



**A
SIMPLIFIED VERSION
OF
THE SEXUAL
OFFENCES ACT
2006**

THE JUDICIARY

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Foreword

With the increase in reported cases of rape, defilement and sodomy in Kenya, the passing of the Sexual Offences Bill into law heralds a milestone in the fight against all forms of sexual violence as there is now for the first time in Kenya a law that comprehensively seeks to tackle sexual violence by offering stiff sentences to a variety of criminal offences of a sexual nature most of which were not catered for in existing legislation.

However even with the introduction of such novel legislation there is still a long way to go in terms of achieving full implementation of the Act and effective implementation hinges on the extent to which Kenyans in general and more particularly, the Judiciary and Executive arms like the police and local administration understand and administer the law in accordance with such an Act

In an effort to demystify the provisions of the Act, the consortium facilitated the simplification of the Act resulting in the production of this guide which shall prove invaluable as a sensitization tool for awareness creation amongst various constituents such as the Police, local administration, Judiciary and the general public. The simplification of the Sexual offences Act is therefore a step towards enabling Kenyans understand the protection the Act offers and to empower them to actively interrogate administration of Justice in cases of sexual violence to ensure that the law is administered in accordance to the provisions of the Act.

We believe that creating awareness on the Act shall bring men, women and children closer to accessing justice in cases relating to sexual violence and the simplified Act is the first strategic step towards achieving this goal.

It is our sincere hope that this simplified Act shall go a long way in enriching you, the reader on the protection offered by this landmark legislation

Publishers

Centre For Rights Education and Awareness (CREAW), Cradle-The Children Foundation, Association of Media Women In Kenya (AMWIK) and The Education Centre for Democracy in Women (ECWD).

Acknowledgements

This simplified Act is an outcome of a partnership between Centre For Rights Education and Awareness (CREAW), Cradle-The Children Foundation, Association of Media Women In Kenya (AMWIK) and The Education Centre for Democracy in Women (ECWD) collectively called “the Consortium” which was supported by the Canadian International Development Agency through their Gender and Equity Support Programme to create awareness on the Sexual Offences Act 2006.

The Consortium would first and foremost like to thank the numerous civil society organizations and individuals who were instrumental in drafting lobbying and ensuring that the Sexual Offences Bill was passed into law and more specifically Hon Njoki Ndungu for her tireless efforts in championing this cause. In addition, we are thankful to Ann Gathumbi for excellent work done in simplifying the Act and we take this opportunity to especially thank Ann Njogu- Executive Director CREAW, for her profound vision guidance and support throughout this programme. We would also like to thank Michael Wachira for aptly coordinating the simplification and production of this simplified Act.

We are highly indebted to the Canadian International Development Agency who through their Gender and Equity Support Programme supported the production of this simplified Act

We thank our partners with whom we worked with closely in stepping down the Act for their commitment and dedication in creating awareness on the same and in addition thank the entire staff of CREAW for their whole hearted support which has been instrumental towards achieving the goals of the entire programme.

To all of you we say thank you!

Background and evolution of the Act-

In the past few years, Kenya has witnessed a rise in cases of sexual violence. Official reports show this increase and in the year 2005, rape was the leading crime in terms of numbers reported to the police as the table below illustrates.

Year	2002	2003	2004	2005	Total
Numbers	2005	2,308	2908	2867	10,088

It is worth noting that the figures above were only the cases reported to the police and recorded. Most cases of sexual violence are unreported to the police and therefore the numbers are much higher. A number of reasons stop the survivors from reporting. Some of these reasons are the trauma and shame associated with rape, the attitude of the police, lack of support from family and friends and blaming of the survivors by the community and sometimes their close family members and an insensitive criminal justice system.

While the Penal Code and the Criminal Law Amendment Act of 2003 had sections dealing with sexual offences, those sections were not enough to stop the increase in sexual offences especially since these are crimes that continue to grow in number and the criminals are becoming better and better at committing them.

Nowadays almost all violent crime is now accompanied by the offence of rape while the ages of survivors range from 3 month olds to 80 year olds. This has created the need for a stronger law to fight the rising cases of sexual violence. The Sexual Offences Act is a law that tries to stop cases of sexual violence in Kenya from happening and from increasing.

What does the Sexual Offences Act offer?

Purpose of the Act

The aim of the Sexual Offences Act is to explain sexual offences and make ways for prevention and protection of all persons from illegal sexual acts. The Act is a big step in the fight against sexual offences as it has strong punishment for criminals and also has sections which look at crimes which were not looked at by other laws in Kenya.

Important features of the Sexual Offences Act

- It brings together different sexual offences into one complete law instead of having many different laws which try and fight sexual violence
- The act explains in full which offences are sexual offences and also the different punishment for these offences
- The Act looks at cases of both male and female victims and so it is not a law by “women to fix men”.
- It provides for minimum sentences which is a first in Kenyan law making. This is important so that if the law says an accused person shall be jailed for 20 years, the Court **MUST** jail him/her for 20 years and not less.
- It also looks at cases of sexual offences against disabled persons and they are recognized as persons who need special protection
- It also looks at cases of sexual offences which can be committed by people who are in positions of authority or trust.
- It looks at new cases of sexual offences against children e.g child pornography.
- It also looks at cases where companies can also be charged for committing sexual offences e.g trafficking in women , child pornography etc and shows the different punishment for those companies
- It removes some of the sections in the Penal Code which were dealing with sexual offences and puts them in the Act where they have tougher punishments.
- It says that only the Attorney general can stop cases of sexual offences and so parties cannot agree to stop a case.

PART ONE - OFFENCES CREATED BY THE ACT

Section 3- Rape

Section 3 says that any person who unlawfully and purposely uses his/her private parts to penetrate another person's private parts without permission and uses force, threats, coercion or intimidation, commits the offence of rape. Such a person shall be jailed for 10 years or more and this can be increased to life in jail.

This section looks at cases where a man can be raped by another man and also by a woman

Section 4 - Attempted rape

Any person who tries to unlawfully and purposely use his/her private parts to penetrate another person's private parts is guilty of attempted rape and shall be jailed for 5 years or more and this can be increased to life in jail.

Section 5 -Sexual assault

Any person who unlawful and purposely uses an object or any part of his body (except his/her private parts) or any part of an animal, to penetrate the private parts of another person without permission is guilty of sexual assault and shall be jailed for at least 10 years and this can be increased to life in jail.

Exception

The only exception is where such penetration is carried out for proper and professional hygienic or medical reasons. Example where a doctor during examination causes penetration (with the patients permission) using medical equipment or his fingers

Section 8- Defilement

The Act says that a child is anyone below the age of 18 years. Having sexual intercourse with a child is illegal and any person who has sex with a child is guilty of the offence called defilement, even if the child agreed to have sex with that person.

The punishment for defilement shall depend on the age of the child and anyone who is found guilty of defiling a child

-
- Of 11 years and below **shall** be sentenced to **life imprisonment**
 - Between the ages of 12 – 15 years **shall** be jailed for 20 years or more.
 - Between the ages of 16-18 shall be jailed for 15 years or more

Defences to the offence of defilement

A person accused of defilement can defend himself/herself by showing that

- The child made him/her believe that he/she was above 18 years at the time
- The accused person reasonably believed that the child was above 18 years

The accused person must also show the Court what steps he/she took to find out the age of the child before having sex with that child.

Exceptions to the defence

Such a defence will not work

- Where the accused person is related to the child by blood e.g a brother cousin uncle aunt

Where a child is accused of defiling another child, the accused child shall not be punished under this Act but under the Children's Act and the Borstal Institutions Act and shall be sent to an institution for children and not to prison.

Section 9 - Attempted defilement

Any person who tries to do an act that causes penetration with a child is guilty of attempted defilement and if found guilty shall be jailed for 10 years or more.

A person accused of attempted defilement can defend himself in the same way as someone who has been accused of defilement (see section 8 above)

Section 10- Gang rape

Where two or more people rape or defile someone they shall all be guilty of gang rape and shall be jailed for 15 years or more

This is important especially because gang rape has become a notorious form of rape and that all violent crime nowadays is accompanied by the offence of rape.

Section 11-Indecent Acts

Where one person touches another person with his/her private parts, breasts or buttocks, that person is said to have committed an indecent Act

Indecent Act with a child - Where one person does an indecent act with a child that person if found guilty shall be jailed for 10 years or more

Indecent act with an adult - Where one person does an indecent act with an adult, that person if found guilty shall be jailed for 5 years or more or fined upto fifty thousand shillings or both.

Where a child does an indecent act, such a child if found guilty shall be punished under the Children's Act and the Borstal Institutions Act.

A person who rapes or does an indecent act with another person in front of

- A family member
- A child
- Or a mentally disabled person

Shall be jailed for 10 years or more if found guilty.

Defences to a charge of committing an indecent act

A person accused of doing an indecent act with a child can defend himself/herself by showing the Court that the child made him/her believe he or she was above 18 years at the time.

However this defence shall not work where the child is a blood relative to the accused person.

Section 12- Promotion of a sexual offence with a child

Manufacturing or distributing of any pornographic material that is planned to promote a sexual offence or to be used in the performance of a sexual act or to encourage or allow a child to perform a sexual act

is an offence under the Act.

Such a person who makes or distributes such pornographic materials shall be jailed for 5 years or more and if it is a company making the materials, it shall be fined Kshs 500,000/= or more.

Section 13- Child trafficking

Any person who on purpose makes or plans for a child to travel anywhere in or outside Kenya so that a sexual offence can be done to that child is guilty of child trafficking and it does not matter if the offence is done or not. Such a person if found guilty shall be jailed for 10 years or more.

Example 1. Kamau on purpose buys a bus ticket for Gitau who is a child so that Gitau can travel to Kisumu where a sexual offence shall be done to Gitau. Kamau is guilty of Child trafficking.

A person who supplies, transports, receives or keeps children in or outside Kenya so that sexual offences can be done to them is also guilty of child trafficking

Example 2: Kariuki supplies children to Njoroge. Njoroge transports the children to Olouch in Kisumu who has a house where sexual offences are done to children.

Kariuki , Njoroge and Olouch are all guilty of child trafficking.

Any company that does child trafficking shall be fined 2 million shillings or more if found guilty.

Example; Ziwani Company arranges for Suleiman to go to Mombassa to do a sexual offence with a child. Ziwani Company is guilty of promoting child sex tourism

2. Any person or company,

which prints or publishes information which would help another person do a sexual offence to a child

Or

Which organizes people to meet by pretending to be a tourism company so that sexual offences can be done to children is guilty of promoting child sex tourism

such a person shall be jailed for 10 years or more if found guilty and

such a company shall be fined 2 million shillings or more if found guilty.

Section 14- Child sex tourism

Any person or company which on purpose makes or plans for another person to travel anywhere in or outside Kenya so that the person travelling can do a sexual offence to a child, that company or person is guilty of promoting child sex tourism and it does not matter if the offence is done or not.

Example; Ziwani Company arranges for Suleiman to go to Mombassa to do a sexual offence with a child. Ziwani Company is guilty of promoting child sex tourism

2. Any person or company,

which prints or publishes information which would help another person do a sexual offence to a child

Or

Which organizes people to meet by pretending to be a tourism company so that sexual offences can be done to children is guilty of promoting child sex tourism

such a person shall be jailed for 10 years or more if found guilty and such a company shall be fined 2 million shillings or more if found guilty.

Section 15- Child prostitution

The following acts are acts of child prostitution and are punishable with a sentence of not less than 10 years.

- a) Keeping a child in a place so that the child can be sexually abused or made to do a sexual activity or to take part in any indecent exhibition or show,
- b) Giving out a child for sex or any form of sexual abuse or indecent exhibition or show,
- c) Using printed materials, tv , radio, advertisements or other similar means to make a person use a child for sexual intercourse or any

other form of sexual abuse, indecent exhibition or show,

- d) A person taking advantage of his/her influence over a child or his/her relationship with a child to give that child to others for sexual intercourse or any other form of sexual abuse, indecent exhibition or show
- e) Threatening or being violent to a child to force them to enter into sexual intercourse or any other form of sexual abuse, indecent exhibition or show
- f) Giving a child or its parents money or gifts so that the child can be used for sexual intercourse , sexual abuse or an indecent exhibition or show
- g) Owning, leasing, renting ,managing, occupying or controlling any moveable property e.g a car or immoveable property e.g a house which that person knows is used for committing sexual offences with or to a child.

Sec 16 - Child pornography

Any person who is found guilty of child pornography shall be jailed for 6 years or more or made to pay a fine of at least 500,000/-, or both a fine and imprisonment.

If a person is found guilty for a second time of child prostitution he/she can be jailed for 7 years or more without being allowed to pay a fine.

Child pornography includes:-

- a) Making any immoral book, pamphlet, paper, drawing, painting, art, picture, figure or representation for sale, hire, letting, distribution, public exhibition, circulation
- b) Bringing into Kenya any immoral object for hire, letting, distribution, public exhibition, circulation,
- c) Taking part in a business or receiving profits from a business which one knows or believes, makes, buys, keeps, imports, exports circulates or publicly shows immoral materials
- d) A person advertising in the newspaper , radio etc that he/she takes part or is ready to take part in making immoral materials

Exceptions

The Act says that certain publications and activities will not be child pornography i.e.

Publications which are made for educational and religious use and generally for the public good. **Example:** a biology text book which has pictures of naked human body is not child pornography

The Act also says that activities between two persons who are above 18 years and who agree to jointly to do such activities are not acts of child pornography.

Sec 17- Exploitation of prostitution

Any person who makes another person become a prostitute and controls or makes money from that prostitute is guilty of gaining from prostitution and can be jailed for 5 years or more or made to pay a fine of Kshs 500,000 or more or be both jailed and made to pay a fine.

Sec 19 - Prostitution of persons with mental disabilities

Any person who makes money by making a disabled person take part in prostitution is guilty of an offence called prostitution of a person with mental disabilities and shall be jailed 10 years or more

Sec 20 – 21 – Incest

A person who has sexual intercourse with someone who he/she knows is his/her

- daughter or son,
- granddaughter or grandson,
- sister or brother,
- mother/ father,
- niece / nephew,
- aunt/ uncle,
- Grandmother/ grand father.
- half brother, half sister
- and adopted brother or sister.

Is guilty of incest and shall be jailed for 10 years or more. However if the victim of incest is below 18 years then the accused person shall be jailed for life

Sec 23- Sexual harassment

Where a person in a position of authority e.g. a boss at work or a public officer uses his/her position to try and make another person have sexual intercourse with them against their will, that person in authority or that public officer is guilty of sexual harassment and shall be jailed for 3 years or more or made to pay a fine of Kshs 100,000/= or both.

However the person claiming that he/she has been sexually harassed must prove that the harassment

- was to decide whether he/she was to get employment, or assistance from the person harassing them
- was to decide the conditions of their employment
- affected their performance at work or school.

Example: Mary's boss Njuguna has been disturbing Mary by trying to get her to sleep with him. Mary has refused to sleep with her boss and Njuguna is threatening to fire her if she doesn't sleep with him. Njuguna is guilty of sexual harassment.

Sec 24- Sexual offences relating to persons in position of authority

The Act says that where a superintendent or manager of a jail, remand home, children's home, law enforcement officer, hospital manager and staff, head teacher, teacher or employee in both formal and non formal and special learning institutions uses his/her position to make a person he/she is in charge of have sexual intercourse with him/her, then that superintendent or manager shall be guilty of abusing their power and shall be jailed for 10 years or more.

However if that superintendent or manager had a sexual relationship with the person complaining before becoming a superintendent or a manager, then this section shall not apply.

Sec 26 - Deliberate transmission of HIV and sexually transmitted diseases.

Any person who knows that he/she has HIV or any other life threatening disease and still goes ahead to spread the disease is guilty of deliberate transmission of the disease and if found guilty shall be jailed for 15 years or more.

The Court is allowed to test the accused person's blood, urine etc to find out if he/she is really infected with HIV or a life threatening disease.

Sec 27- Administering a substance with intent-

Any person, who purposely tries to have sexual intercourse with another person by using a substance to overpower that person e.g like a drug, is guilty of the offence of administering a substance with intent and shall be jailed for 10 years or more. **Example:** Kalonzo puts a drug into Miriam's drink so that the drug can overpower Miriam and allow Kalonzo to have sex with her. Kalonzo is guilty of administering a substance with intent.

Any company which purposely makes or sells drugs or substances which are used to overpower people so that the people buying the drugs can have sexual intercourse with the persons who are overpowered by the drug is guilty of an offence and shall be made to pay a fine of Kshs 5 million or more and its directors can also be jailed for five years or more.

Sec 29- Cultural and religious offences

Forcing a person to take part in a sexual act for cultural or religious reasons is an offence under the Act and prescribes a minimum sentence of 10 years. This clause is important in helping curb harmful cultural practices like early child marriages and cultural rites of passage.

PART 2 - PROVISIONS RELATING TO ADDUCING EVIDENCE

Sec 31- Vulnerable witnesses

The act says that the court may look at a witness and to treat him/her as a helpless or vulnerable witness

A witness may be helpless or vulnerable because they are

- the victim
- a child or
- A person with mental disabilities.

There are something's the Court looks at before it can say a witness is a helpless or vulnerable witness e.g.

- age,
- Physical and psychological damage that the witness has suffered
- trauma,
- race,
- cultural differences,
- whether the witness is being threatened
- relationship of the witness to any party in the case,
- Nature of the evidence or any other factors that the court may consider important.

Sec 32- Protection of vulnerable witnesses-

The act provides for the way in which helpless witnesses can be protected

A helpless witness can be allowed to give evidence

- under protective cover,
- in camera (private)or
- by talking through another person called an intermediary

The Court can also say that the names of the witness and his/family shall

be kept secret and anyone who reveals those names shall be jailed for 3 years or more or made to pay a fine of 50,000/= or more, or sentenced to both jail and a fine.

Any person who reveals the names of a witness who is under 18 years shall be punished by being jailed for 3 years or more or made to pay a fine of 200,000/= or more, or shall be jailed and made to pay that fine

The prosecutor in a case must tell a witness that he/she has the right to apply to the court to be treated as a helpless witness.

Once the Court decides that a witness is a helpless witness it must tell the witness that he/she is now being treated as a helpless/vulnerable witness.

Sec 34- Character evidence and previous sexual history

The Act says that an accused person will not be allowed during the trial to tell the court about the sexual history of the complainant unless

- It has a connection to the case
- It is going to be used by the accused person to attack some evidence brought by the prosecutor or
- It will explain how some sperms were found on the complainant or elsewhere
- Or explain how the complainant got pregnant
- Or how the complainant got a disease or injury
- And it will not hurt the complainants self respect or privacy

Sec 36- Forensic evidence

The Act gives the Court power to order for DNA tests to find out if the accused committed the crime or not.

PART 3 - DEALING WITH SEXUAL OFFENDERS

Sec 35- Treatment and rehabilitation orders for survivors and perpetrators

The Court has the power to order that a person who is found guilty of having committed a sexual offence because of drugs or alcohol abuse shall in addition to going to jail for the crime also go for treatment and professional counselling which the government shall pay for.

However if the Court sees that the accused person can afford such treatment then it will ask him to pay something also for the treatment and counselling.

Rehabilitation

The court also has the power to order that a survivor of sexual violence be treated for free at a public hospital

Sec 39 -Sexual offenders register

The Act says that a special register called sexual offenders register can be made and kept at the High Court and this register shall have the details of sexual offenders and can be read by any person who shows that he/she has a good reason to read it.

Sec 36 (4) Creation of a data bank of dangerous sexual offenders

The Court has the power to take DNA samples from an accused person to find out if he/she committed a sexual offence.

If the court finds the accused person guilty it can decide to keep the DNA samples in a special place called a DNA bank but if the accused person is found innocent the Court shall destroy the samples

The Court also has the power to decide if an accused person is a dangerous sexual offender

An accused person will be considered a dangerous sexual offender if

- He/she has been found guilty of a sexual offence more than once,
- He/she has been found guilty in the past of committing a sexual offence using threats or violence
- He/she has been found guilty in the past of committing a sexual offence against a child.

Whenever such a dangerous sexual offender has been found guilty of committing a sexual offence, the Court shall sentence him/her for the crime they have committed and also order that once that person is released from prison, that the Prison's department shall get someone to supervise that sexual offender for 5 years or more.

If a dangerous sexual offender fails to cooperate with the supervision, the court may order his/her arrest and he/she can be jailed for 3 years or more, or be made to pay a fine of Kshs 50,000/= or more or be both jailed and made to pay a fine.

Section 30- Duty of Disclosure

The Act says that any person who has been convicted of a sexual offence and is looking for a job must in his/her application for that job say that he/she had been convicted for a sexual offence especially if the job he/she is applying for is one which will put him/her in a position of authority over children or vulnerable (helpless) people e.g. mentally disabled persons.

Other provisions

Section 37- Keeping scene of crime secure

The Act says that anyone who on purpose interferes with a crime scene (a place where a crime happened) or with any evidence in a case, such a person is guilty of an offence and can be jailed for 3 years or more or be made to pay a fine of Kshs 100,000 or more

A person is said to interfere in a case if he/she

- Messes around with a scene of crime

-
- Threatens witnesses
 - Or does anything which would make police investigations harder
 - Does anything which will change evidence in a case against him/her

Sec 38 – Making false allegations

The Act says that it is an offence for anyone to falsely accuse another of having committed any of the offences under the Act.

In such a case the person who has untruthfully accused someone else shall be punished with the same punishment which the accused person would have got

Example: Njeri falsely accuses Wafula of raping her for which Wafula can be jailed for 10 years or more. Njeri can be charged with falsely accusing Wafula and be punished with the 10 years that Wafula was to get

Sec 40 – Powers of Attorney General to terminate cases

The Act says that only the Attorney General can stop a case of a sexual offence from continuing.

Example: Mogaka has been charged with defiling Atieno. Mogaka agrees with mama Atieno to pay mama Atieno 5,000/= to stop the case. The Court will not allow mama Atieno to stop the case against Mogaka because only the Attorney General has the power to stop a case of a sexual offence.

Sec 46- Creation of a national policy framework and regulations

This section allows the Minister to create a plan to make sure that the Act is effective.





Setting Standards in Upholding Women's Rights.



ECWD



Cradle- The Children Foundation