

SEXUAL OFFENCES

- These are offences covered under the Sexual Offences Act.
- They include rape, sexual assault, defilement, child sex tourism, child pornography, prostitution of persons with mental disabilities, exploitation of prostitution, and incest, among others.
- Our discussion will mainly focus on the offences of rape, sexual assault, and defilement, the most common sexual offences in our courts.

RAPE

Section 3, the Sexual Offences Act (SOA) provides:

- (1) 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 using threats or intimidation.

Actus reus

- The prohibited conduct: committing an act which causes penetration with one's genital organs.
- Both males and females can be liable for rape
- Questions about how a female can cause the act of penetration when the only genital organ capable of this conduct is the penis.
- The statute does not define "an act which causes penetration"
- ***Daniel Wambugu Maina vs R [2018] eKLR: The law does not envisage absolute penetration into genitals or release of semen by male organs***
- ***Peter Wanjala Wanyonyi v R [2021]eKLR; Peter Mwiti Gichuru v R [2020] eKLR: Penetration does not have to be proved through medical evidence; even the victim's oral or circumstantial evidence will suffice***
- S. 43 of the SOA, defines an act to be unlawful and intentional when committed under any coercive circumstances, under false pretences or fraudulent means, or concerning a person incapable of appreciating the nature of the conduct that offends. Fraudulent means include circumstances where the defendant fails to disclose that she/he is infected by HIV or another life-threatening sexually transmissible disease. This section expressly excludes situations involving married couples.

Mens rea

- The fault element of rape is intentionally and unlawfully causing penetration without consent or with consent obtained through intimidation.
- Under s. 42 SOA, a person is deemed to consent where she/he agrees by choice and has the freedom and capacity to make such choice. As reiterated in ***Charles Ndirangu Kibue v R [2016] eKLR, Criminal Appeal No. 14 of 2014***, consent means "an

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unequivocal voluntary agreement when the person, by words, gestures or any form of non verbal communication, communicates willingness to participate in the specific sexual act.

SEXUAL ASSAULT

Under S. 5 of the SOA, a person will be liable for sexual assault if he or she unlawfully

- a) “penetrates the genital organs of another person with;
 - i) any part of the body of another or that person; or
 - ii) an object manipulated by another or that person except where such penetration is carried out for proper and hygienic or medical purposes;
- b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person’s body.”

Actus reus

It is the causing penetration to a genital organ or any part of the body through the use of a body part or manipulation of an object. In *John Irungu v R [2016] eKLR, Criminal Appeal No. 20 of 2016*, the court observed concerning the essential ingredients of sexual assault:

“..., for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim’s genital organs by any part of the body of the perpetrator of the offence, or of any other person or even objects manipulated for that purpose.”

Mens rea

The act of penetrating or causing penetration would require the defendant to act intentionally.

DEFILEMENT

- S. 8 SOA provides that a person who commits an act which causes penetration with a child
- Where the child is less than eleven years the defendant, upon conviction, is liable to a sentence of life imprisonment, in the case of a child between twelve and 15 years to imprisonment of not less than 20 years and the instance of a child between 16 and 18 years to imprisonment of a term of not less than 18 years.

Actus reus

- Penetration with a child.
- The prosecution must prove the victim's age, this determines the sentence the court will give. This is also important because it can be inferred from the statute's language that a child cannot consent.
- In *Lawrence Kariuki Njeru v Republic [2017] eKLR, Criminal Appeal 71 of 2015*, a case involving the defilement of a two-year-old. The Court set out the ingredients for defilement as
 - a. Age of the victim,
 - b. Proof of penetration, and
 - c. Identification of the assailant.

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- Since the Supreme Court decision of *Francis Karioko Murateru and Another v R., SCK Pet. No. 15 of 2015 [2017] eKLR*, which declared mandatory minimum sentences unconstitutional, Courts no longer observe the prescribed sentences but instead issue sentences depending on the circumstances of each case, including mitigating factors.

Mens rea

- To cause penetration requires acting intentionally. The perpetrator must also know that the victim is a child/minor.
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What should be the correct age for consent and why?

How would you decide a case where a fifteen-year-old boy is accused of defiling a seventeen year-old girl who has since dropped out of school because of the resultant pregnancy?



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