

# **The effects of enforcing the Kenyan Law on defilement on boy child with reference to consensual sex between adolescents.**

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## **Abstract**

The Sexual Offences Act was enacted in Kenya by Parliament in 2006 to ensure accountability for sexual violence, punish offenders with an effort of preventing such offenses and to protect all persons from unlawful sexual acts. It prescribes stiff penalties in offenses against children and introduce minimum sentences which deter sexual violence. This was as a result of the inadequacy of the existing legislature in enabling survivors of sexual violence to access justice. The Sexual Offences Act defines defilement to mean the commission of the act which causes penetration with a child (a person below the age of 18 years). There were high expectations with regards to reduction of sexual offense cases after the enactment of the act. An audit carried out on the criminal justice system in 2016 established that sexual offences (defilement) made up to thirty percent of the cases handled by magistrates. The period of adolescence is characterized by rapid physical, cognitive and social changes including sexual and reproductive maturation, gradually building up to assume adult behaviors and roles. It is a dynamic transition period marked by challenges to their health and development due to their relative vulnerability and pressure from society, including peers to adopt health risk behavior. A continuous focus on girls as the primary victims of child sexual abuse means that much of the research and literature in the field is heavily skewed towards investing and understanding the long term inputs of such abuse on women and much less on men. While laws rightfully seek to protect minors against sexual abuse, criminalizing consensual conduct between adolescents does not achieve this objective and is often based on wrongful stereotypes about adolescents being unable to make decisions and demonstrates misguided view that boys are the offending party despite the language of the statute being gender neutral. This article analyses the trauma encountered by the Kenyan law on defilement, focusing specifically on consensual sex between adolescents. It aims at establishing how adolescents are affected by implementation of the Sexual Offences Act with the current justice system that allows only one minor (male) to be charged and not the other (female). It also argues that punishment cannot be justified in the case of minors who engage in “experimental” sex with each other as victims are found to undergo traumatic effects such as mental, emotional, behavioral, threats to self-identity and develop significant impression management strategies as a way of saving their face.

**Key words: Sexual Offence Act, adolescents, consensual sex.**

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Date of Submission: 28-10-2021

Date of Acceptance: 11-11-2021

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## **I. BACKGROUND OF STUDY**

The period of adolescence is characterized by rapid physical, cognitive and social changes including sexual and reproductive maturation, gradually building up capacity to assume adult behavior and roles. It is a dynamic transition period marked by challenges to their health and development due to their relative vulnerability and pressure from society, including peers to adopt health risk behavior. Cultural practices, social norms, laws stigmatizing adolescent sexuality, criminalizing sexual conduct and limiting access to information on sex and sexuality during this transition period has had a negative impact on adolescent development. In 2014, Kenya Demographic and Health Survey found that slightly more than half of Kenyans engage in sex by age 18. Fifteen percent of women of ages of 20 – 49 first had their sexual intercourse at the age of 15 and fifty percent had it by the age of 18. Twenty two percent of men aged of 20 – 49 first had their intercourse by age of 15 while fifty six percent had by age of 18. This indicates that adolescents engage in sex before the age of 18. While a portion of this includes coerced sex, many adolescents have consensual sexual intercourse among themselves as part of a common phase during this period of life which includes experimentation and curiosity to understand their sexuality. Non coercive and non-exploitative sex refers to sexual conduct that is performed out of desire, voluntarily and without consent, without force, duress or compulsion. Adolescents involved in non-coercive

and non-exploitative sex with one another before the age of 18 expose themselves to the threat of criminal sections under the sexual offense act. This is because the sexual offence act does not make any distinction between adolescent minors and sexual acts between adolescent minors and adults, all of which are classified and/or have been interpreted as criminal offenses.

The period of adolescence is characterized by rapid physical, cognitive and social changes including sexual and reproductive maturation, gradually building up to assume adult behaviors and roles. It is a dynamic transition period marked by challenges to their health and development due to their relative vulnerability and pressure from society, including peers to adopt health risk behavior. A continuous focus on girls as the primary victims of child sexual abuse means that much of the research and literature in the field is heavily skewed towards investing and understanding the long term inputs of such abuse on women and much less on men. Adolescents are unable to comprehensively realize their sexual and reproductive rights in Kenya. This is partly because the Sexual Offence Act criminalizes all sexual acts including non – coercive and non – exploitative sexual conduct between adolescents. The problem is magnified by the judicial decisions that while acknowledging the discomfort of sentencing adolescents who have engaged in non- coercive and non – exploitative sexual conduct, affirm the position of the law. Criminalizing non- coercive and non-exploitative sexual conduct between adolescent minors creates numerous challenges. For example, it punishes them for what is a natural part of development and stigmatizes adolescent sexual conduct that is sexual activity in which both parties desire to have sex without coercion of force. It also results in adolescent males being imprisoned and in some cases ending up with a permanent criminal record for engaging in consensual sexual conduct with other adolescents. While the male adolescents are imprisoned, some of the female partners bear other consequences of the sexual conduct like unwanted pregnancies and unsafe abortions. The blanket criminalization of adolescent consensual sexual intercourse reflects a punitive rather than evidence – based approach to exercise rights, and inevitably makes adolescents concerned about raising the topic of their sexuality with anyone especially adults who they believe may report them to the police. Defilement occurs in different contexts, as in the context of two adolescents having consensual sexual intercourse, thus, provision of a mandatory stiff punishment for all sexual relations with adolescents would be inappropriate. A candid national conversation on this sensitive yet important issue, implicating the challenges of maturing, autonomy, protection of children and the need for proportionality is long overdue.

In 2016, the National Council for administration of Justice commissioned a study whose aim was to establish how adolescents are affected by the Sexual Offence Act. The study found that adolescents were imprisoned for engaging in non – coercive and non – exploitative sexual conduct with one another. Following this study, in recognition of the unjust consequences of the application of the Sexual Offence Act against adolescents and its impact on adolescent development, the National Council for the Administration of Justice proposed among other proposals, to amend the law on sexual offenses by lowering the age of consent to sex. To date this law has not been enacted. The various social and political issues have been raised concerning the proper way to grant autonomy to adolescents while still protecting them from sexual molestation. Several questions have been raised as to whether adolescents who have consensual sexual relations with their fellow adolescents should be prosecuted jointly or separately and which parameters should be applied to determine the most culpable party.

### **Possible effects**

The Kenya's sexual offences law is unjust to boys, there is an obvious injustice of filling up the jails with teenage offenders who get intimate with fellow teenagers as they experiment in their adolescence. The effects include, worsening of chronic conditions or other elements due to lack of care or resources, poor or unsuitable environment, overcrowding, rigidity of prison rules, conflict between prison practices and health needs. Behavioral, psychological and developmental adaptations to prison life which do not translate well upon re-entry into the community and family. This includes the inability or unwillingness to express emotions, hyper – vigilance and increased aggressiveness. Problems upon re-entry including stigma, breakdown of relationships and further exclusion, disintegration of ones sense of identity and roles in the society. The fear of being judged and rejected because of stigma which arises from when he's called a "defiler". The victims is exposed to emotional stress in the form of shame, embarrassment, anger, regret and estrangement from his peers. Negative psychological, emotional and somatic problems such as vulnerability, anxiety, fear and vengeance.

They undergo emotional changes such as irritability and increased tension and anxiety among the families. Boys are exposed to severe trauma that leads to withdrawal, abandonment, fright, fear, feeling of hopelessness as a result of victimization as the law leaves more mistrusted and suspicious of others around them. It brings about parental distress, depression and social strain on family relationships and well-being. Numerous potential consequences that can last a lifetime with serious adverse effects on health, education, employment, crime and the economic well-being of individuals, families, communities and societies. Development of long time psychological and social adjustment problems that can carry over into adulthood and

affect married life and parenthood. Sexual victimization, dating and abuse, fear of intimacy, marital dissatisfaction, spousal violence and marital conflict.

The lack of options for keeping a young person safe in custody are also compromised in such a way that communicable diseases and the behaviors that spread them are commonly developed within the prison environment. Ironically, while authorities were trying to provide protection, the young men's safety ended up being compromised. Firstly, the victims are placed amongst a group of pedophiles which led to sexual assaults and such pains of imprisonment ultimately contribute to an erosion of self. Secondly, being in prison reflects a lifetime of exclusion, marginalization and oppression. The victims are confined in filth conditions and corruption, without adequate food or medical care, with little or nothing to do. Some have suffered open wounds or injuries inflicted by objects, cutting, piercing or stubbing arising manual work, prisoner-prisoner or prisoner-police.

Unresolved trauma leads to anger issues and substance abuse as a result of abuse from boys of similar age and their keepers. The outcomes of trauma depend greatly on whether victims are provided with support, including comfort, reassurance and safety from others. Strong connections, with trust that others will be there for them when needed, counteract feelings of insecurity, helplessness and meaninglessness. Mental health issues resulting from the trauma are also common, for example, one participant specifically referred to his own suffering as 'post-traumatic stress. By far, the most common issue that participants identified as coming from within themselves was uncontrollable anger. While the participants were not screened for mental health disorders as part of this study, previous research has shown mental health problems are prevalent in young inmates, with nearly one quarter of incarcerated youth meeting the criteria for post-traumatic stress disorder (Dierkhising et al. 2013). Furthermore, extreme trauma during childhood increases the risk of serious problems such as oppositional disorder, depression, anxiety, risk taking and substance abuse, which in turn often leads to reactive aggression (Ford et al. 2012).

Untreated anger or mental health issues, combined with substance use, commonly led to a 'brain snap' while under the influence of substances. Participants explained how they put up with a certain amount of provocation or frustration, but reached a point where they just exploded, and violently lashed out at their oppressors while in prison. Supporting this, evidence shows that participants with highly impulsive or antisocial profiles, tended to act without forethought. Instead, they impulsively snap leading to uncontrollable violent behavior, with the immediate objective being to reduce or eliminate the seemingly overwhelming threat (Declercq et al. 2012).

## **II. METHODOLOGY**

Interviews were conducted using an unstructured 'research yarning' approach of listening, talking and observing. Participants were initially asked their age, marital status, education level and occupation prior to prison. Using a checklist to guide the interviews, participants were then asked to: "Tell us your story - how did you end up in prison?" This enabled the disclosure of rich accounts of their experiences in a non-threatening way.

### **Challenges and Limitations**

The Judiciary did not have comprehensive information about the number of pending cases under Sexual Offence Act, types of offence, age gender of offender nor complainant. It was therefore not possible to get information from prisons and probation department on the number of child offenders found guilty under the Sexual Offence act and serving sentences in those facilities. An additional limitation was lack of full control over selection of the participants within the Centres with inmates initially recruited by the residential accommodation manager.

## **III. CONCLUSION**

This study does not in any way seek to challenge the constitutional validity of sections 8(1) and 11(1) of the Sexual Offence Act in so far as those provisions criminalize adults who engaged in acts of sexual penetration or indecent acts with children. It does not also intend to challenge the constitutional validity of those statutory provisions, to the extent that they criminalize those who engage in acts of sexual penetration or of indecent acts with other children, in a way that is non-consensual, forceful, violent or exploitative. It instead deals only with the consensual sexual activity between minors and advocates for different approaches in combating sexual offenses other than criminal sanctions. From this study, the following conclusions can be drawn:

- (i) The Sexual Offence Act of 2006 and its application promoted disproportionate prosecution of the boy child in incidences of consensual sexual acts between the minors, even when it was clear that the female child was a willing participant in the sexual acts.

- (ii) The Sexual Offence Act also fails to meet the ends of justice as the number of underage boys held in remand or after they were jailed for defiling girls aged of 14-17 is on the rise.
- (iii) The victims are found to undergo traumatic effects such as mental, emotional, and behavioral, they suffer threats to identity and develop significant impression management strategies as a way of saving their face.
- (iv) A lack of support for the trauma, along with maladaptive coping methods, commonly led to uncontrollable anger, and possible stress disorders for these inmates. Consistently, alcohol and illicit drugs were used to mask the psychological pain of the trauma.

#### **Recommendations and future research**

- (i) In light of these findings, early prevention and intervention should target the detection and treatment of consequences of trauma. To aid recovery from trauma, it is important to be able to come to terms with it, make sense of it, and put it into perspective using resources such as supportive family and community networks. Furthermore, early intervention is vitally important for those who have suffered trauma and traumatic loss. Leaving a traumatized person untreated may result in years of negative behavior becoming entrenched and difficult to treat later in life. In particular, it is essential that the needs of traumatized youth be met.
- (ii) If the state therefore intends to delay sexual debut among the adolescents, it should not do so by use of criminal law but rather by deliberate campaign of counselling, education and reproductive health services.

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Dr. Makhanu Mutenyo Maxmilla. "The effects of enforcing the Kenyan Law on defilement on boy child with reference to consensual sex between adolescents." *IOSR Journal of Humanities and Social Science (IOSR-JHSS)*, 26(11), 2021, pp. 52-55.