

The Reality of Sexual Offending in Kenya: Are Sex Offenders Finally Cornered?

Dr. Beneah Manyuru Mutsotso¹

Abstract

Since the implementation of the Sexual Offences Act (2006) in Kenya, there have been ululations and condemnation altogether. What is not in doubt is that the Act has protected many women from sexual offenders and helped to net many more who would hitherto have gone free. The prospect of being found guilty is always looming among sexual deviants. The law provides for very long and rigid punishments, and vests too much power of discretion to the judges. It makes important definitions and clarifications regarding sexual offences which is useful for society, and the more vulnerable in particular. Already there are too many sexual offenders serving sentences ranging from probation, borstal to life in prison and penal authorities are getting wary of the high influx as they are admitted in droves. This new reality has led to calls for the review of the law. This paper highlights the key provisions of this law and seeks to inform the reader to be aware of this fact in Kenya. It also presents existing theoretical positions on why some people become sexual deviants.

Keywords: Sexual offence, rape, dangerous, sexual offender, judge, theory, punishment, review

Introduction

On July 14, 2006 The Sexual Offences Act No. 3 of 2006 (Kenya) was assented to and commenced its implementation on July 21, 2006. Its development had been an arduous task following the much haranguing and revisions it went through. What is not in dispute however, is that the Act ushered in a new era of punishing sexual offences with more clarity and fervour than ever before.

¹ University of Nairobi, Department of Sociology and Social Work, P. O. Box 30197-00100. Tel: 0722 833012, Nairobi. Email: mutsotso@uonbi.ac.ke / bmutsotso@yahoo.com

The Act is arranged in a total of 49 sections, each with an elaborate description. I will now turn to the highlights of the key sections that define the intend of the Act.

Key Highlights and Definitions of Sexual Offences

The Act makes provisions about sexual offences, their definition, prevention and protection of all persons from harm emanating from unlawful sexual acts. For the first time, this law recognizes and broadly defines a complainant: That the republic of a victim of a sexual offence can be a complainant. It goes further to state that in the context of a child or a person with a mental disability, any person can lodge a sexual abuse complaint on their behalf.

The most explicit definition of an indecent sexual act is made in this law. Such an indecent sexual act refers to any unlawful and intentional act which leads to any or all of the following: causes contact between the genital organs of a person, his or her breasts or buttocks, and / or exposure or display of pornographic material to any person against his or her will.

Persons with mental disability are defined as those who are not able to consciously make a choice or make an appreciation of some act, irrespective of the cause of that disability. Such people, based on all circumstances, are unable to appreciate the nature and consequences of the sexual act, unable to resist the sexual act or unable to communicate their unwillingness to consciously participate in the act. By this, it implies that it is indefensible to content that a sexual act took place with the full or partial complicity of a person with mental disability.

Offences under Rape

In Section 3 (1) rape is deemed to have taken place if the following circumstances obtain: "if the person intentionally and unlawfully commits an act which causes penetration with his or her genital organs; if the other person to whom it is directed does not consent to the penetration; if the consent is obtained by force or by means of threats or intimidation". Those found guilty of the offence are liable to imprisonment for a period of not less than ten years. This may, however, at the discretion of the judge be enhanced to life in prison.

In Section 3 (4), attempted rape is defined as an act which meets the following criteria: "any attempt to unlawfully and intentionally commit an act which causes penetration with his or her genital organs".

Those who commit this offence are liable to imprisonment of not less than five years. However, based on the judge's discretion, the punishment may be enhanced to life in prison.

Section 5(1) is about sexual assault. The following conditions qualify a sexual assault: "if a person unlawfully penetrates the genital organs of another person using any part of his/her body; or using a manipulated object to gain penetration". (The law is however quick and clear to permit that such penetration using an object is permissible if done for medical or professional hygienic reasons). Those found culpable for such an offence are liable to imprisonment for a period not less than ten years. Again, the judge has the full discretion to enhance the sentence to life in prison. Perhaps Section (7) brings in a new moral dimension to the law: that sexual offences which impinge upon family values and morals are even more serious and therefore attract more stringent deterrence. Section 7 states that sexual acts which cause penetration or other indecent acts committed within the view of a family member, child or a person with mental disabilities is punishable on its own. Those who commit this offence are liable to imprisonment of not less than ten years besides the punishment for the sexual offence.

Sexual Offences Against Children

According to the Childrens Act No. 8 of 2001, a child is defined as a human being under the age of eighteen years.

In this Act, a child is again defined as a vulnerable person, therefore not fit to give consent in matters sexual. Defilement is presented as a sexual act which causes penetration with a child. If the defiled child is eleven years or less the culpable person is sentenced to life in prison with no other option. But if the defiled child is aged between 12 – 15 years the offence attracts a jail term of not less than twenty years. In cases where the defiled child is aged between 16 – 18 years the perpetrator is incarcerated for not less than fifteen years. Although the penalty is stiff, perpetrators have a reprieve if it is proved that the defiled child deceived the perpetrator to believe that one was over eighteen years.

However, there must be irrefutable evidence that the perpetrator took reasonable steps to ascertain that the victim was not a child before indulging into the offence. In case the perpetrator of a sexual offence is a child, then the person is handed over to the relevant penal institution dealing with child offenders.

However, the reprieve does not apply if the perpetrator has close blood relations with the child, who is the victim. In the context of attempted defilement, one is committed to prison for a term not less than ten years. In all sexual offences against children there is no provision for an alternative punishment, apart from a lengthy imprisonment, a fact which has cornered many sexual deviants. However, in a few sexual offences against adults, there is some variation. For example in section 11(a) those who commit an indecent sexual act with an adult can be imprisoned for a term not exceeding five years or a cash fine not exceeding KShs. 50,000 (USD 569) or both. Again it falls on the discretion of the judge to apply that which he /she finds fit.

Promoting sexual offences with a child in section 12 of the law is very clear in seeking to protect children against sexual offences. The law clearly states that those who manufacture or distribute articles that are intended to promote sexual offences with children are guilty of a sexual offence. Equally, those who supply or display articles for performance with the intent to lure children into acting or encouraging them to do so are guilty of a sexual offence.. Such perpetrators are jailed for a period of not less than five years or KShs. 500,000 (USD 5,700).

The Law on Incest

In the history of Kenya there has never been such clarity on sexual offences as that found in Section 20 of the Act. A male person who commits a sexual offence, indecent act or that act which causes penetration with a female person who is related to him such as daughter, grand- daughter, sister, mother, niece, aunt or grandmother commits incest. Such a person is liable to imprisonment for a period of not less than ten years. However, if the victim of incest is a child, the punishment becomes enhanced to life in prison. The offender is further deprived of authority or guardianship over such a child. The same law applies to female offenders who commit incest. In Section 22 Sub section (3) it is provided that irrespective of the circumstances, the offender is assumed to have been aware of the existing relationships.

If the person who commits the incest lives in the same house with the victim, the court has power to remove the accused from the house until the matter is determined. The lack of compromise in the law is what makes sexual deviants a real cornered lot, as there is no manouvre to defeat the law.

Sexual Offences and HIV /AIDS

Ever since the advent of HIV/AIDS many precautions have been taken. In the context of sexual offences, the law in Section 26 clearly spells out how deliberate transmission of HIV or other life threatening sexually transmitted diseases is dealt with. Those who intentionally or knowingly infect others with HIV or other sexually transmitted diseases are guilty of the offence. It is irrelevant whether the two are married to each other or not, but whoever intentionally infects the other is guilty of a sexual offence. One is imprisoned for a period of not less than fifteen years but the judge still retains the discretion to pronounce life imprisonment. The huge discretionary power given to judges has been a constant source for calls for review of the law.

Dangerous Sexual Offenders

According to Section 39(1) a dangerous sexual offender is one declared by court if one meets the following conditions: "has had more than one previous conviction for a sexual offence; been convicted of a sexual offence in which one used violence or threats of violence or convicted of a sexual offence against a child". The sentence is served in prison and on release in the community. Once sentenced to prison, it is a requirement that upon release such a person is placed under long term supervision by an appropriate person for the remainder of the sentence to be served in the community. It is a requirement that the sentence is served both in prison and outside prison under constant supervision. Such supervision outside should be rehabilitative in nature and should run continuously for not less than five years after release. As seen in Section 39 (4), a probation officer's report informs the judge's pronouncement. The probation officer's report should expose the suitability of the dangerous sexual offender to undergo long term supervision as well as the foreseeable benefits of a long term supervision. In addition the probation officers' report should contain a proposed rehabilitative programme for the offender and the conditions to be imposed for the long term supervision.

Additionally the dangerous sexual offender is refrained from visiting certain places, seeking for employment of particular nature and subject himself or herself to monitoring. In Section 39(13), a register for convicted sexual offenders shall be maintained for life. However, the contention has been whether this does not amount to double punishment for the ex-offender does not fully live a free life. The idea of a permanent register for sexual offenders has partly informed calls for review of the law.

This section has equally informed the view that sexual offenders are a cornered group both in and outside prison. Others have argued that this section provides for more than one punishment for committing one offence. Why for instance should a sexual offender suffer long imprisonment in addition to being permanently in the register for sexual offenders which deprives one of certain opportunities in life?

Intentional and Unlawful Acts

As expressed in Section 43(1), intentional and unlawful acts are committed if the following circumstances are present: coercion, false pretence or fraudulence, and if the victim is incapable of appreciating the nature of an act which is offensive. Further coercive circumstances include: use of force against a complainant, threat of harm against the complainant, abuse of power or authority to the extent that the complainant is inhibited from exercising own resistance or unwillingness to participate. False pretence or fraudulence are expressed to include circumstances of cheating and deceiving. Also, if one is duped to believe that he/she is committing the offensive act with a different person not the one presenting oneself; or if the person is led into the act which is different from the one intended, and also if a person fails to disclose to the other one that he/she is infected by HIV or other life threatening sexually transmitted disease. The circumstances under which a person is incapable of appreciating the nature of an act includes sexual offences committed when a person is: asleep; unconscious; altered state of consciousness; under the influence of medicine, drug, alcohol or other intoxicating substance; mentally impaired or a child.

Consent

In Section 44, lack of consent is made clear. It clarifies the circumstances under which there cannot be consent before the sexual act.

Such circumstances include: if at the time of the offence or immediately before it began violence was meted on the complainant or was made to fear violence would be used against him /her; the complainant was unlawfully detained at the time and offender was not; the complainant was asleep or unconscious at the time; the complainants' disability did not enable one to communicate the consent; when a substance is administered to the complainant without consent with view to stupefy or overpower one. Therefore intentionally deceiving and/or inducing another person to take advantage of the situation to commit a sexual offence does not imply consent.

Theories of Sexual Offending

Several theoretical frameworks exist that all attempt to explain aspects of sexual offending. Ward and Beech (2006) summarized these theoretical orientations as: comprehensive explanations of sexual abuse (Ward and Siegert, 2002); empathy problems (Marshall, Champagne, Brown and Miller, 1997); cognitive distortions (Mann and Beech, 2003; Ward and Keenan, 1999); single factors associated with sexual abuse such as intimacy deficits (Marshall, 1999). These diverse writings suggest several but not one cause of sexual offending. For instance Siegert and Ward (2003) centred on genetic predispositions while Beech and Ward (2004) focused on negative developmental experiences including abuse, rejection and attachment deficiencies. Thomas (2002) tends to favour psychological dispositions or traits such as empathy deficits and deviant sexual preferences and interpersonal problems. Cossins (2000) emphasizes social and cultural structures and processes while Hanson and Harris (2001) dwell more on context factors like intoxication and stress.

Ward and Beech (2006) have evaluated the theories and concluded that they suffer from one major defect even though they contribute much information in attempts to understand why certain people commit sexual offences. That the individual theories emphasize the top level symptoms but do not recognize that man is, too, a biological creature. The trouble with such a narrow view is that everyday views of human behavior do not capture subtle causes of sexual offending. Hence the reigning theories scarcely pay attention to the biological and neuropsychological aspects of offending behavior. Existing theories provide incomplete view of why some individuals choose to offend others sexually. But then, can there be a unified theory of sexual offending that brings together all aspects of sexual offending?

The most bold attempt to unify the existing theories of sexual offending is attributed to the work of Ward and Beech (2006), to which I now turn.

The Integrated Theory of Sexual Offending (ITSO)

A theory is a description of an unobserved social phenomena or a proposition of how certain institutions, relationships, interactions or phenomena take place and/or why they take place. It helps to understand a social phenomena (Hooker, 1987).

The Integrated Theory of Sexual Offending (ITSO) is a product of diverse sets of theories integrated into one overarching one. It is derived from diverse sources which all seek to explain sexual offending among some people.

It is presented as a general theory of sexual offending. It seeks to combine explanations of sexual offending from the points of view of genetics, ecology, neuroscience and clinical studies (Ward and Beechl 2006). Three levels of theories are distinguished. Level 1 theories focus on the core features of sexual offending; what causes sexual offending and how sexually abusive actions are manifested. Level II theories describe the single most important factor that is thought to be the cause of sexual offences. Level III theories, generally, emphasize the process taken in sexual offending. They specify the cognitive, behavioural, motivational and social factors associated with sexual offending.

Explanations of Sexual Offending

In problematic anti-social behavior, certain risk factors abound. They (risk factors) are generally grouped into four categories. The first are historical or static risk factors which cannot change because they already happened such as negative developmental events, faulty socialization or other prior psychodynamic factors. The second category are the dispositional or dynamic risk factors. They are factors which can be changed or liable to change, such as anti-social behavior or bad company. The third category are the contextual antecedents which are largely faulty, such as deviant social networks, absence of positive role models, poor socialization or negative peer influence. The fourth category are the clinical factors such as emotional problems, social difficulties, rejection of being supervised, substance abuse and hostility.

The ITSO therefore argues that any one factor will be inadequate to explain sexual offending, but a combination of these traits or vulnerabilities may satisfactorily explain sexual offending.

Neuroscientific Explanations

This account is closely tied to Pennington (2002), who proposed four levels of analysis. These are: the etiological level which focuses on the genetic and environmental factors that cause psychopathology. The second is the brain mechanism, which is concerned with the influence resulting from genetic and environmental factors on brain development, including how it later on functions (Sapolsky, 1997). The neuropsychological analysis is the third level and it is largely confined to explaining the brain oriented systems that generate human behaviours. The surface level analysis is about the clinical phenomena that are concerned with diverse types of psychological pathology, such as sleep, mood, depression .

Biological and Ecological Explanations of Sexual Offending

The emphasis is that biological factors (genetic) and social learning (social, cultural environment, personal circumstances) can interact to shape an individual's psychological functioning. Therefore the cultural and social context in which a person grows can directly create problems, hence increases his /her behavior in a dysfunctional way. For example, those exposed at an early age to parental violence and abuse may negatively influence their brain development and result in offending (Beech and Mitchell, 2005).

In the ITSO three sets of factors are presented to interact continuously. These are biological, ecological and neuropsychological. All the three sets of actors interact to produce sexual offending.

ITSO and Explanations of Sexual Offending

Three factors are central explanations of sexual offending. Based on ITSO, brain development is key. Abnormal brain development, including the acquisition of deviant mating traits and the entire genetic make-up is one.

Evolutionary enthusiasts hold that organisms evolve over time and through natural selection either adapt to the environment or become extinct. Drawing from Darwin (1859), in sexual evolution males and females naturally get attracted to each other. However, males who fail to attract are likely to engage in sexual offending. Therefore genetic and cultural processes account for sexually abusive behavior.

The ecological paradigm focuses on the social habitat in which the person lives in which certain circumstances may compel a person into sexual offending. The factors that predispose the person into sexual offending are mainly adverse social and cultural circumstances, personal circumstances and the physical environment. Therefore, psychodynamic circumstances are central to sexual offending. The ecology in which a person lives is a key factor to sexual offending, because potential victims are easily accessible and the opportunities for escape considerable. For example in a slum environment, for instance opportunistic targets are equally abundant.

The clinical symptomatology explains that, for instance, exposure to anti-social models is likely to teach a person maladaptive ways. This view holds that individuals are most likely commit sexual offences for different reasons, and therefore require different clinical interventions.

There are four clusters of problems or symptoms usually found among adults who commit sexual offences: emotional regulation problems, cognitive distortions, social difficulties and deviant sexual arousal (Hanson and Harris, 2000).

In sum, therefore, the ITSO concludes that sexual offending is a result of biological, environmental and social factors. It takes into account the complexity of factors to explain sexual offending and that no one theory on its own would suffice to explain this complex behavior.

The Precondition Theory

Finkelhor (1984) makes several assumptions in the attempt to explain the underlying factors used to account for the occurrence of sexual offending against children. The theory makes various claims: sex with children is emotionally satisfying; men who offend are sexually aroused by a child; men have sex with children because they are unable to meet their sexual needs in socially appropriate ways, and men become disinhibited and behave in ways contrary to their normal behavior.

The Quadripartite Theory

Hall and Hirschman (1992) developed the quadripartite model of child molestation based on four components: physiological sexual arousal, inaccurate cognitions that justify sexual aggression, affective dyscontrol and personality problems. The idea is that each of these factors motivate the individual or increase the probability of sexual offending against children.

Marshall and Barbaree's Integrated Theory

Marshall Barbaree (1990) proposes that sexual abuse of children takes place as a result of several interacting factors. The theory argues that individuals who are vulnerable to adverse developmental events such as poor parenting, too harsh discipline, physical and sexual abuse are more likely to show distorted relationships especially in line with sex aggression as a consequence of poor self regulation from childhood. Those who lack social regulation are likely to sexually offend. Abused children at adolescent stage become more receptive to sexual preferences, interests and attitudes. The high increase in sexual hormones at this stage predisposes them to sexual offending. In adolescence, especially, lack of effective social and self regulation skills makes it more likely that attempted relationships with women are more likely to be turned down, leading to low self esteem. This may in the final analysis fuel the intensity of sexual desire hence sexual offending becomes more probable.

The Pathways Model of Child Sexual Abuse

Ward and Siegert (2002) suggest, in their pathway model that there are many ways (or paths used) leading to sexual abuse of children. The path adopted is influenced by several factors: learning from past events, biological, cultural and environmental. The model is particularly geared toward explaining child sexual abuse. Evidence among child sexual abusers demonstrate that intimacy and social skills deficits, distorted sexual knowledge, emotional deregulation and cognitive distortions are key to sexual offending. Hence every sexual abuse involves the four paths identified, but one factor may be the primary motivator while others only be secondary.

Sexual Offenders in Kenyan Penal Institutions

Since 2006 following the implementation of the Sexual Offences Act, great new ideas emerged. More than ever before, the law raised the eyebrows of many following the ease with which sexual offenders were hauled into courts and found guilty. The most spine chilling attributes of this law were the high sentences meted on sexual offenders, the almost non-existent recourse to cash fine or its punitiveness and the huge powers of discretion given to judges. More than any other law in Kenya, this law has incarcerated more men in the shortest period since 2006 to the point that there are calls for its revision get credence from this reality. The men of Kenya, in particular, have been finally cornered.

Since 2006, Kenyan penal institutions have become the bastion for sexual offenders. The number is so high that inmates on sexual offences will soon outstrip the population of those incarcerated on all other offences. Given the seriousness with which sexual offenders are taken, most offenders are incarcerated in maximum prisons by virtue of the number of years they are imprisoned. The number of sexual offenders in the penal institutions as shown in the table below tells part of this story. Going by the numbers and given that it is only too recently this law was implemented it can be accurately predicted that in another few years Kenyan prisons will be prisons for sexual offenders only. One question that begs for answers is whether the law is too stringent for society and whether laws that give little break are good for society.

Table 1: Population of Sexual Offenders Compared to Other Offenders in Selected Penal Institutions in Kenya

Prison name	Total no. of inmates	Number of convicted sexual offenders	Percentage of sexual offenders
Naivasha	3063	1208	39.4
Shimo la Tewa	2550	400	15.7
Kisumu Main	2169	450	20.7
Nyeri Main	654	188	28.7
Kamiti Main	2969	703	23.7
Manyani	910	401	44.1

Source: Kenya Prison Service, Headquarter, 2012

Conclusion

Following the implementation of the sexual offences law in Kenya, more and more men have been caught sexually offending. The numbers are so high that there are now calls for its revision given the ease with which offenders get incarcerated. The high number of sexual offenders found guilty raises the question whether the law is too stringent or there are too many sexual offenders in Kenya. What makes it much easy to find sexual offenders guilty is what future research should seek to unearth. Without appearing to suggest that sexual offenders need a break in Kenya, this paper in totality lauds this law.

References

- Ward, T. and Beech, A. (2006). An Integrated Theory of Sexual Offending in Aggression and Violent Behavior 11 44–63.
- Ward, T. and Siegert, R. J. (2002) Toward a Comprehensive Theory of Child Sexual Abuse: A Review of Current Research in *Journal of Child Psychology and Psychiatry*, 33, 197–248.
- Marshall, W. L. et. al. (1997) Empathy, Intimacy, Loneliness and Self-esteem in Nonfamilial Child Molesters: A Brief Report, in *Journal of Child Sexual Abuse*, 6, 87–98.
- The Sexual Offences Act 2006
- Mann, R. and Beech, A. R. (2003) Cognitive Distortions, Schemas and Implicit Theories. In Ward, T., Laws, D. R. and Hudson, S. M. (eds) *Theoretical Issues and Controversies in Sexual Deviance*. Sage. London.
- Ward, T. and Keenan, T. (1999) Child Molester's Implicit Theories. *Journal of Interpersonal Violence*, 14, 821 – 838.
- Siegert, R. J. and Ward, T. (2003) Back to the Future: Evolutionary Explanations of Rape. In Ward, T., Laws, D. R. and Hudson (Eds) *Sexual Deviance: Issues and Controversies*. Sage. Thousand Oaks.
- Beech, A. R. and Ward, T. (2004) The Integration of Etiology and Risk in Sex Offenders: A Theoretical Model. *Aggression and Violent Behavior*, 10, 31–63.
- Cossins, A. (2000) *Masculinities, Sexualities and Child Sexual Abuse*. Kluwer Law International. The Hague.
- Hanson, R. K. Harris, A. (2001) The Sex Offender Need Assessment Rating (SONAR): A method for Measuring Change in Risk Levels: www.gc.ca/epub/corr/e200001a/ht.m
- Hanson, R. K. and Harris, A. (2000) Where should we intervene? Dynamic predictors of sexual offence recidivism. *Criminal Justice and Behavior*, 27, 6–35.
- Hooker, C. A. (1987) *A Realistic Theory of Science*. University of New York. Albany.
- Pennington, B. F. (2002) *The Development of Psychopathology: Nature and Nurture*: Guildford Press. New York.
- Sapolsky, R. M. (1997) Stress and Glucocorticoid Response. *Science*, 275, 1662–1663.
- Beech, A. R. and Mitchell, I. J. (2005) A Neurobiological Perspective on Attachment Problems in Sexual Offenders and the Role Selective Serotonin re-uptake inhibitors in treatment of such problems. *Clinical Psychology Review* 25, 153–182.
- Darwin, C. (1859) *the Origin of Species*. Wordsworth Edition. Hertfordshire.
- Finkelhor, D. (1984) *Child Sexual Abuse: New Theory and Research*. The Free Press. New York.
- Hall, G. C. N. and Hirschman, R. (1992) Sexual Aggression against Children. A Conceptual perspective of Etiology. *Criminal Justice Behavior*. 19, 8–23.
- Marshall, W. L. and Barbaree, H. E. (1990) An Integrated Theory of the Etiology of Sexual Offending: in W. L. Marshall, D. R. Laws and H. E. Barbaree (eds) *Handbook of Sexual Assault: Issues, Theories and Treatment of the Offender* Plenum. New York.