

Circumcision and the rights of the Kenyan boy-child

*Patricia Mande Nyaundi**

Programme Manager, Child Legal Aid Centre; Advocate of the High Court of Kenya

Summary

The adoption of the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child strengthened the protection of the rights of children. Although Kenya has ratified both instruments and enacted the Children's Act, all instruments prohibiting practices that are prejudicial to the rights of children, circumcision of the boy-child for purely cultural reasons still takes place in the country, sometimes with severe consequences, such as deaths. This article demonstrates that the circumcision of non-consenting boys under the age of 18 violates their basic human rights, particularly the right not to be discriminated against, the right to health, the right to privacy and bodily integrity, and the right not to be subjected to cruel and inhuman treatment. The article concludes that the human rights implications stemming from male circumcision necessitate positive action against this practice by the government.

1 Introduction

In recognising the child as an individual holding and exercising rights independently of adults, the United Nations (UN) Convention on the Rights of the Child, 1989¹ (Convention) represents a clear departure from the past where parents were the right bearers through whom the rights of the child were conceived. The rights of children are no longer to be subsumed in the rights of adults. Children are no longer mere

* LLB (Hons) (Nairobi), LLM (Cape Town); chilac1@multitechweb.com

¹ GA Res 44/25, Annex, 44 UN GAOR Supp (No 49) 167, UN Doc A/44/49(1989) entered into force 2 September 1990; signed by Kenya on 26 January 1990; ratified on 30 July 1990.

objects of concern, but are now owners of rights enforceable against the state and other individuals.²

The Convention has restated rights that were already protected by other international instruments, such as the International Covenant on Civil and Political Rights (CCPR), tailoring them to the needs of children. To encourage adoption by member states, the Convention is framed in general terms with a proviso enabling state parties to provide for greater protection in their regional and domestic legislation.³

The African Charter on the Rights and Welfare of the Child, 1990 (Children's Charter)⁴ draws inspiration from, among other regional and international instruments,⁵ the Convention,⁶ and seeks to offer an African perspective on the rights of the child. The Charter, therefore, addresses some issues that are of particular concern to African children. These include early marriages,⁷ the fate of children under apartheid,⁸ children involved in armed conflict,⁹ poor and unsanitary conditions which threaten survival,¹⁰ discrimination against female children,¹¹ children in prison with their mothers¹² and duties of children to their family and society.¹³ The Children's Charter also commits state parties to eliminate cultural, traditional and religious practices that infringe on the rights of the child.¹⁴

Kenya has ratified both the Convention and the Children's Charter without reservation.¹⁵ In doing so, it has signified its commitment to the rights of the child as pronounced in the two treaties. It therefore has a duty to ensure that its laws and the culture and traditions of its citizens do not infringe on the rights now guaranteed. As a first step in this process, Kenya has enacted the Children's Act, 2001 (the Act).¹⁶ In its Preamble, the Act states the following:

² G van Bueren (ed) *International documents on children* (1998) xv-xvi.

³ Art 41.

⁴ OAU Doc CAB/LEG/25.9/49 (1990), entered into force 29 November 1999; ratified by Kenya on 25 July 2000.

⁵ Such as the OAU Heads of State and Government Declaration on the Rights and Welfare of the African Child, 1979 (AHG/ST 4 (XVI) Rev 1); the International Covenant on Civil and Political Rights, entered into force 23 March 1976; the International Covenant on Economic, Social and Cultural Rights, entered into force 3 January 1976.

⁶ Para 9 Preamble & art 46.

⁷ Art 21(2).

⁸ Art 26.

⁹ Art 22.

¹⁰ Art 14(2).

¹¹ Art 21.

¹² Art 30.

¹³ Art 31.

¹⁴ Art 1(3).

¹⁵ See http://www.sahrc.org.za/afr_sec_charter_an-the_child.PDF and <http://www.unhcr.ch/pdf/report.pdf> (accessed 14 March 2005).

¹⁶ Entered into force March 2002.

An Act of Parliament to . . . give effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child and for connected purposes.

The Act guarantees to the Kenyan child without discrimination the rights provided for under the Convention and the Children's Charter. Of direct relevance to this paper, it defines childhood as ending on the attainment of the age of 18 years¹⁷ and prohibits cultural rites, customs and traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development. The Act specifically prohibits female circumcision, but does not deal with the situation of men or boys.¹⁸ Both male and female circumcision is practised in Kenya. Depending on the community, the age of initiation candidates ranges from eight to 16 years.

In this paper, it is intended to demonstrate that male circumcision, when practised on boys under the age of 18 for non-medical purposes, constitutes a violation of the rights of the boy-child. The article's focus is on male circumcision as a procedure done purely for cultural reasons on non-consenting boys. The mutilation of male or female genitalia for other than medical necessity is a violation of their basic human rights.

This paper firstly points out the similarities between female and male circumcision and then shows how male circumcision violates the rights of the boy-child. The campaign against female circumcision has been successfully conducted on the 'rights' platform. The paper seeks to establish that both female and male circumcision negatively impact on the rights of the child. A balanced approach to children's rights requires that equal protection be afforded children irrespective of sex.

2 Features of the rite of circumcision¹⁹

With the exception of the Turkana, Luo and two sub-tribes of the Luhya,²⁰ all the tribes in Kenya regard circumcision as the rite of passage from childhood to adulthood. In terms of numbers, more boys are circumcised than females. Historically, the age of circumcision was between 14 to 16 years, as this ceremony marked and prepared one

¹⁷ Sec 2 defines a child as any human being under the age of 18 years.

¹⁸ Sec 14 provides: '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.'

¹⁹ The author is Kenyan and most of the information in this section is through first-hand experience, and information obtained through informal interviews with senior citizens from various tribal communities.

²⁰ K Tanaka 'Medical anthropological study in Western Kenya and its implications for community health development' March 2000, <http://www.idcj.or.jp/4Publications/wpss.pdf> (accessed 31 March 2005).

for marriage. Marriage fully transformed an individual into an adult. However, children are currently being circumcised at an earlier age. The majority are circumcised between the ages of eight to 12 years, and in some cases even soon after birth.²¹ The ceremony has, to a large extent, been reduced to the cutting or branding of the genitalia. Other aspects that were previously part of the ritual, such as family and life-skills education, are no longer practised.

There are a number of arguments for the reduction of the age of circumcision. Firstly, the younger the initiate, the faster the healing. Secondly, the fee of the circumcisor is higher for mature candidates, and lastly, where the procedure is performed without anaesthesia, it is easier to intimidate young children into submission.²²

Circumcision involves the cutting off of otherwise healthy genital tissue. There are three types of female circumcision, namely *sunna*, excision (or clitoridectomy) and infibulation. The form practised most in Kenya is *sunna* and involves the removal of the tip of the clitoris and the prepuce.²³ For boys, the operation consists of cutting away in part the skin of the penis that goes beyond the glans (prepuce). The prepuce is a vital part on the male sexual organ. When the infant is incontinent, the prepuce fulfils an essential function, to protect the glans.²⁴ The foreskin is more than just penile skin necessary for a natural erection; it is specialised tissue, richly supplied with blood vessels, highly innervated, and uniquely endowed with stretch receptors. The foreskin contributes significantly to the sexual response of the intact male.²⁵

In rural communities, the operation is usually carried out under unhygienic conditions using crude tools. No anaesthesia is administered. Each year there are reports of deaths and severe irreversible damage caused to children.²⁶ In the urban centres, the operation is performed by medical personnel, either in hospital or at the home of the initiate, and anaesthesia is used.

For both female and male circumcision, the consent of the child is never sought. Circumcision is regarded as something done for children and not something done to them. Through the use of myths, folklore

²¹ My informant is Samson Ombongi, aged 80 years, who lives in Machoge Location within Gucha District, Kisii, Kenya.

²² *East African Standard* 3 August 2001 featured a story of an 18 year-old initiate who attacked the circumcisor with a stick in the middle of the operation.

²³ J Kabeberi-Macharia 'Female genital mutilation and the rights of the girl-child in Kenya' in W Ncube (ed) *Law, culture, tradition, and children's rights in Eastern and Southern Africa* (1998) 250.

²⁴ D Gairdner 'Fate of the foreskin' (1949) 2 *British Medical Journal* 1433-1437.

²⁵ M Milos 'Circumcision: Male — Effects on human sexuality' in VL Bullough & B Bullough (eds) *Human sexuality: An encyclopedia* (1994) 119-121.

²⁶ Eg reports appearing in *Daily Nation* on 20 and 27 December 2001 spoke of seven boys who died after undergoing traditional circumcision in Keiyo District and six boys admitted in critical condition in Kapsabet District having developed tetanus.

and peer pressure, the child is conditioned to look forward to the rite with positive anticipation.

In all tribes, different words exist to distinguish between the circumcised and the uncircumcised. The word to describe the uncircumcised is derogatory. Among the Abagusii, a circumcised male is referred to as 'omomura' (meaning young man), while the uncircumcised as 'omoi-sia' (meaning small boy). The circumcised female is referred to as 'enyaroka' (a cut one) and the uncircumcised as 'egesagane' (uncut). Among the Maasai, a circumcised male is referred to as 'ol-murani' (young warrior) and the uncircumcised as 'olayoni' (small boy). The circumcised female is referred to as 'esingaki' (maiden) and the uncircumcised as 'entito' (small girl).

The initiates are secluded away to heal and during this period they are educated on their role within the community as men and women. The actual rite and what is involved is surrounded in mystery and initiates are bound on oath not to divulge what has happened to them. This way, the next group of initiates is not aware of what awaits them. The male parent (or guardian) is responsible for preparing the male candidate and likewise the female parent (or guardian) will prepare the female candidate and present him or her for initiation. After the healing, the 'coming out' ceremony is marked with festivity and there are gifts for both the initiates and their families.

In terms of features, therefore, there is no difference between male and female circumcision. The other issue for consideration is whether circumcision violates the rights of the boy-child.

3 Circumcision and the rights of the boy-child

3.1 Non-discrimination

The right not to be discriminated against is enshrined in the following provisions: article 2 of the Convention, article 3 of the Children's Charter, articles 2 and 3 of the African Charter on Human and Peoples' Rights 1981, (African Charter),²⁷ article 24 of the International Covenant on Civil and Political Rights, 1966,²⁸ articles 1, 2 and 7 of the Universal Declaration of Human Rights, 1948²⁹ and Principle 1 of the UN Declaration of the Rights of the Child 1959.³⁰ These provisions ensure to the child the right to protection and enjoyment of guaran-

²⁷ Adopted 27 June 1981, OAU Doc CAB/LEG/67/3 REV 5, (1982) 21 *International Legal Materials* 58, entered into force 21 October 1986; ratified by Kenya on 23 January 1992.

²⁸ GA Res 2200 A (xxi), 21 UN GAOR Supp (No 16) 52, UN Doc A/6316(1966), 999 UNTS 171 entered into force 23 March 1976; acceded to by Kenya on 1 May 1972.

²⁹ Adopted and proclaimed by Gen Ass Res 217A(III) of 10 December 1948.

³⁰ GA Res 1386 (xiv), 14 UN GAOR/ Supp (No 16) 19, UN Doc A/4354 (1959).

teed rights irrespective of, amongst others, sex and age. As illustrated in the discussion below, the injury is common to both sexes. Secondly, the practice discriminates against the boy-child on account of his age. The same operation conducted on an adult without his consent is a criminal offence. There have been reports of adults who prefer criminal charges of assault against those who forcibly circumcise them.

3.2 Health

Article 21(1) of the Children's Charter provides:

State Parties to the present Charter shall take appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the children and in particular:

- (a) those customs and practices prejudicial to the health of children; and
- (b) those customs and practices discriminatory to the child on the grounds of sex or other status.

Article 24(3) of the Convention requires state parties to take all effective measures with a view to abolishing traditional practices prejudicial to the health of children.

The following is a list of physical damage that may result from male circumcision:³¹

- *Haemorrhage* due to the many veins crossing the penis. If undetected, this can be fatal. Some children are affected by hereditary haemophilia, making it difficult to stop haemorrhaging. In fact, it has been said that 90% of youths who die after undergoing circumcision suffer from this undetected bleeding disorder.³²
- *Infection of the injury*. The injury caused by circumcision may be exposed to urine and faeces, provoking infection, thereby damaging the urethra and its stricture. An operation may be necessary to widen the opening. In the absence of antibiotics, the infection can lead to diseases such as tetanus, gangrene, meningitis and diphtheria.
- *Urinary infection*. This can be caused by the trauma of the operation, from surgical dressings and from pain associated with attempts to urinate. A urinary retention, which if not cured, can lead to a renal disease.
- *Necrosis of the glans*. This is the death of body tissue. This may happen to the glans following circumcision due to an overly tight bandage.
- *Injury and loss of glans*. Occasionally, the glans can be injured or cut off during circumcision.

³¹ Sami A Aldeeb Abu-Sahlieh *Male and female circumcision among Jews, Christians and Muslims. Religious, medical, social and legal debate* (2001) 154-155.

³² *East African Standard* 1 May 2003, quoting Dr Walter Mwanda, Chairperson of the Kenya Haemophilia Association.

- *Excessive penile skin loss.* Any loss of skin on the penis is an irretrievable loss. The damage will vary according to the quantity of amputated skin. Some circumcisors pull the skin and cut as much as they can. This may result in penile bowing and pain at the time of erection.
- *Penis concealed.* The penile shaft following circumcision may retreat into the surrounding skin and fatty area and cannot be seen. This problem must be corrected by surgery, and often skin grafting, to produce a normal looking penis.
- *External deformity of the penis.* The healing of the circumcision wound is not always pretty. It may result in an unpleasant external aspect, or even a cyst or keloid.
- *Loss of penis.* This may be as a result of mishandling the circumcision or as a result of an infection.
- *Death.* Depending on the severity of some of the injuries above, the operation may lead to death.

As with female circumcision, in the long term, owing to the damage to the genitals, the male's ability to perform and enjoy sex is adversely affected.

3.3 Privacy and bodily integrity

As with female circumcision, the rite violates the child's right to privacy, which right is protected by article 16 of the Convention and article 10 of the Children's Charter. The right to privacy and bodily integrity has been defined as the right to be protected from unwelcome interference with one's body without consent.³³ The government is under an obligation to prevent childhood mutilations of either gender. The act of marking a child with a ritual mutilation, particularly upon the genitals, takes away that individual's right to a functional body and his right to choose whether to be marked with the scars of that particular culture.

3.4 Protection from cruel and inhuman treatment

Both the Convention³⁴ and the Children's Charter³⁵ provide that the child should be protected from torture or other cruel, inhuman and degrading treatment and punishment. The excruciating pain which the children are subjected to, especially where no anaesthesia is applied, cannot be justified in modern society. No objective observer who has witnessed a circumcision can dispute that the procedure inflicts severe pain or suffering on the child.

³³ See the decision in *Planned Parenthood of South Eastern PA v Casey* 505 US 833 (1992), cited with approval in the decision in *Roe v Wade* 410 US 113 (1973).

³⁴ Art 37.

³⁵ Art 16.

One newspaper report³⁶ gave a detailed account of how the ceremony is marked among the Bukusu, a sub-tribe of the Luhya in Western Kenya. The actual cutting is preceded by week-long activities of festivity. On the actual day, the candidate is woken up very early and escorted to a stream by a large crowd. There, his body is covered with mud as an uncle extolls the virtue of bravery and urges the young boy to face the knife with courage. From the river, the procession heads back home. This for the boy is the final leg to manhood.

... At home, he was received by his two uncles and his father, who led him to a prepared spot, around which the crowd of onlookers waited with bated breath. Makokha strutted around and then stood still, arms akimbo. Suddenly, a circumciser emerged from the crowd, flashing a traditional knife, *leukaemia*, with two aides in tow. He completed the operation in one swift move before stepping back to allow elders to examine his work. When they pronounced it well done, ululations rent the air as a new round of celebrations began. Makokha raised his right fist to acknowledge the cheers from onlookers, friends and the relatives he had done proud. The crowd mobbed him singing '*Oh khwera omurwa, yaya khwera omurwa!*', which means 'the job is done'.

Not only is pain suffered at the time of the operation, but also during the healing, which may on average take a week.

The foregoing analysis has shown that circumcision is practised as a cultural rite and that it infringes the rights of the boy-child. The Convention³⁷ and the Charter³⁸ have provided direction as to what should happen in the event that there is tension between the rights of the child and culture, as will be discussed in the next part of this article.

4 Culture and the rights of the child

Culture may be defined as '[t]he customs and beliefs, art, way of life and social organisation of a particular society or group' and '[t]he beliefs and attitudes about something that people in a particular group or organisation share ...'³⁹ Tradition is defined as 'a belief, custom or way of doing something that has existed for a long time among a particular group of people'.⁴⁰

Following the adoption of the Convention and the Children's Charter, it is now accepted that children have rights. This marks a development from a time when parents, especially the father, had absolute rights over children. Under the current dispensation, children are recognised as individuals in their own right with indivisible and inalienable rights that they enjoy as members of the human family.

³⁶ 'Elaborate passage into manhood' *Daily Nation* 11 August 2004.

³⁷ Art 24 (3).

³⁸ Art 1(3).

³⁹ *Oxford advanced learners' dictionary*, 6th edition.

⁴⁰ As above.

These international instruments and the Kenyan legislation have charted out the course to be followed towards the improvement of the status of children. In the fifth paragraph of the Preamble, the Convention recognises the family as the fundamental group of society, and in the twelfth paragraph it acknowledges that due account should be taken of the tradition and cultural values of each people for the protection and harmonious development of the child.

In the sixth paragraph of the Preamble, the Children's Charter also recognises the 'virtue of . . . cultural heritage, historical background and the values of the African civilisation, which should inspire and characterise their reflection on the concept of the rights of the child'.

The definition and perception of childhood under both the Convention and the Children's Charter represent a complete departure from that of traditional African culture. Under these instruments and the Children's Act, adulthood is attained on reaching a specific predetermined age. However, under customary law, age has no relevance in determining childhood or adulthood.⁴¹ Adulthood is marked by physical changes marking puberty, capacity to perform adult duties, completion of initiation stages and marriage. It is evident therefore that in certain cultures maturity may be attained before the age of 18, contrary to the provisions of the Convention and the Charter.

Further, the Convention and the Children's Charter are revolutionary in that the child is not to be perceived of as a right-less object of the law, but rather as a possessor of rights in his or her own right enforceable against family, community and state. In other words, children as human beings have the same inherent value as adults. This vision of a child as an autonomous being is at odds with the cultural perception of a child where children are viewed as resources with parents having a duty to protect and provide for them.⁴²

The basic premise of the whole Convention is that its provisions shall be applied with the best interests of the child as a primary consideration,⁴³ and in the case of the Children's Charter as the primary consideration.⁴⁴ In seeking to determine the best interests of the child in any case, the standard to be applied are the provisions in these instruments and the discouragement of any act that would seek to undermine the rights of the child.

Certain aspects of culture left unchecked would work to undermine the advances made as far as children's rights are concerned. The Convention and the Children's Charter are therefore clear as to what should

⁴¹ C Himonga 'The right of the child to participate in decision-making. A perspective from Zambia' in Ncube (n 23 above) 97.

⁴² B Rwezaura 'Law, culture and children's rights in Eastern and Southern Africa: Contemporary challenges and present-day dilemmas' in Ncube (n 23 above) 294.

⁴³ Art 3(1).

⁴⁴ Art 4 (1).

happen when there is a clash between the rights of the child and culture. The Convention in its Preamble only recognises those traditional and cultural values that act for the protection and harmonious development of the child. The Children's Charter is unambiguous and provides that 'any custom, traditional or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged'.⁴⁵

There can be no doubt therefore that where culture undermines or curtails the rights of the child, state parties are bound in the words of the Children's Charter to 'discourage' that culture. The use of the word 'discourage' is intentional. The drafters of the Children's Charter were alive to the fact that when dealing with traditional, cultural and social issues, the approach to adopt is to discourage and provide an acceptable substitute to the community. This is the approach that has been adopted in the campaign against female circumcision where alternative rites have been introduced.

Both the Convention and the Children's Charter do not tolerate practices prejudicial to the rights of children and call for their abolition. The Kenyan Act adopts a similar stand and as a deterrent attaches a criminal sanction.⁴⁶ The Convention and the Children's Charter, together with the Act, spell out the basic standards to which culture and tradition must measure up. Whereas recognition is given to culture, only those practices that are positive and contribute to the welfare, dignity, normal growth and development of the child are to be accommodated.

From the foregoing, it is clear that the cultural rite of circumcising boys runs foul of the express provisions of the Convention, the Children's Charter and the Children's Act.

5 Conclusion

The provisions of the Children's Act are very clear. A careful reading of its provisions⁴⁷ would appear to prohibit circumcision of boys as a rite of passage into adulthood. It pronounces that a child only becomes an adult on the attainment of the age of 18.⁴⁸ By doing so, it renders

⁴⁵ Art 1(3).

⁴⁶ Sec 14 (n 18 above). Sec 20: 'Notwithstanding penalties contained in any other law, where any person wilfully or as a consequence of culpable negligence infringes any of the rights of a child as specified in sections 5 to 19 such person shall be liable upon summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine.'

⁴⁷ As above.

⁴⁸ Sec 2.

incompetent any cultural practices that seek to confer adulthood at an earlier age. Further, the Act provides as follows:⁴⁹

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 psychological development.

Clearly as has been suggested above, male circumcision, when performed on under-age boys who are unable to give their consent, is in breach of this provision. The government of Kenya is acting illegally in facilitating circumcisions through, for example, public health facilities, and in failing to prevent these violations, whether carried out by public or private actors. So as to fulfil its obligations under human rights treaties that it has ratified and the Act, the Kenyan government must take positive action against male circumcision.

⁴⁹ Sec 14 (my emphasis).