

GAPS IN ENFORCEMENT OF SECTIONS 3, 4, 5, 6 AND 8 OF THE SEXUAL OFFENCES ACT, 2006

INTRODUCTION

The Sexual Offences Act No. 3 of 2006 (SOA) came into effect on 21st July 2006. This was subsequent to unending agitation from the civil society organisations together with a large judicial outcry on the application of judicial discretion.

Despite the enactment of the SOA in 2006 to deal with gaps of enforcement presented by the Penal Code, the statistics around sexual violence have not significantly improved (as will be seen below). This research examines the legal framework around the enforcement of the key offences highlighted in Sections 3, 4, 5, 6, 8 & 9 of the SoA in Kenya in terms of arrests investigations, prosecutions and conviction processes in attempting to understand and to inform advocacy work on policy and legal reforms.

CONTEXT ANALYSIS

The World Health Organisation estimates that 30% of women worldwide have experienced physical and/or sexual intimate partner violence (IPV) and 7% have experienced non-partner sexual violence, in their lifetime. In Kenya, approximately 40.7% of women have experienced lifetime physical and/or sexual IPV, higher than the global average. There are no official national statistics on lifetime non-partner sexual violence. The Kenya Demographic and Health Survey (KDHS) 2014 estimates that 14% of women aged 15 to 49 have experienced sexual violence in their lifetime.

Methodology

The methodology was mixed combining a desk review, with focus group discussions and anecdotal experiences of the consultants to address the gaps in literature. The desktop review focused on literature that shall provide both a historical and contextual analysis on the implementation of the SOA.

Participatory, cost-effective means of implementation

A feminist and victim centered approach to sexual violence should consider the following:

1. The legal definition of rape and sexual assault has to be in line with women's experiences, legal definitions should not reinforce stereotypes and myths.
2. Ensuring that participation in the criminal justice process does not exacerbate trauma for the victim by compromising their autonomy or dignity process.
3. Institutional attitudes and practices have to be reformed so that persons who report sexual violence are treated with respect. A report should be an occasion of respect and not an occasion of oppression. The police have been particularly problematic in this however a number of institutions play a part in the reporting process and their attitudes have to be reformed to change experiences for survivors.

Findings

The following key findings were identified:

1. Despite the SOA and the Judiciary not being overly emphatic on the 'perfect victim' narrative many survivors face challenges with reporting sexual violence to the Police.
2. The SOA in Section 8(5) provides a defence that serves to entrench stereotypes of women and children as liars in cases of sexual violence.
3. The position on mandatory minimums opens sexual offences up to judicial discretion which may be exercised

in a manner that trivializes offences.

4. The criminalisation of consensual adolescent sex often criminalises male children.
5. There is an over emphasis on forensic evidence which serves to disqualify many survivors.
6. There are failures by persons in custody of children (including schools) to report violence that occurs to children while in custody.
7. There is misconduct by police in the investigation of sexual offences that sometimes results in dissuading survivors or expecting them to facilitate investigations.
8. Some private facilities will not offer survivors post-rape care services and refer them to public facilities which may delay the process of seeking help.
9. Police and healthcare workers treat victims or survivors with contempt and like third parties not involved with the process
10. Civil society using survivors to further their own agenda.

Recommendations

Research and reporting

- a. The Kenya Police Service revise their data collection tools to be reflective of crimes as described in the SOA (revise from indicators picked from the Penal Code);
- b. The Kenya Police Service, reflect in their data collection tools the number of reports received vis a vis the number of charges or investigations pursued;
- c. The Kenya Police Service, reflect in their Crime Statistics the number of reports received under

the SOA vis a vis reports received in any other crime;

- d. The Kenya Police Service to provide in the crime statistics information on the criteria used to determine whether or not to pursue an investigation; and
- e. The Office of the Director of Public Prosecution to provide information on the criteria used to determine whether or not to pursue a charge or conviction.

Legal and policy reform

- a. Section 8(5) of the Sexual Offences Act, 2006 is repealed in as far as it seeks to entrench the stereotype that women and children lie about sexual violence and the defence of mistake remains available for defendants in the Penal Code;
- b. Section 8 of the Sexual Offences Act, 2006 is amended to include a 'Romeo and Juliet' clause to address the inequitable treatment between children (particularly male children) and to recognise the evolving capacity of children in line with the Charter of the Rights of the Child;
- c. That Regulation 3 of the Sexual Offences Regulations, 2008 [L.N. 132/2008] on "Enhancement of sentence" is revised to reflect the position on 'mandatory minimums' and framed as "Sentencing" and one of the sub-conditions to be included is the: "views of the victim through a victim impact statement or through oral evidence before the Court"; and
- d. The Health Act, 2017 is revised to include the following in the definition of emergency treatment: "refers to necessary immediate health

Trainings

That trainings and sensitisations are provided to and with:

- a. The Kenya Police Service on the role of culture, norms (including gender norms) and attitudes in reporting sexual violence;
- b. The Kenya Police Service on the jurisprudential position on forensic and medical evidence in sexual violence cases and the impact of the 'perfect victim' narrative in dissuading reporting;
- c. The Office of the Director of Public Prosecutor on the jurisprudential position on forensic and medical evidence in sexual violence cases and the impact of the 'perfect victim' narrative in dissuading reporting; and
- d. The Judiciary on the role of mandatory minimum sentences and the impact of biases within the Judiciary in the punishment of sexual violence.

care that must be administered to prevent death or worsening of a medical situation; **or as post rape care**".

Referral mechanisms

The Ministry of Health works collaboratively with the Ministry of Education and other state agents to revise the National Policy on the Management of Sexual Violence (2014 edition) to include a reporting and referral systems that places obligations on healthcare providers, custodians and guardians to refer matters of sexual violence to the Kenya Police Service for child victims of sexual violence.

Resourcing and budget line allocations

- a. Due to the pervasive nature of sexual violence that Parliament work towards increasing funding for the Kenya Police Service to ensure they have necessary resources to investigate sexual violence;
- b. That the emergency medical treatment fund established in line with Section 15(x) of the Health Act, 2017 include budget line items for the management of sexual violence;
- c. That the Ministry of Health include and report on a budget line item on the management of sexual and gender based violence; and
- d. That each County Government include and report on a budget line item on the management of sexual and gender based violence.
- e. That a fund be set aside to
 - Give an incentive to ensure that doctors, counselors, psychologists and other mental health experts can be able to testify in court at the state's expense and not theirs.
 - To develop, produce and circulate a continuous mental health 'Post Rape Care' form for mental health experts that can be filed in court at any moment before the mental health expert testifies in court.

Institutional changes

That a taskforce is established to make recommendations on the institutional steps needed for the integration of health and legal services for the better management of sexual violence.

The role of civil society

That organisations (non-governmental organisations, civil society organisations, community based organisations among others) reflect on the role they play in the lives of survivors. A significant amount of the sensitisations provided for both communities and police are heavily focused on preservation of evidence for the purpose of a conviction and not on securing the health and well-being of survivors. As noted, the criminal justice process is just one aspect of a survivors experience and turning them into a tool to serve that system is not survivor-centred.

"This measure of rape law invites us to ask: is formal disclosure of sexual violence an occasion of respect or an occasion of oppression for victim/survivors?"

Wendy Lacormbe

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