



**THE ELUSIVE JUSTICE FOR WOMEN: A CRITICAL ANALYSIS OF RAPE  
LAW AND PRACTICE IN KENYA**

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Ruth Nekura Lekakeny

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## DEDICATION

I dedicate this work to the 16 rape victims whose experiences I use as case studies in this research.

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## CHAPTER 1

### INTRODUCTION

*Milka, a 16 year old girl was gang raped by 6 young men from her village, one of whom was her boyfriend. Accompanied by her mother, they reported to the nearest Administrative Police (A.Ps) camp the next day and the suspects were summoned. Milka was asked to narrate her story in front of the A.Ps, the alleged perpetrators and her mother. Embarrassed of the incident, she simply said she was assaulted. The A.Ps ordered the alleged perpetrators to slash grass and provide the girl with money to buy pain killers because she complained of back pain.*

*When the pain would not cease she decided to disclose the rape to her mother who took her to a local health facility. After a series of referrals, she was eventually diagnosed with recto-vaginal fistula. It was three months after the incident that the rape was eventually reported to the police, who dismissed the case for lack of sufficient evidence. Upon appeal to the DPP's office, the DPP ordered the investigation and prosecution of the matter. Two years later, only one of the suspects was apprehended and subsequently released for lack of probable cause. The matter remains unresolved. Milka and her family have had to relocate due to societal ostracism.<sup>1</sup>*

Milka's story is an example of the many rape cases that remain unresolved due to challenges encountered in the criminal justice system in Kenya. While there are legal and institutional frameworks in place, women and girl victims of rape continue to face obstacles which encumber their quest for recourse. In this thesis, I investigate the challenges experienced by raped women and girls while seeking recourse in the criminal justice system in Kenya. I then attempt to answer as a secondary research question, whether an integrated service provision approach provides solutions for these challenges.

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<sup>1</sup> Information accessed from COVAW's case database on 30<sup>th</sup> June 2014.

## 1.0 THE CRIME OF 'RAPE'

It has been argued that naturally, women display a sense of shyness, and are inclined to offer resistance in all sexual relations.<sup>2</sup> They are depicted as rarely capable of knowing what they want and therefore often require some degree of force in order to have a pleasurable sexual experience. Men on the other hand are active, aggressive, insistent and easily aroused.<sup>3</sup> These depictions affirm the renowned notion that a woman's "no" *may* mean "yes", or in fact *actually* means "yes", she just has a different way of saying it. Certain psychoanalytical studies have been used to argue that 'the female psyche and sexuality desire or invent forced sex. She then feels shame and guilt and decides to call it rape.'<sup>4</sup>

Under what circumstances then does a sexual act become wrong and unlawful? This is a question that continues to rouse as much debate in Kenya now as it did during the debates that preceded the enactment of the Sexual Offences Act (SOA).<sup>5</sup> This is not just a contention for the law and policy makers. It is one relevant to every community member and stake holder, including service providers and the victims of rape themselves.

Understanding what rape is, when it is deemed to have occurred and the elements that constitute it depends largely on a society's understanding of sexual morality.<sup>6</sup> Social attitudes play a crucial role in the extent to which rape is considered a crime and the response given to it. A significant portion of Kenyan society accepts certain justifications for rape, such as the victim's indecent

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<sup>2</sup> Maria Erickson, *Defining Rape: Emerging Obligations for States under International Law?* (2011) 44.

<sup>3</sup> Ibid at 44.

<sup>4</sup> Footnote 2 at 44.

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

<sup>6</sup> Footnote 2 at 44.

dressing, which make her deserving of rape.<sup>7</sup> The society's tolerance or intolerance to rape is significant because it sets standards on what is acceptable and what is not. The existence of any legal framework on rape operates within these social paradigms which greatly impact how the community, victims and service providers respond to rape.

The earliest codes to recognize rape show that its criminalization was the societies' way of responding to non-consensual sex outside marriage that was condemned.<sup>8</sup> According to the first written law prohibiting rape, the ancient Babylonian Code of Hammurabi, around 1750 BC, women and girls, both as legal minors were considered as property belonging to either their fathers or husbands and rape was classified as a crime of theft.<sup>9</sup> Rape devalued the wives and daughters, and threatened the patrilineal system of inheritance. Therefore, if a woman was raped, compensation was paid to the respective male to whom she belonged. Rape was therefore seen as a crime against the family and a woman's honour as opposed to a crime of violence against an individual's sexual autonomy.<sup>10</sup> Similarly, under Roman law the punishing of rape, as a property crime was for purposes of regulating competing male interests in controlling sexual access to women.<sup>11</sup> As such it is clear why the concept of marital rape was non-existent because a husband had complete power and access to his wife's sexuality.

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<sup>7</sup> Reference is made to the recent series of stripping incidences and public rape of women and girls in Kenya from 15<sup>th</sup> to 26<sup>th</sup> November 2014. See Jessica Hatcher 'Nairobi's 'miniskirt' march exposes sexual violence in Kenya' *The Guardian* 18 November 2014. See also Mercy Kambura 'Let's be real; we can't just dress as we please' *Daily Nation* 25 November 2014.

<sup>8</sup> Footnote 2 at 38.

<sup>9</sup> Footnote 2 at 38.

<sup>10</sup>Footnote 2 at 39.

<sup>11</sup>Footnote 2 at 39.

There are common stereotypes that affect how rape is understood or responded to by the criminal justice system. An example is that women are generally likely to lie about rape and that they can and therefore should resist rape with all their might. Lord Justice Hale probably expounded best on these in his statement “rape is an accusation easily to be made, hard to be proved and even harder to be defended by the party accused.”<sup>12</sup> It is also generally assumed that persons in position of trust are unlikely to commit rape.<sup>13</sup> The corresponding myth to this is that rapists are mostly strangers attacking an unsuspecting victim in a dark alley or other outdoor location.<sup>14</sup>

These ideologies explain the existence of certain legal standards or requirements in rape law. An example is the requirement to prove the existence of physical resistance, or use of force as a determinant factor to establishing rape. In this regard Erickson quotes the work of Havelock Ellis at the beginning of the 20<sup>th</sup> century which viewed that ‘the only way to ensure that a woman’s “no” means “no” is by the utmost, earnest physical resistance to unwanted sex, if it meant to the point of death.’<sup>15</sup>

The ‘ideal victim syndrome’ is one that greatly affects how rape is understood and processed through the criminal justice system. I use this term in this research to mean all the right ways that the society, the law and the players in the criminal justice system expect a rape victim to act either during or after the offence has occurred. Any and all such actions that she takes are deemed critical because they will determine her believability and ultimately her chances at accessing any form of recourse. Among the expectations is that the victim should

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<sup>12</sup> Hale M, *Historia Placitorum Coronae: The History of Pleas of the Crown*, Vol 1, 629.

<sup>13</sup> Temkin J, Khare B *Sexual Assault and the Justice Gap: A Question Of Attitude* (2008) 31.

<sup>14</sup> Ibid.

<sup>15</sup> Footnote 2 at 45.

immediately report the crime and preserve all the relevant evidence to ensure the prosecution will have a strong case. This can be traced to the old English law of 'hue and cry' which required that once a woman is raped she should;

'Go at once and while the deed is newly done with hue and cry to the neighbouring townships and there show the injury done to her to men of good repute, the blood and clothing stained with blood and her torn garments'<sup>16</sup>

Although the terms 'hue and cry' do not appear in today's laws, the spirit behind this principle is still very much alive in today's rape law and practice in Kenya.

## 2.0 WOMEN AS TARGET VICTIMS

It is estimated that every thirty minutes, a woman is raped in Kenya.<sup>17</sup> A study on rape statistics conducted by Crime Scene Investigation, Nairobi, indicates that rape victims are mostly women and girls of ages ranging from 9 months old to 105 years.<sup>18</sup> The report estimates that there were 40,500 rape cases from December 2007 to June 2008 in Kenya. While this figure is astonishingly high, the report indicates that the actual figure could be up to three times higher since rape remains the most under reported crime in the country. It highlights that only 1 in 20 victims will report and only 1 in 6 will seek medical assistance. Incidences of rape occur either in the family space, the general community or perpetrated by and condoned by the state.<sup>19</sup> They occur both in times of 'so-called-peace', in

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<sup>16</sup> H de Bracton (1968) *On the Laws and Customs of England*, quoted by PJ Schwkkard 'Getting Somewhere Slowly-The revision of a New evidence Rules' in L Artz & D Smythe (eds) *Should We Consent? Rape Law Reform in South Africa* (2008) 87.

<sup>17</sup> Kenya National Commission of Human Rights (KNCHR) & Ministry of Justice and Constitutional Affairs *State of Human Rights In Kenya A Baseline Survey Report*, August 2005, 13.

<sup>18</sup> Crime Scene Investigation Nairobi, *Quantitative Research Findings on Rape in Kenya between December 30th 2007 to June 30th 2008*. (2008).

<sup>19</sup> UN General Assembly, *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104 art 1 & 2.

conflict and post– conflict times, especially in the situation of the internally displaced people living in displacement camps.<sup>20</sup>

The latest Kenya Demographic Health Survey shows that 21 percent of Kenyan women (one in five women) have experienced sexual violence.<sup>21</sup> Furthermore, 12 percent of women aged between 15-49 report that their first sexual intercourse was forced against their will.<sup>22</sup> 90 percent of the reported perpetrators are men and most of the violence is committed by an intimate partner. Strangers accounted for only 6 percent of sexual violence in Kenya. It is also reported that the likelihood of experiencing sexual violence increases with the age of the women.<sup>23</sup>

The UN special Rapporteur on Violence against Women has stated that ‘violence against women is neither circumstantial nor random, but rather a structural matter connected to the imbalance of power between the genders.’<sup>24</sup> Rape is targeted at a woman because of her gender. She is perceived as incapable of controlling her sexuality and is unable to refuse sex. Unequal power relations constitute the root cause of all forms of violence against women, including rape.<sup>25</sup> This male dominance increases the vulnerability of women to sexual violence.

From a structural perspective, it is this same mindset that contributes to the patriarchal domination that feminists have argued is foundational to the law

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<sup>20</sup> Ibid.

<sup>21</sup> Kenya National Bureau of Statistics, *Kenya Demographic and Health Survey 2008-09*, June 2010, 250.

<sup>22</sup> Ibid

<sup>23</sup> Ibid at 253.

<sup>24</sup> Preliminary Report Submitted by the Special Rapporteur on Violence Against Women its causes and consequences, MS Rhatika Coomaraswamy in accordance with the Commission on Human Rights Resolution 1994/95 UN Doc E/CN.4/1995/42,22 November 1994, para 49.

<sup>25</sup> Lori Michau and Dipak Naker (ed) *Raising Voices and UN-HABITAT, Safer Cities Program, Preventing Gender-based Violence in the Horn, East and Southern Africa: A Regional Dialogue*, (2004)

and practice of criminal justice systems.<sup>26</sup> The raped woman trying to manoeuvre through the system therefore operates within this context and amidst all social, political, emotional, psychological and often economic obstacles that readily come with it.

### 3.0 PROBLEM STATEMENT AND GUIDING QUESTIONS

This thesis seeks to uncover the challenges encountered by women and girl victims of rape in seeking recourse through the criminal justice system in Kenya. To do this I focus on their experiences in three major points of service provision, i.e. the police, the health facilities and the courts. I then explore, as a secondary research question, whether an integrated service provision approach provides solutions to these challenges. Article 48 of the Constitution of Kenya provides that 'The state shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice'<sup>27</sup> This obligation places a tall order on the state and all its agents to ensure that anyone in pursuit of justice should access it with the minimum obstacles.

A rape victim, by virtue of undergoing the ordeal, goes through a massive degree of trauma and stigma among other devastating effects that may affect their long-term well-being.<sup>28</sup> The SOA, in defining and regulating how rape should be investigated and prosecuted acknowledges the special nature of rape as a crime.<sup>29</sup> It accords various protections to the rape victim to ensure she manoeuvres the criminal justice system in a humane, effective manner that

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<sup>26</sup> Marguerite Russel *A Feminist Analysis of the Criminal Trial Process* (1989) 553.

<sup>27</sup> Constitution of Kenya 2010 art 48.

<sup>28</sup> Ministry of Medical Services and Ministry of Public Health & Sanitation, *National Guidelines on Management of Sexual Violence in Kenya* 2nd Edition, 2009.

<sup>29</sup> Footnote 5 at ss 3, 43, 44 and 45.

preserves her dignity and avoids secondary victimization. The SOA operates as part of a legislative framework that regulates the operations of the criminal justice system. I analyse this legal framework collectively to uncover legal gaps that impede a rape victim's quest for recourse. The law as it is sets quite high standards to be met making it very difficult for rape cases to reach successful conviction.

This is more so if analyzed in light of the wanting structural and institutional support and mechanisms.<sup>30</sup> The available legal protections do not seem to be translating in practice. The very systems and structures that are meant to protect the rape victim often, fail to do so and instead blame her for it and coerce her throughout the system. The service providers, i.e. the police, health workers and judicial officer's who are supposed to protect, investigate, and prosecute often stigmatize the victim. Being a largely patriarchal society entrenched with certain retrogressive cultural practices and attitudes; the criminal justice system in Kenya becomes yet another platform where raped women and girls are victimised.

I acknowledge that the right of an accused person to be presumed innocent until proven guilty is also safe guarded in the bill of rights.<sup>31</sup> Therefore, an attempt to treat rape as a "special kind of offence" in essence, may be seen as lessening the burden of the victim to prove that the accused is guilty, which burden by law, rests on the prosecution. In addressing this concern, I attempt to craft solutions that balance the interests of the raped woman and the accused person in the criminal justice system. My arguments are based on the premise

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<sup>30</sup>National Council for Population and Development *Kenya population situation analysis*, July 2013, 79.

<sup>31</sup> Footnote 27.

that a fair and functional criminal justice system is beneficial for all parties who interact with it.

#### **4.0 RESEARCH DESIGN**

The jurisdictional focus of this thesis is Kenya. The research is partly doctrinal and partly empirical. The desktop research involves a scrutiny of primary sources such as legislation, conventions and case law. This is to show the opportunities as well as challenges posed by the legal framework in ensuring access to justice for raped women. Further, I rely on secondary sources such as books, journals, scholarly articles and newspaper articles in order to contextualize the history of rape as a crime and expound on the peculiar challenges that women face as rape victims. I also rely on government reports and records, reports of multinational and national organizations for statistical information and data. Case law is used selectively to show the role of the courts in enforcing the relevant rape laws.

Empirically, the research analyses 16 rape case studies in order to highlight the experiences of women in the criminal justice system. These cases show disconnect between law and practice and highlight the challenges in the system. Consent was obtained from the victims of rape whose cases are depicted in this research and also from the relevant supporting organization, Coalition on Violence Against Women-Kenya (COVAW).

This research was submitted for ethical clearance to the University of Cape Town Law Faculty's Research Ethics Committee and approved accordingly. For purposes of confidentiality, the research does not refer to any identifiable personal details of the 16 women and girls such as names, locality, and case file numbers. Pseudonyms are used instead. The age, sex and status

(e.g., married, disabled) are retained for purposes of showing the peculiar challenges faced by different categories of raped women and girls.

The 16 victims comprise a wide age range from very young girls to mature women, (2years-50years). It includes victims of different marital status, i.e. single, married and those in other intimate partner relationships. The selection specifically includes some cases of intellectually challenged women and girls. This is often a forgotten category of victims who face peculiar challenges in the system and the research would like to highlight these. It is important to show how the laws and the system distinctively discriminate against them.

The case studies include an array of cases that made it to different points of service provision. That is; from those that did not make it to reporting and the investigation stage, to those that were prosecuted to completion and judgement. I will also rely on qualitative data collected through 3 key in-depth interviews conducted with select respondents from the COVAW. Being an organization with a mandate to eradicate all forms of violence against women in Kenya, data from these interviews with experts in the field adds immense value to the critique of rape law and practice in Kenya.

## **5.0 RESEARCH OVERVIEW**

Through a case study analysis, this research aims to unearth the challenges encountered by women and girl victims of rape in seeking recourse through the criminal justice system in Kenya. To do this I focus on the experiences of women and girls in three major points of service provision i.e. the police, the health facilities and the courts. I then explore as a secondary research question, whether an integrated service provision approach provides solutions to these challenges.

In this chapter I have explored the meaning and origin of rape as a crime and discussed why women and girls as target victims are more predisposed to rape. This sets the background for understanding why the reporting, investigation and processing of this sexual offence raises peculiar challenges. In the following chapters I critically analyse the available legal framework to highlight the challenges it presents and the extent to which it protects rape victims.

In the light of the legal framework, I thematically analyze the case studies to highlight the discrepancies that exist between law and practice. Here I will discuss the relevant available policy frameworks and show whether or not they are actualized. I further highlight the institutional and structural challenges that inhibit access to justice for raped women. This will culminate in a comprehensive analysis that establishes the present impossibilities of manoeuvring the system as it is, hence making justice elusive for raped women and girls.

In the light of the above, I seek to establish that the problem lies in the culture of the criminal justice system. The system, both in norms and practice, need to entrench mechanisms and foster practice that will deliberately minimise secondary victimization. Only holistic and proactive efforts by all stake holders in a multi-sectoral approach can ensure a change in that culture.

## CHAPTER 2

### THE KENYAN LEGISLATIVE FRAMEWORK ON RAPE

#### 1.0 INTRODUCTION

The primary law governing rape in Kenya is the Sexual Offences Act, 2006 (SOA).<sup>32</sup> In its operation, the SOA complements other laws regulating the criminal justice system. These laws include the Criminal Procedure Code,<sup>33</sup> the Evidence Act<sup>34</sup> and the Penal Code.<sup>35</sup> The Constitution of Kenya, 2010<sup>36</sup> is also an integral part of this legal framework because the rights and freedoms enshrined in the bill of rights are relevant to rape. Moreover, the Constitution is relevant by virtue of article 2(5) and (6) which provides that any treaty or convention ratified by Kenya and general rules of international law form part of Kenyan law. This means that regional and international instruments relevant to rape form part of this legal framework and consequently bind the state.

This chapter analyses this framework of law, raising specific issues relevant to rape, highlighting the opportunities availed and the challenges posed to a rape victim seeking recourse. I pay special attention to three typologies or circumstances of rape in order to show the specific legal issues arising. These are; marital rape, rape of mentally challenged women and girls and rape of children (focusing on girls).

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<sup>32</sup> Footnote 5.

<sup>33</sup> Criminal Procedure Code Cap 75 Laws of Kenya.

<sup>34</sup> Evidence Act Cap 80 Laws of Kenya.

<sup>35</sup> Penal Code Cap 63 Laws of Kenya.

<sup>36</sup> Footnote 27.

## 2.0 THE DEVELOPMENT OF KENYAN RAPE LAW

Prior to the enactment of the SOA in 2006, rape was categorised as an offence against morality under the Penal Code, alongside homosexuality and abortion.<sup>37</sup> The law as inherited at independence had a weak framework for addressing rape and other sexual offences as experienced in Kenya.<sup>38</sup> One of the major legal concerns was the definition of rape. It was defined as an offence capable of being committed only against women and girls. In addition, the law did not define or expound on what consent is. As a result, the courts solely relied on circumstantial evidence such as evidence of struggle or resistance to determine the absence or presence of consent. This is problematic because such wide discretion allowed for judicial attitudes and assumptions to come to play.<sup>39</sup>

Furthermore, offences against morality generally attracted lighter sentences compared to offences against the person in the Penal Code. There were no minimum sentences and, as a result, convicted perpetrators could easily get away with either very short imprisonment, or a mere fine. In addition, the presumptions within the law, especially the requirement for corroboration, made it very difficult to convict suspects since most rape cases have no witnesses to corroborate the complainant's testimony.<sup>40</sup>

These legal concerns, coupled with other social concerns arising from the alarming increase of sexual violence cases in Kenya fuelled human rights

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<sup>37</sup> The definition of rape in section 139 of the Penal Code (now repealed) was "Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representation as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of the felony termed rape." The Offences against abortion and homosexuality were retained in the Penal Code ss 158-160, 162,165.

<sup>38</sup> Njoki Ndung'u, N Baraza et al, *The Making of the Kenya Sexual Offenses Act, Behind the Scenes* (2006).

<sup>39</sup> Ibid at 21.

<sup>40</sup> Footnote 38 at 4.

advocacy groups in the early 1990s to begin conversations about the reform of sexual violence laws.<sup>41</sup>

There were major international developments around the same period that greatly informed this law reform process. In 1991, the United Kingdom landmark decision in *R v R* abolished the common law marital exemption in rape.<sup>42</sup> This meant that the law now recognised that a husband can rape his wife and he should not be treated any differently based on his relation to the victim. This set the pace for activists in other common law jurisdictions to question the issue of 'implied consent', which had now been declared a 'common law fiction'.<sup>43</sup> In 1993, violence against women was recognised as a key agenda at the world conference on human rights in Vienna and the need for measures to eradicate gender based violence including sexual violence found expression in the Vienna Declaration and Program for Action.<sup>44</sup>

In the same year, the Declaration on Elimination of Violence Against Women (DEVAW) was adopted.<sup>45</sup> It coined the most accepted definition of violence against women to date, which includes sexual violence and expounds on various types of sexual offences. The Beijing Declaration and Platform for Action adopted in 1995 was another landmark development. It commenced a process of monitoring state accountability around critical areas of concern on

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<sup>41</sup>Footnote 38 at 9.

<sup>42</sup> *R v R* [1991] 3 WLR 767.

<sup>43</sup> *Ibid.*

<sup>44</sup> Vienna Declaration and Program for Action, U.N GAOR, U.N. Doc. A/CONF.157/ 24 (1993) ILM 1661 (1993). Donna J Sullivan, 'Women's Human Rights and the 1993 World Conference on Human Rights' in *The American Journal of International Law*, Vol 88, No.1 (1994) 152-167 for a discussion of the gains of the Vienna Conference and its significance in exposing violence against women as a human rights concern.

<sup>45</sup> Footnote 20 at arts. 1, 2.

gender equality, including violence against women.<sup>46</sup> The global advances further spurred the adoption of regional instruments that address violence against women including the African Women's Protocol in 2003.<sup>47</sup> These developments contributed greatly to the language and conceptualisation of the provisions that comprised the sexual offences bill.

Hon. Njoki Ndungu, who was a lawyer, a women's rights activist and a politician introduced the sexual offences bill as a private member's bill to the Kenyan parliament in 2004.<sup>48</sup> The deliberation process involved negotiations, changes and compromises as the bill was extremely politicised and several provisions were heavily opposed. Some of the major contentious issues included the chemical castration of rape convicts, marital rape, the burden of proof, the definition of a child and the rape shield for victims. Several male politicians were particularly concerned that women would use rape cases to settle scores with men for political reasons. Regional debates on sexual violence including the rape cases against Jacob Zuma in South Africa and Kizza Besigye in Uganda fueled this debate.<sup>49</sup>

Though there were many compromises i.e. the chemical castration did not see the light of day and marital rape is still not recognized as a crime in the Act, the SOA nonetheless brought major developments. The definition of rape was extended to apply to all genders, the elements of 'consent' and 'intentional and unlawful acts' were defined and expounded on, minimum sentences were

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<sup>46</sup> UN Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995.

<sup>47</sup> African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003.

<sup>48</sup> Footnote 38 at 4

<sup>49</sup> Kenya National Assembly. 2005. *The Hansard Parliamentary Debates*, April 27, 2005. Nairobi. See *Dr. Kiiza Besigye v. Uganda*, High Court Criminal Session No. 149/2005. And *S v Zuma* [2006] ZAGPHC 45.

established and 14 new sexual offences were introduced. Different 'circumstances of rape' were recognized and classified as separate offences, eg gang rape, incest, and rape of children (defilement). The SOA further safeguarded the right to free medical care and counselling in public institutions for rape victims and required the setting up of a DNA data bank and a paedophile registry.<sup>50</sup>

The enactment of the Constitution of Kenya, 2010 marked another development to the rape law in Kenya. It guarantees the right to freedom and security of the person, the right not to be subjected to any form of violence from either public or private sources, or to be treated in a cruel inhuman or degrading manner.<sup>51</sup> It establishes the right to human dignity, guarantees equality and freedom from discrimination and states that men and women have the right to equal treatment in social, cultural, political and economic spheres.<sup>52</sup> It requires the state to take legislative measures and policies to redress any disadvantage to any individuals or groups of people.<sup>53</sup> It further obligates the state to ensure access to justice for all persons and if any fee shall be required, it is to be reasonable and not to impede access to justice.<sup>54</sup>

The constitution also states that 'the general rules of international law as well as any treaties ratified by Kenya forms part of Kenyan law.'<sup>55</sup> At a global level the UN Convention on Elimination of all forms of Discrimination Against Women (CEDAW) is relevant. It prohibits all forms of discrimination against

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<sup>50</sup> Footnote 5 at s 39

<sup>51</sup>Footnote 27 arts. 26, 29.

<sup>52</sup> Footnote 27 art 29.

<sup>53</sup>Footnote 27 art 27.

<sup>54</sup>Footnote 27 art 48.

<sup>55</sup>Footnote 27 art 2(5), (6).

women.<sup>56</sup> The CEDAW Committee has interpreted discrimination to include all forms of violence against women including sexual violence.<sup>57</sup>

In addition, DEVAW defines violence against women to include sexual violence, which may occur in the family, the general community, and can be perpetrated and condoned by the state. It specifically identifies marital rape as a form of sexual violence.<sup>58</sup> At the regional level, the African Women's Protocol prohibits violence against women including unwanted or forced sex whether the violence takes place in private or public.<sup>59</sup> It requires law enforcement organs at all levels to be equipped to effectively interpret and enforce gender equality rights.<sup>60</sup> These international instruments provide viable standards by which to measure the rape law and practice in Kenya.

### 3.0 RAPE UNDER THE SEXUAL OFFENCES ACT

The purpose of the SOA is to provide for sexual offences, their definition and to regulate the prevention and protection of all persons from harm arising from unlawful sexual acts.<sup>61</sup> It defines rape as-

'an offence committed when a person *intentionally and unlawfully* commits an act which *causes penetration* with his or her genital organs [and] *without the consent of*

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<sup>56</sup> UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13 art 1, 2.

<sup>57</sup> UN Report of the Committee on the Elimination of Discrimination Against Women: General Recommendation No. 12 (8<sup>th</sup> Sess.1989), U.N. GAOR 44<sup>th</sup> Sess, U.N.Doc.A/44/38 (1992), UN Report of the Committee on the Elimination of Discrimination Against Women: General Recommendation No. 19 (11<sup>th</sup> Sess.1992), U.N. GAOR 47<sup>th</sup> Sess, U.N.Doc. A/47/38 (1992).

<sup>58</sup>Footnote 19 arts 1, 2.

<sup>59</sup> Footnote 47 arts 1, 2, 3, 4.

<sup>60</sup> Footnote 47 art 1, 2, 3.

<sup>61</sup> Footnote 5 at s 2.

the other person, [or] if the consent is obtained by force or by means of threats or intimidation.’<sup>62</sup>

The punishment prescribed for rape is a minimum of 10 years imprisonment, which can be enhanced to life imprisonment.<sup>63</sup> The SOA also provides for attempted rape with a minimum penalty of 5 years<sup>64</sup> as well as gang rape which applies in situations where rape is committed in association with two or more others. The minimum penalty for gang rape is 15 years and can be enhanced to life imprisonment.<sup>65</sup>

### **3.1 Consent and the two levels of presumptions**

Consent is an essential part of the definition of rape because it is undoubtedly important in the determination of guilt in rape cases. According to the SOA, ‘a person consents if he or she *agrees by choice*, and has the *freedom and capacity* to make that choice.’<sup>66</sup> In many cases, consent is often the only disputed issue. Since consent often involves perceptions, interpretation of feelings and reactions, it is a very contentious issue and not easily determined.<sup>67</sup> Such feelings and reactions are more often than not a reflection of societal attitudes, values and gendered power relations.<sup>68</sup> As Nikki Naylor argues, the debate of when ‘no’ means ‘no’ and when ‘no’ means ‘yes’ comes into play ‘when society accepts that in intimate emotional human relationships it is not always easy for men to understand that a

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<sup>62</sup> Footnote 5 at s3, (Own emphasis).

<sup>63</sup> Footnote 5 at s3.

<sup>64</sup> Footnote 5 at s4.

<sup>65</sup> Footnote 5 at 10.

<sup>66</sup> Footnote 5 at s42, (Own emphasis).

<sup>67</sup> Dr. K Winfred, ‘Treatment of Consent in Sexual Offences in Kenya’ (2013), *The Equality Effect*, 9th August 2014.

<sup>68</sup> *Ibid.*

woman is not consenting'.<sup>69</sup> However by introducing the terms 'agreeing by choice' the SOA raises the standard beyond the conventional lack of consent often demonstrated by resistance and emphasizes the sexual autonomy rights of every person.

Conscious of this underlying tension with respect to consent, the SOA introduces two levels of presumptive tests, i.e the evidential presumptions and conclusive presumptions. The presumptions were added to the SOA in order to increase conviction rates for sexual offences by making it easier to for the prosecution to demonstrate a lack of consent on the part of the victim, and a lack of reasonable belief in consent on the part of the accused.<sup>70</sup>

Section 44 of the SOA provides for evidential presumptions. It applies where certain specified circumstances are proved to have existed.<sup>71</sup> These circumstances include for instance that violence was being used against the

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<sup>69</sup> Nikki Naylor 'The Politics of a Definition' in L Artz & D Smythe (ed) *Should We Consent? Rape Law Reform in South Africa* (2008) 26.

<sup>70</sup>Footnote 67 at 7.

<sup>71</sup>Footnote 5 at s 44 the specific circumstances listed are:

- (a) any person was, at the time of the offence or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;
- (b) any person was, at the time of the offence or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person;
- (c) the complainant was, and the accused was not, unlawfully detained at the time of the commission of the act;
- (d) the complainant was asleep or otherwise unconscious at the time of the commission of the act;
- (e) because of the complainant's disability, the complainant would not have been able at the time of the commission of the act to communicate to the accused whether the complainant consented;
- (f) any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the commission of the act.

complainant. If the accused person knew that those circumstances existed, the complainant is to be taken not to have consented and the accused is to be taken not to have reasonably believed that the complainant consented to the act unless *sufficient evidence is adduced to raise an issue*. The evidential presumptions are rebuttable if evidence is produced to disprove the presumption.

What this means is that for this presumption to be effected, the prosecution must first prove the existence of any of these circumstances, and prove that the accused was aware of the same. At this instance, the accused is allowed to adduce evidence as to whether the victim consented and whether he reasonably believed the complainant consented. If he does not provide sufficient evidence to raise an issue in both of these instances then the court will convict the accused. If he does however, the burden shifts back to the prosecution.<sup>72</sup>The conclusive presumptions will arise if it is proved that the accused person committed the act of rape in circumstances where;

‘...the accused intentionally deceived the complainant as to the nature or purpose of the act complained of [or] if the accused person intentionally induced the complainant to consent to the act complained of by impersonating a person known personally to the complainant.’<sup>73</sup>

In these instances, it will be conclusively presumed that the complainant did not consent and that the accused did not believe that the complainant consented.<sup>74</sup>

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<sup>72</sup> Footnote 67 at 8.

<sup>73</sup> Footnote 5 at s 45(2).

<sup>74</sup> Footnote 5 at s45(1).

### 3.2 Sexual intercourse and penetration

The SOA defines penetration as ‘an insertion of the genital organs of a person into the genital organs of another person.’<sup>75</sup> This limits the concept of penetration to ‘genital organs’. It then defines genital organs as ‘the whole or part of male or female genital organs and including the anus.’<sup>76</sup>

The Kenyan definition of rape does not cover instances where penetration of genital organs is by any other part of the body besides genital organs, by objects, animals, or even instances when penetration is through the mouth. Though such instances fall outside the legal definition of rape, they are mostly catered for under the offence ‘sexual assault’. Sexual assault is defined as ‘penetration of the genital organs of another person with any part of the body of another or that person [or] an object manipulated by another...’ It further provides that;

‘any person who manipulates *any part* of his or her body or the body of another person so as to cause penetration of the genital organ *into or by any part of the other person’s body* is also guilty of sexual assault.’<sup>77</sup>

I can imply that this latter provision is intended to cover instances of penetration to other body parts including the mouth. In comparison, other jurisdictions have coined broader definitions of rape that expressly encapsulate all these different forms of penetration. South Africa, for instance defines sexual penetration as;

‘Any act which causes penetration to any extent whatsoever by (a) the genital organs of one other person into or beyond the anus, mouth, or genital organs of another person [or] (b) any object, including any part of the body of the animal, or other part of the body of one person, into or beyond the anus or genital organs of another person; or (c) the anus or genital organs of an animal... into or beyond the mouth of another person.’<sup>78</sup>

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<sup>75</sup> Footnote 5 at s2.

<sup>76</sup> Footnote 5 at s2.

<sup>77</sup> Footnote 5 at s5.

<sup>78</sup> South Africa Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 s1.

Kenya's approach of classifying different forms of penetration as different offences, i.e. rape and sexual assault, maintaining that only penetration by genital organs to genital organs is what constitutes rape, in principle, is not detrimental. This is because penetration by objects or other body parts to other body parts is still recognized as an offence punishable with the same sentence as rape.

However, it is arguable that in practice this classification and separation leads to confusion and possible ambiguity among both service providers and victims in investigation and processing. Such confusion can lead to the wrong charge being placed against an accused because of a complainant's error in understanding or a police officer's ignorance as to the legal definitions. Even worse, what happens in a situation where the unlawful sexual act involves more than one or two of these forms of penetration? Would it necessitate placing both charges of rape and sexual assault against the accused person? It could be seen as advantageous that if the accused is convicted of both these offences he may serve sentences under both offences. However, it also severely increases the prosecutions task in proving both these crimes.

I argue that the better approach is having a broad definition of rape that will encompass all different forms of penetration. For purposes of this thesis therefore, though the term 'rape' is used the same should be understood to include sexual assault as well. The challenges and opportunities highlighted and recommendations prescribed apply to sexual assault as well as to the other 'rape' related offences, which are classified as separate offences by virtue of the fact that they occur in different circumstances. These include; gang rape, incest, attempted rape and defilement.

### 3.3 Intentional and unlawful acts

The other important element that must be proved in rape cases is that the sexual act by the perpetrator is intentional and unlawful. The SOA provides that an act is intentional and unlawful 'if it is committed in any coercive circumstance or under false pretences or by fraudulent means, or in respect of a person who is incapable of appreciating the nature of an act which causes the offence.'<sup>79</sup>

The SOA then defines coercive circumstances as acts which include the use of force or threat of harm against the complainant, or another person. It also includes situations of abuse of power or authority which often can inhibit the victim from indicating his or her resistance or unwillingness to participate in such an act.<sup>80</sup> To this effect, the SOA captures jurisprudence emanating from international tribunals specifically the International Criminal Tribunal for Rwanda with respect to conceptualizing rape beyond the element of consent to incorporate the existence of coercive circumstances.<sup>81</sup>

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<sup>79</sup> Footnote 5 at s 43.

False pretences or fraudulent means include circumstances where a person—

(a) in respect of whom an act is being committed, is led to believe that he or she is committing such an act with a particular person who is in fact a different person; (b) in respect of whom an act is being committed, is led to believe that such an act is something other than that act; or (c) intentionally fails to disclose to the person in respect of whom an act is being committed, that he or she is infected by HIV or any other life threatening,

sexually transmittable disease.

<sup>80</sup> Footnote 5 at s 43(2) lists the stipulates that the following would result in coercive circumstances;

a) use of force against the complainant or another person or against the property of the complainant or that of any other person;

(b) threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or

(c) abuse of power or authority to the extent that the person in respect of whom an act is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act.

<sup>81</sup>Vanessa E. Munro, "From consent to coercion: Evaluating international and domestic frameworks for the criminalization of rape," In *Rethinking Rape Law: International and Comparative Perspectives*, eds. Clare McGlynn and Vanessa E. Munro (2010). See also Prosecutor v. Jean-Paul Akayesu, Judgment, ICTR-96-4-T, Sept. 2 1998.

## 4.0 SPECIFIC TYPOLOGIES OF RAPE

### 4.1 Defilement

The offence of defilement is committed when a person causes penetration with a child *despite* the consent of the child.<sup>82</sup> A child is anyone below the age of 18 years.<sup>83</sup> The SOA then prescribes different penalties for defilement based on the age of the child.<sup>84</sup> The law allows for certain defences against the charge of defilement, if it is proved that the child deceived the accused that she was over 18 years and ‘...having regard to all circumstances including the steps the accused took to ascertain this statement, the accused reasonably believed the victim.’<sup>85</sup> However, this defence does not apply if the accused is related to the child within the prohibited degrees of consanguinity.<sup>86</sup>

This provision is also restricted by the limited definition of ‘penetration’ by genital organs to genital organs as discussed above. It is important to note that this offence is deemed to have occurred *despite* the consent of a child. In addition, the terms ‘intentional and unlawful’ are excluded from the definition though it appears in most other sexual offenses. The effect of this in practice is that consent by the child cannot be used as a defence in the case of defilement. Any sexual penetration with a child is unlawful. Kenyan Courts have consistently held that all children have no capacity in law to give informed consent to sexual relation.

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<sup>82</sup> Footnote 5 at s 8 (Own emphasis).

<sup>83</sup> Children’s Act Cap 141 Laws of Kenya s 2.

<sup>84</sup> Footnote 5 at s,8.

<sup>85</sup> Footnote 5 at s 8(5).

<sup>86</sup>Footnote 5 at s 22.

In *Bonu v. Republic*,<sup>87</sup> the appellant was accused of defiling a 10 year old. He argued that he was in a love affair with her and she was willing to engage in the sexual relations. The court opined that any acts of sexual intercourse with persons proved to be below the age of 18 years amounts to an offence. The SOA does not allude to situations of consensual sexual relation among minors. The criminal justice system has had to grapple with this issue since often such matters do not get to court and the police encourage out of court settlements.<sup>88</sup> Where they get to court the boy is often charged as the perpetrator and the girl is seen as the complainant, which arguably, is a discriminatory standard to be applied in all such cases.<sup>89</sup> Clearly, this is a gap in the law that needs to be addressed.

#### **4.2 Marital rape**

Marital rape is not recognized as an offence in Kenya. Section 43 of the SOA, which expounds on what an 'intentional and unlawful act' is with respect to a sexual offence, provides that the section 'shall not apply in respect of persons who are lawfully married to each other.'<sup>90</sup> The effect of this exemption is that the concept of rape within a marriage is non-existent. It is arguable, in theory, that the use of the term 'a person' when defining who is capable of committing the crime of rape is all inclusive and therefore by virtue of that even a spouse can be accused of rape. However, my position is that the inclusion of section 43(5) excluding the application of intentional and unlawful acts to lawful marriages is a major legislative hurdle. It excludes the marital space from the applicability of

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<sup>87</sup> *Bonu v Republic* [2010] eKLR.

<sup>88</sup> Information from key informant interviews held with COVAW staff conducted on 15<sup>th</sup> July 2014.

<sup>89</sup> Footnote 67 at 8.

<sup>90</sup> Footnote 5 at s 43(5).

the rape law and hence prevents a woman raped by her husband in marriage from relying on the offence rape and seeking recourse accordingly.

The challenge of legislating against marital rape remains a reality in many jurisdictions today. This can be traced back to the 17th century writings of Mathew Hale and the concept that rape law was to ensure the protection of the virginity of women. It is justified that once the wife gave herself to her husband in marriage, she is deemed to have consented to 'everything else that comes with it' hence the 'irrevocable consent' to sex.<sup>91</sup>

Legal feminist theorists have argued that marital rape remains unaddressed because in many societies marriage is considered to fall within the confines of the private sphere. Here the law is not required to govern, as opposed to the public sphere, which is the domain subject to legal regulation. However, this public/private dichotomy has been discredited by scholars who have argued that the society has no problem regulating other aspects of the 'private sphere' such as marriage and divorce laws, succession laws, among others. However, the problem arises when extending this regulation to matters that have to do with violation of specific women's rights tied to women's bodies affecting their right to security and bodily integrity.<sup>92</sup>

The reality that cannot be escaped is that spousal rape continues to occur even though the state and society refuse to label such incidences as human rights

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<sup>91</sup> Footnote 69 at 26.

<sup>92</sup> Celina Romany 'Women as Aliens: A Feminist Critique of the Public/private Distinction in Human Rights Law' in *Harvard Human Rights Law Journal* (1993) 87-125.

violations.<sup>93</sup> Currently, women who are victims of marital rape can only get redress by going through the offence of assault, under the Penal Code.<sup>94</sup> Assuming they retain actual physical harm which can evidence the assault.

### **4.3 Rape of mentally challenged women and girls**

The significance of alluding to this category of victims is to highlight how the law disproportionately discriminates against them. The SOA does not contain express or sufficient provisions to address instances when this category of persons encounter rape. It defines a 'mentally disabled' person as a person affected by any mental disability and includes;

'a person who is unable to appreciate the nature and reasonable foreseeable consequences of a sexual act or if able to appreciate it, unable to act in accordance with such appreciation, [or] unable to resist the commission of such an act, [or] unable to communicate his or her unwillingness to participate any such act.'<sup>95</sup>

Section 146 of the Penal Code provides for an offence referred to as the 'Defilement of idiots and imbeciles'. It states that;

'...Any person who, knowing a person to be an idiot or imbecile, has or attempts to have unlawful carnal connection with him or her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the person was an idiot or imbecile, is guilty of a felony and is liable to imprisonment with hard labour for fourteen years.'<sup>96</sup>

This provision was retained in the Penal Code as an offence against morality even though all other sexual offences were repealed when the SOA was enacted

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<sup>93</sup>Centre for Reproductive Rights, *Freedom from Violence against women is a human right, Government duties to protect individuals from violence, ill treatment, and torture*, (2008).

<sup>94</sup> Footnote 35 at ss 250,253.

<sup>95</sup> Footnote 5 at s 2.

<sup>96</sup> Footnote 35 at s 146.

in 2006. This provision remains legal and applicable. It is modelled in line with the former Penal Code provision on rape which used the terms 'unlawful carnal knowledge without consent' to define rape. The question for determination then is what is the proper legal provision to be used in case a mentally disabled woman or girl is raped? Is it section 3 of the SOA on rape or section 146 of the Penal Code?

To answer this one needs to evaluate the elements of rape, specifically that the act of penetration is 'intentional and unlawful' and committed 'without consent'. The definition of an 'intentional and unlawful act' under section 43 includes acts 'in respect of persons who are incapable of appreciating the nature of the act'. Therefore, this provision includes this category of women and girls. With respect to consent, the law considers mentally disabled persons incapacitated and incapable of giving consent. How then does one prove or disprove the existence of consent when the victim has no capacity to consent? It is quite unfeasible and impracticable to seek to establish this. Such cases could be likened to or classified in the same category as defilement cases involving children who by virtue of their incapacity are considered incapable of consenting. In such cases, the issue of consent is immaterial.

Of significance however, is section 44 of the SOA, which allows for evidentiary presumptions with respect to consent. It provides that one of the circumstances where such a presumption would arise is '...where because of the complainant's disability, the complainant would not have been able at the time of the commission of the act to communicate to the accused whether the

complainant consented.’<sup>97</sup> Therefore, the prosecution could use the offence ‘rape’ and rely on section 3 as read with sections 43 and 44. To establish this presumption however, the prosecution would be required to prove the mental disability and that the accused was aware of it. Since it is not a conclusive presumption, the accused would then be allowed to adduce evidence to rebut. He will only be convicted if he does not provide sufficient evidence to raise an issue in both of these instances.

The law poses a number of legal anomalies in this regard. First, it is unclear which provision(s) is to be relied on in the case that a mentally challenged woman is a victim of rape. The analysis above on consent and unlawful acts has caused a lot of confusion among judges, prosecutors and investigators alike. A good example of this confusion is in **Erro Obba Vs R**<sup>98</sup> where the court was hearing an appeal by an accused charged with the rape of a 17-year-old mentally challenged girl under the SOA. The issue of a defective charge sheet arose because the words “intentional and unlawful” as they appear in section 3 of the SOA were omitted in the charge sheet. In allowing the appeal, setting aside the sentence and setting the accused at liberty on this ground Justice Koome’s stated that;

‘...The charge does not disclose any offence as provided in law by leaving out the words intentionally and unlawful. However, I am compelled to give an opinion in regard to a sexual offence where a mentally challenged victim is involved. Such words “intentionally and unlawful’ are not necessary because the victim has no capacity to give consent. This recommendation could be considered when the SOA is reviewed for possible amendments. As the law stands today my hands are tied this appeal is allowed.’<sup>99</sup>

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<sup>97</sup> Footnote 5 at s 44.

<sup>98</sup> *Erro Oba V Republic* [2009] eKLR.

<sup>99</sup> *Ibid.*

This statement by the court is contradictory on a number of levels. First, and most basically, the charge 'rape' under section 3 of the SOA was wrongfully used and discussed by the court since the victim is a child of 17 years. The correct offence is defilement under section 8. The wording of section 8 does not include the words 'intentional and unlawful' as discussed earlier so the charge sheet should not have been defective.

Secondly, the court mixes its discussion on two separate requirements for rape; 'intentional and unlawful acts' and 'consent'. Its opinion is devoid of legal considerations under section 43 which notes that the requirement of an act being intentional and unlawful includes perpetrators acts in respect of mentally impaired persons. It is also devoid of the argument made above with respect to evidential presumptions for consent under section 44 with respect to complainants who by virtue of disability could not consent.

Another legal anomaly with regard to mentally challenged victims is that section 146 of the Penal Code provides that it entails 'unlawful carnal connection with a victim under circumstances not amounting to rape', which is ambiguous in itself. Does it acknowledge that unlawful 'carnal connection' is a circumstance not amounting to rape? Or is it that the offence of 'defilement of idiots and imbeciles' applies to mentally challenged victims because the inability to prove or disprove the consent element raises a circumstance which can not amount to rape? It is difficult to tell since the provision does not define what 'carnal connection' is and it generally falls short of the comprehensive definition of rape as improved by the SOA.

The offence also does not benefit from the minimum sentencing regime and severity of punishment introduced by the SOA. In addition, the terms “idiot” and “imbecile “ are derogatory and their existence in law has reinforced the secondary victimization of rape victims in the criminal justice system. These anomalies should be addressed and the SOA needs to be amended to expressly provide for rape of mentally challenged women and girls.

## 5.0 THE LAW OF EVIDENCE AND PROCEDURE IN RAPE CASES

### 5.1 Corroboration

Prior to the enactment of the SOA corroborating evidence was a requirement in rape cases. The courts therefore insisted that other material evidence implicating the accused should be adduced to corroborate a complainant’s evidence.<sup>100</sup> The only watershed provision was with respect to child victims of sexual offences where section 124 of the Evidence Act included a proviso that;

‘Provided that where in a criminal case involving a sexual offence the only evidence is that of the child victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth.’<sup>101</sup>

Other than this, the criminal justice system operated oblivious of the fact that rape is an offence that happens often in private and that it is usually unlikely to have corroborating evidence. The theory behind the corroboration requirement stems from the gendered stereotype that women are highly likely to lie about the occurrence of rape, or that rape is an easy accusation to make and difficult to

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<sup>100</sup> *Maina v. R* [1970] EA 370.

<sup>101</sup> Footnote 34 at s 124.

defend.<sup>102</sup> However, the SOA brought amendments to the law by requiring that section 124 of the Evidence Act is amended to replace the word 'child' with 'alleged victim'.<sup>103</sup> The effect is that the law establishing that corroboration is not a requirement in sexual violence cases is now applicable to all victims of rape.

Despite this landmark legislative progress, it is clear that there were still efforts to maintain the above stereotype that women are prone to falsifying rape charges. This same mind-set saw the inclusion of section 38 in the SOA. It criminalized the making of false allegations against another person with respect to sexual offences. The false accuser would then be liable to a punishment equal to that of the offence complained of.<sup>104</sup> The ambiguity of the section led to the conclusion that the failure of a prosecution case meant that the complainant had made false allegations. This discouraged reporting because if a complainant was accused of false allegations, she would face the extremely stringent and punitive punishment prescribed for rape.<sup>105</sup>

Six years after the enactment of the SOA, this provision was deleted. It is questionable why this section was at all necessary when the Penal Code already contains the offence of perjury and other falsifying offences related to the administration of justice.<sup>106</sup>

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<sup>102</sup> Katharine K. Baker 'Once a Rapist? Motivational Evidence and Relevancy in Rape Law in *Harvard Law Review*, Vol. 110, No. 3, (Jan., 1997), pp. 563-624.

<sup>103</sup> Sexual Offences Act, Second Schedule Consequential Amendments and Repeals s 2.

<sup>104</sup> S 38 of SOA now deleted by The Statute Law (Miscellaneous Amendments) Act, 2012.

<sup>105</sup> Anne Kithaka 'Enforcement of the Sexual Offences Act in Kenya' in *Pambazuka, Pan African Voices for Freedom and Justice* 2008, Issue 392.

<sup>106</sup> Footnote 35 at s108, part XI.

## 5.2 Vulnerable witnesses and intermediaries

One of the milestones achieved by the SOA is the legal recognition that certain witnesses are vulnerable and therefore in need of different kinds of protection and sensitive treatment in the criminal justice system. The SOA allows the court in criminal proceedings to declare a witness, other than the accused, as a vulnerable witness if the witness is the alleged victim, a child or a mentally disabled person. Other parameters that may be used to determine vulnerability of a witness include trauma, cultural differences, race, religion, possible intimidation and the relationship of the witness to any party in the proceedings.<sup>107</sup>

Once a witness is declared vulnerable the court can apply various protection measures including allowing the witness to give evidence through an intermediary. The intermediary once appointed is then allowed to answer any questions put to the victim by 'conveying the general purport'.<sup>108</sup> The intermediary may also speak to inform the court at any time that the victim is fatigued or stressed and request the court for a recess.<sup>109</sup> However, the court cannot convict an accused person solely on the uncorroborated evidence of an intermediary.<sup>110</sup> In effect therefore, for the principle on the non-requirement of corroboration to apply, the complainant herself must testify at some point even in cases where an intermediary is appointed.

Other forms of protection include; allowing the witness to give evidence under a protective box, directing that proceedings do not take place in open

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<sup>107</sup> Footnote 5 at s31.

<sup>108</sup> *Ibid*

<sup>109</sup> Footnote 5 at s31.

<sup>110</sup>Footnote 5 at s31 (10).

court, prohibiting the publication of the complainant's identity or information that may lead to the identity of the complainant or her family.<sup>111</sup>

### **5.3 Evidence of character and previous sexual history**

Before the enactment of the SOA, the law categorized rape as an issue of morality. As a crime against morality, it licensed the adducing of character evidence on the moral standing of women in a court of Law. The SOA introduces what is commonly referred to as a rape shield by providing that no evidence as to any previous sexual experience in relation to a rape victim is to be adduced in court. It further provides that 'no evidence in connection to which a sexual offence is alleged other than that relating to the sexual experience or conduct in respect to the crime in question shall be adduced.'<sup>112</sup>

The SOA however recognizes exceptions to this law by allowing such evidence;

'..if it relates to a specific instance of sexual activity relevant to a fact in issue, if it is likely to rebut evidence previously adduced by the prosecution... to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant or where it is relevant to a fact in issue or if it is fundamental to the accused person's defence.'<sup>113</sup>

### **5.4 Plea agreements and withdrawals**

With respect to rape law, there are other crucial legal provisions that are worth noting. The Criminal Procedure Code provides for the manner in which a prosecutor and an accused person may negotiate and enter into an agreement for the reduction of a charge to a lesser offence, the withdrawal of the charge, a stay

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<sup>111</sup> Footnote 5 at s31.

<sup>112</sup> Footnote 5 at s34 (1).

<sup>113</sup> Footnote 5 at s34. (3).

of other charges, or the promise not to proceed with other possible charges.<sup>114</sup> However, section 137 N of the same excludes the application of this law on plea agreements to cases of sexual violence under the sexual offences act as well as offences of genocide war crimes and crimes humanity.<sup>115</sup> The implication here is that the law disallows this kind of negotiation when rape is concerned due to the gravity of the offence.

In addition section 40 of the SOA provides that once police investigation or prosecution of a sexual offence has commenced, it cannot be discontinued unless the Director of Public Prosecutions (DPP) approves.<sup>116</sup> By ascribing this decision to the DPP this law forbids police officers from choosing to close rape files simply because they can't seem to find 'enough' evidence to lay a charge, or because the accused has become elusive, or for any other reasons.

### **5.5 Convictions for offences other than rape or defilement**

The Criminal Procedure Code contains two specialized provisions, which address a situation where the court finds that an accused person who was charged with rape or defilement, is not guilty of those, but is guilty of another offence under the SOA. In such a case if he was charged with rape, section 184 requires the court to convict an accused of the other sexual offence even though he was not charged with it. Section 186 applies the same principle where the accused is charged with defilement of a girl under 14 years of age.

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<sup>114</sup> Footnote 33 at s137A.

<sup>115</sup> Footnote 33 at s137N.

<sup>116</sup> Footnote 5 at s 40.

It is important to note however, that section 186 of the Criminal Procedure Code does not apply this advantage to all potential victims of defilement fairly. It leaves out defilement victims aged between 15 and 18 years, and defiled boys. This is contradictory to the SOA, which classifies defilement as sexual penetration of a child, i.e. persons below 18 years including both boys and girls.

## 6.0 CONCLUSION

Women's rights activists, theorists and other advocates of social justice have often questioned the law and the criminal justice system as a site for social transformation.<sup>117</sup> The legal system cannot in and of itself lead to the realisation of women's human rights. In fact, it could easily be used as a tool of oppression against women. However, it is only through having a legally enforceable claim that obligations and responsibilities to respect and fulfil these claims are possible.

In this chapter, I have discussed the development of rape law in Kenya referring to both national and international processes that affected the contents and language of the SOA. I interrogated the elements of rape including consent, sexual penetration and the concept of intentional and unlawful acts. I discussed legal provisions and challenges associated with rape of children, married women and the mentally challenged. I highlight relevant key issues related to evidence and procedure in rape cases. The legal framework raises both opportunities and challenges for a raped woman or girl seeking recourse. However the reform of laws may not always mean that there will be a corresponding change in practice. The following chapters will analyse the case studies raising specific issues that highlight this disparity between rape law and practice in Kenya.

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<sup>117</sup> Veena Pooncha 'On the Edge of Silence: Gender within Human Rights Discourse' in *Economic and Political Weekly* Vol 28, No.41 (1993) 2192-2194.

## CHAPTER 3

### ANALYSIS OF RAPE PRACTICE IN KENYA

#### 1.0. INTRODUCTION

'Most rapes are never reported. Most reported rapes are never prosecuted. Most prosecuted rape cases do not result in convictions. Sentences for rapes are often short. The vast majority of rapists are never held to account for their acts in any way.'<sup>118</sup>

This statement by Catherine Mackinnon describes the futility often associated with the processing of rape cases.<sup>119</sup> It is indicative of the situation in many jurisdictions across the globe, and unfortunately remains a reality despite the recent wave of rape law reform processes across different parts of the world. Kenya is no exception, despite progressive laws as discussed in the second chapter. In practice, raped women and girls are faced with immense challenges which make it impossible for them to manoeuvre through the criminal justice system.

The next two chapters highlight these challenges by looking at the experiences of 16 raped women and girls from different parts of Kenya. My analysis is guided thematically by a customized application of the six-point checklist on justice for violence against women developed by Amnesty International.<sup>120</sup> In this chapter I focus on challenges in reporting rape, accessing medical care and collection of forensic evidence. I uncover institutional and

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<sup>118</sup> Catherine MacKinnon, *Sex Equality : Rape Law*, University Casebook Series Foundation Press, 2001, 772

<sup>119</sup> David P. Bryden and Sonja Lengnick 'Rape in the Criminal Justice System' *The Journal of Criminal Law and Criminology* (1973-), Vol. 87, No. 4, (Summer, 1997), Marguerite Russell, A feminist Analysis of the Criminal Trial Process, 1989.

<sup>120</sup> Amnesty International, *Six-Point Checklist on Justice for Violence against Women*, Index Number: ACT 77/002/2010, published on 8 March 2010.

systemic challenges that raped women and girls experience in seeking recourse in light of the available policy frameworks. I explore the role of the police in the reporting process and health service providers in handling rape victims. I show how stigma, shame and negative stereotypical perceptions directed at raped women and girls primarily affects the quest for sufficient recourse. I also highlight the impact of retrogressive attitudes and culture within the system of patriarchy as demonstrated by the way state officials handle and make decisions on rape cases.

## **2.0. CHALLENGES IN REPORTING RAPE**

In this section I briefly look at the initial points of reporting for purposes of analysing the ramifications it has on the rape case's progression in the criminal justice system. I explore whether it is safe for a raped woman or girl to report rape. By safety I mean both physical and psychological or emotional sense of security to disclose the occurrence of rape once experienced. Such disclosure can be within the victim's private space, i.e. to a member of the family or a friend. It can also be to a public officer or entity such as the police, administrative officers, religious leaders, community elders, community paralegals and non-governmental organizations, among others.

Most rape victims in Kenya prefer not to report the crime and at best seek medical intervention, where available.<sup>121</sup> Though a victim may not report directly to the police, her disclosure to another public officer, entity or person may eventually result in a report to the police through referral. However this is

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<sup>121</sup> Footnote 18 at 5.

dependent first on the victim's knowledge and willingness to follow through, and second, on the attitudes and responsiveness of the referral officer or entity.

The ignorance of victims and communities on what to do and where to go after rape is a significant encumbrance to reporting rape.<sup>122</sup> Such ignorance is often capitalised on by unresponsive state officers, further impeding the victim's quest for recourse. For instance when 16 year old Milka was gang raped, the case was initially reported to administrative police officers who have no legal mandate to investigate crime.<sup>123</sup> Instead of referring the matter to the Kenya police, who have the legal mandate to investigate crime, two administrative police officers handled the matter. They facilitated a negotiation between the parties and asked the perpetrators to apologise and slash grass as punishment.<sup>124</sup>

In another case, when Mary was defiled, the matter was reported to a children's officer who decided to investigate the case personally. The children's officer was not convinced that there was enough evidence; she therefore urged the victim's family not to report to the police nor pursue the case any further. It is not clear what parameters she employed in her investigation.

These two cases illustrate that some rape cases simply never get reported due to ignorance and gaps in the referral networks. The other challenges highlighted below also come into play within these existing referral networks which are often very practically involved in a rape victim's reporting process.

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<sup>122</sup> Ruth Aura, *Situational Analysis and the Legal Framework on Sexual and Gender-Based Violence in Kenya: Challenges and Opportunities*, Kenya Law Reports Publications, 25.

<sup>123</sup> National Police Service Act Cap 84 of 2011 ss 24 and 27.

<sup>124</sup> Footnote 1.

## 2.1. Shame, stigma and self-blame

Often the victim's decision on whether or not to report is affected by shame and fear of being stigmatized or blamed for the occurrence. Rape is embarrassing, it is shameful. In certain instances the victim questions whether in fact the incidence was rape, whether it was her fault and whether she deserved it. Smythe argues on this point that;

'There is a pernicious nexus between self-blame, concern that no-one will believe you, and the question that many survivors face of whether what happened to them – this violation of their physical and psychological integrity – was "rape", both as distinguished from bad sex and as something defined in that way by the criminal justice system'<sup>125</sup>

The decision to report rape exposes a victim to questions of believability. She has to prove to everyone she encounters that her sexuality and integrity was violated, even though often, no one else witnessed it. Of all 16 victims of rape analysed here, 13 had initially refused to report the rape to the police, for reasons related to shame and stigma. Three never reported to the police at all for the same reason.<sup>126</sup> One victim, Angela, indicated that she will not report because she will just have shamed herself before everyone and yet she may not get any redress.<sup>127</sup>

She was gang raped by two men at a workplace where she had gone for an interview. It was late afternoon and the office was deserted. When she walked into one of the offices to make inquiries, one man in the office asked her to sit down; the other one locked the door behind her and they raped her. They then told her to clean herself, leave the building and never return there again.

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<sup>125</sup> Dee Smythe *Resolving Rape* (2014) 269.

<sup>126</sup> Footnote 1.

<sup>127</sup> Footnote 1.

Beyond disclosing the incident to COVAW, where she received psychosocial support, Angela never reported the case. Although she desired that the perpetrators should be punished, she feared that if her family knew they would blame her for it and not believe her.

## **2.2. Family or community pressure**

The existence of a relationship between the victim and perpetrator often inhibits reporting, due to community or family pressure. Victims of marital rape, defilement, or where the rape perpetrator is a relative or a family friend, are likely to struggle in this regard. As a result, where the rape is coupled with other physical injuries, most victims would rather report the assault and leave out the sexual violation.

For example, Nala a 38 year old woman who had been continuously raped by her husband indicated that she could not report the rape because she feared what her family's reaction would be. She eventually reported after 10 years when she almost died as a result of yet another rape accompanied by grievous bodily harm. As a result of this violation she was hospitalised for over three months. She only reported the assault, which the perpetrator was charged with and is currently being prosecuted for.<sup>128</sup>

In defilement cases involving a girl of tender years, it is the care givers who are likely to discover the offence or be the initial point of disclosure. They play the critical role of deciding whether or not the offence will be reported. Consequently, there is a different layer of family pressure that comes to play. It is not only the defiled victims that are subjected to these pressures, but their families as well. Characteristic of defilement cases also is that often the victim has

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<sup>128</sup> Footnote 1.

suffered more than one incidence, probably numerous incidences of rape before the case is discovered or reported.<sup>129</sup> When two year old Roda was defiled by her mother's boyfriend, the mother sided with her boyfriend and refused to report the case to the police. Nevertheless, Roda's grandmother insisted that the case should be reported and went to the police. Roda's mother fled the village when the suspect was apprehended. The case was investigated, prosecuted to completion and it resulted in a conviction. This was possible because the victim's grandmother decided to see the case through despite pressure to withdraw the matter from family and community members.

### **2.3. Fear of harm**

Fear of harm, physical or otherwise, instilled by intimidation and threats poses another challenge in reporting rape. Often perpetrators will reinforce this fear with manipulation tactics to prevent reporting. In three of the cases analysed the victims reported that the perpetrator had threatened to kill either the victim or their family member.<sup>130</sup> In two cases the perpetrators bribed local police officers who participated in issuing threats to deter the victims from following up on the case.<sup>131</sup>

### **2.4. Lack of faith in the police**

Reporting is discouraged by a victim concerns that the criminal justice system, especially the police, do not effectively respond and ensure redress. In three of the cases where no report to the police was made, the victims highlighted that they do not have faith in the police and therefore did not report. Propagating the lack of faith is the system's way of categorising certain types of rape cases as

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<sup>129</sup>The National Sexual Offences Implementation Workshop Comprehensive Report, 25-27 May 2011, 48.

<sup>130</sup> Footnote 1.

<sup>131</sup> Ibid.

'real' or not. Susan Estrich describes an example of 'real rape' as characterized by;

'a stranger who puts a gun to the head of his victim, threatens to kill her or beats her, and then engages in intercourse, as opposed to where less force is used or no other physical injury is inflicted, where threats are inarticulate, where the two know each other, where the setting is not an alley but a bedroom, where the initial contact was not a kidnapping but a date, where the woman says no but does not fight.'<sup>132</sup>

Estrich argues that in the 'real' rape cases, the actors in the criminal justice system generally acknowledge that a serious crime has been committed. The police depict the 'real' rape cases as capable of being adequately responded to, hence easily acceptable at reporting. Most rape victims fear that they do not satisfy these criteria and indeed they often do not.

However, professionalism among law enforcement agents demands that they should never be dismissive of any rape report including any report of threats to the victim. To ensure that it is safe for rape victims to report, the police should move away from propagating stereotypes which legitimise the 'ideal victim syndrome'. In addition, the police should take steps to ascertain whether the complainant is at risk of any threat from the perpetrator or otherwise and offer protection accordingly.

The functioning of the criminal justice system affects how society gauges its bias, effectiveness and overall accessibility. The police have been criticized for humiliating and intimidating victims of rape at reporting.<sup>133</sup> The initiative to establish gender desks at every police station in Kenya was a step geared at

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<sup>132</sup> Susan Estrich 'Rape' *The Yale Law Journal*, Vol. 95, No. 6, (May, 1986), 1087-1184, 1092.

<sup>133</sup> David A. Ford 'Wife Battery and Criminal Justice: A Study of Victim Decision-Making' *Family Relations*, Vol. 32, No. 4. (Oct., 1983) 463-475.

addressing this stigma.<sup>134</sup> The desks were meant to ensure that a rape victim does not have to report her case at the front desk and in public. Every station was meant to have a specialised trained officer to handle all cases of gender based violence.<sup>135</sup> However, in reality these desks are not present in most police stations across the country.<sup>136</sup> Where available, the desks are often not manned, they are ill equipped and do not provide an environment that fosters privacy of the victim. This is largely attributed to the fact that the Kenya police continues to face numerous challenges including the lack of adequate resources, personnel, facilities and capacity.<sup>137</sup>

In this section I have highlighted factors which impede the reporting of rape. I have argued that these factors operate within the context of an imperfect referral network which has significant implications on a victim's entry and progression in the system. The invaluable role of the police as a critical entry point into the criminal justice system cannot be overemphasised. This is especially because the reporting stage has been described as the highest point of attrition in rape cases.<sup>138</sup>

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<sup>134</sup> Thongori J, Ellis A et al, *Gender and Economic Growth in Kenya: Unleashing the Power of Women* (2007) 69. Institute Of Economic Affairs, *Status of Gender Desks At Police Stations In Kenya A Case Study Of Nairobi Province – Kenya IEA Research Series*, 2009, 4.

<sup>135</sup> Agency for Cooperation and Research in Development, Kenya: *An Audit of Legal Practice on Sexual Violence , Making the Law Count*, (2009) 2.

<sup>136</sup> Institute Of Economic Affairs, *Status of Gender Desks At Police Stations In Kenya A Case Study Of Nairobi Province – Kenya IEA Research Series*, 2009, 4.

<sup>137</sup> Ibid at 22-27.

<sup>138</sup> Footnote 125 at 260.

### 3.0. COLLECTION OF FORENSIC EVIDENCE AND MEDICAL CARE

The health facility is a crucial point of service provision for a rape victim, essentially for two reasons. First, the victim receives medical treatment and care, which may involve addressing any injuries; emergency treatment to prevent contracting sexually transmitted infections (STI's) or pregnancy and also provision of counselling. Second, a physical and forensic medical examination is conducted to gather evidence which is subsequently recorded in a medical report.<sup>139</sup> The rape victim's body is a crime scene. Various types of forensic evidence can be collected and used to identify the perpetrator. Such evidence includes semen, hair, fibres, blood or other trace evidence, and marks including bullet wounds, bite marks or contusions.<sup>140</sup>

Depending on the kind of evidence collected, DNA can be extracted and processed to ascertain the identity of a perpetrator.<sup>141</sup> Tool mark evidence on the victim's body can be used to identify objects or weapons used to cause injury which may in turn be individualized to a weapon in the suspect's possession.<sup>142</sup> In addition, any evidence of intoxication of the victim may give investigative leads towards drug-facilitated rape hence further assisting in the investigation process.<sup>143</sup> Therefore, while other types of physical, demonstrative or testimonial evidence may be useful in establishing rape, forensics often takes the case a step further by linking a suspected perpetrator to the crime hence increasing the

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<sup>139</sup> Footnote 28 at 2.

<sup>140</sup> Ajema, C., Rogena, E., Muchela, H., Buluma, B. and Kilonzo, N. 2009. *Standards required in maintaining the chain of evidence in the context of post rape care services: Findings of a study conducted in Kenya*. Liverpool VCT, Care & Treatment, the Division of Reproductive Health, and the Population Council, 11.

<sup>141</sup> Richard Saferstein, *Criminalistics: An Introduction to Forensic Science* (10th Edition) January 13, 2010.

<sup>142</sup> Ibid at 12

<sup>143</sup> Footnote 141.

chances of a conviction.<sup>144</sup> In this section I discuss the various challenges related to collection of forensic evidence and medical care.

### 3.1. Lack of standardised service delivery

Prior to 2009, there was no framework for standardising service delivery and referral within health institutions in Kenya and between the health facilities and the police stations.<sup>145</sup> A 2003 situational analysis revealed the lack of comprehensive clinical care and forensic examination, including poor chain of custody of evidence in Kenya.<sup>146</sup> It highlighted that rape victims receive poor services in hospitals, that there was no counselling in public hospitals, except for Voluntary Counselling and Testing for HIV (VCT). The study highlighted the lack of protocols on confidential spaces for treatments and clarity on who should collect samples from a victim's body. It evidenced that public health facilities charged rape victims varying amounts for drugs and services.<sup>147</sup>

A later analysis revealed that by June 2007, there were 13 health facilities providing post-rape care services in Kenya.<sup>148</sup> Between them they had delivered services to over 2000 adults and children, with 96% of those receiving emergency treatment at presentation. In this regard the government health facilities work in collaboration with Kenyan non-governmental organizations, especially Liverpool VCT, Care & Treatment.<sup>149</sup> Most of the services available are in Nairobi and a few other select towns, which means that the larger rural parts of the country remain without access to these basic services.

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<sup>144</sup> Ibid.

<sup>145</sup>Footnote 28.

<sup>146</sup> Nduku Kilonzo, *Post Rape Services In Kenya: A Situation Analysis* (2003) 48.

<sup>147</sup> Ibid at 52.

<sup>148</sup> Kilonzo, N., Theobald, S., Ajema, et al (2009) 'Delivering post rape care services: Kenya's experience in developing integrated services' *Bulletin of the World Health Organisation*, 87:555-559, 557.

<sup>149</sup> Ibid at 58.

The 2009 National Guidelines on the Management of Sexual Violence in Kenya was introduced to achieve standardisation in providing services to address all the needs of sexual violence victims.<sup>150</sup> It stipulates that only designated practitioners including registered doctors, nurses and clinical officers may retrieve samples from the victim's body. The guidelines further outline detailed procedures relating to medical management of sexual violence including providing information about the first steps that are to be taken after meeting a victim's of sexual violence. It prescribes ethical issues, how to get the case history, and management of the health related problems of sexual violence. It further provides information on the main psychological consequences of sexual violence and counselling procedures, forensic management, humanitarian issues related to sexual violence and components of quality assurance and improvement.

Despite the existence of this policy framework, later studies have demonstrated that many health facilities continue to operate oblivious of the standards prescribed in the guidelines.<sup>151</sup> As a result a victim's entry and progression in the criminal justice system is fundamentally complicated. This includes concerns such as lack of standardised medical reports or government-approved documentation admissible as evidence. These primarily include the P3 form and the Post Rape Care (PRC) form.<sup>152</sup> In addition there is no

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<sup>150</sup> Footnote 28.

<sup>151</sup> Footnote 140 at 11.

<sup>152</sup> Footnote 28. The P-3 form is 'a Police form that is issued at the police station. It is filled by a health practitioner or the police doctor as evidence that an assault has occurred. It is for all assaults and therefore not specific to sexual violence. 'The Post Rape Care form is a recent development that was first operationalised in practice. It is a medical form filled when attending to a rape survivor. It was gazetted under Legal Notice 133 of 2012 under the Sexual Offences Act (Medical Treatment Regulations).

standardisation with respect to access to emergency treatment and forensic management, as well as maintaining the chain of custody of evidence.<sup>153</sup>

### **3.2. Demeaning attitudes and conduct of health care workers**

Raped women and girls face various challenges when health care workers do not understand their role and fail to handle rape victims with the sensitivity and respect they deserve. Intrusive medical examinations coupled with stereotypical attitudes may result in re- traumatisation and overall secondary victimization.

When Elizabeth, a well-educated, married mother of two, was raped by her neighbour she visited a health facility promptly and disclosed the occurrence. The health care worker's immediate response was to ask her to disrobe and spread her legs. Though uncomfortable, Elizabeth slowly complied. During the examination the health care worker asked her whether in fact she was dating her neighbour and if she is sure that it was rape.

### **3.3. Access to medical care and medico-legal documentation**

Many raped women and girls do not have both financial and physical access to medical care and services. The Medical Treatment Regulations require that a rape victim should access medical treatment, including counselling, in any medical health facility, whether or not they have reported to the police, and that the expenses incurred shall be borne by the government.<sup>154</sup> It also requires the

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<sup>153</sup> C. Ajema, W. Mukoma et al, 'Challenges experienced by service providers in the delivery of medico-legal services to survivors of sexual violence in Kenya' *Journal of Forensic and Legal Medicine* 18 (2011) 162-166, 164.

<sup>154</sup> Sexual Offences (Medical Treatment) Regulations, 2012 [L.N. 133/2012.], section 3

Minister to enter into agreements with private hospitals or any other health facility which may be designated as “public hospitals” for this purpose.<sup>155</sup>

Most health facilities still charge varying amounts of fees for filling the medical-legal documentation, which poses a serious challenge to rape victims. Being critical evidence, failing to access such documents means that no investigations can be commenced.<sup>156</sup> In 2 year old Roda’s defilement case, which was processed before the national guidelines came into force, the victim’s grandmother had to pay Ksh. 1500/= (approximately 19 USD) at a public health facility in Nairobi to get the P3 form filled. In 2012, three years after the guidelines were operational, Anne also a victim of rape was required to pay ksh.1000/= (approximately 12 USD) for the filling of P3 and PRC forms at the same health facility.

Physical access to medical and forensic services in a timely manner remains a challenge due to lack of sufficient health facilities and resources.<sup>157</sup> In addition, most health facilities lack medical practitioners with sufficient capacity and training to manage rape cases.<sup>158</sup> Comprehensive counselling is particularly problematic to access.<sup>159</sup> Though health care workers are expected to collect forensic evidence, a majority of them have absolutely no training in this area. It is documented that by May 2011 only 50 Sexual Assault Forensic Examiners (SAFEs) had been trained in the country, most of whom are nurses.<sup>160</sup>

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<sup>155</sup>Ibid.

<sup>156</sup> Footnote 146 at 51.

<sup>157</sup> Footnote 129 at 19.

<sup>158</sup> Footnote 88.

<sup>159</sup> Footnote 148 at 559.

<sup>160</sup> Footnote 129 at 19.

When Milka was gang raped, it was not until she got to the third health facility that she was eventually correctly diagnosed with recto-vaginal fistula and underwent reconstructive surgery. Unfortunately, the health care worker at the first point of medical examination did not know how to collect forensic evidence nor properly fill the medico-legal form. No forensic evidence was collected and a customized medical report form simply read “the victim came with her mother and they reported rape, it appears to be so.” Neither the P 3 nor the PRC forms were filled. As a result this case had very weak evidence to link the suspects to the crime. Consequently the prosecutor handling this case decided not to prosecute for lack of sufficient evidence.

#### **3.4. The fallacy of the police doctor’s role in filling the P3 form**

One of the greatest challenges that rape victims encounter is the propagated fallacy that only the ‘police doctor’ can fill the P3 form. In Nairobi especially, this is Dr. Zephaniah Kamau, the only police doctor, whose office always has long queues of victims of crime waiting for him to fill their medical reports.<sup>161</sup> This fallacy is propagated by the police who otherwise refuse to accept any medical report that is not filled by the police doctor.

When Sheila was raped, she visited the Nairobi Women’s Gender Violence Recovery Centre where all her medico-legal documentation was properly filled. When she submitted the form to the police, they refused to accept it, stating that they will not open an investigation file until the P3 form is signed by Dr. Kamau. With such huge numbers of victims waiting on him, it is unlikely that any medical examination by the police doctor would be thorough or that he

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<sup>161</sup> Lydia Matata ‘Rape and the Elusive P3 form’ *The Star* 18 December 2013 at 1. Munene Kilongi ‘The Long but Eventful Wait for a P3 form’ *Voices of Africa*, 9 April 2013.

would show up in court to testify in all these rape cases. Rape victims, the community and service providers all reinforce the belief that victims must see the police doctor.

Both policy guidelines and law clearly provide that any registered doctor, nurse or clinical officer can fill the medical forms and that these services should be free for rape victims. However, the fallacy persists in practice.<sup>162</sup> Even before these recent policy and legal provisions were in place, the Evidence Act of 1963 could be used to dispel this myth. Section 77, which deals with reports by medical practitioners or other analysts to be used in criminal proceedings, does not suggest and cannot realistically, be interpreted to mean that only the police doctor can fill such documentary evidence.<sup>163</sup> There is a need for awareness creation, especially among the police on the position of law and policy in this regard.

### **3.5. Forensic evidence: the problem with the government chemist laboratory**

There is only one government chemist in Kenya located in Nairobi which is the main provider of forensic science services. It has branch laboratories in only two other towns, Kisumu and Mombasa. DNA analysis is only conducted in the Nairobi laboratory. Therefore samples from rape victims across the country need

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<sup>162</sup> Footnote 154 at s 2. Footnote 28 at ix.

<sup>163</sup> Evidence Act s 77 provides:

(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.

to be sent to Nairobi for processing, which has been argued to cause immense backlog.<sup>164</sup> While backlogging is certainly plausible in any instance where facilities and capacity is limited, the greater challenge is that the government chemist is not adequately utilized in rape cases. Very few rape case samples actually get to the chemist, and very few results of samples are utilized in prosecution. The government chemist reported that in 2010, requests for forensic analysis were submitted in only 232 sexual violence cases. He proudly asserted that his office 'has moved through most of them, with only 86 pending by 25<sup>th</sup> May 2011.'<sup>165</sup> While this shows effort by the state to address the challenge, these numbers are merely a small fraction in comparison to the tragically high statistics of rape cases.

When Terry was raped by her neighbour, in a village approximately 500 kilometres from Nairobi, she reported to the police within the next few hours. She then went to a district hospital where, upon examination, traces of semen were identified and collected. Meanwhile the suspect had been apprehended and samples were collected from him. Though Terry was informed at the facility that the samples would be sent to the government chemist laboratory for processing; a year and a half later, nothing had come of it. The accused was out on bond and the prosecution was ongoing, characterized by a series of adjournments by the prosecution who were still anticipating the forensic results. Terry despaired, stopped following up on the case and eventually withdrew it. There is no way of ascertaining that these samples ever got to the government chemist because there is no paper trail or documented chain of custody of evidence.

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<sup>164</sup> Footnote 140.

<sup>165</sup> Footnote 129 at 19-20.

A 2009 study indicated that there are no set operational standards on transmission of samples to the government chemist and their utilization.<sup>166</sup> Standards and protocols are necessary to guide service providers involved in the collection, handling, transportation and preservation of samples. The Kenyan Ministry of Health in partnership with LVCT developed an algorithm which indicates that while all samples should be collected by the health service providers, the transmission to the government chemist should be done through the police.<sup>167</sup> The study also underscored the development and usage of locally assembled rape kits within health facilities as opposed to pre-packed ones as a possible strategy in poor resource settings.

The study is a significant step towards finding sustainable solutions to address the challenge of access to and use of forensic services. The state should further prioritise and explore research initiatives in order to uncover other strategies of addressing this challenge.

#### **4.0. CONCLUSION**

This chapter analyses the disparity between rape law and practice in Kenya. Here I have highlighted challenges in reporting rape including shame, stigma and self blame. In addition, pressure from family and community members, fear of harm as well as the lack of faith in the system, especially the police, also discourage reporting. With reference to the various policy frameworks I further discuss challenges related to medical care and forensic services.

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<sup>166</sup> Footnote 140.

<sup>167</sup> Footnote 140 at 20.

Studies have shown that most rape victims opt to visit health facilities for medical care and not report to the police. I argue here that there is a crucial link between the role of the police in the process of reporting and health care workers in collection of forensic evidence and medical care. When a rape victim does not procure medical care and evaluation in a timely manner, it undermines the evidence necessary to strengthen her rape complaint. The following chapter continues the analysis of case studies to show challenges in investigation, prosecution and the trial process.

## CHAPTER 4

### ANALYSIS OF RAPE PRACTICE: INVESTIGATION THROUGH TO TRIAL

#### 1.0. INTRODUCTION

This chapter is a continuation of my analysis of rape practice in Kenya.<sup>168</sup> Here I discuss challenges faced by raped women and girls in investigation and prosecution, including challenges in the entire trial process. Investigation is a process that commences after reporting and continues through to trial. I discuss whether rape trials are fair and efficient.

I explore the role of investigating officers, prosecutors and judicial officers in facilitating redress for raped women and girls. This is tied to a discussion on the availability and accessibility of oversight mechanisms to ensure accountability for service providers responsible for proper investigation and prosecution.

#### 2.0. CHALLENGES IN INVESTIGATION

Rape investigations need to be done efficiently since successful prosecutions invariably depend on thorough investigations. Kenya has increasingly recognized the invaluable role of both investigating officers and prosecutors in crime response. This is reflected in recent reforms both in the Kenya National Police Service and the office of the Director of Public Prosecution's (DPP). These reforms include the initiative to have gender desks at all police stations and the

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<sup>168</sup> As a reminder, it is guided by an application of the six-point checklist on justice for violence against women developed by Amnesty International see Footnote 120.

police vetting process in compliance with requirements under the National Police Service Act, 2011.<sup>169</sup>

Major prosecutorial reforms include the ongoing process of replacing police prosecutors with state counsels who are trained and qualified lawyers.<sup>170</sup> Further, the office of the DPP has created a Sexual Offences, Gender Violence and Victim's Rights section and appointed sixteen (16) Special Prosecutors to prosecute selected complicated sexual violence cases.<sup>171</sup>

In its report to the United Nations Human Rights Council Kenya indicated that it has embarked on training investigators and prosecutors on sexual violence cases throughout the country.<sup>172</sup> This includes specialised training on forensic investigations, crime scene management, handling and presentation of evidence, all aimed at enhancing capacity of law enforcement officers.

However major structural challenges continue to persist and they affect how a raped woman or girl enters and fairs in the criminal justice system. A 2009 study on the status of gender desks at police stations established that a majority of police stations in Nairobi are dilapidated due to inadequate allocation of resources.<sup>173</sup> It evidenced that a shortage of officers trained in handling sexual violence, poor infrastructure and lack of facilities result in weak investigations.<sup>174</sup>

It revealed that over 70 percent of gender violence victims had their complaints improperly recorded in the police occurrence book and were

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<sup>169</sup> Footnote 123 at s 7(2).

<sup>170</sup> Juliet Onyango 'Kenya to Eliminate Police Prosecutors as part of Judicial Reforms' *East Africa News* 2 January 2014, accessed at <http://www.zegabi.com/articles/6593>.

<sup>171</sup> Appointed vide GAZETTE NOTICE NO. 14724 on: dated the 10th October 2012.

<sup>172</sup> Republic of Kenya, *Universal Periodic Review of the United Nations Human Rights Council: National mid Term Report*, September, 2012 31.

<sup>173</sup> Footnote 136 at 7.

<sup>174</sup> Footnote 136 at 8.

unsatisfied.<sup>175</sup> Sixty percent of gender victims waited for more than one hour to be served by a police officer.<sup>176</sup> The rape victims described investigating officers as 'reluctant, asking irrelevant questions, rude, belittling gender violence issues, insensitive to their needs, uncooperative and dishonest.'<sup>177</sup> The study showed that trained police officers working at gender desks were likely to be perceived as supportive to the victim and less corrupt compared to untrained officers.<sup>178</sup>

### **2.1. Demeaning attitudes by police officers**

Retrospective attitudes and stereotypes surrounding rape, which form the basis for questioning the credibility and believability of a rape victim, affect the entire society. Police officers as individual members of society are no exception. However, such perceptions among police officers are particularly problematic because they have grave implications for the quality of investigations conducted by the police.<sup>179</sup> For instance, the police may be biased when they come into the case with a pre-determined mind and it potentially prevents the police from exploring all potential evidence in a rape case.

Dorothy, a 48 old woman who had been married for 18 years, finally decided to report that her husband had continuously raped and assaulted her. The police dismissed the matter as a family affair, stating that a husband cannot rape his wife. They did not commence any investigations. She persisted and reported to four more police stations. Eventually an investigating officer was assigned to investigate only the assault complaint.

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<sup>175</sup> Footnote 136 at 18.

<sup>176</sup> Footnote 136 at 19.

<sup>177</sup> Footnote 136 at 20.

<sup>178</sup> Footnote 136 at 22-23.

<sup>179</sup> David P. Bryden and Sonja Lengnick 'Rape in the Criminal Justice System' *The Journal of Criminal Law and Criminology* (1973-), Vol. 87, No. 4, (Summer, 1997), p. 1195-1196.

Mentally challenged women and girls predominantly experience this challenge. Their credibility is questioned because of their disability, hence making them more vulnerable to rape. Dee Smythe analyses this issue within the context of South Africa, comparatively with Australia and the United Kingdom, and notes that;

‘The competence of mentally impaired people to credibly recount their victimization in court is likely to be challenged and they are almost invariably seen as lacking credibility, embodying for many, the stereotypical crazy woman who fantasizes and lies about being raped’<sup>180</sup>

A recent survey of police practice with respect to mentally challenged victims of rape, conducted in Nairobi and Kiambu Counties, reveals similar trends in Kenya.<sup>181</sup> The police have adopted and customized the use of the stigmatizing terms ‘idiots and imbeciles’ as contained in the Penal Code.<sup>182</sup> In responding to an interview question on how they handle these cases, one investigating officer casually stated ‘*oh zile kesi za wale ma imbe ni za uongo*’ translated as ‘oh, those imbecile cases are never true’.<sup>183</sup>

## **2.2. Police misconduct, indiscipline and lethargy**

The 16 case studies reveal substantial levels of police misconduct which effectively defeat proper investigations. This includes delays in commencing or following through with investigations. There are several instances of failure to

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<sup>180</sup> Footnote 125 at 295.

<sup>181</sup> Coalition on Violence Against Women (COVAW) ‘The knowledge, awareness, practice & prevalence rate of gender based violence (GBV) especially sexual violence among women and girls with intellectual disabilities May-June, 2013

<sup>182</sup> Ibid at 47.

<sup>183</sup> Footnote 88.

apprehend an accused even where he is known.<sup>184</sup> Often the police required the victims to be actively engaged in investigations to the extent of requiring them to participate in apprehending the accused.<sup>185</sup> In one case the police colluded with the perpetrator against the victim in exchange for money.<sup>186</sup> In another case they failed to protect the identity of the victim, exposing the victim to security risks.

There are examples of police refusal to testify in court, or otherwise basically abandoning ship once the case is handed over to the prosecutor, hence delaying the case unnecessarily.<sup>187</sup> The police charge fees before issuing the P3 form, limiting access to medical examination documentation.<sup>188</sup> And the police facilitate negotiations of rape cases out of court to avoid prosecution, which is contrary to law.<sup>189</sup>

In one case five girls aged between 9 and 17 years were defiled, at different times, by the owner of a rescue centre where the girls were living and schooling. Six months after the case was reported to the police, the investigating officer reported that he was still trying to establish that the girls were indeed under 18 years and that none of the sexual encounters were consensual. Only one witness statement had been taken. The suspect was a well-known teacher at the school yet no attempt was made to apprehend him. He closed the school and relocated. The police have not been able to locate him since then.

In another case Diana, a 26 year old woman, reported that she had been raped and assaulted by her ex –boyfriend who had been stalking. The accused

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<sup>184</sup> Footnote 1.

<sup>185</sup> Ibid.

<sup>186</sup> See example of Diana's case below.

<sup>187</sup> Footnote 1.

<sup>188</sup> Ibid.

<sup>189</sup> Ibid.

presented at the same police station where she had reported and alleged that it was Diana who had attacked him. He asked the police to arrest and charge Diana with assault. Being a person of means he bribed the officers and within the same day Diana was arrested and detained in police custody. The police officers informed her that if she wanted to be free she should just go back to her 'husband'. The police never followed up on Diana's rape complaint. Instead, they expedited the assault charge against her. She was arraigned in court within the next two days. The trial magistrate granted her bail at Ksh. 20,000 but she could not afford it and was therefore going to stay in remand. The perpetrator of rape, her ex-boyfriend, the same person who accused her of the assault, offered to pay the bail on condition that she goes back home with him. Though she refused, he went ahead and deposited the bail amount and was there to pick her up when she was released.<sup>190</sup> Diana went back to the perpetrator and dropped all charges him.

The failure to conduct effective and thorough investigations violates the fundamental rights and freedoms of victims of rape seeking redress. As potential witness for the prosecution case, investigating officers should explore all the evidence with utmost professionalism.

### **2.3. Unpredictability; ignorance and/or misuse of the law**

A critical challenge is linked to the unpredictability with which the police will invoke varying provisions of law when a rape case is reported. This could

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<sup>190</sup>The practice when it comes to paying of bail to release an accused on remand is such that anyone can deposit the amount of money due at the relevant bank, present proof of such payment to the court's criminal registry and the accused will be released. There is no way that Diana could have stopped the accused from paying the bail, even if she preferred to stay on remand rather than going with him. Since it is usually the family or friends of an accused that go to pay the bail, nothing seemed particularly unusual with the ex-boyfriend paying her bail.

indicate either ignorance of the law, or a deliberate use or misuse of the legal framework to achieve certain results which could be to defeat justice. Whether by ignorance or design, the rape victim's quest for justice is compromised. For example, when 4 year old Anne was defiled by her step-father, the police charged him with the offence of 'subjecting the child to cruel punishment' under section 18(1) as read with section 20 of the Children's Act.<sup>191</sup> This was despite the clarity in the medico-legal report which described the injuries as being occasioned by defilement.

While the offence under the Children's Act attracts a sentence of twelve months or a fine of Ksh.50, 000, the punishment for defilement or incest against a minor below 11 years is life imprisonment.<sup>192</sup> In a meeting with COVAW's legal officer, the investigating officer in this case stated that it would not be fair to charge the accused with defilement and that it was easier to get conviction for the offence under the Children's Act.<sup>193</sup>

It is unclear why the investigating officers acted as such in this case. One possible inference, certainly held by COVAW's legal officer and the victim, is that the police were compromised by bribery.<sup>194</sup> This would explain the general reluctance by the police to arrest or investigate the matter. However there is no way to ascertain this. It is also possible that the officers were simply ignorant. Not only of SOA provisions on defilement, but of the relaxed legal requirements for corroboration and evidence in defilement cases.<sup>195</sup> Based on the current legal

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<sup>191</sup> Children's Act CAP 141 laws of Kenya, ss 18(1), 20.

<sup>192</sup> Ibid. See also footnote 5 at s8.

<sup>193</sup> Footnote 88.

<sup>194</sup> Ibid.

<sup>195</sup> Footnote 103.

requirements and procedure it would be as easy to get a conviction on a defilement charge as it would be on the offence under the Children's Act.

In another example, Rebecca reported to the police that her husband had been forcefully penetrating her anus on several occasions, the last episode of which left her severely injured. The accused was charged with 'committing unnatural offences' contrary to section 162 and 163 of the Penal Code.<sup>196</sup> The accused was convicted and sentenced to imprisonment for 10 years. The definition of rape includes penetration through the anus therefore rape could be a plausible charge. However it is arguable whether the investigating officers in this case deliberately invoked this charge since marital rape is not a crime in Kenya.

This challenge is also seen in areas where the law itself is anomalous, as is the case when a mentally challenged woman is raped. The discussions in chapter two revealed that the existence in the Penal Code of a provision creating the offence of 'defilement of idiots and imbeciles' raises confusion as to whether this provision should be used as opposed to the charge of 'rape' under section 3 of the SOA. Another possible argument is that the provisions of 'defilement' under section 8 of the SOA should be preferred since mentally challenged persons are usually accorded the same legal status as children in law.

However, the latter argument cannot stand because defilement is defined primarily by age limit. So are the sentences prescribed for it. Therefore any

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<sup>196</sup> Penal Code Section 162 provides : Unnatural offences; Any person who —

(a) has carnal knowledge of any person against the order of nature; or

(b) has carnal knowledge of an animal; or

(c) permits a male person to have carnal knowledge of him or her against

the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years.

Section 163 provides that any person who attempts to commit unnatural offences is guilty of a felony and is liable to imprisonment for seven years.

victim (whether mentally challenged or not) over 18 years old cannot fall within the section.

Interviews with a COVAW women's rights advocate monitoring the prosecution of rape among intellectually challenged women in Kenya revealed that in practice the provisions of law used when a mentally challenged woman is raped can vary from case to case.<sup>197</sup> This absence of a legal standard which can be applied uniformly can only be remedied by undertaking the necessary legal amendments and ensuring sensitization among law enforcement agents.

### 3.0. ACCOUNTABILITY FOR RAPE INVESTIGATIONS AND PROSECUTION

Kenyan Courts have addressed the legal responsibility of police officers in investigating sexual violations. In the recent case of *C.K. (A Child) & 11 others vs. The Commissioner of Police & 2 others*, a group of young girls successfully challenged the Kenya government through a constitutional petition on its inaction with respect to defilement. The court ruled that;

'The failure by the police to conduct effective, prompt, proper and professional investigations into the complainants defilement charges violated the petitioners fundamental rights and freedoms under the constitution including the right to equality and non-discrimination, human dignity, security of the person, the right to fair hearing and the right to access to justice.'<sup>198</sup>

When investigating officers fail to fulfil their role, it propagates impunity for violations of human rights. The lack of accountability for such officers, either

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<sup>197</sup> Footnote 88.

<sup>198</sup> *C.K. (A CHILD) Through Ripples International As Her Guardian And Next Friend) & 11 Others V Commissioner Of Police/Inspector General of the National Police Service & 3 Others* [2013] eKLR.

by disciplinary measures or criminal prosecution where necessary, exacerbates such impunity. Therefore in tandem with these court pronouncements, the National Police Service Commission and the Independent Police Oversight Authority should be proactive in ensuring any such complaints about investigating officers are addressed accordingly.

It is the duty of the state through the police to reduce rape incidences by 'sanctioning perpetrators of crimes and sending a clear message to the population that such actions will not be tolerated.'<sup>199</sup> How police officers and prosecutors respond to rape is a critical part of this message. For example, the use of discretion to easily discontinue rape investigations or prosecution without sufficient legal basis sends a message that rape cases are hardly ever processed to completion. It is important therefore to have functional oversight mechanisms to monitor the discretion of police and prosecutors in deciding to discontinue rape cases.

In Kenya oversight with respect to the discretion to discontinue investigations and prosecutions involve the DPP's office and the courts. Section 40 of the SOA prohibits police officers from discontinuing any investigation or prosecution of rape cases. It indicates that such power shall lie with the DPP.<sup>200</sup> Article 157(8) of the Constitution then stipulates that the DPP may not discontinue a prosecution without the permission of the court. The system prescribed under section 40 of the SOA can be very beneficial. However, it is not easy to determine whether the state counsels, who have this delegated power from the DPP, have any different perceptions as compared to the investigating

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<sup>199</sup> Footnote 136 at 4.

<sup>200</sup> Footnote 5 at s 40.

officers. It only means the discretion has been moved a level higher. It is therefore important to ensure that all service providers are sensitized on dealing with sexual violence cases. This will ensure they understand and apply the legal safeguards entrenched in the SOA. It will also inform, as Smythe argues, 'their choice as to whether to encourage a complainant to bring the perpetrator to justice, or to acquiesce in her withdrawal from the justice system'.<sup>201</sup>

#### 4.0. CHALLENGES IN THE TRIAL PROCESS

A trial process that is fair, effective and free from discrimination paves the way for access to justice for the victim. It fosters reliance on a system of accountability for human rights violations. Conscious of this fact, the Kenya Judiciary Transformation Framework targets 'court procedures, processes, culture, and management to re-orientate them towards a culture of responsive and effective service delivery'.<sup>202</sup> By this framework, the Kenya judiciary has demonstrated its commitment towards expeditious delivery of justice, public involvement and ensuring access to courts.<sup>203</sup>

However, despite the existence of policy initiatives and legal protections afforded to rape victims under the SOA, women and girls continue to experience insurmountable challenges in the trial process. These challenges are often related to cultural norms which diminish the seriousness of rape as a pervasive form of violence; hence the general disinterest in the prosecution of rape. In addition, challenges arise where perpetrators are state actors or are otherwise affiliated with the authorities. Corruption and limited resources also continue to foster

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<sup>201</sup> Footnote 125.

<sup>202</sup> Kenya National Judiciary Transformation framework 2012-2016, 11.

<sup>203</sup> Ibid at 13.

challenges such as bribery of judicial officers and prosecutors inclination to prioritize other more 'serious' crimes.<sup>204</sup>

#### **4.1. Structural challenges affecting access to courts**

Poor infrastructure, inadequate personnel resulting in overwhelmed court officers and backlog of cases remain a practical challenge that affect the trial process.<sup>205</sup> Most rape victims have to travel long distances to get to court. There is no functional mechanism to compensate victims and witnesses for related out of pocket expenses. It becomes expensive for victims to finance themselves to and from court for every hearing, seeing as most women are disproportionately disadvantaged economically.<sup>206</sup> Closely related to this challenge is the delay of court proceedings characterized by numerous adjournments which only means that more trips to court will have to be made. On the other hand prosecutors expect victims to remain enthusiastic, reliable and always available and they often simply interpret a victim's absence as not being interested in pursuing the case further.

When 2 year old Roda was defiled the trial took four years. Her grandmother, who lived 70 kilometres from the court, was distraught whenever it was time for yet another court hearing. Although she was very determined to follow through the court process, she could not afford to pay bus fare of Ksh. 1000 (approx. 15 USD) to and from court. By the end of the first year of trial she wanted to give up. It was too expensive for her. Spending a whole day in court

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<sup>204</sup>Kim Thuy Seelinger et al, *The Investigation And Prosecution of Sexual Violence*, A Working Paper Of The Sexual Violence & Accountability Project Human Rights Centre University Of California, Berkeley, May, 2011, 35-36.

<sup>205</sup> Footnote 202 at 10.

<sup>206</sup> Footnote 88.

meant she closed her grocery shop, her business and only source of livelihood. COVAW had to pay her fare for the years when the matter was in court until judgment was entered in their favour and the accused was sentenced to life imprisonment.

#### **4.2. Lack of an enabling environment**

Trial can be a very difficult, intrusive and cumbersome process for a rape victim with the potential of re-traumatizing the victim especially when she testifies. Defence counsel can subject the victim to demeaning treatment. To avoid this, the Sexual Offences Act stipulates protection measures which can be invoked by declaring that a victim is a vulnerable witness.<sup>207</sup> These measures can be invoked by the court itself or prosecution.

Once invoked, the victim may give evidence under a protective cover, through an intermediary or the court may direct that proceedings will not take place in open court. In addition, publication of the complainant's identity or her family's will be prohibited. These measures can protect a victim from humiliation and disrespectful conduct and also ensure safety from danger of intimidation from the accused or his supporters.

#### **4.3. Poor communication of trial related information**

The case studies reveal that lack of feedback and communication to the victim by the prosecution is a major challenge. Victims who do not understand the trial process will usually not understand at what stage the rape case is. Critical information such as the fact that an accused was released on bail has often

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<sup>207</sup> Footnote 5 at s 31.

caught most rape victims by surprise, which can endanger their well-being. A crucial part of this communication entails victim preparation for trial. The case studies highlight that rape victims are hardly ever prepared for trial. With the prosecutors overwhelmed by the huge number of cases they handle, they are hardly keen on following up and preparing victims for trial. As a result, the victim is left intimidated, vulnerable and fearful of the court process therefore not maximizing an opportunity to testify in support of their case.

#### **4.4. The Role of judicial officers**

Judges and magistrates have a critical role to play to ensure the experience of raped women and girls is not any more traumatic in the trial process. They should be instrumental in stopping the defence counsel where there are attempts to intimidate the victim, or raise irrelevant issues. For instance the defence counsel may raise questions on a woman's credibility based on stereotypical expectations of her sexual conduct. Also problematic is when court officers require corroborative evidence when the law establishes the non-requirement of the same in rape cases. Whenever the presiding officer displays disrespectful or negative stereotypical perceptions towards the victim, it is especially harmful due to their authority in the courtroom.

Silverberg and Mejia suggest certain best practices initiatives used in many jurisdictions to curb this challenge.<sup>208</sup> These include 'training judicial officers on the effects of sexual violence, introducing rules and practices to allow judges to assume an active role during the victim's testimony and assigning

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<sup>208</sup> Footnote 204 at 36

women judges to cases involving sexual violence which has been argued to create a more hospitable courtroom environment.<sup>209</sup>

## 5.0. CONCLUSION

In this chapter I continue to analyse a sample of case studies to show the disparity between rape law and practice in Kenya. I focus on challenges faced by victims of rape at the investigation stage which feeds into the prosecution of rape. I highlight various examples of police misconduct and retrogressive attitudes which compromise the quality of investigations. I also highlight challenges in the trial process including structural issues that affect lack of access to courts, the lack of an enabling environment and poor communication of trial related information.

The police, prosecutors and judicial officers have a crucial role to play in eliminating secondary victimisation. The position they hold enables them to make decisions which gravely impact a victim's progression in the criminal justice system. The state should utilise available frameworks to ensure that these officers do not utilise their discretion to defeat a rape victim's quest for recourse.

The discussions so far demonstrate that efforts geared at addressing the challenges highlighted are sector specific. For instance, while the health sector seems to have a lot of policy frameworks, research and studies conducted with respect to post rape care services in Kenya, the same cannot be said of the legal or security sectors. The following chapter interrogates how the various efforts can be reconciled towards an integrated service provision

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<sup>209</sup>Ibid.

## CHAPTER 5

### TOWARDS AN INTEGRATED SERVICE PROVISION APPROACH

#### 1.0 INTRODUCTION

This chapter explores the concept of integrated service provision and considers its implication in addressing challenges that victims of rape encounter in seeking recourse. I allude to different models that have been used in Kenya and in other jurisdictions. I look at some of the justifications for multisectoral involvement in addressing rape, with reference to case studies which will assist in demonstrating the problems which integration seeks to address.

There is limited research and documentation of the actual status of integration approaches operational in Kenya.<sup>210</sup> Therefore, the chapter relies heavily on information received from key informant interviews conducted with COVAW staff members, and their project reports to supplement available literature.<sup>211</sup>

The chapter then highlights gaps and opportunities in integrated service provision in Kenya. My analysis is guided by a discussion which refers to integration models in other jurisdictions such as the Thuthuzela Care Centres in South Africa. I tap into the discourse interrogating the effectiveness of a

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<sup>210</sup> Jill Keesbury, W. Onyango-Ouma, Chi-Chi Undie, Catherine Maternowska, Frederick Mugisha, Emmy Kageha, Ian Askew. 2012. A Review and Evaluation of Multi-Sectoral Response Services (—One Stop Centres II) for Gender-Based Violence in Kenya and Zambia. Population Council: Nairobi, Kenya.

<sup>211</sup> Three key informant interviews were held with COVAW staff who implement a project on medico-legal and psychosocial response to rape in partnership with four health facilities based Gender Based Violence Recovery Centres, (GBVRCs) at Kenyatta National Hospital, Nakuru Provincial Hospital, Jaramogi Oginga Odinga Teaching and Referral Hospital and Mbagathi District Hoapital.

multisectoral approach in addressing rape.<sup>212</sup> Moreover, I engage with the ongoing debate questioning the use of the one stop centre and its practical application to low resource settings such as Kenya.<sup>213</sup> Ultimately, I argue that creative strategies can and should be employed towards integration of services in rape case management. However, this can only be achieved where there is coordination among stakeholders and requisite political will. In addition I argue that effective response to sexual violence should be prioritised and rape should no longer be trivialised by the state, service providers and entire community in Kenya.

## 2.0 MEANING OF AND JUSTIFICATION FOR INTERGRATION

Women and girl victims of rape can have very different needs based on the difference in their circumstances.<sup>214</sup> Even women in similar circumstances may need different kinds of support over time based on decisions they make after rape.<sup>215</sup> As evidenced in previous chapters, a number of sectors are involved in rape response from the time preceding the formal reporting of rape to eventual determination through trial. The victim would need emergency medical care and crisis counselling. She may need police investigation, court preparation and possibly safe residence.

Therefore, she may visit one or more of the following; health facility, police station, non-governmental organisation, court or a shelter or safe house

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<sup>212</sup> Footnote 210. Africa Regional Sexual and Gender-Based Violence Network Consultation: Technical Exchange and Planning Meeting Report, Roode Vallei Lodge, Pretoria, South Africa, 5th– 7th March, 2008.

<sup>213</sup>Footnote 148 at 555-559. See also Kilonzo, N., Ndung'u, N., Nthamburi, N., Ajema, C., Taegtmeier, M., Theobald, S., Tolhurst, R. (2009) Sexual violence legislation in sub-Saharan Africa: the need for strengthened medico-legal linkages. *Reproductive Health Matters* 17(34): 10–19.

<sup>214</sup>World Health Organisation, *Responding to intimate partner violence and sexual violence against women: WHO clinical and policy guidelines*. ISBN 978 92 4 154859 5.

<sup>215</sup> Ibid.

depending on the need. She is likely to interact with police officers, counsellors, medical doctors, nurses, prosecutors, magistrates or judges and sometimes staff in supportive non-governmental organisations. The victim will interact with more than one person in any given sector for varying reasons especially in follow up sessions.<sup>216</sup>

Integrated service provision entails the involvement of a multi-disciplinary agency providing different services in addressing rape.<sup>217</sup> It could take different models. One increasingly popular model is the one stop centres which provide these integrated services in a single physical location.<sup>218</sup> Studies have evidenced the effective use of one stop centres in North American and European settings.<sup>219</sup> However, the current discourse, based on limited evidence has questioned the applicability and effectiveness of this approach to African contexts.<sup>220</sup> In low resource settings in East and Southern Africa basic services in this regard includes health care, psycho-social support, and police and justice sector responses.<sup>221</sup> Due to the highly medicalised nature of initial rape response, the centre would usually be based at a health facility.<sup>222</sup>

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<sup>216</sup> Footnote 88.

<sup>217</sup> Footnote 210 at vi.

<sup>218</sup> Ibid.

<sup>219</sup> Newman B, Dannenfelser P, and Pendleton D, 2005 'Child abuse investigations: reasons for using child advocacy centres and suggestions for improvement' *Child and Adolescent Social Work Journal*. 22 (2): 165-181.

<sup>220</sup> Chomba E, Murray L, Kautzman M et al., 2010. Integration of services for victims of child sexual abuse at the university teaching hospital one stop centre. *Journal Tropical Medicine*. Epub 2010, 14.

<sup>221</sup> Keesbury J and Askew I, Comprehensive responses to gender based violence in low-resource settings: Lessons learned from implementation. Population Council. 2010.

<sup>222</sup>Footnote 210 at 1.

Another integration model is one that functions as a system of established referral networks rather than a single physical entity.<sup>223</sup> In this regard, though all the services may not be available at one physical location, linkages are created to enable quick and coordinated access to the range of services needed by the rape victim.<sup>224</sup>

Inter-agency collaboration among actors in addressing rape is recommended because it ensures harmonized intervention.<sup>225</sup> In Kenya this approach has been lauded for two major reasons. First, to improve the care and support of rape victims and, second, to enhance investigation and prosecution of the perpetrator.<sup>226</sup> These objectives are quite similar to those put forward in other jurisdictions.<sup>227</sup> The Thuthuzela Care Centres project in South Africa is an integration model which brings all necessary services at one location, aimed at reducing secondary victimization, reducing cycle time to finalization of cases and improving conviction rates.<sup>228</sup> This has been recognized as an approach which can assist in improving the investigation and prosecution of rape cases by providing comprehensive and effective services to rape victims.<sup>229</sup>

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<sup>223</sup>Lauren Harris, Julie Freccero, *Sexual violence: medical and psychosocial support, a Working Paper of the Sexual Violence & Accountability*, Project Human Rights Centre University of California, Berkeley May, 2011, 14.

<sup>224</sup> Footnote 148 at 558.

<sup>225</sup> Footnote 136 at 5.2, 7.3.

<sup>226</sup> Footnote 136 at 7.3.

<sup>227</sup> For a summary view of different models of integration across different parts of the world and their objectives see UN Women compilation Accessed at <http://www.endvawnow.org/en/articles/1564-one-stop-centres-osc.html?next=1565> on 19<sup>th</sup> November 2014.

<sup>228</sup>Artz, L., Smythe, D. & Leggett, T. (2004) *Reflections on Integrated Rape Case Management*. University of Cape Town: South Africa, 14.

<sup>229</sup> Ibid at 14-15.

The complexity of the criminal justice system and intricacies involved in the various steps to be taken can be a tedious process for a rape victim.<sup>230</sup> This is worsened by other challenges in the process, such as the poor attitudes of service providers, delay and cost implications.<sup>231</sup> Whether real or perceived, these challenges can deter victims from engaging with the criminal justice system, or following through with their cases.<sup>232</sup> The parallel uncoordinated efforts among sectors exacerbate these challenges. An example is the weak links between the health personnel and the police with respect to completion and filing of the medico-legal documentation (P3 form and PRC form), which impacts on the quality of evidence and affects a victim's successful progression in the criminal justice system.

The impact of this lack of integration can be seen in the case of Diana, who was raped by her boyfriend. Diana decided not to follow up with the case because during her visits to the police station she spoke to three different police officers who gave her contradicting information. Upon reporting, the first police officer required her to have a medical report from hospital before she could access the P3 form. She therefore went to a health facility and got a medical report. On returning to the police station, she was directed to speak to another officer who told her that she should not have gone to the health facility without the P3 form. She was given the P3 form and asked to go back to the health facility to have the medical section filled by a doctor and then returned promptly. She did as directed. Third time returning, she was asked to speak to yet another officer who refused to accept the P3 form because it was filled by a

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<sup>230</sup> Footnote 153 at 163.

<sup>231</sup>Footnote 153 at 164.

<sup>232</sup> Footnote 88.

clinical officer instead of a doctor. The third officer also informed Diana that the rape was not a police case but a family affair that she needed to solve with her boyfriend.

Diana had to tell her story five times to three police officers and two health workers. Despite numerous narrations, her victim statement had still not been taken. This case demonstrates several gaps tied to the lack of coordination and integration of services and how it can cost a victim who is seeking recourse. While all the different players have independent and important roles, the roles are inextricably linked since they offer their services in response to a particular rape victim. Therefore integration is invaluable in ensuring the victim of rape can access justice.

### 3.0 INTEGRATION APPROACHES IN KENYA

For a long time the Nairobi Women's Hospital, Gender Violence Recovery Centre (GVRC) was the only deliberate attempt at integrating services to address gender-based violence in Kenya.<sup>233</sup> It is a non-profit organisation established in 2001 which is part of Nairobi Women's Hospital, a private institution.<sup>234</sup> The GVRC offers free medical treatment and psychosocial services to victims of rape. Other services such as legal and justice sector responses are incorporated through referrals. They facilitate the process of victim reporting to the police and provision of doctor testimony.<sup>235</sup> Located only in Nairobi city, these integrated services were, until recently, available only to a small fraction of rape victims.

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<sup>233</sup> Footnote 210 at 11.

<sup>234</sup> Nairobi Women's Gender Violence and Recovery Centre (GVRC) information accessed at <http://gvrc.or.ke/index.php/readmore-gvrc> on 21st November 2014.

<sup>235</sup> Ibid

The 2007-2008 post election violence, during which thousands of women and girls were raped, marked an important phase in the establishment and scaling up of integrated service provision for rape victims.<sup>236</sup> It was apparent that despite the existence of a legal framework in the SOA, there was an urgent need to conceptualise ways of addressing institutional gaps and challenges in practice through integration. Various stakeholders were forced to contemplate more effective ways of preventing and responding to rape. Since then other similar centres providing some integrated services have been established primarily in government health facilities across the country, most of them in the wake of the post-election violence. The report of the Commission of Inquiry into Post Election Violence in Kenya and more recently the report of the Truth Justice and Reconciliation Commission have required that the state should establish one stop centres to foster integration.<sup>237</sup>

A 2012 study by Population Council evaluates the multisectoral response services for gender-based violence in Kenya. It refers to the multi-sectoral approaches in Kenya as 'one stop centres' and finds that there are three such models currently operational.<sup>238</sup> First is the health facility based model, owned and implemented by the hospital, which manages the other services that are integrated into the facility's routines. Second, is the health facility-based model, owned by an NGO which establishes separate centres within the facility to offer the other services. Third is the stand-alone NGO-owned model which provides

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<sup>236</sup> Footnote 210 at 12.

<sup>237</sup> Report of the Commission of Inquiry into the Post Election Violence 2007-2008, Kenya accessed at [http://www.kenyalaw.org/Downloads/Reports/Commission\\_of\\_Inquiry\\_into\\_Post\\_Election\\_Violence.pdf](http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf). See also The Truth, Justice and Reconciliation Commission of Kenya, "The Final Report of the TJRC" (2013) Volume IIA, 32 on sexual violence.

<sup>238</sup> Footnote 210 at vii.

legal and psychosocial support services and victims are then referred to health facilities.<sup>239</sup> However the study also acknowledges that;

“Most facilities, both government and NGO, provide one or two of the core services on-site and then refer survivors for other support services. The bulk of health facilities were found to offer medical and psychosocial support, and then to refer survivors to police or legal aid support from NGOs. NGO facilities, on the other hand, tended to offer legal aid and psychosocial support, and then refer survivors for medical services and shelter.”<sup>240</sup>

From this statement, it is clear that though the study uses the terminology ‘one stop centre’ that is in fact not the case. There is no evidence of all of these services being provided at a single physical location anywhere in Kenya. In reality the operational models of integration in Kenya function through a system of referrals among the different service providers. Therefore it is my view that the defined ‘one stop centre’ models should rather be understood as integration models which are functioning as a result of established referral networks among the various stakeholders.<sup>241</sup>

The respondents I interviewed noted that a one stop centre is the preferred integration model for responding to rape in Kenya.<sup>242</sup> A comparison of integration models in Zambia and Kenya revealed that while programs report that one stop centres have increased access to services there is limited data available to confirm this or guide scale-up efforts.<sup>243</sup> It is clear that integration of services in responding to rape is meant to be a priority in addressing rape in

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<sup>239</sup> Ibid

<sup>240</sup> Footnote 210 at11.

<sup>241</sup> Footnote 88.

<sup>242</sup> Ibid

<sup>243</sup> Footnote 210 at 2.

Kenya. However, the repeated recommendation in various reports across a number of years suggests that it is still not being implemented.

#### **4.0 GAPS AND OPPORTUNITIES IN INTERGRATION**

Challenges experienced by rape victims at different points of service provision are interrelated. Therefore the existence of a multi-agency response affects the rape victim's holistic experience in the criminal justice system. In this part I highlight some gaps and opportunities with respect to integration which affect a raped woman or girl seeking recourse.

##### **4.1. Disproportionate sectoral advancement**

Holistic integration incorporates at the very least medical, legal and psychosocial services. In Kenya, comprehensive care within the health sector has significantly developed in comparison to other sectors.<sup>244</sup> Comprehensive health care includes clinical evaluation (forensic examination and documentation), clinical management and counselling services.<sup>245</sup>

Development of policies and protocols has been inclined to advancing health sector responses. The National Guidelines on Clinical Management of Sexual Violence in Kenya, the principal policy instrument, is an example.<sup>246</sup> Though it is a significant step in the standardization of services offered to victims, it only applies in medical settings and barely addresses the other needs of rape victim such as legal and justice responses. There is no similar effort towards development of gender desks at the police stations, which were meant

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<sup>244</sup> Footnote 148 at 554.

<sup>245</sup> LVCT, Comprehensive Post-Rape Care Services in Resource-poor Settings: Lessons Learnt from Kenya, policy paper No.6 of 2005.

<sup>246</sup> Footnote 28.

to provide optimum environment for victim entering the criminal justice system.<sup>247</sup>

The health system is geared at providing emergency medical treatment with no consideration for follow-up or long term care.<sup>248</sup> The further effect of this trend on the experiences of a rape victim is that while she may have her immediate medical needs met, she may also struggle to get legal support through the criminal justice system. Though she may be guaranteed of free medical examination, the victim does not have access to any legal advice on how to pursue her case through the courts if she is interested in doing so.<sup>249</sup>

The general lack of shelters or safe houses is another major gap in services needed by rape victims.<sup>250</sup> This is especially so where the perpetrator is a relative living with the victim, or a where the victim is threatened for pursuing prosecution.

#### **4.2. Weak linkages to the justice system; prosecution and courts**

The potential to improve relationships between the health sector and the justice systems in Kenya is yet to be realised.<sup>251</sup> Most cases which get to the health facilities hardly get to court or successfully progress through the justice system,

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<sup>247</sup> Footnote 136.

<sup>248</sup> Chi-Chi Undie, M. Catherine et al, Routine screening for intimate partner violence in public health care settings in Kenya: An assessment of acceptability, 2012, APHIA II OR Project in Kenya/ Population Council: Nairobi, Kenya.

<sup>249</sup> Footnote 88.

<sup>250</sup> Ibid.

<sup>251</sup> Footnote 153 at 166.

even where the victim so desires.<sup>252</sup> The health facility-based and hospital-owned integration models, such as Kenyatta National Hospital GBVRC, were shown to have the weakest link with the criminal justice system.<sup>253</sup> This is perturbing since these models were also identified as having the greatest potential for achieving the broadest range of health and legal outcomes.<sup>254</sup>

It is imperative therefore that strategic and deliberate ways are devised for ensuring effective linkages to the justice system. Beyond initial reporting and integration with the police, there has to be substantive linkages with prosecutors and the court system. Involvement of specialised prosecutors and having specialised courts is one way to achieve this.

The Director of Public Prosecutions recently appointed special prosecutors to assist in prosecution of sexual gender based violence.<sup>255</sup> They were selected from practicing lawyers who have specialised experience based on recommendations from organisations in this field.<sup>256</sup> While this is a positive step by the state to address challenges in investigations and prosecution of rape, there are only 16 such prosecutors in the entire country and their impact is yet to be felt.<sup>257</sup>

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<sup>252</sup> The population council report indicates that 'of the 1,239 cases referred across all OSCs in the study, about 3 percent (34 cases) were apprehended by police, 2 percent (29 cases) were taken to court, and only 0.5 percent (6 cases) were convicted.

<sup>253</sup> Footnote 210 at 19.

<sup>254</sup> Footnote 210 at 28.

<sup>255</sup> Footnote 171.

<sup>256</sup> Mercy Deche 'Legal Response To Intra-Familial Child Sexual Abuse In Kenya: A Case For Informal Justice 2013' Danish Institute for Human Rights, 27.

<sup>257</sup> Ibid.

The Thuthuzela Care Centre (TCC) model in South Africa relies on prosecutor-led investigations in processing rape cases through the system.<sup>258</sup> This is a beneficial and plausible idea because the prosecutor's crucial role is integrated from earlier on in the process, which improves a victim's connection to the court process. The prosecutor also gets to weigh in on decisions around which evidence is crucial for strengthening the victim's case. This avoids the situation where the victim only meets the prosecutor for the first time in court, and the prosecutor similarly engages with the available evidence late and after crucial parts of the investigation.

Cases referred to the TCC, located in a health facility, are prosecuted in a specialised sexual offences court.<sup>259</sup> This creates an invaluable linkage among the different sectors, which greatly contributes to effective integrated service provision. The sexual offences courts enhance a victim-centred approach to the criminal justice response to rape.<sup>260</sup> It is a recommended initiative because it recognises that victims of rape have special needs and therefore specialised responses by dedicated court personnel are necessary in addressing sexual violence.<sup>261</sup> Research shows that the specialised courts are instrumental in reducing secondary victimisation, reducing case finalisation cycle time and contributed to effective prosecution.<sup>262</sup> With such a system it is possible for all service providers to directly interact with the criminal justice system and accordingly assist the victim. It also becomes possible to identify and address gaps in the system by monitoring and tracking the progression of cases.

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<sup>258</sup> Footnote 228 at 31.

<sup>259</sup> Ibid at 25.

<sup>260</sup> Footnote 228 at 9.

<sup>261</sup> Footnote 228 at 18.

<sup>262</sup> Footnote 228 at 95.

### 4.3. Poor coordination and weak referral networks

Several studies have continuously highlighted the absence of strong and structured referral networks in Kenya.<sup>263</sup> Having argued that the integration approaches in Kenya do not in fact currently comprise of one stop centres, the need for strong referral networks is significant if integration of services is to work. The lack of a system for getting feedback or ensuring follow-up for referrals made is problematic.

Other creative ways of having effective referrals include using victim escorts or referral slips which are properly filed and regularly reviewed.<sup>264</sup> Proximity has been identified among service providers and victims in Kenya as a factor which aids in referral. Available avenues for strengthening referral networks include the Kenya national referral partners' network, run by the Kenya National Human Rights Commission which meets quarterly.<sup>265</sup> The National GBV network hosted by the National Gender and Equality Commission which has monthly meetings is another avenue.<sup>266</sup> Stakeholders should maximise these avenues in strengthening the referral networks. It is through such forums that strategies towards improved models of integration are developed and enhanced.

The Sexual Offences Act Implementation Task Force, in recognition of this challenge as a major impediment to integration, recently launched the national multi-sectoral standard operating procedures on sexual violence prevention and

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<sup>263</sup> Footnote 135 at 5.2.

<sup>264</sup> Footnote 88.

<sup>265</sup> Kenya National Commission on Human Rights Annual Report 2013, 18.

<sup>266</sup> National gender and Equality Commission see <http://www.ngeckkenya.org/program/30/gender-women-mainstreaming>.

response.<sup>267</sup> It lays down guidelines on handling sexual violence for the different service providers and stipulates victim referral requirements. If complied with, this is a tool which can address the challenge of coordination and referral among the different sectors. It is a harmonisation of a number of parallel initiatives attempting to address this challenge through specific policy briefs and practices.

#### 4.4. Funding

Integration of services, and especially the use of one stop centres or providing specialised response to rape, has significant cost implications. Ways of leveraging costs should be explored such as scaling up health facility-based models which benefit from available hospital infrastructure and personnel.<sup>268</sup> In African settings, and certainly in Kenya, integration approaches are highly dependent on donor funding.<sup>269</sup> This remains the case whether the integration efforts spearheaded by public or private entities.<sup>270</sup> Donor funding may not always be sustainable.

Beyond existing financial challenges, a greater challenge lies in the effects of poor coordination among stakeholders. Parallel and uncoordinated 'funding streams and efforts by development partners reduces opportunities for maximising resources and human capacities effectively.'<sup>271</sup> Unfortunately, it is the victims of rape that experience the effects of these challenges. Having the

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<sup>267</sup> Multi-sectoral standard operating procedures (SOPs) for guiding response to sexual violence (2014) see launch in July 2014 See launch at <https://www.youtube.com/watch?v=LGUQ-iaSvwg>.

<sup>268</sup>Footnote 210 at 31.

<sup>269</sup> Ibid.

<sup>270</sup> Ibid.

<sup>271</sup> Kilonzo N, Dartnall E and Obbayi M. (2013). Briefing paper: Policy and practice requirements for bringing to scale sexual violence services in low resource settings. LVCT and SVRI. LVCT, Nairobi, Kenya, 6.

requisite political will and prioritising the need to adequately respond to rape will create optimum environment for addressing these gaps.

## 5.0. CONCLUSION

In this chapter, I have discussed what an integrated approach entails and explored its justification. I highlighted its objectives and the positive impact that it can have on the experiences of a rape victim seeking recourse in the criminal justice system. I discussed the integration approaches in Kenya. With reference to practice models of the Thuthuzela Care Centre in South Africa, I highlighted gaps and opportunities for the integration approach in Kenya. The ideal one stop centre based in a health facility and hospital owned has been recommended as the preferred approach in Kenya. It appears to be most ideal model for ensuring medico-legal outcomes if it will have strong linkages to the legal and justice responses. Scaling up this model would ensure that victim statements are taken at the centre and the medico-legal documentation is completed alongside other services being offered on-site.

I draw attention to the fact that the current SGBV landscape in Kenya is such that all services are not offered in one physical location. Therefore there is a need to strengthen the linkages between different service providers in order to achieve integration. The responsibility for ensuring that the multiagency response to rape is successful should be owned by all the relevant stake holders. The different sectors should take advantage of the existing policy framework, guidelines and opportunities to foster coordination and enhance the integration of services.

## CHAPTER 6

### CONCLUSION

This research sought to unearth the challenges encountered by raped women and girls seeking recourse through the criminal justice system in Kenya. I focused on their experiences in three major points of service provision i.e. the police, the health facilities and the courts. I then explored as a secondary research question, whether an integrated service provision approach provides solutions to these challenges.

I began by interrogating the concept of rape as a crime, and women as target victims. I discussed the historical origins of rape criminalisation. Rape was considered a crime of theft committed as against the respective male to whom the woman or girl belonged to.<sup>272</sup> It could be her father, husband or male family member. Rape was conceptualised as a crime against a woman's honour as opposed to a crime of violence against an individual's sexual autonomy.<sup>273</sup> This background is essential in understanding the nature of rape and the peculiar challenges that raped women and girls experience. Social perceptions and attitudes significantly affect a rape victims experience from the period before reporting through to trial completion.<sup>274</sup>

Available statistics demonstrate that majority of rape victims are women and girls.<sup>275</sup> Statistics also indicate that most rape perpetrators are men.<sup>276</sup>

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<sup>272</sup> Footnote 2 at 38.

<sup>273</sup> Footnote 2 at 39.

<sup>274</sup> Footnote 2 at 44.

<sup>275</sup> Footnote 18 at 4.

<sup>276</sup> Ibid.

The Sexual Offences Act, 2006 is the primary legislation dealing with sexual offences. It brought major improvement to Kenyan rape law. Despite notable gains, this thesis highlights certain gaps in law. For example, marital rape remains unrecognised and non-existent in Kenyan law.<sup>277</sup> In addition, there are no clear and express provisions to be applied where a mentally challenged woman is raped.<sup>278</sup>

While the law has been criticised as a site for social struggle, an enabling legal and policy environment is significant in addressing gender discrimination.<sup>279</sup> It is imperative to characterise women's claims as rights. A legally enforceable claim ensures that there are corresponding obligations to respect and fulfil these claims.<sup>280</sup> Therefore, it is imperative for the state to address the gaps in the law.

However, a sufficient legal framework does not mean that there is corresponding impact or change in practice. With reference to rape case studies I discuss the experiences of women in the criminal justice system in Kenya, highlighting specific challenges. The disparity in law and practice is huge. Rape remains one of the most unreported crimes in Kenya. The challenges in reporting rape include shame, stigma and self-blame, pressure from family and communities, fear of harm as well as the lack of faith in the system, especially the police.

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<sup>277</sup> Footnote 5 at s 43(5).

<sup>278</sup> Footnote 35 at s 146. Footnote 5 at ss 3,43 and 44.

<sup>279</sup> Footnote 117 at 2192.

<sup>280</sup> Chris Hunter 'The Masters Tools Revisited: Can law Contribute to Ending Violence against Women' in *Institute of Development Studies* Vol 37 No 6 (2006) 57-68.

In addition I discuss collection of forensic evidence and medical care and show its value in ensuring access to justice. Here we see a number of challenges related to the lack of standardised service delivery, attitudes and conduct of health care workers, access to medico-legal documentation, and the government chemist lab.

I then explore challenges in investigation which include police misconduct, indiscipline, lethargy and demeaning attitudes which affects the quality of investigations. I further raise challenges in the trial process including structural barriers that affect lack of access to courts, the lack an enabling environment and poor communication of trial related information. In addition her highlighted the role of the judicial officers and the challenges they pose to the complainant through the trial process.

Each sector involved in rape response such as the health sector, the legal sector including police and justice sector responses, have invaluable roles to play. These roles are interlinked and interdependent. Accordingly, I explore the notion of an integrated service provision approach. A multi-agency response to rape can assist to combat secondary victimisation, enhance the care and support of a rape victim, address delay and increase chances of successful prosecution.<sup>281</sup>The lack of integrated service provision can have negative impact on a rape victim's experience in the criminal justice system.

While Kenya has certainly acknowledged the need for a multisectoral response, there are no clear and harmonised strategies for initiating or scaling up such efforts. Stakeholders in various sectors run parallel initiatives, despite similar aims. As a result resources are not maximised. There is disproportionate

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<sup>281</sup> Footnote 228 at 14.

sectoral advancement, weak linkages to the justice system, poor coordination, weak referral networks and the persisting challenge of funding. Available studies, though limited, suggest that the ideal one stop centre based in a health facility and hospital owned has been recommended as the preferred integration approach in Kenya.<sup>282</sup> However, I highlight that currently this is a model that is non-existent in Kenya.<sup>283</sup> Instead what is available is a system of integration that functions through referral networks.<sup>284</sup> Accordingly, there is a need to strengthen the linkages between different actors.

The responsibility for having functional and effective integration should be owned by each stakeholder. While laws and policy frameworks may exist, this thesis shows that these can be ignored, deliberately contravened, misused, or otherwise disregarded easily by service providers. Significant constraints due to limited resources, insufficient personnel, lack of technical expertise and training, continue to plague the country further making it difficult to implement available frameworks. Therefore, while some of the challenges highlighted herein can be addressed by legal or policy reform, most of them require further intervention in practice.

A significant portion of the challenges faced by rape victims result from attitudes and perceptions of the service providers in the criminal justice system. The system is comprised of people affected by social attitudes, which greatly impact on how rape is understood or responded to. Every stakeholder has a responsibility to ensure that the criminal justice system fosters a culture that does not victimise or stigmatise raped women and girls. Only proactive and

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<sup>282</sup> Footnote 210 at 11.

<sup>283</sup> Ibid

<sup>284</sup> Ibid

deliberate efforts by all stake holders in a multi-sectoral approach can create the enabling environment needed to address challenges faced by raped women and girls seeking recourse.

## BIBLIOGRAPHY

### PRIMARY SOURCES

#### CASES

- *Achoki v. R* [2008] 1 KLR
- *Bonu v Republic* [2010] eKLR.
- *C.K. (A CHILD) Through Ripples International As Her Guardian And Next Friend) & 11 [2013] Others V Commissioner Of Police/Inspector General of the National Police Service & 3 Others*
- *Dr. Kiiza Besigye v. Uganda*, High Court Criminal Session No. 149/2005.
- *Erro Oba V Republic* [2009] eKLR.
- *Maina v. R* [1970] EA 370.
- *Paul Nganga Kamau v. Republic* High Court at Nakuru, 2004 – full cite.
- *Peter Mukaba Ondu v. Republic* Criminal Appeal 66 of 2008, High Court at Bungoma.
- *Phillip Kipkoech Chepkwony v. Republic* High Court at Nakuru, 2006
- *R v R* [1991] 3 WLR 767.
- *R v. Oyier* [2008] 1 KLR (G & F)
- *R v. Williams* [1923] 1 KB 340
- *SC v. R* Criminal case 19 of 2009 at the High Court of Kenya at Malindi (unreported).
- *S v Zuma* [2006] ZAGPHC 45.
- *Suleiman v. R* (Criminal Appeal 2004, High Court at Machakos)
- *Wafula v. R* (Criminal Appeal 2005, High Court at Bungoma)

#### STATUTES

- Children's Act Cap 141 Laws of Kenya.
- Constitution of Kenya 2010.
- Criminal Procedure Code Cap 75 Laws of Kenya.
- Evidence Act Cap 80 Laws of Kenya.
- National Police Service Act Cap 84 of 2011.
- Penal Code Cap 63 Laws of Kenya.
- Sexual Offences Act No 3 of 2006.

- Sexual Offences (Medical Treatment) Regulations, 2012 [L.N. 133/2012.
- South Africa Criminal Law (Sexual Offences and Related Matters) Amendment Act 32

## INTERNATIONAL INSTRUMENTS

- African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003.
- UN Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995.
- UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13 art 1,
- UN General Assembly, *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104.
- Vienna Declaration and Program for Action, U.N GAOR, U.N. Doc. A/CONF.157/ 24 (1993) ILM 1661 (1993).
- UN Committee on the Elimination of Discrimination Against Women: *General Recommendation No. 12 (8<sup>th</sup> Sess.1989)*, U.N. GAOR 44<sup>th</sup> Sess, U.N.Doc.A/44/38 (1992)
- UN Committee on the Elimination of Discrimination Against Women: *General Recommendation No. 19 (11<sup>th</sup> Sess.1992)*, U.N. GAOR 47<sup>th</sup> Sess, U.N.Doc. A/47/38 (1992).

## SECONDARY SOURCES

### BOOKS

- Artz Lilian, Dee Smythe (eds) *Should we consent? : rape law reform in South Africa* (2008) Cape Town: Juta.
- Catherine MacKinnon, *Sex Equality : Rape Law*, University Casebook Series Foundation Press, 2001
- Eriksson. M *Defining rape: emerging obligations for states under international law?* (2011) Leiden: Martinus Nijhoff Publishers.

- MacKinnon, Catharine A *Are women human? : and other international dialogues* (2006) Cambridge, Mass.: Belknap Press of Harvard University Press.
- Mc Glyn. C and Munro E Vanessa (eds) *Rethinking rape law : international and comparative perspectives* (2010) Abingdon : Routledge
- Ptacek James(ed) *Restorative justice and violence against women* (2010) Oxford: Oxford University Press.
- Roberts Paul and Jill Hunter *Criminal evidence and human rights: reimagining common law procedural traditions* (2012) Oxford; Portland, Hart Pub.
- Saferstein Richard, *Criminalistics: An Introduction to Forensic Science* (10th Edition) January 13, 2010.
- Temkin, Jennifer *Sexual assault and the justice gap: a question of attitude* (2008) Oxford: Hart.
- Toyin Falola, Nana Akua Amponsah (eds) *Women, gender, and sexualities in Africa* (2012) Durham, N.C. : Carolina Academic Press.

## JOURNAL ARTICLES

- Ajema C, W. Mukoma et al, 'Challenges experienced by service providers in the delivery of medico-legal services to survivors of sexual violence in Kenya' *Journal of Forensic and Legal Medicine* 18 (2011) 162-166, 164.
- Baker K. Katharine 'Once a Rapist? Motivational Evidence and Relevancy in Rape Law in *Harvard Law Review*, Vol. 110, No. 3, (Jan., 1997), 563-624.
- Bryden P David. and Sonja Lengnick 'Rape in the Criminal Justice System' *The Journal of Criminal Law and Criminology* (1973- ), Vol. 87, No. 4, (Summer, 1997).
- Chomba E, Murray L, Kautzman M et al., 2010. Integration of services for victims of child sexual abuse at the university teaching hospital one stop centre. *Journal Tropical Medicine*. Epub 2010.
- David P. Bryden and Sonja Lengnick 'Rape in the Criminal Justice System' *The Journal of Criminal Law and Criminology* (1973-), Vol. 87, No. 4, (Summer, 1997), p. 1195-1196.
- Ford A David. 'Wife Battery and Criminal Justice: A Study of Victim Decision-Making' *Family Relations*, Vol. 32, No. 4. (Oct., 1983) 463-475.

- Hunter Chris 'The Masters Tools Revisited: Can law Contribute to Ending Violence against Women' in *Institute of Development Studies* Vol 37 No 6 (2006) 57-68.
- Kilonzo, N., Theobald, S., Ajema, et al (2009) 'Delivering post rape care services: Kenya's experience in developing integrated services' *Bulletin of the World Health Organisation*, 87:555-559.
- Newman B, Dannenfelser P, and Pendleton D, 2005 'Child abuse investigations: reasons for using child advocacy centres and suggestions for improvement' *Child and Adolescent Social Work Journal*. 22 (2): 165-181.
- Romany Celina 'Women as Aliens: A Feminist Critique of the Public/private Distinction in Human Rights Law' in *Harvard Human Rights Law Journal* (1993) 87-125.
- Susan Estrich 'Rape' *The Yale Law Journal*, Vol. 95, No. 6, (May, 1986), 1087-1184.
- Sullivan J, 'Women's Human Rights and the 1993 World Conference on Human Rights' in *The American Journal of International Law*, Vol 88, No.1 (1994) 152-167.
- Veena Pooncha 'On the Edge of Silence: Gender within Human Rights Discourse' in *Economic and Political Weekly* Vol 28, No.41 (1993) 2192-2194.

## OTHER RESEARCH, REPORTS AND POLICY DOCUMENTS

- Agency for Cooperation and Research in Development, (ACORD) Kenya: *An Audit of Legal Practice on Sexual Violence, Making the Law Count*, (2009).
- Amnesty International, *Six-Point Checklist on Justice for Violence against Women*, Index Number: ACT 77/002/2010, published on 8 March 2010.
- Ajema, C., Rogena, E., Muchela, H., Buluma, B. and Kilonzo, N. 2009. *Standards required in maintaining the chain of evidence in the context of post rape care services: Findings of a study conducted in Kenya*. Liverpool VCT, Care & Treatment, the Division of Reproductive Health, and the Population Council.
- Artz, L., Smythe, D. & Leggett, T. (2004) *Reflections on Integrated Rape Case Management*. University of Cape Town: South Africa.

- Chi-Chi Undie, M. Catherine et al, Routine screening for intimate partner violence in public health care settings in Kenya: An assessment of acceptability, 2012, APHIA II OR Project in Kenya/ Population Council: Nairobi, Kenya.
- Coalition on Violence Against Women (COVAW) *'The knowledge, awareness, practice & prevalence rate of sexual violence among women and girls with intellectual disabilities* May-June, 2013.
- Commission of Inquiry into Post Election Violence, Philip N. Waki, *Report of the Commission of Inquiry Into Post Election Violence (CIPEV)* Kenya Government Printer.
- Crime Scene Investigation Nairobi, *Quantitative Research Findings On Rape In Kenya Between December 30th 2007 to June 30th 2008.* (2008).
- Dee Smythe *Resolving Rape* (2014).
- Institute Of Economic Affairs, *Status of Gender Desks At Police Stations In Kenya A Case Study Of Nairobi Province – Kenya IEA Research Series*, 2009, 4.
- Jill Keesbury, W. Onyango-Ouma, Chi-Chi Undie, Catherine Maternowska, Frederick Mugisha, Emmy Kageha, Ian Askew. 2012. A Review and Evaluation of Multi-Sectoral Response Services (—One Stop Centres||) for Gender-Based Violence in Kenya and Zambia. Population Council: Nairobi, Kenya.
- Keesbury J and Askew I, *Comprehensive responses to gender based violence in low-resource settings: Lessons learned from implementation.* Population Council. 2010.
- Kenya National Commission of Human Rights (KNCHR) & Ministry of Justice and Constitutional Affairs *State of Human Rights In Kenya A Baseline Survey Report*, August 2005.
- Kenya National Bureau of Statistics, *Kenya Demographic and Health Survey 2008-09*, June 2010.
- Kenya National Commission on Human Rights Annual Report 2013.
- Kilonzo N, Dartnall E and Obbayi M. (2013). Briefing paper: Policy and practice requirements for bringing to scale sexual violence services in low resource settings. LVCT and SVRI. LVCT, Nairobi, Kenya.
- Kilonzo, N., Ndung'u, N., Nthamburi, N., Ajema, C., Taegtmeier, M., Theobald, S., Tolhurst, R. (2009) *Sexual violence legislation in sub-Saharan Africa: the need for strengthened medico-legal linkages.* Reproductive Health Matters 17(34): 10–19.

- Kim Thuy Seelinger et al, *The Investigation And Prosecution of Sexual Violence*, A Working Paper Of The Sexual Violence & Accountability Project Human Rights Centre University Of California, Berkeley, May, 2011, 35-36.
- Lauren Harris, Julie Freccero, *Sexual violence: medical and psychosocial support, a Working Paper of the Sexual Violence & Accountability Project Human Rights Centre University of California, Berkeley May, 2011.*
- Lori Michau and Dipak Naker (ed) Raising Voices and UN-HABITAT, Safer Cities Program, *Preventing Gender-based Violence in the Horn, East and Southern Africa: A Regional Dialogue*, (2004)
- LVCT, Comprehensive Post-Rape Care Services in Resource-poor Settings: Lessons Learnt from Kenya, policy paper No.6 of 2005.
- Mercy Deche 'Legal Response To Intra-Familial Child Sexual Abuse In Kenya: A Case For Informal Justice2013' **Danish** Institute for human Rights, 27.
- Ministry of Medical Services and Ministry of Public Health & Sanitation, National Guidelines on Management of Sexual Violence in Kenya 2nd Edition, 2009.
- National Council for Population and Development *Kenya population situation analysis*, July 2013.
- Nduku Kilonzo, *Post Rape Services In Kenya: A Situation Analysis* (2003)
- Njoki Ndung'u, N Baraza et al, *The Making of the Kenya Sexual Offenses Act, Behind the Scenes* (2006).
- Preliminary Report Submitted by the Special Rapporteur on Violence Against Women its causes and consequences, MS Rhatika Coomaraswamy in accordance with the Commission on Human Rights Resolution 1994/95 UN Doc E/CN.4/1995/42.November 1994.
- Ruth Aura, *Situational Analysis and the Legal Framework on Sexual and Gender-Based Violence in Kenya: Challenges and Opportunities*, Kenya Law Reports Publications, 25.
- The National Sexual Offences Implementation Workshop Comprehensive Report, 25-27 May 2011.
- Thongori J, Ellis A et al, *Gender and Economic Growth in Kenya: Unleashing the Power of Women* (2007).
- The Truth, Justice and Reconciliation Commission of Kenya, *The Final Report of the TJRC* (2013) Volume IIA, 32 on sexual violence.

- Winfred. K, 'Treatment of Consent in Sexual Offences in Kenya' (2013), *The Equality Effect*, 9th August 2014.

#### NEWSPAPER ARTICLES

- Anne Kithaka 'Enforcement of the Sexual Offences Act in Kenya' in *Pambazuka, Pan African Voices for Freedom and Justice* 2008, Issue 392.
- Juliet Onyango 'Kenya to Eliminate Police Prosecutors as part of Judicial Reforms' *East Africa News* 2 January 2014.
- Kilongi 'The Long but Eventful Wait for a P3 form' *Voices of Africa*, 9 April 2013.
- Lydia Matata 'Rape and the Elusive P3 form' *The Star* 18 December 2013.

## **KEY INDEPTH INTERVIEW WITH ORGANIZATIONAL STAFF**

**Date of interview:**

**Time of interview:**

**Name of interviewer:**

**Position in Organization:**

*Introduce myself to the respondent, hand out the information sheet and then say the following:*

I am Ruth Nekura, a student conducting research towards a Master's degree at the University of Cape Town. My student number is LKKRUT001. I am researching on the challenges encountered by women and girl survivors of rape in seeking recourse through the criminal justice system in Kenya. To do this I focus on the experiences of women and girls in three major points of service provision i.e. the police, the health facilities and the courts. I then explore as a secondary research question, whether an integrated service provision approach provides solutions to these challenges.

By virtue of the experience and knowledge you have in this field, I seek your consent to interview you. If you accept to participate I will ask you questions on;

- The challenges faced by survivors in reporting, investigation and prosecution of rape cases
- The duties of the police, health service providers and courts in ensuring sufficient recourse for raped women and girls
- What solutions you would propose to these challenges

### **Consent to participate in the research**

1. I understand the purpose of the research.

2. My involvement in this study has been fully explained to me and I freely consent to participate.

3. I understand that my participation is voluntary and that I have the right to withdraw my Consent or discontinue the interview at any time without penalty or prejudice. I have the right to refuse to answer any question(s).

**Date:**

**Participant signature:**

**Researcher; Ruth Nekura**

I declare that I handed out the forms to the participant and answered the participant's questions to my best knowledge.

**Date:**

**signature:**

### **A. Introductory Information**

1. What is the mandate of your organization?
2. How often does the organization deal with rape cases?
3. In terms of sex, what is the ratio of rape cases you receive?
4. Are women and girls more predisposed to rape? Why?
5. What do rape survivors consider sufficient recourse to be?

### **B. Challenges encountered by rape victims:**

6. What are some of the effects of rape on women and girls?
7. What are challenges that survivors are likely to face in reporting rape?
8. What are the challenges that encumber the investigation of rape?
9. What are the challenges faced in prosecution?
10. What is the average annual rate of completion of cases supported by this organization?
11. Of the completed cases, how many are convictions?
12. Of the cases supported, what is the average annual rate of case withdrawals?
13. What are some of the reasons that survivors withdraw their cases?

### **C. Duties of service providers; with respect to rape victims**

14. What is the duty of the police according to the law?
15. What are the duties of health service providers?
16. What are the duties of the courts?

### **D. Specific target groups**

17. Have you received any cases of intellectually challenged women and girls?
18. What are the peculiar challenges faced by them in seeking recourse?
19. Are there peculiar challenges for victims who are in intimate partner relationships? Which are they?
20. What peculiar challenges do raped girls (female children) face?

### **E. Interventions**

21. Have you had any experience with any form of integrated approach to ensuring redress for raped women and girls?
22. If so what model did it take?
23. What advantages does an integrated approach avail?
24. What other interventions do you propose for combating these challenges?

**Thank you for participating in this interview.**

