



LEGAL TREATMENT OF CONSENT IN SEXUAL OFFENCES IN KENYA

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TABLE OF CONTENTS

1.0	INTRODUCTION.....	3
2.0	SEXUAL OFFENCES IN KENYA.....	3
3.0	CONSENT IN SEXUAL OFFENCE CASES.....	5
3.1.	General Definition of Consent	5
3.2	Consent in the <i>Sexual Offences Act</i>	5
3.3	Definition of Consent in the <i>Sexual Offences Act</i>	6
3.4	Evidential Presumptions about Consent.....	6
3.5	Conclusive Presumptions about Consent.....	8
3.6	Intentional and Unlawful Acts	9
3.7	Offences where Consent is not Expressly Provided For.....	10
4.0	CONSENT IN RAPE CASES.....	10
4.1	Definition of Rape.....	10
4.2	Consent in Rape.....	11
4.2.1	Withdrawal of Consent.....	12
4.2.2	Proof of Lack of Consent.....	13
4.3	Customary Law and Consent in Rape Cases.....	13
4.4	Marital Rape.....	16
4.4.1	Marital Status and HIV.....	16
4.4.2	Consent in Civil Marital Cases.....	16
4.4.3	Customary Law and Marital Rape.....	17
5.0	CONSENT IN DEFILEMENT CASES.....	17
5.1.	Definition of Defilement.....	17
5.2	Consent in Defilement cases.....	18
5.2.1	Proof of Age in Defilement Cases.....	19
5.2.2	Age of Consent to Marry.....	20
5.3	Customary law and consent in defilement cases.....	20
6.0	CONSENT IN INCEST CASES.....	21
6.1	Definition of Incest.....	21
6.2	Consent in Incest Cases.....	22
6.3	Customary law and consent in incest cases.....	23
7.0	CONSENT IN SEXUAL ASSAULT CASES.....	23
7.1	Definition of Sexual Assault.....	23
7.2	Customary Law and Consent in Sexual Assault Cases.....	23
8.0	CONSENT IN INDECENT ACT CASES	24
8.1	Definition of Indecent Act.....	24
8.2	Customary Law and Consent in Indecent Assault Cases.....	25
9.0	CONCLUSION.....	25
	CASES.....	27
	STATUTES.....	27
	REFERENCES.....	28

1.0 INTRODUCTION

There is a high prevalence of gender-based violence in Kenya. Sexual violence is one of the manifestations of gender-based violence. Sexual violence takes many forms, including rape, sexual assault, defilement, incest, and many others. This type of violence is a reflection of gender inequality in a society where men exercise power over women and girls. The *Sexual Offences Act*, 2006 was passed in order to deal with the problem of sexual violence. Consent plays an important role in the determination of guilt in sexual offence cases. This is because lack of consent is an essential element in many of the offences under the Act. This paper examines the legal treatment of consent in sexual offences in Kenya. In particular, it discusses the provisions of the *Sexual Offences Act* relating to consent as well as emergent jurisprudence from the Kenyan courts on this issue. The paper begins with a general examination of the issue of consent under the Act. It then explores the treatment of consent in specific offences such as rape, defilement, incest and indecent acts. At the end of each section, the paper also highlights the treatment of consent under customary law, including any conflicts between customary law and statutory law in Kenya. It should, however, be emphasized that customary law is dynamic and flexible and, as reflected in traditional practices, is liable to change over time. Underlying this paper is a concern for the legal protection of women and girls from sexual violence, with a view to realizing their rights to freedom, dignity, equality and non-discrimination.

2.0 SEXUAL OFFENCES LAW IN KENYA

The law on sexual offences in Kenya is governed by the *Sexual Offences Act*.¹ This Act was enacted in 2006 to delineate the acts that qualify as sexual offences and to establish a means of punishing offenders, in an effort to prevent such offences and to protect all persons from unlawful sexual acts. Prior to the enactment of the Act, sexual offences were provided for under the *Penal Code*² and were categorized under offences against morality. The *Sexual Offences Act* sought to consolidate all laws relating to sexual offences and repealed most of the

*The author acknowledges with gratitude the valuable research assistance of Sylvia Kangethe in the writing of this paper.

¹ No. 3 of 2006.

² Chapter 63, Laws of Kenya.

provisions in the *Penal Code* relating to sexual offences.³ The Act also creates a number of new sexual offences such as gang rape, sexual assault, sexual harassment, child pornography, and trafficking for sexual purposes among others.⁴ A notable feature of the Act is that it provides for minimum mandatory sentences for specific sexual offences, as opposed to the *Penal Code* which only provided for maximum sentences and left a lot of room for discretion in sentencing.

It should also be noted that since the passing of the Constitution of 2010, Kenya is now operating under a new constitutional dispensation which gives prominence to human rights and the principles of gender equality and non-discrimination. Some of the fundamental rights entrenched in the Bill of Rights include the rights to equality before the law, dignity of the person, and freedom and security of the person, which includes the right not to be subjected to any form of violence from either public or private sources.⁵ The Constitution provides for the right of every adult to marry a person of the opposite sex, based on the free consent of the parties and declares that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. Further, under Article 2 of the Constitution, all international treaties or conventions ratified by Kenya are now part of Kenya's law.⁶ This means that international instruments such as the Convention on the Elimination of All Kinds of Discrimination against Women (CEDAW) are now directly binding on the country. The Constitution is the supreme law of the land, and any law that is inconsistent with the Constitution, including customary law, is void to the extent of the inconsistency. The Constitution, therefore lays a solid foundation for the protection of equal rights of women and girls in Kenya, including their bodily integrity and dignity.

³ Offences relating to prostitution, abortion and homosexuality were retained in the *Penal Code*.

⁴ Other offences include compelled or induced indecent acts, indecent act with child or adult, promotion of sexual offences with a child, child trafficking, child sex tourism, exploitation of prostitution, prostitution of persons with mental disabilities, deliberate transmission of HIV or any other life threatening sexually transmitted disease.

⁵ See articles 27, 28 and 29 of the Constitution of 2010.

⁶ Article 2 of the Constitution.

3.0 CONSENT IN SEXUAL OFFENCES

3.1 General Definition of Consent

Consent is defined in *Black's Law Dictionary* as the agreement, approval, or permission as to some act or purpose especially given voluntarily by a competent person. Express consent is defined as consent that is clearly and unmistakably stated. Implied consent is consent inferred from one's conduct rather than one's direct expression, while informed consent is a person's agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives. Consent or lack thereof is an important element in sexual offences. Under statute, this element is expressly required in most sexual offence cases in order to find an accused person guilty of the offence alleged. Generally speaking, Kenyan law does not prohibit consensual sexual relations between adults, except in some exceptional cases, such as incest. It is therefore of utmost importance to determine in any given case whether or not there was consent on the part of the complainant. In many cases, the presence or absence of consent is often the only disputed issue in the trial of an accused charged with a sexual offence. The burden of proof in criminal cases is that the prosecution must prove its case beyond reasonable doubt. This, coupled with the fact that sexual offences attract very harsh penalties, therefore necessitates that this element of consent be determined conclusively. However, consent is a contentious issue and not easily determined as it often involves perception, interpretation of feelings and reactions, and is a reflection of societal attitudes and values, policy considerations and gendered power relations.

3.2 Consent in the Sexual Offences Act

Under the repealed sexual offences provisions in the *Penal Code*, consent was a vital element in the offences of rape, indecent assault and incest, acts among others. However, the *Penal Code* did not provide any definition of consent and therefore it was left to the courts to determine consent in any particular case. Often the only means of determining the presence or absence of consent was circumstantial evidence, such as evidence of struggle or resistance on the part

of the victim. Judicial attitudes and assumptions then came into play.⁷ By contrast, the *Sexual Offences Act* contains extensive provisions on consent. First, the Act makes an attempt to define consent. It also offers further elucidation on the issue of consent by providing for evidential and conclusive presumptions about consent. Conclusive presumptions are irrebuttable, while evidential presumptions are rebuttable through production of evidence to disprove the presumption. The presumptions were added to the Sexual Offences Act with the aim of improving conviction rates for sex 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. These presumptions are discussed below.

3.3 Definition of Consent in the Sexual Offences Act

Section 42 of the *Sexual Offences Act* provides that:

“a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice”.

Although the section does not elaborate on the meaning of choice or freedom, this definition appears to emphasize the importance of free-will and the ability to make a decision as to whether or not to take part in the sexual activity at the time in question, in the absence of coercion or deceit. There is also no definition of capacity. However, it may be assumed that capacity here refers (as it usually does in law) to age and mental ability. The question is whether a complainant is of age to and has the mental ability to make a choice about whether or not to take part in the sexual activity at the time in question.

3.4 Evidential Presumption about Consent

Section 44 of the *Sexual Offences Act* provides for evidential presumptions about consent in sexual offences. Section 44(1) provides that if in proceedings for an offence under this Act, it is proved (a) that any of the circumstances specified in subsection (2) existed and that the accused person knew that those circumstances existed, then the complainant is to be taken not to have consented to the act unless sufficient evidence is adduced to raise an issue as to whether he or she consented, and the accused is to be taken not to have reasonably believed

⁷ For instance in *Maina v. Republic* [1970] EA 370 the court stated that in sexual offence cases, girls and women

that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he or she reasonably believed it.

The circumstances specified in subsection (2) are that:

- a) Any person used or threatened violence against the complainant at the time of the act or immediately before the first sexual activity began;
- b) Any person caused the complainant to fear at the time of the act or immediately before the first sexual act, that violence was being used or would be used immediately against another person;
- c) The complainant was, and the defendant was not, unlawfully detained at the time;
- d) The complainant was asleep or otherwise unconscious at the time;
- e) The complainant was unable to communicate consent to the defendant because of a disability.⁸
- f) Any person administered or caused the complainant to take a substance, without the complainant's consent, which was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act.⁹

Section 44 places an evidential burden upon the defendant to adduce sufficient evidence to raise an issue as to whether the complainant consented and whether or not the accused reasonably believed the complainant consented. An evidential burden differs from the legal burden of proof. In the English case of *Sheldrake v. DPP*,¹⁰ Lord Bingham stated as follows:

“An evidential burden is not a burden of proof. It is a burden of raising, on the evidence in the case, an issue as to the matter in question fit for consideration by the tribunal of fact. If an issue is properly raised, it is for the prosecutor to prove, beyond reasonable doubt, that that ground of exoneration does not avail to the defendant.”

While expressing support in the House of Lords for the introduction of evidential presumptions in the UK Sexual Offences Act, 2003¹¹ Baroness Scotland of Asthal stated:

are wont to tell an entirely false story which is very easy to fabricate, but extremely difficult to prove.

⁸ The nature of disability (whether physical or mental) is not specified but would include, for instance, where a complainant is unable to communicate verbally or to nod or shake their head.

⁹ This is a recognition of drug or alcohol-induced rape.

¹⁰ 2005] 1 AC 277 at 289.

¹¹ See section 76 which is virtually identical to section 44 of the Kenyan Sexual Offences Act.

“In order for these presumptions not to apply, the defendant will need to satisfy the judge from the evidence that there is a real issue about consent that is worth putting to the jury. The evidence relied on may be, for example, evidence that the defendant himself gives in the witness box, or evidence given on his behalf by a defence witness, or evidence given by the complainant during cross-examination. If the judge is satisfied that there is sufficient evidence to justify putting the issue of consent to the jury, then the issues will have to be proven by the prosecution in the normal way. If the judge does not think the evidence relied on by the defendant meets the threshold, he will direct the jury to find the defendant guilty.”¹²

Under section 44 of the Kenyan Sexual Offences Act, in order for the presumptions to come into effect, the prosecution must in the first instance through tendering of evidence prove the existence of the circumstances listed in subsection (2) and the accused’s knowledge of those circumstances. Once the prosecution does so, the accused has to adduce sufficient evidence to raise a reasonable doubt, on a balance of probabilities, as to whether the complainant consented and whether or not the defendant reasonably believed the complainant consented. Where the defendant can provide evidence to support a claim that they did not know of the circumstances in question, the presumption will not apply, and the burden will return to the prosecution to prove its case beyond reasonable doubt. If, however, the accused does not submit sufficient evidence to raise an issue, the court will itself have to convict the accused, as there is no jury system in Kenya.

This is a complex area of law that requires elucidation by the Kenyan courts. In England, it has been acknowledged that the scheme of presumptions is not working well due to its complexity and that the presumptions are not often used in practice.¹³ Unfortunately, the Kenyan courts have not made any pronouncements on evidential presumptions in relation to sexual offences.

3.5 Conclusive Presumption about Consent

Section 45 of the Act provides for conclusive presumption about consent in sexual offences. This means that the presence of certain circumstances will give rise to a conclusive

¹² Hansard HL, 17 June 2003, col 670.

¹³ Catherine Elliot & Claire de Than, “The Case for a Rational Construction of Consent in Criminal Law” (2007) 70 *Modern Law Review* 225 at 243; Office for Criminal Justice Reform, A Consultation Paper, *Convicting Rapists and*

presumption that there was lack of consent. Subsection (1) provides that if in proceedings under this Act it is proved that the accused person committed any offence and that any of the circumstances specified in subsection (2) existed, it is to be conclusively presumed that the complainant did not consent to the commission of the sexual act in question; and that the accused person did not believe that the complainant consented to the act. These circumstances are:

- a) The accused person intentionally deceived the complainant as to the nature or purpose of the act complained of; or
- b) The accused person intentionally induced the complainant to consent to the act complained of by impersonating a person known personally to the complainant.¹⁴

A conclusive presumption is an irrebuttable presumption which requires the jury to find the presumed fact upon proof of the basic fact, even if the opposing party introduced rebutting evidence. Once the basic fact is proved, the presumed fact is also deemed to have been proved. In the context of the Kenyan Sexual Offences Act, where the where the circumstances specified in sub-section (2) are proved, then the trial court has to arrive at a finding that the complainant did not consent, and that the accused did not believe that the complainant consented. No evidence will be admitted to rebut the presumption, and the court must find the accused guilty.

It should be noted conclusive presumptions do not constitute a shift of the onus of proof from the prosecution to the accused. Such presumptions merely operate as rules of substantive law to remove from the offence the need to prove absence of consent or mens rea as to it, and would therefore not be incompatible with the presumption of innocence,¹⁵ such as contained in Article 5 (a) of the Constitution of Kenya, 2010. However, these presumptions apply in relatively few cases and Kenyan courts have not made any pronouncements on their operation in relation to sexual offences.

Protecting Victims – Justice for Victims of Rape, 2006 at 15.

¹⁴ It should be noted that the categories of impersonation sufficient to invalidate consent are extended beyond a spouse or regular sexual partner.

¹⁵ This was so held in *Salibiaka v. France* [1988] 13 EHRR 379 with regard to Art 6 (2). of the European Convention on Human Rights.

3.6 Intentional and Unlawful Acts

Section 43 of the Act provides a definition of intentional and unlawful acts. These provisions are important as many of the offences under the Act, such as rape or sexual assault, require that the act must have been “intentional and unlawful”. The provisions are also relevant to the issue of consent as they delineate and shed light on the situations where consent is absent, such as where there is coercion or incapacity.

Under section 43 (1), an act is intentional and unlawful if it is committed -

- a) in any coercive circumstance;
- b) under false pretences or by fraudulent means; or
- c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence.

Coercive circumstances are defined to include use of force against the complainant or another person or against the property of the complainant or that of any other person, threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or 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.

False pretences or fraudulent means include circumstances where the complainant is led to believe that he or she is committing such an act with a particular person who is in fact a different person;¹¹ or is led to believe that such an act is something other than that act; or where the accused person intentionally fails to disclose to the complainant that he or she is infected by HIV or any other life-threatening sexually transmissible disease.

The circumstances in which a person is incapable in law of appreciating the nature of an act include circumstances where such a person is, at the time of the commission of such act, asleep, unconscious, in an altered state of consciousness, under the influence of medicine,

¹¹ Give example of a person being deceived that the other party is married to them.

drug, alcohol or other substance to the extent that the person’s consciousness or judgment is adversely affected, mentally impaired or a child.

3.7 Offences Where Consent is Not Expressly Provided For

There are certain offences in the Sexual Offences Act where lack of consent is not expressly mentioned, but the use of the words “unlawful” or reference to other offences where lack of consent is a key element of an offence may be construed as referring to lack of consent. These offences include: attempted rape, gang rape, sexual assault, compelled or induced indecent acts, acts which cause penetration or indecent acts committed within the view of a family member, child or person with disabilities, indecent act with a child or adult, promotion of sexual offences with a child, child trafficking, child sex tourism, child pornography, exploitation of prostitution, trafficking for sexual exploitation, prostitution of persons with mental disabilities, deliberate transmission of HIV or any other life threatening sexually transmitted disease.

4.0 CONSENT IN RAPE CASES

4.1 Definition of Rape

Section 3(1) of the *Sexual Offences Act* defines rape as follows:

A person commits the offence termed rape if -

- a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
- b) the other person does not consent to the penetration; or
- c) the consent is obtained by force or by means of threats or intimidation of any kind.

From the above definition, the key elements of the offence of rape are the commission of an intentional and unlawful act which causes penetration with the genital organs¹² and absence of consent (or real consent) on the part of the complainant. The term “intentionally and unlawfully” has the meaning assigned to it in section 43 of the Act.¹³ The penalty for rape is a minimum sentence of 10 years’ imprisonment, which may be enhanced to life imprisonment.

¹² Genital organs are defined to include the whole or part of male or female genital organs and for purposes of this Act includes the anus: section 2.

¹³ See para. 3.6 above.

The definition of rape in the *Sexual Offences Act* is innovative as it contemplates that rape may be committed not only by male persons against females, but also by female persons against males and even against persons of the same sex. This is unlike the traditional definition of rape in the *Penal Code* where only a male person could commit rape and only a woman or girl could be raped.¹⁴ However, in the overwhelming majority of cases, rape is still an offence perpetrated by men against women.

The Act also provides for the offence gang rape to cover situations where rape or defilement is committed in association with others, as well as for attempted rape. The minimum penalty for gang rape is 15 years' imprisonment which may be enhanced to life imprisonment, while that for attempted rape is 5 years' imprisonment to a maximum life imprisonment.¹⁵

4.2 Consent in Rape

Consent is a vital element of the offence of rape. This has repeatedly been emphasized by the courts in Kenya prior to and after the passing of the *Sexual Offences Act*. In *R v. Oyier*,¹⁶ which was decided under the *Penal Code*, the Court of Appeal reiterated that lack of consent is an essential element of the crime of rape. The court stated that the *mens rea* in rape is primarily an intention and not a state of mind. The mental element is the intention to have intercourse without consent or without caring whether the woman consented or not. Where a woman yields through fear of death or through duress, it is rape and it is no excuse that she consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact. The courts in Kenya have distinguished between true consent and mere submission.¹⁸

¹⁴ Cf definition of rape in Section 139 of the *Penal Code*: "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".

¹⁵ Section 10 and 4 respectively.

¹⁶ [2008] 1 KLR (G & F).

¹⁸ See also the English case of *Olugboja* [1982] QB 320.

In ***Achoki v. R***¹⁹ the Court of Appeal held that the definition of rape under the *Penal Code* made it clear that it is the lack of consent on the part of the woman or girl that is at the core of the crime. Indeed lack of consent is so vital that even if there was an apparent consent obtained by force, personation etc, a charge of rape would still stand against the suspect. The court went on to state that a charge of rape or attempted rape must allege in its particulars that the act of sexual intercourse was unlawful and that it was without the consent of the woman or girl. As the charge in this particular case did not contain the words “unlawful” or “without consent”, it did not disclose any offence and could not be sustained. Accordingly the appellant’s conviction for attempted rape was quashed. However, the substitute charge of indecent assault was sustained.²⁰ In ***Peter Mukaba Ondu v. Republic***²¹ the High Court, in quashing a conviction of rape, found that the lower court had not considered the issue of consent in regard to how the complainant went to the house of the accused, the amount of time she spent there before “escaping” and the circumstances in which the offence was allegedly committed. Had the trial court done so, it would have arrived at a different finding.

4.2.1 Withdrawal of Consent

The complainant may withdraw consent which had initially been given at the start of the sexual activity in question. In ***Paul Nganga Kamau v. Republic***²² the appellant was convicted of rape and sentenced to 12 years’ imprisonment. The complainant testified that on the day of the incident, she met the appellant at a bar and agreed to spend the night with him for a sum of money. The appellant took her to a house and he and two colleagues raped the complainant for the whole night in turns. The complainant testified that she had withdrawn her consent at the time she had intercourse with the appellant. The court held that if it is proven that the complainant withdrew consent at any time before the sexual act, even if the complainant had initially consented, then the appellant is guilty of rape.

¹⁹ 2008] 1 KLR (G& F).

²⁰ See also *Wafula v. R*, Criminal Appeal 2005, High Court at Bungoma.

²¹ Criminal Appeal 66 of 2008, High Court at Bungoma.

²² Criminal Appeal 2004, High Court at Nakuru.

4.2.2 Proof of lack of consent

In earlier times, Kenyan courts used to insist that the complainant's evidence must be corroborated. This was borne out of the belief among judges that women and girls are inclined to tell false stories "which are easy to fabricate but extremely difficult to prove."²³ However, the courts have become less rigid and have accepted that corroboration is no longer a mandatory requirement but that the prosecution may rely on medical evidence or circumstantial evidence to prove its case.²⁴ For example, in *David Bundi Mararo v. Republic*,²⁵ the appellate court upheld the trial court's conviction of rape. In this case, the accused had waylaid the complainant on her way home, dragged her into a nearby farm and had sex with her. There was evidence that when the complainant went home, her clothes were soiled with blood and mud. She immediately told third parties what the appellant had done to her, and had no time to concoct a story against the appellant. The clinical officer confirmed that the complainant was in her menses and that would explain the blood on her clothes. The medical evidence also confirmed that the complainant had stiff neck and scratches on her face which was indicative of a struggle between the two. The court concluded that she had been forced and subdued to have sex with the appellant without her consent.

4.3 Customary Law and Consent in Rape Cases

Rape is an offence under the customary laws of the majority of communities. Where rape is committed, the husband (in case of a married woman) and the father (in case of a girl) are entitled to compensation from the family of the rapist. However, there are certain cultural practices that condone rape of women. For example, a number of Kenyan communities practice "widow cleansing". This is where a widow is obligated to undergo cleansing in order for her to be integrated into the community. Cleansing involves having sexual intercourse with a man appointed by the husband's clan, who is often a mad man. The widow usually has no choice as to whether or not to accept being cleansed or as to the man involved in the activity. Another cultural practice is wife inheritance, where a woman whose husband has died is obligated to marry her husband's brother in order to ensure that she and her children are taken

²³ *Maina v. R* [1970] EA 370.

²⁴ See *Mukunga v. R* [2002] 2 EA 482 and *Mohamed v. R* [2008] 1 KLR (G & F).

care of by her husband's family. Although in theory the wife is free to refuse to be inherited, the reality is that a woman who refuses to do so faces the prospect of social exclusion and disinheritance.

In some communities, it is permissible for a man to have sexual relations with the wife of his age-mate where the latter is not at home. The man will signify his intention to engage in such relations by leaving his spear outside the door of the woman's house. Given the nature of social relations in such communities, it is unlikely that such a woman would have real choice as to whether or not to accede to the man's advances.

These practices go against the constitutional principles of equality and human dignity and hence should be challenged as unconstitutional. Further, section 29 of the Sexual Act provides that any person who for cultural or religious reasons forces another person to engage in a sexual act or any act that amounts to an offence under this Act is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than ten years. This section prohibits engaging in sexual acts ostensibly for cultural or religious purposes without the consent of the other person. This means that culture or religion cannot be used as an excuse for committing acts which would otherwise be offences under the *Sexual Offences Act*. However, the section is rarely prosecuted.

4.4 Marital Rape

Marital rape is any case where a person uses violence or the threat of violence to force his or her spouse to have sex. Marital rape is as common as other forms of rape. However, in Kenya, although rape is a serious criminal offence punishable with severe penalties, there is no legal protection from rape within marriage.²⁵ Section 43 (5) of the *Sexual Offences Act*, which deals with the definition of lawful and intentional acts in relation to sexual offences, explicitly

²⁵ Criminal Appeal 113 of 2009, High Court at ...

²⁶ Section 43 of the *Sexual Offences Act*.

provides that the section does not apply in respect of persons who are lawfully married to each other. This is effectively non-recognition of marital rape as an offence.

The law, including judicial opinion, reflects the widespread cultural stereotype that marriage confers upon men presumed rights of sexual access to their wives.²⁷ This position was exemplified by Lord Hale's proposition, known as the Lord Hale doctrine, as follows:

“But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.”

This effectively represented a common-law marital rape exemption, under which husbands could not be accused of committing the crime of rape against their wives.²⁸ Thus marital rape is not considered real rape. What some judges seem to have difficulties understanding is that consent to sexual activity, even in an intimate relationship, is a dynamic process, which requires constant negotiation and renegotiation between the partners. It cannot be assumed to exist by virtue of the existence of an ongoing intimate relationship.²⁹ As Kameri-Mbote rightly notes³⁰, Kenyan law needs to concede to the wife's right to withdraw her consent as was upheld in the House of Lord's decision in *Regina v. R*³¹, where the court held as follows:

“The common law was, however, capable of evolving in the light of changing social and cultural developments. Hale's proposition (propounded in 1736 to the effect that a husband cannot be guilty of raping his wife) reflected the state of affairs in those respects as at the time it was enunciated. Since then, the status of women and particularly married women has changed out of all recognition... one of the most important changes was that marriage in modern times regarded as a partnership of equals and no longer one in which the wife was to be the subservient chattels of the husband... on the grounds of principle there was no good reason why the whole proposition of marital exemption to rape should not be held inapplicable in modern time.”

²⁷ Patricia Kameri-Mbote, “Violence against women in Kenya, An analysis of Law, Policy and Institutions”, International Environmental Law Research Centre, IELRC Working Paper 2000-1.

²⁸ Jennifer A. Bennice & Patricia A. Resick: Marital Rape; History, Research and Practice; Trauma, Violence and Abuse, Volume 4, No.3, July 2003, Sage Publications 228-246.

²⁹ Melanie Randall, "Sexual Assault in Spousal Relationships, 'Continuous Consent', and the Law: Honest But Mistaken Judicial Beliefs" (2008) 32Manitoba Law Journal, 144 - 181.

³⁰ Supra note 28.

³¹ [1992] 1 A.C. 599.

The Kenya Constitution of 2010 under Article 45(3) provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. This provision reinforces the above position that a marriage is a union of equal partners and so women can negotiate their rights (including sexual rights) within the marriage.

4.4.1 Marital Status and HIV

Recent research indicates that most HIV infections occur in heterosexual relationships including marriage. Under Section 26 (1) of the *Sexual Offences Act* it is an offence for a person to deliberately transmit HIV or any other life threatening STD to another person. It does not matter whether or not the parties are married to each other. The penalty for such an offence is a minimum term of 15 years' imprisonment to a maximum of life imprisonment. This is one instance where the marital status of the parties does not prevent the law coming into operation. Thus it is possible for one party in a marriage to have the other prosecuted for a sexual offence. It is immaterial whether or not the other party consented to the act.

4.4.2 Consent in Civil Marital Cases

It should be noted that although marital rape is not treated as a criminal offence, lack of consent in marital sexual relations can be considered as a form of cruelty thus constituting a ground for divorce in civil cases. In *Nandi v. Bobo*,³² the petitioner sought dissolution of her marriage on the grounds of cruelty and adultery because the respondent had assaulted her, locked her out of their matrimonial home, and forced her to have sex with him while he was drunk. The High Court found that the respondent's behaviour constituted cruelty that endangered the petitioner's life and health. The court had no hesitation in finding that in the absence of consent, sex, even within a marriage, was an act of cruelty by the respondent and hence a ground for divorce.³³

³² Nairobi High Court Divorce Cause No. 84 of 2005.

³³ Fiona Sampson, "The Legal Treatment of Marital Rape in Canada, Ghana, Kenya and Malawi – A Barometer of Women's Human Rights" (2010) (unpublished).

4.4.3 Customary Law and Marital Rape

Customary law in most cases subordinates women to their male counterparts and women are sometimes viewed as the property of their husbands. Payment of dowry is seen as a way of validating a man's right to "own" his wife and may in many instances be used as a justification of perpetrating spousal rape. This means that women have little or no say regarding conjugal rights. They are not allowed to withdraw their consent in sexual relations with their husbands. Denial of conjugal rights by either party is recognized as a ground for divorce in a customary marriage. However, there are certain instances where a woman is permitted to withhold sex from her husband, namely during menstruation, during pregnancy or shortly after childbirth or during a period of mourning. The subordinate position of wives under customary law in matters of sexual relations is inconsistent with the principles established by the Constitution.

5.0 CONSENT IN DEFILEMENT CASES

5.1 Definition of Defilement

Defilement is defined by section 8 of the *Sexual Offences Act* as the commission of an act which causes penetration with a child. "Child" has the meaning assigned to it in the Children Act³⁴, that is a person below the age of 18 years.³⁵ There are minimum penalties for defilement which vary according to the age of the child. Defilement of a child aged 11 years or less attracts a mandatory sentence of life imprisonment. The minimum sentence for defilement of a child aged between 12 and 15 years is 20 years, while that for a child between 16 and 18 years of age is 15 years. Attempted defilement is provided for under section 9 of the Act with similar penalties. The aim of these provisions is to protect young, vulnerable people in society.³⁶

³⁴ No. 8 of 2001.

³⁵ Section 2 of the Children Act. Under the *Penal Code*, the material age for defilement was 16 years.

³⁶ The *Sexual Offences Act* does not make direct provisions for defilement of persons with mental disabilities or impairment. Section 146 of the *Penal Code* prohibiting sexual intercourse with a female "idiot" or "imbecile" was not repealed by the *Sexual Offences Act* and therefore remains as law. However, see *Sexual Offences Act* sections 2 (definition of "person with mental disabilities") and section 43 (1) (a). The anomaly needs to be corrected by amending the *Sexual Offences Act* to make express provisions for this category of persons.

There is a high prevalence of defilement in Kenya. The court in **Ezekiel Cheruiyot Koros v. R**³⁷ stated that the defilement provisions were made on the realization that in our society, a girl of under the age of 18 years is either not fully mature to consent to and/or engage in sexual intercourse and is too vulnerable and requires protection of the law from those bent on engaging in immoral sexual acts.

5.2 Consent in Defilement Cases

Kenyan courts have repeatedly held that in cases of defilement it is immaterial whether the victim consented to the act of sexual intercourse or not. Consent is therefore not a defence to a charge of defilement. It should be noted that under section 43 of the *Sexual Offences Act*, children are deemed not capable of appreciating the nature of a sexual act, hence incapable of giving consent.

In **Bonu v. R**,³⁸ the appellant was accused of the defilement of a child aged 10 years. He alleged that he was involved in a love affair with the complainant and thus she was an active and willing participant to the sexual relations. However, the court stated that “[a] minor has no capacity in law to give informed consent to sexual relations, thus no matter how willing the minor may have been, any and all acts of sexual intercourse with persons proved to be below the age of 18 years amount to an offence.”³⁹

Similarly, in **Phillip Kipkoech Chepkwony v. Republic**⁴⁰ the appellant was convicted of defilement for taking the complainant to the forest and forcefully having sexual intercourse with her. He appealed on the ground that the complainant was his girlfriend. The Court dismissed the appeal on the ground that sex with any girl younger than 16 (which was the age of majority under the *Penal Code*) was considered unlawful, whether or not the girl consented, and the appellant had not raised the defence that he had a reasonable belief that the girl was above the age of 16 years.

³⁷ Criminal Appeal 5 of 2010 in the High Court of Kenya at Kericho.

³⁸ [2010] eKLR.

³⁹ See also *Solomon v. R* [2010] eKLR.

⁴⁰ High Court at Nakuru, 2006.

One of the issues that courts have faced is defilement offences perpetrated by a minor on another minor or where the sexual relations between the minors is consensual. The usual practice is to charge the boy with defilement and to treat the girl as the complainant, particularly where she is younger than the boy. However, this appears discriminatory and needs rationalization. Further, it often happens, as the above cases illustrate, that the accused adult and the underage complainant are in a consensual intimate relationship, and the accused may even consider the complainant his “wife”. This reflects the cultural practice where young girls are given up for marriage to older men. It is also an indication of ignorance about the legal provisions relating to sex with underage persons, including the irrelevance of consent. Further, there is a prevailing erroneous assumption that sex with young girls, who are presumed free of HIV, is safe.

5.2.1 Proof of Age in Defilement Cases

In a charge of defilement, the prosecution must prove beyond reasonable doubt that (i) there was an act of penetration and (ii) the age of the girl. Thus proof of age is vital to a conviction for defilement. One of the main challenges in defilement cases in Kenya is how to prove age in a society where a considerable proportion of births are not registered. Accused persons will often allege that at the time of committing the act, they believed the complainant to be older than 18 due to the complainant’s body appearance, dressing or manner. Acquittals often result due to failure by the prosecution to conclusively prove the age of the complainant.

In the case of **SC v. R**⁴¹ the appellant was convicted on a charge of defilement of a girl contrary to section 8(3) of the *Sexual Offences Act* and was sentenced to serve 20 years’ imprisonment. The charge provided that the appellant, being a person aged 17 years, induced the complainant, a school going girl aged 15 years, to have sex with him, making her pregnant, thus interfering with her education. The complainant testified that she did not know her date of birth but that she was 17 years old. She also testified that she had a love relationship with the appellant and they had agreed to marry and were living together. The trial magistrate had

⁴¹ Criminal Case 19 of 2009 at the High Court of Kenya at Malindi.

noted that although the complainant said she had consented to their amorous relationship and in having sexual intercourse, “*consent was immaterial in a charge of defilement*”.⁴² It was also his finding that the appellant did not indicate that he was mistaken as to the complainant’s age or that she misled him to believe that she was over 18 years. The appellant ought to have taken steps to verify her age. He therefore found the accused person guilty of defilement, convicted him accordingly and sentenced him to twenty years’ imprisonment. The main issue at the appeal was whether the complainant’s age had been determined. In the absence of proof of the complainant’s date of birth, the appeal court held that it was unsafe to presume that the complainant was a child and thus lacked ability to consent to sexual intercourse. Accordingly the appeal was allowed and the conviction and sentence set aside.

5.2.2 Age of Consent to Marry

It should be noted that there is a disparity between the legal minimum age of marriage of boys and girls under the various statutes. The Children Act categorically states that a child is anyone below the age of 18⁴³ and prohibits child marriages.⁴⁴ However, under the Hindu Marriage and Divorce Act,⁴⁵ the minimum age of marriage for boys is 18 while that for girls is 16 (provided that the girl obtains parental consent to the marriage). Similarly, under the Marriage Act,⁴⁶ the marriage registrar may grant a licence to marry where one of the parties is a minor, provided that the minor’s guardian gives written consent to the marriage. The latter provisions imply that marriage confers adult status, hence the ability to consent to sex, irrespective of age and are in direct conflict with the Children Act. There is need to harmonize the legislative provisions regarding minimum age of marriage to ensure that the law does not sanction marriages by minors.

⁴² Italics mine.

⁴³ Section 2.

⁴⁴ Section 14.

⁴⁵ Cap. 157.

⁴⁶ Cap. 150.

5.3 Customary Law and Consent in Defilement Cases:

Customary law marriages take place in accordance with the customs and traditions of the local communities in Kenya. Under this system, there is no minimum age of marriage. This is because under customary law, a person is deemed ready for marriage after he or she undergoes the relevant initiation rites or after puberty. There is a high prevalence of customary marriages with underage girls among some communities in Kenya. Often the girl is forced to drop out of school and get married to a much older man. There is also betrothal of girls as young as six years of age. The arrangements are made between the parents of the parties and the consent of the girl is not usually required. This means that all consequential acts, including sexual relations, are often without the girl's consent. Such marriages go against constitutional provisions and the provisions of the Children Act and *Sexual Offences Act*. However, there is ignorance of and detachment from such provisions, as people mostly order their personal status according to their cultural norms. There is also the myth that sex with a virgin can cure HIV/AIDs, which contributes to the high incidence of defilement.

In *Masha v. R*,⁴⁷ where the appellant claimed that he had married a 13 year old girl under his community's cultural norms, the court stated as follows:

“...[t]he excuse that Giriama customs allow the marriage of underage girls is totally without merit. Cultural norms cannot be used to excuse criminal offences. A girl of 13 years is too young to give any informed consent to sexual intercourse, much less to marriage. The court will not allow young girls to be abused under the pretext of culture.”

6.0 CONSENT IN INCEST CASES

6.1 Definition of Incest

Sections 20 and 21 of the *Sexual Offences Act* provide for the offence of incest by both male and female persons respectively. These provisions prohibit sexual relations between people who are closely related by birth. The primary object of the law of incest seems to be to prevent the transmission of congenital weaknesses of close blood relations through the conception of children. However, the inclusion of non-blood relationships among the prohibited categories

⁴⁷ [2010] eKLR.

implies a more general public policy against sexual relations between people with close familial affinity.

Incest by a male person refers to the commission of an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother. Incest by a female person covers the commission of similar acts with a son, father, grandson, grandfather, brother, nephew or uncle. The prohibited relationships extend to half-relations, such as half brothers and half sisters, as well as adoptive brothers and sisters whether through lawful wedlock or not. The penalty for incest

and attempted incest is a minimum of 10 years' imprisonment, which may be enhanced to life imprisonment where the other party is under 18. An accused person is presumed, unless the contrary is proved, to have had knowledge, at the time of the alleged offence, of the relationship existing between him and the other party to the incest.

6.2 Consent in Incest Cases

The *Sexual Offences Act* does not deal explicitly with the issue of consent in incest cases. However, it seems implied that consent is not a defence to a charge of incest, as the main issue to be determined is the relationship between the parties. Where the court is satisfied that the act was committed by parties who are within the prohibited degree of consanguinity or affinity, the court will enter a conviction of incest irrespective of whether or not there was consent. In *PMM v. R*,⁴⁸ the court cited with approval the definition of incest given in Wikipedia as follows: "Incest is any sexual intercourse between close relatives, irrespective of the ages of the participants and *irrespective of their consent*, that is illegal in the jurisdiction where it takes place."⁴⁹

⁴⁸ Cite.

⁴⁹ www.en.wikipedia.org/wiki/Incest last accessed on 12 February, 2012 (italics added).

Where incest involves a minor, the Act provides that the adult party shall be liable to life imprisonment, whether or not the act of incest was done with the minor's consent.⁵⁰ This underlines the notion that consent is immaterial in a charge of incest. It should be noted that, in Kenya, incest is closely related to defilement as the vast majority of incest cases prosecuted involve minors (mostly girls) defiled by close relatives such as fathers, uncles, cousins and grandfathers. Hence, even though theoretically it is feasible for both parties to be charged with incest, in practice it is usually the older relative who is charged with the offence. Prosecutions for incest by female persons are rare.

6.3 Customary Law and Consent in Incest Cases

Incest is a taboo among most Kenyan communities. Marriage or sexual relations between persons who are closely related by blood, including first cousins, are generally prohibited even where the parties have consented. This is in order to avoid producing offspring with congenital defects. However, there are a few communities which condone incest. This is done through the practice of "beading", whereby a man places beads around the neck of a young girl who is a close relative, signifying an intention to marry her. The young girl is effectively betrothed to the man, who later on pays dowry for her and marries her after she undergoes initiation. This practice is a violation of the rights of the girl child and also goes contrary to the *Sexual Offences Act* and the Children Act.

7.0 CONSENT IN SEXUAL ASSAULT CASES

7.1 Definition of Sexual Assault

Sexual assault is defined by section 5 of the *Sexual Offences Act* as unlawful penetration of the genital organs of another person with any part of the body of another or with an object. In essence, it constitutes penetration of the genital organs with something other than genital organs, such as penetration with a bottle or other object or even digital penetration. However, penetration by objects carried out for proper and professional hygienic or medical purposes is exempted. The offence attracts a minimum penalty of 10 years which may be enhanced to life imprisonment. The use of the term "unlawful" implies that the act must have been done

⁵⁰ There has been some controversy about whether life imprisonment is mandatory or whether the court has

without consent. Sexual assault is often used as an alternative charge to rape or defilement, and convictions of sexual assault are often entered in cases where there is not sufficient evidence to sustain a rape or defilement charge.

7.2 Customary Law and Consent in Sexual Assault

Sexual assault, like rape or defilement, is not allowed under customary law. However, in many communities in Kenya, the practice of female genital mutilation (FGM) is still carried out as part of traditional rites of passage into womanhood. This practice, particularly when forced on young girls, amounts to a violation of the constitutional right to dignity of the person and the right not to be subjected to violence. Even where the individual woman has given consent, it should be borne in mind that the woman is usually under societal pressure to conform, as non-conformity would result in denial of rights within the community, such as the ability to marry. However, it should be noted that there is a lot of advocacy for eradication of this practice and it is generally on the decline. In 2011, the Prohibition of Female Genital Mutilation Act was passed.⁵¹ The Act makes it an offence to perform FGM on another person and it is no defence that the person on whom FGM was performed consented to it, or that the perpetrator believed that consent had been given. The enforcement of the Act remains a major challenge.

8.0 CONSENT IN INDECENT ACT CASES

8.1 Definition of Indecent Act

Section 2 of the *Sexual Offences Act* defines an indecent act to mean any unlawful intentional act which causes any contact between the genital organs, breasts or buttocks of a person with that of another person, or exposure or display of any pornographic material to any person against his or her will, but does not include an act which causes penetration.

Under section 6, a person who intentionally and unlawfully compels, induces or causes another person to engage in an indecent act in circumstances where that other person would otherwise not have committed or allowed the indecent act or is incapable in law of appreciating the

discretion in sentencing.

⁵¹ No. 32 of 2011.

nature of an indecent act, including the circumstances referred to in section 43, is guilty of an offence and is liable upon conviction to imprisonment of not less than 5 years. The use of the terms “unlawful” and “intentional” as well as reference to circumstances referred to in section 43 means that the act must have taken place either without consent or in circumstances that vitiated consent, that is, under coercive circumstances, under false pretences or by fraudulent means, or in respect of a person who was incapable of appreciating the nature of the act (e.g. a child or a person with a mental impairment). Section 11A provides that a person who commits an indecent act with an adult is guilty of an offence and liable to imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand shillings or to both.⁵²

Under section 11, a person who commits an indecent act with a child is liable upon conviction to imprisonment for a term of not less than ten years. It is a defence for the accused person to prove that he or she was deceived by the child into believing that such child was over the age of eighteen years at the time of the alleged commission of the offence, and the accused person reasonably believed that the child was over the age of eighteen years. Such belief is to be determined having regard to all the circumstances, including the steps the accused person took to ascertain the age of the complainant. Although the section does not explicitly state so, it may be assumed, in line with the provisions on defilement, that the consent of the child is immaterial.

The wording in the above provisions is rather convoluted and there seems to be an overlap between sections 6 and 11A. There is need for clarity in relation to the ingredients of the offence, including the issue of consent. A charge of indecent act is usually used as an alternative to a charge of rape or defilement, and convictions of indecent act are often entered in cases where there is not sufficient evidence to sustain a rape or defilement charge.

8.2 Customary Law and Consent in Indecent Acts

Indecent acts are generally frowned upon under customary law. Men are expected to treat girls and women with respect and therefore not allowed to touch them inappropriately.

⁵² This section was inserted through an amendment, No. 7 of 2007.

However, it should be mentioned that during and after initiation rites, there is some measure of sexual liberty given to the initiates. For example, in some communities, young people are allowed to practice “ngwiko”, which involves caressing and embracing, provided they stop short of intercourse.

9.0 CONCLUSION

From the above discussion, it is clear that consent plays an important role in the determination of whether or not a sexual offence has been committed. In general, Kenyan law does not prohibit consensual sexual relations between adults; hence in a charge of rape, indecent act or indecent assault, it must be proved that there was no consent on the part of the complainant. However, the law seeks to protect the weak and vulnerable in society, particularly children, and therefore sexual intercourse with a minor is prohibited regardless of whether the minor consented. The law also seeks to preserve certain societal moral values irrespective of the consent of the parties, hence the prohibition of incest. The *Sexual Offences Act* has made a laudable attempt at defining consent and the circumstances in which consent may be vitiated. In an effort to alleviate the difficulties faced by the prosecution in proving lack of consent, the Act has imposed evidential and conclusive presumptions relating to consent which theoretically make it easier for the prosecution to prove its case. Unfortunately, Kenyan courts have not made any pronouncements on the operation of these presumptions. Consent remains a difficult issue as it is fraught with uncertainties in meaning and intention, and interpretation always depends on the specific context of the case. In Kenya, there are challenges relating to certain socio-cultural attitudes and practices which negate legislative provisions and violate constitutional rights. There is need for continued awareness raising and sensitization among the populace in order to fully realize the rights of women and girls to bodily integrity and autonomy.

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