

RESEARCH STUDY · 2021

# Gaps in Enforcement of the Sexual Offences Act, 2006

A research study on gaps in the enforcement of Sections 3, 4, 5, 6, 8 and 9 of the Sexual Offences Act, 2006, in Kenya



PRINCIPAL INVESTIGATOR

**Nerima Were**

COMMISSIONED BY

**Centre for Rights Education and Awareness (CREAW)**

YEAR

**2021**

## 01 — INTRODUCTION

# Introduction

The Sexual Offences Act No. 3 of 2006 (SOA) came into effect on 21 July 2006, following sustained agitation from civil society and judicial criticism of the wide discretion courts exercised over sexual violence cases.

The Act supplements and codifies a body of law dealing with offences against the person of a sexual nature, previously covered under the Penal Code. The Penal Code was inadequate: it failed to address issues of law and fact, did not definitively address definitions of offences, did not concisely express elements of offences, and did not treat sexual violence with the gravity it required.

The SOA represented a rebirth of hope to address sexual offences and seal the shortfalls of the Penal Code. The Act introduced a new dynamism encompassing not only punishment of offenders but also alternative dispute resolution in the form of compensation for some offences, and rehabilitation of both offender and victim.

Sexual offences are a great impediment to the personal growth of a victim: such crimes derail not only a victim's legal, social and economic development, but also that of the family unit the victim comes from. Many victims of crimes associated with power and control are women, and there is a high prevalence of gender-based violence in Kenya. Sexual violence is one manifestation of gender-based violence, caused by multiple factors including cultural norms, economic factors, power imbalances and prevailing patriarchal sentiment. What we witness with GBV in all its manifestations is a reflection of gender inequality and inequity in a society where decision-making, implementation and power revolve around men.

Despite the enactment of the SOA in 2006, statistics on sexual violence have not significantly improved. This research examines the legal framework around the enforcement of the key offences highlighted in Sections 3, 4, 5, 6, 8 and 9 of the SOA — arrest, investigation, prosecution and conviction — to inform advocacy on policy and legal reform. The research also feeds submissions to the Government of Kenya during the Generation Equality Forum, marking 25 years since the Beijing Declaration was adopted at the Fourth World Conference on Women, and will be used to increase awareness among rights-holders, duty-bearers and the public.

## 02 — CONTEXT

## Context Analysis

Finding valid, reliable and ethical data on the prevalence of sexual and gender-based violence (SGBV) is challenging: rape is a highly underreported crime, both globally and nationally. It is estimated that only 1 in 20 women in Kenya will report rape to the police, and 1 in 6 will seek medical assistance — making police reports an unreliable source on the prevalence of sexual violence.<sup>1</sup> Differing definitions of what behaviour constitutes violence across cultures, community-level tolerance of violence against women and girls, and stigmatisation of survivors all affect the accuracy of statistics. The best quality prevalence data comes from population-based surveys, with Kenya's most recent survey published in 2014 — meaning available statistics may not accurately reflect the current scale of sexual violence in the country.

**40.7%**

of women in Kenya have experienced lifetime physical and/or sexual intimate partner violence — above the global average of 30%

**14%**

of women aged 15–49 have experienced sexual violence in their lifetime (KDHS, 2014)

**15.6%**

of girls and young women experienced sexual violence before age 18 (VACS, 2019)

The World Health Organisation estimates that 30% of women worldwide have experienced physical and/or sexual intimate partner violence (IPV), and 7% have experienced non-partner sexual violence, in their lifetime. There are no official national statistics on lifetime non-partner sexual violence in Kenya. The Kenya Demographic and Health Survey (KDHS) 2014 estimates that formerly married women, women employed for cash, women from Western, Nyanza and Nairobi regions, and women with three or more living children reported the highest rates of sexual violence. Unemployed and uneducated women, and those in the highest wealth brackets, were less likely to seek help from any source to stop the violence.

The Kenya Violence against Children Survey (VACS) 2019 measured experience of sexual violence in childhood among 18–24 year-olds, describing it as unwanted sexual touching, unwanted attempted sex, pressured sex and physically forced sex. Most

respondents experienced their first incident of sexual violence between age 16 and 17. The most common perpetrator of the first incident in childhood was a current or former spouse or romantic partner, followed by a classmate or schoolmate. A third of girls and women knew where they could seek help, while only one in eight sought it — most often from a healthcare worker.

Gaps remain in data on the prevalence, types and perpetrators of sexual violence against adolescent girls and young women (AGYW) aged 14–24, especially in vulnerable or marginalised populations. A study on prevalence and patterns of SGBV against AGYW in Mombasa found that among those engaged in casual or transactional sex and young sex workers, the prevalence of lifetime sexual violence was 20.5%, with intimate partners the most common perpetrators of a first episode.

Statistics also show that incidents of sexual violence rise during times of social, political or economic strife, such as election periods and, most recently, the COVID-19 pandemic. During the 2007–2008 post-election violence, it was estimated that there were around 40,500 rape cases between December 2007 and June 2008 — a figure researchers noted was conservative. Recent reports indicate a rise in SGBV during the pandemic, with women reporting that greater economic hardship led to increased incidences of IPV and increased sexual exploitation of underage girls in exchange for basic needs. Police posts in parts of Nairobi reported increased helpline and emergency calls related to domestic violence since the outbreak in March 2020, consistent with UN OCHA reports and anecdotal evidence from community organisers in informal settlements. Emerging findings also suggest that lockdowns, stay-at-home directives and dusk-to-dawn curfews have exacerbated sexual violence against children, particularly girls.

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## NOTES

1. Crime Scene Investigation Nairobi, "Quantitative research findings on rape in Kenya between 30 Dec 2007 and 30 June 2008."
2. World Health Organization, *Understanding and addressing violence against women: Sexual violence* (2012).
3. World Health Organization, *Global and regional estimates of violence against women* (Geneva, 2013).
4. UN Women, Global Database on Violence Against Women — Kenya country profile.
5. Kenya Demographic Health Survey 2014, pp. 291–304.
6. Violence Against Children Survey (VACS) 2019, pp. 30–36.
7. Bhattacharjee P, Ma H, Musyoki H, et al., "Prevalence and patterns of gender-based violence across adolescent girls and young women in Mombasa, Kenya," *BMC Women's Health* 20(229), 2020.

### 03 — METHODOLOGY

## Methodology

The overall methodology combined a desk review with focus group discussions and the anecdotal experience of the consultants, to address gaps in the literature. The desk review focused on literature — books, articles, government reports and jurisprudence — that provides both historical and contextual analysis of the SOA's implementation. The consultants used primary literature (statutes, government reports and cases), supplemented with secondary literature offering an analytical and conceptual framework, including comparative material from Scotland, England, Wales and South Africa.

The consultants also conducted a focus group discussion (FGD) with survivors of sexual violence, facilitated by CREAW, together with representative organisations that adopt survivor-centred approaches to the management of sexual violence. The FGD was preceded by a consent form, disseminated to participants beforehand, and a discussion guide (both annexed to the full study). Given Covid-19 restrictions the FGD was held virtually; the consent form outlined the risks associated with the discussion and provided contact details of the research team for follow-up. All names have been redacted to protect participants' privacy.

## 04 — LIMITATIONS

# Study Limitations

1. The focus group discussion provided a small sample of 15 participants in one virtual discussion. While participants varied across support systems, organisations and survivors, this is not a representative sample; findings from it are used only to strengthen gaps identified in the literature.
2. The study is limited to sexual violence as codified within the Sexual Offences Act, and does not include all forms of violence in that Act — only the highlighted sections. Offences outside this scope, including sexual violence in the context of post-election violence, are not included in the analysis, though they are referred to in the findings.
3. There were significant time constraints in the study design, which limited the researchers' ability to engage with institutions within the criminal justice system. Official and unofficial data is used to supplement this.

## 05 — FRAMEWORK

## Theoretical Framework

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

The framework of analysis is feminist, and considers feminist writings on legal reform in sexual violence cases. Weak convictions in sexual violence cases have been backed by quantitative assessments in Scotland, England, Ireland, Wales and South Australia. Informed by this, a feminist and victim-centred approach to sexual violence should consider the following:

1. **Legal definitions must match women's experience.** The legal definition of rape and sexual assault has to align with women's experiences, and should not reinforce stereotypes and myths. In Kenya, intimate partner, spousal and non-stranger violence is statistically more prevalent than violence from strangers; legal definitions of rape founded on absence of consent help ensure these victims are not excluded — though it is not enough to look at the legal definition alone, as stereotypes of the "perfect victim" can disqualify women who do not fit that narrative at any stage of the criminal justice process.
2. **Participation should not compound trauma.** Research shows that victims of sexual violence are often shocked by how little they matter to the criminal justice process. If the victim's role is merely to further a prosecutorial goal, they become a means to an end, and their dignity is impaired.
3. **Institutional attitudes must be reformed.** A report should be an occasion of respect, not of oppression. The police have been particularly problematic here, though a number of institutions play a part in the reporting process and their attitudes must be reformed to change survivors' experiences.

This framework allows us to consider not only the letter of the law but also the institutions that enforce it, as players in a power system that marginalises women and girls and continually violates them.

## 06 — LEGAL FRAMEWORK

# Legal and Policy Framework

## International Law

Article 2 of the Constitution of Kenya, 2010, sub-articles (5) and (6), provide that the rules of international law and treaties and conventions ratified by Kenya form part of the laws of Kenya. The current existence of numerous international legal instruments dealing with sexual violence and violence against women indicates that international bodies and the world's states have identified violence as a global rights concern and human rights violation. Of particular importance is the principle of due diligence — central to the role of government in preventing violence against women — which obliges states to take appropriate and effective steps in responding to human rights abuses, even where perpetrated by private individuals or non-state actors. A table of the international instruments considered is set out in Annexure A of the full study.

## The Constitution of Kenya, 2010

The Preamble to the Constitution recognises the aspirations of all Kenyans for a functioning government based on human rights, equality, freedom, democracy, social justice and the rule of law. Article 10 requires that national values and principles of governance bind all State organs, officers and public officers, including human dignity, equity, social justice, inclusiveness, equality, non-discrimination and protection of the marginalised.

Article 21 imposes a duty on the State and every State organ to observe, respect, protect, promote and fulfil the rights in the Bill of Rights, and to address the needs of vulnerable groups, including women, children, persons with disabilities, youth and marginalised communities. Article 27 prohibits discrimination on grounds including sex, pregnancy and marital status; read with CEDAW General Recommendation No. 19, which recognises gender-based violence as a form of discrimination, all violence against women must be understood as a violation of Article 27. Article 28 guarantees the inherent human dignity of every person, and Article 29 (particularly sub-articles (c) and (f)) guarantees freedom and security of the person. Article 2(4) renders void any



law, including customary law, inconsistent with the Constitution — protecting women, men and children from violence rooted in harmful cultural practice — while Article 22 extends the class of persons who can institute proceedings to enforce these rights.

## **Sexual Offences Act, 2006**

The SOA was enacted to delineate acts that qualify as sexual offences, establish a means of punishing offenders, and protect all persons from unlawful sexual acts. Prior to the Act, sexual offences were provided for under the Penal Code, categorised as offences against morality. The SOA consolidated laws relating to sexual offences and repealed most of the relevant Penal Code provisions, while creating new offences such as gang rape, sexual assault, sexual harassment, child pornography and trafficking for sexual purposes.

A notable feature of the Act is that it provides mandatory minimum sentences for specific offences, in contrast to the Penal Code, which provided only maximum sentences and left considerable discretion — and consequent ambiguity and a sense of stolen justice for victims. The Act also makes statutory provision for how evidence is preserved by the prosecution, identification of convicted sexual predators, and the handling of sexual offences, offenders and victims, and the bodies responsible for managing them.

## **TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS**

Section 48 provides that the SOA overrides any other existing law with respect to sexual offences, making it the primary statute on the subject. Section 49 provides for consequential amendments and repeals of Penal Code sections 139, 140, 141, 142, 143, 144, 145, 147, 148, 149, 161, 164, 166, 167 and 168 — which previously covered rape (life imprisonment on conviction, absent statutory minimums), attempted rape, abduction for marriage or intercourse, abduction of unmarried minors, indecent assault, defilement of a girl under 16, procurement for prostitution, administering drugs to overpower a person, and allowing premises to be used for intercourse with a minor, among others. Sections 124 and 127 of the Evidence Act, and sections 184–186 of the Criminal Procedure Code, were also amended or repealed.

The Penal Code retained two sexual offences outside the SOA's scope — defilement of "idiots and imbeciles" and detention of a female for immoral purposes — an omission this study notes as significant, in that it stigmatises persons with intellectual disabilities and minimises offences against them. Because the SOA supersedes any other law on sexual offences, its protections for persons with intellectual disabilities prevail regardless. Proceedings commenced under a statute repealed by the SOA's coming into force are required to continue under the SOA.

## OFFENCES UNDER THE SEXUAL OFFENCES ACT

**Rape (Section 3).** A person commits rape if they intentionally and unlawfully commit an act causing penetration with their genital organs, where the other person does not consent, or consent is obtained by force, threats or intimidation. The penalty is not less than ten years, up to life imprisonment.

**Attempted rape / attempted defilement (Sections 4 and 9).** The Act's definition of attempt favours the accused in terms of punishment for an incomplete transaction, without necessarily accounting for the trauma victims may have permanently suffered notwithstanding that the underlying harm was not completed. An inchoate offence requires the specific intent to commit the underlying crime, proven through a "dangerous proximity" to completion and a "substantial step" in a course of conduct — the dividing line between legal and illegal conduct.

**Compelled or induced indecent act (Section 6).** It is an offence for a person to intentionally and unlawfully force or cause another to take part in an indecent act with themselves, another person, an object, or any part of an animal, carrying a penalty of not less than five years — except where the act is done to save a life or in the course of a medical procedure. Prosecution can be difficult where there is no physical contact of sexual organs, as held in *Haji Shibwabo Nambwaya v Republic* [2019] eKLR, since "indecent act" under Section 2 requires contact with genital organs, breasts or buttocks, or exposure of pornographic material — any charge must coincide precisely with this definition.

**Defilement (Section 8).** Defilement is having sexual intercourse with a child below 18; a child is deemed incapable of consenting to a sexual act. Sentencing depends on the child's age: life imprisonment where the child is 11 or younger; a minimum of 20 years

where the child is between 12 and 15; and a minimum of 15 years where the child is between 16 and 18. Attempted defilement under Section 9 carries a minimum sentence of 10 years.

| SECTION | OFFENCE                           | SENTENCE (IMPRISONMENT)                                                                     |
|---------|-----------------------------------|---------------------------------------------------------------------------------------------|
| 3       | Rape                              | Minimum 10 years, may be enhanced to life                                                   |
| 4       | Attempted rape                    | Minimum 5 years, may be enhanced to life                                                    |
| 5       | Sexual assault                    | Minimum 10 years, may be enhanced to life                                                   |
| 6       | Compelled or induced indecent act | Minimum 5 years                                                                             |
| 8       | Defilement                        | Age 11 or under: mandatory life · Age 12–15: minimum 20 years · Age 16–18: minimum 15 years |
| 9       | Attempted defilement              | Minimum 10 years                                                                            |

Some allowable defences exist, including where the child misled the perpetrator into believing they were over 18 and the perpetrator reasonably believed this after taking all reasonable measures to ascertain age — a defence unavailable where the accused is related to the child. A recurring question is whether children can commit this offence against other children: it would be hard to qualify two children engaging in a sexual act as defilement, rather than an act of delinquency better handled through counselling, absent evidence of coercion or deceit — though courts continue to see cases where young males are prosecuted for what was, in fact, voluntary conduct between adolescents.

## Other Laws

While this research is founded primarily on the SOA, other relevant legislation forming part of the analysis, as it interacts with the SOA, includes the Criminal Procedure Code, the Penal Code, the Victims Protection Act, 2014, and the Witness Protection Act, 2006.

## 07 — FINDINGS

# Research Findings and Analysis

This section discusses findings against the analytical framework above, in three parts: jurisprudence, literature on reporting, and the focus group discussion.

## Jurisprudence

### CONSENT

Black's Law Dictionary defines consent as agreement, approval or permission for some act, given voluntarily by a competent person — express, implied, or informed. The SOA defines consent, at Section 42, as: a person consents "if he or she agrees by choice, and has the freedom and capacity to make that choice." Given that most sexual violence is committed by persons known to the victim, this definition is a significant step toward legal definitions that reflect victims' lived experience.

In *Lawrence Frank Wanyama and Another v Republic*, Criminal Appeal No. 183 of 2019, the Court held that it did not matter that the victim did not report the ordeal to the police immediately, or that she showed no physical sign of the assault at the time she testified — the intentional and unlawful acts of the appellants under Section 43(1), (2) and (4) were demonstrated by the prosecution. The victim in that case knew the appellants, was intoxicated at the time, and did not immediately report the offence; the Court did not treat these facts as adverse, because her testimony of non-consent was not successfully challenged. Similarly, in *Daniel Kaberu v Republic*, Criminal Appeal No. 6 of 2019, the Court held that "consent cannot be coerced; never implied and cannot be assumed, even in the context of a relationship." While both the SOA and the judiciary have been alert to the need to focus on absence of consent rather than prior relationship, the literature on reporting suggests the police continue to play a significant role in undermining this understanding in practice.

## DEFILEMENT AND THE DEFENCE OF MISTAKE

A principle of a feminist approach to sexual violence is that legislation should not reinforce stereotypes and myths about rape. Section 8(5) of the SOA provides a defence to a defilement charge where it is proved that the child deceived the accused into believing they were over 18, and the accused reasonably believed this. This differs subtly from the ordinary defence of mistake of fact — available at common law and codified at Section 10 of the Penal Code, which excuses an act done under an honest and reasonable, but mistaken, belief in a state of facts that would negate criminal responsibility.

Kenyan courts have found, notably in *Duncan Mwai Gichuchi v Republic*, that defilement is not a strict liability offence, and that the prosecution must prove *mens rea* — supported by comparative authority, including *R v Tolson*, *Sherras v De Rutzen*, and Botswana's *Ketlwaletswe v The State*, which requires the State to prove the accused knew, or was reckless as to, the child's age.

In contrast, Section 8(5) has manifested in the widely criticised decision of *Martin Charo v Republic*, where Chitembwe J considered whether the complainant "reported the defilement immediately," was "threatened after the incident," and how the relationship and its disclosure unfolded — factors this study finds put the victim's own conduct on trial, entrenching the stereotype that women and children lie about sexual violence, when the ordinary defence of mistake would achieve the same protective result for an accused without impugning the survivor's character.

## CLOSE-IN-AGE AND CHILDREN AS OFFENDERS

The SOA makes no close-in-age exemption, criminalising children who engage in adolescent-typical sexual encounters. In *CKW v Attorney General and Director of Public Prosecutions*, a 16-year-old was prosecuted for having sex with a girl of the same age; the Court found that incapacitating children in terms of consent aligned with the best-interest-of-the-child principle. Justice Hellen Omondi, confronted with a similar case, asked without formally ruling on constitutionality: "Does a boy under 18 years have the legal capacity to consent to sex? Haven't both children defiled themselves? ... I think these are children who need guidance and counselling rather than criminal penal sanctions." South Africa's Constitutional Court, in *Teddy Bear Clinic for Abused Children*

*v Minister of Justice and Constitutional Development*, considering a similar question, found that imposing criminal liability on adolescents for consensual acts among themselves was unconstitutional.

## MANDATORY MINIMUM SENTENCES

Article 159 of the Constitution vests judicial authority in courts and tribunals, guided by the concept of judicial discretion. Mandatory minimum sentences curtail this discretion: the Judiciary Sentencing Policy Guidelines favour a more liberal approach in which unique case circumstances inform an appropriate sentence, whereas a mandatory minimum removes the ability to weigh diverse factors. Section 8 of the SOA, in criminalising consensual relations between young persons, has produced long custodial sentences for men as young as nineteen, in line with the mandatory minimum for defilement — even though the Sentencing Policy Guidelines direct that non-custodial orders should be the default for children in conflict with the law.

The Supreme Court, in *Francis Karioko Muruatetu & Another v Republic*, and the Court of Appeal in *Christopher Ochieng v Republic*, have since found mandatory minimum sentences unconstitutional — meaning a substantial body of past convictions may return to the courts on appeal, reopening the risk of stark disparities in the treatment of offenders and a trivialising of victims' experiences.

## FORENSIC EVIDENCE

Sexual assault cases with forensic evidence supporting a survivor's claim are more likely to proceed beyond the reporting stage, and police are more likely to follow up where survivors physically resisted or there is evidence of injury and penetration. This has contributed to a heavy focus on survivors' bodies as crime scenes, reinforcing a "perfect victim" narrative — a formally and promptly disclosed, violently resisted assault — that does not reflect most survivors' experience, particularly within intimate partner relationships. In Kenya, fragmented and under-resourced forensic services mean already-traumatised survivors must seek services across multiple, poorly coordinated institutions.

Section 36 of the SOA empowers courts to direct forensic sampling, including DNA testing. Notwithstanding this, courts have held that rape can be proved by the oral evidence of a survivor alone, or by circumstantial evidence — reflected in the proviso to Section 124 of the Evidence Act, which permits conviction on the survivor's



uncorroborated evidence where the court believes them and records its reasons. This has also been applied to defilement, with the Court of Appeal holding that medical evidence, while relevant, is not mandatory for conviction. There remains a significant research gap on how the availability, or absence, of forensic evidence affects decisions to arrest and charge in the first instance — anecdotal evidence in this study indicates survivors are sometimes turned away from police stations or discouraged from pursuing cases for lack of it.

## Literature on Reporting

Reporting sexual violence, formally or informally, is generally the first step to accessing justice. Because reporting to the police is rarely a survivor's first or unassisted decision, the first point of disclosure — usually family and friends — plays a critical role, with formal referral to police often dependent on the attitude of that first responder. A service-gap analysis across four counties found that community-level perceptions of violence were a major barrier to reporting to the police, with survivors seeking formal help only once informal, community-level mechanisms failed or violence escalated to threaten life or health, and only where they were aware of available formal services.

The National Police Service acknowledges that domestic violence is highly underreported, and has established gender desks with dedicated, trained officers in response — though their effectiveness is limited by minimal resources for training and for the referral, safety and security needs of survivors. Despite recognised social, cultural and structural barriers to reporting, formal disclosure continues to be treated as a key indicator of whether violence occurred — as in *Martin Charo v Republic*, where the timing of a report was treated as probative of whether defilement occurred at all.

**5,506**

defilement cases  
reported to police, 2018  
— the most recent  
official figures available

**979**

rape cases reported,  
2018

**204**

indecent assault cases  
reported, 2018

These figures show only the extent of cases reported, not how they were investigated or resolved. The National Police Service continues to report sexual offences as "offences against morality," reflecting Penal Code categories repealed by the SOA in 2006. Survivors' experiences reporting to the police are reportedly negative, even traumatising: one study found the majority of survivors felt worse after reporting, describing the process as tedious, time-wasting and embarrassing, with survivors blamed for inappropriate dress, dismissed as "jilted lovers," or told to resolve matters at community level. Women reporting rape within marriage are often dismissed as raising a "family affair" — one survivor reported her husband at five different police stations before an officer was assigned to investigate. Fifty-nine percent of respondents in the same study dropped their cases, citing perceived lack of evidence, victim-blaming, safety concerns, and a justice process perceived as too complicated.

A baseline survey in Kasarani, Nairobi found that most survivors who reported to police were nonetheless unsatisfied with the service, feeling police were more concerned with arresting perpetrators than the survivor's welfare, and cited costs such as paying for gender-desk services and P3 forms, alongside limited availability of forensic examination. Across the literature, three themes recur: first, socio-cultural and structural barriers push survivors toward informal, not police, disclosure, with a significant research gap on referral rates from other institutions into the formal system; second, survivors who do report to police describe overwhelmingly negative experiences that further discourage continued engagement; and third, gaps in service integration mean police rarely refer survivors on to medical, counselling or legal support even where they ask whether a survivor has sought care — despite survivors identifying an integrated, one-stop service as the most desirable intervention.

## Focus Group Discussion

Key themes emerged from the discussion with survivors and their representatives, discussed below.

**Prevalence of intimate partner violence.** A significant share of the violence discussed was perpetrated by persons known to participants — relatives, spouses and partners. Participants identified poor reporting mechanisms, a failure by police to take spousal violence seriously, and a lack of understanding of consent as key challenges. One



participant described reporting an attempted rape by her husband, only for police to disregard it on the basis that "her husband had rights over her"; another described being made to believe forced sex was a normal part of reconciling after an argument.

**Failures by custodians or guardians.** Two participants identified schools and guardians as either contributing to or perpetrating violence. One, speaking on behalf of her child — a survivor of sexual violence in a school — described the school's failure to believe the child or report the matter, and its attempt to pre-empt the report and cast doubt on the mother. Another participant, three years old at the time of the offence, was unable at the time to identify her abuser because he was her godfather.

**Mis-characterisation of offences.** One participant described supporting a survivor of gang rape who was also a robbery victim; when reported, the case faced pressure from the assailants' family and bribes to police, resulting in a complaint to the presiding magistrate. In another case, a victim of defilement and incest by her father was, along with her mother, pressured by family to drop the case — pressure so intense the mother went missing with the complainant at points and was eventually held in contempt of court. The case resulted in a conviction and life imprisonment for the father.

**Jurisdictional and procedural barriers.** A parent based in Nairobi County described the burden of travelling roughly 170km to Nakuru County, where her child was assaulted at school, simply to obtain updates on the investigation. Court delays also robbed survivors of justice in other cases: one survivor was 11 at the time of the offence, and by 16 the matter remained unresolved before the perpetrator died unrelated to the case. Conversely, a shorter process — resulting from an admission of guilt in the defilement of a three-year-old — left her mother confused, having expected a lengthier process before believing justice had been served.

**Police misconduct.** Participants described a range of misconduct, including failures to record reports of violence, and instances where police involvement introduced new obstacles rather than resolving them.

**The role of service providers.** Several participants noted that police and healthcare workers treat survivors with contempt, as third parties to their own process: tests and medications go unexplained, legal representation is unavailable, and police and prosecutors fail to communicate case progress unless a survivor follows up themselves. Civil society, by contrast, plays a significant role in evidence preservation

through community sensitisation — though participants also noted tokenism, with some organisations using survivors' stories to further institutional agendas rather than survivors' own interests, at the expense of individual justice and acknowledgment.

These accounts reflect the findings from the literature on reporting: many survivors do not receive a dignified reception when seeking to report sexual violence, and fragmentation across reporting and referral mechanisms deters survivors and denies them access to both health and justice.

## 08 — RECOMMENDATIONS

# Recommendations

### RESEARCH AND REPORTING

A significant challenge in this study was the unavailability of reliable data on the prevalence of sexual violence and its specific categories, and on how the Kenya Police Service and Office of the Director of Public Prosecutions decide whether to investigate or prosecute a matter — data gaps that leave the judiciary as the only institution in the criminal justice chain whose decisions can currently be accessed and analysed. We recommend that:

- The Kenya Police Service revise its data collection tools to reflect the offences described in the SOA, rather than indicators carried over from the Penal Code;
- The Kenya Police Service's data collection tools capture the number of reports received against the number of charges or investigations pursued;
- The Kenya Police Service's published crime statistics report the number of SOA offences received, disaggregated accordingly.

### LEGAL AND POLICY REFORM

- Section 8(5) of the SOA is repealed insofar as it entrenches the stereotype that women and children lie about sexual violence, while the ordinary defence of mistake remains available to defendants under the Penal Code;
- Section 8 of the SOA is amended to include a "Romeo and Juliet" clause, addressing the inequitable treatment of children (particularly male children) and recognising children's evolving capacity, in line with the Charter of the Rights of the Child;
- Regulation 3 of the Sexual Offences Regulations, 2008 ("Enhancement of sentence") is revised to reflect the post-*Muruatetu* position on mandatory minimums, reframed as "Sentencing," with a sub-condition requiring the court to consider the views of the victim through a victim impact statement or oral evidence;

- The Health Act, 2017 is revised so that its definition of emergency treatment explicitly includes post-rape care.

## REFERRAL MECHANISMS

Survivors face barriers to both formal and informal disclosure; the emphasis throughout their interaction with the criminal justice system should be securing their health and well-being, not treating them as a means to a prosecutorial end. We recommend that the Ministry of Health work collaboratively with the Ministry of Education and other state agencies to strengthen referral pathways between schools, healthcare providers, police and support services, so that a disclosure at any point in that network reliably reaches the services a survivor needs.

## RESOURCING AND BUDGET ALLOCATIONS

- Parliament increase funding to the Kenya Police Service for the investigation of sexual violence, given its pervasive nature;
- The emergency medical treatment fund established under Section 15(x) of the Health Act, 2017 include a budget line for the management of sexual violence;
- The Ministry of Health include and report on a dedicated budget line for the management of SGBV;
- Each County Government include and report on a dedicated budget line for the management of SGBV.

## TRAININGS

- The Kenya Police Service, on the role of culture, gender norms and attitudes in reporting sexual violence;
- The Kenya Police Service, on the jurisprudential position on forensic and medical evidence, and the impact of the "perfect victim" narrative in dissuading reporting;
- The Office of the Director of Public Prosecutions, on the same jurisprudential and evidentiary questions;
- The Judiciary, on the role of mandatory minimum sentences and the impact of institutional bias in the punishment of sexual violence.

## **INSTITUTIONAL CHANGES**

A consistent recommendation from both the FGD and the literature is the need for a "one-stop shop" — a single centre where survivors can access medical, psycho-social and legal services together. The Policare model, launched in Nairobi and Makueni counties in August 2020, aims to provide an integrated approach to SGBV services, but there is little published literature yet on its governance or operational model. An integrated model of this kind requires collaboration across the Ministries of Health, Interior and Coordination, and Justice, and across national and county government; we recommend a taskforce be established to define the institutional steps needed to integrate health and legal services for survivors.

## **THE ROLE OF CIVIL SOCIETY**

Organisations working with survivors — non-governmental, civil society and community-based alike — should reflect on the role they play in survivors' lives. A significant share of the sensitisation currently provided to communities and police is focused on preserving evidence for the purpose of conviction, rather than securing survivors' health and well-being. The criminal justice process is only one part of a survivor's experience; treating survivors as instruments of that process is not survivor-centred.

## 09 — CONCLUSION

# Conclusion

Sexual violence is a socio-legal problem, and the law alone will not resolve it. But as far as possible, the law and the institutions charged with enforcing it should play their part in ensuring that survivors are treated with dignity, and that the decision to disclose is met with respect and empathy.