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RESEARCH PROJECT: THE FALLACY OF MANDATORY MINIMUM SENTENCING IN SEXUAL OFFENCES

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NOVEMBER 15 2016

DECLARATION

I declare that this thesis is my original work and has not been submitted/presented before for a degree in this or any other university.

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This Thesis has been submitted for examination with my approval as university supervisor.

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Date

DEDICATION

This thesis is dedicated to all the girls who have survived sexual abuse in Kenya. Their courage to endure and overcome is a source of inspiration to me and many people in Kenya.

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2) The Constitution of Kenya, 2010.
3) The Sexual Offences Act of Kenya, 2006
4) The Sexual Offences Act of South Africa (*Criminal Law (Sexual Offences and Related Matters) Amendment Act* No 32 of 2007)
5) The Victim Protection Act of Kenya, 2014.
6) The Criminal Procedure Code of Kenya, 1987.
7) The Criminal Code of Finland, 1889 as amended up to 2012.
8) The Children's Act of Kenya, 2001.
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5) *Dennis Abuya v Republic* Court of Appeal at Kisumu Criminal Appeal No 164 of 2009
6) *Fred Michael Bwayo v Republic* Court of Appeal at Eldoret Criminal Appeal No 130 of 2007
7) *Gamaldene Abdi Abdirahman v Republic High Court at Garissa Criminal Appeal No 40 of 2013*
8) *Gilbert Miriti Kanampiu v Republic* High Court at Meru Criminal Appeal No 97 of 2009
9) *Godfrey Mutiso v Republic* Court of Appeal at Mombasa Criminal Appeal No 17 of 2008
10) *Kennedy v Louisiana* 554 U.S.407 (2008)
11) *Joel Omino Ngutu v Republic* High Court at Kisumu, Criminal Appeal No. 10 of 2013
12) *Joseph Kiplimo v Republic* Court of Appeal At Eldoret Criminal Appeal No 416 of 2010
13) *Joseph Mwaura Njuguna and another v Republic* Court of Appeal at Nairobi Criminal Appeal No 5 of 2008
14) *Joyce Nyambura Kariuki v. Republic* [2013] eKLR
15) *Lawrence v Texas* 539 US 558 [574] (2003).
16) *Miller v Alabama* 567 US [2012]
17) *Minister of Home Affairs v Fourie* 2006 (3) BCLR 355 (Constitutional Court)
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25) *R v Morrissey* [2000] 2 S.C.R 90
26) *R. v. Nasogaluak* [2010] 1 S.C.R. 206
27) *Re Lynch* 8 Cal 3d 410 [503]

28) *Republic v Enock Kagali* High Court at Kakamega Criminal Appeal No 76 of 2013

29) *Republic v Patrick Lumonje Obote* High Court Criminal Appeal at Eldoret No 32 of 2007

30) *Richard Dickson Ogendo & 2 Others v Attorney General & 4 Others* High Court Petition 70 of 2014

31) *Richard Kipsang Langat v Republic* Unreported Criminal Appeal No 26 of 2012

32) *Robert Julo vs Republic* Unreported Criminal Revision No 254 of 2011

33) *S v Malgas* 2001 (2) SA 1222 (A)

34) *SC v Republic* High Court at Malindi Criminal Appeal No 19 of 2009.

35) *Teddy Bear Clinic for Abused Children & Another v Minister of Justice Constitutional Development & Another* (73300/10) [2013] ZAGPPHC 1 (4 January 2013)

36) *Thomas Mareira v Republic* Criminal Appeal No. 49 of 2011 High Court at Kitale.

1.0 INTRODUCTION: The Sexual Offences Act's Attempt To Reduce Sexual Abuse of Girls In Kenya

The Kenya Parliament enacted the Sexual Offences Act[1] (SOA) to reduce sexual offences in Kenya. The preamble to the Act states that it is *'An Act of Parliament to make provision about sexual offences, their definition, prevention and the protection(emphasis mine) of all persons from harm from unlawful sexual acts and for connected purposes.'* To prevent occurrence of sexual offences correlates with their reduction.

A number of strategies that the SOA employed to protect and prevent sexual offences include provisions for long mandatory minimum sentences,[2] creation of a dangerous sexual offenders' database,[3] supervision of dangerous sexual offenders after sentencing,[4] treatment for sexual offenders during[5] and post incarceration.[6]

The SOA also created certain novelties to increase the chances of conviction of sexual offenders. They included allowing intermediaries to testify on behalf of a victim,[7] allowing evidence of the impact of the sexual offence to decide whether the offence occurred or not,[8] presuming the victims

[1] *Sexual Offences Act* Number 3 of 2006.
[2] Section 8(2) of the Act prescribes a mandatory life sentence for sexual offenders who defile children under 11 years, Section 8(3) prescribes a minimum 20 years for offenders who defile children between the ages of 12 and 15 years, whilst Section 8(4) prescribes a minimum sentence of 15 years for offenders who defile children aged between 16 years and 18 years. Section 20 of the Act prescribes a minimum of 10 years for people who commit incest with a possible enhancement to life imprisonment if proved the victim was a child.
[3] Section 39(13) of the Act creates the Sexual Offenders Database. The database was officially launched by the Chief Registrar to the Judiciary in June 2012.
[4] *Sexual Offences Act*, s 39(2).
[5] ibid s 35.
[6] Section 39(5) allows court to order rehabilitative treatment of the sexual offender as a condition of his release.
[7] *Sexual Offences Act*, s 31.
[8] *Sexual Offences Act*, s 33.

prior sexual conduct being irrelevant[9] and allowing courts to make orders for DNA samples from suspects to be taken for analysis.[10]

This thesis argues that the SOA has been unsuccessful in achieving the reduction and prevention of sexual offences against girls through stiff MMS. Girls are the most targeted category of victims and therefore the thesis will focus on them alone.[11]

1.1 HISTORICAL BACKGROUND OF MANDATORY MINIMUM SENTENCES IN KENYA

Kenya acquired its first criminal law statute in 1897 from its British colonial masters.[12] The first criminal procedure code was the Indian Criminal Procedure Code drafted entirely by Sir Thomas Macaulay.[13] The philosophy at the time regarding sentencing was influenced by Jeremy Bentham's utilitarianism school of thought that advocated for certainty and predictability in sentencing[14] but which Macaulay modified to take into consideration the customs of the Indian native population. This resulted in a code which was flexible and allowed indeterminate sentencing. The colonial

[9] *Sexual Offences Act*, s 33.

[10] *Sexual Offences Act*, s 36 [Unfortunately courts have ruled in recent cases (*Robert Julo vs Republic* High Court at Mombasa Criminal Revision No 254 of 2011, and *Davis Mulinge Mwongela v Republic* High Court at Machakos Criminal Case No. 145 of 2010) that courts cannot compel DNA testing in sexual offences. In my view the cases were wrongly decided because Judges have mistakenly taken constitutional protections intended for testimonial evidence and applied them to physical evidence. Applying the courts logic, by extension fingerprint evidence, breathalyzers and photographic evidence would be inadmissible because they are self-incriminating, a position which would make law enforcement untenable. In *Richard Dickson Ogendo & 2 Others v Attorney General & 4 Others* Petition 70 of 2014, Majanja J at para 63 while looking at the breathalyzer test correctly analyzed the distinction between testimonial and physical evidence and ruled that breathalyzers, fingerprint and blood tests were not a violation of the right to remain silent.]

[11] Taskforce On The Implementation of the Sexual Offences Act 2006, *A Baseline Study of the Programmes Schemes and Mechanisms for the Treatment, Supervision and Rehabilitation of Sexual Offenders in Kenya* (GIZ 2012) 20, (In 2012 girls formed 63.6% of all victims of sexual offences. According to the Kenya National Bureau of Statistics in 2011 girls formed 81% of victims of sexual abuse. Information sourced from <www.knbs.or.ke> accessed 28 October 2013).

[12] H.F. Morris 'A History Of The Adoption Of Codes of Criminal Law And Procedure In British Colonial Africa 1876-1935'(1974) 18(1) Journal of African Law [6-23]

[13] Leslie Sebba 'The Creation And Evolution Of Criminal Law In Colonial And Post-Colonial Societies' (1999) 3(1) Crime History & Society Journal p71-99

[14] Leslie Sebba (n13)

settlers and administrators opposed the Indian Criminal Procedure Code which they didn't understand since it was based on the Indian experience and not their English background.[15] The Code was replaced by a modified replica version of the English Criminal Code in 1930[16] which also controlled judicial discretion[17] by introducing mandatory sentences.[18]However the main reason for introducing the new code was to assist the colonial settlers to administer laws that they were familiar with and in a manner that they understood rather than to control judicial discretion.[19] Upon Independence, Kenya retained the English Criminal Procedure Code and the Penal Code which rare still valid law.[20]

Some of the offences in the Penal Code which had mandatory minimum sentences include treason[21] and murder[22] which both have mandatory death penalties, stock theft[23] preparation to commit a felony,[24] and handling stolen goods[25] with mandatory minimum sentences of seven years. While treason and murder are considered to be serious offences against the state warranting severe penalties,[26] the same cannot be said of stock stealing and handling stolen goods. As far back as 1970 during parliamentary debates on stock theft, one parliamentarian said *'Some of this stock*

[15] Leslie Sebba
[16] Mathew Deflem 'Law Enforcement In British Colonial Africa: A Comparative Analysis of Imperial Policing In Nyasaland, Gold Coast And Kenya' (1994) 17(1) Police Studies 45-68 [The Criminal Procedure Code & Penal Act were passed in 1930]
[17] Leslie Sebba
[18] Leslie Sebba 'The Creation And Evolution Of Criminal Law In Colonial And Post-Colonial Societies' (1999) 3(1) Crime History & Society Journal (71-99)
[19] Leslie Sebba 'The Creation And Evolution Of Criminal Law In Colonial And Post-Colonial Societies' (1999) 3(1) Crime History & Society Journal (71-99)
[20] See *Anthony Njenga Mbuti & Others v Attorney General & Others* Unreported High Court Petition No 45 of 2014 at p46 per Mumbi J
[21] *Penal Code*, s40
[22] *Penal Code*, s203
[23] *Penal Code*, s278
[24] Penal Code s 308
[25] *Penal Code*, s324
[26] David B. Muhlhausen 'Theories of Punishment and Mandatory Minimum Sentences' (A Paper Presented to The U.S Sentencing Commission 27 May 2010) (available @ <http://www.heritage.org/research/testimony/theories-of-punishment-and-mandatory-minimum-sentences> (accessed 8 June 2015)

theft is looked upon in certain areas as part and parcel of their culture. It is one way of expressing whether one is a warrior or not—'[27]

During the colonial period, low conviction rates and the value of stock theft largely contributed to the view by settlers that stiffer laws were needed for stock theft crimes.[28] This advocacy was effective and therefore stiffer sentences were set to deter and incapacitate offenders.[29] Handling stolen stock is a connected crime to stock theft and therefore a similar logic applied. Because of this history, despite vigorous opposition, the amendment to the Penal Act was passed in 1971[30] with the mandatory minimum sentence of seven years being legislated due to pressure from the Government which wanted to be seen to be tough on crime.[31] In supporting the amendment, the Vice President said *"Which Government is wanted by wananchi? Is it not the Government that protects them from cattle rustlers? Is it not the Government that sees the law-abiding citizens can move about without being molested by stock thieves?"* The Vice President was by implication arguing that stiffer laws prevent and show a tough government response to crime.

In 1987 upon the recommendations of the Kenya Law Reform Commission which noted the injustice of having even chicken thieves suffer mandatory minimum sentences of seven years, the Attorney General[32] introduced amendments in parliament for the removal of the mandatory minimum seven year sentence to a maximum sentence of fourteen years for stock theft and

[27] Parliamentary Hansard 07 May 1970, Hon Elijah Mwangale 402.
[28] Ross Mcgregor *Kenya From Within: A Short Political History* (Routledge 2006) p 435- 436 . [The Stock And Produce Ordinance No 8 of 1913 empowered a magistrate to order an accused to immediately pay up to ten times the value of the stolen stock and in default attach the accused's land to pay the fine.]
[29] ibid
[30] *Criminal Law Amendment Act* No 25 of 1971 s2
[31] Parliamentary Hansard 07 May 1970, Hon Vice President Moi p 415.
[32] Parliamentary Hansard 08 December 1987, Hon Attorney General Mathew Guy Muli K2

handling stolen goods which parliament adopted.[33] Clearly even at this time, the government was aware of the unintended consequences of treating different offenders in a like manner. These consequences included harsh sentences for offenders with different levels of culpability.

Leslie Sebba,[34] notes that the code was abolished in the colonies because a man in Nigeria who had murdered another person was given a light sentence. The Secretary of State for colonies in England who made laws for the African protectorate decided to abolish the code and introduce the English Criminal laws with certain mandatory sentences to control judicial discretion.

1.1.1 Why The Sexual Offences Act Was Enacted

There were several reasons why the Sexual Offences Act was enacted. One reason was Kenya's attempt to comply with its international obligations and the second reason was to respond to the public, media and civil society pressure against the prevalence of crimes.

(a) Complying with International Obligations

Kenya is a signatory to many international conventions which strive to protect girls from sexual abuse. Some of these conventions like the United Nations Convention on the Rights of the Child[35] and the International Convention on the Elimination of all forms of Discrimination against Women have reporting requirements mandating states to report back on the measures they have taken to address the issues identified by the states. Kenya had identified sexual abuse of women and girls as an area of concern to various international committees. In her first report to the UN Committee

[33] *Statute Law Miscellaneous Amendment Act* No 22 of 1987 s2

[34] Leslie Sebba 'The Creation And Evolution Of Criminal Law In Colonial And Post-Colonial Societies' (1999) 3(1) Crime History & Society Journal (71-99)

[35] Article 44 of the Convention

under the Convention on the rights of the Child, Kenya highlighted amendments to the Criminal Procedure Code including amendments increasing penalties for defilement as a measure taken to further protect children from sexual abuse.[36] At page 7 of Kenya's seventh periodic report to the CEDAW committee, Kenya highlighted the passage of the Sexual Offences Act as means of reducing sexual violence. Kenya ratified the United Nations Convention on the Rights of the Child in 1990 and domesticated the same via the passage of the Children's Act 2001.[37] Article 19 of the United Nations Convention on the Rights of the Child gives children the right to protection by their states from all forms of physical or mental violence injury or abuse or maltreatment *including sexual abuse* while under the care of their parents or caregivers. Article 34 of the Convention mandates governments to protect children from all forms of sexual exploitation *and abuse* and urges state parties to implement measures protecting children from sexual activity or other unlawful sexual practices. Article 24 of the ICCPR[38] which Kenya ratified in 1976 has a provision i.e for states families and societies to take measures to protect children. Article 16 of the African Charter on the Rights and Welfare of the Child provides that States which Kenya ratified in 2000[39] provides that Parties shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, neglect or maltreatment including *sexual abuse*.

[36] The Kenya Section of the International Committee of Jurists *International Human Rights Standards: Reporting Obligations on the Convention on the Rights of the Child* (KSICJ 2005) 205,206

[37]The Kenya Section of the International Committee of Jurists (n36) 7

[38] International Covenant on Civil and Political Rights (adopted 16 December 1966, and ratified by Kenya on 1 May 1972, entered into force on 23 March 1976) 999 UNTS 171 (ICCPR)

[39] African Charter on the Rights and Welfare of the Child, (opened for signature on July 11, 1990 entered into force on 29 November 1999) OAU Doc. CAB/LEG/24.9/49 available@ <http://kenyalaw.org/treaties/treaties/14/African-Charter-on-the-Rights-and-Welfare-of-the-Child> (accessed 21 August 2015)

(b) Pressure from the Public Media and Civil Society

Civil Society[40] and like-minded legislators[41] lobbied intensively for the passing of the Sexual Offences Act (SOA) to curb sexual violence against girls.

Kenya had experienced unparalleled sexual violence including the July 1991 St Kizito Secondary School tragedy which shocked the Kenyan nation when boys went on a rampage and gang raped 71 girls in the same school. In the ensuing stampede, 19 girls lost their lives.[42] In March 2006 another 15 girls were raped as they walked from Kangubiri Girls School at night to protest poor living conditions.[43] Sadly, none of the perpetrators was convicted of these crimes. Such instances increased the clamor for a new act to address sexual abuse of women and girls because the existing legal framework was inadequate.

Some of the inadequacies of the law included the age of consent to marriage which was in conflict with the Children's Act. [44] The SOA increased the age of consent to sex from 16 years to 18 years[45] effectively repealing section 145 of the Penal Code (which had set the age of consent at sixteen years) and section 19 of the Marriage Act Chapter 151 of the laws of Kenya that allowed girls to get married before eighteen years parental consent.

[40] Patricia Mbote and Migai Aketch, *Kenya: Justice Sector and the Rule of Law* (Open Society Foundation 2011) 51.
[41] Hon Njoki Ndungu was heavily involved in the drafting of the bill. The Act later came to be popularly known as the 'Njoki Act'.
[42] James Ogola Onyango 'The Masculine Discursive Construction of Rape in The Kenyan Press' in Egodi Uchendu & Codescria (eds) *Masculinities in Contemporary Africa* (Council for the Development of Social Science Research in Africa 2008) 54-72,
[43] Truth Justice And Reconciliation Commission *Report of The Truth Justice And Reconciliation Commission Volume IIC*, (TJRC 2013) 190-194; *See Also* Agnes Kibui, Lucy Kibera & Gavin Bradshaw 'Conflict Management As A Tool For Restoring Discipline In Kenyan Schools' [October 2014] 1(3) International Journal of Scientific Research & Innovative Technology available @ <http://www.ijsrit.com/uploaded_all_files/2983095352_g1.pdf> (accessed 6 June 2015)
[44] *Children's Act*, s 2
[45] *Sexual Offences Act*, s 8(4)

Moreover before the SOA's enactment, crimes like defilement and incest did not have a minimum sentence but only a maximum sentence.[46] This resulted in *perceived* low sentences for sexual offenders and a widespread disaffection with the sentencing discretion afforded to judicial officers.[47]The public perception was increased when in some few instances short sentences and fines were meted on offenders leaving the public feeling that justice was not achieved.[48]Though public perception was that offenders were getting off light, Professor Shadle disagrees with this perception.[49] His analysis showed that long sentences were meted out while appeals by sexual offenders were mostly unsuccessful. Between 1966 and 2005, the average sentences meted out by magistrate's courts for sexual offenders rose from 4 years to a peak of 21 years.[50] He argues that societal changes rather than the sentencing policy were to blame for the increase in sexual offences.[51]

During parliamentary debates between April and May 2006 focusing on the passing of the Sexual Offences Bill, several members of parliament advocated for stiff sentences to signify the gravity of sexual offences.[52] However, majority members advocated for lengthy mandatory minimum

[46] *Penal Code* [(repealed) provided for a maximum of fourteen years as the sentence with or without corporal punishment and hard labor. Section 166 (repealed) gave sentences for incest as a maximum of five years if the girl was over thirteen years old and a maximum of life sentence if the girl was younger than thirteen years. The minimum sentence was not defined].

[47] Brett Shadle, 'Sexual Offences in Kenyan Courts: 1960s-2008' (2008-10) 2 KLR. 1, *See also* Patricia Mbote, 'Violence Against Women in Kenya: An Analysis of the Law Policy and Institutions' (2000-1) IELRC Working Paper, available @ < www.ielrc.org/content/w0001.pdf> (accessed 07 July 2014).

[48] Patricia Mbote, 'Violence Against Women in Kenya: An Analysis of the Law Policy and Institutions' (2000-1) IELRC Working Paper, 8, available @ < www.ielrc.org/content/w0001.pdf> (accessed 07 July 2014), gives the example of *Republic v Joseph Mutuku Muania* High Court Criminal Appeal No 6884 of 1995.

[49] Brett Shadle(n47)

[50] ibid

[51] ibid

[52] Parliamentary Hansard 27 April 2006, Hon Jimmy Angwenyi [779] said that the death penalty was appropriate for child defilers and gang rapists, Hon Charles Keter [784] believed that child defilers were 'mad' and ought to be

sentences[53] to act as a deterrent. Mostly, parliamentarian's views were conjoined on these two issues. Parliamentarians admitted that punishment alone is not enough to reduce crime and that loss of cultural and family values was to blame for the increase in crime. [54] Hon. Professor Anyang-Nyongo identified rapid urbanization characterized by poverty in densely populated slums and cultural evolution as partial reasons contributing to the increase of sexual offences.[55] He and the Attorney General advocated for the treatment of sexual offenders[56] though they didn't specify what type of treatment they were recommending. Currently however the Prisons Department lacks staff and capacity to specifically treat sexual offenders.[57] This is a failure on the part of the government as the treatment program was an integral part of the Bill.

1.2 STATEMENT OF THE PROBLEM

Despite setting MMS, sexual offences against girls continue to rise.[58] Current Kenya Government Statistics show that while there has been an insignificant decrease in reported cases of defilement and Incest between January and May 2013, but sexual offences rose generally over the years after the Act was passed.[59] While arguably it may be that more instances of sexual offences are now being reported because of increased public confidence in the Public Justice System (PJS) other

permanently excluded from society, Hon Amos Wako [828-829] believed that the sentence of defilement ought to face capital punishment.

[53] Parliamentary Hansard 30 May 2006, Hon Kivutha Kibwana 992-993.

[54] Parliamentary Hansard 02 May 2006, Hon Moody Awori Vice President of the Republic of Kenya [819] gave an example of Murder and Robbery With Violence which though their punishment are the most severe i.e. death, the rates of this crimes continue to increase despite the penalty.

[55] Parliamentary Hansard 02 May 2006, 823.

[56] Parliamentary Hansard 02 May 2006, Hon Amos Wako [827].

[57] Taskforce On The Implementation of the Sexual Offences Act 2006, *A Baseline Study of the Programmes Schemes and Mechanisms for the Treatment, Supervision and Rehabilitation of Sexual Offenders in Kenya* (GIZ 2012) 43.

[58] *Daniel Munyau Kibati v Republic* Unreported Criminal Appeal No 68 of 2010.

[59] Between January and May 2013 defilement cases hit 1,216 in 2013 as compared to the 1,428 in 2012 and 1,291 in 2011. Statistics from Kenya National Bureau of Statistics shows reported cases of Defilement and Incest went up from 980 and 160 respectively in 2005 to 2202 and 356 respectively in 2010 [Information sourced from <www.knbs.or.ke> (accessed 28 October 2013).

independent research conducted by the Teachers Service Commission,[60] UNICEF[61] and Amnesty International[62] supports the fact that defilement of girls is rampant and unreported.

Sexual abuse of girls is a serious problem in the Kenyan society. The media is replete with stories almost on a daily basis of how girls have been sexually abused. Little however has been done to analyze the impact or efficacy of MMS on sexual abuse of girls.

1.3 JUSTIFICATION OF THE STUDY

Sexual violence against girls is one of the grossest forms of human rights abuse. Its reduction is seen both as a means of protection of children who are vulnerable and also as a moral obligation on the part of the state and society. The non-binding Declaration on the Elimination of Violence Against Women (DEVAW) sets out international norms which state parties have recognized as being fundamental to the elimination of violence against women.[63] States are mandated to take specific measures to eliminate sexual violence against girls in the home.[64] This study will seek answers to reducing the problem of sexual abuse of girls in Kenya. The study's findings will have a positive impact on government by studying MMS and their effect on sexual abuse. Sexual abuse of girls is publicly deplored[65] and stiff Mandatory Minimum Sentences as a means of reducing them doesn't seem to be working. By analyzing the weaknesses of MMS, it is hoped that a more effective sentencing regime can be adopted.

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[60] Hakijamii Magazine *Sex Abuse In Schools: How Safe Is Your Girl Child* (Kenya Education Rights Update November 2009) available @ <www.hakijamii.com/images/Education/r2ednov2009.pdf >(accessed 11 June 2015)

[61] United Nations Children Fund *Violence Against Children In Kenya: Findings From A 2010 Survey* (UNICEF 2012) 2 available @ <www.unicef.org/esaro/VAC_in_Kenya.pdf> (accessed 10 October 2014)[The report demonstrates that 32% of girls under 18 will experience sexual abuse before their 18th birthday]

[62] Amnesty International, *Insecurity & Indignity: Women's Experiences in the Slums in Nairobi, Kenya* (Amnesty International 2010) 42.

[63] Declaration on the Elimination of Violence against Women (adopted on 20 December 1993), UNGA Res 48/104 art 1 defines 'violence against women' as any act of gender-based violence that results in, or likely to result in, physical, sexual or psychological harm.

[64] ibid art 2.

[65] Carol Smart *Feminism And The Power of The Law (*Routledge 2002) 51

1.4 THEORETICAL FRAMEWORK: LOCATING MANDATORY MINIMUM SENTENCES WITHIN THEORIES OF PUNISHMENT

Generally there are two justifications of criminal sanctions, utilitarian and retributive.[66] Utilitarian justifications are forward looking in terms of preventing future crime from occurring while retributive justifications are backward looking with punishing crime that has already happened.[67] The two justifications are further broken down into four rationalizations for criminal sanctions: deterrence, incapacitation, just deserts and rehabilitation. The first three rationalizations of criminal sanctions have underpinned why mandatory minimum sentences are used and the fourth model is the one which the research will demonstrate has been underutilized, is a vital link in reducing sexual abuse of girls. While deterrence incapacitation and rehabilitative rationalizations are based on the utilitarian theory, just deserts rationalizations are based on the retributive theory.

The research will also draw on radical feminist theories conceptualization of why sexual abuse of girls occurs to try to understand how the law can better address this vice.

1.4.1 Deterrence

General deterrence theory assumes that increasing the risk *or the perception* of apprehension and punishment deters society from committing crime.[68] Thus, the cost of the crime i.e. punishment, is intended to deter potential criminals from its benefits i.e. committing crime. This cost benefit analysis is essentially what utilitarianism propounds.[69] Cesare Beccaria proposed that the most

[66] Alana Barbara 'Just Deserts Theory' In M Bosworth (ed) *Encyclopedia of Prisons & Correctional Facilities* (Thousand Oaks Publications CA Sage Publications 2005) 504-507 available @<www.sagepub.com/hanserintro/study/materials/reference/ref3.1.pdf > (accessed 19 June 2015)
[67] Nicola Lacey *State Punishment Political Principles and Community Values* (Routledge 1994) p 7; Alana Barbara (n66)
[68] Larry Seigel *Criminology* (11th Edition Wadsworth Cengage Learning 2012) p 131
[69] Michael Lessnoff 'Two Justifications Of Punishment' [1971] 21(83) Philosophical Quarterly Review [141-148]

effective way to administer punishment is to increase its certainty, swiftness, and severity.[70] Consequently, by setting high Mandatory Minimum Sentences for sexual offences, criminals who are aware of the set sentences will reason that their best self-interest is avoiding these severe punishments thus reducing crime.

1.4.2 Incapacitation

Incapacitation focuses on stopping individuals from committing further crimes by detaining them for certain periods of time. A criminal is incapacitated through incarceration. Incarceration prevents criminals from committing future crimes during incarceration therefore reducing crime in society. [71] By setting lengthy mandatory minimum sentences, the sexual offenders are unable prey upon young girls for long periods thereby creating a safe living environment.

1.4.3 Just deserts

Under the just deserts ("retribution") model, the commission of a crime is itself sufficient justification for punishment[72] because moral gravity of the offense validates the punishment.[73] Just deserts focuses on the *offence*. The level of punishment is guided by proportionality, with minor

[70] Cesare Beccaria *On Crimes and Punishments and Other Writings* (Richard Bellamy ed Cambridge University Press, 2000).

[71] Andrew Leipold 'Recidivism, Incapacitation And Criminal Sentencing Policy' [2006] 3(3) University of St Thomas Law Journal 536,541 available @<http://ir.stthomas.edu/cgi/viewcontent.cgi?article=1097&context=ustlj> (accessed 16 June 2015)

[72] Alana Barbara 'Just Deserts Theory' In M Bosworth (ed) *Encyclopedia of Prisons & Correctional Facilities* (Thousand Oaks Publications CA Sage Publications 2005) 504-507 available @<www.sagepub.com/hanserintro/study/materials/reference/ref3.1.pdf > (accessed 19 June 2015)

[73] David B. Muhlhausen 'Theories of Punishment and Mandatory Minimum Sentences' (A Paper Presented to The U.S Sentencing Commission 27 May 2010) (available @ <http://www.heritage.org/research/testimony/theories-of-punishment-and-mandatory-minimum-sentences> (accessed 8 June 2015)

crimes receiving more lenient punishments and more serious crimes receiving harsher punishments.[74] As explained by James Wilson:-

"The most serious offenses are crimes not simply because society finds them inconvenient, but because it regards them with moral horror. To steal, to rape (emphasis added), to rob, to assault—these acts are destructive of the very possibility of society and affronts to the humanity of their victims. Parents do not instruct their children to be law abiding merely by pointing to the risks of being caught."[75]

Punishment is morally justified even if it fails the utilitarian cost/benefit analysis. Many Kenyan parliamentarians's supported the passing of Mandatory Minimum Sentences in the SOA by positing that the inhuman nature of the offence deserved a severe sentence.[76]

1.4.4 Rehabilitation

This justification assumes that crime is predominately a product of social factors.[77] Consequently, criminal behavior is determined by structural divisions, inequitable power divisions and social injustices—such as poverty, racial discrimination, and lack of employment opportunities—so the object of criminal justice ought to be to mitigate or eliminate those harmful forces.[78] Because structural defects in society cause crime, criminals deserve rehabilitation, not

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[74] David B. Muhlhausen 'Theories of Punishment and Mandatory Minimum Sentences'

[75] James Q. Wilson, *Thinking About Crime* (Revised Edition Vintage Books, 1983) p.163

[76] Parliamentary Hansard 27 April 2006, Hon Jimmy Angwenyi [779] stated *'I have got a granddaughter who is underage. Just imagine if she were raped by a huge person - I do not know who is the most huge Member in this House - then that person is sentenced to only ten years in jail. Just imagine that! That person should be hanged! Our objection to defilement and rape should be shown by the punishment we mete out to these animals(emphasis added) that commit this crime."*

[77] Francis Cullen & Others 'What Correctional Treatment Can Tell Us About The Criminological Theory: Implications For The Social Learning Theory' In Ronald Akers & Gary Jensen (eds) *Social Learning Theory And Explanation Of Crime* (Thousand Oaks, CA Sage Publications 2002) p 339,348

[78] Barbara Hudson *Justice Through Punishment: A Critique of The Justice Model Of Corrections* (Macmillan 1987) 62, 114, 166

punishment.[79]Rehabilitation focuses on the *offender* and addressing through treatment, training or therapy the root causes of criminal behavior. In relation to rehabilitative treatment, the writer has observed over forty five (45) convictions of sexual offenders over the past four years and has only seen one case i.e. *Republic v Maurice Ombajo Lugwiri*[80] where a magistrate ordered the supervision (rehabilitation) of a 30 year old sexual offender to who was sentenced to 120 years in prison.[81] There may be little societal utility in treating an offender for life when he will never be released from prison. Moreover the magistrate failed to indicate what kind of supervision was needed for the offender. Possibly this is because magistrates are aware that the prisons department does not have a psychological treatment program for sexual offenders and see no need to make orders in vain[82]or are simply ignorant of the law. Rehabilitation proponents are against Mandatory Minimum Sentencing because they believe sentences do not address the societal factors that cause crime but prefer other measures to cure offenders and prevent recidivism.

1.4.5 Rehabilitation And Radical Feminism: A Consensus?

The admission by rehabilitation proponents that crime is controlled by social factors seem closely interlinked with Radical Feminism proponents who see sexual abuse of women as a factor of social relations. Radical feminists argue that society views the female body as a means to male sexual satisfaction.[83] The predominant feminist view is that girls' bodies are simply a commodity to be

[79] Barbara Hudson (n78) p62
[80] Unreported Criminal Case No 5489 of 2009 at Kibera Law Courts
[81] Sentencing ruling available on file with the writer
[82] Taskforce On The Implementation of the Sexual Offences Act 2006, *A Baseline Study of the Programmes Schemes and Mechanisms for the Treatment, Supervision and Rehabilitation of Sexual Offenders in Kenya* (GIZ 2012) 42.
[83] Andrea Dworkin, *Intercourse* (20th edn, Basic Books 2006) 18, available at <http://www.feminish.com/wp-content/uploads/2012/08/Intercourse-Andrea-Dworkin-pdf.pdf> (accessed 14 July 2014); Martha Nussbaum, ***Sex and Social Justice*** (Oxford University Press 1999) 257, cited in <http://plato.stanford.edu/entries/feminism-objectification/> (accessed 19 July 2014).

used and abused by men and sexual abuse of girls is normal male sexual behavior symptomized by men's dominance in the familial, political and economic spheres of society and reflected in sexual relations.[84] Sexual abuse is a construct of the powerful patriarchal system which inflicts pain and suffering on girls because they are not viewed as equal to men. The existence and prevalence of sexual abuse of girls and the low enforcement of sexual crimes against girls is a strong indicator that the feminist view has some validity. Therefore, this infliction of pain t is not only about sex per se but actually about power dynamics in society.[85] Radical feminists believe that sexuality is socially constructed.[86] Being so constructed sexual violence against girls is an expression of the construction of society. This means that the law may not deal with sexual violence since it is simply the manifestation/superstructure while the base that is sexuality remains unaddressed.[87] Patriachy underlies the law. Since the dominant (men) define what is true (law) because they wield power, they affect legal outcomes. Radical feminists agree that we have to look at society when looking at the law. That is as close as they get to rehabilitative school of law however they do not believe in any specific criminological theories because they do not target patriarchy. The radical feminist theory is important because it helps up to see how the law can be shaped by those who interpret it.[88] Rehabilitation proponents however fail to look at crime through the *victims* lens as opposed to radical feminists who look at the *victims experience* to understand the crime. Rehabilitation school of thought remains largely offender focused rather than victim

[84] Andrew Lawrence Spivak, *Sexual Violence: Beyond the Feminist Evolutionary Debate* (LFB Scholarly Publishing 2011) 35.
[85] Michel Foucault *The History of Sexuality Vol 1: An Introduction* (Pantheon Books 1978) 84-85.
[86] Andrew Lawrence Spivak, *Sexual Violence: Beyond the Feminist Evolutionary Debate* (LFB Scholarly Publishing 2011) 148
[87] Catherine Mackinnon, 'Feminism, Marxism, Method and the State: An Agenda for Theory' (1982) 7(3) Feminist Theory 515, 516-517.
[88] Carol Smart, *Feminism and the Power of the Law* (Routledge 2002) 19

focused. A good example in Kenya are the Community Service Orders Act[89] and the Probation Act[90] which make no specific mention of victims of crime in determination of whether an offender should be granted community service. Section 3(4) of the Community Service Orders Act states that the minister of internal security will prescribe a form for use in community service officer's report. This form has never been prescribed and in practice, probation officers reports are predominantly focused on the offender's circumstances and pay little attention to the effects of crime of victims. According to Carol Smart, criminological theories failed to recognize how patriarchy contributed to the victimization of women and girls.[91] It is therefore important to infuse rehabilitation of victims in the criminal justice system as much as rehabilitation of offenders so as to deal with patriarchy through sentencing.

1.4.6 CRITIQUING THE THEORIES

By critiquing theories justifying MMS, the study seeks to advocate a new approach to examining sexual abuse of girls and the punishment to be meted out. This approach which in this thesis is termed society centric offender remorse approach or simply SCORA, aims at reducing overdependence on MMS as the primary means of dealing with CSA. SCORA is largely based on the rehabilitative justification of sentencing. Within the Kenyan context, MMS doesn't seem to be working as the prevalence rates of sexual abuse seem to be increasing. The researcher conducted research at Kamiti Main Prison which will be highlighted in Chapter 2. One of the Respondents in

[89] Section 3 (3) of the Act states *"Where a court determines that a community service order should be made, it may, before making the order, direct a community service officer to conduct an inquiry into the circumstances of the case and of the offender and report the findings to the court".* There is no specific mention of the victim.

[90] Section 4 of the Act states "*where a person is charged with an offence which is triable by a subordinate court and the court thinks that the charge is proved but is of the opinion that, having regard to youth, character, antecedents, home surroundings, health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, the court may release the offender. The section is offender focused.*

[91] Carol Smart (n88)

the first focus group, Repondent 1 had this to say about MMS. *"Mimi niko ndani na watu wanaoendelea kushika wasichana wako nje mmesaidia nani?"* translated into *"I am in prison and the other criminals who commit sexual abuse girls are out of prison, whom have you helped?"* This was despite the fact that the sexual offender was serving a life sentence for incest. His lack of remorse is indicative of the fact that many sexual offenders who go through the criminal justice system and are eventually sentenced feel no remorse for what they have done. Such individuals are likely to commit similar offences if they are not rehabilitated. This non-remorse may confirm radical feminism theory that men in society do not see sexual abuse of girls as a crime.

Retributive scholars argue that deterrence as a goal of punishment may be pursued as a means of reducing crime with the constraint of avoiding disproportionate punishment of the guilty.[92] Theorists claim that the offender has given up his right to be treated exceedingly proportionally because he has offended.[93] The justification is based on the fact that the offender has become unworthy of goods from society because of offending.[94] Whilst the justification may be correct, the intention of creating a deterrent effect however may fail because a negative (non-occurrence of crime) is caused by many factors and not solely linked to punishment.[95]

Retributivism principles of just desert and proportionality are the justification for setting MMS[96] but can only work if society knows the sentences. However retributivists claim that the offenders

[92] Richard Lippke 'Some Surprising Implications of Negative Retributivism' (2014) 31(1) Journal of Applied Philosophy@ < http://onlinelibrary.wiley.com/doi/10.1111/japp.12044/pdf> (accessed 3 September 2014)

[93] Anthony Duff, *Punishment Communication and Sentencing* (Oxford University Press 2001) p14; *See Also* Michael Moore *Placing Blame: A General Theory of Criminal Law* (Oxford University Press 1997) p88; *See Also* Malcolm Thoburn 'Accountability And Proportionality in Youth Criminal Justice' (2009) 55 Criminal Law Quarterly 322

[94] Michael Moore (n93)

[95] Michael Tonry and Richard Fraser (eds), *Sentencing and Sanctions in Western Countries* (Oxford University Press 2001) (citing the (Home Office Advisory Committee on Criminal Penalties (1990) at p3-6,

[96] Norval Morris *The Future of Imprisonment* (University of Chicago Press 1974) 78; Norval Morris and Michael Tonry *Between Prison and Probation: Intermediate Punishments in A Rational Sentencing Regime* (Oxford University Press 1990) 105

know what they are doing is wrong even if they do not know the sentence.[97] Lack of public awareness of the sentence strips the norm of its moral authority.[98] Furthermore their idealism seems mismatched with socio-economic realities including the expense of incarceration and the cost of prosecution. Moreover, measuring societal disapproval of crime by reference to sentencing is an inexact, subjective and ambiguous process. Proportionality and desert offer no clear specific scales for what sentence an offender should get. MMS in this regard seems to be set without a clear reference point.

Deterrence works within a theory of choice. It presupposes the offenders balance the benefits and costs of crime.[99] The costs of crime, both tangible and potential are numerous including lengthy imprisonment, expressing dominance, feelings of shame and pangs of conscience after the crime, victim resistance or simply feeling the thrill of the crime. [100] Depending on what motivates sexual offenders, MMS may or may not have an effect on their conduct. MMS may have no effect on recidivism rates of sexual offenders[101] especially if the offenders are psychologically unwell.[102]

[97] The classic example of this assertion is found in the Bible in Romans 1: 20-21 where St Paul states that God's invisible qualities are evident to all humanity.

[98] Marc Gertz & Others 'The Missing Link In General Deterrence Research' (2005) 43:3 Criminology 623-659; *See Also* Maithili Pradhan and Naureen Shameem, *Assessing the Impact of Mandatory Minimum Sentences on Sexual Offences in Tanzania* (2012) Avon Global Center for Women and Justice Memorandum 18, available at <http://ww3.lawschool.cornell.edu/AvonResources/Avon_Global_Center_Memo_Mandatory_Minimum_Sentences.pdf> (accessed 07 August 2014).

[99] Daniel Nagin and Pepper John (eds), *Deterrence and the Death Penalty* (National Academies Press 2012) 28.

[100] ibid.

[101] Kevin Nunes and others, 'Incarceration and Recidivism among Sexual Offenders' (2007) 31(3) Law and Human Behavior 305, 307.

[102] Ian Kanyanya Caleb Othieno & David Ndetei, 'Psychiatric Morbidity among Convicted Male Sexual Offenders at Kamiti Prison, Kenya' (2007) 84(4) East African Medical Journal 151, 155. *See Also* Kristin Carlson 'Commentary, Strong Medicine: Toward Effective Sentencing of Child Pornography Offenders' (2010) 109(27)Michigan Law Rev. available@ <http://www.michiganlawreview.org/assets/fi/109/carlson.pdf. >(Kristin quotes a research that shows most child pornographers who denied sexual offences admitted later after chemical castration that they had molested children)

Deterrence is also largely determined by the prevalence of particular crime. The more prevalent the crime the more likely to have a higher sanction meted to reduce the crime.[103] Prevalence of crime can therefore inversely affect the sentence. This shows an interdependence or reciprocal causation and entanglement between the two phenomena which means deterrence doesn't necessarily justify MMS, but that MMS may only signify prevalence.

1.4.7 Radical Feminism Theory And Why MMS Is Ineffective

Carol Smart[104] identifies the law as a powerful tool for defining what it true and therefore changing the law changes outcomes in society but Andrea Dworkin rejects the law because laws create and maintain male dominance.[105]Smart differs from retributive scholars since she analyzes the power of the law wielded by a patriarchal agent to *define* rather than its outcomes. For example the law defines what constitutes consent in rape cases.[106] According to her this defining power of the law is more important than legal outcomes, for this thesis purposes offences and sentencing. This defining power is the reason why the law guarded by a male culture can disregard female perspectives when interpreting sexual offences. For instance section 124 of the Evidence Act allowing convictions based solely on the evidence of the victim of a sexual offence. However this seldom happens as government officials such as police officers[107] and magistrates interpret the standard of proof 'beyond reasonable doubt' to insist upon corroboration of a victims testimony

[103] In recent times, sentences for traffic offences, drinking alcohol outside regulated licensed hours and poaching have been increased in Kenya because of an apparent increase in the prevalence of these offences.
[104] Carol Smart (n88)
[105] Andrea Dworkin, *Intercourse* (20th edn, Basic Books 2006) 18, 188 available at <http://www.feminish.com/wp-content/uploads/2012/08/Intercourse-Andrea-Dworkin-pdf.pdf> (accessed 14 July 2014)
[106] Carol Smart (n81) 33
[107] Millie Odhiambo 'Protecting Children Rights in Kenya' in Ved Kumari & Susan Brooks (eds) *Creative Child Advocacy Global Perspectives* (Sage Publications 2004) 132,133 [Millie cites police laxity as one of the reasons why people fail to report cases of sexual abuse. My experience is that police are more likely to be lax and fail tot believe girls as having been sexually abused if there evidence is not corroborated by medical evidence or eyewitnesses.]

therefore undermining the intention of section 124.[108] Such examples are the reason Dworkin rejects the laws ability to protect women from male domination. Retributivists on the other hand are more concerned with outcomes, the power of legal punishment to control human behavior. However the power of the law can be used to address patriarchal attitudes and practices implicit and expressly shown in the law and its practices. This is because the law has both instrumental and intrinsic value. Instrumental in the sense that the law can have a goal e.g. to reduce sexual abuse of girls, and intrinsic in the sense that the law has a morality of itself which can change institutions attitudes and practices accepted as right in society e.g. girls who dress provocatively want to be sexually abused.

Michel Foucault saw power relations in society affecting what we view as the truth and knowledge.[109] Both Foucault and radical feminists reject the neutrality of the law, both reject traditional conceptions of power and both focus on institutions and practices of society.[110]The Foucauldian power relations theory however differs from radical feminists because it shows how power dynamics operate and shift within different societies.[111] The theory accounts for why sexual abuse continues despite the *perceived* deterrent effect of MMS since patriarchy operates within and outside the legal system and in many differing forms. The view of majority of power actors

[108] Carol Smart, *Feminism and the Power of the Law* (Routledge 2002) 26,31 [Smart illustrates that law reflects cultural values about female sexuality. The interpretation of the law therefore allows culture to become law. Since both the judge and the rapist hold the view that female sexuality is capricious, intuitively, the word of a female cannot be believed unless it is corroborated. To substantiate her point she quotes *R v Henry and Manning* [1968], 53 Cr.App.153 where it was said *"Human(sic) experience has shown that girls and women do sometimes tell an entirely false story which is very easy to fabricate but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not now enumerate, and sometimes for no reason at all*"]

[109] Michel Foucault *The History of Sexuality Vol 1: An Introduction* (Pantheon Books 1978) 86-89,93-96 (Foucault summarizes his idea by showing how power is self-reproducing, multi-faceted, multi-dimensional, relational and always working in secret to hide its true intention-to hide the truth and what we believe to be knowledge); *See Also* Carol Smart, *Feminism and the Power of the Law* (Routledge 2002) 6-9.

[110] Margaret A. Maclaren *Feminism Foucault and Embodied Subjectivity* (SUNY press 2002) 8

[111] Michel Foucault *The History of Sexuality Vol 1: An Introduction* (Pantheon Books 1978) 99

like police officers,[112] children officers, medical officers, lawyers and magistrates when dealing with sexual offenses against girls is typically unsympathetic (either deliberately or inadvertently) because patriarchal attitudes dominate.[113] This is because the female species is to provide sexual satisfaction for men.[114] The Foucaldian and radical feminists weakness is that they fail to provide a normative framework for the legitimate and good use of law/power to protect girls.[115] Furthermore truth can be emancipatory, objective and not linked to power as Foucault contends.[116] Interestingly, Foucault and radical feminists focus on women (girls) as objects of power dynamics. However power relations are not always linear. One minor victim[117] noted that the perpetrator

[112] Connie Ngondi Houghton *Access to Justice and The Rule of Law in Kenya* (Nov 2006) A Paper Prepared For the Commission for the Legal Empowerment of the Poor p34

[113] Despite the fact that Section 124 of the Evidence Act Chapter 80 Laws of Kenya allows convictions for sexual offences involving children based on the sole uncorroborated evidence of a child, the writers experience is that in practice this seldom happens. The Police Service Standing Orders mandate police officers to ensure a medical report popularly known as P3 is filled by a police doctor or a government hospital doctor before a suspect can be charged. Courts therefore require this evidence to be produced in court. Medical evidence corroborating the girls testimony remains essential to proving defilement and incest despite Section 124s uniqueness. Examples include *R v James Odero Gora* Unreported Criminal Case No 26 of 2011 at Makadara Chief Magistrates Courts where five children testified that the accused had defiled them on multiple occasions. This evidence was corroborated by the initial medical treatment notes from a private hospital. The P3 form filled later indicated that all their hymens were intact. Relying on the police doctor's testimony rather than the children, the magistrate acquitted the suspect. In *R v Joseph Mwaura* Unreported Criminal Case No 3406 of 2009 at Kibera Chief Magistrates Courts, despite the fact the initial treatment notes from a private hospital corroborated the girls testimony that the accused had defiled her, coupled with an eye witness who saw the accused lying undressed on top of the victim, the magistrate relied on the P3 form filled two (2) months later after the incident which showed no evidence of recent abuse to acquit the suspect. In *R v Michael Onyango* Unreported Criminal Case No 4622 of 2012 at Makadara Law Courts the P3 which was filled two days later than the Post Rape Care form (PRC) indicated that the hymen was broken. The PRC form indicated that the hymen was intact with tears at 3 Oclock. The Magistrate acquitted the accused solely on the alleged contradiction between the PRC form and the P3 form and didn't even discuss the evidence of the victim and two eye witnesses who placed the victim in the accused's house during lunch hour. What is surprising is the magistrates finding of an alleged contradiction between the terminology of the two doctors. There is no contradiction between the words 'broken' and 'tear'. In *Richard Kipsang Langat v Republic* Unreported Criminal Appeal No 26 of 2012 Justice Mutava failed to enhance the sentence of a convict who admitted sodomizing a 6 year old boy and was consequently convicted on his own plea of guilty because the medical report concluded there was no evidence of sodomy. He was of the view that the decision to admit the charge was uninformed because the convict would have been acquitted based on the lack of medical evidence.

[114] Mary Joe Frug, 'A Post Modern Feminist Legal Manifesto (Unfinished Draft)' (1991-1992) 105 Harvard Law Review 1045,1062-1066.

[115] Nancy Fraser, *Unruly Practices: power, discourse and gender in contemporary social theory*, (Polity Press, 1989); See Also Nancy Hartsock, 'Foucault on power: a theory for women?' in L. Nicholson (ed.), *Feminism/Postmodernism*, (Routledge, 1990) 164

[116] Nancy Hartsock, 'Foucault on power: a theory for women?' in L. Nicholson (ed.), *Feminism/Postmodernism*, (Routledge, 1990) 164

[117] Respondent 4 Victims Focus Group

(seven years older than her) who she believed to be her boyfriend, had several other underage girlfriends. The perpetrators adult mother and older sister never questioned him, for bringing underage girls to their house. Indeed they further attempted to persuade her family to drop the case. A mother-son loving relationship is dynamic and not linear as espoused by radical feminists.

Another angle to the power dynamics in sexual offences is the high illiteracy levels of sexual offenders. The rehabilitative school of thought believes that poverty and social divisions such as illiteracy are causes of criminality.[118] The Taskforce on the Implementation of the Sexual Offences Act discovered that over 75% of offenders were illiterate.[119] In further support of the above, an earlier research conducted at Kamiti Prison indicated that 94% of sexual offenders were of the lower socio-economic classes with 73% of them having little or no education.[120]They may have contributed to their convictions by conducting poor defenses because of no legal representation.[121]In the first offender focus group discussion, while admitting to committing the offences some offenders[122] decried lack of forensic evidence to tie them to the crimes. The lack of awareness of the legal elements constituting the crimes of defilement and incest by sexual offenders was great. This ignorance is relevant because it further highlights how deeply entrenched patriarchy is in society. Being uneducated and illiterate, the predominant cultural and patriarchal

[118] Barbara Hudson *Justice Through Punishment: A Critique of The Justice Model Of Corrections* (Macmillan 1987) 62, 114, 166

[119] Taskforce On The Implementation of the Sexual Offences Act 2006, *A Baseline Study of the Programmes Schemes and Mechanisms for the Treatment, Supervision and Rehabilitation of Sexual Offenders in Kenya* (GIZ 2012) 42

[120] Ian Kanyanya, Caleb Othieno and David Ndetei, 'Psychiatric Morbidity among Convicted Male Sexual Offenders at Kamiti Prison, Kenya' (2007) 84(4) East African Medical Journal 151, 154

[121] Ian Kanyanya, Caleb Othieno and David Ndetei, 'Psychiatric Morbidity among Convicted Male Sexual Offenders at Kamiti Prison, Kenya' (2007) 84(4) East African Medical Journal 151, 154

[122] Respondent 1 and Respondent 2

view of girls as sexual objects for men's enjoyment is likely to persist unless measures are taken to educate men the negative effects of sexual abuse of girls.

1.5 The SCORA Method

The SCORA approach allows us to examine sentencing with a focus on the society which holds the key to deterring offenders from committing these offences. Interestingly, victims of defilement and sex offenders in the focus groups unanimously laid the blame of these offences on society. The victims blamed ignorance and poor relations with parents while the perpetrators externalized the problem by blaming victims for low morals and their parents for poor parenting for the increase in sexual abuse. Without denying the gravity of the offence, the SCORA approach seeks to reduce the prevalence of sexual abuse on girls by diagnosing the real problem. Sexual abuse of girls continues to increase because many social institutions have broken down in society.[123] The social institutions like the family and community/cultural structures which radical feminists criticize for being patriachal, hold the key to dismantling the thinking of people, men and women who unconsciously believe that sexual abuse of girls is not a problem. By seeking to transform and infuse these institutions and the individuals they affect through the law, the SCORA approach proposes that a normative framework for protecting girls at the local level can be developed. The law can be used to bridge the gap between the offenders and the victims and provide restoration of both of them. Respondent 2 in the victim's focus group was bitter because her neighbors blamed her family for the incarceration of her perpetrator who had a wife and children. The perpetrator was willing to marry her after her parents discovered that she was pregnant. She is worried that the perpetrator who is about to be released after completing his sentence will come and demand her child from her. The author is of the view that the victims concerns can be addressed through

[123] Sarah Jerop Ruto 'Sexual Abuse of School Age Children: Evidence From Kenya' (2009) 12(1) Journal of International Cooperation in Education 177,184

community engagement between herself, her family the local community and the offenders family in a controlled environment with qualified personnel, to change community attitudes to support her and other survivors of sexual abuse.

Community engagement is also important in ensuring rehabilitation of offenders. MMS had been chosen as a means to reducing sexual offences but has failed to achieve its purpose because it focuses on incarceration as a primary means of deterring or incapacitating offenders. Rehabilitation of the offender and the acknowledgment by the offender/community that the victim had been wronged was ignored.

The ineffectiveness of MMS in causing remorse to offenders therefore reducing recidivism is demonstrated by the fact that majority of offenders adamant about their innocence, saw no point in their imprisonment.[124] This is partly because according to them, sexual abuse continues to occur while they are locked up. Their attitudes are symptomatic of the fact that MMS as applied cannot affect or deter reoffending. Respondent 1 who admitted defiling his 8 year old niece was more cynical when asked why sexual offences against girls continue to occur. He stated *"Dunia Imepasuka Msamba"* translated into *"The world is split in the middle"* meaning the world has changed. The respondent's view while not addressing the question that was asked could be seen in the context of Carol Gilligans perspective that men tend to think externally when solving ethical dilemmas.[125] Respondent 1 sees him outside the problem of sexual offences looking in at the world. SCORA allows offenders and their communities to be taught to engage in the problem of sexual

[124] Offender Focus Group Table
[125] Carol Gilligan *In A Different Voice: Psychological Theory And Women's Development* (Harvard University Press 1982) p24-39

abuse in dialoging during and post sentencing to bring awareness to the society while promoting victim closure. Otherwise, absent a conciliatory environment, many victims will continue to suffer in fear as they count down the years to the time the offender will be released negating the victim's ability to live normally. The SCORA approach aims to allow healing and bring transformation to victims, offenders and society.

MMS are unusually concerned with offenders but not victims. By utilizing the SCORA method, it gives us the ability to focus on the issue of sexual abuse of girls as a whole without being preoccupied with the offender's punishment. MMS obscure issues affecting victims. The MMS sentence brings to a close the long trial with the idea that the victims and society are satisfied with the result. SCORA enables us to see the dynamics that plague victims during trial and even post-trial.

1.6 LITERATURE REVIEW: HOW STUDIES HAVE FAILED TO ADDRESS MMS WITH REGARD TO SEXUAL ABUSE OF GIRLS IN KENYA

The review will focus on five key areas of access to justice, value, efficacy, deterrence and symbolism of MMS. These areas are important because they form the underlying justification for the use of MMS. Examining their rationale can assist determine whether deterrent MMS are the best sentencing tool for solving sexual abuse of girls.

1.6.1 Access to Justice

According to Crew[126], The Taskforce of Sexual Offences,[127] Millie Odhiambo[128] and the African Child Policy Forum[129] sex offenders tend to be predominantly male, victims predominantly young girls and the majority of sex offending occurs in the family. Cartrien, [130] Migai & Kinyanjui[131] state that girls are often young, dependent, and do not have external assistance. This coupled with the evidence that most sexual abuse remains underreported[132] suggests majority of victims of defilement do not access justice in courts.

In order to encourage such victims to access justice, there is an implied message to victims and society that the severe sentences (MMS) is the good/just result for those who choose to report.[133] This assumption however, doesn't seem to encourage victims of defilement to report sexual abuse as evidenced by the large disparate numbers between prevalence surveys[134] and official government statistics.[135] If victims are not encouraged by MMS to report sexual abuse, then sexual

[126]Jennifer Crew, 'Child Sexual Abuse by Family Members: A Radical Feminist Perspective' (1992) 27 (2)Sex Roles;

[127] Taskforce On The Implementation of the Sexual Offences Act 2006, *A Baseline Study of the Programmes Schemes and Mechanisms for the Treatment, Supervision and Rehabilitation of Sexual Offenders in Kenya* (GIZ 2012), 20 the research done shows that most sexual offending occurs by people related either by blood or by marriage.

[128] Millie Odhiambo 'Protecting Children Rights in Kenya' in Ved Kumari & Susan Brooks (eds) *Creative Child Advocacy Global Perspectives* (Sage Publications 2004) 132,133,139 [Millie Odhiambo highlights that girls are nine times more likely to be sexually abused than boys]

[129] The African Child Policy Forum *Violence Against Girls in Africa: A Retrospective Survey in Ethiopia, Kenya and Uganda*, (ACPF 2006) 86 [Their study showed 85.2% of girls in Kenya had experienced some form of sexual abuse with 26.4 % of girls had been defiled by the time they reached 18 years]

[130] Catrien Bijleveld, 'Sex Offenders and Sex Offending Crime and Justice' (2007) 35(1) Crime and Justice in the Netherlands 319

[131] Migai Aketch and Sarah Kinyanjui, *Sentencing in Kenya: Practice Trends, Perspectives & Judicial Discretion* (Legal Resources Foundation 2011) 23

[132] Millie Odhiambo (n 128) 132, African Child Policy Forum (n 129) 10

[133] Millie Odhiambo (p140)lamented lack of MMS in defilement cases leading to injustice

[134] United Nations Children Fund *Violence Against Children In Kenya: Findings From A 2010 National Survey* (UNICEF 2012) 2 available @ <www.unicef.org/esaro/VAC_in_Kenya.pdf> (accessed 10 October 2014)[The report demonstrated that 32% of girls in the survey experienced sexual violence before their 18th birthday]

[135] Between January and May 2013 defilement cases hit 1,216 in 2013 as compared to the 1,428 in 2012 and 1,291 in 2011. Statistics from Kenya National Bureau of Statistics shows reported cases of Defilement and Incest went up from 980 and 160 respectively in 2005 to 2202 and 356 respectively in 2010 [Information sourced from <www.knbs.or.ke> (accessed 28 October 2013).

abuse will continue unabated and the Sexual Offences Act will have failed in one of its key aims. The question to ask is what sentencing regime will likely encourage victims and well-wishers to report sexual abuse? A sentencing regime which has the victims interests as well as the offender as central to the decision making process.

1.6.2 Why Sex Offenders Target Girls and Efficacy of Mandatory Minimum Sentences

Why do sexual offenders target girls? If we know the cause(s) then we can correctly select the appropriate punishment(s) to address the issue. Furthermore, we know according to Crew[136] that sexual offenders know their victims and select their victims deliberately. Analyzing this *deliberateness* can shed some light on how to prevent sexual abuse of girls through sentencing.

Spivak[137] analyses the competing claims of feminists and sociobiologists. While feminists believe that sexually abusing girls is caused by the relative power of men towards vulnerable young girls, sociobiologists simply believe offenders target girls due to their attractiveness and perceived virility.[138] Tonry[139] submits that most criminals (including sexual offenders) are opportunistic and impulsive and therefore their ability to think about the consequences of crimes is highly improbable. Tonry's weakness is that he doesn't analyze what causes or catalyzes the impulsivity of criminals.

[136]Jennifer Crew, 'Child Sexual Abuse by Family Members: A Radical Feminist Perspective' (1992) 27(2) Sex Roles 27.
[137]Andrew Spivak, *Sexual Violence: Beyond the Feminist Evolutionary Debate* (LFB Scholarly Publishing 2011) 1
[138]Andrew Spivak (n137) 1
[139] Michael Tonry and Richard Fraser (eds), *Sentencing and Sanctions in Western Countries* (Oxford University Press 2001) 138

David Crawford[140], Levin & Troiden[141] and Doug Pryor[142] introduce scientific research into the psychology of sexual offenders. David Crawford and Levin & Troiden demonstrate that research has not been able to prove conclusively whether all people who sexually abuse children are psychologically unwell or simply normal criminals who are sexually deviant.[143] Kevin Nunes[144] states that not all sexual offenders recidivate meaning they are normal human beings with deviant tendencies. This ties in with Andrea Dworkins radical feminist's viewpoint that men are inherently rapists.[145]

However, Ian Kanyanya, Caleb Othieno and David Ndetei indicate that most of the offenders who targeted children had certain impulsive or personality disorders including a higher rate of alcohol and drug addiction.[146] Furthermore, the Taskforce on the Implementation of the Sexual Offences Act 2006[147] established that a high percentage of offenders were psychologically unwell. Doug Pryor[148] notes that sexual offenders are normal but seem to have a higher incidence of being sexually abused as children.

[140] David Crawford, 'Treatment Approaches with Pedophiles' in Mark Cook and Kevin Howells (eds), *Adult Sexual Interest In Children* (Academic Press 1981) 181-217
[141] Levin Martin and Troiden Richard, 'The Myth of Sexual Compulsivity' (1988) 25(3) The Journal of Sex Research 347
[142] Doug Pryor *Unspeakable Acts Why Men Sexually Abuse Children* (New York University Press 1996) 271
[143] Levin Martin and Troiden Richard, 'The Myth of Sexual Compulsivity' (1988) 25(3) The Journal of Sex Research 347
[144] Kevin Nunes and others, 'Incarceration and Recidivism among Sexual Offenders' (2007) 31(3) Law and Human Behavior 305.
[145] Andrea Dworkin, *Intercourse* (20th edn, Basic Books 2006) 175
[146] Ian Kanyanya, Caleb Othieno and David Ndetei, 'Psychiatric Morbidity Among Convicted Male Sexual Offenders at Kamiti Prison, Kenya' (2007) 84(4) East African Medical Journal 151, 154
[147] Taskforce On The Implementation of the Sexual Offences Act 2006, *A Baseline Study of the Programmes Schemes and Mechanisms for the Treatment, Supervision and Rehabilitation of Sexual Offenders in Kenya* (GIZ 2012) 13.
[148] Doug Pryor 272

Given this complexity of the dynamics of sexual offenders, MMS is inflexible to assist different sets of offenders who have different psychological and social needs. Punishment that is detached from why people choose to offend is unlikely to meet its objectives of deterrence or reducing the chances of crime to reoccur.

1.6.3 Mandatory Minimum Sentencing, Judicial and Police Exercise of Discretion

During the parliamentary debates legislators acknowledged that laws− mandatory minimum sentences− cannot change human behavior.[149] Yet they went ahead to pass them to deter offending. This acceptance by parliament that MMS doesn't change human behavior cuts across the executive served by police investigators and judiciary manned by magistrates.

Migai and Kinyanjui[150] interviewed several magistrates who asserted that MMS for sex offenders failed to address consensual sexual intercourse between girls slightly less than eighteen and adult male offenders. The magistrates[151] believed MMS were unfair to such men who were ignorant of the age of consent. Furthermore according to Carol Smart[152] and Michael Tonry,[153] judicial officers and juries unhappy with MMS are less likely to convict suspects or simply ignore[154] the set MMS if they feel their hands are tied. The magistrates in such instances believe the law is unduly harsh and find creative ways to acquit. The police[155] on the other hand decide to draw incorrect charges.

[149] supra (n 30).
[150] Migai Aketch and Sarah Kinyanjui, *Sentencing in Kenya: Practice Trends, Perspectives & Judicial Discretion* (Legal Resources Foundation 2011) 22-23.
[151] Aketch and Kinyanjui (n 151) 24. Aketch and Kinyanjui (n 151) 24.
[152] Carol Smart, *Feminism and the Power of the Law* (Routledge 2002) 45
[153] Michael Tonry and Richard Fraser (eds) *Sentencing and Sanctions in Western Countries* (Oxford University Press 2001)147,
[154] For example *Kennedy Munga v Republic* Unreported High Court at Mombasa Criminal Appeal No 13 of 2011 a magistrate sentenced a man who had defiled a 17 year old girl to three year's probation instead of the mandatory fifteen year sentence.
[155] In *Republic v Wycliff Seme,* Unreported Criminal Case No 3473 of 2012 at Kibera Magistrates Court, the police charged the a teacher with rape instead of defilement despite having the victims birth certificate showing she was 17 years at the time of the abuse.

This undermines the efficacy of MMS and the law as a whole. The reason why some magistrates fail to see the underage girls as victims and look at the offender as a victim is because of patriarchal and cultural biases.[156] For example, if sex with girls under eighteen years by men slightly over eighteen years is considered natural by society, then MMS would seem unfair. Courts and police then would reject the unnatural sentences by acquitting the 'innocent' suspects.[157] Carol Smart puts it succinctly by stating,

> "*The most apparent disadvantage was the increased penalties for sexual assaults (rape). Whilst the feminists wanted a more effective criminal justice system, they did not want to support the conservative law and order argument which demanded harsher punishments. It has to be recognized as well that, where juries are reluctant to convict men for doing 'natural' manly things, this reluctance may be increased if the penalties are seen as unreasonably high (emphasis added)."*

Considering the non-neutrality of judicial officers affected by cultural and societal biases, sentencing regimes should be flexible enough to give magistrates alternative sentencing solutions that work best within the Kenyan societal context.

[156] Carol Smart, *Feminism and the Power of the Law* (Routledge 2002) 45

[157] Migai Aketch and Sarah Kinyanjui, *Sentencing in Kenya: Practice Trends, Perspectives & Judicial Discretion* (Legal Resources Foundation 2011) 25

1.6.4 Value of Mandatory Minimum Sentences

Barbara Vincent & Paul Hofer[158] and Anthony Doob and Carla Cesaroni[159] have also argued that MMS serve an important symbolic purpose of deterrence by being a moral compass of society's abhorrence to particular crimes. Spivak[160] challenged the view that deterrent sentences reduce sexual offences. In Canada for example it has been shown by empirical evidence that MMS have no effect on whether sexual offenders will recidivate.[161] However, in August 2013, the Prime Minister of Canada proposed that the sentences of sexual offenders be increased in the wake of a three per cent increase in sexual offences.[162] Michael Tonry[163] and Anthony Doob[164] argue that politicians who act tough on crime cultivate an image of power which appeals to the public and shows that they care about the public rather than try to prevent crime.

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[158] Barbara Vincent and Paul Hofer, *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings* (Federal Judicial Center 1994) 2

[159] Anthony Doob and Carla Cesaroni, 'The Political Attractiveness of Mandatory Minimum Sentences' (2001) 39(2 &3) Osgoode Hall Law Journal 287, 291

[160] Andrew Lawrence Spivak, *Sexual Violence: Beyond the Feminist--Evolutionary Debate* (LFB Scholarly Publishing) 32.

[161] Robin Wilson, 'Does Canada Need Harsher Penalties for Sexual Offenders?' (2013) Sexual Abuse: A Journal of Research and Treatment, available @ <http://sajrt.blogspot.com/2013/09/does-canada-need-harsher-penalties-for.html> (accessed 26 October 2013) (Whilst in the Canadian example there was a 3% increase in sexual offending, the Prime Minister didn't mention that sexual offences have been on a steady decline over the past twenty years in Canada due to a combination of factors including community supervision, risk assessment, treatment methods and citizen engagement).

[162] Hislop Markham, 'Stephen Harper Introduces Tough Sentences for Child Sex Offenders' *Calgary Beacon*, (Calgary, 31 August 2013), available @ <http://beaconnews.ca/calgary/2013/08> (accessed 10 October 2013), (Some of the amendments the Prime Minister wanted to introduce include increasing maximum and minimum penalties for child sexual offences, increasing penalties for violation of conditions of supervision orders, requiring those convicted of child pornography and related offences to serve their sentences consecutively especially people convicted of abusing multiple children).

[163] Michael Tonry, *Handbook of Crime and Punishment* (Oxford University Press 2000) 4 (The writer gives the example of how Republicans and Conservatives such as President George Bush used a case of an African American who had raped a white woman as part of his campaign to get reelected by appealing to the psyche of the white voters).

[164] Anthony Doob and Carla Cesaroni, 'The Political Attractiveness of Mandatory Minimum Sentences' (2001) 39(2 &3) Osgoode Hall Law Journal 287

Nonetheless, removing offenders for set periods of time, communicates the fact that victims matter. Nicola Lacey[165] states that imprisonment provides relief to the victim and possible class of victims by providing societal protection during the period of incarceration. Lincoln Gaylor[166] argues that MMS introduce uniformity to the sentencing regime, are proportionate and ensure certainty and predictability in sentencing. However while the symbolic value of the law is obviously powerful, the question of whether mandatory minimum sentencing is efficacious as a deterrent measure has not been clearly articulated. Absent an effective sentencing regime, symbolism may quickly lose its value. The literature has not explored the views of victims of sexual abuse and offenders and how they think the sentences ought to be meted out. This research will attempt to fill that gap.

1.6.5 Cost Effectiveness of Mandatory Minimum Sentences

Imprisonment through MMS contributes to increase in prison population which has cost implications for taxpayers. The maximum sentences for defilement and incest is life imprisonment. Statistics have shown that the majority of the convicted prisoners are between eighteen and twenty five years[167] which are some of the most economically productive years of a person's life. Kenya National Bureau of Statistics state that at July 2012, sexual offenders constituted 22.8 % of the prison population.[168] This is a significant percentage of people in prison. The Prisons Department has to feed, house, guard, and provide medical services for convicted offenders. Mirko Bargaric

[165] Nicola Lacey, *State Punishment: Political Principles and Community Values* (Routledge 1994) 34.

[166] Lincoln Caylor and Gannon Beaulne, 'Parliamentary Restrictions on Judicial Discretion in Sentencing: A Defence of Mandatory Minimum Sentences' (2014) Macdonald Laurier 18-19, available @ <http://www.macdonaldlaurier.ca/files/pdf/MLIMandatoryMinimumSentences-final.pdf> (accessed 19 July 2014).

[167] Available@<http://www.knbs.or.ke/Convicted%20Prison%20Population%20by%20Age%20and%20Gender.php > (accessed 2 November 2013) (Between 2004 and 2010 this age group accounted on average 50% of the prison population).

[168] ibid 22.

and Richard Edney[169] argue that if the prison population was less, governments obviously could have been used resources for social services or preventing crime.

In the Kenyan scenario, we face a future cost of reintegrating prisoners back to society after a long MMS. There is need to consider therefore alternative more cost effective ways of achieving best better sentencing results.

The literature review has revealed gaps brought about by applying lengthy MMS in the Kenyan context. In Chapter 4 I will compare other sentencing models to Kenya's to see what lessons we can learn from them. By doing so I intend to fill in some gaps and introduce reform to the law.

1.7 OBJECTIVES OF THE STUDY

1.7.1 Main Objective

To find out the effect of mandatory minimum sentences on the prevalence of male offending in Defilement and Incest offences committed against girls in Kenya.

1.7.2 Specific Objectives

The Specific Objectives of the research study are to:

a) To determine the efficacy of MMS.

b) To identify any other cost effective means to reduce the prevalence of sexual abuse cases against girls.

[169]Mirko Bargaric and Richard Edney, 'The Sentencing Advisory Commission And The Hope For Smarter Sentencing' (2004) 16(2) Current Issues In Criminal Justice 125, 130, available @ <http://www.austlii.edu.au/au/journals/CICrimJust/2004/19.pdf> (accessed 18 July 2014) (Australians and many other countries are also grappling with the economic cost of incarceration).

1.8 RESEARCH HYPOTHESIS

Mandatory Minimum Sentences in the SOA have failed to curb the prevalence of sexual offences against girls in Kenya. Despite the fact that people are presumed to know the law,[170] the reality is that majority of society are unaware of the stiff sentences for sexual offences and discover them only when in conflict with the law.[171] Key societal engagement is needed to reduce sexual violence against girls since many cases are unreported.

1.9 RESEARCH QUESTIONS

The study will seek to answer the following questions:

a) Why MMS is not working as envisioned as a deterrent measure in sexual offences?

b) Are there viable alternatives to MMS?

1.10 METHODOLOGY

The methodology employed was gathering different primary statistical data from Government and other sources on the prevalence of sexual abuse of girls through desktop research. This involved research conducted primarily through the internet and library research. The research cut across two different fields involving gender studies and criminal law. The research will also utilize a comparative approach with other jurisdictions to explore the subject. Field research was conducted through focus group discussions in September 2014 at the researcher's offices and Kamiti Maximum Prison. The discussions were with victims of sexual violence and sexual offenders to find out their perceptions and knowledge about MMS in general. The focus group discussions were led by the researcher and assisted by note takers who had previously been briefed by the researcher. As the research was motivated by the observations of the researcher, information from personal

[170] The maxim 'Ignorance of the law is no defence' can be gleaned from section 8 of the Penal Code.

[171] Daniel Nagin and Pepper John (eds), *Deterrence and the Death Penalty* (National Academies Press 2012) 30, (Sanctions can only work if people know the existence of the sanction. However, the writers argue that the existence of 'a' sanction is deterrent even if the severity is unknown. If this is the case, deterrence can be achieved by less repressive sentences).

observation of court cases the researcher had handled in the past was incorporated. In Chapter 2 I will discuss the research methodology in more detail.

1.11 ASSUMPTIONS

The following will be the assumptions the study will make:

a) The study will assume that the information given by the respondents is correct.

b) The research will assume that the increase in reporting of sexual offences against girls is equivalent to the increase of the crime and not increased reporting of crime..

1.12 LIMITATIONS

The following are the limitations of the scope of the study:

a) The focus of the study is Defilement and Incest to form the basis of the conclusions. Other sexual crimes such as child sex tourism, Indecent Act, and pornography will not be examined.

b) The study will focus on girls as victims of defilement and incest.

c) The study will be focusing on victims of sexual abuse whose cases are concluded.

d) The study will rely on data from Kenya National Bureau of Statistics and other sources. The writer acknowledges that this data does not represent the actual rate of crime of defilement and incest which are largely unreported.

e) The study will also rely on personal observation of the writer that maybe prone to bias.

1.13 THESIS BREAKDOWN

Chapter One gives an introduction of the area of study. It outlines the historical basis for the introduction of the SOA and MMS specifically. The chapter examines the problems with the theoretical basis for MMS and introduces the gaps in the literature justifying MMS. The justification and objectives of the research, together with the research questions and hypothesis are

described. An introduction to the research methodology is discussed briefly as well as the limitations and the assumptions of the research.

Chapter Two examines and explains the research methods and the research methodology. Building on the theories, the chapter applies the theoretical framework of the thesis to the research. The chapter describes the research process including obtaining permission and approvals and the challenges encountered.

Chapter Three is a comparative analysis of MMS and sentencing practices between Kenya and other jurisdictions within the context of the normative framework developed in chapter one. By examining some practices in other jurisdictions suggestions will be made for future consideration by lawmakers.

Chapter Four summarizes the findings, conclusion and recommends a way forward.

CHAPTER 2- RESEARCH METHODOLOGY

In the previous chapter we explored the theoretical foundations for MMS for sex offences against girls and reviewed the literature. The identified gaps in MMS with regard to access to justice, why sex offenders target girls, value of MMS and cost implications resulted in proposal of an alternative approach towards sentencing. In this chapter, we shall explore the methods used to gather data, the research instruments, the justification for using the research methods and the participants of the study. We will also discuss the challenges faced in gathering data, solutions to this challenges and the analysis of the data.

2.1 The Research Process: Choosing The Method of Study, Respondents and Instrument

This section explains how the method of study, the respondents and the research instrument was chosen.

2.1.1 Qualitative v Quantitative Methods

Since sentencing is a technical and legal area, a qualitative study which could generate new and unusual data was chosen. Furthermore it emerged during internet research using keywords such as "sex offenders in Kenya" and "victims of sexual abuse in Kenya" that there was very little Kenyan data on victims and sex offenders. The lack of data was worsened by introducing search words such as "mandatory minimum sentencing in Kenya" and "minimum sentencing in Kenya" and trying various combinations of the phrases. Field research was therefore necessary. Both victims and sex offenders are affected by sentencing and their views were considered important. Moreover the literature review demonstrated motivation of sex offenders may be significant in determining appropriate sentencing regimes. Additionally earlier research conducted on magistrates attitudes

towards MMS had been done but victims and sex offenders have never been interviewed on the same issue in Kenya.[1]

The next step was to identify how data would be obtained. Focus groups were thought to be a unique way of generating new knowledge because the thoughts and reactions of respondents would also be relevant.[2] It would also give the researcher the ability to observe their interactions and emotions from which new data could be obtained. Moreover, Foucault and radical feminist's use of discourses as a method also influenced the choice of focus groups as the method data collection. 3 Discourses are a "systems of thoughts composed of ideas, attitudes, courses of action, beliefs and practices that systematically construct the subjects and the worlds of which they speak. [4]By listening and observing the respondents in their conversations, the researcher can pick out their belief system and determine their attitudes and perceptions of MMS.[5] This was contrasted with questionnaires which would restrict the information that could be gathered. The researcher also considered conducting interviews but determined that focus groups had the ability of reducing interviewer bias since the respondents would feel like they are talking to people who had been in similar circumstances. Considering the limited time, sensitivity of the topic and degree of openness needed from respondents, focus groups were considered the most suitable objective method to

[1] Migai Aketch and Sarah Kinyanjui, *Sentencing in Kenya: Practice Trends, Perspectives & Judicial Discretion* (Legal Resources Foundation 2011) 2

[2] David Morgan "Focus Groups As Qualitative Research: Planning and Research Design For Focus Groups" [2013] Sage Research Methods [1-18][2] available at <http://www.uk.sagepub.com/gray3e/study/chapter18/Book%20chapters/Planning_and_designing_focus_groups.pdf> (accessed 3 October 2014)

[3] Michel Foucault *The History of Sexuality Vol 1: An Introduction* (Pantheon Books 1978) 84-85.)

[4] Ian. Lessa "Discursive struggles within social welfare: Restaging teen motherhood". (2006) British Journal of Social Work Vol 36 (2): 283–298.

[5] Janet Smithson 'Using and Analyzing Focus Groups: Limitations and Possibilities' (2000) Int.J. Social Research Methodology 3:2 [103-119] [105]. (Janet states that language used in focus groups should be viewed and analyzed as a function and construct instead of simply as a medium of conveying information)

gather data. As opposed to interviews which were susceptible to a higher degree of interviewer bias through questions phrasing.

2.1.2 Determining Participants In The Focus Groups

To find victims of sexual abuse and sex offenders was the next task. Victims of sexual abuse, who have been to court and are willing to talk about their experiences are sensitive, are difficult to identify, and were therefore identified through snowball sampling. Snowball sampling was chosen because of its ability to investigate sensitive and hidden populations.[6] Through snowball sampling method, a social worker of an NGO who had provided psychosocial support to a group of girl victims of sexual abuse identified some young women who had gone through the court process as children. Two of the victims identified other victims they knew whom they had met at Kenyatta National Hospital Gender Violence Recovery Centre where they had received counselling. The victims had also been provided with counselling services by the NGO in which the social worker worked in the past. Out of a list of ten victims, six responded positively. The focus group was held on the 20th of September 2014 at the researcher's offices.

In regard to sex offenders, enquiries were made by the researcher through phone calls to contacts working in prison to determine where sexual offenders are incarcerated.[7] The researcher discovered that convicted sexual offenders who had abused children from Nairobi, Kiambu and some parts of the former eastern province are incarcerated at Kamiti Main Prison. Due to the large number of potential participants and accessibility, Kamiti Main Prison was chosen for this research.

[6] Kath Browne 'Snowball Sampling: Using Social Networks to Research Non-Heterosexual Women' (Feb 2005) Int J. Social Research Methodology 8:1 [47-60][47]

[7] Telephone Call with Sergeant Bob Tete of Nairobi Industrial Area Remand on 16th September 2014.

2.1.3 The Data Collection Instrument

The researcher further explained the purpose of the research and what Mandatory Minimum Sentences were to aid in their understanding of the research. The researcher also developed a set of questions or themes to be explored in the focus group discussions. The themes were based on the areas identified in the literature review and the research questions. The questions were exploring the same topic but were worded differently for the two groups. Some of the questions explored for the victims focus group included:-

(a) Was your perpetrator jailed and if so are you satisfied with the Mandatory Sentence?

(b) Do you think such sentences prevent girls from being abused?

(c) How should the court deal with sex offenders?

And for the sex offenders, some of the following themes were explored in the focus group:-

a) Why did you sexually abuse the victim?

b) Do you think MMS can prevent people from sexually abusing girls?

c) How do you think sexual abuse of girls can be prevented?

2.2 Details of Data Collected and Findings

The sample for the focus group discussion for the women consisted of women who came from different socio-economic backgrounds but were in the same age bracket and had been abused between the ages of 13-15. (Table 1)

Table 1 Breakdown of Victims Ages

Age	Number of Victims	Percentage
18	2	33.3
19	1	16.67
20	2	33.3
22	1	16.67
Total	6	100

However, the age bracket for the sex offenders was difficult to obtain. They were not willing to give out their exact ages due to their distrust of the researcher, however they agreed to give an age range (Table 2)

Table 2 Breakdown of Offender Ages

Age Range	Number of Sex Offenders	Percentage
18-25	9	50
25-35	5	27.7
35-50	3	16.67
50-60	1	5.5
Total	18	100

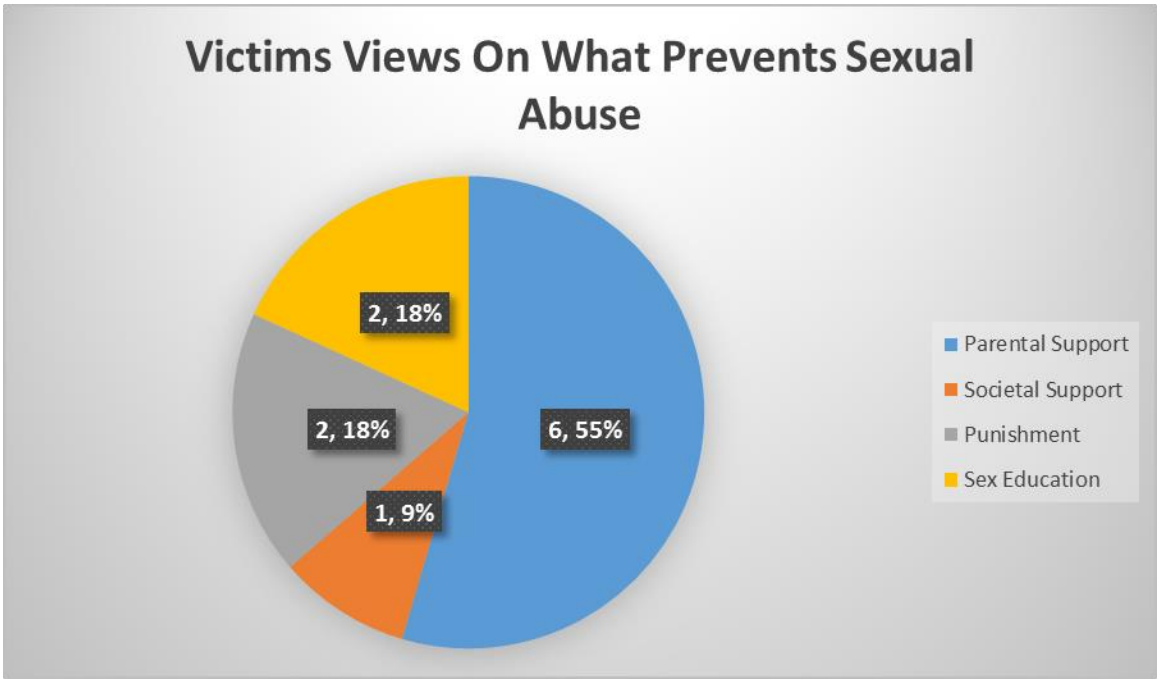
The sex offenders focus groups agreed to disclose the length of their sentences shown in Table 3 below.

Table 3 Breakdown of Length of Prison Sentences

Number of Sex Offenders	Length of Sentence	Percentage
6	Life Sentence	33.3
5	20	27
5	15	27
2	10	11
Total	18	100

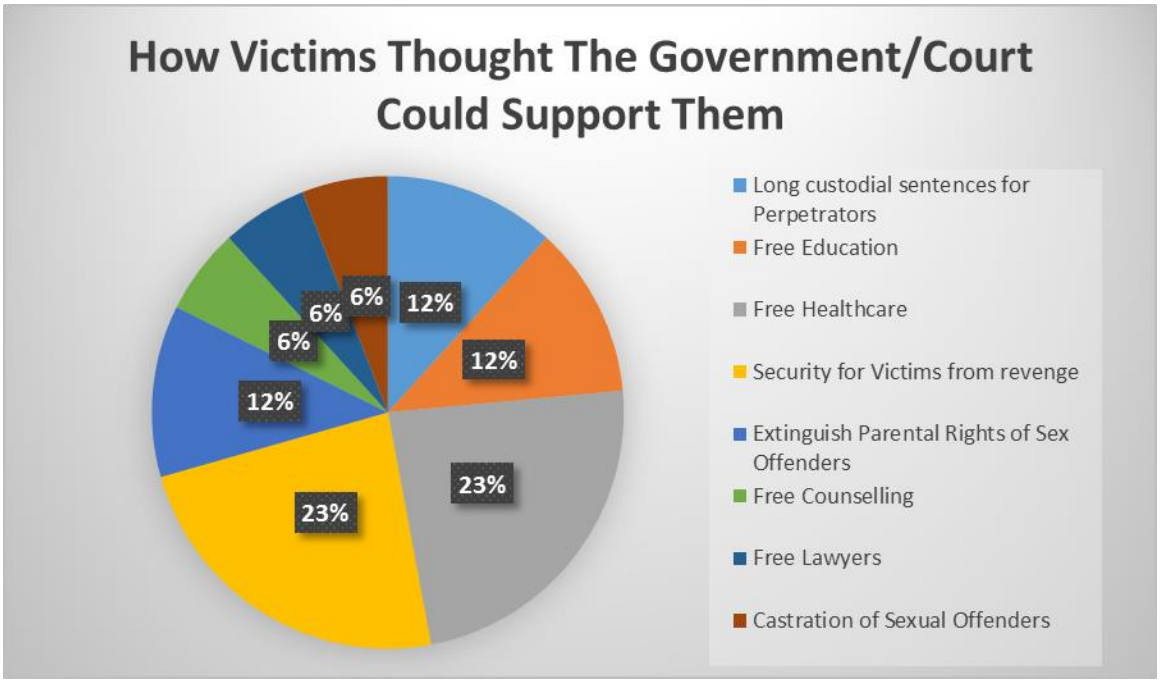
Pie Chart 1.1 shows how victims viewed prevention measures of sexual abuse. Most of them believed that parental support was key to helping prevent sexual abuse.

PieChart1.1



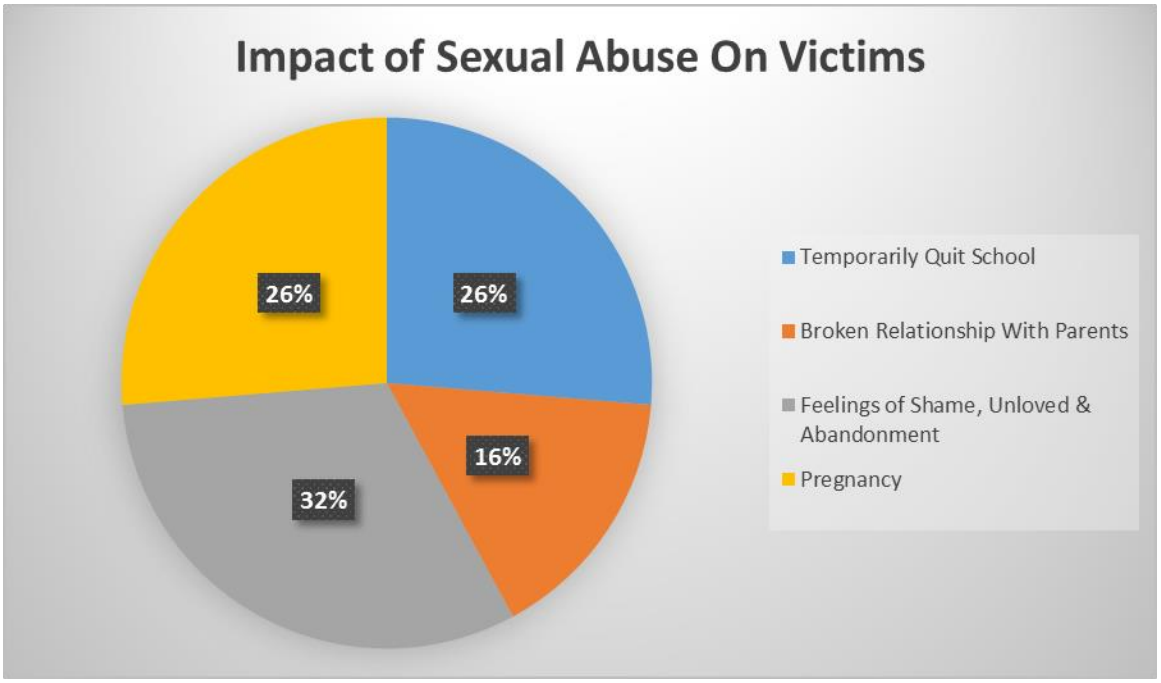
Pie Chart 1.2 demonstrates victim's views on how the government/court could support them. Most of them advocated for free healthcare services for victims of sexual abuse.

1.2



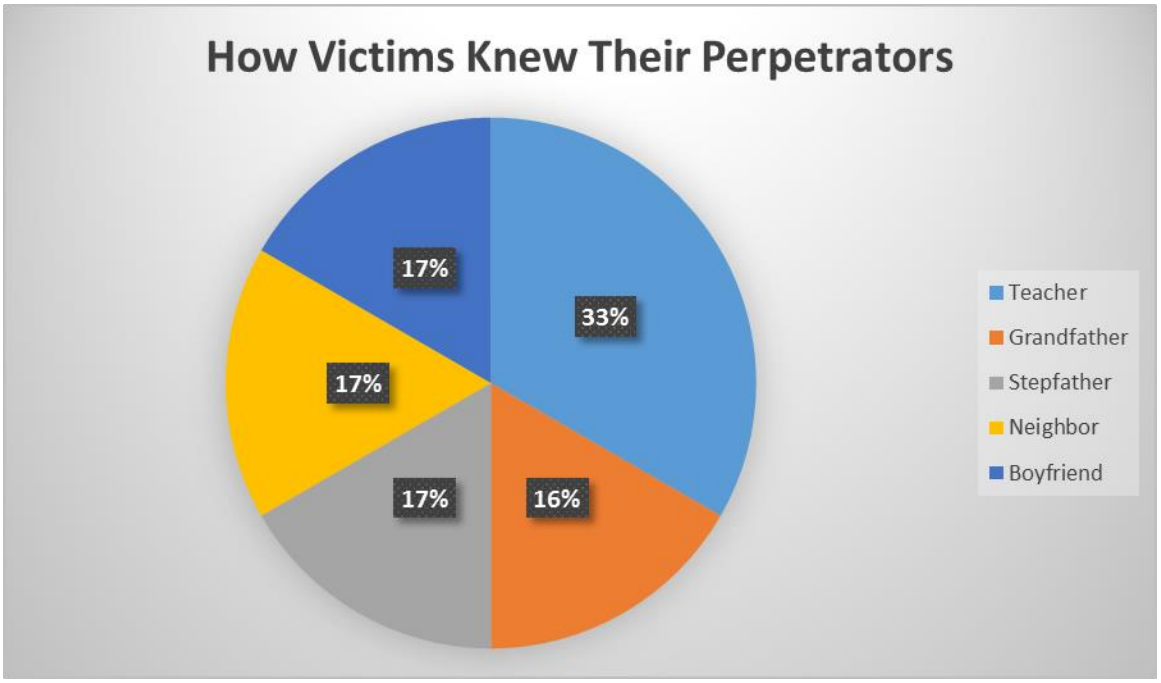
Pie Chart 1.3 below demonstrates the impact of the sexual abuse on the victims. Most of them had to temporarily quit school due to pregnancy or because of the social impact of the abuse. This is because some of them were relocated from the area where the sexual abuse occurred. Pregnancy was also a big impact of the sexual abuse.

Pie Chart 1.3



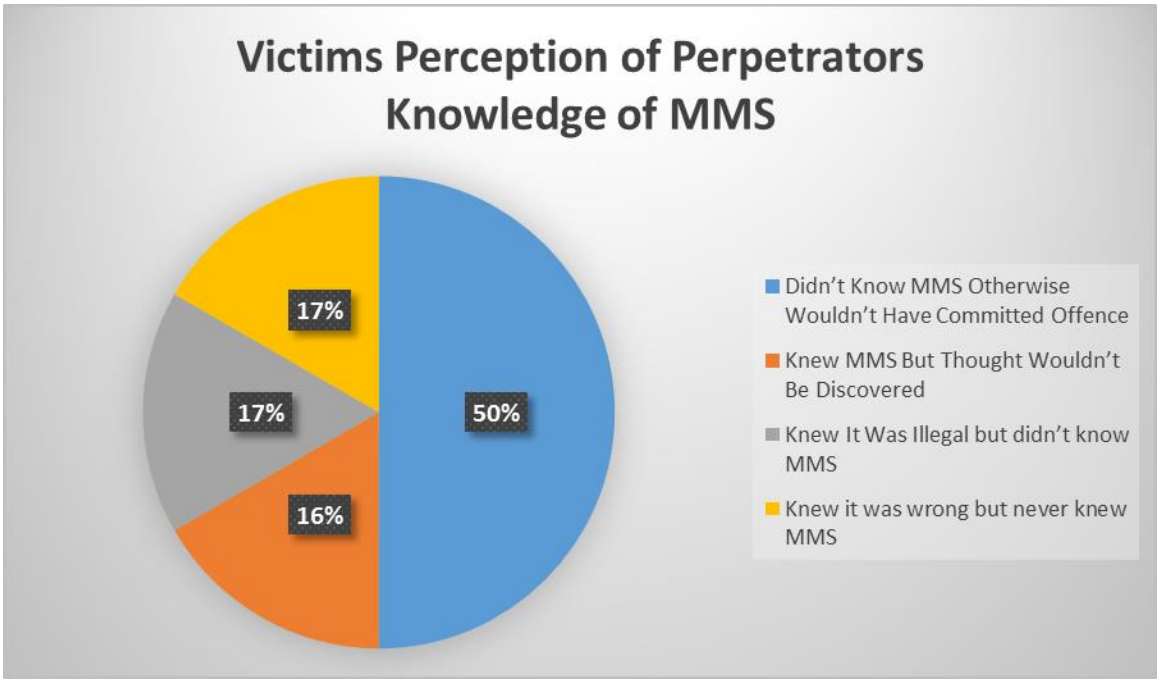
Pie Chart 1.4 shows the relationship between the perpetrators and the victims. All the victims knew the sex offenders and none was defiled by a stranger.

Pie Chart 1.4



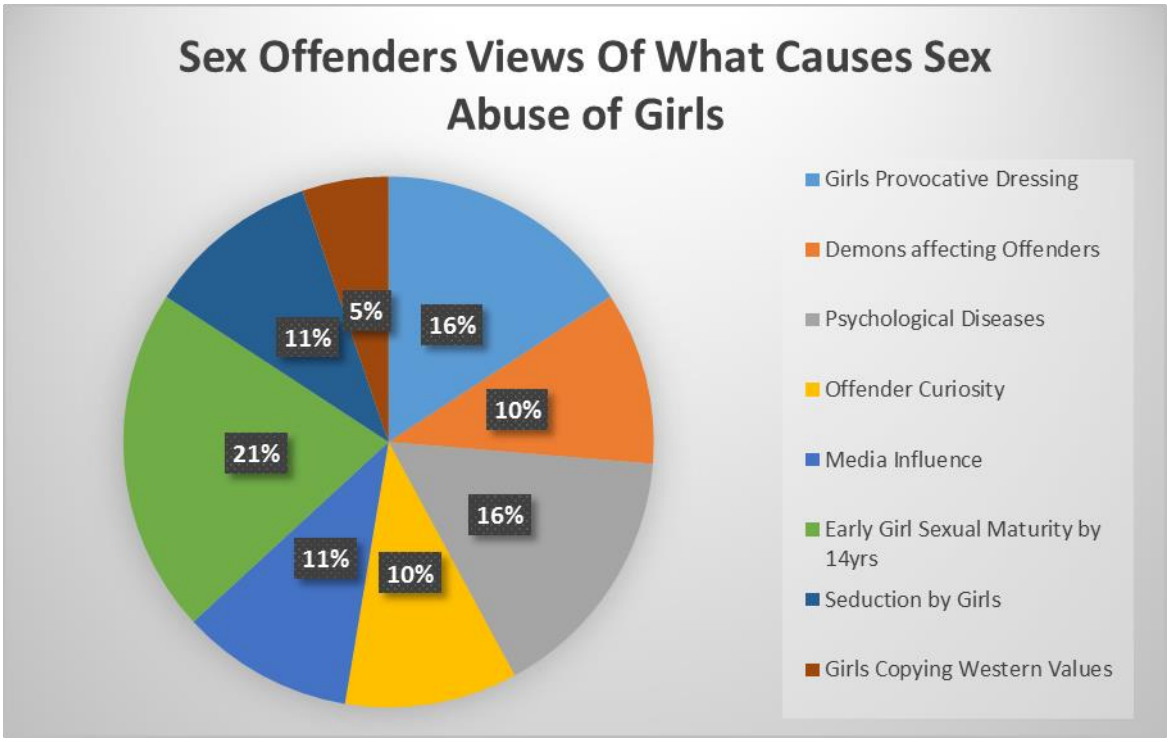
Pie Chart 1.5 below demonstrates victim's perception of the perpetrators knowledge of MMS. Majority of the victims thought that the perpetrators didn't know MMS otherwise they wouldn't have committed the offences.

Pie Chart 1.5



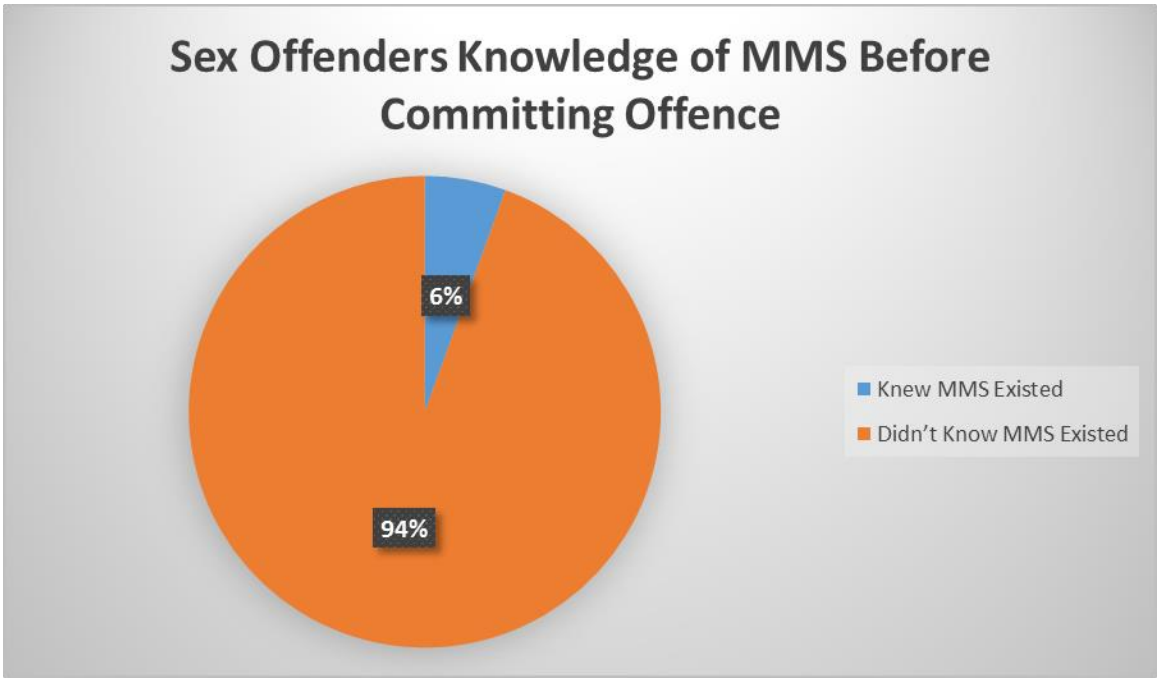
In regard to the focus groups conducted with sex offenders, most sex offenders thought that early girl sexual maturity was the reason for sex offences. They thought that once a girl was over fourteen she was 'fair game' to have sex with. Others were of the view that girls asked for it and sought sex from men through dressing provocatively and copying western values. This answers can be seen in the context of patriarchy where some men generally believe that they have a natural right to access girl's body for sex, especially those who are vulnerable to their physical power. It further shows that irrespective of the fact that girls do not have the legal capacity to consent, some men view them as fair game. Most of these sexual offenders believed that a girl over fourteen years was mature enough to have sex with. See Pie Chart 2.1.

Pie Chart 2.1



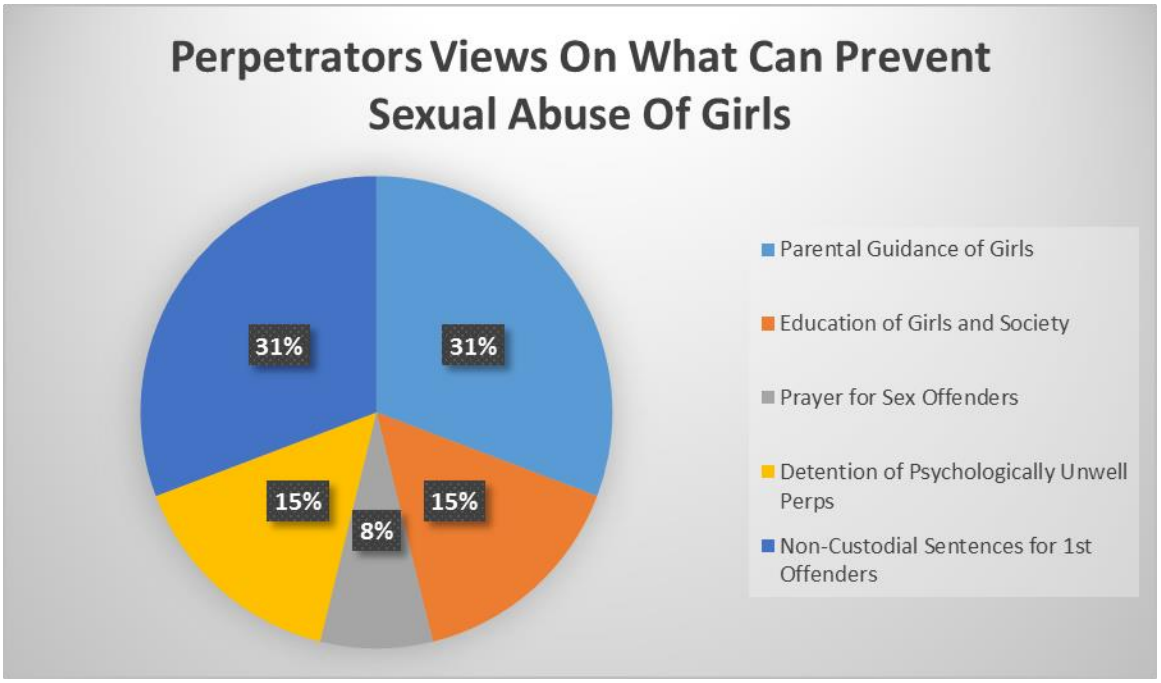
Most sex offenders had no knowledge of MMS before committing the offence. See Pie Chart 2.2

Pie Chart 2.2



When asked what can be done to prevent sexual abuse of girls, the sex offenders externalized the problem and suggested parental guidance as the primary means of preventing sexual abuse. They thought that the girls would have not engaged in sex if their parents were involved in actively guiding their children not to consent to sex. Therefore in addition to their patriarchal views, the sex offenders believe that girls are responsible having or not having sex. The sex offenders therefore view themselves as victims of the girl's choices. See Pie Chart 2.3.

Pie Chart 2.3



2.3 Analysing The Data

One challenge of analysing focus group data is that the distinction between data collection and analysis is not clear cut.[8] This is because of the fact that the data and the analysis of the data are conjoined. The researcher therefore analysed the data collected using the dominant voices

[8] Janet Smithson 'Using and Analyzing Focus Groups: Limitations and Possibilities' (2000) Int. J. Social Research Methodology 3:2 [103-119] [106]

approach.[9] This approach aims to capture the dominant view or agreement of the participants. To do so the researcher grouped the responses together through going through the text of the focus groups and color coding similar responses. The researcher further used non-verbal language, an important data collection tool to gauge the level of agreement with what other participants are saying. For example nodding of heads in agreement etc.

From the data collected the following findings emerged from the focus group discussions:-

(a) Victims experienced high levels of trauma due to the sexual abuse and therefore require psychosocial support services from the government like counselling and healthcare services.

(b) Consequently parental and societal support for victims of sexual abuse is the most important singular thing that the victims craved during the abuse and trial process. Emotional support for the victims by their parents, societal support by not trying to suppress the victims or the victim's parents from pursuit of justice. Government support from the police during investigations etc. The victims felt that their parents could have given them more emotional support during this period in their lives..

(c) Majority of the victims support long custodial sentences or life imprisonment for perpetrators of such sexual abuse. They do not specifically advocate for MMS and seemed to find it difficult to come up with an exact term of imprisonment. However even with these sentences, victims worry about their security and fear revenge from the offender and their proxies of the sex offender. Their security scored highly on their list of concerns. Indeed one girl noted that when the offender was given a ten year sentence she thought that it was adequate at the time. However she has now realized the offender is likely to be released in

[9] Janes Smithson (n8)

two years' time and is concerned for her safety and the safety of her son born as a result of the defilement. The victims were willing to either engage directly or through a government representative or through their family's engagement with the offender and or his family to ensure that they are never at risk from revenge. This also confirms that victims do not believe that MMS (sentencing) are enough to secure them from their offenders and underscores SCORAs relevance in sentencing. One victim's mother[10] for example had received threatening phone calls from the perpetrator in prison and feared for her life.

Another major theme that the victim highlighted was the inadequacy of the MMS to cure the major social problems that they faced as a result of the defilement. They thought that the perpetrator could enjoy life in prison and engage in homosexual sex without accepting responsibility of the offences they committed or even changing. Therefore castration was considered an option to prevent them from abusing others. Further that some system needed to be put in place to ensure that the perpetrators were accepting responsibility of their actions e.g. by acquiring their property to support children born out of defilement, or by having them sign some acknowledgment that they would never harm the victim or other means that the government would deem appropriate.

(d) Perpetrators of sexual abuse do not seem to accept personal responsibility over their actions and seem to blame the victim's parents and or the victims for their actions of sexual abuse. Majority of the sex offenders believe that a girl over 14 years is ripe to have sex with. This is because they believe that children have matured faster nowadays than they did when they were growing up. They see the girls provocative dressing and flirtation as confirmation that they are sexually ready. This means that they are at risk to recidivism

[10] Respondent 4

since they believe they are the victim. Majority of the offenders criticized MMS for being too harsh for their circumstances. In discussing what sentence should be appropriate they were of the view that non-custodial sentences should be meted out for first offenders and that this would help them to change and even educate others on the need to stop engaging in sex with minors. They thought that sentences ranging from five to seven years would be appropriate for second time offenders. However they agreed that certain sex offenders who used a lot of violence to cut and disfigure their victims (who in their view were mad) needed to be detained in psychiatric institutions for life.

(e) Sex offenders did not know the existence of MMS before committing the offences. This supports the theory that MMS doesn't influence offender behaviour. Furthermore all the victims were defiled by a person they were familiar with. Given the patriarchal and cultural biases against the female gender in a male dominated society one can see clearly that the perpetrators didn't believe they were wrong or that the victims would disclose the sexual abuse. This findings further find credence in expert research that most criminals don't research into possible sentences before committing offences whether those offences are punishable by MMS or not.[11] The departure from general criminological theories is that sexual abuse of girls is done specifically due to the fact that the victims are known to them, more proximate, and the hidden nature of the crime gives more opportunity for escaping judgement. .

(f) The offenders admitted that some sex offenders need to be confined in mental institutions indefinitely since they are psychopaths. One sex offender explained how a sex offender

[11] Marc Gertz & Others 'The Missing Link In General Deterrence Research' (2005) 43:3 Criminology 623-659

had slit the vagina of a girl to enlarge the entrance in order to penetrate her. The group agreed that such offenders need to be confined in mental institutions.

2.4 Challenges In Conducting Research

This research project posed serious challenges to the researcher. Girls who have been sexually abused and convicted sex offenders are difficult to reach. Furthermore, for children to participate in research, it was important and necessary to obtain parental consent.[12]Parents act as gatekeepers to ensure that the children's rights and well-being are protected. In addition to parental consent ethical standards and obligations dictate that any healthy research subject must give informed consent meaning necessary information to weigh the risks and benefits involved in research participation.[13] The researcher attempted to contact parents of children who had been sexually abused to do a pilot but they declined to have their children participate in the focus group. The researcher resolved the issue by seeking young adult women who had been abused as children and could consent to participating in the focus group. Another difficulty was the fact that the victims were female while the researcher was male. This difficulty was overcome by having the social worker in the room when the research was being conducted and introducing the researcher to the victims a week earlier before the research was conducted. The women agreed to participate if the social worker was present in the focus group.

In regard to sex offenders, the prison institution selected the participants. This is a common trend in prison research and according to Grimwade[14] and Bosworth,[15] this makes it difficult for

[12] Murray L. Wax 'Paradoxes of "Consent" to the Practice of Fieldwork' (Feb 1980) Vol 27:3 Social Problems pg 272-283 [279]

13 Emma Williamson et al 'Conducting Research with Children: The Limits of Confidentiality and Child Protection Protocols' (Nov 2005) Vol 19:5 Children & Society 397-409, [403]

14 C. Grimwade 'Diminishing Opportunities: Researching Women's Imprisonment' In S. Cook & S Davids (eds) *Harsh Punishment: International Experiences of Women's Imprisonment* (Northeastern University Press 1999) 292-314

[15] Mary Bosworth et al 'Doing Prison Research: Views From Inside' (2005) Qualitative Inquiry 11:2 [249-264] [255]

researchers to connect with participants. Furthermore informed consent is fully unlikely to be obtained for prisons research.[16] In this research involving prisoners, the participants were given the opportunity to leave the focus group after they had been selected by the warders. Most opted to remain but refused to be audio recorded or to sign consent forms as they were afraid, despite repeated assurances that the data wouldn't leak, that the recordings could fall into the hands of judicial officers and affect their pending appeals. A few offenders refused for notes to be taken by the research assistant. The distrust the offenders had could not have been helped by prison protocols which require officers to guard them at all times, especially with a visitor to the prison. Researchers know that trust with respondents is vital in gathering data.[17] How can a prisoner trust a person who has never been in prison and how can their trust be gauged?[18] However the choice to remain was there's and their decision not to have the evidence recorded demonstrates their informed consent. Two respondents however agreed to have their conversations audio-recorded.

Further there were logistical challenges since the prisoners focus groups were called out at once and sat outside the chapel waiting for their turn to get into the focus group. The door could not be closed for security issues since only one guard was guarding six inmates. Privacy was not fully guaranteed and it is possible that some respondents heard what the other groups said.

Another challenge was the denial of entry of the research assistant to Kamiti Maximum Prison since his name was not included in the request for approval to access Kamiti. The Officer-In-Charge later used his discretion to allow the research assistant in. Furthermore initially, the researcher was denied entry into Kamiti with an audio recorder and later an officer came back with the recorder and confirmed that it could be used.

[16] Pamela Davis, 'Doing Interviews In Prison' in Pamela Davies Peter Francis & Victor Jupp (eds) *Doing Criminological Research* (Sage Publications 2011) 168
[17] Bosworth (n15) 254
[18] Bosworth (n15)

2.5 Confidentiality and Anonymity of Participants

Ethical issues involving confidentiality and anonymity of the respondents had to be considered. In relation to the participants, two code forms (one for each set of participants) was developed to ensure their identities remain hidden. Furthermore only initials were used on the front page of the consent forms while the names were written on the back of the form. The victims gave out the names of their abusers and the researcher ensured that they did not participate in the offender focus groups because there could be inadvertent spillover of information. A focus group note taking form developed from the objectives and the research questions annexed as appendix 1 & 2 including the areas of exploration was developed and utilized to take down the views of the respondents. The conversations were audio recorded after seeking permission from the respondents. The researcher discovered that inadvertently the names of the victims during the audio recording of the focus groups had been used. The researcher decided to redact the names of the victims, the perpetrators and other identifying information from the transcripts. Furthermore, the transcription was further edited to ensure the anonymity of the respondents views by non- disclosure of which respondent gave what comment.

2.6 Conclusions

This chapter set out to explain why particular research methods were adopted and the meaning that can be derived from the data collected. In Chapter 3 the researcher explores comparative analysis of MMS in other countries.

CHAPTER 3 MOVING AWAY FROM LENGTHY MMS: LESSONS FROM OTHER JURISDICTIONS

In the last chapter, we examined research methods and methodology, the data collected and the major themes that emerged from the data. Chapter 1 analyzed the ways in which the sentencing laws on sexual abuse of girls developed from deterrence, retributive and just deserts theories with some influenced by radical feminists. The weaknesses of these theoretical standpoints resulted in the proposal of an alternative normative approach which I have called SCORA. In Chapter 2, the research findings confirmed that MMS do not have any deterrent effect on offending since majority of offenders are unaware of their existence. Furthermore whilst victims advocated long custodial sentences, they didn't have a specific range or number of years as the minimum sentence. Moreover, from pie chart 1.2 victims were more concerned with the social issues resulting from the sexual abuse than sentencing.

If not lengthy MMS then what should be the alternative? The problem of MMS limiting judicial discretion has been adjudicated in different jurisdictions. This chapter compares sentencing practices and judicial interpretation of MMS in other jurisdictions. The countries chosen for these comparisons are United States, Canada, South Africa and Finland.

Canada and United States of America were chosen for this comparison because they have highly sophisticated legal systems from which we can learn from. Furthermore, their legal systems have dealt with many of the issues that we are now grappling with in regard to MMS. The lessons that we can learn from them will assist us to avoid falling into common pitfalls.

South Africa on the other hand was chosen because it is an African country facing similar challenges with high levels of sexual abuse of girls. It is further ranked as the country with the

highest levels of sex abuse of children and women in the world.[1]We can learn some important lessons from their mistakes and their successes. Lastly, we will compare Finland which is a scandanavian country that made a radical switch from custodial to non-custodial sentences for sexual offenders. We will examine what we can learn and borrow from these countries with a specific bias towards SCORA.

3.1 The Kenyan Judicial Position On MMS

The fact that MMS deprive judicial officers discretion had been subject of adjudication in the case of *Godfrey Mutiso v Republic*[2] . The judges stated:-

The process of sentencing a person is part of the trial. This is because the court will take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence. This is clearly evident where the law provides for a maximum sentence. The court will truly have exercised its function as an impartial tribunal in trying and sentencing a person. But the court is denied the exercise of this function ***where the sentence has already been pre-ordained by the Legislature, as in capital cases****. In our view, this compromises the principle of fair trial…*

The *Godfrey Mutiso* case was followed by courts resulting in derogation from the mandatory death sentences. In *Boniface Juma Khisa v Republic*[3] the court reduced the mandatory death sentence for

[1] Ludovica Laccino Child Sexual Abuse: Top 5 Countries With The Highest Abuse *International Business Times* (London 12 February 2014) available @ <www.ibtimes.co.uk/child-sexual-abuse-top-5-countries-highest-rates-1436162> accessed 30 September 2015

[2] Court of Appeal at Mombasa Criminal Appeal No 17 of 2008

[3] Court of Appeal at Eldoret Criminal Appeal No 268 of 2009

attempted robbery with violence to five years. In *Republic v Patrick Lumonje Obote*[4] the High Court reduced the mandatory death sentence for murder to fifteen years imprisonment.

However the *Godfrey Mutiso* case was subsequently overruled by a five judge bench in *Joseph Mwaura Njuguna and Another v Republic*.[5] The appellate court judges ruled that the courts had no authority to vary sentences set by parliament. They ruled *"it is not for the Judiciary to usurp the mandate of Parliament and outlaw a sentence that has been put in place by Kenyans, or purport to impose another sentence that has not been provided in law."*

The same principle of following statutory mandatory minimum sentences stated in the Joseph Mwaura case had been stated in earlier in several defilement cases. In the case of *Kennedy Munga v Republic*[6] a 3 year probation sentence imposed on a sex offender who had defiled a 15 year old girl was revised by the high court to a fifteen year sentence which was the statutory minimum sentence Furthermore in *Joseph Kiplimo v Republic*[7] the court of appeal in changing a sentence of 50 years imprisonment with a mandatory sentence for life stated, "*As the law stands,* ***section 8 (2)*** *(supra) does not allow for substitution of a definite period of imprisonment. It provides for life imprisonment and no more, no less. If the legislature had intended to allow for any discretionary term, it would have proceeded the way it did in* ***section 8 (3)*** *and* ***8 (4)*** *of the same Act."*

Judges have ruled therefore that the judicial arm of government cannot derogate from the set mandatory minimum sentences. Offering reduced sentences and room for restorative justice processes is common practice in developed legal jurisdictions. Sexual offenders therefore have

[4] High Court Criminal Appeal No 32 of 2007 at Eldoret
[5] Court of Appeal at Nairobi Criminal Appeal No 5 of 2008
[6] High Court At Mombasa Criminal Appeal No 13 of 2011
[7] Court of Appeal At Eldoret Criminal Appeal No 416 of 2010

little incentive or room to engage in restorative justice processes with victims within the formal justice system since there can be no derogation from MMS.

3.2 United States

In the United States, the constitutionality of MMS has been subject of much discussion in the US Supreme Court. The attack on MMS has been that it amounts to cruel and unusual punishment since various offenders are treated equally despite their varied circumstances. An example includes treatment of minors vis a vis adults in sentencing. In the case of *Miller v Alabama*[8] the court held that mandatory life sentences for juveniles who had committed murder was unconstitutional because it left no room for judicial discretion to consider a juvenile's *'lessened culpability'* and greater *'capacity for change'*.[9] There are sexual offenders who may be less culpable than others and who have capacity to change, they ought to be entitled to lower sentences.[10] In *Kennedy v Louisiana*[11] the court held that the mandatory death penalty for an offender who had committed child rape was cruel and unusual punishment that offended the 8th amendment of the United States Constitution protection against cruel and disproportionate punishment. The Supreme Court found that cruel and disproportionate punishment was punishment that was excessive.

Douglas Kieso commenting on mandatory sentences for sex offenders argues that based on the *Kennedy* decision, convicted prisoners may argue that their sentences are disproportionate to their individual conditions.[12] In *Re Lynch*[13] for example the California Supreme Court using the

[8] 567 US (2012), available at <www.supremecourt.gov/opinions/11pdf/10-9646g2i8.pdf> (accessed 21 July 2014).
[9] ibid 2.
[10] Eric J. Buske 'Sex Offenders Are Different: Extending Graham To Categorically Protect the Less Culpable' (2011) Vol 89:2 Washington University Law Review 417-447
[11] 554 U.S.407 (2008), available @ <www.law.cornell.edu/supct/html/07-343.ZO.html> (accessed 24 July 2014).
[12] Douglas Kieso, *Unjust Sentencing and The California Three Strikes Law* (LFB Scholarly Publishing LLC 2005) 198.
[13] 8 Cal 3d 410 [503], available @ <http://scocal.stanford.edu/opinion/re-lynch-22901> (accessed 25 July 2014).

proportionality test held that a mandatory life sentence for repeat indecent exposure was excessive and unconstitutional because the offence was a misdemeanour.[14] According to California law, a second time offender would be indefinitely held in prison till prison authorities were satisfied that he had been rehabilitated. Justice Mosk J writing the majority judgment stated *"it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity."*[15] The court found that the non-violent nature of the offence, minimal harm to the victim and the fact that more serious offences such as manslaughter had lighter sentences demonstrated the disproportionality of the sentence.[16]

The Kenyan constitutions article 29(f) bears similarities to the 8th amendment of the United States constitution which forbids the federal government from imposing cruel and unusual punishment on United States citizens. Article 29(f) of the constitution of Kenya outlaws cruel and unusual punishment.[17] In *Solem v Helm*[18], the US Supreme court defined cruel and unusual punishment in relation to incarceration by comparing the gravity of the offence to the sentence imposed and coming with a disproportional test to determine what amounted to cruel and unusual punishment. According to Lee[19], there exists an analytical framework to determine whether a sentence is cruel and unusual. It includes analysing the offense gravity, harm, culpability, violence, and magnitude against the offender's sentence and likely age and life opportunities upon release from prison. By using this weighing method courts will come with different sentences for the same offence. There is no reason in principle, why a sex offender cannot argue that these mandatory minimum sentences constitute cruel and unusual punishment if they can demonstrate that the sentence was

[14] ibid.
[15] ibid para II.
[16] ibid para III.
[17] Constitution of Kenya 2010.
[18] 463 U.S. 277 (1983)
[19] Donna Lee 'Resuscitating Proportionality In State Sentencing'(2008) Vol 40 Arizona State Law Journal 527

disproportionate to their circumstances. The burden would however fall upon the sex offender to demonstrate that the sentence was disproportionate. United States has embraced other targeted sentencing incapacitation measures to prevent sexual offenders from abusing girls. This is primarily through castration and violent offender statutes that allow indeterminate incarceration. At the time of the passage of the SOA activists called for castration of sexual offenders which would be a permanent way of ensuring they did not personally defile girls.[20] Castration is also a more cost effective means of incapacitation than incarceration. However the proposal was shelved after opposition from male parliamentarians.[21] Chemical castration has been embraced by some states in US as a means of ensuring that offenders do not reoffend.[22] Castration as a substitute to MMS has a deterrent effect may be as men value their sexual function, especially paedophiles.[23] Furthermore, it is used as an incentive to first offenders to have a shorter jail term[24] and only used mandatorily for repeat offenders.[25] It is in my view less cruel than MMS to temporarily lose sexual function and be free than to remain in custody because of MMS.

Some United States statutes give states power to use civil law to commit sexually violent offenders to a mental facility even after conclusion of their sentences to ensure public safety. This laws target

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[20] Ochieng Ogodo 'Kenyan Activists Push For Sex Assault Law' *We News* (Nairobi 11 May 2006) available @ < http://womensenews.org/story/law/060511/kenyan-activists-push-new-sex-assault-law> (accessed 13 September 2014)

[21] Ochieng Ogodo (n20)

[22] Decca Aitkenhead 'Chemical Castration: The Soft Option' *The Guardian* (London 18 January 2013) available @ < http://www.theguardian.com/society/2013/jan/18/chemical-castration-soft-option-sex-offenders >

[23] Kristin Carlson 'Commentary, Strong Medicine: Toward Effective Sentencing of Child Pornography Offenders' (2010) Vol 109:27 Mich. L. Rev. First Impressions available at <http://www.michiganlawreview.org/assets/fi/109/carlson.pdf. >

[24] Decca Aitkenhead (n22)

[25] Charles Scott and Trent Holberg 'Castration of Sex Offenders: Prisoners Rights Versus Public Safety' (2003) Vol 31 (3) [502-509][504] (only Oregon state makes it mandatory to castrate first time sex offenders) available @ < http://www.jaapl.org/content/31/4/502.full.pdf > (accessed 13 September 2014)

offenders with psychopathic tendencies who would commit a sexual offence after release from prison. If treatment did not work during their period of incarceration, the state could apply for their indeterminate confinement to psychiatric facilities pending their cure from their mental illness. In one case challenging such a statute,[26]the United States supreme court upheld the constitutionality of the Kansas Sexual Violent Predator Act which allowed the state to indefinitely commit a violent sexual offender who had completed his prison sentence as a means of protecting the public at large.

3.3 Canada

In Canada, the Supreme Court has ruled against MMS in various cases. In the case of *R*. v. *Nasogaluak,*[27]they held that a sentencing court in exceptional circumstances could derogate from the mandatory minimum sentence of an offender as a remedy against breach of constitutional rights. However absent a declaration that the mandatory minimum sentence was unconstitutional, courts were mandated to follow mandatory minimum sentences imposed by parliament.[28] Earlier the Canadian supreme court ruled in *R v Morrissey*[29] in a case of accidental death caused by criminal negligence that mandatory minimum sentences were constitutional and did not constitute cruel and unusual punishment but courts could derogate from them when the *sentences was harsh or unreasonable to the offender*. The court in that case thereafter reduced the sentence by the amount of time the offender had been in pre-trial custody.

In *R v Ferguson*[30] the court ruled that constitutional remedies for breach of the constitution should not include derogation from MMS because they undermined the rule of law. By reducing the

[26] *Kansas v Hendricks* 521 U.S 346(1997)
[27] [2010] 1 S.C.R. 206.
[28] Para 6.
[29] [2000] 2 S.C.R 90.
[30] [2008] 1.S.C.R 6

mandatory minimum sentence, courts were undermining the rule of law by creating their own legislation. The court stated:-

"In granting constitutional exemptions, courts would be altering the state of the law on constitutional grounds without giving clear guidance to Parliament as to what the Constitution requires in the circumstances. Bad law, fixed up on a case-by-case basis by the courts, does not accord with the role and responsibility of Parliament to enact constitutional laws for the people of Canada."[31]

The supreme court of Canada ruled in *R v ferguson*[32] that if the mandatory minimum sentence was disproportionate to an individual, the individual should not be exempt from its application through the use of judicial discretion, but that the entire legal provision should be struck down.

Following the *Ferguson* decision, in *R v Nur*[33] the supreme court struck out section 95(1) of the Canadian Criminal Code which imposed a mandatory minimum sentence of 3 years for a first time offender caught with a loaded firearm and 5 years mandatory minimum sentence for an repeat offender caught with a firearm. Chief Justice Mclachlin writing the majority decision found that the sentences constituted 'cruel and inhuman treatment' under section 12 of the Canadian Charter of human rights. She further came up with a two-tier test to analyse the constitutionality of the MMS. *77] … when a mandatory minimum sentencing provision is challenged, two questions arise. The first is whether the provision results in a grossly disproportionate sentence* ***on the individual*** *before the court. If the answer is no, the second question is whether the provision's reasonably foreseeable applications will impose grossly disproportionate sentences on others."*

[31] para 72.
[32] ibid
[33] [2015] SCC 15

The court stated that there was need to fashion individual sentences based on the seriousness of the situation, the offender's blameworthiness and the harm resulting from the offence, and noted that mandatory minimum sentences function as a "blunt instrument"[34] that complicate proportionality which is an integral part in sentencing.[35] The court further noted that the general deterrence principle cannot sanitize a sentence against gross disproportionality.[36]

The Supreme Court of Canada seem to have been right in their assessment in the *Nur* case. In Canada, judicial discretion has assisted in the reduction of child sexual abuse. There has been a steady decline over the past twenty years in the number of child sexual offenders through different measures that have been adopted in the sentencing models including risk assessment, community supervision, treatment methods and citizen engagement.[37] Both victims and sex offender's focus groups suggested other alternative measures to prevent sexual abuse of children analysed in chapter 2 as shown in pie chart 1.1 and 2.3 respectively. The victims advocated parental and societal support for victims. This is engaging citizens to participate in assisting victims and offender. In Canada citizen engagement involves publishing lists of sexual offenders in communities so that they are aware of who they are in order to engage them. Victims are also supported by the social services system.

[34] [2015] SCC 15 para 43
[35] Ibid at para 44
[36] Ibid at para 45
[37] Robin Wilson, 'Does Canada Need Harsher Penalties for Sexual Offenders?' (2013) Sexual Abuse: A Journal of Research and Treatment, available at <http://sajrt.blogspot.com/2013/09/does-canada-need-harsher-penalties-for.html> (accessed 26 October 2013)

3.4 South Africa

In South Africa the law allows judges to deviate from the statutory minimum mandatory sentences if substantial and compelling circumstances exist.[38] Sex offences are subject to MMS.[39] In *S v Malgas*[40] the Supreme Court of Appeal of South Africa laid down a broad test which includes the sense of fairness, justice or unease a judge would believe a sentence would bring depending on the individual circumstances of the case. However the substantial and compelling circumstances exception test has been used to the extent that MMS are less applied than was anticipated.[41] Critics are unhappy with this wide discretion as studies have shown that only 17.7% of cases result in the mandatory minimum sentences being imposed in rape cases.[42] The substantial and compelling circumstances exception created by the law has now become the rule and the intention of legislators has therefore not been achieved.

Furthermore the reasons given for failing to adhere to the statutory minimum sentences vary from judge to judge. There are now three broad interpretations of the substantial and compelling circumstances reasons which are the strict interpretation, the lenient interpretation and the middle-ground interpretation.[43] The strict interpretation seeks only the most unusual and exceptional

[38] Republic of South Africa *Criminal Law Amendment Act 105 of 1997 as amended by Criminal Law (Sentencing) Act 38 of 2007*, (2007) s 51(3)(a) [If any court referred to in § (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence]. *See also* Jill Thompson and Felly Nketwo Simmonds, *Rape Sentencing Study: Statutory Provisions For Rape, Defilement and Sexual Assault In East, Central and Southern Africa* (Population Council 2012) 13.

[39] Republic of South Africa, *Criminal Law (Sexual Offences and Related Matters) Amendment Act* No 32 of 2007 s15(2)(a) and 16(2)(a).

[40] 2001 (2) SA 1222 (A) 1234-25

[41] ibid.

[42] Maithili Pradhan and Naureen Shameem, *Assessing the Impact of Mandatory Minimum Sentences on Sexual Offences in Tanzania* (Avon Global Center for Women and Justice 2012) 14.

[43] Sandra Roth 'South African Mandatory Minimum Sentencing: Reform Required' (2008) 17 Minn J. Int. Law Journal 155,167

circumstances[44] to deviate from MMS while the lenient interpretation seeks to retain the traditional discretion for judicial officers.[45] The middle-ground interpretation recognises the diminished discretionary powers of judges but *cumulatively* considers traditional factors such as perpetrator remorse, time served in remand for reducing sentences.[46] The three different approaches have led to different considerations including non-virginity of the victim, the lack of physical harm, intoxication of the offender, cultural beliefs of the offender, and the relationship between the victim and the offender.[47] Some of these reasons do not seem exceptional and compelling. For example virginity does not have any significant co-relation with the psychological or physical harm suffered as a result of sexual abuse. For example in *Vilakazi v S*[48] the accused who had raped a girl under 16 got his mandatory life sentence reduced to fifteen years (he was to serve 13 years as they court deducted pre-trial detention period) on appeal because the court reasoned he was less likely to reoffend again when released. This was because he was employed, had a family and used a condom during the offence and had not used extraneous violence on the victim.

It is therefore clear that the 'substantial and compelling circumstances' test is ambiguous and is prone to great disparities between judicial officers.

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[44] *S v Mofokeng and Another* 1999 (1) SACR 502 (W) at 523(C-D) [Per Stegman J 'for substantial and compelling circumstances to be found, the facts of the particular case must present some circumstance that is so exceptional in its nature, and that so obviously exposes the injustice of the statutorily prescribed sentence in the particular case']

[45] Sandra Roth 'South African Mandatory Minimum Sentencing: Reform Required' (2008) 17 Minn J. Int. Law Journal 167

[46] Ibid at 168

[47] Maithili Pradhan and Naureen Shameem, *Assessing the Impact of Mandatory Minimum Sentences on Sexual Offences in Tanzania* (Avon Global Center for Women and Justice 2012) 14; See Also Julia Sloth-Nielsen & Louise Ehlers, 'A Pyrrhic Victory?: Mandatory And Minimum Sentences In South Africa' Inst. For Sec. Studies Paper111, 3 (July 2005), *available* @ <www.Iss.Co.Za/Dynamic/Administration/file_manager/file_links/PAPER111.PDF?link_id=3&slink_id=404&link_type=12&sli nk_type=23&tmpl_id=3.>

[48] [2008] ZASCA 87

3.5 Finland

Finland has struggled with high levels of child sexual abuse in the past and determined that a purely custodial system was not working in reducing crime.[49] Finland therefore adopted the lightest sentencing regimes for sexual offenders against children in the world. Section 6 of chapter 20 of the Finnish Criminal Code outlaws non-aggravated sexual abuse of a child.[50] The penalty for non-aggravated sexual abuse which doesn't involve a large degree of violence is a minimum four (4) months and maximum four year sentence. Section 7 of the Code criminalizes aggravated sexual abuse with a minimum one year sentence and a maximum ten year sentence. Finland reformed its criminal justice system in the 1960s ostensibly to reduce the economic cost of imprisonment and the need to introduce proportionality to sentencing.[51] This resulted in reform measures including a focus and shift towards non-custodial sentences, mediation, fines, suspended sentences and light sentences.[52] There has been an insignificant increase in sexual offences against girls between 1970s and 2000.[53] However between 2012 and 2014 the rate has been static.[54] While the reforms have resulted in a drop in penal population, in recent times, Finland has been criticized for not taking

[49] Tapio Lippi Seppalla, 'Imprisonment and Penal Policy in Finland' (1999-2012) Scandanavian Studies in Law 349-350, available @ <www.scandinavianlaw.se/pdf/54-17.pdf> (accessed 18 July 2014).
[50] Available @<www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf> (accessed 18 July 2014).
[51] Tapio Lippi Seppalla, 'Imprisonment and Penal Policy in Finland' (1999-2012) Scandanavian Studies in Law 334, 349-350, available @ <www.scandinavianlaw.se/pdf/54-17.pdf> (accessed 18 July 2014).
[52] ibid.
[53] Ibid at 370
[54] Statistics Finland *Official Statistics Of Finland (OSF): Decisions By District Courts In Criminal Cases* (OSF 2014) available @ <www.stat.fi/til/koikrr/2013/koikrr_2013_2014-06-10_tie_001_en.html> accessed 18 July 2014

victim's rights seriously.[55] Questions can also be raised about Finland's low incarceration rate.[56] The Finland Criminal Code has decriminalized public drunkenness[57] and consensual sex between minors and persons who are close to each other in age. Finland also increased the age of criminal responsibility to fifteen years with criminal issues for children under fifteen addressed by the social system.[58] The low incarceration rate is therefore partly attributed to decriminalization and not purely having non-custodial sentences, coupled together with mediation and restitution approaches However Finland recently increased the minimum sentences for sexual offences from four months to one year.[59] Furthermore Finland's sentencing regime allows restitution and mediation as an alternative to the formal system.[60] Mediation results in agreements which can be enforced by the courts. Majority of the mediation agreements results in monetary compensation (60%) with other agreements resulting in apologies (20%) and agreements never to repeat such offences again.[61] This mediation process is important in repairing the emotional and psychological damage of the offences and is applicable even to sexual offences.[62]

3.6 Lessons Learned From The Reviewed Jurisdictions

[55] Amnesty International, *Case Closed Rape And Human Rights In The Nordic Countries A Summary Report* (Amnesty International 2010) 11-13; *See also* Finnish *Criminal Code Act* s 7(a) which states that
'*An act that does not violate the sexual autonomy of the subject and where there is no great difference in the mental and physical maturity of the parties shall not be deemed sexual abuse of a child, or the aggravated sexual abuse of a child referred to in section 7, subsection 1, paragraph 1.*'
(This means that where there is no physical violence used against a girl or if the girl is consenting despite her age, no offence would have been committed.)

[56] Tapio Lippi Seppalla, 'Sentencing and Sanctions in Finland: The Decline of the Repressive Ideal' in Michael Tonry and Richard Fraser (eds), *Sentencing and Sanctions in Western Countries* (Oxford University Press 2001) 102 (Reported crime increased between 1965-1995 but prison population fell).

[57] ibid 111.

[58] Tapio Lippi Seppalla, 'Imprisonment and Penal Policy in Finland' (1999-2012) Scandanavian Studies in Law 334, 350, available @ <www.scandinavianlaw.se/pdf/54-17.pdf> (accessed 18 July 2014).

[59] ibid 369-370.

[60] ibid 336.

[61] Ibid at 340

[62] Ibid at 340

This section summarizes the lessons learned from the reviewed jurisdictions and suggests possible ways of applying the strengths of the sentencing regimes.

3.6.1 MMS Can Be Challenged As Being Unconstitutional

Michael Tonry, an avowed critique of MMS states that mandatory minimum sentences provoke judicial stratagems to altogether avoid their application.[63]Carol Smart[64] and Migai Aketch[65] agree with the conclusion that less judicial flexibility in sentencing may result in more acquittals, conversely therefore, some discretion may result in more convictions for deserving sex offenders. Some evidence suggests that some magistrates are simply ignoring the mandatory minimum sentences. For example in *Kennedy Munga v Republic*[66], a magistrate sentenced a sex offender to 3 years' probation instead of the statutory 15 years MMS because the 15 year girl had accepted accused's advances. The magistrate went as far as to ignore a probation report which highlighted the accused's unsuitability for a non-custodial sentence.[67] MMS do not give magistrates discretion to consider any other sentence than the MMS itself.

What can we learn from the jurisdictions reviewed on limiting judicial discretion? The United States and Canada models have demonstrated that claims of unconstitutionality can be made against mandatory minimum sentences which seem disproportional to the circumstances of the

[63] Michael Tonry, 'Judges and Sentencing Policy—The American Experience' in Colin Munro & Martin Wasik (eds) *Sentencing, Judicial Discretion And Training* (Butterworths 1992). 137, 152
[64] Carol Smart, *Feminism and the Power of the Law* (Routledge 2002) 45
[65] Migai Aketch and Sarah Kinyanjui, *Sentencing in Kenya: Practice Trends, Perspectives & Judicial Discretion* (Legal Resources Foundation 2011) 24
[66] Kaloleni SRMCC 150 of 2010; See also Mombasa HC Review No 119 of 2010
[67] Ibid

offence and the offender. Given the right set of circumstances, the argument that MMS for defilement for example may be unconstitutional is not altogether far-fetched. This is because our constitution already has the article 29(f) which outlaws cruel and inhuman punishment which has been the lynchpin of the constitutional challenges to MMS in Canada and United States. Furthermore, article 259 of the Kenyan constitution mandates the courts to interpret the constitution in a purposive manner which enhances individual rights and freedoms. This gives opportunity for interpretation that favors the sex offender who has been affected by the sentence.

3.6.2 Unusual And Exceptional Circumstances

South Africa's substantial and compelling circumstances approach was well intentioned but the lack of clarity of its scope and application has led to its widespread abuse. The mixed approach of having MMS and an exception to having the MMS applied is a clever legal innovation, but it would need further tightening to ensure that it isn't abused. Kenya can borrow this model and fine tune it to its circumstances. Setting MMS like South Africa to signify the gravity of the sexual offence and satisfy societal need for retributive and punitive sentences is important. However having a vague substantial and compelling circumstances rule may undermine the set MMS as has happened in South Africa. To avoid the over-use of the substantial and compelling circumstances factors, it is proposed to introduce guided discretion to determine what substantial and compelling circumstances are. Firstly the terms to be used instead of substantial and compelling circumstances should be 'unusual and exceptional circumstances' to narrow its application in line with the strict approach adopted in *S v Mofokeng*.[68] Secondly, these 'unusual and exceptional circumstances' can be identified by the definition part of the statute to further guide magistrate discretion.

[68] 1999 (1) SACR 502 (W) at 523(C-D)

The unusual and exceptional factors that can militate towards reduction of the statutory MMS can include in line with SCORAs approach the remorse shown by the accused through their actions after the offence i.e. self-reporting to the police, or through accepting a guilty plea, compensation offered and accepted by the victim(s) or their legal representatives through mediation between the victim(s) and the accused and the measures agreed upon by the accused and the victim's legal representatives. By applying mediation, we shall be copying the Finnish mediation approach as grounds of waiving or varying sentences.[69]

The unusual and exceptional factors can either be used to reduce or increase MMS. Those that can affect increase of the sentence include multiple perpetrators, severe or greater use of force, lack of remorse shown by the perpetrator etc etc. Lastly, to give the magistrates a window to utilize an unusual and exceptional factor which had not been foreseen by parliament, there can be a last factor of 'any other unusual and exceptional factor'.

3.6.3 Creating A MMS Sentencing Range

Kenya can borrow from the Finnish model[70] which has a range of years as a sentence, to give judicial officers discretion to issue a sentence within the certain bracket of years. It is proposed to amend section 8 and section 20 of the Sexual Offences Act. For example section 8(4) of the sexual offences act can have as its sentence a range between three and fifteen years, Section 8(3) can be no less than five and no more than twenty years and section 8(2) can be no less than seven years to life imprisonment. Granting magistrates control over which sentence to mete out from the MMS

[69] Tapio Lippi Seppalla, 'Imprisonment and Penal Policy in Finland' (1999-2012) Scandanavian Studies in Law 340, available @ <www.scandinavianlaw.se/pdf/54-17.pdf> (accessed 18 July 2014)

[70] Section 6 of Chapter 20 of the Finnish Criminal Code outlaws non-aggravated sexual abuse of a child whose penalty is a minimum one year and maximum four year sentence

bracket may give them back a sense of control which may increase the chances of correct judgments being issued out and avoid what Michael Tonry calls 'stratagems'.

3.6.4 Applying SCORA: Introducing Non-Custodial Measures As A Sentencing Option

Both Finland and Canada have also adopted aggressive non-custodial measures for sex offenders which seem to be working. The crime rates for sexual abuse cases in Canada[71] and Finland[72] have been on the decline for the past twenty years through guided discretion that allows magistrates and judges to determine the appropriate sentences depending on individual circumstances. In Canada the measures adopted include treatment, community supervision and citizen engagement.[73]In Finland community service, suspended sentences, conditional sentences, fines and mediation.[74] In line with the 'unusual and exceptional circumstances' south African factors approach, magistrates can apply other existing sentencing measures like community service as a sentence when it is proved that the offender is deserving of a non-custodial sentence. Not only will this reduce the cost of incarceration, it will ensure that less culpable or more remorseful offenders are given a chance to improve themselves in society.

This will also avoid the abuse of the court system by ensuring that detailed information is captured by the mediators on the remorse of the accused and the motives behind their engagement in the

[71] Robin Wilson, 'Does Canada Need Harsher Penalties for Sexual Offenders?' (2013) Sexual Abuse: A Journal of Research and Treatment, available at <http://sajrt.blogspot.com/2013/09/does-canada-need-harsher-penalties-for.html> (accessed 26 October 2013)
[72] Tapio Lippi Seppalla, 'Imprisonment and Penal Policy in Finland' (1999-2012) Scandanavian Studies in Law 349-350, available @ <www.scandinavianlaw.se/pdf/54-17.pdf> (accessed 18 July 2014).
[73] Robin Wilson (n69)
[74] Tapio (n72)

mediation process. In *Republic v James Njehia*[75], the victim a 17 year old girl who was defiled and impregnated by her 28 year old neighbor gave birth and later came to court and withdrew the charges against the accused when she turned 18. The researcher observed this process in court and noted that, despite the victim's mother's objections, she was withdrawing the charges because she had agreed to get married to the wealthy perpetrator. Unfortunately, immediately after withdrawing the criminal charges, the girl was kicked out of the perpetrators home. This demonstrates that the offender was not genuinely remorseful or concerned for the victim but only wanted to have the charges officially dropped.

3.7 Conclusion

This chapter has highlighted lessons learned from several jurisdictions about the judicial reactions to MMS. Further by analysing the sentencing practices from these jurisdictions and applying SCORA, a more flexible sentencing regime has been advocated for. However this sentencing regime has adequate checks and balances to ensure that judicial discretion is guided to avoid unjustifiable deviation from MMS range. In the next chapter, we will summarize the findings from the research and the recommendations to be adopted.

[75] Unreported Criminal Case at Limuru No 723 of 2011

CHAPTER 4

4. CHAPTER 4 CONCLUSION AND RECOMMENDATIONS

This research set to highlight the inefficiency of MMS as a deterrent measure aimed at preventing sexual abuse of girls. This thesis has demonstrated that there can be alternatives that are more effective than MMS as sentencing models. The hypothesis herein: That MMS have failed to curb or address sexual abuse of girls and has therefore been proved. The following are a summary of the conclusions and recommendations.

4.1 TOWARDS A SOCIETY CENTRIC OFFENDER REMORSE APPROACH IN SENTENCING

The legal process can be used to educate society about sexual abuse of girls and it potential impact on victims. In the previous chapter I argued that Finland has seen a reduction of sexual abuse generally because of mediation approaches. Finland shares a similar history like Kenya and present challenges as there is pressure to increase the length of sentences for sexual offences. I further noted that in South Africa unbridled judicial discretion has seen irrelevant factors like non-virginity applied in sentencing, however this has been mitigated by the emergence of the strict 'substantial and compelling' circumstances interpretive approach.

The Finnish approach towards mediation and the South African's substantial and compelling circumstances approach can be useful in engaging communities while retaining the victim's well being. In Chapter two pie chart 1.3 the research demonstrated that victims are quite affected by the reaction of their families, neighbours and society in general. Taking care of the victim will make the best out of a difficult situation and assist us stop assuming sentencing reduces sexual abuse. A number of important lessons learnt from the research include:-

4.1.0 Society is Ignorant About lengthy MMS And Therefore MMS Will Not Reduce the Prevalence of Sexual Abuse Against Girls.

From interacting with the sexual offenders one thing was very clear, knowledge about MMS was minimal. MMS cannot act as a deterrent if the people who are supposed to be deterred against committing the offence are ignorant of its existence. The public needs to be sensitized about the existence of MMS in order to deter the potential perpetrators. In order to maximize the efficacy of MMS, policies should be introduced at the local level to ensure the public is more aware about the existence of a legal system that deals with MMS. This can be done through advocacy campaigns such as media campaigns, introducing sex education in schools and its consequences etc etc.

4.1.1 Victims Advocate for Stiff Not Mandatory Minimum Sentences But Are More Concerned About Their Psychosocial Welfare.

The victims interviewed did not necessarily advocate for MMS. Interesting to note was a respondent 4 who initially thought that a 10 year sentence was appropriate but has since changed her mind now that the sentence is almost complete. Respondent 3 was similarly afraid that after the 20 year sentence was complete, the perpetrator would come and take her son or harm her. The victims want their perpetrators incarcerated for a long time, some even for life. However some of them advocate for these sentences because of fear of retaliation from the perpetrator. The victims recognise that the lack of resolution between themselves and the offenders puts them at risk of revenge. By adopting the Finnish mediation approach, a pre-sentencing judicial process guided by qualified mediators between the victim (and the victim's family) and the offender and his family can begin a healing process and reduce the fears and anxieties that the victims hold.

4.1.2 The Government Should Reduce Mandatory Minimum Sentences And Legislate Appropriate Supportive Guidelines For Judicial Discretion

I would recommend that the government explores reducing the current Mandatory Minimum Sentences and instead give a range within which a sentence can lie. This would create a hybrid sentencing regime. For example defilement of a girl between 16-18 years can be no less than three and no more than fifteen years. Defilement of a girl between 12 and 15 can be no less than five and no more than twenty years. Defilement of a girl less than 11 years can be no less than seven years to life imprisonment. To supplement the reduction, appropriate sentencing guidelines should be legislated in the Sexual Offences Act to allow magistrates to derogate from Mandatory Minimum Sentences based on clear criteria. For example if the sexual intercourse was consensual between an offender who is less than two years older than a girl, the court can derogate from the mandatory minimum sentence and order other sentences like probation. This could be applicable to the age group between 16-18 years. It may also encourage admissions by offenders and start processes of reconciliation or mediation between the parties for those who are willing to engage in such processes. The guidelines can also allow magistrates to give stiffer penalties than MMS if the circumstances necessitate. This would be equivalent to the strict South African model of having 'unusual and exceptional circumstances'. For example use of victim impact statements, mediation and psychological reports to determine the status of the victim or the offenders. Defilement that results in permanent physical bodily or psychological harm can also constitute unusual and exceptional reasons.

Furthermore a parole system to monitor can supplement magistrate discretion and assist victims participate in the release of offenders after some years. Introducing some flexibility will allow magistrates to feel they have control to vary the sentence and reduce the appetite to acquit based

on the length of the sentence. It is hoped that through successful counselling and government support some of the victims will be willing to forgive the offenders and the offenders will be willing to work towards their release to achieve behaviour change.[1] This will be in line with the objectives of the Victim Protection Act which supports reconciliation[2] and restorative[3] justice processes.

4.1.3 The Government and Society Need to take Responsibility For Addressing Sexual Abuse Against Girls.

This was an area where the views of sexual offenders and victims were alike. According to pie charts 1.1 and 2.3, they believed that parents and the society have a role to play by educating girls from an early age about good manners and the existence of sexual predators who target girls to help them identify and escape from them. The government can also introduce education on sexual abuse in primary schools to enable children to identify sexual predators and keep them safe from them.

4.1.4 Specialized Programs Designed for Rehabilitation of Sexual Offenders

From my observations, rehabilitating sexual offenders is a very difficult process. Given the fact that the vast majority of the focus group participants saw nothing wrong with having sex with girls over 14-15 years, because according to them the girls in this age group were exhibiting invitations to men by dressing inappropriately and also engaging them directly in sex. They thought this girls were mentally and sexually mature. Pie Charts 2.1 and 2.3 demonstrate this offender perspectives. More needs to be done to educate sex offenders on essence of childhood. Furthermore, the majority

[1] The Government of Kenya, *Victims Protection Act* (National Council for Law Reporting 2014) s15, s23.
[2] Victim Protection Act S 3b(ii)
[3] Victim Protection Act S 26

of the participants did not believe they had committed a criminal offence. Therefore any rehabilitative measures need to be geared towards changing the mentality of the offenders to accept that they have committed an offence. Only by accepting their wrongdoing can rehabilitation meet its goal.

4.1.5 The Government should implement the Victims Protection Act 2014.

The government needs to come up with policies to assist these families who are the primary social support for victims of sexual abuse. The Victims Protection Act 2014 which came into force on 3rd October 2014 has created rights for victims and obligations upon the state to ensure the well-being of victims of sexual abuse.[4] The girls who participated in the focus group decried the lack of government support for victims of sexual abuse and now the government has attempted to redress the issue. The Victims Protection Act 2014 has created a fund for victims of crimes[5] to ensure that they get free medical and psychosocial treatment for sexual abuse. The fund should also cater for other expenses such as education for them and for the children born as a result of the sexual abuse.

4.1.6 Parental Rights of Sexual Offenders

The SOA also needs to introduce a section dealing with the parental rights of sexual offenders. The victims interviewed were concerned that the offenders could later come to claim parental rights over children born as a result of sexual abuse. While the precise terms and approach of the proposed section is beyond the scope of this research, the government needs a clear policy to deal with this emerging issue. The law will have to provide a clear pathway for termination of some

[4] *Victims Protection Act 2014*, s9
[5] *Victims Protection Act 2014*, s28(2)

sexual offender's parental rights when they have abused their own children or have impregnated girls. The law will also take into consideration the constitutional rights of the offender's child and the offender.

If the offender is willing to accept parental responsibility and the victim is willing to reconcile with the offender then the law can allow an agreement between the two parties setting out their respective responsibilities and rights in line with SCORAs restorative objectives.

4.2 LESSONS LEARNED FROM CONDUCTING RESEARCH WITH OFFENDERS AND VICTIMS OF SEXUAL ABUSE

Research is a process through which we question the world as we know it and learn new paradigms or ways of thinking. Through the process of research the following lessons were learnt and could be potentially useful for future researchers.

4.2.1 Rapport Is Key To Holding Successful Research With Sex Offenders And Victims of Sexual Abuse

Conducting research with sex offenders and victims of sexual abuse needs special rapport with both groups. The girls who participated in the focus groups found some help through the rapport created by the social worker. However there wasn't a similar person who the offenders trusted for the prisons focus group. Furthermore, conducting research in prison raises ethical issues for researchers. How researchers can maintain privacy in institutions where prisoners have lost a large part of their privacy calls for creativity. For future research it is recommended that researchers try to create special rapport by spending more time in prison before conducting the actual research to avoid the challenges faced by the writer.

4.2.2 There needs to be more scientific research conducted into why Sexual Offenders commit these crimes.

There was very little local scientific material in Kenya that researches into why sexual offending occurs. Sexual Offenders are a closed group of people and deeper research into the underlying social and psychological reasons why they committed these offences is necessary to assist in the formulation of laws and policies that further address this societal problem.

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