

INTERPRETATION OF SECTION 8 OF THE SEXUAL OFFENCES ACT, 2006 AND ITS  
EFFECT ON THE BOY CHILD IN CASES OF MINOR TO MINOR TEENAGE  
DEFILEMENT IN KENYA

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**DECLARATION**

I, **NELLY KASISO NGOVI**, do hereby declare that this is my original work and that it has not been submitted and is not being submitted for the award of a degree or any other academic credit in any other university.

Signed..... Date.....

**Nelly Kasiso Ngovi**

This thesis has been submitted for examination with my approval as the University Supervisor

Signed........ Date...26<sup>th</sup> November, 2020.....

**Dr. Scholastica Omondi**

## **DEDICATION**

To my loving parents and siblings

For their love and support; they are the best gifts God ever gave me.

## **ACKNOWLEDGEMENTS**

I am most grateful to the Almighty God for unconditional providence, good health and grace.

This research project would not have been possible without invaluable counsel, guidance and support of my supervisor, Dr. Scholastica Omondi. I am privileged and humbled to have worked under her supervision.

Finally, I am grateful to all my friends and especially the University of Nairobi LL.M class of 2018

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## **LIST OF ABBREVIATIONS**

SOA- Sexual Offences Act No.3 Of 2006.

ODPP-Office of The Director Public Prosecutions

SA-South Africa

UG-Uganda

CRI-Criminal

COVAW- Coalition on Violence Against Women

FIDA-Federation of Women Lawyers

UNCRC- United Nations Convention on The Rights of The Child

PRC- People's Republic of China

eKLR-Electronic Kenya Law Reports

DCI-Directorate of Criminal Investigations

POSCO-The Protection of Children Against Sexual Offences Act,2012

CRA-Children's Rights Act

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## ABSTRACT

The study interrogates the role of the Sexual Offences Act No. 3 of 2006 in addressing defilement of the child and in particular section 8 of the act, with focus on the gap in its provision or lack thereof of on guidelines on what to do or whom to charge in the event that two minors a boy and a girl of close age (both teens) of about age 15 and 16 defile each other. It is quite notable that there are inequities in applicability of the law by society, law enforcers and the Justice system for example, where this can be applied in the context that when two minors (boy and a girl) both of 16years of age or one is 15 and the other 16 engage in sex, the boy is often charged in court while the girl is viewed and treated as the victim and is sought to be consoled and empowered while the boy is taken through the criminal justice system for trial.

Under criminal Justice internationally, defilement is recognized as the act of taking away the chastity and purity of a child-an act that involves the penetration of genital organs of an adult into the genital organs of a child-The Sexual Offences Act No. 3 of 2006, Laws of Kenya section 8 defines defilement as such and goes on to give penalty for children of tender years to those of adolescent age. This refers to both the girl and boy child of an act of penetration by an adult but has a glaring gap on what should happen when minor adolescents are the ones who have defiled each other and as such this gap in law allows for abuse or other factors to be considered on whom to charge and it has become clear over the years that bias is on the boy child.<sup>1</sup> “Child” has the meaning assigned to it in the Children Act<sup>2</sup>that is a person below

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<sup>1</sup> Section 8 of the Sexual offences Act No. 3 of 2006

<sup>2</sup> No. 8 of 2001. Revised Edition 2017 [2012]

the age of 18 years.<sup>3</sup> The aim of these provisions is to protect any child irrespective of gender as supported by the Constitution 2010 on the best interests of the child.<sup>4</sup>

There is too much focus on the girl child in Kenya that the boy child has often been left out, neglected and even stigmatized; many boys get defiled/sodomised and this goes unreported partly due to social factors such as culture, societal beliefs and biological make up that causes the community at large including many Justice stake holders to believe that a boy cannot be defiled especially by a girl or by a woman.

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<sup>3</sup> Section 2 of the Children Act. Under the Penal Code, the material age for defilement was 16 years.

<sup>4</sup> Article 53 (2) of the Constitution provides that a child's best interests are of paramount importance in every matter concerning the child

# **CHAPTER ONE**

## **INTRODUCTION**

### **1.1 Background of the Study**

There is the need to project and seek for an amendment of the Sexual offences Act No. 3 of 2006 (SOA) and particularly section 8 of the act, to provide under it the applicable action when two adolescent minors (a boy and girl aged 16/15 or 16/17 respectively) defile each other. Such a provision is totally lacking in the Act, which has led to gender discrimination and abuse on the boy child knowingly, either presumably or otherwise.<sup>5</sup>

There is the need to examine issues pitting the boy child against the criminal justice system and to refocus some attention into the development and wellbeing of the boy child. There is need for determination of the rights of the boy child as is envisaged in the Constitution of Kenya and by international conventions on the rights of the child, by pointing out the need to support the boy just as much as the girl as the law is equal for all children.

The patriarchal system in Kenya and Africa generally, complicates matters when it comes to dealing with the consequences of sexual violence against boys who are raised from an early age to be strong, domineering and that girls are the weaker sex, hence the boys are programmed to know and believe they can never be seen as victims hence some boys when defiled will never come out to say it to their parents or guardians, and their guardians may never seek to have the same reported to law enforcers, as it is perceived as taboo and unbelievable.

The aforementioned mentality is one of the main reasons that largely cause an adolescent boy child to be picked on for prosecution in a case where they have defiled each other with an

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<sup>5</sup> Sexual offences Act No.3 of 2006

adolescent girl child. This is greatly enabled by the society by way of practice and this leads to inequity in application of the law.

Prior to the enactment of SOA, sexual offences were provided for under the penal code wherein they were categorised as offences against morality.<sup>6</sup> SOA sought to consolidate other acts dealing with sexual offences and repealed others while bringing in some new offences such as child tourism, child pornography, child trafficking and sexual assault among others. A key aspect of the act is that it has provided for minimum mandatory sentences that were not there in the penal code and as such the penalties under the SOA seek to allow for minimal discretion by judicial officers and ensure maximum punishment for offenders.<sup>7</sup>

Defilement has clearly been outlined under section 8 of the SOA, an issue that was not clearly defined under the penal code. The standard of proof in a case of defilement is lower compared to that of rape where corroboration is necessary hence these are among the issues that have caused some ground breaking in protecting children from sexual offences and abuse. The enactment of the Constitution of Kenya 2010 is also key on children's rights under Article 53 and keen on basic human rights.<sup>8</sup>

The above having been noted and the strides made in enacting laws governing children's rights and protection of children's chastity, a lot still remains to be done as some cases go unreported while others are lost as the evidence is not properly preserved or the complainant takes off among other cases.

It is worth noting that ever since the enactment of the SOA, it is safe to say that quite a number of defilement cases have been reported directly through the police, the media, the courts among others and about 80% of this cases have been cases of defilement against the girl child, where in a number of convictions have been recorded and published.

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<sup>6</sup> The Penal Code of Kenya-Chapter 63 Laws of Kenya.

<sup>7</sup> Section 8 of the sexual offences Act no. 3 of 2006

<sup>8</sup> Article 53(1)(d) of the Constitution of Kenya

Statistics from the Office of the Director of Public Prosecutions (ODPP), Director of Criminal Investigations (DCI) and the courts will demonstrate that very few cases on defilement against the boy child have been reported. This is perhaps attributed to the gender cultural roles assigned/associated with boys and girls, and that a boy would not be expected so to speak by the society to have been defiled by a fellow man or worse still by a woman.

Further, where defilement is between two adolescent minors (a boy and a girl of age 15 & 16 or 16 & 17 respectively), the same statistics will show that the boy is charged with defilement against the girl, while the girl is seen as the victim of the act. This was pointed out as a gap by the High Court in *POO (A minor) v Director of Public Prosecutions*.<sup>9</sup> In the ground breaking case that set precedent, the court set at liberty a 17-year-old who had been convicted for allegedly defiling a fellow minor and had served his sentence for over a year. In holding that the Sexual Offences Act had been applied discriminatorily against the boy, the court awarded the boy Kshs.200, 000/- as damages.

In similar light, we are now seeing the issue of the boy child has been raised with the legality and morality of the SOA, as it is being seen as a law that protects the girl and criminalises the boy. This issue was brought out in a newspaper article of the Daily Nation, which captured a forum in Nyeri of lawyers representing teenage boys.<sup>10</sup>

From the above issues and this notable case law, the glaring gap in SOA and particularly section 8 of the act was also exposed, as to the fact that it is silent and gives no guide as to how to proceed where two minors defile each other.

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<sup>9</sup> Hellen Omondi J- Constitutional Petition 1 of 2017-POO (A minor) VS. Director of Public Prosecutions.

<sup>10</sup> The Daily Nation-Monday 1<sup>st</sup> February,2016-Page

## 1.2 Statement of the Problem

Although SOA was intended to protect the child against defilement, the focus of the perpetrator was on an adult, but failed to take into account when both the perpetrator and victim are minors. Consequently, in defilement cases involving child victims and child perpetrators, the boy child is prosecuted for the offence. And what is more is that enforcement officers seem to overlook the possibility that the boy is also a victim in that both minors have defiled each other.

Parliamentary debates pre-enactment of the Sexual offences Act,2006, on April 26,2006<sup>11</sup>in parliament, the Sexual Offences Bill, as it then was before enactment, came for a second reading and there was so much debate around it.

A nominated member of the house then Honourable Njoki Ndungú proposed to move the house on a motion for the second reading of the bill stating that the country was at war due to insecurity at home and there was urgent need to address sexual violence in the society.

Members went through the bill's provisions and debated around it, the key issues of debate were around rape and there was recognition that men too can be raped and there were cases of such rape reported and the stigma that came with that was also highlighted due to societal mind set.<sup>12</sup>

In spite of the above debates, the bill was seen as having a limited definition of rape where a man or a boy could not be seen as a victim of sexual violence.

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<sup>11</sup> April 26, 2006 Hansard Parliamentary Debates 735

<sup>12</sup> 736 Hansard Parliamentary Debates of April 26<sup>th</sup> 2006



The current bill as was seen by a number of members as one that would not allow or expressly assert that a boy can report and be protected of defilement<sup>13</sup> seeing that even sodomy was never in the bill and never made it to the Act.

Some members sought to emphasize the need for equity and equal protection, that the law should protect all since men and boys can be and are raped and defiled too just as women and girls.<sup>14</sup>The bill as is did not seem to provide equity as protection of the girl and women seemed to be of greater focus.

There was also debate around the penalties for defilement with some members proposing that the distinction in ages to determine the degree of sentence be abolished and instead a harmonized sentence for all children from 0-18 years be put in place. The argument was that the definition of a child is one and defilement is still defilement regardless of whether it was to an eleven-year-old or a twelve-year-old.

It is worthy to note that the above provision was the case when the bill was first tabled but after consideration of among others children of tender years as defined in the Children's Act<sup>15</sup>, the varying sentences were considered and proposed in the bill.

Majority of the members supported the bill as a good move to cure sexual violence and protect children.<sup>16</sup>

Eventually, the bill was passed and the Sexual Offences Act, No. 3 of 2006 came into force but despite some crucial deliberations witness in the foregoing in parliament, the act still has no provision specific to the boy child i.e. sodomy.

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<sup>13</sup> April 26, 2006 Hansard Parliamentary Debates 745-Honorable Mutula Kilonzo

<sup>14</sup> 1106 Hansard Parliamentary Debates May 31, 2006-Kirugi Joseph Laiboni M'Mukindia

<sup>15</sup> Section 2(1) of the Children Act 2001

<sup>16</sup> Hansard Parliamentary Debates May 31, 2006

The coming into force of the act was celebrated as a good move towards curbing sexual violence and deterrence but over time, more than ten year since the enactment of the act, we have seen equity principle between the girl and the boy violated over and over with discriminate application of the law especially in cases of teenage defilement where the boy is also treated as the perpetrator, charged and is jailed while the girl is protected against the boy. The root cause of this discriminate application can be traced back to the fact that no clear provision in the sexual offences Act has been provided for how to proceed.

Hence, although there is notable progress in terms of curbing this behaviour, through sensitization of the law on defilement leading to more reported cases and serious punishment meted on adult offenders , there still exists a gap in the law on SOA (Section 8) and more so in its discriminate application against the boy child which has been a pending issue that has gone unspoken and not addressed for long until more recently, with a lot left to be done on the same and in the same breath, it has led to many unreported cases of boy children who are equally defiled/sodomized by adults due to the stigma and deep believe in society and the community at large that boys/men are the defilers and that a boy/man is the initiator hence cannot be defiled.

The problem thus which this research seeks to address is the issue of application of the law which was put in place to curb defilement of children (boy and girl) yet it has continued to be favourable to the girl child and not much to the boy child (under 18 years).

### **1.3 Objectives of the Research**

- I. To examine the adequacy of section 8 of SOA in providing equal protection of the law to both the girl and boy child without discrimination.
- II. To examine the impact of the court's interpretation and application in handling of defilement cases where adolescents have engaged in sexual intercourse.

- III. To establish what factors are considered by the prosecution in deciding who to prosecute in such cases.
- IV. To find out the effect of such prosecution and the court's decisions on the protection of child victims of defilement equally irrespective of gender in line with children's rights and best interests' principle.
- V. To identify what measures to be taken to protect child victims of defilement without discrimination on the boychild, in cases involving minors (adolescents) and who is responsible ensuring these measures are taken and followed.

#### **1.4 Research Questions**

The primary research question that this research seeks to address is: How adequate is section 8 of SOA in providing equal protection of the child in defilement cases involving child victims and perpetrators where they are both adolescents/age mates of a minimal age difference such as 15 & 16 or 16 & 17 respectively?

#### **The other questions arising from the main research question are**

- i. How has this gap in section 8 of SOA impacted the court's interpretation and application of the Law on minor to minor defilement (adolescents especially age mates of about 15 & 16 years)?
- ii. What is the impact of the varying and/or often misguided application of the court's in handling such cases?
- iii. What factors does the prosecution consider in deciding who to prosecute under such cases?
- iv. What is the effect of such prosecution on the protection of children in line with children's rights and best principle of the child?

- v. What measures can be taken to protect child victims of defilement without discrimination on the boychild in cases of sexual intercourse between adolescents?
- vi. Who is responsible for addressing the concerns arising from this research?

## **1.5 Theoretical Framework**

This study is informed by, Theory on socialization-childhood and Social Cognitive Theory of Gender Development and Socialization.

### **1.5.1 Theory on Socialization-Childhood**

This theory focuses on children's observations about their genitals (e.g., castration anxiety, penis envy). It has not marshaled much empirical support.<sup>17</sup> Social learning theories are behaviorist theories that rely on reinforcement and modeling explanations of behavior—the environment makes people do things. Cognitive developmental theories posit that children learn gender (and gender stereotypes) through their mental efforts to organize their social world.

One problem with some variants of this perspective is the assumption that children learn gender because it is a natural facet of the world, rather than that it is an important facet of the social world. Research shows that the importance children place on gender varies by class, race, family structure, sexuality of parents, etc. Three key gender lenses seen as hidden assumptions: gender polarization (men and women are different and these differences constitute a central organizing principle of social life), androcentric (males are superior to females; male experience is the normative standard); and biological essentialism (the first two lenses are due to biological differences between the sexes) were identified. It is recommended

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<sup>17</sup> Sigmund Freud: Freud's Psychoanalytic Theory- Page 2.

that an individual differences lens that emphasizes the remarkable variability of individuals within groups.<sup>18</sup>

A social constructionist approach views gender acquisition as a self-fulfilling prophecy.<sup>19</sup> The most important insight from research on gender socialization is that because boys and girls are treated differently and put into different learning environments, they develop different needs, wants, desires, skills, and temperaments; in short they become different types of people—men and women—who hardly question why they are different or how they ended up that way.<sup>20</sup>

The basic underlying model is that of the self-fulfilling prophecy. Because people think boys and girls are supposed to be different, they treat them differently and give them different opportunities for development. This differential treatment promotes certain behaviors and self-images that recreate the preconceived cultural stereotypes about gender. The process repeats itself over and over in an unending spiral across the generations, so that although gender stereotypes are being constantly re-created and modified, they seem natural and impervious to change.<sup>21</sup>

Children learn about gender and how to “do gender” because it is central to the way we organize society. Children “learn culturally appropriate ways of thinking and being as they follow routine rituals and respond to the everyday demands of the world in which they live.

To be considered competent members of society, they must learn how to fit in as appropriately gendered individuals.”<sup>22</sup> Gender socialization turns children into “cultural

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<sup>18</sup> Sandra Lipsitz Bem, *The Lenses of Gender: Transforming the Debate on Sexual Inequality* (New Haven: Yale University Press, 1993), pp. 2-5.

<sup>19</sup> Theories of gender socialization by Bem&Coltrane-Chapter 5(Page 114)

<sup>20</sup> Biological essentialism, which rationalizes and legitimizes both other lenses by treating them as the natural and inevitable consequences of the intrinsic biological natures of women and men. This is the lens that has secularized God’s grand creation by substituting its scientific equivalent: evolution’s grand creation.

<sup>21</sup> Book by R&C, Chapter 4, Coltrane. Chapter 5(Page 114)

<sup>22</sup> See Supra note 1

natives,” who know their culture’s reality without realizing that other realities are possible. Both R & C and Coltrane review research showing that boys and girls are treated differently. The conflict in application of the law on defilement under the Sexual Offences Act against the boy child can well and easily be related to this theory that in this very way that children are socialized to see their differences, act differently and ultimately are treated and handled differently does impact on many other social-economic issues in their lives. The very same society that grooms them to act differently also treats them as such on all aspects hence the attitude noted in the handling of girls versus boys in cases of defilement.

### **1.5.2 Social Cognitive Theory of Gender Development and Differentiation**

Social Cognitive Theory of Gender Development and Differentiation- Relevance of behavioral and cognitive factors is considered in this theory; however, primary emphasis is placed upon the environment and social practices in producing and perpetuating gender differentiation, particularly through modeling (Bussey & Bandura, 1999). Specifically, social cognitive theorists argue that the development and differentiation of gender transpires through the reciprocal and bidirectional influences occurring between three factors: personal, behavioral, and environmental. Personal factors refer to gender-related cognitions, judgmental standards, and self-regulatory influences such as thoughts, evaluations, and decision-making.

Behavioral factors account for overt actions linked to gender (e.g., flirting behavior’s), and environmental factors are the numerous social influences experienced in every day interactions. Bussey and Bandura (1999) posit that this approach is different from gender schema theory and cognitive-developmental theory in that it specifically emphasizes the importance of non-cognitive related influences, specifically motivational, affective and environmental factors. In particular, it highlights the importance of learning gendered

information through models. In their own words, Bussey and Bandura (1999) explain: “gender constancy is the product rather than an antecedent of the emulation of same sex models”<sup>23</sup>

This theory is more or less similar to the aforementioned theory on socialization-childhood which models children’s behavior, attitudes and roles early in life and this are creations of the society they are in. This theory like the other, then influences the discrimination or different ways in which girls are treated from boys-girls being seen as the weaker, more fragile sex hence treated as the victim in most circumstances including this issue on defilement, forgetting that the boy is equally a child who requires protection by the same society and under the law.

### **1.6 Study Hypotheses**

**The study was guided by the following hypotheses;**

1. There is noted inadequacy of section 8 of SOA in providing equal protection of the law to both the girl and boy child without discrimination as it is lacking in a clear provision for adolescent to adolescent sex (defilement), which has left the law open to various interpretations and application.

### **1.7 Justification Of The Study**

The findings of the study will be key in informing necessary law reforms. By highlighting the legal challenges faced when applying the law, the study will also make a call for urgent reform/amendment of section 8 of SOA to give clear direction as to how to proceed when two minors (adolescents) defile each other. The findings of the study will also assist in policy

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<sup>23</sup>Psychological Review 106 (4):676-713 (1999) Page 688(Journal)

formulation and development. The study will highlight best practices and lessons which Kenya can learn from other jurisdictions with regards to the application of SOA, more so in dealing with minors.

In addition, the findings of the study will enhance knowledge. It will fill the existing gap in law and offer suggestions, proposals on what can be done about minor to minor defilement (adolescent sex). The findings will assist policy makers develop programmes that can address the current predicament of boy minors facing the criminal justice system due to discriminate application of law and altogether address adolescent sexual conduct. Lastly, the study will identify other areas of research that can contribute to this study or enhance the same.

### **1.8 Research Methodology**

The study largely employs desktop review by utilizing already existing data available from secondary sources like published books, websites, case law, journal articles, and government reports. It also critically analyses several other jurisdictions namely Nigeria, China, India and with a view to identifying any positive lessons which Kenya can learn from their experiences with prosecuting defilement cases between minors.

The research also involved my observation and first-hand experience the area of prosecuting defilement cases, as I had previously worked as a public prosecutor at the ODPP and had the benefit of prosecuting various defilement cases from the Subordinate Courts up to the Court of Appeal, most of my study is drawn from my experience in court and also desk review which includes review of the most recent cases and issues surrounding my topic.

In the initial stages of my research and with recent case law in 2019, I would have wished to employ part of the qualitative research method by building a questionnaire and interviewing some of the Judges and/or Magistrates but this proved difficult because the standard requirement for a project thesis research paper under the qualitative style of research requires



that a minimum number of thirty (30) Judicial Officers be interviewed. This was challenging considering that the number of Judgements really bringing out the issues in my research so far are not as many and can only be counted up to about six (6).

Sample size guidelines suggest a range of about thirty (30) interviews to be adequate<sup>24</sup>, 1, especially where further interviews bring no new concepts.

## **1.9 Literature Review**

This literature review provides the reader with an overview of major academic works concerning child sexual abuse in the general population. This is a comprehensive review of the available literature, though it is not a meta-analysis (a synthesis of research results using various statistical methods to retrieve, select, and combine results from previous studies).

During the course of the past fifteen years, the field of defilement research has expanded and become increasingly inter-disciplinary. It would be nearly impossible to review every piece of information relating to the topic. Instead, this is a compilation of information pertaining to theories that have attained general acceptance within the community.

In reviewing the literature concerning defilement, and more so of discrimination in the application of the law, in particular section 8 of SOA for the boy child where two minors of minimal age difference i.e. 15 & 16 or 16 & 17 years, have defiled each other, the amount of empirical research was limited. Additionally, much of the literature consisted of either defilement generally and the birth of SOA and strides it has made to protect children from defilement or purely on defilement of girls by men.<sup>25</sup>

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<sup>24</sup> Qualitative inquiry and research design: Choosing Among Five Traditions by Creswell J.W(1998)

<sup>25</sup> Section 8 of the Sexual Offences Act No. 3 of 2006

One aim of this literature review is to put into perspective the problem of discrimination of the boy child in the application of the law against defilement of a child as compared to the attention and protection offered to the girl child through the same law. However, there is little or no empirical data in books or reports pertaining to the true prevalence of defilement of the boy child in terms of reported cases that have gone unpunished, but too much focus noted on the girl child, which in turn exposes the glaring gap on what about the hushed tones of the defiled boy child? What has been said or done about it, or for him? What about the many reported cases pending before court and others determined, where the boy child was treated as the offender for having defiled each other with a girl child (seen as the victim) of close age gap (15 & 16 or 16 & 17)?

For this reason, to contextualize this, the basis for comparison would be in the general population's perceptions and the current state of affairs in the criminal justice system. Though not so empirical in nature, this literature review does contain an overview of published articles on defilement with some touching on or pointing out the gap in the law for the boy child in terms of reported cases but not in terms of discrimination against him from the very law that should protect him in equal measure to the girl child (SOA).

## **THERE EXISTS LITERATURE IN THIS AREA OF STUDY, CATEGORISED IN;**

### **1.9.1 Child Sexual Abuse: Awareness and Backlash**

In an article, Child Sexual Abuse: Awareness and Backlash<sup>26</sup> sexual abuse issues stir up strong emotions, denial, minimization and rationalizations have always played a central role in the societal response to the subject. This stems from the fact that when society fails to protect its children from sexual abuse, it looks for excuses as to why it failed. It is thus important to interrogate why despite there being laws to protect children from defilement, the

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<sup>26</sup> Jon R. Conte, "Child Sexual Abuse: Awareness and Backlash", in *The Future of Children* 4 (1994) pages 227, available at [http://futureofchildren.org/futureofchildren/publications/docs/04\\_02\\_Full\\_Journal.pdf](http://futureofchildren.org/futureofchildren/publications/docs/04_02_Full_Journal.pdf)

incidences are on the rise. The role of the society and those who enforce and implement these laws and their attitude requires scrutiny to find the weak points in protecting children from defilement.

Although the scholar seeks to bring out the issues that may hinder child protection and has articulated well the key societal norms that may hinder lawful action and justice, he makes no mention on discrimination of the boy child and how he is denied equal protection based on societal attitudes or otherwise where he is involved sexually with a girl of similar age range. Hence, this literature review fails to bring out the glaring gap that informs the very reason of my study.

### **1.9.2 Loss of Innocence: A Plea against the Defilement of Minors in Kenya**

In another paper, “Loss of Innocence: A Plea against the Defilement of Minors in Kenya”<sup>27</sup> the writer brought out concern for the rising cases of defilement in Kenya sometime in 2007 and questioned whether the law was too lenient on child sex offenders. She then concluded that there was failure in the implementation of the law. This paper was done when the SOA was still fresh and a lot was yet to be done on implementation. It is worth noting that with more sensitization, there has been remarkable improvement in terms of the courts understanding and restricting themselves to the minimum sentences provided for under the Act.

However, over ten years since the enactment of this Act the very notable and glaring gap of the unfair discriminative application of the law needs to be interrogated and addressed. This is no noting that this situation has persisted for so long despite guidelines and the task force on sexual offences having been put in place to facilitate review and proper implementation of the Act. Many commentators have documented that societies have varied both over time and

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<sup>27</sup> Awuor Linda, “Loss of Innocence: A Plea against the Defilement of Minors in Kenya”  
University of Nairobi, LLB Dissertation, June 2007

within themselves in their levels of awareness of the problem and commitment to address it. One of the most comprehensive discussions of the history of awareness is a recent article that describes discovery, a push from awareness and the rediscovery cycle.<sup>28</sup>

### **1.9.3 Discovery—push from awareness—rediscovery cycle; Social Stigma**

The review of the writer, identifies a discovery—push from awareness—rediscovery cycle in the mental health field's response to child sexual abuse. Reviewing materials from the eighteenth and nine-tenth centuries in Europe, the authors have found a considerable body of literature, extant a century ago and abundant after 1971, that describes both the occurrence and the damaging effects of child sexual abuse. They also find, however, that this information was often not well received by the public or professionals of the time.

The writer's detail numerous instances in which accounts of sexual abuse were suppressed and the victims, or those who wrote or spoke on their behalf, were ostracized and subjected to suspicion and criticism. They also discuss a number of interesting psychological issues, including the historical and cultural use of denial, minimization, and rationalization of child sexual abuse.

Indeed, this attitude had been deeply engraved in society but there has been a lot of improvement noted mostly in securing justice for the girl child with the society and law enforcers not shying away from reporting, publicizing, openly condemning and protecting the girl child from abuse. But so much still remains to be done as some communities here in Kenya and in Africa still treat reporting such matters as taboo and more so when it is abuse against boys who are never seen as victims and who also shy away from reporting more so sexual abuse as they are socialized to be domineering and not as the victim.

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<sup>28</sup> Olafson, E., Corwin, D.L., and Summit, R.C. Modern history of child sexual abuse aware-ness: Cycles of discovery and suppression. *Child Abuse & Neglect* (1993) 17:7-24.

A case study in Nigeria also shows that cases of the boy child are rarely reported and that a lot remains to be done. The Children Act of Nigeria is where the country draws its mandate to deal with sexual offenders, which provides for life imprisonment for anyone who defiles a minor.

Similarly, closer home, in Uganda, despite having a penal code that provides for death penalty for sexual offenders who defile minors, there is yet to be any reported execution conducted and a lot remains unsaid about the boy child as much is said about the girl child.

The foregoing articles have one thing in common, they speak out broadly on the stigmatization of boy child sexual abuse due to societal attitudes and the poor effect it has in causing the boy child to shy off from reporting such abuse and hence having the girl child benefit from protection while the boy child goes without justice, care and protection.

None of these articles, not even the ones from Africa (Nigeria and Uganda) talk of the issue regarding my intended study-that is any gaps noted or the application of the law in cases involving to adolescent minors defiling each other.

#### **1.9.4 Without Narrative; Child Sexual Abuse**

In an article in 1997 child sexual abuse, attempts to bring out the deep-seated aspect of child abuse/defilement and how it is perceived when it is against a girl vis-a-vie a boy. And the writer goes on to say that a comfortable belief persists those only pedophiles-a tiny number of sexual deviants-abuse children sexually.<sup>29</sup> Of course, one cultural stereotype of pedophiles emphasizes that they are men who prey on boys, not girls. The absence of concern for females ought to give one pause. In fact, cultural images of little girls speak of them flirting or being seductive.<sup>30</sup>

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<sup>29</sup> Joseph R. Long, II, N.V. v. Moraine Mutual Insurance Co.: The Liability Insurance

<sup>30</sup> Without Narrative; Child Sexual Abuse by Lynne N. Henderson-Indiana University School of Law, 1997(Articles by Maurer Faculty)-page 3-4

The popular image portrayed in Nabokov's *Lolita*<sup>31</sup> gave cultural permission to sexual contact with young adolescent girls as part of a narrative of female sexuality.

On the other hand, in our culture, for a male to exploit a young male sexually is seen as horrific at all times; female sexual exploitation of young males is often portrayed in narratives of rites of passage or humor, depending on the circumstances. Thus, the movies *Summer of '42*<sup>32</sup> and *The Graduate*<sup>33</sup> seemingly approve of a boy's and a young man's "sexual initiation" by an attractive older woman; more recently, *Spanking the Monkey*, a film about mother-son incest, was highly regarded by critics, who portrayed it as comedic, failing to scrutinize the film for any message of exploitative and damaging sexuality. At the same time, however, Freudian theory considers actual sexual abuse of boys by their mothers particularly horrific and damaging.

It is sad to note from the above writings that the public would view sexual molestation of a boy by his mother or an older attractive woman as comic. From this article, it is notable that this bias in gender on sexuality and sexual exploitation dates way back over 40 years and has continued to be so into the 20th century. This then confirms the community mindset that in the case of a boy and girl who defile each other, the girl is the victim and the boy the perpetrator as the perception is the boy cannot be defiled by a girl, whether or not they are both adolescents of a minimal age difference of 15 & 16 or 16 & 17 respectively. This attitude has caused and continues to cause discrimination against the boy child in application of the law.

A good case in point of how the discrimination in gender of the boy and the girl has often been treated as normal that it was never noted as an issue by justice stake holders in

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<sup>31</sup> Vladimir Nabokov, *Lolita* (Vintage Books 1989) (1955)

<sup>32</sup> *Summer of '42* (Warner Bros. 1971)

<sup>33</sup> *The Graduate* (Embassy 1967).

prosecuting and handling of Trials is the case of In the case of *SC v. R*<sup>34</sup> the appellant was convicted on a charge of defilement of a girl contrary to section 8 (3) of SOA and was sentenced to serve 20 years' imprisonment.

The charge provided that the appellant, being a person aged 17 years, induced the complainant, a school going girl aged 15 years, to have sex with him, making her pregnant, thus interfering with her education. The complainant testified that she did not know her date of birth but that she was 17 years old. She also testified that she had a love relationship with the appellant and they had agreed to marry and were living together. The trial magistrate had noted that although the complainant said she had consented to their amorous relationship and in having sexual intercourse, "*consent was immaterial in a charge of defilement*".<sup>35</sup>

It was also his finding that the appellant did not indicate that he was mistaken as to the complainant's age or that she misled him to believe that she was over 18 years. The appellant ought to have taken steps to verify her age. He therefore found the accused person guilty of defilement, convicted him accordingly and sentenced him to twenty years' imprisonment. The main issue at the appeal was whether the complainant's age had been determined. In the absence of proof of the complainant's date of birth, the appeal court held that it was unsafe to presume that the complainant was a child and thus lacked ability to consent to sexual intercourse. Accordingly, the appeal was allowed and the conviction and sentence set aside.

In the above case, although the accused/appellant succeeded at appeal by being acquitted, the key issue for determination was age, proof of age and consent-yet it is clear in the case that both complainant and accused were minors of below 18, hence there was no basis to pick on the boy to charge and treat the girl as the victim.

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<sup>34</sup> Criminal Case 19 of 2009 at the High Court of Kenya at Malindi.

<sup>35</sup> Sexual offences Act no.3 of 2006-Section 8

It is however commendable to note the two more recent cases of older women in Kenya who defiled minor boys and were sentenced upon conviction, as reported on citizen digital media platform of a Kitale woman, 26 years of age was jailed for 15 years for having sex with a 17 year old boy<sup>36</sup>-the minimum sentence provided for by the Act in section 8 (4) was meted. This comes in the wake of a debate that has been held for the longest time and continues to be held as to whether a woman can defile or rape a member of the opposite sex (boy or a man) as per the definition of defilement. As noted earlier in my introduction, defilement is an act of penetration (partial or whole) with the genital organs of a perpetrator with that of a child. In the case of a woman, she can cause a boy or child of tender years to penetrate her either wholly or partially by luring him or even forcing him, as the issue of consent does not even arise when it comes to a child.

#### **1.9.5 The Right to a Fair Trial and the Need to Protect Child Victims of Sexual Abuse: Challenges of Prosecuting Child Sexual Abuse under the Adversarial Legal System in Kenya**

In an Article, the Right to a Fair Trial and the Need to Protect Child Victims of Sexual Abuse: Challenges of Prosecuting Child Sexual Abuse under the Adversarial Legal System in Kenya; focus is on representation for children under going the Criminal justice system, their right to representation (its brilliant and original).<sup>37</sup>

The issue of the trial process, particularly of children is well articulated. It seeks to strike a balance between, the importance of protecting the rights of accused persons to a fair trial in criminal proceedings, and the need to safeguard the interests of victims of crime generally in

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<sup>36</sup> 'By Citizen reporter for Citizen Digital-Published on 10<sup>th</sup> October,2017-Page 1

<sup>37</sup> Scholastica Omondi -The Right to a Fair Trial and the Need to Protect Child Victims of Sexual Abuse: Challenges of Prosecuting Child Sexual Abuse under the Adversarial Legal System in Kenya-Page 9-10



criminal proceedings, by protecting their rights and being sensitive to their concerns, plus the challenges involved in prosecuting child sexual abuse.<sup>38</sup>

The article also delves into the International framework ratified in the Kenyan Constitution that is in support of the right to a fair trial and right to protection and best interests of the child-such as UNCRC (The United Nations Convention on the rights of the child), ICCPR (International Convention on Civil and Political Rights), which provides for the right to fair trial for accused persons also imposes obligations on member states to protect children as required by their status as minors, among others.

The writer goes on to point out that, the setup of the Kenyan Courts does not necessarily adhere to the protection of Child victims-may not be user friendly and that the trial process is often not sensitive to victims of child sexual abuse. A lot still remains yet to be done.

The writer however fails to identify the gap in treatment of minors i.e. when a boy child and girl child engage in intercourse (defile each other), why the boy child is always pitted against the criminal Justice system when he and the girl child are involved in defiling each other. She has not raised it as a challenge that really brings out the glaring gap in the law and in the Criminal Justice System-where the sexual offences gap has failed to address how to go about a case where two adolescent minors of minimal age difference of 15 & 16 or 16 & 17 defile each other, and that the Criminal Justice System and stakeholders there in have discriminated against the boy child.<sup>39</sup>

A close look at Nigeria, just like Kenya and many other African countries and globally, incidences of sexual abuse of a male child are also prevalent in Nigeria society as those of the

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<sup>38</sup> Scholastica Omondi -The Right to a Fair Trial and the Need to Protect Child Victims of Sexual Abuse: Challenges of Prosecuting Child Sexual Abuse under the Adversarial Legal System in Kenya-page 12

<sup>39</sup> “ibid”

female child.<sup>40</sup> In a study, it was reported that it is noteworthy that no cases of male child victims of sexual abuse were found, owing to the fact that male child victims are less likely to disclose their experience following the sexual abuse. However, that is not to say that the incidences of male child victims do not occur. The Ogun State Police Commander arrested a school teacher, a Mr. Matthew Sodeke for allegedly abusing a child of Igballa Community School, Sango Ota sexually on July 12, 2016.<sup>41</sup>

In this case, the teacher was assaulting a boy and was caught in the act by a parent who came to pick his child after school. The child victim confessed that that was not the first time he was being sexually abused by the teacher but he was warned not to disclose the information to anybody. Even though the incidence rates have only marginal differences, it seems that the cases of female abuse have received more attention. Researchers have discovered that the male child victim is more likely to be at a disadvantage compared to his female counterpart, in terms of having a redress of the problem. This disadvantage is directly linked with the reluctance of the male child victim to report the incidences. The non-reporting of incidences could be due to a variety of said to be the “weaker sex”, they are perceived to be more disadvantaged sexually and thus more prone to be victims of sexual abuse than their male counterparts.

This notion, however may not be correct at all times. Another reason is that a man’s ego and masculinity may prevent him from exposing an action that seemed to have robbed him of them. Men are likely to find it difficult to admit to having been sexually abused because a number of cultures around the world encourage male dominance, making them believe they should be in charge of every aspect of their lives, such that when boys are abused, they often

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<sup>40</sup> Folake, B. “Child Victim of Sexual Abuse in Nigeria”, *Frontiers of Legal Research*, (2014), Vol. 2, No. 1, p. 102.

<sup>41</sup> Aluko, O. “Ogun Teacher Caught Sexually Abusing Pupil” *The Punc* (Lagos: July 21, 2016) 5

think they should have been able to confront and, if possible, arrest the situation and stop the abuser. Another scholar argued that male gender norms dictate that “appropriately masculine” men do not acknowledge and certainly do not express their own pain, vulnerability or feelings of helplessness.<sup>42</sup>

Under the United Nations Convention on the rights of the child which has been ratified by most countries of the world and gained universal application and acceptance, the rights of the child are equal and non-negotiable. Favouring the girl over the boy amounts to gross discrimination on the rights of the child. This concept is domesticated in many constitutions of the world including the Kenyan constitution.<sup>43</sup>

### **1.10 Chapter Break down**

Chapter one offers the introduction and background under pinning this research.

Chapter two provides an insight on the Best Interest Principle of the child and Rights of the child in relation to this research.

Chapter three offers a critical analysis of the Courts interpretation of section 8 of SOA&Comparative analysis with other Countries.

Chapter four outlines the implication of the Courts interpretation on the protection of the boy child.

Chapter five outlines the findings, conclusions.

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<sup>42</sup> Lisak, D. “The Psychological Impact of Sexual Abuse: Content Analysis of Interviews with Male Survivors”, *Journal of Traumatic Stress*, (2011), Vol. 7, No. 1, pp. 530-538.

<sup>43</sup> Article 53 of the Constitution of Kenya.

## **CHAPTER TWO**

### **BEST INTERESTS PRINCIPLE OF THE CHILD AND RIGHTS OF THE CHILD**

#### **2.1 Introduction**

This Chapter discusses the principle of the best interests of the child and the rights of the child which are crucial in the well being and development of a child to maturation and State are tasked with the obligation to ensure implementation of these. In it I highlight and discuss some key International, Regional and National framework and their salient features that emphasize on the critical aspect of the best interest principle and the central role it plays when it comes to decision making on any matter concerning a child.

This chapter also answers the research question, on the effect of prosecution on the protection of children in line with children's rights and the equal protection of the child, noting to analyse this in light of section 8 of the Sexual Offences Act no.3 of 2006, the spirit of the act and whether in its enactment and subsequent application, it has honoured the rights of the child as envisaged in the Child rights conventions and the Constitution of Kenya and whether subsequent application of the Act has by persons in authority such as the Courts, has upheld the principle of the best interest of the child and the rights of the child including the right to freedom from discrimination.

#### **2.2 Best Interest Principle of the child and Rights of the child**

All people from their birth to the age of puberty are children.<sup>44</sup> They are all delicate, innocent and dependent. They are not capable of making right decisions. They need good support from their family and society. Children occupy an important portion of every population.

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<sup>44</sup> A child is any human being under the age of 18

The term “Best interests of the child” refers to the consideration in all actions concerning children that focuses towards their essential needs, their growth and development and achievement to their capabilities to the maximum extent possible. Whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, all are required to ensure the best interests of the child standard.

### **2.3 Some Key National, regional and International instruments defining Best Interests principle of the child ratified in Kenya**

The UN Convention on the Rights of the Child 1989 recognized various rights for the survival, development, protection and participation of children.<sup>45</sup> This Convention set the pace and background for the development of framework on the rights of children universally/globally, regionally and even at National level.

Article 3 of the UN Convention on the Rights of the child, which says that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”<sup>46</sup>

The African Charter on the Rights and Welfare of the Child also referred to as the ACRWC was adopted by the Organisation of African Unity (OAU) in 1990 and was entered into force in 1999.<sup>47</sup> (The OAU later legally became the African Union in 2001)

In similar light with the Convention on Children’s rights, every human being under the age of 18 is a child under the definition of the African Charter on the Rights and Welfare of the child.<sup>48</sup>

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<sup>45</sup> The United Nations Convention on the rights of the child

<sup>46</sup> Article 3 of the United Nations Convention on the rights of the child.

<sup>47</sup> [www.achpr.org](http://www.achpr.org)

All adults should do what is best for children. When adults make decisions, they should think about how their decisions will affect children. The government has a responsibility to make sure Children's rights are protected.

They must help their families protect their rights and create an environment where they can grow and reach their potential.

The African Charter took cognition of conflicting cultural norms and sought to reach over and above any tradition, cultural view or practice that does not conform to the best interests of the child in terms of their rights. The Charter thus abhors any such conflicting norms against the rights, duties and obligations set out under it.

Article 4 which 4(1) states that ‘‘in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.’’<sup>49</sup>

At the Implementation of the charter, the key guiding principles were;

- The best interests of the child.
- Non-discrimination.
- Child participation.
- The life, survival and development of the child.
- Providing for the responsibilities that every child has with regard to their and society, the state and the international community.

The Constitution of Kenya- under Article 2 domesticates the convention and the charter above mentioned. Further, Article 53 provides for the basic rights of the child-right to life, food, and education, freedom from abuse, neglect, and labour among others.<sup>50</sup>

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<sup>48</sup> Article 2 of The African Charter on the Rights and Welfare of the Child-[www.achpr.org](http://www.achpr.org)

<sup>49</sup> Article 4(1) of The African Charter on the Rights and Welfare of the Child-[www.achpr.org](http://www.achpr.org)

A reading of the Children’s Act of Kenya appears uniform with the two legal frameworks (the Convention and the Charter)-for instance, the definition of a child is any human being below the age of 18 years.<sup>51</sup>

It also has provision of the Survival of the child and best interests of the child as being or primary consideration.<sup>52</sup>

The Kenyan Constitution provides that an “adult” means an individual who has attained the age of eighteen years and “child” means an individual who has not attained the age of eighteen years<sup>53</sup>

The Children’s Act is also very clear on tat the best interests of the child are of primary concern in any matter involving the welfare of the child.<sup>54</sup>

#### **2.4 Implication of the best interest’s principle in handling teenage minor to minor defilement**

Governments have the main responsibility to make sure the rights of children in the available Conventions and legal framework on the Rights of the Child are protected and provided for. All citizens have responsibilities to respect the rights of children as well.

In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration<sup>55</sup>as provided for in Article 4 of the United

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<sup>50</sup> The Constitution of Kenya 2010.

<sup>51</sup> The Children’s Act no. 8 of 2001, Revised Edition 2017 [2012]

<sup>52</sup> 4(1) and (2)-The Children’s Act no. 8 of 2001, Revised Edition 2017 [2012]

<sup>53</sup> Article 260 of the Constitution of Kenya

<sup>54</sup> Section 4(3) of the Children Act 2001

<sup>55</sup> Article 4(1) of The African Charter on the Rights and Welfare of the Child-www.achpr.org

Nations Convention on the rights of the child, authority's such as the Court's and justice stakeholders must consider the best interest of the child in arriving at their decisions.

In the UN Convention and the Charter, the best interest principle is paramount and wholesome and clearly states that no child shall be discriminated but rather will be protected irrespective of gender. This principle must thus be applied in all cases concerning children including cases of sexual involvement of two teenage minors with each other where the paramount concern ought to be their safety, protection and guidance as opposed to pitting one child against the other based on gender and subsequently punishing one, in this case who is often the boy child.

### **2.5 Is the Sexual Offences Act sufficient in the protection of the child?**

There are instances when the court may be confronted with some cases where both parties are minors who have engaged in sexual intercourse and it is not clear who is the victim or culprit as the two are more or less age mates. For instance, a boy may be 18 years of age and the girl is 17 years. When such two have consensual sexual intercourse, in the eyes of the law this would be defilement. Since we are aware of this age as a very volatile age where teens are experimenting on their sexuality, the law ought to have appreciated this fact. It is thus proposed that a sub-section to be inserted under section 8 to cater for such circumstances.<sup>56</sup>

Sodomy is a sexual offence. However, it was left out in the Sexual Offences Act for section 162 of the penal code was not repealed.<sup>57</sup>

In the Sexual Offences Act genital organs have been defined to include: *the whole or part of male or female genital organs and for the purposes of this Act includes the anus.*<sup>58</sup>

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<sup>56</sup> The Sexual Offences Act: Omissions and Ambiguities-Kiarie Waweru Kiarie Ag. Senior Principal Magistrate Kibera Law Courts July 2007

<sup>57</sup> "ibid"



Sodomy is a sexual because it involves the male sexual organ (penis) and the anal orifice (which has been defined in the Act, as a sexual organ.)<sup>59</sup>

In light of child protection, children's rights and the best interests of the child, the act has failed to meet equal protection of the child as even sodomy as noted in the above has not been captured in the act to provide a clear provision in the act to protect the boychild where he has been sexually molested by a male adult.

It may be argued and rightfully so, that defilement <sup>60</sup>under the act caters for the boychild who has been sexually molested by a male adult, but another angle of looking at this would be that the drafters of the act were not keen on the realization that many boys face sodomy and the stigmatization that comes with it due to the hashed tones about in the society and under the law.

In considering all the issues discussed in the foregoing paragraphs, the concern is to check whether the best interests of the child principle and right to equal protection and non-discrimination of the law has been applied for teenage minors as envisaged in the law.

The best interest principle is mapped out under all conventions on the rights of the child, in the Constitution of Kenya and the Children's Act as discussed, hence we cannot possibly consider this principle, without considering or discussing rights of the child.

Some of these key rights include, the right to non-discrimination<sup>61</sup>the right to non-discrimination is an obligation, prohibiting all forms of discrimination in the enjoyment of

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<sup>58</sup> Definition of genital organs under the Sexual Offences Act No. 2 of 2006

<sup>59</sup> "ibid"

<sup>60</sup> Defilement is an act that causes penetration wholly or partially with the genital organs of a child-Section 8 of the Sexual Offences Act No. 3 of 2006

<sup>61</sup> Article 2 of the United Nations Convention on the Rights of the Child,1989

rights for all children, and States are required to ensure effective equal protection and opportunities for all children to enjoy the rights.

The right to life, survival and development<sup>62</sup> States are obliged to create an environment that respects human dignity and ensures the holistic development of every child. In deciding on the child's best interests, the State must ensure full respect for his or her inherent right to life, survival and development.

The right to be heard<sup>63</sup> in consideration for a child's best interests, respect for the child's right to express his or her views freely and such views be considered is key.

## **2.6 The Rights of the child**

### **2.6.1 Some Key International, Regional and National instruments governing rights of the child ratified in Kenya: The United Nations Convention on the rights of the child**

As already stated in the foregoing, the UN Convention on the Rights of the Child 1989 set the pace and background for the development of framework on the rights of children universally/globally, regionally and even at National level

According to it, children below 18 years of age have a right to a name/identity, nationality, and care within a family, including good health care and nutrition. Children have a right to be protected from mistreatment or exploitation and to special provision if they are handicapped or orphans.<sup>64</sup>

All children have these rights, no matter who they are, where they live, what their parents do, what language they speak, what their religion is, whether they are a boy or girl, what their

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<sup>62</sup> Article 6 of the United Nations Convention on the Rights of the Child, 1989

<sup>63</sup> Article 12 of the United Nations Convention on the Rights of the Child, 1989

<sup>64</sup> "ibid"

culture is, whether they have a disability, whether they are rich or poor. No child should be treated unfairly on any basis.<sup>65</sup>

### **2.6.2 The African Charter on the rights and welfare of the child**

In Africa we have, The African Charter on the Rights and Welfare of the Child often referred to as ACRWC was birthed after the Convention on the rights of the child, when although the world appreciated the framework on children's rights, Africa and member states of the African Union in particular realised that the convention did not take into account the African culture and its uniqueness, taking to note that children on the African continent are socialized differently from children in the European, Asian and other continents.

### **2.6.3 Are the rights of the child protected adequately and balanced for both genders in teenage minor to minor defilement?**

Pre-2016 since the enactment of the sexual offences Act, we have seen more and more cases reported of adults defiling girls being reported, prosecuted and judgments delivered with some having severe sentences as provided under the act.

The Sexual Offences Act provided for protection of minors against defilement, but very few cases to date are reported of boys being defiled. Worse still pre-2016, many cases of defilement between teenage minors have pitted the girl child against the boychild, with the girl being treated as the victim and protected by the community and the courts, whereas the boy is charged as the perpetrator and taken through the rigorous Court process and handed Judgments where they end up in prison and their promising future is cut short.

Such acts have caused open discrimination of the boy which is against the very language and spirit of the Convention and Charter discussed in the foregoing which speak against any form

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<sup>65</sup> "ibid"

of discrimination and advocate for protection of children's rights equally to all whether boy or girl.

Recent Judgments post 2016 as will be analysed in the subsequent chapter however, are a breath of fresh air where judges now have turned around and seem to be correcting a position that has been held for so long in society that only a girl can be a victim of defilement and that a boy understands his sexuality in a way that the girl does not.

## **2.7 Conclusion**

In concluding this chapter, the review and analysis of the Key International, Regional and National regimes on children's rights applicable in Kenya, there is one key feature that has been consistently maintained, and that is that best interests of a child are of paramount importance in any matter concerning a child, the welfare of that child is of utmost importance in any circumstance.

What is clear from the foregoing is that one cannot speak of rights of a child without applying the best interest principle, the two cannot be separated whether we are discussing issues of analyzed to basic needs, right of protection, matters before the Courts involving child victims of child offenders, there is always consideration to be given to a child that differs from that of an adult.

It is noteworthy to state that the conventions and laws on children's rights as discussed above Internationally, Regionally and Nationally have the rights of the child well defined with the best interest's principle defined as key even at implementation and the same is well embedded in the Constitution of Kenya as noted in the foregoing.

This thus means that the laws on children's rights in place are not the problem but rather implementation and more so application of the same in handling children especially in matters concerning defilement, particularly teenage minors who have engaged in sexual

conduct but society and the Justice stakeholders decide that the boy is the perpetrator whereas the girl the victim, this without any legal basis but rather based on a societal bias that a boy understands his sexuality better than a girl and that he is socialized in a way that he is the initiator of sex hence can only be the perpetrator and not the victim or an innocent boy exploring his sexuality as is the girl who is his age mate.

Although good laws are in place as seen above on child protection and strides have been made in the protection and promotion of children's rights, a lot remains to be done, with more awareness creation and good will on the part of the government, persons in authority such as Law enforcers, the Courts etc. seeing who have is a great responsibility in ensuring the well-being and safety of every child.

The Sexual offences Act section 8 which is the focus of my research as highlighted in this chapter and my subsequent chapter has been applied discriminately in favor of teenage girls and unfavorably of the teenage boys when both have engaged in sexual intercourse which is recognized as defilement.

The discrimination dates back to the drafting and pre-enactment of the law, where in the foregoing issues of such teenage defilement were highlighted for consideration of inclusion or amendment to be inserted in section 8 for clear provision as to how to proceed with teenage defilement, but this remains glaring about fourteen years since the enactment of the Sexual offences Act, which has over the years only seen abuse of the Act against the boy child without any consideration for equal protection of his rights and without considering his welfare and best interests like those of the girl.

A lack of clear definition for sodomy in the act which is defilement of the boychild by a male adult and is rampant in the society also reveals discriminate consideration of gender in the drafting and spirit of the act seeing that this aspect has not only been raised in recent times

but also came up for debate pre-enactment of the act when the same was raised in parliamentary debates of the second reading of the bill as it then was, as was highlighted in my previous chapter.

The SOA appears on the face of it like an Act that focused more on the protection of the rights of the girl and the best interests of the girl and not the boy.

Finally, the State has the key responsibility to play in child rights protection and upholding the child's best interest by ensuring children's rights as guaranteed are guaranteed and protected and it must do all it can to ensure this equally for all children. Society too has a great role in this as we need to get involved in the advocacy of children's rights and welfare pushing the agenda for equal protection and the best interests of the child above all else regardless of gender.

## **CHAPTER THREE**

### **CRITICAL ANALYSIS OF COURTS INTERPRETATION OF SECTION 8 OF SOA&COMPARATIVE ANALYSIS WITH OTHER COUNTRIES**

#### **3.1 Introduction**

This chapter introduces various court cases on defilement in Kenya with a comparative analysis of other cases in jurisdictions in Africa, with a view to comparing how best matters involving minor to minor teenage defilement is handled. I also picked some countries in Asia, particularly those that have ratified similar conventions as Kenya on the rights of the child, and in particular, the United Nations Convention on the rights of the child (UNCRC) with a view to comparing the value with which matters concerning minors are handled in light of the best principle of the child and children's right. There are many concluded cases and pending cases on defilement in courts all over the country in Kenya and some of these countries that I have picked for a comparative study. Majority are cases of adult men who have defiled minors but there are also a number of cases that are between minors particularly teenagers who are agetates between the ages of fifteen (15) and sixteen (16) years or seventeen (17) and eighteen (18) years.

In this chapter I focus on cases between teenage minors and most particularly on recent judgments regarding the same, which have sought to expose the discrimination meted on the boychild and open suggestions on how to correct the same in a bid to derive equality.

The chapter also delves slightly into the issue of age of consent as being made central in discussions surrounding teenage defilement with one of the Court of Appeal decisions prompting this proposal with the reasoning that teenagers do engage in sex thus fronting this as a solution to the problem yet seeming to take away from the underlying societal, legal and policy issues that need to be addressed.

In this chapter I will also discuss, how the courts are guided by the general framework of the rights of a child and in particular the principle of the best interests of a child in deriving at their decisions and their reasoning more so for cases overturned at Appeal stage where utmost priority is on the best interests of the boy as a child in equal protection of the law just as the girl with some judges even offering compensation in damages for time lost and suffering in prison of a boy who had been through the discriminate application of the law.

The chapter will show discrimination applied in the subordinate court where no equal protection of rights was considered for the boy nor was the best interest principle applied in considering that he too was a child just like the girl, but later a higher Court is seen to apply and be guided by the principle of the best interests of the child and recognition for equity and equal protection of the boys rights in spite of the lacking provision on teenage defilement in section 8 of the Sexual Offences Act,2006.

## **3.2 Kenya**

### **3.2.1 Case law in Kenya:**

While we grapple with the unending headache that is teenage minor to minor defilement and the mishandling of these cases without due consideration for the best interests of the minors involved and their right to protection under the law, some of the Justice stake holders seem to concern themselves with another aspect of the sexual offences Act arising from teenage sexual conduct.

The most recent debate around the defilement issue has been on reducing the age of consent from eighteen (18) years to sixteen (16) years. Three Court of Appeal judges support this position and in fact have proposed a law change into the country's age of consent seeking to lower it from 18 to 16 years.



Three judges of the Court of Appeal in Kenya, ruled that it is time for the country to change SOA, saying that lengthy sentences have been given to young men found guilty of defilement.<sup>66</sup>The judges held: “Our prisons are teeming with young men serving lengthy sentences for having had sexual intercourse with adolescent girls whose consent had been held to be immaterial because they were under 18 years. It is unrealistic to assume that teenagers and maturing adults do not engage in sexual activities.” According to them, underage boys and girls often engage in sexual relations wilfully.

The Judges went on to hold that, “This appeal epitomizes for umpteenth time the unfair consequences that are inherent in a critical enforcement of SOA and the unquestioning imposition of some of its penal provisions which could easily lead to a statute-backed purveyance of harm, prejudice and injustice, quite apart from the noble intentions of the legislation”.<sup>67</sup>

The finding in this case and analysis there in opened a lot of debate within the Country with different stakeholders and persons holding divergent views, where as some were for reduction of age as proposed, others like National Gender and Equality Commission (NGEC) argued against reduction of age and urged law makers not to reduce the age of consent for sex<sup>68</sup>where as others such as one Knut official argued that the age of consent ought to be increased from eighteen (18) years to twenty (20) years.<sup>69</sup>

The National Gender and Equality Commission put up a strong voice against the proposal which it contends could undermine the best interests of a child irreversibly.<sup>70</sup>“It would be simplistic to lower the age of consent for sex ostensibly to shield the girl child while in actual

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<sup>66</sup> Criminal Appeal No. 102 of 2016-Eliud Waweru Wambui&Republic (Nambuye, Musinga&Kiage J.J.A)

<sup>67</sup> ‘Ibid’

<sup>68</sup> <https://www.ngeckeny.org-reported on 20/05/2019>.

<sup>69</sup> The Star newspaper of 10<sup>th</sup> April,2019-page 4

<sup>70</sup> <https://www.ngeckeny.org/news/8230/ngec--don-t-lower-the-age-of-consent-for-sex>

fact boys are being sexually molested as well adding that statistics do indicate that young boys are increasingly becoming targets of sexual violence.”<sup>71</sup>

Mutinda went on to add that the whole discourse should be guided by the principle of the best interest of the child in deciding whether to lower the age of consent or to adopt other strategies such as legal consent.<sup>72</sup> An amendment to SOA presented to Parliament through The Statue Law (Miscellaneous Amendment Bill) 2016 now wants to lower the age for consensual sex from 18 to 16 years. The age of consent laws is meant to protect young people from exploitation by adults but in so many instances they send 18-year-old boys to jail for having consensual sex with their 15-year-old girlfriends. The boys then end up on sex offender registries for life alongside rapists and paedophiles.<sup>73</sup>

The age of consent debate was largely argued in light of legal, moral and health issues and consequences. Majority of Kenyans were opposed to reduction of age of sexual consent from 18 to 16 years, as was found from a survey conducted in April 2019 where it was recorded that 80% of the people were opposed to it, with only 20% supporting it.<sup>74</sup> Majority opposing it cited lack of maturity and immaturity in children, not been able to handle a relationship, teenage killings, lack of know-how for health protection and reproductive health protection. It would be dire to reduce the age of sexual consent from 18 years to 16 years, as the same would have ill consequences on children who do not have the maturity to handle a relationship and more so make informed choices on sex, sexual health and as such this would only open room for destruction among teenagers.

The church was of the view that sex was more a moral debate than a legal one and called upon parents to speak to and educate their children about sex and the consequences thereof,

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<sup>71</sup> Joyce Mutinda-Chairperson National Gender and Equality Commission (NGEC)

<sup>72</sup> “ibid”

<sup>73</sup> <https://www.allsaintsnairobi.org/teenage-and-age-of-consent-in-kenya/>

<sup>74</sup> Ipsos Survey in April 2019

citing that adolescents in their formative years get affirmation from parents.<sup>75</sup>“A girl who is 16 years is in Form 1 or 2 and is in need of parental protection, support and care.”<sup>76</sup>Hence consequences of such reduction of age would adversely affect transition of school going teenagers.

Coalition on Violence Against Women (COVAW) a non-governmental organisation, made reference to the three Judge bench Court of Appeal Judgment mentioned in the foregoing and weighed in on the debate. They strongly opposed the idea of reducing consensual age for sexual activity as proposed by the three judges from the current age at 18 years to 16 years.<sup>77</sup>

COVAW went on to argue the definition of a child and that a person under the age of 18 years is recognised as a child under the National laws and the United Nations Convention on the Rights of the Child (UNCRC) and as such is a vulnerable person who requires protection.

They went on to quote Article 53 of the Constitution of Kenya which expressly provides for the protection of children noting that children below the age of 18 are exposed to much vulnerability.<sup>78</sup>

A more recent case delivered at Kisumu Court of Appeal in 2019, the Appeal of a woman who was jailed for 15 years for having sex with a 16-year-old boy in Kisumu was dismissed.<sup>79</sup>The Appeal seeks to bring to light the much assumed and ignorant interpretation of section 8 of the sexual offences Act, 2006 of what entails penetration which is the key ingredient for defilement.

Penetration under the act is well defined as an act that causes penetration, whole or partial with the genital organs of a child.<sup>80</sup>This would broadly mean either of the parties of the

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<sup>75</sup> “ibid”

<sup>76</sup> Ms. Safina Kwekwe- Principal Secretary at the State department of Gender

<sup>77</sup> <https://covaw.or.ke/covaw-recommends-18-years-on-consensual-age-for-sexual-activity-in-kenya/>

<sup>78</sup> Article 53 of the Constitution of Kenya

<sup>79</sup> Judith Khayosa Wandera Versus Republic (2019) eKLR-Ochieng A. Fred J

<sup>80</sup> Definition of Penetration in the Sexual Offences Act No. 3 of 2006

opposite sex involved in sexual intercourse can instigate such penetration to occur as this appeal sought to clarify.

The Appellant a 24-year-old, had appealed the ruling of Principal Magistrate Joan Wambilyanga on 23<sup>rd</sup> May 2018. The appeal was dismissed as the Judge held that, the conviction was founded upon evidence that proved the case beyond reasonable doubt. The Appellant had been found guilty of defilement and performing an indecent act with a minor. She admitted to having a sexual relationship with the boy, saying she didn't know he was a minor. The offence occurred on July 15, 2017, at Kikoi in Kisumu County.

- Part of the Judgment by the Appellate Judge in his analysis of the case read; The law does not excuse an adult who has sex with a minor, even when it might appear that it is the said minor who may have behaved in a manner that could have enticed the adult.
- The Sexual Offences Act was legislated for purposes of, inter alia, providing protection of all persons from harm from unlawful sexual acts.
- Under the Children Act, a child is any person who was under the age of 18.<sup>81</sup>
- Such persons have no legal capacity to, amongst other things, enter into a contract.
- They are deemed as having not yet been fully developed in terms of their mental capacity. Therefore, whether or not they might be academic giants, the law provides them with protection, so that they might not be taken advantage of.
- As part of that intended protection, SOA makes it an offence for a person to commit an act which causes penetration with a child.
- In my considered view, the words of the statute were carefully put together, so as to make it possible to charge both males and females with the offence of defilement.

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<sup>81</sup> The Children's Act no. 1 of 2009

- If the statutory provision said that defilement would only occur if the act of penetration occurred on the genital organs of the child, the offence would have been limited.
- Similarly, if the statutory provision said that defilement would only occur if penetration was caused by the genital organs of the offender, the offence would have been limited accordingly.
- The offence of defilement occurs when a person commits an act which causes penetration with a child. Thus, penetration can be on the child or by the child.
- In this case, the penetration is said to have been committed by the child: if that was proved, the offence of defilement would still have been proved.
- Both the Complainant and the Appellant admitted that the two of them had had sexual intercourse.

In essence, the reasoning of the learned Judge offers a resounding and refreshing interpretation and application of what the spirit and letter of the Act<sup>82</sup> intended. In particular where he states that even if penetration was caused by the child (in this case his penis penetrated the vagina of the appellant), the act still constituted defilement of a minor by an adult as he was a minor and she was an adult, where in the eyes of the law she took advantage of the child.<sup>83</sup>

This is a good judgment where the judge played a great role in the clear interpretation of law and set clarity in his analysis of the same; the law is meant for protection of all children, boy or girl and we cannot run away from the fact that many boys are defiled and it is hardly spoken about as the focus is always on the girl child.

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<sup>82</sup> The Sexual Offences Act No. 3 of 2006

<sup>83</sup> Section 8 of the Sexual Offences Act No. 3 of 2006

One might argue that this was clear cut and simple case as the woman was older than the boy as opposed to cases that involve minors who are age mates. This might be the case but we cannot deny the clarity cast by the learned honourable judge in clearly identifying that defilement occurs on the boy child, whether he caused penetration or not. It is a different view point from the usual assumption by most that a boy cannot be defiled and that where teens are involved, the boy is the perpetrator, he cannot be the victim, the victim is automatically the girl because he penetrated her.

This Judgment could change the narrative.

Further, where defilement is between two teenage minors the boy is charged with defilement against the girl, while the girl is seen as the victim of the act. This was pointed out as a gap by a High Court judge at Homabay<sup>84</sup> in the ground breaking case, that set precedent, where the Judge released a boy of 17 years who had been held in an adult prison for over a year for allegedly defiling a fellow minor-she argued that the law on SOA, had been applied discriminatorily on the boy. The judge then proceeded to award the boy Kshs.200, 000/- as damages. The learned honourable judge laid emphasis on equal protection on the applicability of the law for both minors<sup>85</sup>.

In the above judgement<sup>86</sup>reference is made to the House of Lords; as sexual touching is usually a mutual activity, both the children involved might in theory be prosecuted, the person penetrated may be the offender, obviously there will be wide variations in the blame worthiness of the behaviour. Hence, both prosecutors and courts will have to make careful judgments about who should be prosecuted and what punishment, if any, is appropriate.<sup>87</sup>

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<sup>84</sup> Constitutional Petition 1 of 2017-POO (A minor) VS. Director of Public Prosecutions- Hellen Omondi J

<sup>85</sup> P Constitutional Petition 1 of 2017-POO (A minor) VS. Director of Public Prosecutions- Hellen Omondi J- Para 46

<sup>86</sup> ‘ibid’-Para 29

<sup>87</sup> In the English case of R vs. G (Appellant) the Baroness Hale of Richmond in her opinion in the House of Lords-Para 29

In similar light, we are now seeing the issue of the boy child been raised with the legality and morality of SOA been brought to question as it is seen as a law that protects the girl and criminalises the boy. This issue was brought out in a newspaper article of the Daily Nation, which captured a forum in Nyeri of lawyers representing teenage boys.<sup>88</sup>

In another case before the High Court at Eldoret, similar thoughts were echoed. In Kenya the law does not distinguish between the girl and the boy, in section 8 of SOA. In effect, the law as enacted does not discriminate. The petitioner said he was charged because he was a boy whilst the girl was let scot free. The DPP said the decision to prefer the charge against the petitioner was not based on gender. It will therefore be a matter of evidence why the petitioner was charged with defilement whilst his willing female partner was not charged. But even if ultimately it is proved that the petitioner was charged largely because he is a boy (as opposed to being a girl), that would not render the statutory provisions discriminatory. The discriminatory application of a law if it is established is wrong. But such a conduct by the person who exercises it does not render the law itself discriminatory: I share these sentiments to the extent that the law is not discriminatory rather its application is what may be discriminatory.<sup>89</sup>

Further, in the afore mentioned case, the High Court of Kenya keenly considered a challenge to defilement provisions of SOA. Section 8 of SOA defines defilement as an act of sexual penetration with a child. A child is defined as a person below the age of 18 years under the Children's Act.

The facts of this case are that; a 16-year-old boy was being prosecuted in the magistrate's court for committing the offense of defilement, for having consensual sex with a girl of 16

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<sup>88</sup> The Daily Nation-Monday 1<sup>st</sup> February,2016-Page

<sup>89</sup> C K W v Attorney General & another [2014] eKLR

years. The boy petitioned the High Court to declare Sections 8(1) and 11(1) of SOA invalid to the extent that they are inconsistent with the rights of children as protected under the Constitution of Kenya, for criminalizing consensual sexual conduct between adolescents below the age of 18 years.

The High Court of Kenya decided that it was in the best interest of the child to criminalize consensual sexual conduct between teenagers in order to protect children from harmful sexual activity. In arriving at this decision, the court considered the decision of the South African Constitutional Court in the *Teddy Bear Clinic v. Minister of Justice and Constitutional Development*<sup>90</sup> where it came up with an opposing position on how they viewed adolescent sex and the impact thereof. Both the South African and Kenyan courts pegged their decisions on promoting the best interests of the child.

In essence, the judgment in the case afore mentioned, implies that in Kenya, teenagers below 18 years may be prosecuted for consensual sex. These two decisions are representative of the various judicial interpretation and approaches that African states have adopted toward adolescent consensual sexual conduct: a punitive and a nonpunitive approach. The two approaches are not necessarily always expressly written in books or shared in policy documents but they have in recent years arisen in legal arguments and court judgments that seek to defend or reject laws that criminalize adolescent sexual conduct.

The two judgments and the interpretations derived by both have different impact on the safety and sexual wellbeing of adolescents and debate will always arise as to which approach is in the best interests of the child. In all this, the key focus was adolescent sex as opposed to the key issue which was the clear discrimination on of the boy child who had consensual sex with his age mate but she was treated as the victim while he as the perpetrator. The Kenyan

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<sup>90</sup> 2014 (2) SA 168 (CC).



decision in the foregoing went into the issues of discrimination against gender but ultimately concerned itself with adolescent sexual conduct and its impact on both the girl and boy child. An analysis of both of the judgments show a differing mind set in the approach on adolescent sex, which is representative of the African culture and norm. Ultimately going by the South Africa judgment, would mean that there will be no discrimination on gender as the boy will not be picked against the girl as the perpetrator of the law and that both children are protected under the law, seen as children who need guidance not punishment.

On the other hand, the approach by the Kenyan courts on the aforementioned judgment though seeking also to discourage adolescent sex and protect and preserve our children, in absence of a law in place or an amendment to SOA to cure the gap in law presented by section 8, it leaves room for abuse where it continues to remain open to varying interpretations by law enforcers and courts, where the boy child is at risk of punitive measures whereas the girl child is treated as the victim and remains free but this does not guarantee she will not repeat similar sexual activities with other agemates.

In essence these two judgments open debate for adolescent sex and is a call for African states to speak up the prevalent norm on adolescent and teenage sexual activities and come up with measures to address the same, either in policy or law.

Another case of defilement between teenage minors that raised similar queries and concerns was at the High Court at Siaya, the judge held that the appellant was discriminated against on the basis of sex in that he was arrested, charged instead of the prosecution charging both the complainant and the appellant for the offence of defilement. In the instant case, he found that at the time of the commission of the offence, both the appellant and the complainant were minors. Further, he found that the complainant was a senior to the appellant and blame should not have been wholly shifted to the appellant but should have been apportioned against both

the complainant and the appellant, and both being minors, they needed protection against harmful sexual activities and none should have been sent to prison.<sup>91</sup>

The Judge then proceeded to find the appellant's appeal against the sentence to be meritorious. He upheld the conviction and set aside the sentence meted against the appellant and noting the appellant had been in custody and prison for 5 months, he placed the appellant under probation for a period of six (6) months under supervision of the probation office, Siaya County.

The recent judgments from the courts are a welcome breath of fresh air that recognize that children of both sexes are entitled to equal protection of the law as envisaged in the Constitution.<sup>92</sup> Such judgments are raising the long silent recognition of issues that the society continues to ignore or assume albeit under the cultural, societal guise of socialization of girls and boys. In these judgments, they make clear and particular reference to the law in terms of equal protection of children<sup>93</sup> and non-discrimination in the protection and application of the law especially discrimination against gender/sex as envisaged in the constitution.<sup>94</sup>

### **3.3 Uganda**

In Uganda, defilement is defined as an unlawful act of intercourse with a girl under the age of 18 years where in the offence is punishable by death.<sup>95</sup> The focus and debate on defilement and sexual abuse is on the girl child as is common in most African countries where little or no focus is given to the boy child especially the teenage boy child due to the believe that girls are more vulnerable than boys and that boys are the ones that are active sexually.

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<sup>91</sup> G O v Republic [2017] eKLR

<sup>92</sup> Article 53 of the Constitution of Kenya

<sup>93</sup> Article 53 of the Constitution of Kenya

<sup>94</sup> Article 27 of the Constitution of Kenya

<sup>95</sup> Penal Code (Amendment) Act, 2007 Uganda.

In the case of *A. versus OH (a Juvenile Offender)*<sup>96</sup>-this matter involved a five-year-old girl and a juvenile offender aged 15 years, although the two were both minors by definition under the law, the girl was of tender years within the formative years of child development, whereas the boy was a teenager. The boy had been charged with the offence of aggravated defilement and he pleaded guilty and was detained for one year.

Uganda explicitly criminalizes sex between adolescents, as stipulated by the Penal Code (Amendment) Act, 2007, amending Section 129 of the Penal Code on defilement.<sup>97</sup> It states that child-to-child sex would be dealt with in accordance with relevant sections of the Children Act (Uganda) including being placed under supervision if the child involved is below 12 years, and if above 12 years but below 18 years, the child would be treated in accordance with the provisions for criminal prosecution of child offenders.<sup>98</sup>

### **3.4 Malawi**

In the Constitution of Malawi, a child is defined as any person below the age of 18<sup>99</sup> and yet the age of sexual consent in Malawi is 16 years old which moved up from 13 years upon amendment of the law in the year 2000 by a recommendation of the Malawi Law Commission. In Malawi just like in Kenya the law on defilement has been misconstrued and taken the African cultural norm, where it is believed the boys sexuality is active while that of the girls is passive hence a boy is seen as the initiator of sex and in turn the perpetrator.

The key sections of law that deal with defilement in Malawian law are sections 138 and section 106 of the Penal code. Section 138 criminalises sexual intercourse with a girl below the age of 16, whereas section 106 criminalises any act of sexual activity with a child. There

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<sup>96</sup> HC Ug. Cri. 0103/2018-A. versus OH-Judge Stephen Mubiru

<sup>97</sup> The Penal Code (Amendment Act) 8 of 2007 (Uganda).

<sup>98</sup> (De)Criminalizing Adolescent Sex: A Rights-Based Assessment of Age of Consent Laws in Eastern and Southern Africa by Godfrey Dalitso Kangaude and Ann Skelton

<sup>99</sup> Section 23(6) of the Constitution of Malawi

is clearly a gap in the law<sup>100</sup> as the first section only addresses girls and it does not recognise or appreciate that a boy can be defiled. The same law has no provision for handling of teenage to teenage sex but rather seem to target teenage boys as perpetrators.

In some contexts, the law out rightly targets the teenage boy, as seen in Malawi while in other places the law is left open to interpretation based on norms and beliefs on sexuality. ML.Kamwambe J in Yamikani Paul Vs. Republic,<sup>101</sup>the accused a boy of seventeen years (17) had been charged with defilement of a girl of fifteen years (15), both were minors and teenagers attending the same high School. The girl was in form 2 whereas the boy was in form 3.

The appellant pleaded guilty and was convicted on his own plea of guilty to six years imprisonment at the lower court. On appeal, he was discharged. One of the key factors considered on his Appeal leading up to his discharge was his age, where the judge stated “His age (17 years) is some of the special circumstances to take into account as he deserves to be given another chance to proceed with school. He is a first offender, really useful and young and should be saved from getting into hardened prisoners.”<sup>102</sup> Hence, the accused was discharged absolutely to go back to School.

This case follows a similar finding in the case of *Felix Joseph vs. Republic*, also in Malawi<sup>103</sup> where in it was held that the boy child has also to be considered for protection by the Law.

These considerations given in the foregoing cases in Malawi are great examples of the application of the best interests of the child principle in deciding on any matter involving a child. The appreciation for the need of protection of the boy child just as much as the girl

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<sup>100</sup> The Penal Code, Malawi.

<sup>101</sup> Cri. Appeal 16/2017-Yamikani Paul Vs. Republic, Judge ML. Kamwambe at Chichiri Blantyre.

<sup>102</sup> Cri. Appeal 16/2017-Yamikani Paul Vs. Republic, Judge ML. Kamwambe at Chichiri Blantyre-In open Court on 7<sup>th</sup> June, 2017.

<sup>103</sup> Cri. 3 of 2015-Felix Joseph Vs. Republic-Kenyatta Nyirenda J(Unreported)

child, is in line with the protection of the child envisioned under the rights of the child at National, regional and International level.

### **3.5 Nigeria**

In 2003, Nigeria adopted the Child Rights Act to domesticate the Convention on the Rights of the Child.<sup>104</sup> Under the Act, a child is defined as any person under the age of 18 years.<sup>105</sup> In Nigeria like many parts of Africa and the world defilement cases are on the rise and worrying with some courts seen as not giving deterring sentences and the government taking measures to protect children. In Nigeria children are sexually abused by both adults and other children entrusted with them or in a position of power by virtue of age or standing.<sup>106</sup>

In Nigeria, children have been reported as perpetrators against their fellow children. In a review by a Mr. Langan, 40% of sex offenders in the world were minors below the age of 18 years, whereas in Nigeria adolescent boys aged between 7 and 15 years were found to be perpetrators, more so of gang rape.<sup>107</sup> Notable is that, Nigeria like Kenya has ratified the United Nations Conventions on Children's rights as well as the African Charter on the rights and welfare of the child and in similar fashion, the debate on minor to minor defilement more so among teenagers is a rampant issue that is yet to be addressed in equal measure, just like in Kenya and other parts of Africa.

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<sup>104</sup> Child rights Act,2003

<sup>105</sup> The Child's Rights Act (CRA)Nigeria 2003

<sup>106</sup> Finkelhor, D. "The International Epidemiology of Child Sexual Abuse", Child Abuse & Neglect Journal (2008), Vol. 18, No.1 pg. 409

<sup>107</sup> Langan P. And Wolf, H.C. "Child Rape Victims", Journal of Interpersonal Violence, (2013), Vol.4 No.1, pp. 101-108

### 3.6 South Africa

The age of consent in South Africa is 16,<sup>108</sup> as specified in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007. The Act goes on to define a child as a person who is 12 years or older but under the age of 16 years. In South Africa defilement is classified under rape, as statutory rape, prohibits the commission of an act of sexual penetration with a child,<sup>109</sup> while section 16 defines statutory sexual assault, and prohibits the commission of an act of sexual violation with a child. Children under the age of 12 are conclusively presumed by the law to be incapable of consenting, so a sexual act with a child under that age constitutes rape or sexual assault.

In South African case law that sought to address adolescent defilement (defilement between minors), was the case of *Teddy Bear Clinic v. Minister of Justice and Constitutional Development*,<sup>110</sup> where the issue before the Constitutional Court of South Africa was whether Sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act of South Africa were unconstitutional for criminalizing consensual sex between adolescents within the age group of 12 to 16 years. The Court held that imposing criminal liability on adolescent sexual conduct was punitive over what was seen as children maturing into adults and starting to understand their sexuality. This was also weighed in light of the rights of the child, including, dignity and privacy, and is against the best interests of the child principle.

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<sup>108</sup> Sections 15 and 16 read with section 1

<sup>109</sup> Section 15 of the Constitution of India 1949.

<sup>110</sup> 2014 (2) SA 168 (CC).

The Court held that the law was unconstitutional, and directed Parliament to decriminalize consensual sexual activity between adolescents. The law was amended and subsequently passed in 2015.<sup>111</sup>

The decision in the above case in itself recognises the equal protection of children and the principle of the best interests of the child. It does not pick any of the genders over the other but instead recognizes that adolescents are children and sexual conduct committed between them cannot be used against them hence it makes no sense to decide that the boy child is the bad person, and the perpetrator, the one lacking in morality when it comes to adolescent or teenage sex. The adolescent or teenage boy is a child under the definition of the law and as such must be treated equally and protected under the law in the same way as the girl child.

The manner in which the above case and the issues analysed by the judge, are the very issues that we are seeing coming out of the recent judgments in the Kenyan Courts where Judges are seeking to correct a bad practice that has gone on for so long, discrimination against the boy child.

It is evident that South Africa like Kenya and various African Countries have been grappling with the issue of teenage minor to minor defilement and it is the very reason I relied on it for a comparative study.

### **3.7 Zambia**

Here I look at Zambia. In Zambia, the Age of Consent to sexual intercourse is 16 years for both boys and girls. This came to be following an amendment to their Laws in 2016, as the age of consent as at 1933 was 12 years.

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<sup>111</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act No. 5 of 2015 (South Africa).

According to the National Child Policy (2006: 4), Zambia is also a signatory to the Convention on the Rights of the Child. The convention defines a child as any person under the age of 18, and sets out a wide range of political, civil, cultural, economic and social rights for children. The Committee on the Rights of the Child has identified the following articles as general principles that are basic to implementation of all rights contained in the CRC:

- Non-discrimination • Best interests of the child • Right to life, survival and development • Respect for the views of the child.

Section 138(1) of the Penal Code of Zambia states that: any person who unlawfully and carnally knows any child commits a felony and is liable, upon conviction, to a term of imprisonment of not less than fifteen years and may be liable to imprisonment for life.

In a working paper by Lungowe Matakala, he goes on to say that notwithstanding, I am of the opinion that section 138(1) must distinguish between offenders. Currently, the prohibition in section 138(1) is a blanket prohibition that does not look at the profile of the offender and the circumstances under which the carnal knowledge took place. So, for example, a 12-year-old boy who had carnal knowledge of his 15-year-old girlfriend could face punishment as prescribed in the Penal Code. It does not matter that the two were in a relationship, and that the girl did not refuse to engage in the act.

Much as a minor cannot give consent, when punishing the offender, the law must distinguish between instances where the offender is an adult who defiled the girl child; and those where the girl child willingly engaged in the act with a fellow minor. Most certainly, it is unfair to treat the 12-year-old boy in the scenario outlined above, in the same way as a 40-year-old man who had carnal knowledge of a two-year-old girl child. In short, the argument presented



here is that the law fails to offer adequate protection to the boy child who has committed a sexual offence, which is not as vile as rape or the usual cases of defilement.<sup>112</sup>

Again, in the *Zambian* context, there are clear similarities in *Kenya* where the glaring discrimination of the boy child by the justice system is exposed and call for a change in law or justice stake holders in ensuring and upholding the best interests and protection of the rights of the boy child just as much as the girl.

It is the very similar issues experienced and highlighted in this working paper, that made *Zambia* a good case study for my research.

### **3.8 Zimbabwe**

In *Zimbabwe*, In *State v. B Masuku*,<sup>113</sup> Amy Tsanga J sought to break the differing decisions in *Kenya* and *South Africa* already discussed in the foregoing, on adolescent sexual conduct when two minors defile each other, and attempted to give a way forward.

The High Court of *Zimbabwe* reviewed the case of a boy of 17 years, who had consensual sexual intercourse with his girlfriend of 15 years, and was charged and convicted of the offense of having sexual intercourse with a child. In her decision, Amy Tsanga J delved into the issue of criminalization of adolescent consensual sex. She was cognizant of the intention of criminal law to protect adolescents from sexual predation, and discourage young people from sex, the dangers it possesses to the health, and teenage pregnancies.

The judge however, she observed and noted that there was a lacuna in law (similar to that in the *Kenyan* context in the Sexual Offences Act no. 2 of 2006) where the law failed to clearly distinguish an adult perpetrator to minor/adolescents lovers and as such led to a punishment under the criminal law which is not expressly written or provided for but due to the wide interpretation by courts and the criminal justice system.

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<sup>112</sup> Pp 34 of the working paper by Lungowe Matakala Research Partnership Programme Danish Institute for Human Rights (DIHR)December 2012

<sup>113</sup> [2015] ZWHHC 106, CRB B467/14 (High Court of Zimbabwe).

In her judgment, she noted the following:

‘Ignoring the reality of consensual sex among teenagers and adopting an overly formalistic approach to the crime can result not only in an unnecessarily punitive sentence, but also a criminal record and stigmatisation as a sex offender.’ She further noted as follows among peers is a reality of adolescent sexuality. It does not justify a suspended imprisonment term for the teen male offender who has had sex as part of a romantic relationship with a peer.’

Justice Tsanga expressed the view that criminalizing minors for having consensual sexual conduct was not the best way to achieve the intention of protecting adolescents, especially girls, from harm of sexual conduct. She invited justice stakeholders and policy makers to come up with appropriate interventions rather than seek to punish one gender over the other in a bid to protect girls and more so to avert the dangers that arise for girls from teenage sex. Part of the answer she opined would also lie in more open and realistic approaches such as contraceptive protection.

The case law above in Zimbabwe and the issues arising therein are the very same issues arising in Kenya on minor to minor defilement among teenagers where the glaring discrimination of the boy child by the justice system is evident and discussed with a call for a justice stake holders, policy makers and persons in authority to find measures to curb the menace that is teenage sexual conduct.

The issues raised in the above case are at the very core of the issues in my research and the recommendations made therein are similar as those intended in my research. It is these very reasons that made Zimbabwe a good case study for my research.

### 3.9 India

India boasts one of the best constitutions in the world. Protection of children by the state is guaranteed to Indian citizens.<sup>114</sup> India is also a signatory of the United Nations Convention on the Rights of the Child and as such has made strides in enacting laws for the protection of children. With regard to defilement and sexual assault, there is The Protection of Children Against Sexual Offences Act, 2012 (POSCO), under this act defilement is described as penetrative sexual assault.<sup>115</sup>

The act defines a child as any person below the age of 18 years and does not recognise consent where sexual relations are with a child below 18 years old and thus recognises acts by two teenagers who engage in consensual sexual act will also be punished under this law.

This is often noted where teenagers are in a relationship with someone from a different caste, or religion and the parents are opposed to the relationship, they file cases to punish the two.<sup>116</sup>

What is clear from India is that teenage minor to minor defilement is punished but there is no particular provision on how to handle the same. It is treated under the act aforementioned (POSCO, 2012) in the same way as an adult having defiled a minor.

India like Kenya, despite having ratified the United Nations Convention on the Rights of the Child and having such a strong Constitution covering the rights of the child and best interests of the child, when it comes to teenage minor to minor defilement, the narrative seems to change and no special consideration is given to the age nor vulnerability of this minors who are in need of care, protection and guidance.

Also, noteworthy and troubling is that in India, there is discrimination of minors not only on gender but also on caste and religion with families seeking to misuse the criminal justice

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<sup>114</sup> Article 21 of the Constitution of India 1949.

<sup>115</sup> Section 3 of The Protection of Children Against Sexual Offences Act, 2012 (POSCO)

<sup>116</sup> "Love and Sex in the Time of the POCSO Act, 2012 . In Plain speak. 1 June 2014. Retrieved 20 August 2019.

avenue to punish a child for being of a lower caste or a religion that is not favourable to the reporting parents.<sup>117</sup>

The caste system is an ugly system in India that has continued for decades, where one is discriminated on the basis of their social status, class or skin colour, with the rich being from the upper class, upper caste while the poor are from the lower class hence lower caste.<sup>118</sup>

### **3.9 Japan**

Japan is a signatory of many international conventions, which aim to protect the rights of children and this, include provisions, which punish acts that harm children, both in special laws and in the Criminal Code. There is a juvenile justice system, which is separated from the normal criminal justice system. The Japanese Constitution is seen as one that is strong and key in driving away vices of discrimination. It professes twice that there shall be no discrimination based on race, sex or family origin in Japan in family laws and social relations.<sup>119</sup>

Japan is a fairly well-developed country with good laws in place but the laws are hardly effective especially on issues of discrimination against gender. In contrast to this, according to Article 177 of the Japanese Penal Code,<sup>120</sup> anyone who "commits sexual intercourse with a female under thirteen years of age" will receive a minimum of 3 years in prison, and no less. This means that anyone who has sex with anyone under 13 years old will have committed a crime.

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<sup>117</sup> "ibid"

<sup>118</sup> India's Caste System by Archana Chaudhary

<sup>119</sup> The Constitution of Japan.

<sup>120</sup> Penal Code of Japan No. 45 of 1907, amended through Law No. 52 of 2 June 1987

However, under Article 34 of the Child Welfare Act, "No person shall conduct any acts of fornication to children" 'fornication' refers to sex with an individual to which one is not married, and 'children' refers to anyone under 18 years of age. This notwithstanding, the age of consent for sexual conduct in Japan is sixteen (16) years. Marriage is even encouraged for a female above the age of sixteen (16) years but the male partner must be 18 years of age or older.<sup>121</sup> Parental approval however must be sought for marriage of anyone under the age of twenty (20) years and such cannot marry without such approval being obtained. The girl child at an early age is sexualized and even used in comic books to promote pornography.<sup>122</sup>

Japan was reported as being an international centre for the production and distribution of child pornography.<sup>123</sup> This has in many ways contributed to the rise in defilement and more so teenage/adolescent engaging in exploitative sex. Japan government with the raise on child protection laws, children and human rights both nationally and internationally, has now been seen leading in the crackdown of child abusers and fighting distribution of child pornography. Japan made a good study for comparison in my research because like Kenya it is a signatory to many International conventions yet has over the year had challenges with implementing this law to protect children and curb old societal practices such as child pornography. Like Kenya, it is such deep entrenched societal norms that hinder proper implementation or application of the law.

Japan just like Kenya and many other African Countries as discussed in the foregoing, is grappling with a rise in the number of adolescent and teenage defilement.

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<sup>121</sup> "Marriage in Japan" *jp.usembassy.gov*

<sup>122</sup> In an Article on CRIN child network Organisation- Japan child still being treated as sexual objects in cartoons and comic books by Sawa Omori a Senior Associate Professor of Public Policy of the Department of Politics and International studies at the International Christian University, Tokyo.

<sup>123</sup> 2013 US State department report-on Child Pornography in Japan

### 3.10 China

China has ratified a number of major international instruments with regard to children's rights protection. China's domestic legislation has also aligned itself with these international instruments to provide protection for a wide range of children's rights. The reality however with regard to children's protection remains a big problem. The People's Republic of China (PRC) Constitution provides for the state protection of children, and prohibits maltreatment of children.<sup>124</sup>

Among many laws and regulations providing children's rights protection, the primary law in this field is The PRC Law on the Protection of Minors (first passed in 1991, revised in 2006) (Minors Protection Law).<sup>125</sup> The newly revised Minors Protection Law entered into force on June 1, 2007.<sup>126</sup> This law sets up responsibilities of the families, the schools, and the government with regard to the protection of children's rights, and judicial protection, as well.<sup>127</sup> Eighteen is the age of majority in China. Under the Minors Protection Law, "minors" are defined as citizens less than eighteen years old.<sup>128</sup> This notwithstanding and recognising that children are those below the age of eighteen (18) years, the age of consent for sexual conduct has remained at fourteen (14) years.

China does not seem to have a clear law on child sexual abuse nor stringent penalties. Under China's child sexual abuse laws, offenders can be sentenced to between three and 12 years in prison, depending on whether their crimes were classified under rape and trafficking offences affecting girls and women, or indecent assault, which can apply to both genders. The age of

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<sup>124</sup> Xian FA [Constitution] art. 49 (1982) (P.R.C).

<sup>125</sup> The PRC Law on the Protection of Minors, 2007 Gazette of The Standing Committee of The National People's Congress 5 (P.R.C) (official source).

<sup>126</sup> "ibid"

<sup>127</sup> The Minors Protection Law has seven chapters as follows: Chapter 1, General Principles; Chapter 2, Family Protection; Chapter 3, School Protection; Chapter 4, Society Protection; Chapter 5, Judicial Protection; Chapter 6, Legal Penalties; and Chapter 7, Miscellaneous

<sup>128</sup> Article 2 of The Minors Protection Law.

consent in China for sexual activity is 14 years old regardless of gender or sexual orientation. Chinese law defines statutory rape as having sex with a girl who is less than fourteen years of age. The age of consent is the age at which a young person can legally agree to sexual activity.

Article 49 of the Chinese constitution forbids the physical abuses of elderly people, women and children.<sup>129</sup> For long child sexual abuse was swept under the carpet in China, it was seen as taboo. But with the rise in child rights globally the courts and law enforcement agencies have vowed zero tolerance on child sexual abuses cases. A lot however remains to be done in law. With no clear guidelines or stringent penalties on defilement in china, even adolescent sex is a non-issue or a point that is yet to arise for debate.

What seems to cut across Africa and Asia is the concern for adolescent sexual activity and the age of consent with each taking varying opinions on whether to raise or lower the age of consent. Legislators and political advisers in China have in the recent year called for raising the age of sexual consent from the current 14 years of age to 16.

"Sex education is scarce in China and a lot of girls are not aware of how they should be protected at the age of 14," said Zhu Lieyu, a lawyer from Guangdong province and a deputy to the National People's Congress.<sup>130</sup> Age of consent laws apply to all forms of sexual activity, ranging from kissing and fondling to sexual intercourse. Xu Juehui, another National lawmaker also suggested raising the age of consent, saying that minors may be physically mature at age 14 but have no mental maturity for sex and the consequences that arise thereof, owing to insufficient sex education, especially sex-related morality, from family, school and society and natural growth and maturation of the mind.<sup>131</sup>

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<sup>129</sup> The Constitution of China

<sup>130</sup> Lawmakers urge raising age of consent By Yang Wanli | China Daily 2020-05-30

<sup>131</sup> Lawmakers urge raising age of consent By Yang Wanli | China Daily 2020-05-30

China made a good study for comparison with Kenya as it has ratified similar international conventions on the rights of the child just like Kenya, such as the United Nations Convention on the rights of the child but like Kenya is grappling with issues of teenage defilement and grappling with areas of reform such as in policy or administrative reforms to educate adolescent and teenage minors as they are alive to the fact that sexual intercourse between such minors is on the rise.

### **3.11 Conclusion**

The various African and Asian countries above were picked intentionally and purposefully to investigate in particular countries where cultures and/or norms were predominantly practiced and to gauge what effect the same has in the justice system, as well as what strides such countries have made if any in view of the international laws in place. It is clear that some countries have made more strides than others, although for most the focus is the girl child and there exist clear discrimination on the boy child seen as the perpetrator based on biological set up, socialisation and cultural norms.

With the constantly rising debate on reduction of the age of sexual consent, the focus still seems to be the girl child yet the issue of reduction of age does not seem to cure the problem nor the glaring gap in law in SOA that does not give any direction on how the courts and law enforcers should proceed where two minors engage in sexual activity. It seems clear that what Kenya should concern itself with a move to amend SOA to include provision for directions on teenage (minor to minor) sex as opposed to punishing the boy child who is also a child entitled to equal protection under the law and considered vulnerable.

The cases in the comparative analysis particularly the cases in particular with differing decisions in Kenya and South Africa, that Zimbabwe sought to reach a middle-ground, have highlighted the concern for adolescents and the sexuality and the need to address long term



measures that will deal with the reality of adolescents engaging in romantic relationships including sexual intercourse, where courts are now trying to bring into perspective that teenage sex needs to be addressed by having clear policy measures and interventions to ensure sexual health and wellbeing of girls and boys.<sup>132</sup>

It is a wakeup call that discriminating and punishing the boy child for engaging romantically with his peer is not the solution to the problem as it will not necessarily stop the same girl from engaging sexually with another boy, nor will it prevent the far reaching consequences of teenage pregnancies and the risk of a fatherless child with a single mother because his young father was incarcerated when the court's discriminated against him.

Considering the statistics of decided cases on child defilement by the Kenyan judicial system, a cursory look shows that most reported instances of child defilement in Kenya are on the girl child and those involving minors of adolescent age defiling each other, a boy and a girl aged 15 & 16 or 16 & 17, the boy child has always been picked as the offender and the girl the victim.<sup>133</sup>

This research reveals that boys too are victims of defilement especially from older ladies and men which go unreported and this often leads these boys to suffer from long-term devastation, emotional problems, lack of sexual enjoyment and emancipation, trauma and psychological problem and that they too are children who require equal protection of the law and not discrimination by it.

The law and discrimination in the handling of the boy child under the criminal Justice system or reporting on boy child cases is attributed mostly to societal socialization and as seen in the foregoing child socialization where a boy speaking out or acting as a victim is seen as weak and near taboo. The society itself also views exposure of sodomy as embarrassing and

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<sup>132</sup> (De)Criminalizing Adolescent Sex: A Rights-Based Assessment of Age of Consent Laws in Eastern and Southern Africa by Godfrey Dalitso Kangaude and Ann Skelton

<sup>133</sup> Constitutional Petition 1 of 2017-POO (A minor) VS. Director of Public Prosecutions.

associate it with social stigma. Although there is literature around defilement and the sexual offences act, nothing has been written on the glaring gap in section 8 of SOA and its adverse effects on boy child discrimination. However, the application of the law in handling teenage minors brings out this aspect very clearly and there is empirical data on this as noted in the foregoing where Judges seek to correct wrongs meted against the boy child by society, law enforcers and the Courts as well.

International and Regional law is clear on the rights and protection of the rights and welfare of the child, free of discrimination. Although this concept is well captured in the Constitution of Kenya, under Article 53,<sup>134</sup> as well as the Children's Act of Kenya <sup>135</sup>with the best principle of the child being of utmost priority in any matter concerning any child, section 8 of SOA, though it was well intended to protect all minors and their right to remain chaste and free from sexual abuse, the unforeseen gap in law as discussed in my work, has led to a major abuse of the act by justice stake holders hence causing great discrimination against the boy child in application and protection of the law in cases where two teenage minors defile each other.

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<sup>134</sup> The Constitution of Kenya.

<sup>135</sup> The Children's rights of Kenya,2001(revised 2016)

**CHAPTER FOUR**

**THE IMPLICATION OF THE COURTS INTERPRETATION ON THE  
PROTECTION OF THE BOY CHILD PERPETRATOR**

**4.1 Introduction**

This chapter looks at the analysis in the previous chapter i.e. chapter three on the Court's interpretation of the law on defilement, in particular section 8 of SOA, and seeks to address the effect of such interpretation of the courts; what it means going forward.

**4.2 Shift in handling of sexual offences cases involving teenage**

Sexual feelings are a natural part of growth and development of a person as they transition from childhood to adulthood, especially for adolescents as they transition into teenagers and later into adults.<sup>136</sup> At that stage of their development, they experience intense feelings that may be hard to control without proper adult guidance or counselling.<sup>137</sup> The punishing of such acts seems inappropriate especially between adolescents and teenagers who are in the process of growth. Further, defilement between two teenagers having consensual sexual intercourse, and provision of stiff penalties especially when law enforcement and the court pick on the male gender, in this case the boy, seems inappropriate.

The Courts seems to be clearing up the interpretation and application of the law equally to minors and judging from the judgments in the foregoing chapter, it is clear that judges are giving light to the best interests of the child and right to equal protection of children under the law and by the society in the arriving at their decisions, seeking to correct wrongs and offer interpretation into law where no clear provision has been given.

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<sup>136</sup>World Health Organization, 'Defining sexual health: Report of a technical consultation on Sexual Health', 2006, 5.

<sup>137</sup> Papatasiou I, 'Adolescence, sexuality and sexual education' 1 Health Science Journal, (2014), 4

### **4.3 De-Stigmatization of the Bboychild**

Majority of the judgments pre- 2016 have always discriminated against the boy child where courts and criminal justice stakeholders were noted as having bias against the boy child based on the social norm that boys are the ones who approach girls and are the ones capable of defiling the girl child. This has been seen as an error perhaps in interpretation of the definition of defilement and the ingredients that constitute defilement, the key one being penetration with courts believing it is only a male (boy in this context) who can penetrate a female (girl in this context).

This also increasingly led to stigmatization of sodomy amongst boys which was treated as unheard of and abnormal within the African set up where patriarchy dictates that the girl is the weaker sex and that a boy cannot be ‘sexually abused’. This believe is an unrealistic mind set which is not in line with equal protection of the rights of the child and against the principle of the best interests of the child where a child is a child and must be protected as such irrespective of gender. Post 2016, after the *Constitutional Petition 1 of 2017-POO (A minor) vs Director of Public Prosecutions*, judgment, analysed in the foregoing chapters, we have seen a shift in the mind sets and judgments of judges who are the custodians of justice.

We are seeing more and more judges coming out to correct the anomaly of the noted discrimination against the boy child, while seeking to bring equality to the table, noting that the adolescent or teenage boy is a child just as much as his female (girl) counter-part.

### **4.4 Road towards equality in child protection in Kenya and globally**

The recent judgments by the courts in Kenya and similar light held in Uganda, Malawi, Zimbabwe etc only goes to show that the narrative is changing where law is taking its rightful place against interference by societal norm and cultural taboos, beliefs and ideologies. Judges are rightfully taking up the role jurisprudence bestows upon them to interpret the law and

offer clarity to its meaning and application. With these recent judgments we are seeing equal protection of the law and applicability of the law being called for and judges seeking to correct injustices meted on the boy child in discrimination of the law, thereby protecting the boy child just as much as the girl child and allowing them an opportunity to be heard.

We are also seeing judges calling out what in socialization theory has been seen as taboo and is not spoken of, that the boy child too can be defiled, that he too can be the victim, that he too must be equally protected under the law.

#### **4.5 Conclusion**

A lot however remains to be done and there is the danger of injustices meted against the boychild along with silent suffering of the boychild in unreported cases where they are the victim even against adults.

## **CHAPTER FIVE**

### **CONCLUSIONS AND RECOMMENDATIONS**

#### **5.1 Introduction**

This chapter presents the summary of the key findings and draws conclusions from the findings based on the objectives and research questions. The chapter also presents the recommendations made from the findings. The purpose of this study was to investigate the impact of the court's interpretation of section 8 of SOA in safeguarding the child in Kenya. This chapter presents the conclusions made from the entire research and the recommendations made as a way forward. The recommendations are categorized as legal reforms, administrative reforms and policy reform.

#### **5.2 Findings and Conclusion of the Study**

Based on the literature reviewed as well as the comparative analysis carried out to establish the practices in other countries, the study concludes that Kenya is far ahead of various African countries in having a specific Act on defilement and sexual violence. In most countries it is noted that sexual violence and defilement is captured in their penal code.

Lack of a provision in policy or law in what direction to take for adolescent sex/minor to minor sex has contributed to the varying opinions in who should be held culpable, with the boy child mostly being targeted as the perpetrator. The courts and law enforcers have a great role to play in the interpretation and application of the law and even leading in legal reforms and as such have failed to ensure equal protection of the law to all children with their misconstrued enabling of the application of the law on defilement.

There are bigger concerns that the society needs to be open to and address that the law may not necessarily address, like counselling for adolescents, open interventions and education on sexual well-being and health. Current judgments from the courts have exposed the gap not only in law but also in the interpretation of the law by the criminal justice system bearers starting with the law enforcers, prosecutors and the courts and there is need for the Law and policy makers to review SOA and amend the same to give clear provisions for adolescent consensual sex.

States appear to focus more on punishment more so of the boy child than on taking measures to address the structural issues and harms associated with sexual intercourse among minors.

There is therefore urgent for reform of the law and policy on laws to decriminalize consensual sex between adolescents in accordance with recognized rights of the child and to avoid abuse of the laws in discriminating against the boy child as has been noted in various African countries. In the course of my research, I noted that states both in Africa, Asia and even globally, concern themselves so much with the age of consent either in light of adolescent sex or adult to adult sex as noted in the discussions outlined in my research.

What is most worrying is that some countries in Africa like Kenya propose to reduce the age of consent to sixteen but these does not appear to support the best interests of the child but rather would appear to encourage patriarchy where adult men benefit from having sexual intercourse with children below the age of eighteen (18) provided they are not below sixteen (16) years. This will not in any way cure the continued prevalence on defilement of the child, nor will it cure early teenage pregnancies, abortions, responsibilities on sexuality over people who are not yet mature to make sound decisions in a romantic relationship. At sixteen (16) or eighteen (18) one is not mature to handle a sexual romantic relationship and as such is open to emotional, mental and sexual abuse by an adult.

To say we lower the age of consent would only men benefitting the adult perpetrators against the wellbeing and interests of the child. Boy child defilement which is prevalent but often goes unreported and is treated as taboo would be encouraged by lowering the age of consent. It would lead to more boys being sodomized (defiled) and this interferes with their manhood and development into responsible young men who will later be good husbands and fathers. It interferes with their self-esteem and brings about confusion on their sexuality and this would have negative far reaching consequences later in their life when they are adults.

### **5.3 Recommendations**

#### **5.3.1 Legal Reforms**

There needs to be a review of SOA to address the gap in section 8 on defilement of a child, to include what action is to be taken when two minors defile each other (have sex). Adolescent sex is on the rise in various parts of the world and the same cannot be ignored. The gap in law in SOA leaves room for various interpretations and application by the law enforcers and judicial officers. There is need for uniformity and express law and directions on a standard way to handle adolescent to adolescent sex.

We also need an International Convention on defilement that can be adopted globally; one that addresses all gaps and brings uniformity. A regional law on defilement as well for Africa would be good especially to harmonize the issue of the age of consent as we have seen it varies from twelve (12) to eighteen (18) years old.

#### **5.3.2 Administrative Reforms**

The judiciary is tasked with giving guidelines and bringing reforms where gaps are noted and raised as points of concern. The judiciary should start by changing the norm of the usual



stereo type in charging the boychild in cases of adolescent sex while favouring the girl child whereas in law all the above are children who have equal rights of protection under the law.

The judiciary should caution itself from been drawn into the African cultural mind set/view that only a girl can be defiled hence the boy must be treated as the perpetrator. Hence, the courts may give guidelines/rules on how to handle such cases.

### **5.3.3 Monitoring and Evaluation**

The government through the children's department and with the aid of Non-governmental Organisations such as FIDA (For women's rights), CRADLE (For children's rights) etc may create a task force to ensure monitoring and evaluation of the application of the law on defilement to ensure equal protection of the law for all children irrespective of gender/sex.

The ODPP who is in charge of the decision to prosecute and is the gate keeper of criminal justice system, should come up with guidelines on handling of adolescent sex (defilement) and ensure strict adherence to that guideline.

### **5.4 Conclusion**

We have come a long way globally in the fight against defilement and child sexual abuse. Kenya has done well with the law on SOA but needs to address itself to the rampant growth of adolescent sex and an amendment to the act to give direction on charging both minors or counselling them without undue discrimination on either.

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