



Right to Education

Legal and policy framework: Early and unintended pregnancy and the right to education in Kenya

Constitution of Kenya

The [Kenyan Constitution](#) (2010) recognises the right to education of everyone. It states: ‘**every person has the right to education**’ (Article 43.1.f) and: ‘**every child has the right to free and compulsory basic education**’ (Article 53.1.b).

In order to ensure the right to education of specific groups, the Constitution makes it clear that positive discrimination measures are necessary. According to Article 55.a, the state shall put in place affirmative action programmes to ensure that youth can access relevant education and training and that minorities and marginalised groups are provided special opportunities in education (Article 56.b).

The Constitution also guarantees **equality and freedom from discrimination** and explicitly prohibits discrimination on the basis of pregnancy. Article 27 reads:

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.*
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.*
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.*

*(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, **pregnancy**, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.*

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage...

Article 43.1.a guarantees the right to the highest attainable standard of health, which includes the right to health care services, including **reproductive health care**. However, abortion is prohibited by

Article 26.4 on the right to life: 'Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.' There are no exemptions for cases of rape, defilement, or incest.

The Constitution also protects children from 'abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour' (Article 53.1.d) and similarly youth are protected from 'harmful cultural practices and exploitation' (Article 55.d).

Article 48 guarantees access to justice and that any fees shall be 'reasonable' and 'not impede access to justice'.

Legislation

Basic Education Act (Act No. 14 of 2013, last amended in 2017)

The [Basic Education Act](#) implements Article 53 of the Constitution and provides the overarching legal framework for pre-primary, primary, secondary education, mobile schools, and adult education. It includes parts on:

- the powers and functions of the national government (part 2)
- the powers and functions at the county level (part 3)
- free and compulsory basic education (part 4)
- the system and structure of the education system (part 5)
- special needs education (part 6)
- private education (part 7)
- governance and management of basic education and training (part 8)
- standards relating to the quality of education (part 9)
- registration and licensing (part 10)
- financing of education (part 11)

One of the guiding principles of the Act includes the elimination of gender discrimination in education.

Sections 28 - 40 set out free and compulsory basic education, and includes the **prohibition of tuition fees** (Section 29) and **admission fees** (Section 32). However, other charges by public schools are

lawful if agreed by local and national government, but no child can be refused attendance if they fail to pay these charges.

Section 34.2 **prohibits discrimination on any grounds, including gender and sex.**

Section 35 **prohibits expulsions** except for 'delinquent pupil[s] for whom all other corrective measures have been exhausted'.

Section 40 sets out the **duty of head teachers to investigate and report pupil absences**. If the head teacher finds 'no reasonable grounds' she must write to the parents reminding them that education is compulsory under the law and submit a report to the county education board.

A 2017 amendment to the Act requires the government to: 'provide free, sufficient and quality sanitary towels to every girl child registered and enrolled in a public basic education institution who has reached puberty and provide a safe and environmentally sound mechanism for disposal of the sanitary towels' (Section 39.k).

The Children Act (Act No. 8 of 2001, last amended 2018)

The [Children Act](#) guarantees the right to free and basic education (Section 7) in accordance with Article 28 of the UN Convention on the Rights of the Child, and the right to non-discrimination (Section 5).

Section 14 protects children from harmful cultural practices: 'No person shall subject a child 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.'

Section 15 protects children from sexual exploitation: 'A child shall be protected from sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity'.

Minimum age legislation

The age of consent is eighteen years old. Section 43.4.f of the [Sexual Offences Act](#) (Act No.3 of 2006) sets out that consent cannot be given by a child, which under the Children Act is below eighteen years old.

The minimum age of marriage is eighteen years ago, as stipulated by the [Marriage Act](#) (Act No. 4 of 2014).

Criminal law

Penal Code (Cap. 63)

Sections 158-160 of the [Penal Code](#) criminalise any attempt to procure an abortion; any attempt to induce a miscarriage; and any attempt to supply or support the procurement of an abortion.

Provisions of the Penal Code related to sexual offences have mostly been repealed and have been replaced by the Sexual Offences Act.

Sexual Offences Act (Act No. 3 of 2006)

Section 3 criminalises **rape** and sets out the criteria for what constitutes rape. One of the criteria is that the perpetrator must commit the act 'intentionally and unlawfully', which is defined in section 43, and which states that a child is incapable of appreciating the nature of the offense. This means that any genital penetration of a child is automatically rape. This crime carries a minimum custodial sentence of ten years and a maximum of life imprisonment. Attempted rape set-out in section 4 carries a minimum custodial sentence of five years and a maximum of life imprisonment.

Section 8 sets out a separate category of criminal offence called **defilement**, also known as *statutory rape* or *child rape*. Defilement is when a person, 'commits an act which causes penetration with a child' (anyone under 18). The only legally permissible defence, set-out in section 8.5.b, is if, 'it is proved that such child, deceived the accused into believing that he or she was over the age of eighteen' and that the accused 'reasonably' believed the child was over the age of eighteen years old, which is assessed, 'by having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.'

The sentencing guidelines set out in the Act vary depending on the age of the complainant. If the complainant is 11 or under the minimum sentence is life imprisonment; for the defilement of 12-15 year olds the sentence is a minimum of 20 years; and for 16-18 year olds the minimum sentence is 15 years. Attempted defilement is also a criminal offence and carries a minimum sentence of 15 years. Section 8.7 confirms that defilement and attempted defilement can be committed by someone under the age of 18. However, the sentencing guidelines are set out in the [Borstal Institutions Act](#) (Cap. 92) and the Children Act.

Section 15 is on **child prostitution** which includes acts such as taking advantage of influence over, or an existing relationship with a child, 'to procure the child for sexual intercourse or any form of sexual abuse', and giving, 'monetary consideration, goods, other benefits or any other form of inducement to a child [...] with intent to procure the child for sexual intercourse'.

Section 20 is on **incest by male persons**, and is defined as an indecent act or act that causes penetration of a female family member (daughter, granddaughter, sister, mother, niece, aunt or grandmother). The accused must know the family member is a family member. If the female family member is below the age of 18 it is 'immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.'

Section 24 refers to **sexual offences relating to position of authority and persons in position of trust**. This includes:

'Any person who being the head-teacher, teacher or employee in a primary or secondary school or special institution of learning whether formal or informal, takes advantage of his or her official position and induces or seduces a pupil or student to have sexual intercourse with him or her or commits any other offence under this Act, such sexual intercourse not amounting to the offence of rape or defilement, shall be guilty of an offence of abuse of position of authority'.

There are other sexual offences set out in the Act that whilst not directly causing early and unintended pregnancy are often committed in tandem with offences such as: defilement, rape, and incest. These include:

- Sexual assault which is defined as penetration of the genitals with other body parts, the body parts of others, or other objects. This sentencing guidelines are the same for rape (section 5).
- Indecent act with a child, which is defined as: 'any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration' (section 11).
- Promotion of sexual offences with a child, which is defined as anyone 'who supplies or displays to a child any article which is intended to be used in the performance of a sexual act with the intention of encouraging or enabling that child to perform such sexual act (section 12).
- Sexual communication with a child (section 16A.1).
- Sexual harassment, including in the educational setting. However, the victim must prove that: 'such advances or requests have the effect of interfering with the alleged victim's...educational performance or creating an offensive...learning environment for the alleged victim' (section 23).

-
See [Sexualised violence against children: a review of laws and policies in Kenya](#) and [Legal treatment of consent in sexual offences in Kenya](#) for a legal analysis of the Sexual Offences Act.

Policies

Kenya has also addressed girls' education and sexual and reproductive health through various policies that aim to give full effect to the legal provisions outlined above.

In 1994, the ministry of education drafted its first policy addressing early and unintended pregnancy: the School Re-entry Policy. This policy is not publicly available and as a result the full content is unclear. However, according to [published excerpts obtained through a doctoral dissertation](#) by a former MoE official, the policy includes stipulations that:

- girls are unconditionally admitted back to school
- headteachers and local and municipal education officials should assist girls in being readmitted back to school
- once a girl is sent home, the parents should be summoned and intensive guidance and counselling should be provided to them, after which they should take the girl home with them. Counselling should also be given to all those affected
- schools should keep in contact with affected girls and their families to monitor what is happening
- the parents should seek readmission of the girl once the baby is weaned
- other girls (boys are not specified) 'should be counselled on consequences of irresponsible sexual behaviour, adolescent sexuality, boy/girl relationships, negative peer influences, building self-confidence and self-esteem'
- those who make girls pregnant should be exposed, and face legal action if they are an adult or teacher. Boys should receive counselling

-

Given the policy's unavailability it is highly doubtful that relevant stakeholders are aware of it and are actively implementing its provisions.

In 2009, the ministry of education and the ministry of public health and sanitation published the [National School Health Policy](#), recognising the connected nature of the right to education and the right to health. The policy dedicates an entire section to teenage pregnancy, reaffirming some of the provisions found in the School Re-entry Policy, and adding new provisions, such as:

- girls are to undergo voluntary medical screening once a term
- pregnant learners should be able to stay in school for as long as possible
- girls and parents are to be given counselling on returning back to school and attending antenatal classes
- efforts should be made to investigate what happened and the children's officer should be informed
- young mothers should be encouraged to learn how to care for and bond with their child
- new borns should be 'allowed the benefit of breastfeeding as much as possible including exclusive breastfeeding for six months and introduction of complementary feeding at 6 months of age while continuing breastfeeding'
- 'young mothers shall be encouraged to attend child welfare clinics (youth friendly) and ensure that babies are fully vaccinated'

Once a girl goes back to school (to the one she previously attended or another one, should they wish), the policy recommends the following practice (quoted in full):

- her parents/guardian shall be encouraged to make adequate arrangements for the care of the child at home while the young mother is in school. This is to avoid unnecessary interruptions to the teenage mother's studies
- as far as possible the teenage mother shall be allowed to join at the level where she left
- the school administration shall make all efforts to treat the teenage mother like other students and not keep reminding her of her mistake. To all intents and purposes the school fraternity shall act as if nothing had happened to her
- teenage mothers in school shall not be allowed to form groupings e.g. of young mothers clubs
- counselling services shall be available to the teenage mothers including re-emphasis on life skills for avoidance of future unplanned pregnancies
- confidentiality and professionalism shall be adhered to in handling the teenage mother
-

The National School Health Policy is further implemented by the [National School Health Strategy Implementation Plan](#) running from 2011-2015. It includes key activities to address gaps that lead to gender issues in education, including pregnancy, notably: slow implementation of laws and policies; lack of resources; lack of sex disaggregated data; lack of redress systems in schools; and unfavourable social norms that perpetuate gender inequality. It is unclear whether these key activities have been successfully implemented because the government has not released a status report or an updated version.

The [Education and Training Sector Gender Policy](#) (2015) has two policy statements relevant to re-entry for pregnant girls, including one committed to develop and implement national re-entry guidelines for all learners who drop out of school. The Policy also states that there exists a ministry

of education circular that should be implemented on re-entry of pregnant girls who drop-out of school but fails to give further details.

In 2015, the ministry of health has published [The National Adolescent Sexual and Reproductive Health Policy](#) (ASRH). It provides an overall policy framework for all sectors working on adolescent sexual and reproductive health. Unlike ministry of education policies that principally deal with ensuring girls stay in school whilst pregnant and get back to school once they have recovered, the ASRH attempts to reduce early and unintended pregnancy and stop them from happening in the first place. For example, amongst its aims are to reduce gender-based violence against girls and increase access to age-appropriate comprehensive sexuality education. It also sets out specific actions to reduce early and unintended pregnancies, including to:

1. *Promote provision of accurate information and services to prevent early and unintended pregnancies among adolescents.*
2. *Enhance existing service provision channels to provide accurate information and services on a wide range of contraceptive methods to capture diverse needs of adolescents.*
3. *Ensure all pregnant adolescents, including the poor and 'hard-to-reach', have access to skilled care throughout pregnancy, delivery and postnatal periods.*
4. *Enhance establishment of linkages for effective referrals to relevant services for pregnant adolescents.*
5. *Strengthen programs to delay sexual debut and promote abstinence among adolescents.*
6. *Support review of all maternal and perinatal deaths and provide adolescent-specific maternal death reports.*
7. *Promote male involvement in prevention of early and unintended pregnancy.*
8. *Enhance provision of high quality post-abortion care services to adolescents.*
9. *Support sensitization and implementation of the Education Re-entry Policy and a social support system for adolescents.*
10. *Strengthen community involvement in prevention of early and unintended pregnancy.*
11. *Encourage political leaders, planners and community leaders to enforce laws and policies to prohibit marriage of girls below 18 years.*
12. *Support interventions to delay marriage of girls until they attain 18 years by influencing family and community norms.*
13. *Promote educational opportunities for girls through formal and non-formal channels to delay marriage until they attain 18 years.*
14. *Strengthen and scale up social protection for vulnerable adolescent girls to delay sexual debut as well as improve mental health and educational outcomes.*

ASRH recognises that a multisectoral approach is needed to address the issue and recommends that the ministry of education:

- implement age appropriate comprehensive sexuality education in-line with the [Education Sector Policy on HIV and AIDS](#) (2013)
- ensure implementation of the Education Re-entry Policy for adolescents
- facilitate provision of information to parents on sexual and reproductive health of adolescents within the school set-up
- strengthen partnership with the MoH to provide ASRH information and services in schools
-

Lastly, in 2018 the National Re-entry Guidelines for Learners in Basic Education were drafted to give key stakeholders clear guidance on the procedure for re-entry. [A commonly cited complaint](#) about the above policies is that they are 'not accompanied by clear guidelines for teachers on implementation. It is therefore open to interpretation and the use of discretion, which means its implementation can be influenced by discriminatory attitudes, beliefs and stereotypes'.

To rectify this lack of clear guidance on what exactly to do at the school level, in 2018, the government started drafting the National Re-Entry Guidelines for Learners in Basic Education which serve to enable those children who drop out of schools for various reasons, including early pregnancy, to resume learning. The Guidelines have yet to be published and are subject to change but currently the draft guidelines provide for steps to be taken once a girl is confirmed to be pregnant in school. They include:

1. informing the parents / guardians of the pregnancy
2. enrolling the learner in a guidance and counselling programme and ensuring she has access to age appropriate reproductive health services
3. explaining the school re-entry policy to the girl and her parents / guardians
4. signing of a committal letter by the school, girl, and her parents / guardians committing that the girl shall re-enter school six months after delivery or at the beginning of the school year
5. allowing the girl to stay in school for as long as possible
6. allowing the girl to sit national exams if her pregnancy allows and granting her accommodations, if she needs them, during the exam period

The Guidelines further provide guidance on what schools and teaching staff are required to do to facilitate the re-entry of girls who have dropped-out due to early and unintended pregnancy. They include:

7. being admitted back to the same school unconditionally but if the girl prefers she can go back to another school and should be assisted in doing so
8. if a girl becomes pregnant more than once she shall be allowed re-entry as long as she is within the mandatory schooling age
9. being admitted back to the same class / form/ grade
10. if the girl is over the age of 18 she shall be admitted in Adult and Continuing Education Centres

In addition to this, the Guidelines specify the actions that shall be taken regarding the person responsible for the pregnancy:

11. the girl shall be encouraged to disclose the identity of the person responsible for the pregnancy and if he is an underage, he shall be given guidance and counselling on his responsibilities
12. if the person responsible is an adult, the head teacher shall report the case to the police and the Children's Department
13. if the person responsible is a teacher disciplinary measures shall be taken in accordance with the Teachers Service Commission code of conduct and school management should advise the girl and her parents / guardians to take legal action

14. if he is a caregiver the school management shall report to the Department of Children’s Services for further action

International human rights law

According to Article 2.5 of the Kenyan Constitution, Kenya is a monist country meaning that international human rights treaties form part of national law. Kenya has ratified most of the key human rights treaties protecting the right to education and gender equality with the exception of the Unesco Convention against Discrimination in Education.

Human rights treaty	Date of ratification
UN International Covenant on Economic, Social and Cultural Rights	01 May 1972
UN Convention on the Rights of the Child	30 July 1990
UN Convention on the Elimination of All Forms of Discrimination against Women	09 March 1984
Unesco Convention against Discrimination in Education	Not ratified
AU African Charter on Human and Peoples' Rights	23 January 1992
AU Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa	6 October 2010
AU African Charter on the Rights and Welfare of the Child	25 July 2000
AU African Youth Charter	23 January 2014



Right to Education

www.right-to-education.org

Right Education Initiative (2019) *Legal and policy framework: Early and unintended pregnancy and the right to education in Kenya.*