

**COMBATING SEXUAL OFFENCES IN KENYA: AN APPRAISAL OF THE  
IMPLEMENTATION OF THE SEXUAL OFFENCES ACT**

**ANGELA WANGA AMBOKO**

**G62/68553/2011**

**Supervisor: Dr. Sarah Kinyanjui**

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## **Declaration**

I, **ANGELA WANGA AMBOKO** do hereby declare that this is my original work and it has not been presented for the award of a degree or any other award in any other university. Where works by other people have been used, references have provided.

Student: ANGELA WANGA AMBOKO

Admission Number: G62/68553/2011

Signature:

Date:

**With the approval of:**

Supervisor: Dr. Sarah Kinyanjui

Signature:

Date:

## **DEDICATION**

This Project is dedicated to my parents Jemima Achung'o Omung'ala and the late Job Omung'ala Amboko for their unconditional and steadfast love, unwavering support and always having faith in me. They are the ones who challenged me to back to school and better myself. Dad, I know you are smiling now. I rest easy knowing that I have delivered what you asked of me!

To my brother Kenneth Amunga, Sister in Love Sanura Jumanne and my nephews Trevor Amboko and Job Newton, thanks for your love and encouragement without which this journey would have not been easy.

To My lovely sisters, Hildah Amboko, Viannah Amboko and Winnie Amboko. I have finished my part, I hereby hand over the baton!

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## **ABSTRACT**

Kenya has not fully realized the objective of minimizing sexual offences despite the enactment of the Sexual Offences Act, 2006, which imposes harsh penalties for sexual offences.

The aim of this study is to analyze the efficacy and the success of the Sexual Offences Act 2006. To this end, the study examines the extent to which the Sexual Offences Act effectively facilitated prosecution, conviction and sentencing of sexual offenders. It further interrogates the factors which have undermined its implementation.

Both desk and field research were undertaken in this study. Findings from the research reveal that for the objectives of the Sexual Offences Act to be fully achieved, there is an urgent need for constant civic awareness, amendment of some portions of the said Act and implementation of other pieces of legislation such as the Employment Act and the Public Officers Ethics Act.

The study therefore recommends that public awareness initiatives should be undertaken and that all the relevant personnel be provided with adequate resources and the knowledge on how to handle such cases. It also recommends the provision of a proper policy implementation programme to ensure the alignment of the relevant sectors and institutions with the provisions of the Sexual offences Act.

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## LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and People's Rights.
CoK	Constitution of Kenya, 2010.
SOA	Sexual Offences Act.
PC	Penal Code.
COVAW	Coalition on Violence Against Women.
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women.
WPA	Witness Protection Act.
DNA	Deoxyribonucleic acid.
UDHR	Universal Declaration of Human Rights.
DEVAW	Declaration on the Elimination of Violence against Women.
UNGA	United Nations General Assembly.
BPFA	Beijing Platform for Action.
TFSOA	Task Force on Implementation of the Sexual Offences Act.
GIZ	German Development Corporation.
HRC	University of California, Berkeley.
CREW	Centre for Rights, Education and Awareness.
LIVCT	Liverpool VCT Care and Treatment.
SGBV	Sexual Gender Based Violence.
HON	Honourable.
FIDA	Federation of Women Lawyers.
NCRC	National Crime Research Centre.
ICJ	International Commission of Jurists.
AIDS	Acquired Immune Deficiency Syndrome.
HIV	Human Immunodeficiency Virus.
GBV	Gender Based Violence
HRW	Human Rights Watch



## **LIST OF DOMESTIC LEGAL INSTRUMENTS**

Penal Code Chapter 63 of the Laws of Kenya

The Constitution of Kenya 2010

The Sexual Offences Act, 2006, No. 3 of 2006

The Marriage Act, 2014, No. 4 of 2014

The Law of Succession Act Chapter 160 of the Laws of Kenya

Witness Protection Act Chapter 79 of the Laws of Kenya

The Statute Law (Miscellaneous Amendments) Act, 2013

Employment Act

Public Officer Ethics Act

## **LIST OF REGIONAL AND INTERNATIONAL LEGAL INSTRUMENTS**

United Nations, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995.

UNGA, Declaration on the Elimination of Violence against Women, 20 December 1993,

Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III) (UDHR) art 5

UNGA, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979,

Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982),

## **LIST OF CASES**

MK v. Republic Criminal Appeal 136 of 2011 [2013] eKLR

C.K. (A Child) Through Ripples International as her Guardian and Next Friend) & 11 Others v.. Commissioner of Police/Inspector General of the National Police Service & 3 Others, Petition 8 of 2012 [2013] eKLR.

K.M v. Republic, Criminal Revision No. 6 OF 2014 [2014] eKLR

Raphael Akumu Ogongo v Republic Criminal Appeal 178 of 2007 [2008] eKLR

Kamaro Wanyigi v Republic Criminal Appeal 185 of 2006 [2008] eKLR

Dalmar Musa Ali v Republic Criminal Appeal 58 of 2007 [2008] eKLR

Fatuma Hassan Salo v Republic Criminal Appeal 429 of 2006 [2006]CA eKLR.

P O.O (A Minor) v Director of Public Prosecutions & another Constitutional Petition No.1 of 2017  
[2017] eKLR.

# CHAPTER ONE

## 1.0 INTRODUCTION

The enactment of Sexual Offences Act in 2006 heralded a radical change in as far treatment of sexual offences in Kenya is concerned. It imposed stiffer penalties for sexual offenders and raised awareness on related issues of concern such as the rise in defilement of minors<sup>1</sup>. The enactment of the Act reportedly sparked an exponential rise in the number of cases sexual offences reported, startling many a child rights activist.<sup>2</sup> The atypical character of some of the reported offenses has brought to question the effectiveness of the law in deterring such wicked, cruel and inhuman acts on minors some as young as a year-old. The rise is possibly attributable to the fact that Kenyans are increasingly becoming aware of their rights since the Act and the new Constitution came into operation. Further, the on-going reforms in the Judiciary have inspired conviction in Kenyans and are willing to seek justice from the courts. However, many cases still go unreported either due to fear of the victims being banished or blackballed by the community, interposition by family or the community or general ignorance of the law.<sup>3</sup>

Prior to the enactment of the Sexual Offences Act 2006<sup>4</sup>, the courts relied on the Penal Code which did not adequately address sexual offences particularly in terms of definitions as well as in providing for the diverse forms of sexual offences. The SOA was therefore a timely response against increased incidences of sexual violence especially against the background of an inadequate and reluctant penal system which not only defined but also treated such offences as offences against morality. The Penal Code gave wide sentencing discretion. This led to inconsistencies in sentencing of offenders. In some cases, the sentences were manifestly lenient.<sup>5</sup> Most cases either went unreported or not investigated or even when reported were not prosecuted effectively and expeditiously.<sup>6</sup> The enactment of the Sexual Offences Act was celebrated as a tool that would enable players in the criminal justice system

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<sup>1</sup>Wanjiku J. Khamasi and Wairimu Mutia, 'Media Coverage of Sexual Violence and its Implications on Educational Leadership.' (2005) <<http://www.kaeam.or.ke/articles/vol1/wanjikufulltext.pdf>> accessed 21 May 2015.

<sup>2</sup> Editorial, 'Act Against Rising Sexual Offences Against Children' *The Standard Digital* (Nairobi, 18 April 2013) <<http://www.standardmedia.co.ke/article/2000081755/act-against-rising-sexual-offences-against-children>> accessed 2 March 2015.

<sup>3</sup> Ibid.

<sup>4</sup> The Sexual Offences Act No.3 of 2006 (SOA)

<sup>5</sup> Brett Shadle, 'Sexual Offences in Kenya Courts, 1960's-2008' [2010] Vol. II [2008-2010] Kenya Law review p.1.

<sup>6</sup> COVAW, *Judicial Attitude of the Kenyan Bench on Sexual Cases: A Digest* (Nairobi: COVAW, 2005).

to confidently handle sexual offences cases. This Act defined such offences with clarity and also prescribed stiffer penalties for offenders.

Courts are now sensitive to the plight of sexual offences victims than they were before. Before the enactment of SOA, defilement could then only be punished by up to fourteen (14) years imprisonment. This penalty was however enhanced by the SOA to life imprisonment to act as a stern deterrent to potential and or possible repeat offenders. Evidentiary requirements were also relaxed in sexual offences against minors.<sup>7</sup> To reach a guilty verdict, the court needs not a corroboration of evidence provided by a minor as long as it is completely certain that that evidence is truthful.<sup>8</sup>

The change of law in 2003 could not have been timelier for the bench. They quickly took advantage of the powers bestowed upon them under the new law and began imposing harsher sentences on the offenders. Despite this clear display of progress and effort, effective dealing with sexual offences remained and still remains a big challenge in Kenya. Many cases still go unreported and even reported cases are not accorded the requisite evidentiary attention by the police and law enforcement agencies.<sup>9</sup>

On June 11<sup>th</sup> 2013, a story captured headlines in Kenyan News. Eighteen primary school girls had dropped out of school at Chepkurkur Primary School owing to pregnancy.<sup>10</sup> This incident, though not isolated,<sup>11</sup> caught the attention of the Deputy President, Hon. William Ruto who, on August 4<sup>th</sup> 2013 during a visit to the region called on chiefs and their assistants to take personal charge of the fight against defilement.<sup>12</sup> The Deputy President called for the jailing of perpetrators of these acts.

Challenges in implementation of the law is however not unique to Kenya. In India for instance, the world was in December 2012 treated to a spectacle as a 23-year-old was gang

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<sup>7</sup>Criminal Law (Amendment) Act (6 of 2003)

<sup>8</sup>n2(12)

<sup>9</sup> Brett Shadle (n5).

<sup>10</sup>Daniel Psirmoi, 'Concern as 18 Schoolgirls Fall Pregnant,' *The Standard Digital* (Nairobi 11 June 2013) <<http://www.standardmedia.co.ke/lifestyle/article/2000085669/concern-as-18-schoolgirls-fall-pregnant>> accessed 8 March 2015

<sup>11</sup>Nikko Tanui, 'More drop out of school over pregnancy,' *Standard Digital* (Nairobi, 24 June 2013) [http://cached.newslookup.com/cached.php?ref\\_id=77&siteid=2065&id=2335442&t=1372144646](http://cached.newslookup.com/cached.php?ref_id=77&siteid=2065&id=2335442&t=1372144646) > accessed 8 March 2015

<sup>12</sup>Daniel Psirmoi, 'Ruto warns chiefs over teen pregnancies,' *The Standard Digital* (Nairobi 6 August 2013) <[www.standardmedia.co.ke/.../ruto-warns-chiefs-over-teen-pregnancies?...0](http://www.standardmedia.co.ke/.../ruto-warns-chiefs-over-teen-pregnancies?...0)> accessed 8 March 2015

raped in a Delhi bus and left for the dead.<sup>13</sup> The incident sparked demonstrations throughout the sub-continent and was roundly condemned the world over. It called for a rethinking of India's anti – sexual violence laws.<sup>14</sup> Brazil too had been capturing world headlines for gang rapes and other sexual offences even as the country prepared to host international sporting competitions.<sup>15</sup>

At the international level, efforts to combat sexual violence are evident especially in conflict situations.<sup>16</sup> In recent times, rape, defilement and other forms of child sexual abuse and violence have been recognized as war crimes.<sup>17</sup> The Rome Statute that deals with crimes against humanity classifies “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity as a crime against humanity when it is committed in a widespread or systematic way”.<sup>18</sup> Further, the UN Convention on Elimination of All forms of Discrimination against Women (CEDAW) isolates sexual violence and is of great importance to the global fight against sexual crimes.

This study interrogates the implementation of the Sexual Offences Act in light of its objectives.

## 1.1 STATEMENT OF THE PROBLEM

As already alluded to, Kenya has not fully realized the objective of minimizing sexual offences that the enactment of the SOA aimed to achieve. Despite the strict provisions of the Act and the severe punishments it prescribes for offenders, the occurrence of sexual offences is still high and continues to pose a challenge to law enforcers. In fact there has been an

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<sup>13</sup>Gardiner Harris, ‘Charges Filed Against 5 Over Rape in New Delhi,’ *The New York Times* (New Delhi, 3 January 2013) <[http://www.nytimes.com/2013/01/04/world/asia/murder-charges-filed-against-5-men-in-india-gang-rape.html?\\_r=0](http://www.nytimes.com/2013/01/04/world/asia/murder-charges-filed-against-5-men-in-india-gang-rape.html?_r=0)> accessed 8 March 2015.

<sup>14</sup>Indian Criminal Law (Amendment) Act No. 13 of 2013 (assented to on April 2, 2013 with a retroactive application from February 3, 2013 as a direct result of this incident. The Act brought about stiffer penalties for sexual offences including a minimum of twenty year and maximum of life imprisonment for gang rape and rapes occasioning grievous harm or death to the victim.)

<sup>15</sup>Simon Romero, ‘Public Rape Outrage Brazil, Testing Ideas of Image and class,’ *The New York Times* (Rio De Janeiro, 24 May 2013) <<http://www.nytimes.com/2013/05/25/world/americas/rapes-in-brazil-spur-class-and-gender-debate.html>> accessed 8 March 2015

<sup>16</sup>United Nations, ‘Sexual Violence and Armed Conflict: United Nations Response’ (1998) <<http://www.un.org/womenwatch/daw/public/cover.htm>> accessed 8 March 2015

<sup>17</sup>The first such recognition was in 1993 by the ICC during the trials of the Yugoslavia war crimes when it issued warrants of arrest recognizing widespread gang rape, massive torture and sexual enslavement of Muslim women in Foca by Bosnian Serb soldiers during the takeover of the city in April 1992. See more recently the UN SC/9364, United Nations Resolution No.1820 adopted by the 5916<sup>th</sup> meeting of the UN Security Council. This resolution observed that rape and other forms of sexual violence can not only be considered as war crimes, but also as crimes against humanity or a constitutive act with respect to genocide.

<sup>18</sup>Rome Statute, Article 7, 1 (g)

increase in the number of sexual offences cases over the years following the enactment of this Act<sup>19</sup>. The failure by the SOA to achieve its objective can be attributed to several challenges faced in its implementation. This study interrogates the implementation of the Sexual Offences Act and the extent to which its objectives are being met. It also examines the bottlenecks and or challenges that have impeded the efficacy of the Act.

## **1.2 JUSTIFICATION OF THE STUDY**

This study was motivated by the need for focused literature addressing challenges faced in combating sexual violence in Kenya. A lot has been written on sexual offences and statistics have been collected but little literature has specifically addressed the main challenge faced in the operationalization of the SOA since its enactment. The study is relevant given the reawakening created by the passage and annunciation of the Constitution of Kenya, 2010 that has brought with it a clamour for respect for human rights and dignity. This study was made all the more relevant by the rise in sexual offences despite the efforts geared at combating the violence.<sup>20</sup>

Reports, studies and analyses are replete with information indicative of the fact that cases of sexual offences in Kenya are on a downward spiral thanks to a multiplicity of factors among them: the enactment of SOA in 2006<sup>21</sup>; inclusion of more women into the bench; promulgation of the new Constitution which not only saw equality featuring majorly as a right but also provided many more elective and appointive opportunities for women to enable them influence key policy decisions; robust judicial reforms; vibrant media and activist campaigns countrywide as well as widespread public appreciation of the need to protect women, girls as well as vulnerable men from sexual predators. Whereas these achievements undoubtedly border on milestones, their net effects have, as evidence demonstrates, been only but little. Cases of abuse of minors, rape and defilement are still on the rise, albeit almost imperceptibly, despite the existence of this robust law with the genesis of this rather unfortunate occurrence being attributable to the weakness in the legal and institutional framework put in place by the law itself to ensure compliance. Utter and flagrant disobedience or misuse of the provisions of the same law (SOA) by law enforcement officers

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<sup>19</sup>SOA

<sup>20</sup> KCRC, 'Gender Based Violence in Kenya Report 2015'; The Report compiles other sub reports from various crime agencies and organs including the Kenya Police.

<sup>21</sup>Refer Table 1

has made it even more difficult to effectively implement and thus realize its aforesaid fundamental objectives.

The need to effectively address factors that flare or spur cases of sexual violence cannot be gainsaid. Women especially (the most vulnerable) are a fundamental pillar of any society. They are instrumental in social, political, economic and cultural metamorphosis and development of any society. Their welfare is by far a going concern. We have a law that on the face of it seems to sufficiently address cases of sexual offences. On the other hand, we have a reluctant and lacklustre policy implementation programme. There is therefore need to identify the challenges faced in the implementation of the SOA and set out recommendations on how these ought to be addressed.

### **1.3 STATEMENT OF OBJECTIVES**

The primary objective of this study was to interrogate the implementation and efficacy of the Sexual Offences Act, 2006 in Kenya.

The specific objectives of the study were:

1. To assess the efficacy and adequacy of the SOA in curbing sexual offences;
2. To examine the challenges faced in the implementation of the SOA.

### **1.4 RESEARCH QUESTIONS**

This study sought comprehensive responses to the following questions:

1. How effective has the Sexual Offences Act of 2006 been in meeting its objectives?
2. To what extent has the SOA been effective in successfully facilitating prosecution, conviction and sentencing of sexual offenders?
3. What factors have undermined the implementation of the Act?

### **1.5 THEORETICAL AND CONCEPTUAL FRAMEWORK**

This study is grounded within the concept of human rights and within theories of criminology and penology.

This study interrogates issues through the lens of the human rights approach that places responsibilities and obligations on the State protect, uphold and respect human rights including preventing the vulnerable members of the society.

This study is also grounded within theories of penology and criminology to analyse the imposition of punishments to offenders. This approach basically looks at delinquency and sexual offences in particular as social phenomena. Criminology broadly refers to the study of the process of enactment of laws, of violation of the law and of the response and reaction of the society to offending criminal acts.<sup>22</sup> Penology focuses on punishment as a response to criminal offending.

The theoretical and conceptual framework is discussed in detail in chapter two.

## **1.6 RESEARCH METHODOLOGY**

The research adopted both desk and field research.

### **1.6.1 Desk Research**

The desk research involved analysis of primary and secondary sources of data. These included international, domestic and regional legal instruments, reports, books and journals.

The researcher had access to material and data from Constitutional as well as statutory bodies and specialized institutions such as the national Human Rights and Gender Commission, Federation of Women Layers (FIDA), Human Rights Watch (HRW), (ICJ), National Crimes Research Centre and relevant government ministries. Registries of the police were also visited to interview the officers. Courts were also visited to interview magistrates and judicial officers directly involved in sexual offences cases.

### **1.6.2 Field Research**

Field work was carried out to provide data that sheds light on the implementation of the SOA. The findings from the field research were then incorporated throughout the research project rather than in an exclusive chapter setting out findings. With this objective for the fieldwork, the respondents therefore selected were mainly key informants.

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<sup>22</sup>Mushanga (n 13) 1.



The research generally expected the respondents to provide, among others, the following information:

- i) Incidences of sexual violations that are regularly reported to the law enforcement agencies.
- ii) The effects of inefficiencies of the enforcement officers to follow up on some of the reported cases and reasons, if any, for such reluctance.
- iii) Their awareness as to the offences created, defined and punished by the SOA and their willingness to pursue justice in recognition of the same.

#### **a) Ethical Issues**

This research intended to engage in ongoing reflectivity while responding sensitively to the needs of individual interviewees. Below are some of the ethical issues that impacted the study as well as an outline of how this study handled them.

##### **i) Confidentiality and Privacy**

Where necessary, the study uses pseudonyms or initials or change other identifying details to conceal the identity of the participants. It only identifies participants who did not wish to remain anonymous. The study however informed participants of its inability to guarantee complete confidentiality, especially with narratives and life histories, even if pseudonyms were used. It also promptly informed the participants of the boundaries of confidentiality; that is, what could not be reasonably held as confidential.

##### **ii) Informed Consent**

The study also provided detailed information to participants about the nature of the research and the need to gain consent. To this end, the participants were from the outset appraised of the purpose and scope of the study as well as the types of questions likely to be asked.

#### **b) Scope of the study**

Administratively, Kenya is a relatively large country comprising forty-seven (47) administrative units referred to as counties. These counties are incredibly diverse not only in terms of economic activities but also in cultural and ethnic extracts. Due to the undeniably significant influence social and cultural practices have on matters sexual offending, it was important for this study to extend its reach to ensure the findings are as representative as possible. However, extensive coverage would have posed a number of foreseeable

operational constraints including time, financial and human resources. It would not have been humanly possible to conduct a countrywide research in less than two months with limited financial resources. Secondly, conducting such a research would be extremely unnecessary since such raw data are periodically gathered by various non-governmental organizations as well as state law agencies. The most effective and financially-sound approach was to base the study around metropolis and specific areas where there is a convergence of individuals of diverse backgrounds and the nature of sexual offences take various dimensions reflective of the diversity. Secondly, it was prudent to select a few cultures that to date seem to persistently hold strong cultural views of matters sexuality and sexual offending. It is on the premise of these considerations that this study elected to limit its scope to Nairobi, Baringo and Nakuru counties. While Nairobi provided an excellent platform for the study due to the multi-ethnic and multicultural nature of its population, Nakuru and in particular, Naivasha Sub-county offered a strong cultural resource with community elders and leaders very vocal on cultural nuance of sexual offending. Naivasha also provided an incredibly experienced and competent pool of healthcare and legal professionals intimately familiar with sexual offending.

### **c) Sampling**

The fundamental objective of this study was to interrogate the efficacy and adequacy of the Sexual Offences Act in curbing sexual offending. Accordingly, the study sought to specifically interrogate the efficiency of the legal, policy and institutional framework established under the Act to realize its fundamental objectives; to appraise the sufficiency and adequacy of the SOA in dealing with the rising complexities and emerging realities and evolutions in cases of sexual offending; and finally, to propose reasonable measures that can be adopted to improve the ability of the county's legal, policy, institutional and cultural framework to effectively combat the crimes of sexual offending. It necessarily follows that the focus of fieldwork data collection was therefore on persons critical to implementation of the SOA. Key respondents interviewed by this study had extensive exposure to defilement cases in Kabarnet, Naivasha and Nairobi law Courts. The study focused victims of Defilement, Magistrates, Advocates and Prosecutors, Police Officers, a Doctors, a Nurse and a Community elders. The study considered Naivasha Town and law courts located in the area due to the rise in the number of rape and defilement cases reported ostensibly due to an ever-rising high population contributed to by the influx of immigrants looking for work at the many flower farms located in that region. The study also settled on Nairobi and Thika Law

courts because the regions have courts was specifically and specially designed to hear cases of sexual offending. Thika law Courts had been made child friendly with pictures of cartoons colourfully done to suit children. The court also had a witness box which provided the much-needed comfort for any survivor who would otherwise have challenges testifying in the presence of the accused. The study also interviewed a victim and actors within the justice system at Naivasha, Thika and Kabarnet law Courts.

The interaction with these respondents was facilitated through in-depth open-ended interviews as well as participatory observation. The use of open-ended interviews was informed by the need for the researcher to establish a deep connection with the respondents to ensure the responses elicited by the carefully chosen questions were as honest, comprehensive and detailed as possible leaving very little room for selection bias. The questions were as varied as the respondents themselves. For instance, a police officer attached to Kilimani Police Station gender desk was specifically asked how long she has worked at the desk, her first impression of the desk's operating environment when she first reported, the percentage (approximate) of the number of defilement case reported at the desk, the challenges she faced in discharging her duties as well as the changes she would like to see made to improve the fight against defilement and other sexual offences.

#### **d) Profile of the Respondents**

In an attempt at getting extensive and exhaustive answers to the research questions as well as effectively test its hypothesis, this study interviewed the following persons:

***First Respondent-*** A Senior Operations officer at Nairobi Women's Hospital who oversees operations of the Hospital's Gender and Violence Recovery Centre (GVRC). He has worked at the hospital in various capacities and has been the head of operations for nearly three years. He is responsible for all administrative functions, including operations, management, process improvement, identifying various compliance issues and strategic planning and development at the GVRC.

***Second Respondent-***A senior gynaecologist at the Kenyatta National Hospital. She is a doctor of eight years standing and five of which years she has been closely working with victims of gender based sexual violence as a volunteer consultant at the Kenyatta Hospital Gender and Violence Recovery Centre.

**Third Respondent**-A nurse of ten years standing. She has over five-years' experience working with victims of sexual violence including children at the Nairobi Women's Hospital.

**Fourth Respondent**-A senior police officer of the rank of Chief Inspector with many years of experience dealing with cases and incidences of defilement and other types of sexual offending and has been involved in numerous studies and campaigns on and against sexual violence. At the time of the interview, she was based at the Parklands Police Station.

**Fifth Respondent**-A police officer with the National Police Service holding the rank of Inspector based at the Kilimani Police Station Gender Desk. She has vast experience with cases of defilement and rape and has participated in several workshops, seminars and boot-camps on Sexual Violence including a seminar held by the International Association for Women in Radio and Television (IAWRT) in collaboration with the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the UN Joint Programme on Gender Equality and Women Empowerment in Kenya.

**Sixth Respondent**-An advocate of twelve (12) years standing with over six years' experience prosecuting cases of defilement and rape as an Assistant Director of Prosecutions at the Office of the Director of Public Prosecutions.

**Seventh Respondent**-A Chief Magistrate with vast experience handling and overseeing numerous cases of child sexual offending having worked in several and diverse judicial stations including Kajiado, Kibera, Makadara, Milimani and Kiambu Law Courts in various capacities.

**Eighth Respondent**-An Advocate of 25 years standing, a council member of the Law Society of Kenya and a member of the Federation of Women Lawyers (FIDA) actively involved in community mobilization against gender-based violence and has participated in numerous initiatives aimed at alleviating suffering of women as a marginalized group. She was instrumental not only in the drafting of the Sexual Offences Act but also in the inclusion of gender equality and equity principles in the Constitution.

***Ninth Respondent***-A 25-year old entrepreneur and a survivor of intrafamilial child sex abuse having been abused by her step father when she was fourteen years old and about to join high school.

***Tenth Respondent***- A senior researcher with the National Crime Research Centre. As part of the research team of the governmental agency, his mandate, one he has dutifully discharged for nearly half a decade, is to ensure the organization meets its key objective which is to carry out research into the causes of crime, its prevention and to disseminate the research findings and recommendations to Government Agencies concerned with the administration of criminal justice as well as the public. To a large extent, he has an incredibly insightful and intimate understanding of the trend of crime in the country and in particular, those relating to sexual offending.

***Eleventh Respondent***-A 75-year old community Elder of the Riwo village Njemp Community, Baringo County, Kabarnet Sub-County with vast experience handling disputes involving rape and intrafamilial child sexual abuse long before the advent of the SOA. He is also very aware of the implications of the SOA on community-based mediation and reconciliation processes in matters sexual offending.

***Twelfth Respondent***-A Community Elder from Inkokirding village in Kajiado County with expansive experience mediating cases and incidences of child sexual abuse prior to the SOA.

***Thirteenth Respondent***-A senior representative of International Justice Mission (IJM), a prominent women human rights organization specifically focused on gender-based violence and sexual abuse against children.

### **Focus Group Interviews**

I conducted focused group interviews with four Police Officers from Kihoto Police station which is a small sub base at the Naivasha area. The said Police station is in charge of a small slum village called Kihoto in Naivasha area whose inhabitants are mostly flower farm workers who have migrated from various parts of the country and settle there. I also talked to Five Police Officers based at the Naivasha Police station. The work environment of the said officers is basically the same and hence they face the almost the same challenges.

## 1.7 LITERATURE REVIEW

### 1.7.1 Efficacy of the SOA In Curbing Sexual Offences

According to the SOA Report<sup>23</sup> prepared by the Task Force on Implementation of the Sexual Offences Act (TFSOA)<sup>24</sup> a myriad of challenges faced and continue to face implementation of the SOA. A keen interaction with the report clearly shows it identifies and groups these challenges into two broad categories namely, institutional and legislative. For instance, it challenges into two broad categories namely, institutional and legislative. For instance, it contends that despite being an undoubtedly future-looking and a revolutionary law, the SOA is largely a product of political compromise and as such is awash with items of controversy. For instance, it singles out the “false allegation” provision in Section 38 (repealed by The Statute Law (Miscellaneous Amendments) Act, 2013) as a as the single most concerning provision, at least to gender rights activists. This infamous provision provided that a victim or witness found to have knowingly provided false testimony could receive the same sentence the accused would have received if found guilty. Prior to the repeal, many women and child rights activists proffered strong arguments that the provision discouraged victims from reporting such offences ostensibly due to the prospect of such victims not only having to deal to deal with the likelihood of losing a case but also facing prosecution for ‘false testimony’ let alone the psychological implications of the offending behaviour on them. This feared “chilling effect” is what decidedly made Section 38 of the SOA an appropriate target for repeal.

Further, the report contends that whereas significant advancements has been made towards realization of the Act’s endpoints, both public and private entities directly and indirectly involved are still learning how to deploy its intents and provisions effectively. Responses by the various sectors and institutions espoused by the law are yet to be fully aligned with its provisions. This is despite the law laying emphasis on collection and admission of forensic evidence into sex crime cases and prescribing for creation of a set of databanks for the registration of convicted sexual offenders and their DNA. Moreover, it provides for psychosocial counselling for survivors and, where necessary, a rehabilitative counselling for

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<sup>23</sup>TFSOA, ‘*Sexual Offences Act Implementation Workshop 25-27 May 2011*,’ summary Report.

<sup>24</sup>Established in March 2017, the fundamental objective of the Task Force on Implementation of the Sexual Offences Act (TFSOA) to oversee the implementation of Sexual Offences Act of 2006. TFSOA’s responsibilities as outlined in its terms of reference included, among others: to develop and oversee the intersectoral implementation and administration of the SOA; ensure consistency between the Act and other existing laws and policies; and to oversee all research, public education, and sensitization campaigns necessary to fulfil its mandate and promote the objectives of the SOA.

the offender. Most of these are far from being achieved especially the rehabilitation of the offender as the bench seems to prefer the retributive and punitive route in meting out sentences.

This research looks keenly into the challenges faced in the implementation of these recommendations with the view to understanding the surrounding circumstances and proposes ways of overcoming those challenges. It notes however that Section 38 of the SOA was repealed in 2013 in line with TFSOA recommendations.

Njoki S. Ndungu's<sup>25</sup> paper<sup>26</sup> presented in New Delhi is indeed one of the most instructive situational analysis that this study considered. In her rather detailed discussion, Ndung'u looks at the history that circumscribed the enactment of the Sexual Offences Act, the challenges, institution or otherwise, that its implementation has faced over the years and makes recommendations as to possible solutions to those challenges. She begins by analysing the global trends in the past twenty years that has seen various governments make purposive efforts to expand representation of women both in law and policy formulation. She contends that these measures are guided by the very close association between discrimination against women generally and its constitutive elements including GBV and other gross infringement of rights, and poor representation within the spheres of political influence necessary to effectively address these injustices through a comprehensive legislative framework. Ndung'u further argues that presently, many states have incorporated affirmative action in their Constitutions and policy frameworks to ensure the plight of women can be actively addressed through legislation. She notes with concern however, that Kenya is sadly not among these states. In spite of modernization and robustness of its politics and economy, the country operates one of the most male-dominated parliaments in Africa. This situation has not only frustrated reform efforts but has also created an ecosystem unfriendly to any advocacy on matters of rights of women and children. She quotes rejection of the Marriage Bill of 2011 (as it then was, it has now been passed into law) and the discriminatory clauses that over the

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<sup>25</sup>Njoki Ndung'u is currently a Supreme Court Justice in Kenya. She previously was a nominated Member of Parliament and is credited for being the mover of the Sexual Offences Act of 2006. She brought together several policy makers in crafting the SOA as it is. She has previously confessed to how daunting and challenging striking a political accommodation to have the said law enacted was. She faced a myriad of challenges including the unfortunate situation that Kenya Parliament, as it then was, was almost a male-only club and most of them were reluctant to endorse such a considerably 'harsh' legislation due to the rather disturbing perception that women could be the only victims of sexual offences.

<sup>26</sup>Ndung'u Njoki, 'Preventing and Responding to Violence Against Women and Girls: from Legislation to Effective Law Enforcement; *Kenyan Experience*,' Regional Seminar for Asian Parliaments, New Delhi 15-17 September 2011.

years defined the Law of Succession. Ndung'u also gives a detailed account of the challenges she faced as a mover of the SOA and her frustration with the male chauvinism that towered over the deliberations on the Bill as it then was.

Ndung'u says one of the most far-reaching and by far the most outstanding gains of the SOA is that it created an integral regulatory apparatus for a national substructure for application as well as a multi-sectoral set-up to confront the overlapping concerns affecting cases on sexual violence. She singles out Section 47 which obligates the Ministries under whose docket the responsibility of police, provincial administration, prisons, health, education, justice, social services and prosecutions lie to effectively cooperate and coordinate to ensure all services under the law are adequately delivered. She intimates that though TFSO, in line with its mandate developed a curriculum for the training of the police, a lot still remain undone, and in particular, the training of medical staff to protect and preserve the chain of evidence and also sensitization of the public who remain largely unaware of the law that was primarily intended to serve them. She further posits that SOA runs the risk of becoming a white elephant of laws if the other pieces of legislation such as the Employment Act and the Public Officer Ethics Act, passed to complement its efforts are not implemented as well. She singles out witness protection, publicly funded medical treatment and drafting of special rules for the judicial and prosecutorial process as the major challenges that need to be immediately addressed.

This study lauds Ndung'u's identification of the real challenges facing implementation of the SOA as instructive and contends, albeit sadly, that very little has changed since 2011 when she identified the said challenges. This research did not only endeavour to establish the challenges to the implementation of the SOA as it were, it also sought to understand why there has been slow implementation of the recommendations put forward by the lobbyists and industry players alike. It proposes solutions as to the way forward based on that understanding.

### **1.7.2 Challenges Facing Implementation of the SOA**

Dr. Ruth Aura's<sup>27</sup> situational analysis of the challenges facing implementation of the laws against sexual gender-based violence (SGBV) especially the SOA. She contends that violence

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<sup>27</sup>Aura Ruth, 'Situational Analysis and Legal Framework on Sexual and Gender-Based Violence in Kenya: Challenges and Opportunities.



against women is undeniably one of the most ubiquitous and socially condoned of human rights abuse globally. She gives an in-depth explanation of the effects of sexual violations especially against women. In as much as her study is primarily focused on sexual gender based violence against women, her analysis is relevant to this research as it to a large extent touches on the abilities of the SOA to effectively prevent escalation of cases of sexual offences against women. She quips that the impact of sexual violence against women is almost irreversibly ruinous. The victims of such abuses oftentimes undergo life-long draining physical health, emotional and psychological challenges and oftentimes vulnerable to acquiring HIV and other sexually transmitted diseases. This effectively makes them some of the most intensive users of the medical and healthcare system. Further, the cost to victims, their families and their entire ecosystem is a monumental handicap to eradication of poverty, attainment of gender equity and equality as well as facilitation of a calm changeover following conflict. This, together with the health complications ordinarily associated with the violations, negatively affect a government's ability to adequately develop and sustain a stable, productive society, or rebuild a country following conflict.

Like TFSOA, Aura contends that effective and sufficient protection can only be achieved by preventing sexual violence against women, recognizing dangers and responding to survivors, using a coordinated, multi-sectoral approach. She problematizes the current operating regime and adds that it is brimming with challenges and opportunities almost in equal measures, and which opportunities and challenges she quips should be carefully appraised when formulating appropriate responses. She posits that while the existing legal and policy framework in Kenya prescribe an apparatus for confronting SGBV and related vices, the level to which they respond to and address the plight of the survivors is admittedly contentious. The framework lays more emphasis on making the offenders accountable for their egregious conduct and less on the need to alleviate the conditions of the victims. Ironically, the survivor, intended to be protected by the law largely remains a stranger to the criminal justice system primarily due to the long-held perception that such crime, as are all crimes, is committed against the state and not against the victim as an individual. Ruth further asserts that the state oftentimes unknowingly commits or condones violations of women either directly or indirectly particularly in demonstrating preference of traditions and norms over the respect of fundamental freedoms and rights. She contends that Kenya is particularly blameworthy of having a criminal justice system that is replete with incidences of violation of women liberties. Nonetheless, *C.K. (A Child) Through Ripples International As Her Guardian And*

*Next Friend) & 11 Others v. Commissioner Of Police/Inspector General Of The National Police Service & 3 Others*<sup>28</sup> was rather a radical departure from the norm. The High Court made a finding that the failure on the part of the police and the larger law enforcement mechanism to effectively apply Section 8 of the Sexual Offences Act, 2006 constituted “a violation of the rights of the petitioners to equal protection and benefit of the law contrary to Article 27(1) of the Constitution of Kenya, 2010.” The court noted that in failing to strictly enforce prevailing defilement laws, the police fuelled the growth of a backward culture of impunity and tolerance for egregious sexual acts targeting children and women. Aura’s article is centred around this decision.

In order to justify her study, Aura looks carefully and keenly into the forms, prevalence, causes as well as the impact of SGBV in Kenya within the lenses of the SOA. She explains that the causes of sexual violence are numerous, multiplex and varied depending on the individual incidence. She notes further that generally, the traditional attitudes towards women globally help immortalize the abuse. Stereotypical societal roles and functions in which women are foundationally deemed inferior to men immensely limit a woman’s ability to adequately utilize or exert options that would otherwise empower her stop the abuse. She quips that a study carried out by Odhiambo establishes that the causes of sexual violence against women are extremely varied and take equality varied dimensions including religious, economic, cultural, political and social.<sup>29</sup> She quotes Rhonda Capelon who argues that abuse of women is not only systematic but also structural—a mechanism of patriarchal control of women that is founded on perceived male superiority and dominance of the male in almost every aspects of life and the corresponding reliance of women on them.<sup>30</sup> She adds that the causes of sexual offences and violence against women are predominantly legal and socio-cultural.<sup>31</sup>

Whereas this study hails Aura’s study as thorough and detailed, it takes exception with the wide sweeping nature with which she discusses the same. She covers sexual offences as a singular aspect of violence against women. Further, her study due to its wide coverage assumes sexual violence and offences only affect women only as direct victims. This study

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<sup>28</sup> Petition 8 of 2012 [2013] eKLR.

<sup>29</sup> Odhiambo R.A.A (2000), *Intimate terror: A case study of the law versus lived realities of battered wives among the Luo Community living in Nakuru, Kenya*. PGD Thesis: University of Zimbabwe 16.

<sup>30</sup> R. Capelon ‘Intimate terror: Understanding Domestic Violence as Torture’ in R.J. Cook (ed) *Human Rights of Women: National and International Perspectives* (1994) 20.

<sup>31</sup> K. Kibwana, *Law and the Status of Women in Kenya* (1996) 160

sought to understand challenges facing implementation of the SOA in singleness and isolation with the aim of crafting or devising lasting solutions. It also acknowledged the fact that whereas women stand to be the most vulnerable group of persons targeted for protection under the Act, other groups of individuals considered equally vulnerable are also almost equally protected under the same regime.

According to Ann Waithaka<sup>32</sup> the most important question is: Is Kenya's criminal justice system properly equipped to shield women and children from sexual violence? The answer, she contends lies in a strict analysis of the effectiveness and purposefulness of the SOA from a practical perspective and in consideration of the prevailing challenges and circumstances. She argues that SOA has in the recent past and even now is still extolled both as a revolutionary and evolutionally legal policy that protects everybody from dastardly sexual acts. Waithaka notes the law broadened the explanation of rape to align with jurisprudence that is unrolling and expanding on the global platform and introduces new crimes otherwise absent from the previous legal framework. Her paper examines the challenges faced by women seeking recompense within the criminal justice system as well as recommending measures to effectively rebuff them and emphasizes the importance of the rights to development, peace and justice. She not only looks at the glaring inadequacies within the national legal framework but also takes a situational analysis of the practical problems faced while accessing protection under the SOA. In respect of the latter she lists high cost of access to justice, ignorance and the risk of falling victim to dishonest and unprincipled police officers likely to exploit their timidity as some of the most daunting challenges faced by sexual offences victims. She says it is regrettable that whereas Section 24 of SOA strongly precludes police officers seeking sexual favours from individuals who reach out for help, very little has been done or put in place to ensure strict compliance. It is not uncommon for female victims of sexual violence who seek refuge at the police station to get sexually attacked; harassed or forced to offer bribes in order to access basic services. She further contends that at the very least, a female victim of sexual abuse risks victimization under section 38 of the SOA (now repealed) which criminalized the offence of making false unfounded allegations. Many police investigators and prosecutors did not hide their readiness to exploit and invoke the repealed provision to charge complainants in the event he alleged offenders were not found not guilty or not put to their defence by the trial magistrates.

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<sup>32</sup> Ann Waithaka, 'Comment and Analysis: Enforcement of the Sexual Offences Act in Kenya' 2008-08-05, Issue 392

Waithaka also singles out some of the provisions in SOA she considers ‘white-elephant’. She for instance, gives example of section 39 of SOA, which obligates the Registrar of the High Court to maintain an entry and a database of convicted sexual offenders. Additionally, Section 47 authorizes the relevant state secretary to formulate regulations on what is to comprise the database. She is uncertain however, whether such guidelines have been conceived thus far.

As already noted, studies and research conducted show to a larger extent a uniformity and striking similarity in identification of challenges facing implementation of the SOA. This boils down even to the recommendations made by sector players in respect thereof. Rather than just identify and enumerate even more challenges facing implementation of the SOA and put forward corrective measures in recommendation, this goes as far as looking into the progress made so far by the relevant players in implementing the aforementioned recommendations and critically analyses the factors slowing speedy action. It also identifies contemporary challenges facing effective application of the Act and make recommendations in that respect as well.

## **1.8 LIMITATIONS OF THE STUDY**

This study would not have been feasible without field research, and would have lacked any significant explanatory power if it were only predicated on secondary literature. To be in the field furthermore opened new perspectives and created new channels for acquiring information.

In carrying out the research the following challenges were experienced.

Firstly, considering a research or survey on sexual offences is strikingly similar to that on stigmatizing behaviors such drug and substance abuse, the challenge of unavoidable respondent bias was encountered. Some respondents understated or overstated the effects of the same, depending on their attitude towards and experience with cases of sexual offences. To effectively deal with this challenge, the research sought verifications for most of the responses provided especially where such instances had been recorded. For instance, interviews of victims were followed by scrutiny of the relevant police reports, court files and interviews with respective magistrates and court officials.

Secondly, the research also faced the limitation or challenge of respondent self-selection bias, that is, the officials and members of public involved in or who have benefited either directly or indirectly from the injustices (such as the police who solicit bribes) failed or declined to respond. This challenge was resolved through the promise of confidentiality to such interviewees. The study gained their confidence and trust by promising to use pseudonyms or initials or change other identifying details to conceal their identity as participants. The study however informed participants of its inability to guarantee anonymity, particularly with narratives and backgrounds, even where pseudonyms were used. It also promptly informed the participants of the limits of confidentiality; that is, what could not be reasonably held as confidential. Additionally, the study provided detailed information to participants on the background of the study and the purpose of the research and the need for their consent, written or otherwise. To this end, the participants were from the very beginning appraised of the scope of the study as well as the kinds of questions likely to be asked.

Thirdly, considering the SOA is less prominent unlike the Constitution, most members of the public were not acquainted with its provisions and most appeared utterly misled or misinformed. This challenge was to a little extent resolved through general familiarization of the participants with the general provisions of the SOA. The study also provided clarifications in instances where such participants seemed to have been misled. It was very interesting to see many participants appreciate the chances to get clarifications to their concerns and misconceptions.

## **1.9 RESEARCH HYPOTHESES**

This research was premised on the following assumptions:

1. Full implementation of the SOA is necessary for success in the fight against sexual offences in Kenya.
2. Thorough prosecution of sexual offences is key to realization of the goals of the SOA.
3. Shortcomings in the criminal justice system in Kenya hinder thorough prosecution of sexual offences.

## **1.10 BROAD CHAPTER BREAK DOWN**

Chapter Two sets out the theories and the concepts which underpin the research.

The salient features and provisions of the Sexual Offences Act, 2006 are discussed in Chapter Three. The Objective of the discussion will be to lay basis for the study of the challenges faced in implementing the Act which forms the crux of the study. This chapter also critically analyzes the policy, legal and practical challenges faced in implementation of the Sexual Offences Act, 2006.

Chapter Four concludes the study by way of concise summary tying up the hypothesis with the findings. It also outlines the important lessons that can be learnt from the comparative case studies to realize full implementation of the Sexual Offences Act, 2006 in Kenya in a manner that would deal decisively with sexual offenders while at the same time aiding and assisting victims of sexual offences with the whole objective of reducing the occurrence rate of sexual offences.

## **CHAPTER 2:**

### **CONCEPTUAL AND THEORETICAL FRAMEWORK**

#### **2.1. Introduction**

This chapter sets out the theories and concepts which underpin this research. It seeks to create an in-depth understanding of the nexus between sexual offences as crimes and the psychology of the offenders. It interrogates the efficacy and relevance of the Sexual Offences Act in curbing sexual offences by first seeking to understand the wills, thoughts, intentions and reactions of sexual offenders. It believes prescription of punishments for offences without due consideration and deep understanding of the underlying etiology is in itself not sufficient to adequately curb future commissions.

The etiology of sexual offending by adults implies the origination of dastardly sexual behaviour, as well as the avenues closely linked with the behaviour's onset, growth and sustenance. Whereas questions on sexual offending have lingered for years without number, they remain extremely material and pertinent today ostensibly due the fact that definitive answers are yet to be found. While extensive study has produced incredible foundational insights on the etiology of sexual offending, the general perception of the origins of aggressive and offensive sexual behaviour conceivably remains largely elementary.<sup>33</sup> This chapter examines theories on the causes of sexual offending for a number of reasons:

Firstly, establishment of potent prevention or forestalment strategies is conditional on logical and well-founded understanding of the underlying causes of sexual offending and victimization. In the absence of dependable etiological comprehension, prevention efforts are likely to remain moot and at best, inefficient.<sup>34</sup>

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<sup>33</sup> Susan Faupel, 'Etiology of Adult Sexual Offending' (2005) NCJRS 01.

<sup>34</sup> Ibid.

Secondly, the understanding of origination of sexual offending can provide invaluable insights into the attributes of variegated sexually offending behaviours and the probability that they will continue or carry on over time.<sup>35</sup>

Thirdly, mastery of the origination of sexual offending can offer invaluable guidance to rehabilitators and enable them establish more efficacious tailor-made treatment measures. Instead laying emphasis on indicators and manifestations or using a generic approach, rehabilitation efforts can target the specific repressed causes to offending applicable to an individual offender.<sup>36</sup>

Lastly, etiological knowledge can pervade decision-making at the policy level, notwithstanding the focus. In a nutshell, the cognizance of the origination of sexual offending plays a crucial role in the design, development and deployment of workable public safety strategies.<sup>37</sup>

Additionally, in-depth familiarity with the contributory behavioural patterns exhibited by the offenders and the understanding of the environment that influence such behaviours is essential in any juridical system that embraces an indeterminate sentencing structure focused more on offender reform as opposed retributive punishments. To this end, this chapter carefully interrogates the SOA, the sentencing guidelines therein, and the extent to which sentencing discretion impacts effective realization of the goals of the Act. It essentially looks at how the psychology of the offenders is nuanced by their social situation and how effective the SOA is in understanding and effectively dealing with these dynamics from a sentencing perspective.

Several theories have been advanced to explain the etiology of adult sexual offending. They however can be broadly classified into two major categories namely: The Single-factor theories and the Multifactor theories. Whereas most of these theories offer ingenious insights into the psychology of sexual offenders generally, just a few have specific resonance and relevance to the local set up. Thus, this chapter discusses only those it believes to be distinctively relevant to the local Kenyan context and especially the ones that help this research gauge the efficacy and adequacy of the provisions in the Sexual Offences Act, 2006

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<sup>35</sup> Faupel(n1).

<sup>36</sup> Ibid.

<sup>37</sup> Faupel (n1).



in adequately dealing with the sexual offences. It has been established that effective repression of any criminal activity is heavily contingent upon successful understanding of supervening circumstances or factors with the view to reducing to a minimum an offender's future exposure to the same and thus the likelihood of a repeat offence. Remedies prescribed in law should thus advisably be less retributive and more corrective to achieve more meaningful and less-diminutive outcomes.

## **2.2. Implication of Sentencing Structure on Effectiveness of the Law**

Effective realization of the goals of any criminal justice system is arguably contingent on the sentencing modules adopted by the underlying laws or supporting secondary sentencing guidelines put in place by the juridical body. It is thus no coincidence that jurisdictions that exhibit lower crime rates or offender delinquency tend to lean more towards restorative justice or offender reform and as such offer much wider sentencing discretion to judicial officers. This is ostensibly due to the belief that such officers are capable of exercising this power judiciously. Conversely, jurisdictions synonymous with high crime rates subconsciously tend to lean more towards determinate sentencing with retribution and deterrence as the key overriding and overarching objectives. This effectively leaves little room for judicial officers to exercise discretion.

The fundamental difference between indeterminate and determinate sentencing structures lies in the objectives and goals of the criminal justice system. The principle behind undefined sentences is the possibility that the corrective facilities will reform and reintegrate some offenders and is premised upon the understanding that individuals depict varied responses to punishment and that no single predefined punishment fits all as circumstances surrounding crime commission always differ, similarity of the offences notwithstanding. Prison officials and judicial officers more often than not like undefined sentencing due the fact that higher likelihood of earlier release incentivises prisoners to behave while under incarceration.<sup>38</sup> However, the primary undoing of the indeterminate sentencing lies in the advantage itself; it tends to institutionalize organized chaos as evidenced by clear disparities in the sentences imposed in similar offences.<sup>39</sup> Migai<sup>40</sup> and Kinyanjui<sup>41</sup> argue that these disparities admittedly

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<sup>38</sup>Janet Portman, 'Indeterminate vs Determinate Prison Sentences Explained' (2016) CDL <<http://www.criminaldefenselawyer.com/determinate-sentences.cfm#>> accessed 20 September 2016.

<sup>39</sup> Sarah Kinyanjui M. and Migai Akech, 'Towards Structured Sentencing in Kenya: A Case for Reform' (2016) 9(1) AJCJS <[https://www.umes.edu/cms300uploadedFiles/AJCJS/Volume\\_9\\_Issue\\_1/VOL9.%20KINYANJUI%20%20FI%20NAL.pdf](https://www.umes.edu/cms300uploadedFiles/AJCJS/Volume_9_Issue_1/VOL9.%20KINYANJUI%20%20FI%20NAL.pdf)> accessed 22 September 2016.

create a lot of doubt on the sentencing process and raise concerns as to whether the fundamental objectives of the criminal justice system are indeed realized.<sup>42</sup>

Generally considered as a “tough on crime” system due to its mandatory minimum sentences, determinate or structured sentencing on the other hand tends to leave very little latitude to judicial officers in as far determination of punishments in respect of offences is concerned. The result is thus a relatively more uniform and predictable criminal justice system. It is fundamentally premised upon the belief and understanding that the efficacy of any criminal justice system is to a great degree determinable on the footing of the results of its sentencing process, with predictability and uniformity often taking precedence. However, one principal argument against determinate or structured sentencing is that it tends to undermine judicial discretion—a key tenet of the justice system.

It is arguable, on the balance of probabilities, that a structured approach to sentencing has a higher likelihood of eliminating both perceived and unperceived individual bias on the part of judicial officers especially in sensitive offences such as sexual offences. Migai and Kinyanjui argue that whereas a structured approach to sentencing tends reduce the discretionary powers of judicial officers, the compromise is a more predictable, uniform, repeatable process especially if the same is effectively implemented through an effective and regularly updated sentencing guideline that takes into consideration most if not all factors (both social and psychological) surrounding a crime. Both assert that such a structure should be viewed more as guideline that helps judicial officers make more sound and dependable judgments and not as an impediment to effective administration of justice.<sup>43</sup>

The Sexual Offences Act embraces a more or less hybrid sentencing system. It adopts a determinate approach by prescribing both minimum and maximum sentences only with respect to certain offences while providing only the maximum sentence with respect to majority others in the process endowing judicial officers with vast and abusable discretionary powers. For instance, (Migai and Kinyanjui argue), where only the maximum sentence of life

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<sup>40</sup> Migai Akech is a Lecturer at the University of Nairobi School of Law and an advocate of the High Court of Kenya of several years standing. He has authored a number of publications covering a wide array of topical issues.

<sup>41</sup> Sarah Kinyanjui is a Senior Lecturer at the University of Nairobi, School of Law and presently serves as an Associate Dean.

<sup>42</sup> Kinyanjui and Migai (n7).

<sup>43</sup> Kinyanjui and Migai (n7).

imprisonment is provided, the judicial officer is decidedly within his/her legal mandate for any sentence meted out.<sup>44</sup> While appreciating that sentencing is a matter of discretion, Justice Makhandia in *Fatuma Hassan Salo v Republic*<sup>45</sup> aptly summarized that this discretion is not exercised arbitrarily but judicially and must at all times be guided by evidence and sound legal principles. He stated further that effective and judicious exercise of such discretionary powers must consider all relevant factors and disallow all extraneous or irrelevant ones. Research conducted by Migai and Kinyanjui as well as the Taskforce on Sentencing<sup>46</sup> however established that while judicial officers often take into account the fundamental principles and guidelines in the exercise of their judicial powers, such intervention was demonstrably inadequate in light of the wide sweeping discretionary powers.<sup>47</sup>

Effective exercise of discretionary powers by judicial officers is a function fully underpinned by the Constitution provided such power is exercised in strict commitment to national values and principles of good governance, integrity, transparency and accountability.<sup>48</sup> Further, the Penal Code<sup>49</sup> and the probation law<sup>50</sup> direct judicial officers to consider the context of the offences and the individuality of the offender during sentencing. Some of these factors and circumstances include: age, personality, precursors, family background, psychological predisposition of the offender, the nature of the offence and any mitigative or exonerating situations surrounding the offending. It is thus clear that the drafters of these laws found it necessary to consider all factors antecedent to a crime in effectively determining the appropriate sentence. This necessitates a critical understanding of the intention and objectives of the criminal law in question.

It is therefore critical to interrogate the theories that tend to explain the physical, social, economic and psychological factors that render certain persons more vulnerable to commission of offences (and in particular, sexual offences) than the average person. As indicated before, these theories can be broadly classified into two broad categories namely: single and multifactor theories.

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<sup>44</sup> Ibid.

<sup>45</sup> Criminal Appeal 429 of 2006 [2006]CA eKLR.

<sup>46</sup> Judiciary. (2016a). Report of the judicial taskforce on sentencing. Nairobi: Judiciary.

<sup>47</sup> Kinyanjui and Migai (n11)

<sup>48</sup> The Constitution of Kenya 2010, Art. 10(1).

<sup>49</sup> Penal Code 1958, s.35.

<sup>50</sup> Probation Offenders Act 1943, s.4.

### 2.3. Single-factor Theories of Sexual Offending Behaviour

Single factor theories of sexual offences tend to narrow down to single isolated components, elements or characteristics or factors that have a higher likelihood of driving any vulnerable offender to commit an offence. This research did not delve deep into the complexities of every theory but rather focused on their general relevance to the legislative process as well as effective management of offenders. Single-factor theories can be further broadly classified into the following sub-categories:

#### **Biological Theories.**

Biological theories of sexual offending have been premised on anomalies in the brain structure, hormonal imbalance, genetic construction, and deficiencies in intellectual functioning.<sup>51</sup> A few specialists have argued that specific sorts of organic variables, for example, hormones, add to why people take part in bastardly sexual acts. Likely, most basic within this classification is high testosterone levels- observed to have a strong correlation with amplified sex-drive and belligerence.<sup>52</sup> Also, some organic speculations propose that specific people might be inclined toward abnormally aggressive sexual practices as a result of physiologically or naturally foreordained sexual hungers or inclinations.<sup>53</sup>

It is striking nonetheless, that no experimental confirmation delivered to date demonstrate that the nearness of a specific natural wonder has a causal association with sexual offending. In any case, natural examinations are still moderately new.<sup>54</sup> With enhanced techniques, future research may show that specific parts of natural speculations yield useful data for effective clarification, comprehension and understanding of the sources of sexually offending conduct.

The inconclusive nature of these theories could potentially explain the reluctance of the law to consider biological phenomena in sentencing offenders. It is noteworthy however, that most offenders are routinely subjected to psychiatric examination before taking plea. Even then, this exercise has been at the discretion of the presiding judicial officers with the warranting provisions outlined in the Criminal Procedure Code. In its prescription of

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<sup>51</sup> Faupel (n1).

<sup>52</sup> Centre for Sex Offender Management (CSOM), 'Etiological and Explanatory Notes' (2014) USDOJ 01.

<sup>53</sup> Richard Grant, 'Mental Illness and Sexual Abuse: The Shocking Link,' *The Guardian* (London, 4<sup>th</sup> September 2014).

<sup>54</sup> CSOM (n8).

sentences in respect of sexual offences, the SOA does not even in the remotest of sense, consider or propose consideration of genetic or hormonal or psychological predisposition of an offender to the commission of an offence. This could plausibly be due either of the following reasons: Firstly, that the legislators did not at the time of drafting of the law, have the foresight of a possibility of a mentally, hormonally or genetically predisposed person committing a sexual offence or secondly, that the results of related biological studies are so far not conclusive enough to warrant consideration. Nonetheless, mental predisposition is admittedly real enough to warrant legislative consideration.

### **Behavioural Theories**

Behavioural scholars contend that sexually offending behaviour thrive partially due to conditioning and training. Put differently, just as it is understood that people “learn” acceptable sexual behaviour and expression, divergent or inappropriate sexual expressions or behaviours can also be learned. For instance, a father who exhibits sexually abusive behaviour at home devises a representation of belligerent, forceful and violent practices toward ladies, and children who are exposed to that sort of condition are most likely inclined to act in a similar way as a major aspect of their formative encounters.<sup>55</sup> Another type of behavioural hypothesis includes moulding or conditioning, whereby after some time, a person's sexual advantages or excitement designs end up fortified by diverse and perverse sexual experiences. When an individual masturbates to imaginations of divergent or unacceptable sexual expression, for instance, such acts tend to reinforce excitement to those infelicitous imaginations, which may ultimately drive them to the actual offending.

Sexual overindulgence and the apparent absence of negative outcomes for sexual transgression, combined with an absence of help for not participating in sexually offending conduct, improves the probability for sexual offending to persist. If the punishment associated with the offending behaviour is adequately dire, the perverse behaviour that brings about the sexual offending is less likely to manifest.<sup>56</sup>

Research provides evidence in to buttresses arguments for sexual transgression being an acquired behaviour. Affirmation of the role of self-direction additionally seems, by all

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<sup>55</sup> Ibid.

<sup>56</sup> Marshall, D.R. Laws, & H.E. Barbaree (Eds.), *Handbook of Sexual Assault: Issues, Theories, and Treatment of the Offender* (New York: Plenum Press, 2005).

accounts, to be an essential aspect of an intensive comprehension of sexual conduct problems.

Additional study in these respects certainly seems justified. However, behavioural theories have conspicuous constraints. To start with, it is vital to appreciate that many male sex offenders do not ordinarily exhibit digressive sexual arousal patterns; as a matter of fact, most male sex offenders have arousal patterns identical to their non-offending counterparts.<sup>57</sup> This restrains the capacity to generalize the sexual arousal tendencies of some sex wrongdoers to every single such offending party. What's more, no examination has anticipated which fortifications or results are probably going to escalate or hinder sexually deviant conduct. Be that as it may, no exact proof substantiates this presumption reliably. Subsequently, offending parties may not think about the results of their conduct as a disincentive to their activities.<sup>58</sup>

It is significant to note that the purpose of any criminal laws generally is to keep order in any society and lessen the harm individuals may cause one another. Most of the human conduct that threaten the very stability that the law seeks to guarantee are behavioural in nature. Sexual offences law is one such law that seeks to streamline human sexual conduct by prohibiting violations. In this regard it is remotely arguable that the drafters of the SOA either prohibited such offences with the human behavioural theories in mind or just made such prescriptions subconsciously. Either way, the law clearly seeks to curb unwarranted sexual behaviour. As the theorists suggest, sensitization of the public on the sanctions of the law has a higher chance of reducing incidences of behaviour-driven sexual offences. Further, sentencing of offenders whose offence can be closely linked to such behavioural predisposition should advisably take a distinct approach that lays more emphasis behavioural correction and moderation.

### **Sociocultural Theories**

Another manner by which scholars have endeavoured to explain the cause of sexual offending underlines the social structures, standards, and messages. For instance, a few scholars argue that desensitizing messages of brutality in TV or computer games may

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<sup>57</sup>Looman, J., and Marshall, W.L, 'Sexual Arousal in Rapists' *Criminal Justice and Behaviour*,32, 367–389. (2005)

<sup>58</sup>Stinson, J.D., Sales, B.D., & Becker, J.V, *Sex Offending: Causal Theories to Inform Research, Prevention and Treatment*. (Washington, DC: American Psychological Association, 2009)

verifiably overlook savagery. Others contend that the manners by which women and children are sexualized or depicted as tame and aloof through notices, TV projects, and movies may add to sexual brutality. However, others hold the view that men are generally socialized to be forceful and to dominate, or "control" women, which some hypothesize supports male brutality. Some these socio-cultural beliefs have arguably prevented many societies including Kenya from classifying spousal rape as a sexual offence despite the clear definition of the offence to include lack of consent from either party. This reluctance has been premised on the misguided presumption that marriage definitively implies unconditional consent. It is in respect of this classification, that unstructured sentencing becomes more relevant. Judicial officers need to intimately interrogate cases on case by case basis to determine the most appropriate corrective mechanism. Spousal rape is one such offence whose commission is deeply rooted in classical ignorance and wayward social leanings. Sentencing that makes mandatory social equity and equality education with respect to such offenders could possibly transform them into the most responsible and sensitive gender rights advocates.

#### **Attachment/Intimacy theories.**

One of the basic qualities and hazard factors that significantly adds to propagation of sexual offending include intimacy shortfalls. One hypothesis of the etiology of sex offending draws its legitimacy from those very issues.<sup>59</sup> All the more particularly, it has been proposed that diverse sorts of risky connections may lead people to have an assortment of issues identified with intimacy in grown-up connections, and that at last these closeness shortfalls may lead people to take part in sexually offending conduct. For instance, scholars have proposed that insecurely attached people might need to be candidly near others yet maintain a strategic distance from it out of dread of repulsion or harm. Thus, they may endeavour to set up "sentimental" or cosy associations with children (with whom they may feel more "accepted") and they may eventually have improper and unacceptable sexual contact with them. Others with pretentious connection styles may have not want to get close or private with others and may even harbour negative, furious, and antagonistic sentiments toward others, for example, grown-up women. Also, accordingly they may showcase their outrage or anger in sexually forceful ways.<sup>60</sup>

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<sup>59</sup> Grant (n9).

<sup>60</sup> CSOM (n8).

The intimacy theories are perhaps the most direct and familiar to most people.<sup>61</sup> Whereas the current legal framework on sexual offences gives immense consideration to sexual offences victims counselling, it does very little in respect to offenders besides jail time. This theory opines the offender and the offense should not be looked at in isolation. Rather, important factors such as psychological predisposition need to be emphasized and addressed clinically.

These are only a couple of cases of a portion of the single-factor or all the more barely engaged theories that have been proposed throughout the years trying to clarify why individuals perpetrate sex offenses. Furthermore, as explained hereinafter, numerous parts of those speculations continue to remain compellingly relevant today. Be that as it may, none of these theories can in detachment completely clarify why many individuals take part in sexually offending practices.<sup>62</sup> And it is highly doubtful whether any one of those theories can single-handedly satisfactorily and convincingly provide explanations as to why a person commits a sexual offence.

As said before, numerous individuals might want to trust that there is a solitary, effortlessly identifiable trademark that enables us to "recognize" a sex wrongdoer so we can take fitting defensive measures. Correspondingly, it would make our endeavours less demanding if there existed a solitary identifiable or "treatable" etiological or logical factor that at last decides if somebody will sexually offend, on the grounds that then we could intervene (and not really through legislation) and possibly keep sexual offending from happening by and large.

Be that as it may, we realize this isn't the situation—the etiology of sexual transgression is more composite and multifaceted than that. Actually, specialists presently can't seem to recognize any single factor that makes people transgress sexually, and maybe they never will. This past single-factor study and these smaller speculations have, in any case, furnished us with significantly more data than we already had concerning why people may sexually offend, and have immensely contributed to progressive understanding of this widespread issue. Interestingly, whereas research has made tremendous efforts towards creating an understanding on the predisposition of offenders to catalytic factors, the legislative process has yet to. As a result, our laws, including the SOA, tend to focus more on general punitive and retributive measures as opposed to corrective and restorative programs prescribed on case

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<sup>61</sup> Hanson, R.K, 'Working with sex offenders: A personal view. *Journal of Sexual Aggression*' 4, 81–93 (1999).

<sup>62</sup> Ibid.



by case basis. It is my contention that sexual offences would be reduced considerably if the judicial officers and the sentencing programs, structured or unstructured, took into consideration the circumstances (psychological, economic, social or otherwise) that circumscribe every offence in absolute isolation.

### **2.3 Multifactor Theories of Sexual Offending Behaviour**

Trusting that single-factor theories are deficient, various researchers have created hypotheses that join numerous components to clarify sexual offending conduct. Like the single-factor theories, the multifactor theories are central to this research. Successful legislation on sexual offences is contingent on the understanding of the psychology of the offender and effective adoption of the most appropriate corrective or rehabilitative mechanisms to avoid relapse or repeat offences. The SOA and the prevailing penology process pays very little attention to these rather important assertions. Assessment of the effectiveness of the existing framework on the basis of this critical understanding with the view to making appropriate recommendations is thus undeniably timely. The most eminent of these theories are illustrated as follows.<sup>63</sup>

#### **Finkelhor's Precondition Theory**

The main coordinated theory of sexual culpable conduct was advanced by Finkelhor in 1984. Finkelhor's theory, which applies just to child sexual abuse, plots four preconditions that must exist for a sex offense to happen: the inspiration to mishandle, (for example, sexual fulfilment, absence of other sexual outlets); the overcoming of inward hindrances, (for example, individual feeling of ethics, dread of being found out); the overcoming of external inhibitors (such as, absence of security, negative social outcomes); and the overcoming of casualty protection, (for example, exploiting a close association with the child or parental figure). In spite of the fact that the overcoming of internal and external inhibitors and in addition resistance from the victim has been upheld by numerous studies, Finkelhor's hypothesis does not clarify how sex offending inspiration starts. Moreover, conditions, for example, poor social aptitudes or absence of accessible outlets for sexual gratification (among different variables) are not immediate reasons for sexual transgression.<sup>64</sup>

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<sup>63</sup> Hanson R.K (n18) 83.

<sup>64</sup> Ibid.

### **Marshall and Barbaree's Integrated Theory**

Marshall and Barbaree advanced that the unmistakable causal components for sexual offending are formative encounters, natural procedures, social standards, and the mental defencelessness that can come about because of a blend of these elements. They contended that early pessimistic encounters in youth, (for example, sexual molestation, physical abuse, abandonment or isolation) make children see their guardians as candidly emotionally unavailable and themselves as unworthy of affection or security, bringing about low confidence and poor relational abilities. They additionally proposed that a key formative undertaking for pre-adult young men is to figure out how to recognize sexual motivations and animosity, contending that this endeavour is troublesome and gruesome on the grounds that the two sorts of driving forces are created by a similar brain structure. Henceforth, juvenile young men may think that it is hard to know when they are irate, sexually stirred, or both, and figuring out how to restrain hostility in sexual circumstances may likewise be troublesome.

A number of Marshall and Barbaree's theories, and in particular, such as the presence of poor impulse control and a lack of sufficient social skills in sexual offenders-have been affirmed through research.<sup>65</sup> Moreover, studies have demonstrated that insecure childhood association can be closely linked to coercive sexual conduct. Accordingly, the hypothesis has numerous convincing highlights, including its capacity to amalgamate diverse influences.

Nonetheless, the experimental proof demonstrates that albeit some sex wrongdoers experience difficulty with sexual drive control, this isn't the situation for every single sexual guilty party. What's more, the supposition that essential human drives and limits share neurological structures has been thrown into doubt.<sup>66</sup>

### **Hall and Hirschman's Quadripartite Model**

Hall and Hirschman classified sex offender qualities and attributes got from different investigations into four variables they accepted to be most critical in the etiology of sex offending: (1) sexual excitement, (2) manners of thinking, (3) emotional control, and (4)

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<sup>65</sup>Smallbone, S.W. and Dadds, M.R. Attachment and coercive sexual behaviour. *Sexual Abuse Journal of Research and Treatment*, 12(1), 3-15, (2000).

<sup>66</sup> Kolb, B. & Whisaw, I.W, *Fundamentals of Human Neuropsychology*, (4th ed. New York: W.H. Freeman & Co. 1995).

identity issues. They suggested that despite the fact that every one of the four variables are essential, one is for the most part noticeable in the individual sexual wrongdoer.<sup>67</sup>

The theory is premised upon sound observational research about the characteristics of sex offending parties, and the idea that individual wrongdoers show differentiating issues has empirical affirmation. However, the theory does not sufficiently clarify the connections that exist and associations that occur among etiological variables, nor does it recognize causal systems behind each factor.<sup>68</sup>

### **Ward and Siegert's Pathways Model**

Ward and Siegert's pathways model proposes that various distinctive pathways may prompt sexually abusive conduct. In view of a collection of symptoms, Ward and Siegert recognized five diverse causal pathways for the advancement of sexual offending conduct: closeness deficiencies, aberrant ways of thinking, emotional deregulation, withdrawn cognizance including a feeling of privilege and little respect for the emotional and psychological needs of others, and numerous dysfunctional instruments including all symptom clusters related with these past pathways. In the model, situational stressors fill in as triggers for sexual offending, and the particular triggers will change depending on the specific profile of causes basic to every individual's pathway.<sup>69</sup>

Information from different respects of psychology bolster the fundamental precepts of the pathways model, however there is minimal direct reinforcement of the theory from sex offending studies, and there is proof indicating that people in each of the five pathways share a large number of similar attributes.<sup>70</sup> Be that as it may, the pathways model has various beneficial qualities, not to mention an inside-out portrayal of the variables associated with sexual offending and its capacity to bring together progressive facets of different hypotheses.

### **Malamuth's Confluence Model**

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<sup>67</sup> Ibid.

<sup>68</sup> Ward, 2000; Ward, Polachek, & Beech, 2006; Stinson, Sales, & Becker, 2008).

<sup>69</sup> Ibid

<sup>70</sup> Simon, L.M.J. Do criminal offenders specialize in crime types? *Applied and Preventative Psychology*, 6, 35–53, (1997).

The confluence model advances that two factors—sexual promiscuity and hostile masculinity converge to bring about sexually forceful conduct. The theory supposes that human evolution has made, on a very basic level, distinctive mental systems in the brains of women and men concerning sex and intimacy, bringing about the male's predilection for short term over long-term mating patterns. As indicated by the theory, it is to women's greatest advantage to withhold sex from inadequately devoted partners.<sup>71</sup>

Additionally, if a woman more than once withholds sex from a man, the male may turn to compulsion. Despite the fact that research offers bolster for a few precepts of the theory for instance, men with selfish intentions are significantly more inclined to follow through on forceful contemplations than those with more sympathy or compassion<sup>72</sup>—the confluence model has the same deficiencies affiliated with single-factor evolutionary theories of sexual offending<sup>73</sup>. Further, the model does not factor into consideration the significance of the influence of situational factors or cognitive rationalizations in sexual offending.

### **Policy Ramifications**

Whereas no single reason for sexual culpable has been discovered, studies presuppose that a convergence of variables is likely to further sexual transgression. Unfavourable conditions in a person's early development can prompt relational difficulties and challenges, and these conditions can add to the advancement of sexual offending. Like other human conduct and behaviour, sexual aggression seems, by all accounts, to be learned and impacted by support and retribution.<sup>74</sup> The particular punishments expected to alleviate sexual offending, in any case, stay indistinct, especially in light of the subjective cognitive falsifications held by numerous sexual transgressors. Self-direction and motivation control issues both seem, by all accounts, to be identified with sexual offending. Persistent subjection to sexually aggressive pornography may influence aggressive sexual conduct towards women, diminished sympathy and compassion for casualties, and an expanded acknowledgment of physical viciousness

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<sup>71</sup> Ibid

<sup>72</sup> Malamuth N.M., Linz, D., Heavey, C.L., Barnes, G., and Acker, M. Using the confluence model of sexual aggression to predict men's conflict with women: A 10-year follow-up study. *Journal of Personality and Social Psychology*, 69, 353–369, (1995).

<sup>73</sup> Stinson, J.D., Sales, B.D., & Becker, J.V. *Sex Offending: Causal Theories to Inform Research, Prevention and Treatment* (Washington, DC: American Psychological Association, 2008).

<sup>74</sup> Ibid 54

toward women. Men who utilize sexual pressure will probably keep up negative states of mind toward women, and men with self-intrigued intentions will probably follow up on forceful considerations than those with more sympathy or compassion.

Etiological research as of now experiences two noteworthy deficiencies: sampling drawbacks and an absence of convergence among various hypothetical viewpoints. A great part of the surviving exploration depends on tests of sex wrongdoers who are in treatment, in jail, or both; and these investigations speak to just a subset of sex offenders by and large. Additionally, numerous investigations depend on self-report information, which is of faulty legitimacy on the grounds that numerous sex offenders take part in cognitive distortions. Contemporary hypotheses also tend to centre around expositions for sexual offending that dwell inside the person.<sup>75</sup>

Rarely do studies investigate how cultural factors or social structures influence sexual offending conduct. A few dynamics warrant additionally studies, including abuse in early youth advancement; how thinking flaws start, and why a few people follow up on these considerations and many don't; how certain penalties and rewards influence sexual offending conduct; and the effect of sexually violent and exploitive pictures in the way of life, not just in pornography.<sup>76</sup>

There additionally is a requirement for planned, longitudinal research that investigates precursors to sex offending and changes in sexually forceful conduct after some time. Endeavours to utilize tests that are more illustrative of the range of people who commit sexual offences likewise are required. Lastly, it is necessary to carry on further research on integration and confluence of theories and the various ways that diverse factors relating to sexual offending associate with each other.<sup>77</sup>

The primary objective of this research as set out in chapter 1 include, chiefly to assess the efficacy and adequacy of the provisions of the SOA in curbing sexual offences and to recommend workable solutions to existing limitations both in law and practice. As noted before, such effectiveness can only be interrogated through a holistic assessment of the sexual offences penology process. It is inherent that the penology process takes into consideration

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<sup>75</sup> Stinson (n28).

<sup>76</sup> Ibid 59.

<sup>77</sup> Ibid

the discussed predisposing factors with the view to understanding the psychology of individual sex offenders. That way appropriate corrective and rehabilitative measures can be employed on case by case basis. As things stand, the SOA is in itself insufficiently equipped to effectively deal with the psychology behind every offence. There is thus an urgent need for adoption of these new measures through a legislative process to complement the existing deterrent (retributive) measures.

#### **2.4 The Human Rights Approach to Sexual Offences**

This study considers handling and eventual trial of sexual offences as a matter of human rights. Accordingly, the handling of the reporting, arrest of offenders and the trial of such cases can only be reviewed and interrogated from a human rights perspective and especially with respect to the International Human Rights Initiative (IHRI) that prescribes the right to dignity, the right of a person's bodily integrity, the right to equal treatment before the law as well as the right to access justice to effectively ensure that victims of sexual offences as contemplated by the SOA access justice. The IHRI can be exploited as a yardstick to advance reforms aimed at improving the effectiveness of the trial of offences effectively aiding access to justice by the victims.

Victims of sexual offences, who by default of the study became the point of focus, have a right to access justice. This right is an inherent human right that accrues to all, including such sexual offences victims and simply implies the capacity or aptness of a judicial system to offer a fair platform upon which any individual can seek redress even for their most mundane of disputes. All laws including various provisions of the SOA that deal with the rights of victim of sexual offences to protection mandatorily have to be compliant with international human rights for equal protection before the law. This study sought to establish whether the law indeed affords the victims the promised access to justice. This perspective enabled this study to examine the provision of the SOA alongside the established international human rights standards.

In an attempt to effectively appreciate the steps made thus far in the implementation of the SOA as well as provide a glimpse into the possible misgivings of the law and the operating environment, this study employs the human rights approach. This it does in several ways. First, as a befitting conceptual framework for the process of sexual offending and gender discrimination that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights, the human rights approach

sets out to establish and interrogate the inequalities underlying sexual offending and redress any discriminatory and unjust prosecutorial practices that impede effective realization of the goals of the sexual offences law. Accordingly, Mere sympathy towards the victims is inadequate-at least from a human rights perspective.<sup>78</sup> Under a human rights-based approach, the policies and processes of defining and prescribing punishment of sexual offences are anchored in a system of rights and corresponding obligations established by international law. This helps to promote the sustainability of the fight against sexual offending, empowering people themselves especially the most affected-women to participate in not only in policy formulation and but also in holding accountable those who have a duty to act-including the police, judiciary and correctional facilities.

Ordinarily, there is no ubiquitous formula for a human rights-based approach. However, the United Nations as well as most global humanitarian agencies seemingly agree on a number of attributes that this study not only considers fundamental but also indisputably essential. These include:

- a) As policies and programmes to curb sexual offences and gender violence are conceived, the overarching goal should always be to consummate human rights;
- b) An effective human rights-based approach effectively identifies right holders and their liberties and the corresponding duty-bearers and their respective obligations, and works towards strengthening the capacities of rights-holders to boldly report the offences and of duty-bearers to meet their requisite legal obligations in reining in on the offenders; and
- c) From the relevant governmental department, to the police, gender desks, the judiciary and the correctional facilities, the fundamental principles and standards derived from international human rights treaties should guide all parties involved in the fight against sexual offending in the society. Some of these key operational principles include: universality and inalienability; indivisibility; interdependence and interrelatedness; equality and non-discrimination; participation and inclusion; and accountability and the rule of law.

The important practical value of a human rights-based approach to Sexual offending lies in the following:

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<sup>78</sup> Judith V. Becker and William D. Murphy, 'What We Know And Do Not Know About Assessing And Treating Sex Offenders.' (1998) 4 Psychology, Public Policy, and Law.

- a) *Whose rights?* The primary focus of the human rights-based approach lies on those it believes to be the most vulnerable or marginalized and are at a higher risk of violation in comparison to the ordinary population. In the case of this study, these include the sexual offences victims. Universality of rights implies that despite economic, social and political constraints that the government and the institutions it has established to combat sexual offences may face, they are strictly under obligation to show or demonstration incremental realization of the intended objectives. Accordingly, it is required that governments take steps and measures necessary to ensure the victims of sexual offences are adequately attended to and justice accordingly dispensed;
- b) *Participatory process:* Accountabilities for effective realization of the objectives and the established standard of the human rights approach and especially with respect to sexual offending are only possible through a robust and inclusive participatory processes (this encompasses policy development, national planning). It must accordingly reflect the general consensus between those whose rights have been violated (sexual offences victims) and those with a duty to act. A human rights-based approach seeks both to assist in the participatory development and formulation of the needed legal, policy and regulatory framework, and to ensure that the participatory and transparent processes are institutionalized nationally. This effectively calls for capacity-building among families, communities and civil society to participate constructively in relevant forums that go a long way to not only sensitize the communities on sexual offending but also have an input in sexual offenses policy formulation.
- c) *Monitoring:* A human rights-based approach to sexual offending supports the superintendence of government commitments with the aid of recommendations of human rights treaty bodies, and through public and independent assessments of State performance;
- d) *Transparency and accountability:* A human rights-based approach aids enactment of legislation, regulations and budgets that explicitly establish the human rights to be addressed, including what has to be done, to what standard and by whom, and guarantees the availability of requisite resources. This approach helps to make the policy development and formulation process more transparent, and emboldens the



people and communities to hold those who have a duty to act accountable, ensuring effective remedies where rights are inadvertently violated.

This study employs the human rights-based approach to not only assess the achievements the government has made thus far in handling sexual offences and helping victims but also look into the existing operational and policy inadequacies with the view to making recommendations as to possible workable and human-rights-based solutions.

The SOA seeks to streamline human sexual conduct by prohibiting violations. As the theories suggest, continuous sensitization of the public on the sanctions of the law will greatly reduce behavior driven sexual offences. The consideration of the genetic or psychological predisposition of an offender should be mandatory prior to the sentencing of such an offender. Considering the Human right approach, it will be of great importance to balance the attention and focus given to both the offender and the victim. Once an offender has been found culpable, then proper guidance and counselling should be given so that the source of what led him/or her to commit the said offence can be dealt with. In doing so then there will be a decrease in such offences.

## CHAPTER 3:

### OVERVIEW OF THE SEXUAL OFFENCES ACT

#### Introduction

The Sexual Offences Act was enacted in response to the rising incidences of sexual violence and especially those targeting the most vulnerable of the society; women. Its fundamental objective was to ensure complaints of sexual violence were reported, properly investigated and that the victims got justice proportionate to the harm occasioned. It sought to among other objectives, explain, rewrite, and integrate legislation on sexual offending, so as to shield everyone aggressive unlawful sexual behaviour. Most importantly, it redefined specific types of sexual offending including the offence of rape, attempted rape, and defilement. It also introduced other offences that previously existed then but were otherwise not codified in the existing legal regime despite being prevalent. Moreover, the SOA endeavoured to explicitly explain what constitutes consent to sexual activity. In order to effectively interrogate the challenges faced in the implementation of the SOA, it is imperative to not only be familiar with its salient provisions but also understand the factors that necessitated those provisions in the first place. This Chapter looks into the background of the Act, discusses its objectives and highlights its key features.

#### Background

Prior to the enactment of the SOA, incidences of sexual violence were alarmingly on the rise. In fact, by the start of 2004, sexual abuse including rape and defilement had grown to become one of the highest reported crimes in Kenya, second only to common assault—a closely related offence.<sup>79</sup> This uncharacteristic rise was officially ascribed to surging drug and alcohol abuse, collapse of family values and poverty. There was admittedly however, a general prevailing contempt and disrespect of dignity and privacy of women. Violence that dominated gender relations within the communities generally exacerbated this problem. Cases of sexual violence became so rife that towards the close of 2005, the police reported that a sexual assault was committed every thirty minutes.<sup>80</sup>

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<sup>79</sup> Njoki Ndung'u, "Preventing and Responding to Violence Against Women and Girls: From legislation to effective law enforcement: The Kenyan Experience," (Regional Seminar for Asian Parliaments, Organized by The Inter-Parliamentary Union (IPU) and the Parliament of India, New Delhi, 15- 17 September 2011) <http://www.ipu.org/splz-e/newdelhi11/ndungu.pdf> accessed January 15, 2017.

<sup>80</sup> Ibid

Sexual offences cases were met with insurmountable challenges. There were barely any successful prosecutions undertaken since the law made it extremely burdensome for victims to effectively provide evidence. Further, the lacklustre and careless handling of evidence by the police gave several perpetrators an undeserved lifeline. This discourages the victims from reporting the crimes. Others withdrew their statements mid-hearing following intimidation by the perpetrators or pressure from family to negotiate out of court settlements. Before 2006, sexual offences were interestingly classified by the Penal Code as offences against morality as opposed offences against the person. Their enactment in the late 1920's did not make the situation any better. The provisions were distinctly Victorian and were out of tune with the country's realities of sex tourism, HIV/AIDS, male on male rapes and trafficking.

### **Other factors that necessitated the enactment of the SOA**

The laws relating to sexual offences were not consolidated and this limited access to justice. The courts relied on four different legislations to define and punish sexual offences. These included: The Criminal Amendment Act, the Criminal Procedure Code, the Penal Code and the Evidence Act. Access to access the law and punishments for sexual crimes was evidently gruesome. However, where such laws were accessible, their application was limited. For instance, the definition of the crime of rape by the legislation was very limited. It did not address the possibility of victims of sexual offences being male despite such cases being prevalent. Further, since rape was classified as offence against morality, the character and moral standing of the female victims could be called to question and presented at trials effectively exposing them to a possibility of humiliation and invasion of privacy. The court process was in itself deterrent enough to discourage the victims from seeking redress.

Despite its prevalence and cases of repeat offences, defilement remained aailable offence even in cases where the evidence of likelihood of interference and evidence tempering by the accused was compelling. The aggressors could thus, manipulate evidence or threaten the victim without the fear of incarceration. It is not surprising therefore, that even in situations where such aggressors were found guilty, the law did not prescribe the minimum sentence. It instead gave discretionary powers in respect of the same to the presiding magistrate without any guidance whatsoever. Further there were no provisions regarding the infection of another with sexually transmitted diseases.

The application of general standards of proof of crime in sexual offences made it uncharacteristically difficult to secure convictions. The requirement for corroboration as a standard (albeit helpful in other criminal cases) served as a hurdle to an impartial trial in sexual offences especially considering most of the victims are minors and hardly can one locate witnesses to these offences due to their extremely private nature. Further, there were no provisions for the sensitization of the police to effectively handle these offences let alone make them accountable for non-action.

### **Highlight of Key Provisions**

As explained previously, the SOA was sanctioned with the essential target of defining, amending, and consolidating laws on sexual offenses, in order to improve the protection of the most vulnerable from these offenses. It presented stiffer and improved punishments for sexual offending parties by putting in place minimum sentences to hinder and to rebuff sexual wrongdoers. The Act accommodated less demanding revealing of sexual offenses to the police. It additionally prescribed medical treatment for both the perpetrators and victims of sexual offenses. Further, the law stipulated strategies for post-conviction checking of repeat sexual offending. Some of the key provisions of the Act include:

Section 3 of the Act expands the definition of the term rape, to accommodate incidences where males are victims with females or other males as perpetrators. In a radical departure from the practice of the past where rape was generally classified as an offence against morality, the law now classifies it as an offence against the person. As such the morality of women or any other victims can no longer be impugned during trial. Admissibility of evidence is thus confined only to matters relevant, effectively shielding victims from unnecessary shame and dishonour. The SOA prescribes an imprisonment for not less than ten years and may be enhanced to imprisonment for life for the offence of rape, also effectively limiting the discretion judicial officers previously had in such cases.

The challenge of judicial discretion in sentencing that previously served as an escape window for the aggressors was effectively shut in SOA through prescription of minimum and maximum sentences for every sexual offence. Section 4 prescribes imprisonment for a minimum of 5 years for attempted rape; Section 5 prescribes not less than 10 years for the offence of sexual assault. Further, Section 7 prescribes a minimum sentence of 10 years in

respect of acts that cause penetration or indecent sexual acts done in the presence of a minor or a mentally challenged person.

Sections 9 and 10 cover defilement and attempted defilement respectively. Specific description of defilement as a crime that can be perpetrated against any individual under the age of 18 is a radical departure from the past practice that was marred by contradictions on the age of a child as regards the application of the law on defilement. Under the SOA, defilement and attempted defilement of minor carry varied heavy minimum sentences depending on the age of the minor. For instance, defilement of a child of 11 years or less carries a life imprisonment; of a child of 12 to 15 years imprisonment of not less than 20 years while defilement of a child of 16 to 18 years imprisonment of not less than 15 years. On the other hand, attempted defilement of a child under 11 carries a minimum imprisonment sentence of not less than 15 years; of a child between 12 and 15: ten years; while that of a child between 16 and 18-not less than 5 years. Also, indecent act with a child and promotion of sexual offences with a child carry not less than 10 and 5 years imprisonments respectively.

Child trafficking, sex tourism, prostitution and pornography are also punishable under the SOA. Sections 13 and 14 prescribe imprisonment of not less than 10 years and fines of not less than 2 million in case of juristic persons for the offences of child trafficking and child sex tourism respectively. Child attracts a minimum sentence of 10 years. Child pornography on the other hand attracts a minimum sentence of 6 years imprisonment or a fine of not less than Kenyan Shillings five hundred thousand or both.

Incest by both male and female aggressors is now punishable with imprisonment of not less than 10 years under Sections 20 and 21 respectively. Further, sexual abuse by persons in position of authority or trust carries a minimum sentence of not less than ten years imprisonment. One fundamental milestone under the SOA is Section 27 which prescribes a minimum sentence of 15 years in respect of the offence of intentional transference of HIV or any other STIs.

Further to the offences prescribed, the SOA also has provisions for support of victims and protection of witnesses, publicly funded restorative medical treatment, establishment of rules for the judicial and prosecutorial process and a framework for application of the Act generally.

While several provisions have been considered progressive in as far as management of sexual offences is concerned, others have provided fertile ground for unjust and unfair exploitation. One such provision was the now amended Section 38 that allowed the aggressors to sue victims in respect of false prosecution. This section did not factor in all the factors necessary for effective prosecution of such offences and in particular, matters preservation and handling of evidence, which provided loopholes. Effectively, the victims had very little to do with the collapse of cases.

The next chapter discusses the findings of the field study with the view to properly capturing the challenges affecting implementation of SOA.

## CHAPTER 4

### IMPLEMENTATION OF THE SOA

This chapter critically examines some of the challenges to implementation of the SOA. The challenges identified by the study include, generally:

- i) Limited access to quality medical services by the victims of sexual offences;
- ii) Lack of knowledge on handling, preservation and management of evidence of sexual offences by the police;
- iii) General lack of awareness on handling and management of victims of sexual offences;
- iv) Insufficient funding of key enforcement agencies;
- v) Administrative shortcomings in the judiciary;
- vi) Loopholes in key provisions of the act;

Research shows that the determination of ubiquity of sexual assault is extremely burdensome. This ostensibly explains why it is one of the most underreported offences in the Kenya and world over.<sup>81</sup> This study found out that within the Kenyan legal and policy context, the degree of public trust in the police, the level of awareness of the evidential as well as health value of medical assistance are some of the key matters of concern to successful implementation of the SOA.

In a bid to effectively answer the research questions, this study adopted a cross-sectional qualitative approach. It held comprehensive interviews and focus group discussions with the sexual and GBV response centre personnel at Kenyatta National Hospital, the sexual violence report desk of the Police, senior representatives of women human rights organizations focusing on SGBV, some survivors and personnel of the Gender, Community Policing.

This chapter carefully interrogates some of the challenges to implementation of the Sexual Offences Act as identified by the study.

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<sup>81</sup> Emily Thomas, 'Rape Is Grossly Underreported', *Huffington Post* (21<sup>st</sup> November, 2013)

#### 4.1 Medical Services

It is notable that all the post-sexual violence recovery services centres visited by the researcher offer comprehensive post-sexual violence services. These include the Nairobi Women's Hospital's Gender Violence Recovery Centre and the Gender Violence Recovery Centre (GVRC) of Kenyatta National Hospital. Other than the Nairobi Hospital, most of the other sexual and gender-based recovery centres are more often unknown and thus under-utilized. Due to the extremely huge demand of medical attention and the correspondingly exorbitant and unaffordable medical fees, the hospital (Nairobi Women's Hospital) remains largely unreachable to many women especially those from the slums who most often fall prey to sexual assault. In a bid to effectively cope with the ever-rising demand, Nairobi Women's Hospital is often forced to refer many affected women and girls to small clinics that do not have the capacity to provide comprehensive sexual violence response services; a factor that could potentially discourage victims from seeking the requisite health assistance.<sup>82</sup>

According to the statistics provided by the Kenyatta National Hospital Gender Violence Recovery Centre, rape constitutes 60 per cent of the reported cases, defilement 35 per cent and sodomy 5 per cent. This study noted that the trend has remained fairly static over the years with slight variations especially during the post-election violence.<sup>83</sup> The hospital has its own fair share of challenges and shortcomings. It not only lacks facilities but also has an alarming shortage of qualified personnel. The doctors available are at best, medical students or work on locum. The sexual violence recovery services are only available between 9 am and 5 pm every day during the week day and each facility is managed by one nurse. Most of the medical personnel are more redirected from the main hospital on needs basis often with massive delays. Even then, most of the available medical personnel are not properly trained and equipped to effectively handle sexual violence and offences victims. This study established that a majority of these personnel do not know how to effectively handle survivors or confidentiality. The handling and management of forensic evidence necessary for successful prosecution of offenders is strangely poor and wanting. Typically, when a patient reports at to the Hospital, he or she first meets a counsellor before a medical examination is done. The hospital uses a standardized rape kit which unfortunately does not include medication and this could vary extensively from patient to patient. Under the current sexual offences regime, successful conviction of an offender on the charges of rape can only

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<sup>82</sup> A.N, Nurse, Nairobi Women's Hospital, Hurlingham Java Coffee Shop, Saturday, February 23, 2015.

<sup>83</sup> National Crimes Research Centre, "Summary of Study on SGBV in Kenya" (2015)



be secured by evidence procured by evaluation of semen deposits, bruises and laceration and without which evidence prosecution's case is rendered mute.

The focus groups discussions and the interviews established that communication between and among police, forensic analysts and sexual violence medical personnel is extremely limited, a factor that could potentially restrain an effective forensic process. This state of affairs is not made any better by the ubiquitous absence of national minimum standards and effective referral mechanisms. Kenyatta National Hospital laboratories are not sufficiently equipped to support forensic evidence examination services. Many of the available doctors have very little to no experience with victims of sexual offences and are oftentimes clueless as how to take evidence. Further, the police do not always bother to subject suspects to mandatory medical examinations for corroboratory evidence. As a consequence, many sexual offences cases get dismissed for lack of corroboration and evidence all together.<sup>84</sup>

The woes of the sexual offences medical services are further compounded by the general population's inescapable lack of awareness on the appropriate procedure after rape, the window of opportunity for medical attention and forensic examination. Though globally recognized as the most accurate and effective means of proving or disproving a link to sexual assault, DNA samples are expensive to procure and most local hospitals lack the facilities and resources to effectively conduct the process. In a bid to cover for their inadequacies, many hospitals partner with non-profit organizations that offer legal services to survivors seeking legal justice. The hospitals routinely test the survivors and counsel them in a six month follow up. Other than Kenyatta National Hospital, other post sexual assault and violence services are offered in the larger Nairobi area through the National Kenyatta Hospital Gender Violence Recovery Centre (GVRC), the Ministry of Health Riruta Health Centre (with support from Liverpool VCT)<sup>42</sup>, MSF Blue House (Mathare), MSF France, Kibera South MSF/Ministry of Health (MOH) Health Centre and NWH GVRC. Marie Stopes Kenya on the other hand offers post rape care that includes provision STI prophylaxis treatment and emergency contraception aside from PEP, through six clinics: Kangemi, Eastleigh, Kibera, Kencom City and Kenyatta Market. For PEP, Marie Stopes Kenya makes referrals to one of its HIV partners. The Nairobi Women's Hospital is doubtlessly the most popular referral hospital for sexual assault cases despite its inconvenient location for many of the slum-based

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<sup>84</sup> According to the KII interviewed for this information, there is no data collected on SGBV cases.

victims. This demand is ostensibly high due to victim's lack of knowledge of the discussed alternatives.

The challenges facing the sexual violence medical facilities and services are further compounded by the general acute lack of awareness of existence of facilities capable of effectively administering comprehensive post-sexual violence care and treatment. This research's assessment of the management of survivors during the visit to Kenyatta National Hospital Gender Violence Recovery Centre revealed a chaotic and non-uniform approach to similar cases of sexual violence. There is clearly an acute lack of capacity building and training. Interestingly, even the hospitals least suited to offer these services seldom offer them free to the general public. This is extensively constraining considering the victims of sexual offences are predominantly poor. A clear demonstration of this limitation is the number of sexual violence cases reportedly handled by these hospitals. While the number of reported cases is significant, the number of those who failed to report to mainstream hospitals or went to nondescript clinics is even more significant.<sup>85</sup>

#### **4.2 Law Enforcement Agencies; the Police**

The Kenyan Police has been a huge stumbling block to effective application of the SOA. This study visited the national gender violence report desk of the Kilimani Police Station where the officers were interviewed. Based on the Police's account, over 876 cases of rape, 1,984 cases of defilement; 198 cases of sodomy; 191 cases of indecent assault and 181 cases of incest were reported in 2007.<sup>86</sup> These findings corroborate the Kenya Demographic and Health Survey conducted in 2003 which showed that 49 per cent of Kenyan women reported enduring some form of sexual abuse and violence in their lifetime with one in four revealing they had faced sexual assault in the previous 12 months.<sup>87</sup> Further, women aged between 12 and 25 reported experiencing their first sexual encounter by force.<sup>88</sup> Over 60 per cent of these

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<sup>85</sup> Most of the survivors interviewed hailed from Mathare and Kibera slums. Most reckon they were sexually assaulted (mostly raped) by the people they least expected such as neighbours and friends. One interviewee Lorna reported most of her female friends in Kibera including herself were raped during the 2007/2008 post-election violence but none of those cases were taken to hospitals. Instead they sought emergency pills and consoled each other. She is still fearful of moving around unaccompanied even in the day.

<sup>86</sup> Kenya Police, *The National Crime Report*, 2007.

<sup>87</sup> Kenya Demographic Health Survey 2003.

<sup>88</sup> UNAIDS, *Violence Against Women and Girls in the Era of HIV and AIDS. A Situation and Response Analysis in Kenya 2006*.

women and girls did not report their experiences prior to the survey. In fact, only a dismal 12 per cent had reported to someone.<sup>89</sup>

The first police gender desk was launched at Kilimani Police Station in Nairobi in 2004 specifically to handle sexual and gender violence cases.<sup>90</sup> Currently, the desk receives an average of two cases daily. By 2006, over 95 incidents of assault and 24 rape or attempted rape cases had been reported.<sup>91</sup> Most of the survivors were counselled and referred hospital for medical examination and treatment while investigations were carried out. Currently, every police station of the country's total of 341 police stations has a gender violence report desk.<sup>92</sup> However, the effectiveness of these violence desks is limited due to a number of constraints. Little financial resources allocation by the government means these desks lack equipment and police officers sufficiently trained, skilled, experienced and extensively knowledgeable in handling victims, including counselling and referral. The available officers have not been trained on gender responsive crime management. Most police officers reckon resource constraints are one of the key hindrances to effective comprehensive and credible investigations process.<sup>93</sup> Resources can therefore hamper effective and conclusive investigation into sexual offences cases. Even in circumstances where a police officer is extensive trained and experience on matters sexual violence, lack of resources has the potential to particularly make the security and safety of the victims a daunting task.

The typical crime reporting process is also discouraging to sexual offence victims. In order for effective investigations to be launched as a consequence of a reported sexual offense, the victim has to report the crime to the police who record her statement in the Occurrence Book held in each police station. Due to lack of specialised skills on dealing with sexual offences victims, most officers handle some of the cases casually. For instance, one of the focus groups members recounted her encounter with a Police officer when she went to report a case of marital rape. The male police officer insensitively dismissed her case as a small domestic

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<sup>89</sup> Ibid.

<sup>90</sup> WILDAF Kenya, *Study on the Operations of the Gender Desk/Office in Kenya 2009*.

<sup>91</sup> Ibid.

<sup>92</sup> Interagency GBV Assessment Report Jan-Feb 2008

<sup>93</sup> One of the officers interviewed at the Kilimani Police Station gender desk recounted her experience with a rape victim. She said, "I remember attending to a lady at about 11.30 p.m on a Friday night. She reported having been raped and I could tell she was very traumatized. Under normal circumstance, the first thing I could do to attend to her would have been to subject her to medical examination. We did not have any vehicle on standby to take her to the hospital I had referred her. I was also afraid that due to the trauma, the chances of her leaving without giving sufficient information were high. I regret not having been in a position to effectively help her."

matter and advised her to seek amicable solution within her home.<sup>94</sup> Although separate special desks were established in every police station to make the police more responsive to sexual offences, most of the female sexual offences victims report being embarrassed, ridiculed, verbally abused and made feel as if their cases are a total waste of the officer's time.<sup>95</sup> Women thus resorted to reporting their cases to police when the respective situations were unbearable.<sup>96</sup> Further, the Human Rights Organization reported that police are normally either reluctant or slow to effectively handle cases where the sexual offences complaints are against their colleagues. On most occasions, many such victims are reluctant to report for fear of reprisal or inaction. When reported, investigated and cases filed, most of the officers are often unwilling to testify against their colleagues even when they witnessed the incidence. The police have also been blamed for file disappearance or blatant deliberate delay of cases.

As this study unwound, it established several weaknesses in the links of the chain of effective implementation of the SOA. Whereas the drafters were clear on the objectives of the Act, there appeared to be an acute lack of sense of direction on the part of implementers thanks to ineffective knowledge transfer only attributable to poor civic education. This inexcusable lack of awareness of the law and disinterest on the part of various actors including the Police and the Judiciary has made realization of the primary intents of the SOA a mirage at best. A classic demonstration of this laxity could be seen at the early stages of the implementation of the Act when the police and Magistrates would either deliberately or ignorantly fail to implement the salient provisions of the Act—a tendency only attributable to well established operational inertia. This resulted in several acquittals on appeal and reviews. In *Republic v Wycliff Adulu*<sup>97</sup> for instance, the accused was charged with abduction in violation of section 143 of the Penal Code. The offence with which he was charged was allegedly committed on 2<sup>nd</sup> December 2006, three months after the SOA had come into force. The SOA was thus the appropriate law governing such offences at the material time. The Chief Magistrates court hearing the case declared a mistrial and discharged the accused person because he was

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<sup>94</sup> In 2001 a senior Kiambu police officer reportedly released a church leader arrested by the public on suspicion that he had defiled a minor on ground that he was incapable of such an offense since he was a married man and a father to many not mention, a religious leader.

<sup>95</sup> WIDLAF Kenya (n99)

<sup>96</sup> One of the Survivor interviewees, Akinyi, said her first encounter with the police to report a gang rape in Kibera was marred by embarrassment and blame. She said the male policeman she reported the crime to started leering at her even before she could report the rape. When she eventually got to report the offense, the policeman jokingly blamed her mini-skirt and retorted that she was 'irresistible'. She was subsequently raped on five other different occasions in Kibera but failed to report for fear of being judged. It is only after the sixth almost brutal rape incident that Akinyi resorted to report. The case is still pending at Kibera Law Courts.

<sup>97</sup> Criminal Case No 3899 Of 2006 [2008] KWJA (190).

charged under a **non-existent** law. This is despite the fact that the evidence against the accused person was overwhelming and would have supported a finding of guilty. Clearly, the police officers who had drawn up the charge sheet and the magistrate who dispensed the case were acutely unaware that the SOA was the relevant statute in this case.

Other challenges and limitations faced by the law enforcement agencies in effective implementation of the Sexual Offences Act include: slow response to offences committed against certain social groups; the attitude of the police towards SGBV offences, specifically if it has happened in the domestic environment; unjustifiably immoderate use of force against certain groups, such as the LGBT people<sup>98</sup>; exclusion of particular groups within the police institutions; misconduct and abuse of function; blatant and deliberate refusal to register complaints; poor investigation skills leading to low conviction rates; lack of accountability and integrity; and general lack of civilian trust.

Inaction on the part of the police in competently investigating and effectively handling sexual offences is now actionable thanks to *C K (A Child) through Ripples International as her guardian & next friend & 11 others v. Commissioner of Police / Inspector General of the National Police Service & 3 others*<sup>99</sup>. The Petitioners, victims of defilement, instituted a negligence claim against the police. They pleaded that the police had grossly neglected, omitted, refused, or failed to effectively investigate their complaints and take the necessary action, under legislative, policing or administrative powers, which actions would have effectively made the offenders accountable for their egregious acts. The victims premised their suit on several local and international legal instruments, including the Constitution of Kenya, 2010, the Sexual Offences Act, 2006, and the Police Act of the Laws of Kenya, the Universal Declaration of Human Rights, the African Charter on the Rights and Welfare of the Child, and the African Charter on Human and Peoples' Rights.

The 11 petitioners sought the court's address to the following questions:

- i) "Whether the neglect, omission, refusal and/or failure of the police to conduct prompt, proper and professional investigation into the complaints of petitioners

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<sup>98</sup> Vincent Agoya, '3 suspected gays arrested in estate,' *Nairobi Star* (Nairobi, June 22, 2009).

<sup>99</sup> Petition 8 of 2012 [2013] eKLR

violated their fundamental rights and freedoms under Articles 2, 10, 19, 21, 22, 23, 27, 28, 29, 48, 50(1) and 53 of the Constitution of Kenya, 2010;

- ii) Whether the neglect, omission, refusal and failure of the police to conduct prompt, effective, proper and professional investigations into the eleven petitioners' respective complaints violated their respective fundamental rights and freedoms under Articles 1, 2, 3, 5, 7, 8 and 10 of the Universal Declaration of Human Rights, Articles 2, 3, 19, 34 and 39 of the United Nations Convention on the Rights of the Child, Articles, 1, 2, 3, 4, 16 and 27 of the African Charter on the Rights and Welfare of the Child, and Articles 2, 3, 4, 5, 6, 7 and 18 of the African Charter on Human and Peoples' Rights; and
- iii) Whether failure of the police to act on the petitioners' complaints constituted an abdication of statutory duty, contrary to express and implied provisions of the Sexual Offences Act, 2006, and the Police Act.”

The court held thus:<sup>100</sup>

“Failure of the police to conduct prompt, effective, proper and professional investigations into the petitioners' complaints of defilement and other forms of sexual violence amounted to discrimination contrary to the express and implied provisions of Article 27 of the Constitution of Kenya, 2010 and contrary to Article 244 of the Constitution of Kenya, 2010.

Failure of the police to effectively enforce Section 8 of the Sexual Offences Act, 2006, infringed upon the petitioners' right to equal protection and benefit of the law, contrary to Article 27(1) of the Constitution of Kenya, 2010.”

Further, failure of the respondents to conduct prompt, effective, proper and professional investigations into the petitioners' complaints of defilement and other forms of sexual violence infringed on the petitioners' fundamental rights and freedoms, under Articles 21(1) and (3), 27, 28, 29, 48, 50(1) and 53(1), (d) of the Constitution of Kenya, 2010 and the general rules of international law, including any treaty or convention ratified by Kenya which form part of the law of Kenya as per Articles 2(5) and 2(6) of the Constitution of Kenya,

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<sup>100</sup> *ibid*

2010. These include Articles 2, 3, 4, 5, 6, 7 and 18 of the African Charter on Human and Peoples' Rights, amongst others.

The ruling established a legal history in the country as it acknowledges the responsibility on the Kenyan police to undertake proper and effective investigations into incidences of sexual violation and holds them (the police) answerable for their handling of defilement and rape victims. This precedent is expected to provide impetus to the police to conduct thorough investigations into sexual offences, properly manage and handle evidence in such cases. This would result in higher conviction rates in sexual offences.

### **4.3 Judiciary**

The enactment of the SOA in 2006 paved the way for massive institutional, policy as well as functional transformation amongst many of the concerned institutions. One of the institutions most impacted by the transformation was the Judiciary that had to radically re-evaluate its hard-wired penal-code view of sexual offences as offence against morality. Lady Justice Roselyn Nambuye admitted that implementation of the Act was initially fraught with challenges. She said the new law had completely new concepts; new and expanded definitions of offences, new procedure all of which challenged the traditional role of a judicial officer of being a mere impartial arbiter or umpire and added thereon the role of a counsellor, friend, social worker, psychologist and a human rights activist for the parties without discrimination and or distinction.<sup>101</sup>

#### **4.3.1 Initial Challenges:**

##### **a) Administrative Intermission:**

One of the most immediate challenges to effective implementation of the SOA was administrative lapse in the Judiciary. When interviewed for this study, former Deputy Chief Justice Nancy Baraza, recounted some of the events that preceded the enactment of the SOA. She for instance mentioned the administrative gaps the judiciary experienced due to slow distribution of copies of the Act to courts and police stations countrywide.<sup>102</sup> Because of lack of awareness and training, the courts and prosecution continued to unlawfully apply the old

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<sup>101</sup> Kenya Women Judges Association, *Training Manual 2008*. Forward by Lady Justice Roselyne Nambuye.

<sup>102</sup> This however no longer a challenge since the statutes are now readily available and accessible online and especially vide the Judiciary website or the Kenya Law Reports online data bank. Further, Judicial officers now have access to internet.

law as contained in the Penal Code. On appeal, the higher courts would quash the conviction, not for lack of evidence, but because of the incurable procedural defects brought on by these lapses. When interviewed by IPS in March 2007, the then Executive Director of the Federation of Women Lawyers (FIDA) Jane Onyango said, “There is no awareness creation among judicial officers. As we speak, the law is not being fully utilized. Copies of the law are not even available in courts, particularly those in remote places.”<sup>103</sup> One of the cases irregularly tried in the wake of this administrative gap was *Republic v Wycliff Adulu*<sup>104</sup> where the perpetrator was booked for the offense of abduction in contravention of section 143 of the Penal Code. The offence with which he was charged was allegedly committed on 2nd December 2006. The SOA had come into force on 21<sup>st</sup> July 2006 and it was the governing law on such matters at the material time. The Chief Magistrates court hearing the case declared a mistrial and discharged the accused person because he was charged under a non-existent law. This is despite the fact that the evidence against the accused person was overwhelming and would have supported a finding of guilty. Clearly, the police officers who had drawn up the charge sheet were unaware that the SOA was the relevant statute in this case. This can be because they did not have a copy of the Act or they had no information that it had come into force.

#### **b) Inadequate Training:**

Besides massive administrative gaps, the judiciary and prosecutors received little or no training on effective and appropriate application of the SOA prior to the law coming into force. It was a common occurrence therefore for many magistrates who are charged with hearing sexual offences cases to either improperly invoke certain provisions of the law, or fail to invoke them at all, especially where relevant. A magistrate could for instance sentence an accused under the provisions of the SOA in cases where the charges had been pressed under the Penal Code. This irregularity led to massive discharge of otherwise guilty persons by the appeal courts. In *Raphael Ogongo Akumu v Republic*<sup>105</sup> for instance, the accused was charged with defilement and abduction under the Penal Code.<sup>106</sup> The presiding magistrate found him guilty and sentenced him to 20 years and 1-year imprisonment in respect of count 1 and 2 respectively pursuant to Section 8(1) of the SOA. The accused appealed the

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<sup>103</sup> Joyce Mulama, ‘International Women’s Day Kenya: Kenyan Courts Far From safe Haven’. *IPS News* (Nairobi, March 7 2007)

<sup>104</sup> Criminal Case No 3899 Of 2006 [2008] KWJA (190).

<sup>105</sup> Criminal Appeal 178 of 2007 [2008] eKLR.

<sup>106</sup> Contrary to Sections 145 and 143 of the Penal Code respectively.



conviction and sentence on the ground, among others, that the erred in law by convicting him under the SOA with a mandatory amendment of the charge sheet. He cited Part 3 of the First Schedule of SOA to support his appeal.<sup>107</sup> The court of appeal did not however quash the sentence, instead it said the sentencing was not in any way fatal and directed that the case be retried by a different court.

Similarly, in *Kamaro Wanyingi v Republic*<sup>108</sup> the accused, a 67-year-old was charged with rape under the Penal Code and sentenced to 20 years imprisonment pursuant to Section 8(4) of the SOA. On appeal, the sentence was quashed and the accused discharged on account of the fact that the trial magistrate erred in sentencing the accused under the SOA when he had been charged under the Penal Code. Further, in *Dalmar Musa Ali v Republic*<sup>109</sup>, the accused was charged with the offence of abduction contrary to Section 142 of the Penal Code. The offence was committed just a few months preceding the enactment of the SOA. The trial magistrate modified the charge which the accused had been charged with while writing the Judgement and sentenced the accused pursuant to Section 8(3) of the SOA. The High Court, on appeal quashed the conviction and sentence ostensibly due to the fact that the accused person had been denied his constitutional right to answer to the charge of defilement which had been included arbitrarily by the magistrate at the time of judgment.

Further, In *Republic v Nelson Githu Kibaki*<sup>110</sup> the accused was charged with defilement of two minors both aged 11 who were both his nieces. One of the survivors was not able to testify during trial due to trauma suffered as a consequence of the ordeal. The medical doctor who testified in the case gave evidence that the survivors were traumatized and he could not take virginal swabs for analysis as they were scared and cried through the entire process without uttering a word. Further, during the trial, one the survivor was stood down three times due to trauma. She went mute every time she was asked whether she knew the accused. She only managed to state that she knows him and that he did something to her. She also stated that they live together. The court ordered that she be assessed by a psychologist but the order was not carried out and subsequently the prosecution chose not to continue with her evidence. The court acquitted the accused of the offense on the premise that the victim's

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<sup>107</sup> Part 3 of the First Schedule of the SOA provides for non-retroactive application of any new law that all cases commenced under any written law repealed by the Act shall continue to their logical conclusion under those written laws.

<sup>108</sup> Criminal Appeal 185 of 2006 [2008] eKLR.

<sup>109</sup> Criminal Appeal 58 of 2007 [2008] eKLR

<sup>110</sup> Criminal Case No. 1245 Of 2006 [2008].

evidence was deficient and incomplete enough to effectively prove the charges against the offender. The trial magistrate dismissed the testimony of the victim delivered through her mother as hearsay.<sup>111</sup>

It appears the magistrate in this case either was not aware of the existence of the SOA or chose to ignore it completely. He clearly issued a judgment in flagrant breach and contravention of Sections 31 and 32 of the SOA which makes clear the conduct of such cases and provides for protection of vulnerable witnesses as well as the duty of the prosecution to promptly inform a potentially vulnerable witness of the need to declare them vulnerable and the protection measures to be taken respectively. Section 31 provides that the court can in on its own volition or upon imploration by the prosecution or a witness other than the accused, declare a witness vulnerable. However, a witness can only be declared vulnerable on account of qualifiable factors including but not limited to age; intellectual, psychological or physical impairment; trauma; the relational closeness of the witness with any party to the matter before court; the nature of evidence and any other issues or factors the court might find relevant. Upon evaluation of such application or request, the court is obliged under the SOA to undertake a single or a combination of the following measures:

- i. “Direct that the proceedings may not take place in open court;
- ii. Allow such witness to give evidence under the protective cover of a witness protection box;
- iii. Direct that the witness shall give evidence through an intermediary;
- iv. Prohibit the publication of the identity of the complainant or of the victim’s family, including the publication of information that may lead to the identification of the complainant or the complainant’s family; or
- v. Undertake any other measure or a combination of measures it deems just and appropriate in the circumstances.”

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<sup>111</sup> The trial Magistrate’s judgment read thus, “The second PW2, did not give concrete testimony. She appeared scared, and traumatized and only managed to state that the accused did something to her. PW4 (her mother) and PW5 (the investigating officer) told the court that she reported to them that the accused had slept with the 2 of them. The P3 form (medical form) produced by the doctor shows that she had bruises on her genitalia, her hymen partially broken and it was concluded that penetration had been attempted. Without evidence of the complainant herself as to how the partial penetration occurred it is difficult to make a finding of guilty against the subject. The medical report is left hanging and the evidence of PW4 and 5 remain hearsay which is not admissible.”

Section 32 of the SOA on the other hand makes the prosecution duty-bound to promptly inform a potentially vulnerable witness, in a clear concise precise manner and in a language they understand, of the need to declare them vulnerable and the protection measures necessary to effectively shield them from their vulnerabilities. The court is also mandated under the Act to inquire whether such witness has been properly informed of this right and that where no such communication has been made, to promptly do so.

Back to *Republic v Nelson Githu Kibaki*, the trial magistrate erred fatally. Even the court itself noted the witness was traumatized and appeared scared. It could have in the circumstance allowed the witness to testify through an intermediary pursuant to section 31 of the SOA. This could include the parent whose testimony the magistrate disregarded as hearsay. These challenges are clear demonstration that even after close to 10 years following its enactment, judicial officers, the police and the general public are still oblivious of some of the key provisions of the SOA. Public sensitization on the provisions of the law is still necessary.

### **2.3.2. Present Challenges:**

#### **a) Prosecution of Sexual Offences cases with Civil angle:**

This study found out that sexual harassment is unusually prevalent and widespread in white collar employment. The victims are predominantly women and most fail to report such incidences for fear of loss of employment and livelihood. Consequently, many of these incidences go on unabated and whenever reported are dealt with from civil angle in cases of wrongful dismissal where the harassment only features as evidence. Most of the women interviewed for this study find sexual harassment in the office to be an accepted occurrence. Other than loss of employment and livelihood, many women in employment fail to take steps to prosecute the offenders due to the embarrassment they are likely to face in front of their colleagues. Many therefore either withstand the harassment or attempt to put an end personally by changing their employers just to avoid the offenders.

This study analyzed one of the employment cases currently before the industrial court where a former Sales Executive with a multinational company is suing her employer for wrongful termination. The Plaintiff cited sexual harassment as the grounds for her dismissal. Evidentially she refused to yield in to her manager's numerous unwanted and explicit sexual

advances which involved occasional ‘unwanted hugs and squeezes’ and leering; ‘fixed office-work holidays involving the two and explicit text messages complementing her body parts in sexual overtones.’ It is notable that this case did not involve prosecution of the said manager under Section 23 of the SOA as should be. In fact, no complaint had been filed or reported by the said Plaintiff. In this case, only damages for wrongful termination were sought. No prosecution whatsoever was instituted pursuant to the SOA. In such cases, courts are required to take proactive role and inquire as to why a criminal investigation into the harassment allegations have not been commenced. Many judges however, take a backseat role and opt to make no such inquiries or direct accordingly.

This study established that successful legislation against a particular practice is in itself inadequate and inconclusive. Individuals most susceptible to such prohibited acts need to be constantly and consistently appraised of their rights to seek appropriate remedies under the law. They must be encouraged and incentivized to take action against the offenders where such offences have been committed. Further, employers who have the strict responsibility to provide conducive work environment need to strictly comply with the employment legislative requirements including sexual harassment policy. The wider society also needs widespread civic education to encourage behavioural change so that everyone can understand that sexual harassment is a crime and thus unacceptable.

**b) Insensitivity of courts to Victims’ ordeals:**

A careful scrutiny of the SOA shows the law by its provisions sought to protect survivors of sexual offences to the furthest extent possible. It makes clear the conduct of such cases and provides for protection of vulnerable witnesses in Section 31.<sup>112</sup> The courts can on application by the prosecution, or on its own volition or on application by a witness other than the accused, declare a witness vulnerable.<sup>113</sup> The said witness could be declared vulnerable due to a number of reasons including: trauma, age, psychological or physical impairment, intellectual, the character of evidence, the relational closeness of the witness with any parties before court; and any other issue or issues the court may find material. Ordinarily, the court is mandatorily required to protect such witness through any or a combination of the following measures:

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<sup>112</sup> The Sexual Offences Act of 2006, s31 states, “The court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is; a) The alleged survivor in the proceedings pending before the court; b) A child; or c) A person with mental disabilities.”

<sup>113</sup> SOA, s31(2).

- i. Providing instructions that a witness protection box be used to offer the victims comfort when giving their testimony;
- ii. Giving directions that trial be conducted in camera;
- iii. Allowing victims to provide evidence vide an intermediary;
- iv. Disallowing any publications likely to reveal the identity of the victim or their family; or
- v. Any other measure which the court deems just and appropriate in the circumstances.

Pursuant to Section 32 of the SOA the prosecution has a duty to promptly inform a potentially vulnerable witness of the need to declare them vulnerable and the protection measures to be taken. Such witnesses are required to be properly informed before the commencement of their testimony. The court therefore is strictly mandated to inquire whether the witness is promptly informed of the declaration and where no such information has been communicated to the witness in a language they understand, undertake to promptly inform them. Section 31(10), however, prohibits the court from making convictions solely on unsubstantiated or unsupported evidence of an intermediary. Of the few cases this study analyzed, this important provision of the law has been largely ignored by trial courts even where circumstances merited it. This potentially fatal omission is attributable to lack of prior training of magistrates and prosecutors on protection of survivor. Other magistrates seem to be deliberately insensitive to the plight of the survivors. In *Republic v Nelson Githu Kibaki*<sup>114c</sup> for instance, the accused was booked for the offence of defilement of two minors both aged 11 who were both his nieces. One of the survivors was not able to testify during trial due to trauma suffered as a consequence of the ordeal. The medical doctor who testified in the case gave evidence that the survivors were traumatized and he could not take vaginal swabs for analysis as they were scared and cried through the entire process without uttering a word. Further, during the trial, one the survivor was stood down three times due to trauma. She went mute every time she was asked whether she knew the accused. She only managed to state that she knows him and that he did something to her. She also stated that they live together. The court ordered that she be assessed by a psychologist but the order was not carried out and subsequently the prosecution chose not to continue with her evidence. Purely

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<sup>114</sup> CRIMINAL CASE NO 1245 OF 2006 [2008].

on the premise that almost non-material issue, the trial court adjudged the accused not guilty indicating that the victim's evidence failed to demonstrate a linkage between the accused and the crime. The trial magistrate dismissed the victim mother's testimony as hearsay despite clear legal guidelines in respect of the same.<sup>115</sup>

The magistrate's court issued judgment in flagrant breach of Section 31 and 32 of the SOA. Even the court itself noted the witness was traumatized and appeared scared. It could have in the circumstance allowed the witness to testify through an intermediary pursuant to section 31 of the SOA. This could include the parent whose testimony the magistrate disregarded as hearsay.

These challenges are clear demonstration even after close to 10 years following its enactment, judicial officers, the police and the general public are still oblivious of some of the key provisions of the SOA. Public sensitization on the provisions of the law is still necessary.

#### **4.4 Provisions of the Act**

Whereas most of the challenges facing implementation of the SOA are evidently institutional, it noteworthy that some provisions of the Act are in themselves problematic especially from an enforcement point of view. Sections 9 and 10 on the offences of defilement and attempted defilement of minors respectively are examples of provisions that have provided undue loopholes for wrongful punishment and convictions of alleged aggressors even in cases where minors aged 16 and capable of consent are involved. The act is especially silent on a possibility of consensual sex with a minor. As such many otherwise innocent offenders are wrongly convicted and punished. This challenge is so widespread that it also concerns even child rights campaigners. Federation of Women Lawyers (FIDA) for instance revealed that the boy child has thanks to Section 9, become the unintended victim of SOA especially considering many teenagers are in sexually active relationships.<sup>116</sup> Most of the girls' parents

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<sup>115</sup> In her judgment, the trial magistrate stated thus, "The second PW2, did not give concrete testimony. She appeared scared, and traumatized and only managed to state that the accused did something to her. PW4 (her mother) and PW5 (the investigating officer) told the court that she reported to them that the accused had slept with the 2 of them. The P3 form (medical form) produced by the doctor shows that she had bruises on her genitalia, her hymen partially broken and it was concluded that penetration had been attempted. Without evidence of the complainant herself as to how the partial penetration occurred it is difficult to make a finding of guilty against the subject. The medical report is left hanging and the evidence of PW4 and 5 remain hearsay which is not admissible."

<sup>116</sup> Odhiambo Rodha, 'Law proposes reduction of consensual sex age from 18 to 16' *The Star* (Nairobi, 20 December 2016), [http://www.the-star.co.ke/news/2016/12/20/law-proposes-reduction-of-consensual-sex-age-from-18-to-16\\_c1476072](http://www.the-star.co.ke/news/2016/12/20/law-proposes-reduction-of-consensual-sex-age-from-18-to-16_c1476072) accessed 10 January 2017

who do not approve of such relationships would report defilement or rape ostensibly to punish the boy. A few Child Protection Unit investigators interviewed for this study corroborate this assertion and revealed that indeed many parents take advantage of this loophole in SOA.

There is however a recent legal authority on the question consent by a minor. Justice Chitembwe in *Martin Charo v Republic*<sup>117</sup>, said thus:

It is true that under the Sexual Offences Act, a child below 18 years old cannot give consent to sexual intercourse. However, where the child behaves like an adult and willingly sneaks into men's houses for purposes of having sex, the court ought to treat such a child as a grown-up who knows what she is doing. The appellant was 23 years old when the incident occurred as per the pre-bail report. It would be unfair to have the appellant serve 20 years behind bars yet PW1 was after sex from him. The evidence does not show that the appellant knew that PW1 was a student or that the appellant took advantage of PW1 being a young girl. It is clear to me that PW1 started engaging in sex way before that date.

Justice Chitembwe said the intention of the law is to punish those people who lure young children into sexual intercourse. However, the judge said, when young children behave like adults and start enjoying sex at the age of 13 years, the perpetrator is not entirely to blame. "The victim would have made the accused believe she was mature enough to have sex," he said.<sup>118</sup> He further said the behaviour of the victim, at the time of the alleged offence, was important in arriving at the decision.

Further, in *P O.O (A Minor) v Director of Public Prosecutions & another*<sup>119</sup>, Lady Justice Hellen Omondi held that it is discriminatory to punish a juvenile male for the offense of defilement and let the female juvenile walk out scot-free. The Appellant (a minor) had been arrested, charged, prosecuted and sentenced to one-year imprisonment for defiling and impregnating his teenage girlfriend. Justice Omondi noted that the boy was charged alone despite the fact that he, like his girlfriend, could not consent to sex on account of his age and

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<sup>117</sup> Criminal Appeal No.35 of 2015 [2016] eKLR

<sup>118</sup> *ibid*

<sup>119</sup> 2017[eKLR.

so he too was a victim of defilement. She held that both should have been charged with defiling each other within the meaning of the Sexual Offences Act. Lady Justice noted with concern however, that there seems to be a rise in cases of consensual juvenile sex. She noted that in light of these rather unfortunate circumstances, what the children need is effective guidance and counselling as opposed to criminal penal sanctions. Accordingly, such situations, in her view, call for immediate thorough re-examination of the entire criminal justice system.

There is thus a need to for amendment of the SOA to include consensual juveniles. Such amendments would empower judicial officers to determine the nature of the sexual offence before them-whether it is a genuine case or a boyfriend-girlfriend case presented as defilement.

Another clear challenge discovered by this research is effective implementation of Section 31(10) of the SOA. This section prohibits the court from convicting an individual on account of sexual violation purely on the premise of unsupported evidence of an intermediary. This important provision of the law has been largely ignored by trial courts even where circumstances merit it. This potentially fatal omission is attributable to lack of prior training of magistrates and prosecutors on protection of survivors. Some magistrates however seem to be deliberately insensitive to the plight of the survivors.

The SOA also fails to effectively acknowledge the gravity of spousal rape. The reason many jurisdictions do not classify this as a sexual violation has its roots in cultural understanding of marriage as an institution.<sup>120</sup> At Common law, spouses were excluded from arraignment for assaulting their wives in light of the understanding that marriage implied sexual consent. Sir Mathew Hale's rationale for this was considered sufficiently dependable and definitive and effectively embraced in the common law.<sup>121</sup> Notwithstanding Hale's justification that marriage suggested interminable, non-withdrawable consent to sex, different hypotheses and reasoning for the common law conjugal assault exception were premised on the otherwise benighted understanding that at marriage, a woman effectively becomes the property or asset of her husband, and that when two individuals get married, they wind up one, rendering conjugal assault unimaginable on the grounds that a spouse is incapable of assaulting himself.

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<sup>120</sup> *Reg v Mayers* (1872) 12 Cox CC 311 (Lush J).

<sup>121</sup> Sir Matthew Hale said thus, "The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and the contract the wife hath given up herself in this kind unto her husband, which she cannot retract."



Further schools of thought and reasoning incorporated the assumed evidentiary troubles of demonstrating absence of assent in an on-going marriage, the affirmed inclination of the fairer gender to generally mislead about assault, and the contention that conjugal assault is less severe a crime compared to an assault outside of marriage. The spousal-rape-exemption was countermanded in the early 90's in the United Kingdom following a Law Commission report that emphatically denounced and censured the spousal-rape-exemption, and a landmark 1991 House of Lords determination that held that the presumption of a husband's inability to rape his own wife was no longer part of the English common law.<sup>122</sup>

Despite the change of the societal view in England, several countries are yet to change their perception on spousal rape. A 2011 report by the United Nations lamented that whereas over sixty five percent of all the countries in the world have enacted laws and policies against sexual violations, many are yet to formulate laws clearly and expressly criminalizing marital-rape. Based on the said report, out of the possible 173, only 52 countries had revised their laws to make spousal-rape criminally actionable as of February 2011. Among them include Rwanda, South Africa, Canada, Denmark, Australia, Turkey, Brazil and South Africa. Back to Kenya, the SOA prescribes a direct and clear marital-rape-exemption, whereby the definition of rape is said not to apply in respect of persons who are "lawfully married" to each other.<sup>123</sup> This research established that the failure to censure spousal rape breeds a culture of lawlessness in which sexual violations and in particular, rape, against married women is generally condoned and socially accepted and serves to cement gender inequality both within marriage and in the society generally. It effectively communicates an understanding that a marital union can provide a *de facto* license to rape effectively refusing women the much-needed protection of the law, and sustaining a culture of impunity which only serves to make women vulnerable to further abuse. The reluctance of the law to consider spousal-rape as a criminally sanctionable offense affirms and reinforces an anachronistic perception and understanding of women as chattels, with no separate legal existence and liberties from their spouses. It effectively implies that the rape of a woman by her spouse is less deplorable and unjustifiable than by someone with whom she does not have a marital relationship; and is an aspersion to women's rights to freedom from abuse.

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<sup>122</sup> Sasha Hart, "Rape, Marriage and Rights", 50.50 Inclusive Democracy, 14 June 2014, available at <https://www.opendemocracy.net/5050/sasha-hart/rape-marriage-and-rights>, accessed November 6, 2015

<sup>123</sup>

This study established further that the requirement for corroboration is another major stumbling block to effective implementation of the SOA. While there are precedents that clearly prescribe exception to the same on constitutional basis, such are rendered arguably moot as long as the explicit provisions persist in law. It was stated in *Njuguna s/o Wangurimu v Reginam*<sup>124</sup>, that whilst it is strictly not a legal requirement that an accused charged with rape cannot be convicted on unsupported evidence, the practice is to look for and to require corroboration in sexual offences. This position was reiterated in *Bernard Kebiba v Republic*<sup>125</sup>, where the court stated that corroboration is not a rule of law, but of practice. In appropriate circumstances, where the trial court is convinced that the complainant is speaking the truth, the court may convict without corroboration. The court must however warn itself of the danger of basing a conviction upon uncorroborated evidence of the complainant. Where the court feels that there is need for corroboration, it must say so expressly in the judgment and look for it from the evidence led and recorded and if the court finds it, it must state so in the judgment. Where the court finds no corroboration after forming the opinion that it is necessary, it must give the accused the benefit of doubt and acquit him. This position was echoed in *Thuo v Republic*<sup>126</sup>, where it was held that the court trying a sexual offence should be aware and careful of the danger of making decisions on the unsubstantiated testimony of the complainant, but while aware of such danger, it can effectively convict in the absence of substantiation in instances where it is properly convinced that the testimony is in and of itself truthful. In instance where the court fails to give such a warning, the conviction will normally be set aside unless the appellate court is satisfied that there was no failure of justice. In *Mukungu v Republic*<sup>127</sup>, it was held that since the trial court and the High Court had believed the complainant and convicted the appellant, the conviction was proper and it was not necessary to fault it.

The Court of Appeal held that the requirement for corroboration in sexual offences affecting adult women and girls is unlawful to the degree that the requirement is limiting and unjust. The requirement was found to be in violation of section 82 of the old Constitution, and it was further held that all the decisions which hold that corroboration is essential in sexual offences are no longer good law, as they are discriminatory and the Constitution has various provisions against discriminatory treatment on the basis of sex. Despite these judgments as to

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<sup>124</sup> (1953) 20 EACA 196 (Sir Barclay Nihill P, Sir Newnham Worley VP and Bourke J).

<sup>125</sup> CACRA No. 104 of 2000 (Chunga CJ, Akiwumi and Keiwua JJA).

<sup>126</sup> [1988] KLR 763 (Platt, Gachuhi JJA and Masime Ag JA).

<sup>127</sup> [2002] 2 EA 482 (Kwach, Bosire and O’Kubasu JJA).

the requirement of corroboration, the drafters of the SOA still went ahead to incorporate an express requirement of corroboration in the statute.

## CHAPTER 5

### 5.0 CONCLUSION AND RECOMMENDATIONS

#### 5.1 Introduction

As highlighted previously, the objectives of this research primarily included, among others, to provide an overview of the SOA with the aim of understanding how the same defines and punishes sexual offences; examine specific provisions in the SOA that either facilitate or hinder the expeditious and just trial of sexual offence related cases; assess the efficacy and adequacy of the provisions in the SOA in curbing sexual offences; examine the challenges faced in implementing the provisions of the SOA and prosecuting sexual offences cases in the fight against sexual offences; and to propose recommendations on improvement of the Kenyan practice based on select international practices. This Chapter is thus a culmination of the research into the efficacy of the SOA. It condenses the findings into simple coherent statements of finality reflective of the established norm and effectively recommends adjustments, policy or otherwise, necessary to effectively address shortcomings identified in the course of the study.

Protection of the most vulnerable in the community from the discriminative and diminutive acts, omissions or commissions of the dominant is a universal right guaranteed by the Constitution as well as the international legal and policy instruments ratified by Kenya. The Preamble to our Constitution effectively acknowledges the desires of the Kenyan citizenry for an inclusive government anchored by the fundamental values of social justice, democracy, human rights, freedom, equality and the rule of law. Pursuant to the Constitution<sup>128</sup>, all state and public officers are restricted and placed within certain limits by the national values and principles whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions. These values include non-discrimination, social justice, human dignity, inclusiveness, equity, **protection of the**

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<sup>128</sup> CoK 2010, Article 10.

**marginalized**, equality and human rights.<sup>129</sup> In a bid to realize these aspirations and objectives, the Constitution<sup>130</sup> makes it a fundamental duty of the state to uphold, respect, protect, observe and the fundamental freedoms and rights of the citizenry as enshrined in the Bill of Rights.<sup>131</sup> Effective implementation of the SOA therefore falls within the realm of the state's strict duty and obligations.

## 5.2 Legal and Policy Reforms

In as much as the SOA is a progressive piece of legislation in as far sexual offences is concerned, it still does not comprehensively or adequately deal with all the sexual violations witnessed in the Kenyan society every day. This research noted that the Act is very bold and clear especially when it comes to the definition of offences and prescription of respective sentences. Whereas the definitions are clear, there is neither the mention of a human rights-based approach nor the prevention through sensitization. The Act is strangely silent on a National Policy Framework requisite for effective periodic appraisal of the implementation of the Act. Moreover, whereas the SOA talks about sexual violations by a person in position of authority or trust in Section 31 in determining vulnerability of a witness, it does not extensively canvass the same from a sentencing perspective like the South African law. Moreover, albeit few individuals know as it has not been posted on the web, Section 38 of the Sexual Offences Act 2006 criminalizing false allegations/charges was effectively countermanded by statute (Miscellaneous Law) Amendment Act, 2012.<sup>132</sup>

Marital rape is also another area that the SOA does not effectively canvass possibly due to the traditional societal respect for marriage as a sacred union. This research established that spousal rape is on the rise. It is critical that the overarching practice with regards to the SOA of expanding the full insurance of sexual offences laws just to women who are assaulted by somebody other than their spouses denies conjugal sexual assault victims the full and equivalent security of the law, a major assurance guaranteed under global human rights instruments. The way that the SOA does not unequivocally criminalize conjugal sexual

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<sup>129</sup> Makau J. Aaron, "State Responsibility for Eliminating Violence against Women: The Due Diligence Principle and the Role of Judges," December 10-12, 2013 Available at: <http://kenyalaw.org/kenyalawblog/role-of-judges-eliminate-violence-against-women-meru-petition-8-of-2012/#sthash.5ffZKPE3.dpuf> accessed November 2, 2015.

<sup>130</sup> COK, art 21.

<sup>131</sup> Under Clause (3) of the Article 21, "All State organs and all public officers have the duty to address the needs of vulnerable groups within the society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities.

<sup>132</sup> Criminal Revision No. 6 of 2014 [2015] eKLR.

assault is especially disturbing given that studies globally have established that close connections constitute the fundamental site of women's encounters with physical and sexual viciousness.<sup>133</sup> There is therefore an urgent need for amendment of the SOA to include spousal rape under the purview of the sexual offences. The provisions of rape in the SOA should be expanded to define and anticipate necessary ingredients, proof and punishment for marital rape.

The requirement for corroboration in law is also still a stumbling block towards effective realization of the goals of the SOA. Though there is case law clearly providing for an exception to the same, the fact that the same is still explicit in the statute renders such precedents moot. There is a need to amend the law to leave the aspect of corroboration to be dealt with by the courts on a case by case basis as established by the cited legal precedents.

### **5.3 Judicial and Police Reforms**

Effective implementation of the SOA doubtlessly requires strong, vibrant and autonomous judiciary and police. As explained earlier, the sluggish implementation of the SOA has been attributable to the shortcomings of the judiciary and police with the major shortcomings being lack of awareness as to the provisions of the law and poor training in handling of sexual offences victims. Other challenges identified by this research that directly affects the victims' right of access to justice include:

- i. Massive delays in court processes and procedures;
- ii. The demand that confirmation of sexual brutality against ladies be validated. In Kenya, there are strict tenets of proof in connection to sexual offenses, whereby as an issue of legal practice, the confirmation of sexual offenses was required to be substantiated;
- iii. Difficulties in obtaining certification from a medical doctor.
- iv. Poor treatment of victims at the police report desks.

Effective implementation of the SOA in a bid to deter cases of fresh violations requires strict implementation of the sanctions enshrined in the law. Failure or reluctance by or on the part of the police to forward cases of gross violations for prosecutions has seen cases of repeat violations rise. In one famous case for instance, in Busia, Western Kenya, six men defiled

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<sup>133</sup> World Health Organization

and dumped a sixteen-year old girl in a 15-foot pit latrine leaving her for dead. It by sheer luck that the poor girl was saved. The incident confined her to a wheelchair. The aggressors were arrested after the victim identified them but later released after cutting grass. This sparked massive uproar especially within the human rights society. Nonetheless, the suspects are yet to face the law.<sup>134</sup> When analysing this case and other cases before the courts, this research established that as creatures of a strong system of social patriarchy, persons and individuals working in the criminal justice system will inevitably resort to analyse facts before them based on their socialization. There is thus an urgent need to effectively integrate gender and human rights in a holistic and systematic manner throughout the entire criminal justice system. Within the judiciary itself, the Kenya Women Judges Association is a potentially significant actor in reforming the institution from within. Their flagship programme on Equality of Jurisprudence could be up-scaled and supported so that it becomes integrated as a core curriculum within the Judiciary Training Institute. In the short run, support to highlight and document subordinate court decisions on sexual offences would provide a solid foundation for the training and sensitization of the judicial officers-as these determinations would be appraised for their adherence not only to gender sensitivity but also to regard for women's rights.

Despite their inadequacies in handling the sexual offences victims, the gender desks were excellent inventions. They present an even better opportunity for improved service provision to the sexual offences victims. Their current limitations and shortcomings are attributable to poor training and acute lack of requisite knowledge on the part of the manning officers. Another identifiable challenge is lack of resources, financial or otherwise. A systematic process of ensuring that the problem of sexual offences receives high priority could be reflected through the establishment of a special force on sexual violence as well as seniority of officers assigned to manage the desks. These officers to manage these desks should desirably be of specific rank and should be properly and adequately trained to handle sexual offences. This research notes that whereas some trainings on handling sexual offence victims are currently conducted by the Federation of Women Lawyers (FIDA-Kenya) at Kiganjo Training College, the same is not fully and properly integrated into the police training curriculum. There is thus an urgent need to integrate the training within the entire police training curricula with relevant practical assignments undertaken, in order for recruits to qualify for their pass outs. In addition, overall reform within the entire security sector that

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<sup>134</sup> Digital News, 'Radical protest for rape victim Liz kicks off' *The Daily Nation* (Nairobi, October 31, 2015).

assures gender responsiveness is necessary. Such interventions should be targeted to the Military, Administration police, Criminal Investigation department as well as the General Service units. The post electoral violence of 2008 demonstrated that most security actors were unable to recognize the sexual violence risks that women and girls were exposed to, and hence, they were unable to provide sufficient preventive measures.

#### **5.4 Awareness and Advocacy and Training**

This research established that Kenya currently has a model gender recovery centre established at the Nairobi Women's Hospital with the intention to replicate the concept at every hospital throughout the country. Though other recovery centres such as Kenyatta and others have been replicated, they face major challenges of capacity including human resource, equipment and adequate funding. There is therefore an urgent need for the government to effectively provide adequate funding to the model gender recovery centres to make them sufficiently equipped to handle even the most complex of cases. This research supports the recommendations by the Commission for Investigations into the Post-Election Violence in Kenya (CIPEV) (famously known as the Waki Commission) which directed the government to establish gender violence recovery centres as departments in every public hospital with their independent staff, facilities, and budget.

This study also established there currently the challenge of low level of awareness amongst survivors on where or how to get assistance or help. It is noted that there are several organisations which are conducting community mobilisation and awareness on gender and rights throughout the country. However, the awareness campaigns should be intensified and widely disseminated, allowing communities to know where and how to contact organisations that can offer assistance. Whilst this research acknowledges that cultural change in behaviour and attitudes takes time, there is need to structure the mobilisation and awareness interventions so as to obtain the desired results.

Other than the police, the government ought to equally extend extensive and thorough tutelage to specialized groups and entities, for example, prosecutors and the Judiciary on manners by which state organs can effectively cooperate to eradicate sexual brutality against women. Article 244 of our Constitution requires the National Police Service to educate its staff on the most noteworthy conceivable benchmarks of competence and integrity and to regard and respect human dignity as well as the fundamental rights and freedoms. In petition

8/2012 Justice Aaron Makau issued an order of mandamus forcing the Inspector General of Police to actualize this Constitutional provision. On the off chance that this measure of creation of awareness is to be completely successful, these three organs of the state need to synergize their efforts in sensitization and acting swiftly to avert sexual violence against women.<sup>135</sup> On the other hand, creation of awareness in the Judiciary is essential.<sup>136</sup> The determinations of our courts can arguably only effectively deal with sexual offending if they are first sensitive to the realities and needs of the victims of such offences.

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<sup>135</sup>Makau J. Aaron, "State Responsibility for Eliminating Violence against Women: The Due Diligence Principle and the Role of Judges," December 10-12, 2013 Available at: <http://kenyalaw.org/kenyalawblog/role-of-judges-eliminate-violence-against-women-meru-petition-8-of-2012/#sthash.5ffZKPE3.dpuf> accessed November 2, 2015.

<sup>136</sup> The Kenyan Judiciary has in the past been criticized for being cold and moderate in factoring universal arrangements on women's human rights in their decisions. See for example the Court of Appeal determination in *Omambia v. Republic Criminal Appeal No. 47 of 1995 and Stephen Muendo Koti v. R* where the court held that touching a lady's chest and behind did not constitute improper sexual conduct or assault as they were not part of her genitals. The domestication global human rights instruments through the local laws has added to solving these challenges; however, the courts need to finish the procedure by consolidating these standards in judicial precedents.



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