every three (3) months.
- 2.8 All court proceedings shall follow and adhere to the gender sensitive courtroom management guidelines as per Annex 4.
- 2.9 Hard to reach areas or villages shall be serviced with a mobile court at least once in a quarter.
- 2.10 All judgements should be written and put on the court files and all files shall be submitted for review every three (3) months.

Article 3
Participation and Discipline

- 3.1 Any magistrate in a Spotlight Initiative district shall be considered and be allowed to be scheduled to undertake a mobile court session at least once in the project cycle.
- 3.2 Any participant not complying to the policy and guidelines shall be suspended from conducting any more mobile court sessions under the WOJAM Justice Consortium project.

DECLARATION

I

.....
DECLARE that have read the Mobile Court Policy its entirety, or it has been read (or translated) to me in its entirety, and I have had the opportunity to ask questions about it.\

I hereby DECLARE that I shall abide by its provisions for the WOJAM Justice Consortium Project mobile courts which I am taking part in.

Name:

Position:

District of Jurisdiction:

Date:

Signature:

Witness:

ANNEX 3

MINIMUM GENDER BASED VIOLENCE GUIDELINES FOR THE JUDICIARY

1.0.INTRODUCTION

1.1. The persistence and prevalence of gender based violence has been described by UN Women as “a pandemic”¹ and by the World Health Organization as a “public health problem of epidemic proportions”,² affecting from 35 to 70 per cent of women and girls globally according to national studies.³ In 2013, the World Health Organization stated that when more than one in three women worldwide (35.6%) have reported having experienced sexual or physical violence then violence against women evidently “pervades all corners of the globe, puts women’s health at risk, limits their participation in society and causes great human suffering.”⁴

1.2. Gender Based Violence (hereinafter referred to as GBV) refers to all acts perpetrated against women, men, girls and boys on the basis of their sex which cause or could cause physical, sexual, psychological, emotional or economic harm, including the threats to take such acts or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed or other forms of conflict⁵.

1.3. Access to justice for survivors of GBV resides in the criminal justice response to the perpetrator. However, survivors may identify other aspirations as their idea of justice for the harm they have experienced: the ability to seek safety through effective protection orders; physical and mental recovery through good quality and accessible health services; and/or the opportunity to seek a divorce and a new

¹ UN Women, “Facts and Figures: Ending Violence against Women A pandemic in diverse forms”, URL: <http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures> (webpage last updated October 2015).

² World Health Organization, “Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner violence” (Geneva: World Health Organization, 2013), page 35.

³ Ibid. For individual country information, see full compilation of data in UN Women, 2012, Violence against Women Prevalence Data: Surveys by Country, URL: <http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures#notes> (website last updated October 2015).

⁴ World Health Organization, “Global and regional estimates of violence against women”, above note 2, page 35.

⁵Article 1 (2) of the SADC Protocol on Gender and Development, 2016

life free from the violence of a spouse. These forms of redress under the civil justice system together with the criminal justice system comprise the formal justice sector. Therefore, recognizing the pervasive nature of GBV in Malawi, the Judiciary as a critical component of the formal justice system must take the lead in providing services that are receptive, responsive accessible and available to victims and survivors of GBV. Therefore, in order to be accountable and transparent the Judiciary recognizes the need for systems and processes that ensure victims and survivors, witnesses, lawyers, experts and other court users are provided with user friendly services.

1.4.Therefore, judicial officers and staff need to maintain the highest degree of care especially in dealing with GBV victims and survivors. In this regard the Judiciary in Malawi sets out to ensure that accountability measures are designed and implemented to ensure the protection and active participation of victims and survivors in the justice system.

1.5.Lastly, despite the guidelines being promulgated for use by personnel in the judiciary, they have a multi-sectoral approach as such applicable to all key justice responders.

2.0.SCOPE AND PURPOSE

2.1. The guidelines deal with the issue of the place and role of personnel in the judiciary as they relate to the views, rights and needs of GBV victims and survivors in judicial proceedings and in alternatives to such proceedings which include reconciliation, counselling and mediation sessions in the formal and informal system.

2.2. The guidelines apply to all ways in which GBV victims and survivors are likely to be, for whatever reason and in whatever capacity, brought into contact with all the personnel in the judiciary and other officers of the court such as lawyers, police officers and expert witnesses for services involved in implementing criminal and civil law.

2.3. The guidelines aim to ensure that, in any such proceedings, all rights of GBV victims and survivors, among which the right to information, representation, participation and protection, are fully respected with due consideration to their physical capability, level of development and understanding and to the circumstances of the case.

2.4. The guidelines aim to safeguard the rights of survivors of GBV such as sexual violence and abuse, guaranteeing that they receive a holistic package of age and

gender sensitive, survivor-centred services for their psychosocial well-being and protection by the welfare and justice systems.

2.5. The guidelines to provide a standard set of age and gender-sensitive procedures that must be followed to ensure this holistic response to child and women survivors of sexual abuse.

2.6. The guidelines aim to strengthen and clarify the roles and responsibilities between service providers and agencies that have statutory and thus obligatory responsibilities in the delivery of age, disability and gender sensitive, survivor-centred services thereby enhancing their accountability and credibility.

2.7. The fundamental rights of an accused person must be observed with a clear and fair balance with the rights of a survivor or victim to ensure fair trial to the alleged perpetrator on one side and provision of effective remedies to the survivor on the other side. The court should ensure that respecting victim's and/or survivor's rights should not jeopardize the rights of the accused as well as other parties involved in the case.

2.8. The Guidelines aim to ensure that court users especially GBV victims and survivors have information of how they should be treated when seeking services from the judiciary including its complaints procedures.

3.0. GUIDING PRINCIPLES

3.1. **Accessibility-** requires facilitation to ensure availability and where appropriate, access to court for survivors of GBV for instance, creating a conducive environment for court users who are seeking legal redress, adapting court structures and processes to accommodate victim and survivor needs such as provisions of ramps, lifts and disability friendly infrastructure court circuits, mobile courts where courts are not available.

3.2. **Age Sensitivity-** “age-sensitive justice” refers to justice systems which guarantee the respect and the effective implementation of rights of people of all ages at the highest attainable level, bearing in mind the principles listed below and giving due consideration to the court users level of maturity and understanding and the circumstances of each particular case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on their needs and rights, respecting the said rights including the rights to due process, to participate in and to

understand the proceedings, to respect for private and family life and to integrity and dignity.

3.3. Best interests- The child's best interests should be a primary consideration in all cases involving children and should be conducted professionally, through comprehensive assessment of a child's needs and situation. These guidelines promote the development of multidisciplinary methods for assessing the best interests of the child acknowledging that this is a complex exercise. In determining the best interests of the child in judicial proceedings, the court should always have recourse to the Child Care, Protection and Justice, Act (CCPJA) of 2010.

3.4. Confidentiality- Confidentiality is paramount in all judicial proceedings with special considerations for cases dealing with victims and survivors of GBV including their families. Judicial officers, staff and court users should ensure confidentiality is respected at all times. This includes the respect for privacy where such is necessary for instance in sexual offences, matrimonial and child related matters. Confidentiality also means sharing only the necessary information as requested and authorized and where necessary, with the consent of the victim or survivor, and with those actors involved in providing assistance.

3.5. Dignity- every person should be treated with care, sensitivity, fairness and respect throughout any procedure or case, with special attention for their personal situation, well-being and specific needs, and with full respect for their physical and psychological integrity. This treatment should be given to them, in whichever way they have come into contact with judicial or non-judicial proceedings or other interventions, and regardless of their legal status and capacity in any procedure or case.

3.6. Disability Friendly-reasonable accommodation- every person with disability(ies) are entitled to all necessary support to enable their equitable access to all relevant services during judicial proceedings. In that regard, reasonable accommodation as defined in the Disability Act shall be the principle upon which these guidelines are implemented.

3.7. Do no harm - survivors should not re-victimized or re-traumatized by their experiences, interactions as well as utilization of services within the justice system.

3.8. **Gender Sensitivity-** Services, processes and strategies should respond and address the specific needs of victims and survivors, that is, women and girls, men and boys.

3.9. **Individualized** court experiences shall always be generalized for all court users but the Judiciary recognizes that the individual needs of victims and survivors must be considered and supported.

3.10. **Inclusivity-**this means providing judicial services to all manner of people regardless and ensuring that judiciary reflects and provides the population it serves, including psychosocial support, interpretation services,

3.11. **Non-discriminatory-** The rights of all people shall be promoted and respected without discrimination on any grounds such as sex, race, colour or ethnic background, age, language, religion, political or other opinion, national or social origin, socio-economic background, association, birth, sexual orientation, gender identity or other status.

3.12. **Participatory-** Victims and survivors must be supported to actively and meaningfully participate throughout the response process (through justice, health, education, the community of social welfare) and their views must be considered in accordance with their age, availability, mental capacity and maturity. To ensure participation, victims and survivors need to be well informed of their rights, have all relevant information necessary to make an informed decision on available services, given appropriate ways to access justice and to be consulted and heard in proceedings involving or affecting them.

3.13. **Referral-** judicial proceedings in GBV cases should ensure that they utilize a comprehensive referral system which involves provision of services that aim at ensuring the protection and assistance of survivors, towards their full recovery and empowerment. In referring cases judicial officers should consider the aim of referral which is the prevention of GBV, the prosecution of perpetrators and protection of victims and survivors, personnel in the judiciary in general and judicial officers in particular should ensure referrals are based on clear lines of communications and accompanied with clear instructions or order. Referrals should ensure victims and survivors are linked to health, security, safety, protection and legal services

3.14. **Security and Safety-** every person should be protected from harm, including intimidation, reprisals and secondary victimization. Judicial proceedings should recognize the need for security and safety whilst dealing with victims and survivors. Special precautionary measures should apply to all victims and survivors when the alleged perpetrator is a parent, a member of the family or a primary caregiver or in a special relationship e.g. employer, social, legal and medical service providers.

3.15. **Victim friendly-** means and environment that ensures that judicial proceedings are conducted in a manner that assists the victim including special assistance where necessary.

4.0. BASIC REQUIREMENTS FROM PERSONNEL IN THE JUDICIARY AND OFFICERS OF THE COURT

4.1. All personnel in the judiciary and officers of the court shall adhere to the existing minimum standards as provided in the Trafficking in Persons Act of 2015 and Practice Direction on treatment of victims and survivors of GBV.

4.2. All personnel in the judiciary and officers of the court shall receive standard trainings with minimum standards for the care of GBV victims or survivors.

4.3. As a minimum, the judiciary shall strive to conduct refresher or periodic in-house training for its personnel as well as for other officers of the court on newly enacted laws to avoid misinforming clients.

4.4. All personnel in the judiciary shall ensure that court environment is conducive for children, victim or survivor to express themselves by providing sufficient space and distance between the witnesses and suspects. In cases where the witnesses cannot testify in the presence of the suspect, provide a separate room where the witness can testify and be cross examined by the suspect.

4.5. In order to ensure that age sensitivity is attained, judicial officers will make deliberate efforts to probe more especially for those victims or survivors or suspects whose ages are on the borderline.

4.6. In the event that a child is a witness, Magistrates shall conduct *voir dire* to ascertain the child's understanding of the importance of oath and being true when testifying.

4.7. In cases where a witness is a child, the personnel in the judiciary shall ensure that she is accompanied by a person with whom she is comfortable such as social welfare officer, guardian or parent.

4.8. The personnel in the judiciary shall take active steps on each court day to prioritize GBV cases and try them first and in camera.

4.9. All personnel in the judiciary have to inform the court users their right to access information from and how to lodge a complaint or appeal where dissatisfied with services or judgments or any orders. The court users can complain before a senior officer to the officer being complained of.

4.10. All personnel in the judiciary and officers of the court are reminded of their distinct roles in the institution according to the law and any abuse of their power and non-performance shall be dealt with by relevant institutions.

4.11. There shall be a transparent recruitment process for both judicial officers and support staff.

4.12. Community Service Officers shall periodically supervise and ensure compliance of court orders by subjects of the court directions.

4.13. All trials are public except where they are expressly exempted by law or procedure for example section 71A of the Criminal Procedure and Evidence Code which provides for hearing in camera on sexual offenses. In all GBV cases, magistrates should take care to note all cases where there is sensitivity issues or complex issues that require that the case be held in camera.

4.14. All personnel in the judiciary should explain to court users about the need and relevance of having court in camera.

4.15. All personnel in the judiciary shall not refer to GBV victims and child victims by name and shall use initials in all cases involving children as victims or perpetrators.

4.16. At the close of a case, judicial officers shall use sections 260 and 321 of the Criminal Procedure and Evidence Code to appreciate the impact of the crime on the victim and survivor in order to pass an appropriate sentence.

4.17. In the event of any interest has been expressed by an institution or persons who promote the respect and observance of the rights of victims or survivors who are called victim advocates, magistrates should first assess the interest if it is in the interest of the child, victim or survivor. If satisfied on a balance of probabilities that the interest is legitimate, in that it does not prejudice the child, victim or survivor, he or she will allow such interested institutions and victim advocates to access the court proceedings and the victim or survivor and where necessary contribute to the fair determination of issues.

4.18. The personnel in the judiciary should provide general information to the public in relation to any court proceedings but that information should not explicitly give information that directly reveals the identity of the child, victim or survivor of GBV. This information should not include full names of the child, victim or survivor but they can use initials where necessary. Most importantly, judicial officers should make sure that the Guidelines should be made available to the general public.

4.19. Magistrates should strive to conclude GBV cases within three (3) months from commencement. In the event that a person with disability is either a victim, survivor or witness, the court shall make all efforts to reasonably accommodate the peculiar need of that court user by contacting relevant service providers to assist in providing services such as sign language, braille materials and where possible interpretation or hearing aids to such court users so that justice is provided to them as well.

4.20. Magistrates once requested by the party for a copy of the judgment should do so within two weeks from the day of request at the cost stipulated in the Courts Act.

4.21. Judicial officers, support staff and officers of the court as well court users should always ensure that a government issued receipt is given for all payments made with regard to any matter in court.

4.22. Judicial officers and clerks and officers of the court such as lawyers or paralegals should clearly explain to victims and survivors that bail can be granted in any case but bail does not mean closure of a case. It means that a person will face trial

whilst staying at home under the conditions as set by the court. In the event that he breaches any of the set conditions, bail can be revoked. That granting of bail does not mean that the offence is less serious.

4.23. The courts shall make deliberate effort to explain to sureties and suspects that the bail/bond is recoverable on completion of the matter and on production of the government issued receipt with the GR number.

4.24. Magistrates are obligated to provide bonds and summons only at the cost prescribed by the Courts Act.

4.25. When adjourning a matter, magistrates shall adhere to the dictates of section 250 of the Criminal Procedure and Evidence Code.

4.26. Judicial officers, support staff and officers of the court should ensure that witnesses are attended to without undue delay once they present themselves at court.

4.27. Judicial officers, support staff and officers of the court are under obligation to communicate in good time of dates of cases and any adjournments or unavailability of an officer two days before such date.

4.28. Judicial officers shall exercise their discretion on whether or not to withdraw cases, especially sexual violence cases judiciously or sparingly.

4.29. Judicial officers and Clerks as well as officers of the court shall explain to victims or survivors that they can seek civil remedies through instituting civil matters at court as they pursue a criminal matter in matters involving property grabbing, assaults and sexual offences to mention a few.

4.30. Enforcement of protection orders under that Prevention of Domestic Violence Act should be vigilantly followed up by court officers.

4.31. Judicial officers should adjourn cases in open court in the presence of all affected parties to ensure that they know reasons for continued detention of the accused if in custody; reasons for adjournment and next date for the case.

4.32. The registry shall produce cause lists which shall be affixed on court public notice boards for parties to know where and when their cases are happening. Prior to the date of hearing, notices shall be served to the parties to allow them ample time in which to prepare for their cases.

4.33. Judicial officers and court administrators should ensure that there are court users committees in their jurisdictions which meet regularly.

5.0. LANGUAGE

5.1. Judicial officers, support staff and officers of the court as well court users shall avoid the use of any demeaning and intimidating language such as opunduka, hule or chitsiru towards victims and survivors of GBV.

5.2. Court Clerks shall use conventionally acceptable language when interpreting the evidence of victims and survivors in GBV cases. Court clerks should not exaggerate evidence when interpreting proceedings in court. However, there should be clarity when interpreting and the tone used should be moderate.

5.3. Judicial officers shall ensure cases dealing with children either as victims or offenders are tried using the standards and practices as applied in child justice courts.

6.0. REFERRALS

6.1. Judicial officers should ensure they are aware and have relevant and up to date information on all victim and survivor services in their jurisdiction.

6.2. Judicial officers shall take into consideration recommendations made by Social Welfare Officers in cases involving children and young offenders when making orders for psycho-social counseling of GBV victims and survivors.

6.3. Judicial officers are encouraged to embrace instant collaboration with other stakeholders in the justice system such as police, and social welfare in order to have sustainable referral pathway for victims and survivors of GBV.

6.4. All personnel in the judiciary and officers of the court should be aware and make early and timely identification of potential harm or sufficient suspicious acts leading to GBV and make necessary orders that prevent the occurrence of the violence.

6.5. Judicial officers and clerks shall make periodic follow up on referral orders in terms of their implementation and compliance by other service providers.

6.6. Judicial officers should obtain sufficient and relevant information about the perpetrators and victim or survivor for them to pass proper punishment and make ancillary orders as set in section 260 of the Criminal Procedure and Evidence code.

All ancillary orders especially psycho-social or economic should have a time frame and should demand feedback from the service providers.

6.7. Magistrates should always explain in court that the matter is not final as any party has a right to appeal or have the matter reviewed. Furthermore, criminal matters are subject to confirmation by the High Court. Magistrates should be aware of sections 20, 25 and 26 of the Courts Act and sections 15, 346, 360, 361 and 362 of the Criminal Procedure and Evidence Code.

7.0. COMPLAINTS

7.1. Judicial officers support staff and officers of the court shall not use public spaces for handling complaints from victims and survivors of GBV; using judgmental, blaming, demeaning, rude, sarcastic or obscene words when dealing with victims or survivors of GBV; publicize the discussions or do anything that breaches the trust and confidence of the complainant in the institution;. Shall not be quick in making determination of a complaint from a victim of survivor of GBV without hearing from both parties.

7.2. Complaints processes for the Judiciary should be clearly explained and given to a person wishing to make a complaint. Please see Annex 1 for further details.

7.3. Complaints must be resolved within two weeks and the resolution must be communicated to the complainant in writing.

8.0. COURT ENVIRONMENT

8.1. There is need for adequate space, facilities such as chairs and disability friendly toilets to be provided for children and girls who are victims or witnesses of GBV especially sexual violence when they go to court.

8.2. There shall be sign posts directing where disability friendly facilities such as toilets are located.

8.3. All GBV cases shall be prioritized at court so that victims are taken care of speedily and released. These cases include sexual offenses, trafficking, cases involving children or nursing mothers, cases involving school going children as witnesses.

ANNEX 1 – FOR COMPLAINTS

MAGISTRATES COURTS

- Satellite Courts** - Third Grade Magistrate (various across the country)
- District Courts** - District Resident Magistrate (Mulanje, Mangochi, Zomba, Karonga, Kasungu, Dedza, Ntcheu, Thyolo) or First Grade Magistrate (for all other districts)
- Regional Courts** - Chief Resident Magistrate: Blantyre – 01, Zomba – 01, Lilongwe – 01, Mzuzu - 01

ANNEX 4

GENDER SENSITIVE COURTROOM MANAGEMENT GUIDE FOR SEXUAL VIOLENCE/GENDER BASED VIOLENCE CAMP COURTS

These camp courts have been funded by UN WOMEN, under the Spotlight initiative which has a keen interest to ensure that sexual violence/GBV cases are speedily tried, but also and more specifically that they are tried in a gender sensitive manner. What follows is simply guidance that we are to take into account in carrying out this project as these are the indicators that our partner will use in evaluating whether we have successfully carried out the project.

The skills and knowledge which have been recently acquired through trainings in Gender Sensitivity and Gender Sensitive Courtroom Management shall be critical to the management of these cases. Supervisors have been given checklists to ensure that this is done. This guidance is particularly focused on the issues raised above. Please take a moment to read it and refer to the Executive Committee of WOJAM if you have any questions.

1. Gender Sensitive Courtroom Management

DURING TRIAL

“Judicial officers should take specific steps to ensure the safety of victims in legal proceedings, both to avoid victimisation by the perpetrator and secondary victimisation during the legal process itself.”

Let us remember that courts are intimidating. It is not easy for victims to give evidence and they require support through the process.

What does this entail in practice?

Section 71A CP&EC: when a victim of sexual offence is giving evidence, the court can (*by its own motion* or on application) order:

- That the case be heard in camera;

- That a screen be used to block the victim's view of the accused (but not the magistrate);
- That the victim be accompanied by a relative/friend for support; and
- That the victim's evidence be given by closed circuit television
- WHERE THE WITNESS IS A CHILD: Section 303(5)(h) CP&EC foresees the possibility of a pre-recorded interview of a child witness being submitted as evidence-in-chief.

GENERAL VICTIM/WITNESS SAFETY

Safety precautions can be categorized as immediate measures and on-going processes that improve the overall management of cases in which women are in high risk situations.

In civil cases, safety refers not only to the risk of physical violence but also to protection of the plaintiff from harassment, threats, hostile reactions and even potential secondary victimization during investigation and trial processes (for example, subjecting women to repeated and intrusive questioning, pressuring women to drop cases or reconcile with violent partners, etc.)

HUMAN TRAFFICKING

If the case is one involving trafficking please remember the following provisions for victim/witness protection under the TIPAA.

- **Restrictions on Disclosure:** The Act requires that disclosure to the media of information relating to identity of victim or steps in relation to judicial proceedings should not be done without leave of the court. Violation of this is an offence punishable with MK1 Million and 2 years imprisonment (**Section 46**)
- **Witness Protection:** to protect the safety of witnesses (under protection) and trafficked persons; the Act prohibits giving access to unauthorized persons to any witness or trafficked person and disclosure of any information relating to the identity of a protected or trafficked person; place of safety of the witness; the fact that a particular person is under protection. Violation of the provision attracts 7 years imprisonment (**Section 47**).

2. Confronting Gender Stereotypes and Biases

- A stereotype is a generalized view or preconception about attributes or characteristics that are or ought to be possessed by, or the roles that are or should be performed by, members of a particular social group.

- Bias and Prejudice-an attitude about another person or group of people based on stereotypes.

Judicial stereotyping is a common and dangerous barrier to access to justice, particularly for women victims and survivors of violence. Such stereotyping causes judges/magistrates to reach a view about cases based on preconceived beliefs, rather than relevant facts and actual enquiry. For example, we have seen judgments where the conclusion was that a prostitute cannot be raped because she “enjoys sex for a living”. This view was not supported by facts or evidence. Another example of stereotyping is the failure to effectively investigate, prosecute and sentence sexual violence against women based on, e.g., the stereotype that women should protect themselves from sexual violence by dressing and behaving modestly. So a woman who dresses in a way the judicial officer does not consider as appropriate or speaks confidently, the judicial officer reaches the conclusion that such a person deserved to have been raped and therefore the accused is not guilty or that she does not appear to have been a victim because she appears too confident. Stereotyping of this nature can have potentially wide-ranging consequences. It may, for instance, distort judicial officers perception of the facts, affect their vision of who is a ‘victim’, and influence their views about witness credibility. We should not assess victim credibility by how the dress or how we think they should behave but we should consider the facts of the case and the evidence. Ultimately, however, stereotyping compromises the impartiality and integrity of the justice system, which can, in turn, lead to miscarriages of justice and the re-victimization of complainants.

Let us confront our biases and stereotypes and make sure they don’t appear in our courtroom!!!
In summary, avoid the following stereotypes where women can be assumed to be:

- (a) sexually available (and therefore the accused did not commit an offence);
- (b) women can be inferred to be consenting to sex even if forced, threatened or coerced, because they remained silent (so if a woman did not fight or scream they are stereotyped as having consented);
- (c) previous sexual experience predisposes women to be sexually available(so a woman who has had many sexual partners, the stereotype is that she cannot have been raped as such women automatically consent to sex);
- (d) women bear the responsibility for sexual attacks or invite them by being out late or in isolated places or by dressing in a particular manner (yet if a man was robbed late at night nobody asks what he was doing at an isolated spot at night);
- (e) it is impossible to rape a sex worker;
- (f) raped women have been dishonoured or shamed or are guilty rather than victimized (instead of treating the woman as a victim we treat her as a n object of shame)

LET US AVOID THESE SCENARIOS BY ACTING ON THE FACTS AND EVIDENCE.
LET OUR JUDGMENTS REFLECT OUR REASONING BASED ON EVIDENCE NOT
BASED ON STEREOTYPES!!

3. Gender Sensitive Language in Judgments

“Language can never be neutral, it creates versions of reality. To describe an event is inevitably to characterize an event.”

Bavelas and Coates 2001

We are trying under this project to ensure that we do not doubly victimize the victim/witness by using language that is going to castigate them. Language is never neutral so in sexual violence cases we need to be careful what words we use.

“Written judgments not only express current law, but also shape future law and society itself”

Macmartin 2002

Even though you may not be a court of record, many people will listen to our judgments and the newspapers will report them. We need to avoid language that further victimizes victims and use language that will send a strong message of condemnation of gender based violence.

Below is an example of gender insensitive language in a judgment:

Republic v. Bulaziyo [1997] 1 MLR 121.

50 year old defiled a girl child aged 4 years. A sentence of 5 years was reduced to 6 months. Although the accused pleaded guilty in the lower court; on confirmation **Kumange J** stated:

‘what the accused did was to rub his sex organ against the warm legs of the girl and having applied his mind to the imaginative act of engaging in normal sex, discharged his semen to the outer part of the little girl. This explains why the girl acted nonchalantly. She sensed neither pain nor the sweetness that ensues upon the actual sexual event’

Our job as judicial officer is to analyse facts and evidence not to give our own account based on our stereotypes.

4. Compensation and Ancillary Orders

Generally, the criminal justice system concerns itself in penalizing the perpetrator and overlooks the welfare of the victim. Once the complainant has given evidence we forget about her even though she may have suffered injury or loss as a result of the offence.

Sexual offences cause not only physical injury but also emotional and psychological injury which may exist for years to come. Such injuries if not attended to may lead to other problems like Post Traumatic Stress Disorder, suicidal tendencies, relationship problems school performance drop or even school dropout. Unwanted and early pregnancies and infection with sexually transmitted diseases may also be impacts of sexual offences and so are loss of business, school dropout due to pregnancies and stigma. The early pregnancies may result in fistula during birth. These are overlooked by courts sometimes because of the philosophy that monetary orders are not suitable for serious offences like sexual offences and that to order both imprisonment and compensation would be double punishment to the accused the consideration that most accused cannot afford to pay compensation.

Each case however is different and you should decide based on the circumstances of the particular case before you. It is good practice in every case to use the provisions in section 260 of the CP&EC :

1) The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the sentence proper to be passed.

(2) Evidence that the court may receive under subsection (1) may, in addition to the evidence of the accused or the prosecution, include the evidence by or on behalf of the victim of the offence and any relevant reports to enable the court assess the gravity of the offence.

Thus, being aware that that the victim could have suffered injury, the court should before sentencing ask for further information about the nature of injuries and then order compensation if appropriate. The means of the perpetrator must first be assessed in ordering compensation. Please note that compensation is not fining. When sentencing the perpetrator, he is being punished for the offence, but if the offence caused harm and made the victim incur expenses, those should be paid to the victim if the perpetrator has the means. The overall sentence need not be lenient

because the perpetrator has been asked to pay compensation, but it should take the fact of compensation into account.

Other ancillary orders such as ordering that the victim goes for counselling may also be made. Therefore before you start the trial check whether counselling services are available in the area you are working in.

5. CHIEF JUSTICE'S MEMO

Let us not forget the direction from the Honourable the Chief Justice that in cases where the victim of a sexual assault is under 21 years but above 16 years, there is still an offence committed under section 159A of the Penal Code!

6. CHECKLIST

- (a) Is the case of such a sensitive nature that the magistrate should consider taking action under section 71A of the CP&EC?
- (b) What practical steps did magistrate take to ensure that the victim was comfortable?
 - (i) Take breaks if victim/witness was uncomfortable(where necessary)?
 - (ii) Make arrangements for the victim/witness to testify in a manner that she was shielded from the view of the accused but visible to the court (by using a screen) (where necessary)?
 - (iii) Make arrangements for victim/witness to come into court using different entrances (where possible) etc?
 - (iv) Allow a support person to accompany victim/witness to give testimony(where necessary)?
 - (v) Ensured that sitting arrangements in court are such that accused and his/her family are not in close proximity with victim/witness and his/her family?
 - (vi) Prevent unnecessary cross-examination about the victims dressing, or previous sexual history(where necessary)?
 - (vii) Ordering matter to be heard in camera(where necessary)?
 - (viii) Controlled the trial so that use of gender insensitive language was not allowed (where necessary)?
 - (ix) Awareness of intimidatory tactics being used on the victim/witness and taking decisive action must be taken against intimidators(where necessary)?
 - (x) If accused is not in custody (on bail etc) – allow time lag between victim/witness and accused when leaving court?
 - (xi) Order security escort out of court premises by court marshall/police if necessary?

- (xii) Ensure that if there are any reporters in the courtroom, they should be told they cannot disclose the name or any other identifying features of a victim or a child!!
- (c) Human Trafficking Cases
 - (i) Check whether there are members of the media in the courtroom and remind them of the law.
 - (d) Is gender sensitive language used and enforced during the proceedings?
 - (e) Has there been recognition that the victim has suffered injury as a result of the offence?
 - (f) Was additional information on the victim ordered before sentencing?
 - (g) Does the sentence reflect the fact that the victim was injured (including psychological injury)?
 - (h) Was compensation ordered?
 - (i) If no, why not?
 - (j) Was any ancillary order made for the victim's welfare?
 - (k) If no, why not?