SEXUAL OFFENCES LAW OF KENYA: THOUGHTS ON IMPLEMENTATION PROGRESS, CHALLENGES AND OPPORTUNITIES

By Mwaura Kelvin Karuga: Legal Officer, The Co-Exist Initiative.

- ***Amendment of Section 38 of the Sexual Offences Act***

Section 38 of the Sexual Offences Act, before amendment, provided that:

> *Any person who makes false allegations against another person to the effect that the person has committed an offence under this Act is guilty of an offence and shall be liable to punishment equal to that for the offence complained of.*

The effect of this section was to make it hard for victims of sexual abuse from coming forward to report cases of SGBV and was therefore criticized for transgressing the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, both of which Kenya has ratified, has since been repealed. *(The actual repeal was done vide The Statute Law (Miscellaneous Amendments) Act No. 12 of 2012 Special Issue Kenya Gazette Supplement No. 72 (Acts No. 12) Date of Assent: 6th July, 2012; Date of Commencement: 12th July, 2012).*

The section was seen as going against the common-law principles of fairness and equity and was further criticized for being too harsh and risked being viewed as one that imposed fear even to a complainant with a genuine complaint.

Taking into account that most Kenyans, including those who have gone to school, do not understand legal issues, one may be persuaded to argue that a false allegation may include where an accused has been acquitted, erroneous as it may be or where a case is dismissed on a technicality. The amendment of this section is therefore a major achievement in advancement of women's rights in the fight against SGBV.

- **The Sexual Offences Act: Omissions And Ambiguities**

Sexual offences leave a very bad taste in the mouths of the victims and of their close relatives. To some, unless properly counseled, they may leave permanent emotional scars. These scars may affect not only how they relate with members of the opposite sex, but also how they may react to ordinary life circumstances. They may at all times have an axe to grind with the society. But why not the rapists, defilers and those involved in sodomy are a product of the society.

Those of us who have come into contact with victims of sexual offences know very well how traumatizing the offences may be. Doctors, nurses, police officers,

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magistrates and counselors have tales to tell. The only victim we may not be able to tell if it's traumatized and if so the effect of such trauma is an animal in cases of bestiality. How low can a man sink In this case a man means the male? I am tempted to describe him as an animal but I'll be falsely accusing animals. In the animal kingdom, defilement does not exist except in only one animal; the stoat. However, in the case of this animal the defilement is not meant for pleasure but for procreation and ensuring that one's lineage does not become extinct.

It was against this background that the sexual offences Act, was mooted and eventually passed by parliament.

While the bill was still under debate in parliament, the said debate was carried out as if there was war between the male and the female. The bill was dismembered and some sections were introduced that at a glance appear to be good but on scrutiny, they don't make sense at all.

Inspite of the flaws the Act was enacted with the notion, in my opinion, in that its better half a loaf than none at all.

I'll endeavor to point out the short comings that may need to be rectified so as to make the Act workable.

The constitution of Kenya is the supreme law of the country and section 3 provides: -

This constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to section 47, if any other law is inconsistent with this constitution, this constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.

Section 47 of the constitution is on alteration of the constitution.

Section 77 (4) of the constitution of Kenya provides:

No person shall be held to be guilty of a criminal offence on account of an act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.

Provision 3 of the First schedule made under section 48 of the Sexual Offences Act in my view is unconstitutional. It provides:

Any proceedings commenced under any written law or part thereof repeated by this Act shall, so far as practicable, be continued under this Act.

In my view, the import of this provision is to have the sentence to be meted out be the one prescribed under the Sexual Offences Act, the then existing cases or offences committed before the repeals of the sections of other written laws, would have been tried under section 23 (3) [d] and (e) of Interpretation and General Provisions Act, Cap 2 laws of Kenya. This section provides; -

23(3) Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not-

(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and

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any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealed written law had not been made.
This legal position was recently clearly stated in the case of **Christopher MwangangiKatumo v R [2007] e KLR Court of Appeal at Nairobi.** The brief facts were as follows: -

On September 18 2003, the appellant was arraigned before the Thika Chief Magistrate's Court on a charge alleging one count of defilement of a girl under the age of 16 years and an alternative count of indecent assault on a female contrary to sections 145(1) and 144(1) of the Penal Code (Cap. 63) respectively. The particulars of the offence in respect of the first count stated that the offence had taken place on diverse dates between December, 2002 and August, 2003.

As at December 2002, section 145(1) of the Penal Code provided that any person who unlawfully and carnally knew any girl under the age of fourteen years was guilty of a felony and was liable to imprisonment with hard labour for 14 years together with corporal punishment. However, by virtue of the Criminal Law (Amendment) Act 2003 (Act No. 5 of 2003), which came into force on 25th July, 2003, the section was amended to provide; Any person who unlawfully and carnally knows any girl under the age of sixteen years is guilty of a felony and is liable to imprisonment with hard labour for life.
The appellant was tried and convicted on the charge of defilement and on March 7, 2005, a probation officer's report was presented to the trial court. The court later placed the appellant on probation for three years.

On 15th May, 2005, Lesiit J issued a warrant of arrest against the appellant and on 6th April, 2005, he was brought before her. The record of the proceedings only showed that the Court had issued an order on revision stated to be made under sections 362 and 364 of the Criminal Procedure Code (Cap. 75). By that order, the sentence of probation for three years imposed on the appellant was set aside and substituted with a sentence of imprisonment for 15 years.
The appellant appealed against the decision.
Held:
Under the Criminal Procedure Code section 364(2), it is provided that an order under that section should not be made to the prejudice of an accused person unless he has had an opportunity of being heard in his own defence. As he not been given an opportunity to address the High Court, the appellant had been prejudiced. From the evidence, it was clear that when the appellant had sexual intercourse with the young complainant, the law talked of a girl under the age of fourteen years so that in framing the charge, it was incorrect to say that the appellant or any other person

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could be charged with defilement of a girl under the age of 16 years prior to 25th July, 2003. The charge as laid was therefore defective.
Appeal allowed, High Court's order on revision set aside, appellant's conviction and order of probation set aside, appellant to be released from prison.

Under the sexual offences Act, 2006, the word **penetration** means the partial or complete insertion of the genital organs of a person into the organs of another person.
Genital Organ have been interpreted as follows: -
'includes the whole or part of male or female genital organs and for the purposes of this Act includes the anus;
According to Collins Concise Dictionary **penetrate** means;

1. to find or force way into or through (something) piece,
1. (of a man) to insert the penis- into the vagina of (a woman).

It's my contention therefore that the definition given to the word penetration in the Sexual Offences Act, 2006 is wrong for it assumes that a female's genitalia can penetrate that of a male which in reality is an impossibility.

Was this erroneous definition included so as to appease the male legislators who argued, and rightly so, that a male can also be raped this word need to be re-defined to only encompass what is possible. If a woman is charged with an offence of rape she will definitely be acquitted on a technicality for it will be so easy to prove that her genitalia did not at all penetrate that of her alleged victim.
The repealed section 144(3) of the penal code provided: -
Whoever, intending to insult the modesty of any woman or give, utters any word, makes any sound or gesture or exhibits any object, intending that the word or sound shall be heard, or that the gesture or object shall be seen, by the woman or girl, or intrudes upon the privacy of the woman or girl, is guilty of a misdemeanour and is liable to imprisonment for one year.

This section had played a very central role in checking some behavious that may not fit in the definition of indecent assault: See generally, *KIARIE WAWERU KIARIE Ag. SENIOR PRINCIPAL MAGISTRATE KIBERA LAW COURTS JULY 2007 available at kenyalaw.org/kl/index.php?id=1894*

IS THE CRIMINAL JUSTICE SYSTEM IN KENYA WELL EQUIPPED TO PROTECT WOMEN FROM GENDER-BASED VIOLENCE?
The Office of the Attorney General has formulated a Reference Manual that expounds the Act as well as setting standards and recommendations on best practices to various key service providers. The target is not only the police investigator and prosecutor,

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but also medical practitioners, civil society, gender activists and general consumers of criminal justice services.
If used well, the manual can become an important tool in achieving the objectives set out in the preamble of the Act as well as sensitizing communities through outreach programs.
This discussion paper is going to examine the shortcomings encountered by women who seek redress within the criminal justice sector as well as making recommendations to counter them. The right to development, to peace and to justice cannot be overemphasized.
Violence against women denies women peace of mind, bodily integrity and a sense of development, curtailing their contribution to development.

- **INADEQUACIES WITHIN THE NATIONAL LEGAL FRAMEWORK**

According to international practice, it is the duty of states to promote and protect human rights at the national level. In its 85th Plenary Meeting held on 20th December 1993, the General Assembly of the United Nations passed the

- **PRACTICAL PROBLEMS ENCOUNTERED WHILE ACCESSING PROTECTION UNDER THE SEXUAL OFFENCES ACT**

Even for those women who have a 'legitimate' right not to be raped; (because their experience of rape fall under the legislative mandate) their road to legal redress is not smooth sailing. Apart from the high cost of accessing justice, ignorance and technicality of the court process, they risk falling foul to rogue police officers who may take advantage of their vulnerability to extract the 'extra pound' of flesh before they receive services.
It is unfortunate that although section 24 of SOA prohibits law enforcement officers extracting sexual favors from people who seek their services, there is no enforcing and monitoring mechanism in place to ensure compliance.
Women who seek services at the police station have get sexually attacked; harassed or simply forced to give bribes in order to receive services. Take the case on Sarah, a woman who had complained against her estranged husband for assault. Every time the case came for hearing it got adjourned. When she made inquiries from the prosecutor, she learnt that the magistrate was waiting to be 'seen'. The prosecutor asked for her mobile number and she began to receive very seductive messages from the trial magistrate. He wanted to have sexual relations with her and at one time told her that her case would not 'go' anywhere unless she complies. Although the matter was referred to police for investigations, nothing happened. They alerted the rogue magistrate who stopped sending the offensive messages. They also claimed that they did not have the technical know-how to extract the previous messages from Sarah's phone. In the end, the matter fizzled to oblivion after the case got transferred to another court. The trial magistrate later got disciplined by getting a transfer to a remote area, where it is feared, he may be continuing his wayward ways against defenseless, disempowered and ignorant women.

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At the worst, a woman who is a victim of violence also risks being victimized under section 38 of the SOA which criminalizes the offence of making false allegations. Many police investigators and prosecutors are categorical that they would not hesitate to charge complainants in sexual offences case if the trial magistrate failed to place an accused on his defense. To them failure of a prosecution case at this stage showed that the complainant had given false allegations. The police need to be disabused from this hackneyed interpretation of section 38. They should know that a criminal prosecution can flounder for other reasons. Sometimes a crucial witness such as a doctor can fail to appear in court and exhibits can get misplaced.

Another problem facing women in Kenya in their quest for justice is lack of specialization and sensitization of police investigators and prosecutors. Police prosecutors carry out most prosecutions before subordinate courts where most sexual offences are prosecuted. State counsels who are trained lawyers handle the more serious crimes like murder and treason in High court.

Many factors contribute to the high rate of acquittals in sexual offences. In a system where access to justice is based on dichotomies of whether one is rich or poor, man or woman, health or sick; with the first variable almost always getting the upper hand, women are bound to suffer.

This makes nonsense the doctrine of equality and non-discrimination in justice, which is the cornerstone of international, regional and national jurisprudence.

Also heavy work loads on the part of prosecutors lead to shoddy prosecutions. In a day, a prosecutor may handle 25 cases, so he is not able to give focused attention on any particular case. Logistics deny him research facilities, which put him at a disadvantage when compared with sharp defense lawyers who have all the time and facilities to prepare for their cases. There is no opportunity for holding pre-trial interviews with witnesses or even visiting the scene of crime in preparation for the hearing. Most prosecutors' offices are one room affairs tucked in a corner of the court premises and sometimes it is shared between two to five prosecutors. This makes it impossible to comply with the good practices recommended to services providers in cases of violence against women [4].

- **DORMANT 'WHITE ELEPHANT' PROVISIONS**

It is laudable that the Attorney General has appointed a multi-sectoral task force that is now in the process of developing a National Policy Framework to guide in the implementation and enforcement of the SOA. Once the policy is formulated, the Attorney General will have complied with the provisions of section 46 of the Sexual Offences Act.

Unfortunately, there are many sections existing in our current legal framework, which are not yet operational for lack of regulations to make them effective. Designated officers who are mandated to formulate rules and guidance to trigger their operation have failed to do their duty.

I have in mind section 39 of SOA, which places the onus of keeping a register and a data bank of convicted sexual offenders on the registrar of the high court. Section 47

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likewise gives the implementing minister power to prescribe regulations on what is to be contained in this data bank. I am not sure such regulations have been formulated so far. Perhaps they will be included in the National Policy Framework.
Another glaring example is section 329 (A) which was introduced by a 2003 amendment of the Criminal Procedure Code. The Chief Justice is required to make rules and regulations to guide the manner in which Victim Impact Statements can be received and their use by courts. Such statements are intended to guide the court in its exercise of sentencing discretion as well as assessing damages that can be ordered against convicted accused person. Attempts by prosecutors to produce such statements in spousal battering cases get rejected because courts are of the opinion that ground rules have not been legally defined.

- **THE PROBLEM WITH CIVIL SOCIETY, NGOS AND GENDER ACTIVISTS**

Agitators for equality and justice among the justice system are ignorant about the law, the legal process and the court procedure.
Many members of civil society do not appear to know that the office of the Attorney General can help in cases where victims feel they have been short charged by first line service providers.

The SOA has achieved the following:

- Expanded definition of sexual offences i.e. rape and defilement including both sexes.
- Introduction of 14 new sexual offences.
- Created minimum and maximum mandatory sentences
- Enhanced and stiffer penalties for sentences for sexual offences
- Limited requirement on burden of proof for the victims.
- Establishment of register of sexual offenders at the high court.
- Setting up of a DNA data bank and a paedophile registry.

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