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THE SEXUAL OFFENCES ACT

No. 3 of 2006

Date of Assent: 14th July, 2006

Date of Commencement: 21st July, 2006

ARRANGEMENT OF SECTIONS

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THE SEXUAL OFFENCES ACT, 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;

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

"gang rape" has the meaning assigned to it under section 10 of this Act;

"HIV" means the Human Immunodefiency Virus which causes AIDS;

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

"indecent act" means any 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.

Rape.

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

(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 by any part of the other person's body,

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.

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

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.

Defilement.

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

Cap. 92
Act No. 8 of 2001.

with the provisions of the Borstal Institutions Act and the Children's Act.

(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.

Attempted defilement.

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.

(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.

10. Any person who commits the offence of rape or defilement under this Act in association with ~~others~~ 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.

(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. Cap. 92 Act No.8 of 2001

(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) Any person who commits an indecent act with an adult is guilty of an offence and is liable to imprisonment for a term not exceeding five years or to a fine not exceeding shillings or to both.

Indecent act with adult.

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.

Promotion of sexual offences with a child.

on who—

utes any article that to promote a sexual

(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.

Child trafficking.

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 sex tourism.

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 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, representation or figure or any other object whatsoever;

(b) imports, exports or conveys ... for any of the purposes s... ...ion (1), or knowingly or h... ...believe that such object will ... hire, distributed ... ...ed or in any manner put into ci...

(c) takes part ... 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.

Exploitation of prostitution.

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 persons 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 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.

Incest by male persons.

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:

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.

(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.

No.8 of 2001.

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 fist 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

Sexual harassment.

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.

(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.

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

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.

(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 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.

Cultural and religious offences.

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.

Non-disclosure of conviction of sexual 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.

Vulnerable witnesses.

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—

(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—

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

(c) 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.

Medical treatment orders.

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.

(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), a court shall not grant an order under which a victim of sexual offence may access treatment in any public hospital or institution.

s.35(3) Insert the words "responsible for health" immediately after the word "Minister".

(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.

(5) Insert at the end thereof the words "or any other institution approved or gazetted by the Minister responsible for health.

Evidence of medical or forensic nature.

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 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.

Keeping scene of crime secure etc.

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.

(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.

Offence to make false allegations.

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.

Supervision of dangerous sexual offenders.

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.

(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.

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

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.

Extra-territorial jurisdiction.

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.

(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.

Consent.

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.

Intentional and unlawful acts.

43.(1) An act is intentional and unlawful if it is committed—

(a) in any coercive circumstance;

(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.

Evidential presumptions about consent.

44.(1) If in proceedings for an offence under this Act, it is proved—

(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.

Conclusive presumptions about consent.

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.

(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

Chief Justice may make rules.

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

Transitional provisions.

all apply.

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

Consequential amendments and repeals.

FIRST SCHEDULE

s.48

TRANSITIONAL PROVISIONS

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

written law or part is practicable, be

SECOND SCHEDULE

s. 49

CONSEQUENTIAL AMENDMENTS AND REPEALS

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

Cap.63.

(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.80.

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 "alleg ed victim".

(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;

Cap 75

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

(2) Section 184 of the 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 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.