

LAWS OF KENYA

The Sexual Offences Act

No 3 OF 2006



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THE SEXUAL OFFENCES ACT
No. 3 of 2006

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THE SEXUAL OFFENCES ACT, 2006

Commencement Date: 21st July 2006

An Act of Parliament to make provision about sexual offences, their definition, prevention and the protection of all persons from harm from unlawful sexual acts, and for connected purposes.

ENACTED BY THE PARLIAMENT OF KENYA AS FOLLOWS -

Short title.

1. This Act may be cited as the Sexual Offences Act, 2006.

Interpretation.

2. (1) In this Act, unless the context otherwise requires -

“act which causes penetration” means an act contemplated under this Act;

No. 8 of 2001.

“child” has the meaning assigned thereto in the Children Act;

“complainant” means the Republic or the alleged victim of a sexual offence and in the case of a child or a person with mental disabilities, includes a person who lodges a complaint on behalf of the alleged victim where the victim is unable or inhibited from lodging and following up a complaint of sexual abuse;

“consent” has the meaning assigned to it under this Act;

“DNA” means deoxyribonucleic acid, the genetic code unique to every living organism, including human beings and “DNA Test” shall be construed accordingly;

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“gang” means two or more persons;

“genital organs” includes the whole or part of male or female genital organs and for purposes of this Act includes the anus;

“gang rape” as the meaning assigned to it under section 10 of this Act;

“HIV” means the Human Immunodeficiency Virus which causes AIDS;

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“HIV test” means the test which determines whether a person is infected with HIV;

“indecent act” means any unlawful intentional act which causes-

- (a) any contact between the genital organs of a person, his or her breasts and buttocks with that of another person;
- (b) exposure or display of any pornographic material to any person against his or her will, but does not include an act which causes penetration;

“intermediary” means a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counselor, guardian, children’s officer or social worker;

“law enforcement officer” means any person whose duties involve law enforcement and includes but is not limited to a police officer as defined under the Police Act;

“person with mental disabilities” means a person affected by any mental disability irrespective of its cause, whether temporary or permanent, and for purposes of this Act includes a person affected by such mental disability to the extent that he or she, at the time of the alleged commission of the offence in question, was -

- (a) unable to appreciate the nature and reasonably foreseeable consequences of any act described under this Act;
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act;

“Minister” means the Minister for the time being responsible for matters relating to legal affairs and public prosecutions;

“penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

“sexual offence” means any offence prescribed in this Act; and

“vulnerable person” means a child, a person with mental disabilities or an elderly person and “vulnerable witness” shall be construed accordingly.

3.(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

Rape.

(c) the consent is obtained by force or by means of threats or intimidation of any kind.

(2) In this section the term “intentionally and unlawfully” has the meaning assigned to it in section 43 of this Act.

(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

Attempted Rape. **4.** Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape and is liable upon conviction for imprisonment for a term which shall not be less than five years but which may be enhanced to imprisonment for life.

Sexual assault. **5.**(1) Any person who 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 professional 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,

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is guilty of an offence termed sexual assault.

(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

Compelled or induced indecent acts. **6.** A person who intentionally and unlawfully compels, induces or causes another person to engage in an indecent act with -
 (a) the person compelling, inducing or causing the other person to engage in the act;
 (b) a third person;
 (c) that other person himself or herself; or
 (d) an object, including any part of the body of an animal, in circumstances where that other person -
 (i) would otherwise not have committed or allowed the indecent act; or
 (ii) is incapable in law of appreciating the 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

for a term which shall not be less than five years.

7. A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years.

Acts which cause penetration or indecent acts committed within the view of a family member, child or person with mental disabilities.

8.(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

Defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

(5) It is a defence to a charge under this section if -

- (a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
- (b) the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children's Act.

Cap. 92
Act No. 8 of 2001.

(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.

9.(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

Attempted
defilement.

(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.

(3) The provisions of section 8(5),(6),(7) and (8) shall apply *mutatis mutandis* to this section.

Gang rape.

7 of 2007.

10. Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life.

Indecent act with
child or adult.

11.(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

(2) It is a defence to a charge under subsection (1) if it is proved that such child deceived the accused person 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.

(3) The belief referred to in subsection (2) is to be determined having regard to all the circumstances, including the steps the accused person took to ascertain the age of the complainant.

Cap. 92
Act No. 8 of 2001

(4) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children's Act.

(5) The provisions of subsection (2) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.

(6) *Repealed by 7 of 2007.*

Indecent act with
adult.
7 of 2007.

11A. Any 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.

12. A person including a juristic person who -

- (a) manufactures or distributes any article that promotes or is intended to promote a sexual offence with a child; or
- (b) who supplies or displays to a child any article which is intended to be used in the performance of a sexual act with the intention of encouraging or enabling that child to perform such sexual act,

is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than five years and where the accused person is a juristic person to a fine of not less than five hundred thousand shillings.

Promotion of sexual offences with a child.

13. A person including a juristic person who, in relation to a child-

- (a) knowingly or intentionally makes or organizes any travel arrangements for or on behalf of a child within or outside the borders of Kenya, with the intention of facilitating the commission of any sexual offence against that child, irrespective of whether the offence is committed;
- (b) supplies, recruits, transports, transfers, harbors or receives a child, within or across the borders of Kenya, for purposes of the commission of any sexual offence under this Act with such child or any other person,

is, in addition to any other offence for which he or she may be convicted, guilty of the offence of child trafficking and is liable upon conviction to imprisonment for a term of not less than ten years and where the accused person is a juristic person to a fine of not less than two million shillings.

Child trafficking.

14. A person including a juristic person who -

- (a) makes or organizes any travel arrangements for or on behalf of any other person, whether that other person is resident within or outside the borders of Kenya, with the intention of facilitating the commission of any sexual offence against a child, irrespective of whether that offence is committed; or
- (b) prints or publishes, in any manner, any information that is intended to promote or facilitate conduct that would constitute a sexual offence against a child
- (c) introduces, organizes or facilitates contact with another person under the auspices of promoting tourism, in any manner, in order to promote conduct that would constitute a sexual offence against a child,

is guilty of an offence of promoting child sex tourism and is liable upon conviction to imprisonment for a term of not less than ten years and where the accused person is a juristic person to a fine of not less than two million shillings.

Child sex tourism.

Child prostitution.

15. Any person who -

- (a) knowingly permits any child to remain in any premises, for the purposes of causing such child to be sexually abused or to participate in any form of sexual activity or in any obscene or indecent exhibition or show;
- (b) acts as a procurer of a child for the purposes of sexual intercourse or for any form of sexual abuse or indecent exhibition or show;
- (c) induces a person to be a client of a child for sexual intercourse or for any form of sexual abuse or indecent exhibition or show, by means of print or other media, oral advertisements or other similar means;
- (d) takes advantage of his influence over, or his relationship to a child, to procure the child for sexual intercourse or any form of sexual abuse or indecent exhibition or show;
- (e) threatens or uses violence towards a child to procure the child for sexual intercourse or any form of sexual abuse or indecent exhibition or show;
- (f) intentionally or knowingly owns, leases, rents, manages, occupies or has control of any movable or immovable property used for purposes of the commission of any offence under this Act with a child by any person;
- (g) gives monetary consideration, goods, other benefits or any other form of inducement to a child or his parents with intent to procure the child for sexual intercourse or any form of sexual abuse or indecent exhibition or show,

commits the offence of benefiting from child prostitution and is liable upon conviction to imprisonment for a term of not less than ten years.

Child pornography.

16.(1) Any person including a juristic person who -

- (a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his or her possession any obscene book, pamphlet, paper, drawing, painting, art, representation or figure or any other obscene object whatsoever which depict the image of any child;
- (b) imports, exports or conveys any obscene object for any of the purposes specified in subsection (1), or knowingly or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation;
- (c) takes part in or receives profits from any business in the course of which he or she knows or has reason to believe that any such obscene objects are, for any of the purposes

specifically in this section, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation;

- (d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be produced from or through any person; or
- (e) offers or attempts to do any act which is an offence under this section,

is guilty of an offence of child pornography and upon conviction is liable to imprisonment for a term of not less than six years or to a fine of not less than five hundred thousand shillings or to both and upon subsequent conviction, for imprisonment to a term of not less than seven years without the option of a fine.

(2) This section shall not apply to -

- (a) a publication which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, art, representation or figure is in the interest of science, literature, learning or other objects of general concern;
- (b) any book, pamphlet, paper, writing, drawing, painting, representation or figure which is kept or used bona fide for religious purposes;
- (c) any representation sculptured, engraved, painted or otherwise represented on or in any ancient monument recognized as such in law; and
- (d) activities between two persons of over eighteen years by mutual consent.

(3) For the purposes of subsection (1), a book, pamphlet, paper, drawing, painting, art, representation or figure or any other object shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or where it comprises two or more distinct items the effect of any one of its items, if taken as a whole, tends to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

17. Any person who -

- (a) intentionally causes or incites another person to become a prostitute; and
 - (b) intentionally controls any of the activities of another person relating to that person's prostitution; and does so for or in expectation of gain for him or her self or a third person,
- is guilty of an offence and is liable upon conviction to imprisonment for

Exploitation of
prostitution.

a term of not less than five years or to a fine of five hundred thousand shillings or to both.

Trafficking for sexual exploitation.

18.(1) Any person who intentionally or knowingly arranges or facilitates travel within or across the borders of Kenya by another person and either -

- (a) intends to do anything to or in respect of the person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act; or
- (b) believes that another person is likely to do something to or in respect of the other person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act,

is guilty of an offence of trafficking for sexual exploitation.

(2) A person guilty of an offence under this section is liable upon conviction, to imprisonment for a term of not less than fifteen years or to a fine of not less than two million shillings or to both.

Prostitution of persons with mental disabilities.

19.(1) A person who, in relation to a person with mental disability, for financial or other reward, favour or compensation to such person with mental disability or to any other person, intentionally -

- (a) commits any offence under this Act with such person with disabilities;
- (b) invites, persuades or induces such person with disabilities to allow him or her to commit any offence under this Act with such person with disabilities;
- (c) makes available, offers or engages such person with disabilities for purposes of the commission of any offence under this Act with any person;
- (d) supplies, recruits, transports, transfers, harbours or receives such person with disabilities, within or across the borders of Kenya, for purposes of the commission of any offence under this Act with any person;
- (e) allows or knowingly permits the commission of any offence under this Act by any person with such person with disabilities;
- (f) knowingly or intentionally owns, leases, rents, manages, occupies or has control of any movable or immovable property used for purposes of the commission of any offence under this Act with such person with disabilities by any person;
- (g) detains such person with disabilities, whether under threat, coercion, deception, abuse of power or force for purposes of the commission of any offence under this Act with any person; or
- (h) participates in, is involved in, promotes, encourages or

facilitates the commission of any offence under this Act with such person with disabilities by any person, is, in addition to any other offence which he or she may be convicted, guilty of the offence of being involved in the prostitution of a person with disabilities and shall, upon conviction, be liable to imprisonment for a term of not less than ten years.

(2) A person who intentionally lives wholly or in part on rewards or compensation or receives financial or other reward, favour or compensation from the commission of any offence under this Act with a person with disabilities by another person is guilty of an offence of benefiting from prostitution of a person with disabilities and is liable upon conviction to imprisonment for a term of not less than ten years.

(3) Any person including a juristic person who -

(a) knowingly or intentionally makes or organizes any travel arrangements for or on behalf of any person, whether that person is resident within or outside the borders of Kenya, with the intention of facilitating the commission of any sexual offence against a person with disabilities, irrespective of whether that offence is committed or not; or

(b) prints or publishes, in any manner, any information that is intended to promote or facilitate conduct that would constitute a sexual offence against a person with disabilities,

is guilty of an offence of promoting sex tourism with persons with disabilities and is liable upon conviction to imprisonment for a term of not less than ten years or to a fine of not less than two million shillings.

(4) A juristic person convicted of an offence under this section is liable upon conviction to a fine of not less than two million shillings.

20. (1) Any male person who commits 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 is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

Incest by male persons.

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.

(2) If any male person attempts to commit the offence specified in subsection (1), he is guilty of an offence of attempted incest and is liable upon conviction to a term of imprisonment of not less than ten years.

No 8 of 2001.

(3) Upon conviction in any court of any male person for an offence under this section, or of an attempt to commit such an offence, it shall be within the power of the court to issue orders referred to as “section 114 orders” under the Children’s Act and in addition divest the offender of all authority over such female, remove the offender from such guardianship and in such case to appoint any person or persons to be the guardian or guardians of any such female during her minority or less period.

Incest by female persons.

21. The provisions of section 20 shall apply *mutatis mutandis* with respect to any female person who commits an indecent act or act which causes penetration with a male person who is to her knowledge her son, father, grandson grand father, brother, nephew or uncle.

Test of relationship.

22.(1) In cases of the offence of incest, brother and sister includes half brother, half sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not.

(2) In this Act -

- (a) “uncle” means the brother of a person’s parent and “aunt” has a corresponding meaning;
- (b) “nephew” means the child of a person’s brother or sister and “niece” has a corresponding meaning;
- (c) “half-brother” means a brother who shares only one parent with another;
- (d) “half-sister” means a sister who shares only one parent with another; and
- (e) “adoptive brother” means a brother who is related to another through adoption and “adoptive sister” has a corresponding meaning.

(3) An accused person shall be presumed, unless the contrary is proved, to have had knowledge, at the time of the alleged offence, of the relationship existing between him or her and the other party to the incest.

(4) In cases where the accused person is a person living with the complainant in the same house or is a parent or guardian of the complainant, the court may give an order removing the accused person from the house until the matter is determined and the court may also give an order classifying such a child as a child in need of care and protection and may give further orders under the Children’s Act.

No. 8 of 2001

23.(1) Any person, who being in a position of authority, or holding a public office, who persistently makes any sexual advances or requests which he or she knows, or has reasonable grounds to know, are unwelcome, is guilty of the offence of sexual harassment and shall be liable to imprisonment for a term of not less than three years or to a fine of not less than one hundred thousand shillings or to both.

Sexual harassment.

(2) It shall be necessary to prove in a charge of sexual harassment that-

- (a) the submission or rejection by the person to whom advances or requests are made is intended to be used as basis of employment or of a decision relevant to the career of the alleged victim or of a service due to a member of the public in the case of a public officer;
- (b) such advances or requests have the effect of interfering with the alleged victim's work or educational performance or creating an offensive working or learning environment for the alleged victim or denial of a service due to the member of the
- (c) public from a public office.

24.(1) Whoever being the superintendent or manager of a jail, remand home or children's or any institution or any other place of custody established by or under any law takes advantage of his or her official position and induces or seduces any inmate or inhabitant of such jail or institution, remand home, place or institution to have sexual intercourse with him or her, such sexual intercourse not amounting to the offence of rape or defilement shall be guilty of a sexual offence relating to a position of authority and shall be liable upon conviction to imprisonment for a term of not less than ten years.

Sexual offences relating to position of authority and persons in position of trust.

(2) Any person who being a law enforcement officer takes advantage of his or her position and has sexual intercourse or commits any other sexual offence under this Act -

- (a) within the limits of the station to which he or she is appointed; or
- (b) in the premises of any station house whether or not situated in the station to which he or she is appointed; or
- (c) on a person in his or her custody or in the custody of a law enforcement officer subordinate to him or her,

commits an offence of abuse of position of authority and is liable upon conviction to imprisonment for a term of not less than ten years.

(3) Any person who being the manager of any hospital or staff of a hospital takes advantage of his or her position and has sexual intercourse with or commits any other sexual offence under this Act with any patient

in the hospital, such sexual intercourse not amounting to the offence of rape or defilement shall be guilty of an offence of abuse of position of authority and shall be liable upon conviction to imprisonment for a term of not less than ten years.

(4) Any person who being the head-teacher, teacher or employee in a primary or secondary school or special institution of learning whether formal or informal, takes advantage of his or her official position and induces or seduces a pupil or student to have sexual intercourse with him or her or commits any other offence under this Act, such sexual intercourse not amounting to the offence of rape or defilement, shall be guilty of an offence of abuse of position of authority and shall be liable upon conviction to imprisonment for a term of not less than ten years.

(5) Any person who being in a position of trust takes advantage of his or her position and induces or seduces a person in their care to have sexual intercourse with him or her or commits any other offence under this Act, such sexual intercourse not amounting to the offence of rape or defilement, shall be guilty of an offence of abuse of position of trust and shall be liable upon conviction to imprisonment for a term of not less than ten years.

Sexual relationships
which pre-date
position of authority
or trust.

25.(1) Conduct by a person which would otherwise be an offence under this Act against another person is not an offence under section 24 if, immediately before the position of authority or trust arose, a sexual relationship existed between that person and the other person.

(2) Subsection (1) does not apply if at that time sexual intercourse between such persons would have been unlawful.

(3) In proceedings for an offence under this section it is for the accused person to prove that such a relationship existed at that time.

Deliberate
transmission of HIV
or any other life
threatening sexually
transmitted disease.

26. (1) Any person who, having actual knowledge that he or she is infected with HIV or any other life threatening sexually transmitted disease intentionally, knowingly and willfully does anything or permits the doing of anything which he or she knows or ought to reasonably know -

- (a) will infect another person with HIV or any other life threatening sexually transmitted disease;
- (b) is likely to lead to another person being infected with HIV or any other life threatening sexually transmitted disease;
- (c) will infect another person with any other sexually transmitted disease,

shall be guilty of an offence, whether or not he or she is married to that other person, and shall be liable upon conviction to imprisonment for a term of not less than fifteen years but which may be for life.

(2) Notwithstanding the provisions of any other law, where a person is charged with committing an offence under this section, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct, for the purpose of ascertaining whether or not he or she is infected with HIV or any other life threatening sexually transmitted disease.

(3) The sample or samples taken from an accused person in terms of subsection (2) shall be stored at an appropriate place until finalization of the trial.

(4) The court shall, where the accused person is convicted, order that the sample or samples be tested for HIV or any other life threatening sexually transmitted disease and where the accused person is acquitted, order that the sample or samples be destroyed.

(5) Where a court has given directions under subsection (4), any medical practitioner or designated person shall, if so requested in writing by a police officer above the rank of a constable, take an appropriate sample or samples from the accused person concerned;

(6) An appropriate sample or samples taken in terms of subsection (5)-

- (a) shall consist of blood, urine or other tissue or substance as may be determined by the medical practitioner or designated person concerned, in such quantity as is reasonably necessary for the purpose of determining whether or not the accused person is infected with HIV or any other life threatening sexually transmitted disease; and
- (b) in the case a blood or tissue sample, shall be taken from a part of the accused person's body selected by the medical practitioner or designated person concerned in accordance with accepted medical practice.

(7) Without prejudice to any other defence or limitation that may be available under any law, no claim shall lie and no set-off shall operate against -

- (a) the State;
- (b) any Minister; or
- (c) any medical practitioner or designated persons, in respect of any detention, injury or loss caused by or in connection with the taking of an appropriate sample in terms of subsection (5), unless the taking was unreasonable or done in bad faith or the person who took the sample was culpably ignorant and negligent.

(8) Any person who, without reasonable excuse, hinders or obstructs the taking of an appropriate sample in terms of subsection (5) shall be guilty of an offence of obstructing the cause of justice and shall on conviction be liable to imprisonment for a term of not less than five years or to a fine of not less fifty thousand shillings or to both.

(9) Where a person is convicted of any offence under this Act and it is proved that at the time of the commission of the offence, the convicted person was infected with HIV or any other life threatening sexually transmitted disease whether or not he or she was aware of his or her infection, notwithstanding any other sentence in this Act, he or she shall be liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.

(10) For purposes of this section -

- (a) the presence in a person's body of HIV antibodies or antigens, detected through an appropriate test or series of tests, shall be prima facie proof that the person concerned is infected with HIV; and
- (b) if it is proved that a person was infected with HIV after committing an offence referred to in this Act, it shall be presumed, unless the contrary is shown, that he or she was infected with HIV when the offence was committed.

Administering a
substance with intent.

27. (1) Any person commits an offence if he intentionally administers a substance to, or causes a substance to be administered to or taken by, another person with the intention of -

- (a) stupefying; or
- (b) overpowering that person,

so as to enable any person to engage in a sexual activity with that person.

(2) In proceedings for an offence under this section it is for the complainant to prove that the accused person administered or caused the alleged victim to take any substance with a view to engaging in a sexual activity with the alleged victim.

(3) A person guilty of an offence under this section is, in addition to any other offence under this Act, liable on conviction to imprisonment for a term of not less than ten years.

Distribution of a
substance by juristic
person.

28.(1) Any juristic person commits an offence if he intentionally distributes or administers a substance to, or causes a substance to be distributed by other persons with the intention of -

- (a) stupefying; or

(b) overpowering another person,
so as to enable any person to engage in a sexual activity with that other person.

(2) In proceedings for an offence under this section it is for the accused person to prove that he did not distribute or cause to be taken any substance with a view to one person engaging into a sexual activity with another person.

(3) A juristic person guilty of an offence under this section is liable on conviction to a fine of not less than five million shillings or imprisonment of its directors for a term of not less than ten years or both.

29. 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.

Cultural and religious offences.

30. A person who has been convicted of a sexual offence and who fails to disclose such conviction when applying for employment which places him or her in a position of authority or care of children or any other vulnerable person or when offering or agreeing to take care of or supervise children or any other vulnerable person is guilty of an offence and liable upon conviction to imprisonment for a term of not less than three years or to a fine of not less than fifty thousand shillings or to both.

Non-disclosure of conviction of sexual offences.

31.(1) A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is -

Vulnerable witnesses.

- (a) the alleged victim in the proceedings pending before the court;
- (b) a child; or
- (c) a person with mental disabilities.

(2) The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of -

- (a) age;
- (b) intellectual, psychological or physical impairment;
- (c) trauma;
- (d) cultural differences;

- (e) the possibility of intimidation;
- (f) race;
- (g) religion;
- (h) language;
- (i) the relationship of the witness to any party to the proceedings;
- (j) the nature of the subject matter of the evidence; or
- (k) any other factor the court considers relevant.

(3) The court may, if it is in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon an intermediary to appear before the court and advise the court on the vulnerability of such witness.

(4) Upon declaration of a witness as a vulnerable witness in terms of this section, the court shall, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures -

- (a) allowing such witness to give evidence under the protective cover of a witness protection box;
- (b) directing that the witness shall give evidence through an intermediary;
- (c) directing that the proceedings may not take place in open court;
- (d) prohibiting the publication of the identity of the complainant or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family; or
- (e) any other measure which the court deems just and appropriate.

(5) Once a court declares any person a vulnerable witness, the court shall direct that an intermediary referred to in subsection (3), be appointed in respect of such witness unless the interests of justice justify the non-appointment of an intermediary, in which case the court shall record the reasons for not appointing an intermediary.

(6) An intermediary referred to in subsection (3) shall be summoned to appear in court on a specified date, place and time to act as an intermediary and shall, upon failure to appear as directed, appear before the court to advance reasons for such failure, upon which the court may act as it deems fit.

(7) If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may -

- (a) convey the general purport of any question to the relevant witness;

- (b) inform the court at any time that the witness is fatigued or stressed; and
- (c) request the court for a recess.

(8) In determining which of the protective measures referred to in subsection (4) should be applied to a witness, the court shall have regard to all the circumstances of the case, including -

- (a) any views expressed by the witness, but the court shall accord such views the weight it considers appropriate in view of the witness's age and maturity;
- (b) any views expressed by a knowledgeable person who is acquainted with or has dealt with the witness;
- (c) the need to protect the witness's dignity and safety and protect the witness from trauma; and
- (d) the question whether the protective measures are likely to prevent the evidence given by the witness from being effectively tested by a party to the proceedings.

(9) The court may, on its own initiative or upon the request of the prosecution, at anytime revoke or vary a direction given in terms of subsection (4), and the court shall, if such revocation or variation has been made on its own initiative, furnish reasons therefor at the time of the revocation or variation.

(10) A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary.

(11) Any person, including a juristic person, who publishes any information in contravention of this section or contrary to any direction or authority under this section or who in any manner whatsoever reveals the identity of a witness in contravention of a direction under this section, is guilty of an offence and liable on conviction to imprisonment for a term of not less than three years or to a fine of not less than fifty thousand shillings or to both if the person in respect of whom the publication or revelation of identity was done is under the age of eighteen years and in any other case to imprisonment for a term of not less three years or to a fine of not less than two hundred thousand shillings or to both.

(12) Any juristic person convicted of any offence under this section shall be liable to a fine of one million shillings.

(13) An accused person in criminal proceedings involving the alleged commission of a sexual offence who has no legal representation shall put any questions to a vulnerable witness by stating the questions to the court and the court shall repeat the questions accurately to the witness.

Vulnerable witness
to be notified of
protective measures.

32.(1) The prosecution shall inform a witness who is to give evidence in criminal proceedings in which a person is charged with the alleged commission of a sexual offence, or if such witness is a child, such child, his or her parent or guardian or a person in *loco parentis*, of the possibility that he or she may be declared a vulnerable witness in terms of section 31 and of the protective measures listed in paragraphs (a) to (e) of section 31(4) prior to such witness commencing his or her testimony at any stage of the proceedings.

(2) The court shall, prior to hearing evidence given by a witness referred to in subsection (1), enquire from the prosecutor whether the witness has been informed as contemplated in this section and the court shall note the witness's response on the record of the proceedings, and if the witness indicates that he or she has not been so informed, the court shall ensure that the witness is so informed.

Evidence of
surrounding
circumstances and
impact of sexual
offence.

33. Evidence of the surrounding circumstances and impact of any sexual offence upon a complainant may be adduced in criminal proceedings involving the alleged commission of a sexual offence where such offence is tried in order to prove -

- (a) whether a sexual offence is likely to have been committed-
 - (i) towards or in connection with the person concerned;
 - (ii) under coercive circumstances referred to in section 43;
- and
- (b) for purposes of imposing an appropriate sentence, the extent of the harm suffered by the person concerned.

Evidence of character
and previous sexual
history.

34.(1) No evidence as to any previous sexual experience or conduct of any person against or in connection with whom any offence of a sexual nature is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, shall be adduced, and no question regarding such sexual conduct shall be put to such person, the accused or any other witness at the proceedings pending before a court unless the court has, on application by any party to the proceedings, granted leave to adduce such evidence or to put such questions.

(2) Before an application for leave contemplated in subsection (1) is heard, the court shall direct that any person, other than the complainant, whose presence is not necessary, may not be present at the proceedings.

(3) The court shall, subject to subsection (4), grant the application referred to in subsection (1) if satisfied that such evidence or questioning-

- (a) relates to a specific instance of sexual activity relevant to a fact in issue;
- (b) is likely to rebut evidence previously adduced by the prosecution;
- (c) is likely to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue;
- (d) is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right to privacy; or
- (e) is fundamental to the accused's defence.

35. (1) A court shall upon conviction of a person having committed a sexual offence and if satisfied that the convicted person is dependent on or has the propensity to misuse alcohol, any drug or is suffering from any other disorder, and may benefit from treatment, grant an order for treatment or professional counseling and such an order *shall* be made in addition to any sentence, including a sentence of imprisonment which is not suspended.

Medical treatment orders.

(2) Notwithstanding the provisions of sub-section (1), a court shall, at any time at the request of a victim of sexual offence or an intermediary, grant an order for the treatment of a victim of sexual offence.

(3) Notwithstanding the provisions of sub-section (2), the Minister responsible for health shall prescribe circumstances under which a victim of a sexual offence may at any time access treatment in any public hospital or institution.

7 of 2007.

(4) The expenses incurred for the treatment or professional counseling of any person convicted of an offence under this section or a victim of a sexual offence as the case may be, shall be borne by the State.

(5) All treatment in respect of a treatment order or professional counseling granted under this Act shall be undertaken at a public hospital or institution or any other institution approved or gazetted by the Minister responsible for health.

7 of 2007.

(6) All medical records relating to treatment pursuant to subsections (1), (2), (3) and (4) shall be kept and may be used as evidence before any court with regard to any offence under this Act.

36. (1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject

Evidence of medical or forensic nature.

to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.

(2) The sample or samples taken from an accused person in terms of subsection (1) shall be stored at an appropriate place until finalization of the trial.

(3) The court shall, where the accused person is convicted, order that the sample or samples be stored in a databank for dangerous sexual offenders and where the accused person is acquitted, order that the sample or samples be destroyed.

(4) The dangerous sexual offenders databank referred to in subsection (3) shall be kept for such purpose and at such place and shall contain such particulars as may be determined by the Minister.

(5) Where a court has given directions under subsection (1), any medical practitioner or designated person shall, if so requested in writing by a police officer above the rank of a constable, take an appropriate sample or samples from the accused person concerned.

- (6) An appropriate sample or samples taken in terms of subsection (5)-
- (a) shall consist of blood, urine or other tissue or substance as may be determined by the medical practitioner or designated person concerned, in such quantity as is reasonably necessary for the purpose of gathering evidence in ascertaining whether or not the accused person committed an offence or not; and
 - (b) in the case a blood or tissue sample, shall be taken from a part of the accused person's body selected by the medical practitioner or designated person concerned in accordance with accepted medical practice.

(7) Without prejudice to any other defence or limitation that may be available under any law, no claim shall lie and no set-off shall operate against -

- (a) the State;
- (b) any Minister; or
- (c) any medical practitioner or designated persons,

in respect of any detention, injury or loss caused by or in connection with the taking of an appropriate sample in terms of subsection (5), unless the taking was unreasonable or done in bad faith or the person who took the sample was culpably ignorant and negligent.

(8) Any person who, without reasonable excuse, hinders or obstructs the taking of an appropriate sample in terms of subsection (5) shall be guilty of an offence of obstructing the course of justice and shall on conviction be liable to imprisonment for a term of not less than five years or to a fine of not less fifty thousand shillings or to both.

37.(1) Any person who intentionally interferes with a scene of crime or any evidence relating to the commission of an offence under this Act is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than three years or to a fine of one hundred thousand shillings or to both.

Keeping scene of crime secure etc.

(2) Interference referred to in subsection (1) includes but is not limited to -

- (a) tampering with a scene of crime;
- (b) interference or intimidation of witnesses; and
- (c) any other act or omission that would hinder or obstruct investigations or materially misrepresent any evidence.

38. Any person who makes false allegations against another person to the effect that the person has committed an offence under this Act is guilty of an offence and shall be liable to punishment equal to that for the offence complained of.

Offence to make false allegations.

39.(1) A court may declare a person who has been convicted of a sexual offence a dangerous sexual offender if such a person has -

- (a) more than one conviction for a sexual offence;
- (b) been convicted of a sexual offence which was accompanied by violence or threats of violence; or
- (c) been convicted of a sexual offence against a child.

Supervision of dangerous sexual offenders.

(2) Whenever a dangerous sexual offender has been convicted of a sexual offence and sentenced by a court to imprisonment without an option of a fine, the court shall order, as part of the sentence, that when such offender is released after serving part of a term of imprisonment imposed by a court, the prisons department shall ensure that the offender is placed under long-term supervision by an appropriate person for the remainder of the sentence.

(3) For purposes of subsection (2), long term supervision means supervision of a rehabilitative nature for a period of not less than five years.

(4) A court may not make an order referred to in subsection (2) unless the court has had regard to a report by a probation officer, social worker, or other persons designated by the court for the purposes of this section as such, which report shall contain an exposition of -

- (a) the suitability of the offender to undergo a long-term supervision order;
- (b) the possible benefits of the imposition of a long-term supervision order on the offender;
- (c) a proposed rehabilitative programme for the offender;
- (d) information on the family and social background of the offender;
- (e) recommendations regarding any conditions to be imposed upon the granting of a long-term supervision order; and
- (f) any other matter directed by the court.

(5) An order referred to in subsection (2) shall specify -

- (a) that the offender is required to take part in a rehabilitative programme;
- (b) the nature of the rehabilitative programme to be attended;
- (c) the number of hours per month that the offender is required to undergo rehabilitative supervision; and
- (d) that the offender is required, where applicable, to refrain from using or abusing alcohol or drugs.

(6) An order referred to in subsection (2) may specify that the offender is required to -

- (a) refrain from visiting a specified location;
- (b) refrain from seeking employment of a specified nature; and
- (c) subject himself or herself to a specified form of monitoring.

(7) A long-term supervision order made by a court in terms of this section shall be reviewed by that court within three years from the date on which the order was made or within such shorter period as the court may direct upon referral by the Commissioner of Prisons of such an order to that court for review.

(8) Upon making a long-term supervision order in terms of this section, the court shall explain to the victim, including the next of kin of a deceased victim, that they have the right to be present at the review proceedings referred to in subsection (7) and may make representations.

(9) A court which has granted a long-term supervision order in terms of this section may, upon evidence that a dangerous sexual offender has failed to comply with the order or with any condition imposed in connection with such order, direct that such an offender be -

- (a) ordered to appear before that court or another court of similar or higher jurisdiction at a specified place and on a specified date and time; or
- (b) arrested and brought before such court.

(10) Upon the appearance of a dangerous sexual offender at a court pursuant to the provisions of subsection (9), the court shall direct the accused person to show cause for failure to comply with a long-term supervision order or with any condition imposed in connection with such order and the court may -

- (a) confirm the original order and any conditions imposed in connection with such order;
- (b) vary or withdraw such order or any conditions imposed;
- (c) impose an additional condition or conditions; or
- (d) make any other order as the court deems fit.

(11) If a court has directed that a dangerous sexual offender is required to take part in a rehabilitative programme contemplated in this section, the court may order that the offender, upon being found by the court to have adequate means, shall contribute to the costs of such programme to the extent specified by the court.

(12) A person who has been declared a dangerous sexual offender and who does not comply with a supervision order in accordance with this section is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than three years or to a fine of not less than fifty thousand shillings or to both.

(13) A register for convicted sexual offenders shall be maintained by the Registrar of the High Court and any person who has reasonable cause to so examine it may examine the register.

40. The decision as to whether the prosecution or investigation by any police officer of a complaint that a sexual offence has been committed should be discontinued shall rest with the Attorney General.

Attorney-General to decide whether police investigations should be discontinued.

41.(1) A person who, while being a citizen of, or permanently residing in Kenya, commits an act outside Kenya which act would constitute a sexual offence had it been committed in Kenya, is guilty of such an offence and is liable to the same penalty prescribed for such offence under this Act.

Extra-territorial jurisdiction.

(2) A person may not be convicted of an offence contemplated in subsection (1) if such a person has been acquitted or convicted in the country where that offence was committed.

42. For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.

Consent.

43.(1) An act is intentional and unlawful if it is committed -
(a) in any coercive circumstance;

Intentional and unlawful acts.

- (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.

(2) The coercive circumstances, referred to in subsection (1)(a) include any circumstances where there is -

- (a) use of force against the complainant or another person or against the property of the complainant or that of any other person;
- (b) threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or
- (c) 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.

(3) False pretences or fraudulent means, referred to in subsection (1)(b), include circumstances where a person -

- (a) in respect of whom an act is being committed, is led to believe that he or she is committing such an act with a particular person who is in fact a different person;
- (b) in respect of whom an act is being committed, is led to believe that such an act is something other than that act; or
- (c) intentionally fails to disclose to the person in respect of whom an act is being committed, that he or she is infected by HIV or any other life-threatening sexually transmissible disease.

(4) The circumstances in which a person is incapable in law of appreciating the nature of an act referred to in subsection (1) include circumstances where such a person is, at the time of the commission of such act -

- (a) asleep;
- (b) unconscious;
- (c) in an altered state of consciousness;
- (d) under the influence of medicine, drug, alcohol or other substance to the extent that the person's consciousness or judgment is adversely affected;
- (e) mentally impaired; or
- (f) a child.

(5) This section shall not apply in respect of persons who are lawfully married to each other.

- (a) that any of the circumstances specified in subsection (2) existed; and
- (b) that the accused person knew that those circumstances existed,

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

(2) The circumstances are that-

- (a) any person was, at the time of the offence or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;
- (b) any person was, at the time of the offence or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person;
- (c) the complainant was, and the accused was not, unlawfully detained at the time of the commission of the act;
- (d) the complainant was asleep or otherwise unconscious at the time of the commission of the act;
- (e) because of the complainant's disability, the complainant would not have been able at the time of the commission of the act to communicate to the accused whether the complainant consented;
- (f) any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the commission of the act.

(3) In subsection (2)(a) and (b), the reference to the time immediately before the act is, in the case of an act which is one of a continuous series of sexual activities, a reference to the time immediately before the first sexual activity began.

45. (1) 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 -

- (a) that the complainant did not consent to the commission of that act; and
- (b) that the accused person did not believe that the complainant consented to the act being complained of.

Conclusive
presumptions about
consent.

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

National policy
framework.

- 46.** The Minister shall -
- (a) prepare a national policy framework to guide the implementation, and administration of this Act in order to secure acceptable and uniform treatment of all sexual related offences including treatment and care of victims of sexual offences;
 - (b) review the policy framework at least once every five years; and
 - (c) when required, amend the policy framework.

Regulations.

- 47.** The Minister may, in consultation with the Ministers for the time being responsible for matters relating to internal security, prisons, social services, education and health, make regulations regarding -
- (a) any matter which is required or permitted by this Act to be prescribed by regulations;
 - (b) the inter-sectoral implementation of this Act; and
 - (c) any other matter which is necessary or expedient to prescribe in order to achieve or promote the objects of this Act.

Chief Justice may
make rules.
7 of 2007.

- 47A.** The Chief Justice may make rules of Court for the implementation of this Act.

Transitional
provisions.

- 48.** The provisions of the First Schedule shall apply.

Consequential
amendments and
repeals.

- 49.** The Acts identified in the Second Schedule are amended in the manner set out in the schedule.

FIRST SCHEDULE
TRANSITIONAL PROVISIONS

s. 48.

1. Notwithstanding the provisions of any other Act, the provisions of this Act shall apply with necessary modifications upon the commencement of this Act to all sexual offences.

2. For greater certainty, the provisions of this Act shall supersede any existing provisions of any other law with respect to sexual offences.

3. Any proceedings commenced under any written law or part thereof repealed by this Act shall continue to their logical conclusion under those written laws. 7 of 2007.

SECOND SCHEDULE
CONSEQUENTIAL AMENDMENTS AND REPEALS

1. (1) This paragraph amends the Penal Code.

s. 49.

(2) Sections 139, 140, 141, 142, 143, 144, 145, 147, 148, 149, 161, 164, 166, 167 and 168 of the Penal Code are repealed. Cap. 63.

2. (1) This paragraph amends the Evidence Act.

(2) Section 124 of the Evidence Act is amended deleting the words “a child of tender years who is” and substituting therefor the words “alleged victim” and by deleting the word “child” wherever it appears thereafter and substituting therefor the words “alleged victim”. Cap. 80.

(3) Section 127 of the Evidence Act is amended in subsection (3) by repealing paragraph (b) and substituting therefor the following new paragraph -

(b) with offences under the Sexual Offences Act;

3. (1) This paragraph amends the Criminal Procedure Code.

(2) Section 184 of the Criminal Procedure Code is repealed and replaced with the following new section-

Charge of rape. 184. Where a person is charged with rape and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under one of the sections of the Sexual Offences Act, he may be convicted of that

Cap.75.

offence although he was not charged with it.

(3) Section 185 of the Criminal Procedure Code is repealed and replaced with the following new section -

(b) with offences under the Sexual Offences Act;

(4) Section 186 of the Criminal Procedure Code is repealed and replaced with the following new section -

186. When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the Sexual Offences Act, he may be convicted of that offence although he was not charged with it.

[Subsidiary]

THE SEXUAL OFFENCES REGULATIONS, 2008

L.N.132/2008

1. These Regulations may be cited as the Sexual Offences Regulations, 2008. Citation.

2. In these Regulations, unless the context otherwise requires—

“Act” means the Sexual Offences Act, 2006; and

No.3 of 2006.

“Prohibited Publications Review Board” means the Board by that name established under section 53(3) of the Penal Code.

3. (1) For purposes of sentences imposed by sections 3(3), 4, 5(2), 10 or any other under the Act which may require alteration, revision or enhancement, the High Court may exercise the powers and procedures provided for under sections 362, 363, 364, 365, 366, and 367 of the Criminal Procedure Code.

Enhancement of sentence.

Cap. 75.

(2) In exercise of the power to alter, revise or enhance sentences under the Act, regard shall be had to —

- (a) whether the sentence imposed is unlawful or contrary to that provided for by the Act;
- (b) the number of times the perpetrator of the offence has committed the offence;
- (c) the age of the victim(s) of the sexual offence;
- (d) the age of the perpetrator(s) of the sexual offence;
- (e) the victim impact statement adduced in accordance with section 33(b) of the Act;
- (f) whether force was involved;
- (g) prior criminal history;
- (h) the relationship existing at the time of the offence between the victim and the accused; and
- (i) any other factor which may be relevant in the opinion of the Court:

Provided that proceedings under this regulation shall be subject to section 382 of the Criminal Procedure Code. Cap. 75.

[Subsidiary]

Prohibited
publications.
Cap.63.

4. (1) The articles referred to in section 16 of the Act include those articles prohibited by an order published in the Gazette under section 52(1) and (2) of the Penal Code.

(2) The Minister shall, in consultation with the Prohibited Publications Review Board, ensure the better implementation of section 16 of the Act.

(3) The Minister may, in consultation with the Prohibited Publications Review Board, and by an order in the Gazette, prohibit other publications for purposes of section 16 of the Act.

Designated persons
and medical
practitioners.

6. (1) For purposes of section 26(5) of the Act –

(a) “designated person” includes –

Cap.257.

(i) a nurse registered under section 12(1) of the Nurses Act;
or

Cap. 260.

(ii) a clinical officer registered under section 7 of the Clinical Officers (Training, Registration and Licensing) Act; and

Cap. 253.

(b) “medical practitioner” means a medical practitioner registered in accordance with section 6 of the Medical Practitioners and Dentists Act.

Register of offenders.

7. (1) The Registrar of the High Court shall maintain a register to be known as the Register of Convicted Sexual Offenders (hereinafter referred to as “the Register”) in accordance with section 39(13) of the Act, in which shall be entered the following information regarding a sexual offender –

(a) the name(s) of the sexual offender and alias(es);

(b) date of birth;

(c) place of birth;

(d) nationality;

(e) physical description, in particular, sex, race, height, weight, eye color, hair color, scars, tattoos or other marks or characteristics;

(f) passport photograph and a set of fingerprints;

- (g) physical address at the time of the offence and any other domiciles;
- (h) the offence with which charged;
- (i) the sentence entered by the trial court;
- (j) the date(s) of conviction and any sentence(s) imposed;
- (k) the sentence entered on reversal or enhancement;
- (l) the age of victim(s) in the sexual offence in question;
- (m) previous convictions entered against the convict under the Act or related penal laws;
- (n) the relationship between the convict and the victim, if any, including information as to whether there was a position of trust;
- (o) brief particulars of the offences as well as the circumstances under which the offence was committed;
- (p) whether the sexual offender has been declared dangerous by a court of law; or
- (q) any other information, which, in the Registrar's opinion, requires to be kept.

(2) The Register, which may also be kept in electronic form, shall be kept in the form set out in the Schedule.

(3) The registration period for a sex offender shall lapse upon the sex offender's death.

(4) A sex offender shall notify the Registrar if he –

- (a) ceases to live or reside at the registered address or moves to a different address.
- (b) leaves a job or obtains a new job, or leaves a school or enrolls in a new school;
- (c) leaves the jurisdiction of the High Court.

(5) Notice of the changes described in paragraph (4) above shall

[Subsidiary] be in writing and shall be provided prior to the change, if feasible, and in any event within twenty one days of the occurrence of the change.

(6) Notices of change in address or place of work or school attendance shall include the new address, location and phone information.

(7) In the exercise of the powers provided for under section 39 (13) of the Act, regard shall be had to the need to protect the names and identity of the complainant, victims and other witnesses, especially where such persons have been declared vulnerable by a court of law during criminal proceedings.

(8) The Registrar may, in writing, indicate to any person who demonstrates to the Registrar that he has a reasonable interest whether a person's name has been entered in the Register.

(9) Notwithstanding any other provision in these Regulations, the Registrar shall at all times ensure access to the Register by the following person(s) –

- (a) judicial officers;
- (b) advocates of the High Court involved in criminal proceedings to which information kept in the Register has a bearing;
- (c) probation officers;
- (d) children officers;
- (e) state counsels and prosecutors;
- (f) police investigators;
- (g) the prisons department;
- (h) other relevant agencies which, in the opinion of the Register, may require such information.

(10) The Registrar shall not allow access to the Register where he has reason to believe that the information is intended to be used in a prejudicial manner.

(11) Any person who uses or allows to be used in a prejudicial manner information kept in the Register commits an offence and shall be liable, on conviction, to a fine not exceeding six thousand shillings or imprisonment for a term not exceeding six months, or both.

[Subsidiary]
Dangerous
offenders.

8. (1) A prosecutor or an interested party in criminal proceedings may apply to a court of law, within a reasonable time after conviction but before a sentence is entered, to declare a person convicted of a sexual offence, a dangerous offender:

Provided that a trial court may on its own motion declare a convicted sexual offender dangerous.

(2) An application under paragraph (1) shall be made in open court and the convicted person shall be given an opportunity to state his case either in person or through an advocate of his choice.

(3) A court may order that either of, the following institutions supervise a dangerous offender –

- (a) the prisons department;
- (b) the probations department;
- (c) the children's department;
- (d) the police department; or
- (e) the criminal investigations department:

Provided that nothing in this regulation may be interpreted to take away the discretion of the court to decide the institution under which to place a person declared a dangerous offender for supervision.

9. For purposes of section 33 of the Act –

Victim impact
statements.

- (a) the provisions of sections 329A, 329B, 329C, 329D and 329E of the Criminal Procedure Code shall apply *mutatis mutandis*; and
- (b) any rules made by the Chief Justice under section 329F of the Criminal Procedure Code shall apply.

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[Subsidiary]

SCHEDULE

(r. 7(2))

FORM 1

REGISTER OF CONVICTED SEXUAL OFFENDERS



Full name(s) of the sexual offender

Alias(es) of the sexual offender (if any)

Date of birth Place of birth

Physical address Telephone No.

Sex Race Height Weight

Other physical characteristics

.....

Offence(s) with which charged

Sentence entered by the trial court

Whether the offender has been declared dangerous

Date(s) of conviction

Sentence entered on reversal or enhancement

Date(s) of reversal or enhancement

Age of the victim(s) in the sexual offence

Previous convictions

Dates of previous convictions

Relationship between the convict and the victim

Brief particulars of the offence

Any other information

[Subsidiary]

Finger print

SEXUAL OFFENCES (DANGEROUS OFFENDERS DNA DATA BANK) REGULATIONS, 2008

L.N. 133/ 2008

1. These Regulations may be cited as the Sexual Offences (Dangerous Offenders DNA Data Bank) Regulations, 2008.

Citation

2. In these Regulations, unless the context otherwise requires-

Interpretation.

“dangerous offender” means a person declared as such under section 39 of the Act;

“Director” means the Director of the Criminal Investigations Department;

“DNA data bank” means the Dangerous Offenders DNA Data Bank established under regulation 3;

3. (1) The Director shall, for purposes of Criminal identification, establish and maintain a data bank to be known as the Dangerous Offenders DNA Data Bank, which shall consist of a crime scene index and dangerous offenders’ index.

Establishment of the DNA data bank.

4. The crime scene index shall contain DNA profiles derived from bodily substances that are found-

Contents of crime scene index.

- (a) at any place where a sexual offence was committed;
- (b) on or within the body of the victim of a sexual offence;
- (c) on anything worn or carried by the victim at the time when a sexual offence was committed; or
- (d) on or within the body of any person or thing or at any place associated with the commission of a sexual offence.

Contents of dangerous index.

5. The dangerous offenders’ index shall contain-

- (a) DNA profiles derived from bodily substances as provided for under section 122A(2) of the Penal Code; and

Cap.63.

[Subsidiary]

(b) profiles derived from lubricants, any kind or hair or skin.

Additional
contents.

6. In addition to the DNA profiles referred to in regulations 4 and 5 above, the DNA data bank shall contain, in relation to each of the profiles, information from which can be established-

(a) in the case of a profile in the crime scene index, the case number of the investigation associated with the bodily substances from which the profile was derived; and

(b) in the case of a profile in the dangerous offenders index, the identity of the person from whose bodily substance the profile was derived.

Procedure on
receipt of DNA
profile.

7. On receipt of a DNA profile, the Director shall compare it with the DNA profiles in the data bank in order to determine whether it is already contained in the data bank, and may then communicate, for the purposes of the investigation or prosecution of a criminal offence, the following information to any other law enforcement agency considered appropriate-

(a) whether the DNA profile is already contained in the data bank; and

(b) any information, other than the DNA profile itself, that is contained in the data bank in relation to that DNA profile.

DNA
profiles from
foreign states, etc.

8. On receipt of DNA profile from the Government of a foreign state, an international organization established by the Governments of states or an institution of any such Government or international organization, the Director may compare the DNA profile with those in the DNA data bank in order to determine whether it is already contained in the data bank and may then communicate information referred to in regulation 7 to that Government, international organization or institution.

Communication
of DNA profile by
Director.

9. The Director may communicate a DNA profile contained in the crime scene index to the Government of a foreign state, an international organization established by the Governments of states or an institution of any such Government or international organization.

Application of
regulations 8 and 9.

10. Regulations 8 and 9 shall apply only if the Government of Kenya or one of its institutions has entered into an agreement or arrangement, in accordance with an Act of Parliament, with that Government, international organization or institution, as the case may be, authorizing the communication solely for the purposes of the investigation or prosecution of a criminal offence.

- | | |
|---|--|
| <p>11.No person who receives a DNA profile for entry in the DNA data bank shall use it or allow it to be used other than for the purposes of the administration of the Act.</p> | <p>[Subsidiary]
Prohibited use of DNA profile.</p> |
| <p>12. No person shall, except in accordance with these Regulations, communicate or allow to be communicated a DNA profile that is contained in the DNA data bank or any other related information.</p> | <p>Prohibited communication of DNA profile.</p> |
| <p>13. Access to information contained in the DNA data bank may be granted to any person or class of persons that the Director considers appropriate for the purposes of the proper operation and maintenance of the DNA data bank.</p> | <p>Access to information.</p> |
| <p>14. No person to whom information is communicated under regulation 13 or who has access to information under any provision of these Regulations shall use that information other than for the purposes referred to in that regulation or provision thereof.</p> | <p>Unauthorised use of information.</p> |
| <p>15. (1) Information in the crime scene index shall be permanently removed, if the information relates to a DNA profile derived from a bodily substance of-</p> <ul style="list-style-type: none"> (a) a victim of a sexual offence that was the object of the relevant investigation; or (b) a person who has been eliminated as a suspect in the relevant investigation. <p>(2) Subject to any other provision of these Regulations, information in the dangerous offenders index shall be kept indefinitely.</p> | <p>Removal of information from crime scene index.</p> |
| <p>16. The following information in the dangerous offenders' index shall be permanently removed without delay after-</p> <ul style="list-style-type: none"> (a) the conviction of a suspect is quashed and a final acquittal entered; (b)in the case of information in relation to a person who has been discharged- <ul style="list-style-type: none"> (i) the expiry of three years after the person is discharged absolutely, unless the person is convicted of another sexual offence during that period; or (ii) the expiry of five years after the person is discharged conditionally, unless the person is convicted of another offence during that period. | <p>Removal of information from dangerous offenders' index.</p> |

[Subsidiary]

(2) Information in the dangerous offenders' index in relation to a child shall be permanently removed without delay.

Storage of samples,
etc

17. (1) When bodily substances are transmitted to the Director under regulation 7 or 8, the Director shall store, safely and securely for the purpose of forensic DNA analysis, the portions of the samples of the bodily substances that he considers appropriate, and shall destroy the remaining portions without delay.

(2) Forensic DNA analysis of stored bodily substances may be performed if the Director is of the opinion that the analysis is justified because significant technological advances have been made since the time when a DNA profile of the person who provided the bodily substances, or from whom they were taken, was last derived.

(3) Any DNA profile that is derived from stored bodily substances shall be transmitted to the Director for entry in the dangerous offenders index and no person shall use such a DNA profile except to transmit it under this subsection.

(4) Access to stored bodily substances may be granted to any person or class of persons that the Director considers appropriate for the purpose of preserving the bodily substances.

(5) No person shall transmit stored bodily substances to any person or use stored bodily substances except for the purpose of forensic DNA analysis.

(6) The Director may at any time destroy any or all of the stored bodily substances if he considers that they are no longer required for the purpose of forensic DNA analysis.

(7) The Director shall nevertheless destroy the stored bodily substances of a person without delay-

(a) after the conviction is quashed and a final acquittal entered;
and

(b) if the person has been discharged-

(i) after the expiry of three years after the person is discharged absolutely, unless the person is convicted during that period of another offence; or

(ii) after the expiry of five years after the person is discharged conditionally, unless the person is convicted during those three years of another offence.

[Subsidiary]

(8) Despite anything contained in this regulation, stored bodily substances of a person in respect of whom a pardon is in effect shall be kept separate and apart from other stored bodily substances, and no such bodily substance shall be used for forensic DNA analysis, nor shall the existence of such a bodily substance be communicated to any person.

(9) The Director shall, without delay, destroy stored bodily substances of a child.

18. Every person who contravenes any provision of these Regulations commits an offence and shall be liable, on conviction, to a fine not exceeding six thousand shillings or imprisonment for a term not exceeding six months, or both.