

# KENYAN'S EXPERIENCE LEGISLATING THE SEXUAL OFFENCES ACT

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# OBJECTIVES

- ◉ To share the Kenyan's experience in legislating on Sexual and Gender Based Violence (SGBV).The SOA.
- ◉ To discuss the strategies used in the process (pre and post the Sexual Offences Act (SOA)).
- ◉ To highlight the key achievements in the Sexual Offences Act geared towards eliminating SGBV.
- ◉ To discuss some claw back clauses in the SOA
- ◉ Suggest a Way Forward for Countries wishing to legislate on SGBV.

# INTRODUCTION

- ◉ SGBV in its various forms is endemic around the world.
- ◉ There is no universal or single definition of SGBV. It is understood to be the expression used to differentiate violence aimed at individuals on the basis of their gender (men and women) from violence in general. It refers to the physical, emotional or sexual abuse of a survivor.
- ◉ SGBV is a form of discrimination and a gross violation of Human Rights.
- ◉ SGBV is worsened by the culture of normalization of violence meted against women as ‘a right.’

# BACKGROUND INFORMATION PRECEDING THE LEGISLATION ON SOA

- ◉ Many sexual offences committed against women including rape, defilement, incest and indecent assault.
- ◉ Compromised and incompetent investigators and prosecutors.
- ◉ Insensitive and corrupt judiciary that dismissed cases for want of evidence.
- ◉ Reluctance by the Hon Attorney's office to appeal on unjust dismissals and lenient sentences.
- ◉ Growing number of women infected with HIV and unwanted pregnancies.
- ◉ DNA was very expensive and unaffordable to most victims.

# CONTEXT OF THE PROCESS

- Critically the criminal justice system was ill equipped to protect women from gender based violence.
- Many women suffered the consequence of giving birth to unwanted babies occurring from rape including gang rapes.
- Young girls were traumatised through incest relationships that went unpunished. Some carried unwanted pregnancies to term and delivered unwanted babies.

# BEHIND THE SCENES OF THE LEGISLATION

- ◉ Civil Society Organizations.
- ◉ Women's rights activists.
- ◉ Politicians.
- ◉ Organizations working in juvenile Justice network.
- ◉ Human Rights organizations.
- ◉ The main mover was Hon. Njoki Ndungu, a women rights lawyer and politician who moved the private member motion. (Nominated member of the 9<sup>th</sup> Parliament)

# STRATEGIES USED

- ◉ Consultative forums
- ◉ Drawing draft bill
- ◉ Workshops
- ◉ Media discussions
- ◉ Public debates
- ◉ Lobbying and advocacy
- ◉ Public demonstrations by CSOs
- ◉ Public Education

# THE LEGISLATIVE PROCESS

- Hon. Njoki moved the motion seeking to introduce the private members motion in December 2004.
- Among the punishments proposed by the first draft was the castration of rapists. This angered most of the male parliamentarians.
- In April 2005, the motion was passed with amendments as proposed.
- Of course the amendments watered down the initial thinking into the sexual offences' law.

# THE SOA

- ◉ Came into force as law in Kenya in July 2006
- ◉ In 2007, the Hon. A.G appointed a multi-sectoral task force that has been spearheading the implementation of the SOA.

# BENEFITS ACCRUING FROM THE SOA

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

# OFFENCES IN THE SOA

| Offence and Sentences   | Offences and Sentences   |
|---|--|
| <b>Rape</b> -Not less than 10 years and can be enhanced life  | <b>Attempted Rape</b> -Not less than 5 years and can be enhanced to life   |
| <b>Sexual Assault</b> -not less than 10 years and can be enhanced to life   | <b>Compelled or induced acts</b> -<br>Prison term of 10 years  |
| <b>Acts that cause penetration or indecent acts that are done in view of family member, child or person with mental disability</b> -<br>Not less than 10 years. | <b>Defilement of child:</b><br>Less than 11 years-life imprisonment<br>12-15 years-not less than 20years<br>16-18 years-not less than 15 years |
| <b>Attempted defilement</b> -Not less than 10 yrs   | <b>Gang rape</b> -Not less than 15 yrs and can be enhanced to life   |

# OFFENCES CONTI..

| Offences and Sentences   | Offences and Sentences   |
|--|--|
| Child prostitution-not less than 10yrs   | Child pornography-not less than 6yrs or fine of kshs.500,000/=   |
| Exploitation of Prostitution-not less than 5yrs or fine of kshs. 500,000/=                             | Trafficking for sexual Exploitation- Not less than 15 yrs or fine of not less than Kshs 2million                       |
| Prostitution of persons with mental disabilities-not less than 10yrs and fine of not less than 2m      | Incest by Male persons-not less than 10 yrs  |
| Incest by Female persons-not less than 10yrs   | Sexual harassment-not less than 3yrs or fine not less than kshs. 100,000/=   |
| Sexual offences relating to position of Authority and persons in position of trust-not less than 10yrs | Deliberate transmission of HIV-not less than 15yrs   |
| Administering substance with intent-not less than 10yrs  | Distribution of substance by a jurisdic person-fine of not less than Kshs.5m or directors fines not less than 10yrs or |

## CONTI...

- ◉ **Indecent acts with:**
  - Child-not less than 10 yrs
  - Adult-2yrs or fine of Kshs.50,000/=
- ◉ **Promotion of sexual offence with a child-**  
**Not less than 5 years or fine of Kshs.**  
**500,000/=**
- ◉ **Child trafficking-Not less than 10yrs if a**  
**juristic person fine of not less than kshs**  
**2million**
- ◉ **Child Sex Tourism-Not less than 10yrs and if**  
**juristic person a fine of not less than 2million**

# CLAW-BACK CLAUSE

- S. 38 that came in as a last minute amendment is very un-progressive. It makes it an offence to make false allegations .
- It criminalizes the victims and has a penalty similar to the offence complained of.
- Proposal for amendments have been made to expunge this section from the law.

# ENFORCEMENT OF THE SOA

- ◉ For the successful implementation of the law, it requires multisectoral concerted efforts of doctors, police, judicial officers, and members of public.
- ◉ For example doctors have to follow certain protocols in handling suspected cases of sexual violence to help in adducing evidence.
- ◉ The AG then set up a multisectoral task force in 2007 to look into modalities of implementation.
- ◉ Chaired by a court of appeal retired judge with membership from key players, the AGs office, CSOs, Kenya National Commission on Human Rights, the Police and Prison departments.

# TASKS UNDERTAKEN BY THE TASK FORCE

- ◉ Developed training manuals for the police, doctors and the judiciary on the SOA.
- ◉ Have prepared modalities for implementation.
- ◉ Draft National policy and guidelines on administration of the sexual offences Act was finalized in 2010 and it awaits validation by stakeholders.
- ◉ The Chief Justice rules have been developed and are awaiting validation.

# OTHER ACTIVITIES PLANNED BY THE TASK FORCE

- ◉ Preparing a cabinet memorandum for adoption of the policy for implementation.
- ◉ Proposed a study visit to South Africa to see how the one stop Centre works and consider its viability.
- ◉ Are working on further proposed amendments to the SOA especially s. 38 and to establish an independent Authority to replace the task force
- ◉ Planning to hold a National Convention to raise awareness on the SOA.
- ◉ Plan to hold various sensitization and awareness raising activities.

# JUDICIAL ACHIEVEMENTS

- ◉ In implementation, some convictions have been upheld by the court of appeal which is the highest court of the land.
- ◉ Child defilers have been imprisoned to life.
- ◉ Rape perpetrators have been imprisoned and sentenced as per the law.
- ◉ Police have been reluctant to judge victims whose cases have been dismissed.

# WHAT HAS NOT BEEN ADDRESSED

- ◉ Marital rape and domestic violence continue unabated.
- ◉ Cultural factors hinder women from accessing justice.
- ◉ S. 38 of the SOA is a threat to women offenders who decide to sweep the crime under the carpet.
- ◉ It is important to note that law alone is not a panacea for survivors of SGBV.
- ◉ Unsafe abortion are still on the increase despite the implementation guidelines recognizing access to safe abortion for the sexual offences victims.

# SUGGESTED WAY FORWARD

- ◉ The judiciary require a lot of sensitization to change attitude of some of the officers.
- The judiciary did not avail the new laws to all the courts in good time.
- ◉ Police continued charging offenders using the old law. Convections would be set aside by the higher court.
- The training of judicial officers and the police was a bit too late in time. This should have been immediately.
- ◉ Confusion was experienced where charges would be brought before the old law and magistrates would use the new law to sentence. The training should have been done immediately.

# RECOMMENDATIONS

- ◉ The new constitution protects the right to health including reproductive health(Art. 43)
- ◉ In art. 26, it permits abortion where the life of the mother is in danger.
- ◉ It is hoped that the rules for regulations would clearly give guidance that will help link the SOA to this progressive sections of the constitution to allow women to access reproductive health services as emergency treatment when sexual offences occur to avoid the many unsafe abortions.

THE END

Questions and Comments

Thank you