



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS



**SEXUAL AND GENDER
BASED VIOLENCE**

**RAPID REFERENCE GUIDE ON THE
PROSECUTION OF SEXUAL AND
GENDER-BASED VIOLENCE
CASES IN KENYA**

Copyright © Office of the Director of Public Prosecutions, 2022

ODPP House
Ragati Road, Upper Hill
P.O. Box 30701 - 00100
Nairobi, Kenya
Email: info@odpp.go.ke
www.odpp.go.ke

This publication may be produced in whole or in part and in any form for educational or non-profit purposes without special permission from the copyright holder, provided acknowledgement of the source is made.

Author: Technical Committee on Rapid Reference Guide for Sexual and Gender Based Violence Offences

Design and layout: UNON Publishing Services Section, Nairobi, Kenya



**Funded by
the European Union**



UNODC
United Nations Office on Drugs and Crime

This publication was produced with technical assistance from the United Nations Office on Drugs and Crime and the financial support of the European Union. Its contents are the sole responsibility of the Office of the Director of Public Prosecutions and do not necessarily reflect the views of the European Union.

TABLE OF CONTENT

FOREWORD.....	vii
ACKNOWLEDGEMENT	ix
ABBREVIATIONS AND ACRONYMS.....	x
WORKING DEFINITIONS.....	xi
USER GUIDE.....	xiv

PART A: OVERVIEW **1**

1. NATURE OF SGBV.....	1
2. OBJECTIVES AND SCOPE.....	3
3. GUIDING PRINCIPLES	4
4. LEGAL AND POLICY FRAMEWORK ON SGBV.....	5
4.1 Legal Framework	5
4.2 Policy Framework	8

PART B: SGBV OFFENCES, ESSENTIAL INGREDIENTS AND EVIDENCE REQUIRED **10**

5. OFFENCES UNDER THE SEXUAL OFFENCES ACT	10
5.1 Rape	10
5.2 Gang Rape	11
5.3 Sexual Acts within the View of a Family Member.....	12
5.4 Defilement	13
5.5 Sexual Assault	13
5.6 Compelled or Induced Indecent Act.....	14
5.7 Indecent Act	14
5.8 Incest.....	15
5.9 Promotion of Sexual Offences with a Child	16
5.10 Child Sex Tourism.....	16
5.11 Child Prostitution.....	17

5.12	Child Pornography	18
5.13	Sexual Communication with a Child	18
5.14	Exploitation of Prostitution	19
5.15	Prostitution of Persons with Mental Disabilities	19
5.16	Sexual Offences Relating to Position of Authority and Persons in Position of Trust.....	21
5.17	Sexual Harassment	21
5.18	Deliberate Transmission with HIV and other Life Threatening Sexually Transmitted Disease.....	22
5.19	Administering a Substance with Intent.....	22
5.20	Distribution of Substance by Juristic Person.....	23
5.21	Cultural and Religious Offences	23
5.22	Non-disclosure of Conviction of Sexual Offences	23
5.23	Obstructing the Course of Justice.....	24
5.24	Interference with Crime Scene	24
6.	OFFENCES UNDER THE MARRIAGE ACT	24
6.1	Child Marriage	24
6.2	Marriage through Coercion, Fraud/ Forced Marriage.....	25
7.	OFFENCES UNDER THE PROHIBITION OF FEMALE GENITAL MUTILATION (FGM) ACT	25
7.1	Conducting FGM.....	25
7.2	Causing Death through FGM.....	26
7.3	Aiding and Abetting, Counseling or Procuring FGM	26
7.4	Procuring a Person to Perform FGM in another Country.....	26
7.5	Possession of Tools or Equipment for FGM	27
7.6	Failure to Report Commission of Offence.....	27
7.7	Use of Derogatory or Abusive Language	28
8.	OFFENCES UNDER THE COMPUTER MISUSE AND CYBER CRIMES ACT	28
8.1	Child Pornography	29
8.2	Wrongful Distribution of Obscene or Intimate Images	29

9.	OFFENCES UNDER THE COUNTER TRAFFICKING IN PERSONS ACT	30
9.1	Trafficking for Sexual Exploitation.....	30
9.2	Promoting Child Trafficking	30
9.3	Promotion of Trafficking in Person	31
10.	OFFENCES UNDER THE PENAL CODE.....	32
10.1	Defilement of Idiots or Imbeciles	32
10.2	Detention of Females for Immoral Purposes	32
10.3	Conspiracy to Defile	33
10.4	Unnatural Offences.....	33
10.5	Bigamy.....	34
11.	OTHER OFFENCES WITH SGBV COMPONENT	34
11.1	Sections on Offences under the Penal Code	34
11.2	Sections on Offences Under the Election Offences Act No. 37 of 2016	34
11.3	Sections on Offences under the Counter Trafficking in Persons Act No. 8 of 2020	35
11.4	Sections on Offences under the Computer Misuse and Cyber-Crimes Act No. 5 of 2018.....	35

PART C: PROCEDURAL AREAS OF CONCERN IN SGBV PROSECUTION 36

1.	INTRODUCTION	36
2.	INVESTIGATION AND EVIDENCE GATHERING AND MANAGEMENT	36
3	BAIL AND BOND	38
4.	PLEA BARGAIN	39
5.	DIVERSION.....	39
6.	TRIAL.....	40
7.	VICTIM AND WITNESS MANAGEMENT	41
8.	CHILDREN IN THE JUSTICE SYSTEM	44
9.	SENTENCING	45
10.	REVIEW, REVISION AND APPEAL.....	45

CONTACTS OF REFERRAL AGENCIES	49
ANNEX 1.....	54
NOTABLE SGBV CASES	54
MONITORING AND EVALUATION	59
Exit Questionnaire.....	59
Part 1: Details of SGBV Cases Handled.....	60
Part 2: User Experience with the Tool	61
Part 3: Conclusion/ Recommendations	63



FOREWORD

Sexual and gender-based violence (SGBV) has been identified as a silent pandemic that has been affecting the family and general environments. It has for the longest time been used as a tool by perpetrators to maintain and reinforce a gender power imbalance. It is estimated that one in three women worldwide experience physical or sexual violence mostly perpetrated by persons well known to them.

Kenya has enacted various legislations, policies, regulations and guidelines on the response, prevention and management of SGBV despite the well-established and progressive normative framework. The conviction rates remain low and this can be attributed to major factors such as the capacity of the prosecutors and other criminal justice players.

Kenya has made several commitments to achieve gender equality and end gender-based violence. At the domestic and global levels, this will be achieved through the adoption of the policy, legal measures related to gender-based violence (GBV); a multi-sectoral approach to prevent and respond to SGBV and the intergovernmental framework of coordination.

The Office of the Director of Public Prosecutions is the sole prosecuting authority and occupies a pivotal position in the criminal justice system. It ensures that the rule of law is upheld and the rights of citizens and victims of crimes are protected within and without the borders of Kenya. As a critical player in the criminal justice system, the office is tasked to prevent and respond to SGBV cases by well trained and organized prosecutors through policies and guidelines that guide them to make the decision to charge where evidence is presented before them.

Article 28 and 29 of the Constitution of Kenya, provide for the protection of human dignity and freedom and security of persons including victims of SGBV. For this reason, the ODPP has developed this Rapid Reference Guide for prosecutors dealing with SGBV cases. It will highlight the practical steps towards identifying the offence, ingredients of the offence and the practice of law to secure justice for the victims/survivors of SGBV. Further, it will serve as a guide for investigators who deal with these cases.

I take this opportunity to thank the Head of Conventional and Related Crimes Department, Ms. Jacinta Nyamosi, OGW under whose docket the SGBV division falls, for her overall leadership in the drafting of this guide. I also thank the Head of the SGBV Division, Ms. Jacqueline Njagi, together with technical team members and stakeholders who participated in one way or another. I hope that the guide will be a useful tool for prosecutors in dealing with SGBV crimes and that it will enhance the capacity of prosecutors and other criminal justice stakeholders.



NOORDIN HAJI, CBS, OGW
DIRECTOR OF PUBLIC PROSECUTIONS



ACKNOWLEDGEMENT

On behalf of the Office of the Director of Public Prosecutions (ODPP), I convey our sincere appreciation to the United Nations Office on Drugs and Crime (UNODC) and the European Union through the Programme for Legal Empowerment and Aid Delivery in Kenya (PLEAD) for the partnership, support, provision of technical assistance and guidance throughout the development process of this guide. The ODPP specifically recognizes the technical expertise of Dr. Mercy Deche, UNODC Consultant, together with the invaluable contribution of Ms. Joyce Matara and Mr. William Mathenge.

We acknowledge the invaluable contribution, views, critique of all the internal and external stakeholders that enriched the development of this guide.

Last but not least, may I make special mention of the critical role and unwavering dedication of the ODPP SGBV-RRG technical team members led by Ms. Jacinta Nyamosi (Ag. DDPP), Ms. Jacqueline Njagi (ADPP), Ms. Mary Wangele (ADPP), Mr. Duncan Ondimu (SPPC), Mr. Eddie Kaddebe (SPPC), Ms. Ebby Maswai (SPPC), Ms. Mecel Ikol (SPPC), Ms. Ann Penny Gakumu (SPPC), Ms. Linda Mwamburi (PPC), Mr. Allen Mulama (PPC), Ms. Naomi Atina (SPC), Mr. James Gachoka (SPC), Ms. Peninah Ngondi (PC), Mr. Hubert Sonye (PC), Ms. Shukri Ayan (PC), Ms. Angela Kinyanjui (SS) and Ms. Catherine Nguthu (CO), for bringing this guide to completion. I hope that the guide will contribute to ensuring, effective, efficient and expeditious prosecution of SGBV cases.



JACINTA NYAMOSI, OGW
AG. DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS
OFFENCES AGAINST THE PERSON DEPARTMENT

ABBREVIATIONS AND ACRONYMS

AG	Attorney General
AHTCPU	Anti-Human Trafficking and Child Protection Unit
AJS	Alternative Justice System
CA	Communication Authority of Kenya
CBO	Community Based Organisation
CJS	Criminal Justice System
COVAW	Coalition on Violence Against Women
CPC	Criminal Procedure Code
CRC	Committee on the Rights of the Child
DCS	Directorate of Children's Services
DPP	Director of Public Prosecutions
DNA	Deoxyribonucleic acid
ECOSOC	Economic and Social Council
FGM	Female Genital Mutilation
HAPCA	HIV & AIDS Prevention and Control Act
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
INTERPOL	International Criminal Police Organization
IO	Investigating Officer
IPOA	Independent Police Oversight Authority
KNCHR	Kenya National Commission for Human Rights
KPS	Kenya Prison Service
NCAJ	National Council on the Administration of Justice
NGAO	National Government Administration Officers
NGEC	National Gender and Equality Commission
NPS	National Police Service
ODPP	Office of the Director of Public Prosecutions
PRC	Post Rape Care
PACS	Probation and After Care Service
POMAC	Power of Mercy Advisory Committee
RRG	Rapid Reference Guide
SCSL	Special Court for Sierra Leone
SGBV	Sexual and Gender Based Violence
SOA	Sexual Offences Act
WPA	Witness Protection Agency
VPA	Victim Protection Act

WORKING DEFINITIONS

Adolescent: A person in transition between childhood and adulthood whose age threshold is determined on an individual case by case basis.¹

Age of Consent: The legal age at which an individual is considered mature enough to make a competent decision to engage in sex. In Kenya, it is the same age as adulthood which is 18 years.

Explanatory Note 1

The Committee on the Rights of the Child (CRC) has avoided assigning numerical delimitation to adolescence after conceding that children mature at different ages both as individuals and according to their gender.

Crimes against Humanity: Any of the acts listed in Article 7 of the Rome Statute when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Where persons are targeted for the attack of rape and other forms of sexual violations based on any identifiable group like ethnicity, it qualifies as an act of crimes against humanity.²

Discretionary Adolescent Sex: Sexual activity amongst adolescents in circumstances that would be consensual save for the age limitation with regard to consent.

Domestic Violence: Violence against a person, or threat of violence or of imminent danger to that person, by any other person with whom that person is, or has been, in a domestic relationship.³

Domestic Relationship: Any of the relationships listed in Section 4 of The Protection Against Domestic Violence Act, 2015.

Gender: Characteristics of women, men, girls and boys that are socially constructed. This includes norms, behaviors and roles associated with being a woman, man, girl or boy, as well as their relationships with each other. As a social construct, gender varies from society to society and can change over time.⁴

Gender-Based Violence: Any offence perpetuated on a person based on their gender.

1 General Comment No. 20 of 2016 on the implementation of the rights of the child during adolescence, paragraph 5

2 *Prosecutor v Akayesu* Case No. IT-96-4-T, Judgment, T 597 (Sept. 2, 1998), *Prosecutor v Kunarac* Case No. IT-96-23-A and IT-96-23/1-A, 12 June 2002

3 Section 3 of Protection Against Domestic Violence Act; and *Republic v Cornelius Thuku Mbugua* [2020] eKLR

4 WHO available at https://www.who.int/health-topics/gender#tab=tab_1

Genocide: Any of the acts listed in Article 6 of the Rome Statute, committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group. Where rape and sexual violence is carried out systematically during conflict with the specific intent to destroy, in whole or in part, a particular group, it qualifies as an act of genocide.⁵

Harmful Practices: Any attitude and/or practices which negatively affect the fundamental rights of women and girls, such as the right to life, health, dignity education and physical integrity.⁶

Patriarchy: The social organization in which a male is the head of the descent with kinship and title being traced through the male line.⁷

It is applied to refer to the male domination in both public and private spheres which ordains men as the ultimate decision makers. Patriarchy within the political sphere has been identified as the root cause of the prevalence of election related SGBV.⁸

Sex: The different biological and physiological differences that characterize people as male and female. There are, however, those whose biological identity are not clear or may have both male and female organs. These are the intersex persons who are gradually gaining recognition in all public spheres in Kenya. The Children Act (2021) has included intersex persons in the list of children in need of care and protection under [Section 144](#).

Sexual Violence: Any sexual act or attempt to obtain a sexual act, or unwanted sexual comments or acts to traffic, that are directed against a person's sexuality using coercion by anyone, regardless of their relationship to the victim, in any setting, including at home and at work.⁹

Victim: Any natural person who suffers injury, loss or damage as a consequence of an offence.¹⁰

5 [Prosecutor v Akayesu](#) (n 2)

6 [Protocol to the Africa Charter on Human and People's Right on the Rights of Women in Africa](#)

7 Collins English Dictionary (3rd edition, Haper Collins, 1991) 1143

8 FIDH/KHRC, *Sexual Violence as a Political Tool During Elections in Kenya. State Actions Needed Ahead of the 2022 Polls* (2021). Available at <https://www.khrc.or.ke/mobile-publications/equality-and-anti-discrimination/232-sexual-violence-as-a-political-tool-during-elections-in-kenya-state-actions-needed-ahead-of-the-2022-polls/file.html>

9 Sexual Violence Research Initiative available at <https://www.svri.org/research-methods/definitions>.

10 Section 2 of the Victim Protection Act

Vulnerable Witness: A witness who, for justified reasons, should be interviewed or allowed to testify in a special manner and includes children, victims of sexual and gender-based violence, the elderly, persons who are ill or any other person who has been declared a vulnerable witness due to the personal characteristics of the witness, the type of offence committed or relationship between the witness and the perpetrator or other circumstances.¹¹ They are the category entitled to the protection measures in [Section 31 \(4\) of the Sexual Offences Act, 2006](#).

War Crime: This means the grave breaches of the Geneva Conventions of 12 August 1949, as per the acts listed in Article 8(2) of the Rome Statute, against persons or property protected under the provisions of the relevant Geneva Convention when committed as part of a plan or policy or as part of a large-scale commission. Rape and humiliation of sexual nature when carried out during conflict, including non-international conflict, constitute an outrage against personal dignity which is an act of war crimes.¹²

¹¹ Section 2 Witness Protection Regulations

¹² *Prosecutor v Furundzija* Case No. IT-95-17-1, Judgment (Trial Chamber), 10 December 1998

USER GUIDE

- a. This RRG complements pre-existing policies and guidelines. It is not designed to be utilized in isolation but within the context of the ODPP's peer guidelines.
- b. The RRG has prioritized brevity, readability and user friendliness. It is punctuated by explanatory notes to emphasize key issues and linkages through hyperlinks for ease of use of the electronic version.
- c. The RRG is divided into four main parts comprising the following:

Part A sets out the salient features of SGBV, the objectives and overriding principles of the RRG, and the existing legal and policy framework of SGBV.

Part B lays out in a tabular form; key SGBV offences, essential ingredients and the evidence required to prove each ingredient. In addition, general offences that often have a gender component are also discussed in narrative form in this part.

Part C highlights the procedural areas of concern.

Part D sets out in tabular form relevant agencies that the prosecutor should work in collaboration with during prosecution of SGBV. It also states their respective roles and provides their contacts.

SGBV is fuelled by patriarchal beliefs and mindsets that impact the response at all levels. These have the potential of colouring evaluation and decision making by professionals in the justice sector including prosecutors. Some of these myths and realities are shared across Parts A and C of the Guide.

The guide has an Annexe of notable SGBV cases for quick reference.

At the end of the RRG is a questionnaire for periodic completion by the user to monitor the effectiveness of the guide.

PART A:

OVERVIEW

1. NATURE OF SGBV

- 1.1 SGBV is diverse in typology and context. It takes the form of physical, sexual, emotional, verbal and economic violence. Increased use of technology has introduced a new frontier of violence in the form of cyber facilitated SGBV like child pornography, sexual harassment, stalking and gender based cyber bullying.
- 1.2 It takes place within the family, in places of worship, social places, learning institutions, work places, in cyber spaces and in random public places. Perpetrators are both biological legal persons and juristic persons including the State. Although it is perpetrated by both men and women and against both genders, the perpetrators are predominantly male and the victims disproportionately women and girls.¹³
- 1.3 Victims of SGBV engage the criminal justice system from a point of multiple vulnerabilities due to the effect of the violation. This includes psychological and/or physical trauma, security concerns, mistrust of people and systems, self and societal stigma, fear of re-victimization and possible pressure from the perpetrator and their sympathizers. Many victims are indigent and have to balance between pursuing justice and their livelihood.
- 1.4 Not all SGBV offences are sexual. Ordinary offences like murder or assault may also qualify as SGBV offences where the victim's gender is the primary motive for the violent act.
- 1.5 SGBV often takes place in private, making it hard to prove and for victims to follow through for fear of not being believed. It therefore remains severely under reported and not all the reported cases end up in court. This does not however diminish the state's obligation to investigate, prosecute, punish and provide reparation for acts or omissions by non-State actors which result in gender-based violence against women.¹⁴

13 WHO, 'Violence Against Women' available at <<https://www.who.int/news-room/fact-sheets/detail/violence-against-women>>

14 CEDAW General Recommendation 19 para 9

- 1.6 Although Kenya has an elaborate legal framework on SGBV, the conviction rates have remained low. As has been pointed out, it is the certainty of punishment after conviction, and not the severity of punishment, that is more likely to produce deterrent benefits.¹⁵
- 1.7 In a patriarchal society like Kenya, SGBV is fuelled by patriarchal beliefs, mindsets and myths that impact the response at all levels. These have the potential of colouring evaluation and decision making by professionals in the justice sector including prosecutors. The beliefs include and not limited to perceiving certain persons as deserving to be violated, shifting the blame to the victim because of their choice of dress, venue, time, profession or company; excusing certain violations in the name of culture, among others.¹⁶

Myth	Reality
That sexual assault is about uncontrollable sexual desire that seizes the perpetrator.	Sexual violence is about power and control.
That SGBV is usually perpetrated by a stranger.	The perpetrator is often someone known to the victim.
That absence of consent must always involve overt protestations by the perpetrator.	Failure to resist does not always mean consent and should not automatically affect credibility of the victim.
That rape only happens to good looking desirable people.	It can actually happen to anyone.
That SGBV perpetrators have an identifiable profile i.e. by their physical appearance or social interactions.	There is no one size fit all profile of an SGBV perpetrator It is impossible to physically profile a perpetrator.
That people involved in risky behaviour like commercial sex workers and drug users have no moral authority to complain when violated.	Access to justice should be availed to all without discrimination.
That some victims deserve it and bring it upon themselves by their actions, dress, geographical location, intoxication or sexual orientation.	No one deserves to be violated.

15 'Deterrence in Criminal Justice Evaluating CERTAINTY vs. Severity of Punishment' Valerie Wright, Ph.D. November 2010 available <https://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf>

16 UNODC, 'Handbook on Effective Prosecution Responses to Violence Against Women and Girls' Criminal Justice HandBook Series (2014)

Myth	Reality
That many SGBV complaints by women are likely to be fabricated.	Inconsistencies in a victim's story is not because they are untruthful. It could be out of trauma.
A genuine victim will report the violation immediately it happens.	A lot of genuine cases are reported late.
That domestic violence is a private matter to be settled privately away from the criminal justice system.	No act is immune from the reach of criminal law.
What a victim refers to as sexual harassment is harmless flirtation.	All complaints of sexual harassment should be taken seriously.
Trafficking only involves foreigners.	It is both international and internal.
Victims of trafficking will always ask for help.	Many victims of trafficking suffer in silence for long periods.

2. OBJECTIVES AND SCOPE

The principal objective of the RRG is to provide an easily accessible resource for prosecutors to facilitate a coherent, expeditious and efficient prosecution of SGBV cases in a manner that will maximize convictions.

It aims to:

- 2.1 Highlight the practical steps towards identifying the offence disclosed, ingredients of the offence, and the applicable law with the aim of securing justice;
- 2.2 Set out the essentials of building a case based on evidence against the perpetrators of SGBV offences;
- 2.3 Enhance the standards of prosecution of SGBV cases through consistent application of the guidelines at all stages of the criminal justice process;
- 2.4 Assist the prosecutor in appreciating the impact of the gendered nature of SGBV offences which may affect their prosecution;
- 2.5 Streamline and standardize the response to SGBV for purposes of uniformity and consistency across the country;

- 2.6 Relocate SGBV from the realms of marginalization and position it as a serious violation deserving the attention and diligence often accorded to other offences by the actors in the criminal justice system;
- 2.7 Ensure prosecutors are aware of and protect the rights of victims and witnesses of SGBV during and after trial;
- 2.8 Enhance effective and efficient cooperation, collaboration and coordination between the ODPP and stakeholders within the CJS; and
- 2.9 Guide prosecutors and investigators to adhere to national, regional and international laws when handling SGBV cases.

Explanatory Note 2

Whereas it is a prosecutorial tool, the RRG is, by its nature also beneficial to investigators and judicial officers as it contains information that can improve their response to SGBV cases.

3. GUIDING PRINCIPLES

The overall implementation of this RRG shall be guided by the following principles:

- 3.1 **Expeditious disposal:** SGBV cases should be heard and determined within the shortest time possible as per the constitutional imperative in Article 50(2) (b).
- 3.2 **Diligence:** The prosecutor shall give due regard to every detail of investigation and prosecution of SGBV cases including strict adherence to constitutional and statutory provisions, due process and the rules of evidence.
- 3.3 **Victim centred approach:** The needs, interests, concerns and aspirations of the SGBV victim should be a prosecutor's key concern throughout the victim's interaction with the criminal justice process.
- 3.4 **Human rights approach:** SGBV is, among other things, a human rights violation. Responding to it must be from a human rights perspective. This includes giving due regard to human rights principles such as equality, non-discrimination, right to dignity and privacy, among others.

- 3.5 **Therapeutic approach:** This approach is based on several international standards.¹⁷ It requires the prosecutor to show empathy, consideration, tolerance and patience to the vulnerable victims of SGBV as they navigate through the criminal justice system.
- 3.6 **Collaboration:** Any successful response to SGBV must involve inter-agency collaboration and coordination. The prosecutor must intentionally and proactively reach out to other agencies in the criminal justice system.
- 3.7 **Sensitivity to external environment:** There are extraneous factors that influence the trajectory of an SGBV case. These include the influence of culture, religion, poverty, geographical area and level of marginalization. The prosecutor should be cognizant of these realities and be innovative in how to overcome them.
- 3.8 **Public interest:** The prosecutor shall always handle SGBV cases with due regard to public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process as required by the Constitution.¹⁸

4. LEGAL AND POLICY FRAMEWORK ON SGBV

4.1 Legal Framework

The criminal justice system in Kenya is replete with laws and policies that provide a sound legal and policy framework for a comprehensive legal response to SGBV. These are contained in the Constitution of Kenya, 2010, domestic legislation and judicial precedents, policies and guidelines. As espoused in the Constitution 2010, Article 2 (4-6), customary laws that are consistent with the Constitution, general rules of international law, regional and international statutes that have been ratified, are also part of the legal framework. In addition, there is an established body of soft law, which though not legally binding, sets norms and standards relating to SGBV. All these are outlined as below:

4.1.1 *The Constitution of Kenya, 2010*

SGBV is a human rights concern. The Bill of Rights in Chapter 4 of the Constitution is of great relevance to the legal response to SGBV.

17 The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; The Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime; and the United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice

18 Article 157 (11)

4.1.2 Statutory Framework

This includes but is not limited to the following:

Substantive Laws

- [Sexual Offences Act](#), No. 3 of 2006
- [Penal Code](#), Cap 63 Laws of Kenya
- [Children Act](#), No. 29 of 2022
- [Counter-Trafficking in Persons Act](#), No. 28 of 2010
- [Prohibition of Female Genital Mutilation Act](#), No. 32 of 2011
- [Computer Misuse and Cybercrimes Act](#), No. 5 of 2018
- [Marriage Act](#), No. 4 of 2014
- [Office of the Director of Public Prosecutions Act](#), No. 2 of 2013
- [International Crimes Act](#), No. 16 of 2008

Procedural Laws

- [Criminal Procedure Code](#), Cap 75 Laws of Kenya
- [Evidence Act](#), Cap 80 Laws of Kenya

Supporting Laws

- [Witness Protection Act](#), No. 16 of 2006
- [Victim Protection Act](#), No. 17 of 2014
- [Protection against Domestic Violence Act](#), No. 2 of 2015

Subsidiary Rules

- [Evidence \(Out of Court Confessions\) Rules](#), 2009
- [Child Offender Rules](#)
- [Sexual Offences Regulations](#), 2008
- [Sexual Offences \(Dangerous Offenders DNA Data Bank\) Regulations](#), 2008
- [Sexual offences \(Medical Treatment\) Regulations](#), 2012
- [Sexual Offences Rules of Court](#) 2014
- [Victims Protection \(Trust Fund\) Regulations](#)

4.1.3 Judicial Precedents

The superior courts have made binding pronouncements on both substantive and procedural issues around SGBV. A summary of key decisions is attached to this guide as Annexe 1.

4.1.4 International Instruments

These include but not limited to the following:

- [Convention on the Rights of the Child](#), GA res. 44/25.
- [Convention on the Elimination of All Forms of Discrimination Against Women](#), A/Res/34/180.
- [Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power](#), A/Res/40/34/ annex.
- [Declaration on the Elimination of Violence against Women](#), A/Res/48/104.
- [Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime](#), ECOSOC res. 2005/20, annex.
- [International Covenant on Civil and Political Rights](#), New York, 16 December 1966, United Nations Treaty Series, vol. 999.
- [International Covenant on Economic, Social and Cultural Rights](#), New York, 16 December 1966, United Nations Treaty Series, vol. 993. 8. Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice, A/Res/69/194.
- [Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography](#), New York, 25 May 2000, United Nations Treaty Series, vol. 2171.
- [Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime](#), New York, 15 November 2000, United Nations Treaty Series, vol. 2237.
- [Universal Declaration of Human Rights](#), General Assembly resolution 217 A (III).
- [Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice](#), A/Res/65/228, annex. General Comments.
- [Rome Statute of the International Criminal Court](#).

4.1.5 Regional Instruments

- [African Charter on Human and Peoples' Rights](#) (adopted 27 June 1981, OAU Doc. CAB/ LEG/67/3rev.5).
- [Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa](#) (adopted by the 2nd x. Ordinary Session of the Assembly of the African Union, Maputo, CAB/ LEG/66.6, 13 Sept 2000).
- [African Charter on the Rights and Welfare of the Child](#) (OAU Doc. CAB/ LEG/24.9/49, 1990).

4.2 Policy Framework

Over time, the ODPP has developed policies, guidelines, standards and manuals to guide the execution of their core mandate to institute and undertake prosecution of criminal matters. Most apply across the prosecution of all offences while a few are specific to the prosecution of SGBV offences.

In addition, there are other SGBV specific guidelines developed by other agencies both locally and abroad that are useful to the SGBV prosecutor.

Explanatory Note 3

The RRG should not be read in isolation but within the context of pre-existing policy documents and guidelines.

They include the following:

4.2.1 ODPP Policy Documents

- A Prosecutor's Guide to Children in the Criminal Justice System
- Ending Sexual & Gender Based Violence: The Role of the Prosecutors
- Decision to Charge Guidelines
- ODPP Diversion Guidelines and Explanatory Notes
- ODPP Diversion Policy
- ODPP National Prosecution Policy
- ODPP Plea Bargaining Guidelines
- ODPP Standard Operating Procedures Manual & Rapid Reference Guide on Prosecution of Female Genital Mutilation Cases
- Practice Directions on Children's Matters

4.2.2 Other Policy Documents

- Bail and Bond Policy Guidelines (NCAJ 2015)
- Case Law Handbook on Violence Against Women and Girls in Commonwealth East Africa: Kenya, Rwanda, Tanzania and Uganda (Commonwealth, 2019)
- Criminal Procedure Bench Book (Judiciary, 2018)
- Guidelines for Active Case Management of Criminal Cases in Magistrate Courts and High Courts in Kenya (NCAJ 2019)
- Hand Book Prosecuting Conflict-Related Sexual Violence (UN International Residual Mechanism for Criminal Tribunals, Office of Prosecutor & KAS Rule of Law Program for Sub Saharan Africa, 2021)
- National Guidelines on Management of Sexual Violence in Kenya (Ministry of Health, 2014)
- National Policy for Prevention and Response to Gender Based Violence (GoK 2014)

- [National Police Service Standing Orders](#) (NPS, 2017)
- NCAJ Standard Operating Guidelines on Sexual Gender Based Case Management During Crisis (NCAJ, 2020)
- [PoliCare Policy](#) (NPS 2021)
- [Sentencing Guidelines](#) (NCAJ 2011)

PART B:

**SGBV OFFENCES, ESSENTIAL INGREDIENTS
AND EVIDENCE REQUIRED**

Explanatory Note 4

The prosecutor is under no obligation to tender all the evidence listed against the offence in the table below. They must however ensure that there is evidence tendered to prove each ingredient of the offence.

5. OFFENCES UNDER THE SEXUAL OFFENCES ACT

5.1 Rape

Section 3	
Ingredients	Evidence
a. Penetration of genital organ with another genital organ, section 3(1)(a) of SOA	- Oral evidence
b. Lack of consent or consent not freely given (use of force, duress, threats, intimidation, undue influence) section (42) of SOA	- Medical evidence (Post Rape Care Form, P3 form, treatment note, medical report to prove mental incapacity to consent etc.)
c. Intentional and unlawful acts section (43) SOA	- Forensic evidence (hair, nail clippings, saliva, blood, debris, semen collected from scene or clothing etc.)
d. Identification of assailant	- Photographic evidence section 78 of Evidence Act
	- Certificate for production of electronic evidence section 78A of the Evidence Act
	- Recognition/visual identification of assailant

5.2 Gang Rape

Section 10

Ingredients	Evidence
a. Penetration of genital organ with another genital organ, section 3(1) (a) of SOA b. Age of the victim (defilement) c. Lack of consent or consent not freely given (use of force, duress, threats, intimidation, undue influence) section 42 of the SOA d. Intentional and unlawful acts section 43 of SOA e. Involvement of more than one suspect f. Identification of assailant/s) g. Common intent. section 21 of the Penal Code	- Oral evidence - Birth notification/certificates/baptismal card/immunization card/age assessment report - Medical evidence (Post Rape Care Form P3 form, treatment note etc.) - Forensic evidence (hair, nail clippings, saliva, blood, debris, semen collected from scene or clothing etc.) - Photographic evidence (section 78 of Evidence Act) accompanied by certificate - Electronic evidence accompanied by a certificate (section 78A of the Evidence Act & section 65 (8)) - Proof of involvement of more than one person - Recognition/visual identification of assailant(s)

Explanatory Note 5

With regard to gang rape, the level of involvement of each assailant is irrelevant as long as there is proof of common intention in the commission of the offence. Acts indicative of common intention include, but not limited to, luring, looking out or pinning down the victim.

Explanatory Note 6

For attempted rape, see the decision of [Abraham Otieno vs Republic \(2011\) eKLR](#)

“The prosecution must prove that the culprit acted in such manner that there was no doubt at all as to what his intention was. The intention must be to rape. It must be shown that he was about to rape the victim but was stopped in tracks and/or in the nick of time. The intention to rape must be manifest. Such intention can be manifested for instance by word of mouth or conduct of the culprit. If the culprit proclaims his intention to rape and directs his efforts towards that goal for instance, by holding the victim or pushing her to the ground, undressing her, removing her pants if at all and also unleashing his male genital organ in preparation thereof but does not go the whole hog because of factus interventions, that would be good evidence of attempted rape. Alternatively, if the culprit without expressing his intentions verbally gets hold of the victim, fondles her, removes her clothes including her pants and also undresses himself in preparation thereof but for one reason or another something happens which compels him stop, again that would be good evidence of attempted rape.”

The same evidentiary threshold applies to Attempted Defilement.

See also [Moses Kabue Karuoya v Republic \[2016\] eKLR](#) and [DKM v Republic \[2019\] eKLR](#).

5.3 Sexual Acts within the View of a Family Member

Section 7

Ingredients	Evidence
a. Penetration of genital organ with another genital organ, section 3(1)(a) of SOA b. Lack of consent or consent not freely given (use of force, duress, threats, intimidation, undue influence), section (42) of SOA c. Intentional and unlawful acts section (43) SOA d. The act(s) committed within the view of a family member, a child or a person with mental disabilities e. The act(s) committed intentionally f. Age of the victim (section 11 of SOA) g. Intentional and unlawful act h. Non-penetrative contact between the genital organs, breasts and/or buttocks with that of another person i. Exposure or display of pornographic material j. Lack of consent or consent not freely given (use of force, duress, threats, intimidation, undue influence) k. Identity of the assailant	- Oral evidence - Birth notification/certificates/baptismal card/immunization card/age assessment report - Medical evidence (Post Rape Care Form, P3 form, treatment note; Psychiatric report etc. - Forensic evidence (hair, nail clippings, saliva, blood, debris, semen collected from scene or clothing etc.) - Photographic/electronic (pornographic) evidence section 78 of Evidence Act Certificate for production of electronic evidence section 78A of the Evidence Act - Recognition/visual Identification of assailant

Explanatory Note 7

For discretionary adolescent sex ("Romeo and Juliet") cases, refer to 'A Prosecutor's Guide to Children in the Criminal Justice System, ODPP 2020', paragraph 2.2.5.7 on Sexual Offences and Diversion Guidelines and Explanatory Notes, Clauses 35-43

5.4 Defilement

Section 8	
Ingredients	Evidence
a. Penetration of genital organ with another genital organ b. Age of the victim c. Identification of assailant NB: Consent is immaterial in cases of defilement	- Oral evidence - Birth notification/certificates/baptismal card/immunization card/age assessment report or any other credible evidence¹⁹ - Medical evidence (Post Rape Care Form P3 form, treatment note etc. - forensic evidence (hair, nail clippings, saliva, blood, debris, semen collected from the scene) - Photographic evidence section 78 of Evidence Act - Certificate for production of electronic evidence section 78A of the Evidence Act - Recognition/visual identification of assailant

5.5 Sexual Assault

Section 5	
Ingredients	Evidence
a. Penetration of genital organ with i. any part of the accused's body or of another person's body part or ii. an object OR iii. Manipulation of an object to penetrate another's genital organs OR iv. Manipulation of one's body part (other than a penis) or another person's body to penetrate another's genital organs b. Lack of consent or Consent not freely given (use of force, duress, threats, intimidation, undue influence) c. Identity of accused	- Oral evidence - Medical evidence (Post Rape Care Form P3 form, treatment note etc. - Forensic evidence (hair, nail clippings, saliva, blood, debris, semen collected from the scene or clothing, object etc.) - Photographic evidence section 78 of Evidence Act - Certificate for production of electronic evidence section 78A of the Evidence Act - Recognition/visual identification of assailant

19 Kaingu Elias Kasomo versus Republic Malindi Court of Appeal No 504 of 2010

5.6 Compelled or Induced Indecent Act

Section 6

Ingredients	Evidence
a. Intentional or unlawful act b. Use of an object including any part of the body of an animal c. Exposure or display of pornographic material (section 2) d. Lack of consent or Consent not freely given (use of inducement) e. Involving of more than one assailant f. Identity of assailant	- Oral evidence - Medical evidence (Post Rape Care Form P3 form, treatment note etc. - Forensic evidence (hair, nail clippings, saliva, blood, debris, semen collected from scene or clothing etc.) - Photographic/electronic (pornographic) evidence section 78 of Evidence Act - Certificate for production of electronic evidence section 78A of the Evidence Act - Recognition/visual Identification of assailant

5.7 Indecent Act

Sections 11, 11A

Ingredients	Evidence
a. Age of the Victim (section 11 of SOA) b. Intentional and unlawful act c. Non-penetrative contact between the genital organs, breasts and/or buttocks with that of another person d. Exposure or display of pornographic material e. Lack of consent or Consent not freely given (use of force, duress, threats, intimidation, undue influence) f. Identity of the assailant	- Birth notification/certificates/baptismal card/immunization card/age assessment report - Medical evidence (Post Rape Care Form P3 form, treatment note etc. - Any forensic evidence analyzed by government chemist (hair, nail clippings, semen collected from the scene or clothing etc. where there is ejaculation.) - Pornographic material (photos, videos, drawings etc.) - Photographs of the crime scene - Certificate for production of electronic evidence - Recognition/visual Identification of assailant

5.8 Incest

Section 20(1), 21

Ingredients	Evidence
a. Parties are relatives within the prohibited degrees b. Knowledge that the relationship is within the prohibited degrees (See: section 22 SoA cousins not included) c. Penetration OR i. indecent act d. Age of the victim if they are below 18 years to determine sentencing e. Identification of the assailant	- Oral evidence - Birth notification/certificates/baptismal card/immunization card/age assessment report - Medical evidence (Post Rape Care Form P3 form, treatment note etc. - Forensic evidence (hair, nail clippings, saliva, blood, debris, semen collected from the scene etc. for DNA analysis) - Photographic evidence section 78 of Evidence Act - Certificate for production of electronic evidence section 78A of the Evidence Act - Witness/Evidence on relationship (section 22 of SOA) - Recognition/visual Identification of assailant

5.9 Promotion of Sexual Offences with a Child

Explanatory Note 8

Rape and sexual violence have been recognized as international crimes i.e. crimes against humanity, war crime and genocide by the ICTY (*Prosecutor v Kunarac, Kovac, and Vukovic*), the ICTR (*Prosecutor v. Akayesu*), and the SCSL (*Prosecutor v. Sesay, Kallon & Gbao*). In addition, the ICC Statute criminalizes rape, sexual slavery, enforced, prostitution, forced pregnancy, enforced sterilization, and sexual violence.

Although the tribunals never reached a consensus on the essential ingredients of rape as an International offence, the Rome Statute has defined rape as follows:

The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent. (Article 7(1)g(1))

Kenya has domesticated the Rome Statute through the International Criminal Court Act.

Kenyan courts have jurisdiction to prosecute rape and sexual violence as international crimes by virtue of the International Crimes Act.

See also Hand Book Prosecuting Conflict- Related Sexual Violence (UN International Residual Mechanism for Criminal Tribunals, Office of Prosecutor & KAS Rule of Law Program for Sub Saharan Africa, 2021)

Section 12

Ingredients

- a. Age of the victim
- b. Production/manufacture and/or distributing/sharing/giving out of material (s)
- c. Use of or intention to use the material to promote a sexual offence with a child or to encourage a child to perform a sexual act

OR

- d. Supply or display to a child with any (pornographic) material(s)
- e. The material is intended to encourage or enable the child to perform sexual acts

NB: Juristic persons can also be held culpable and may be charged with this offence

Evidence

- Birth notification/certificates/baptismal card/immunization card/age assessment report
- The material that promotes sexual offence (s) with a child or encourages or enables a child to perform a sexual act
- The pornographic material that has been supplied or displayed to a child
- Photographic evidence [section 78 of Evidence Act](#)
- Certificate for production of electronic evidence [section 78A of the Evidence Act](#)
- Recognition/visual Identification of assailant

5.10 Child Sex Tourism

Section 14

Ingredients

- a. Age of the victim
- b. Organizing and facilitation for the travel of a child
- c. Intention to facilitate the commission of any sexual offence against the child

OR

- d. Printing or publishing, information that is intended to promote or facilitate conduct that would constitute a sexual offence against a child

OR

- e. Introducing, organizing or facilitating contact with another person under the auspices of promoting tourism, in order to promote conduct that would constitute a sexual offence against a child

NB: Juristic persons also culpable and may be charged with this offence

Evidence

- Oral evidence
- Evidence of travel arrangements (Documentations i.e. invoice, receipts, tickets etc., from travel agencies, bus company, airlines or other modes of transport)
- Passport, visa and other travel documents
- Birth notification/certificates/baptismal card/immunization card/age assessment report
- Medical evidence (Post Rape Care Form P3 form, treatment note etc.)
- Information that has been published or printed using any form of media Communication between involved parties
- Photographic/electronic (pornographic) evidence [section 78 of Evidence Act](#)
- Certificate for production of electronic evidence [section 78A of the Evidence Act](#)
- Recognition/visual Identification of assailant

5.11 Child Prostitution

Section 15

Ingredients	Evidence
a. Age of the victim b. Knowingly permitting a child to remain in any premises, for the purposes of causing such child i. to be sexually abused or ii. to participate in any form of sexual activity or iii. in any obscene or indecent exhibition or show OR c. Procuring a child for sexual intercourse or for any form of sexual abuse or indecent exhibition or show d. Inducing a person to be a client of a child for sexual intercourse or for any form of sexual abuse or indecent exhibition or show e. Taking advantage of one's 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 f. Threatening or using violence towards a child to procure the child for sexual intercourse or any form of sexual abuse or indecent exhibition or show g. Intentionally or knowingly owning, leasing, renting, managing, occupying or having 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 h. Giving 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	- Oral evidence - Birth notification/certificates/baptismal card/immunization card/age assessment report - Medical evidence (Post Rape Care Form P3 form, treatment note etc. - forensic evidence (hair, nail clippings, saliva, blood, debris, semen collected from scene or clothing etc. for DNA analysis) - Photographic/electronic (pornographic) evidence section 78 of Evidence Act - Certificate for production of electronic evidence section 78A of the Evidence Act - Advertisements through print or other media, oral advertisements or other means - Documents proving ownership, leasing, tenancy and/or occupation of premises used for child prostitution - Money and evidence of payment or provision of goods and benefits to the child or his/her parents as consideration - Certificate for production of electronic evidence - Recognition/visual identification of assailant(s)

5.12 Child Pornography

Section 16	
Ingredients	Evidence
a. The age of the victim b. Possession of an indecent photograph of a child c. Sale, distribution, or public display. Trade in or transport any obscene materials that has the naked image of a child. d. They engage in business involving obscene materials with the naked image of a child e. Advertises such obscene materials with the naked image of any child among others NB: Juristic persons also culpable and may be charged with this offence	- Oral evidence - Birth notification/certificates/baptismal card/immunization card/age assessment report - Photographic/electronic(pornographic) evidence section 78 of Evidence Act - Certificate for production of electronic evidence section 78A of the Evidence Act - Documentary evidence including obscene material - Evidence on motor vehicle ownership - Evidence on business permit - Proof of ownership where the material is found in a premises

5.13 Sexual Communication with a Child

Section 16A	
Ingredients	Evidence
a. The age of the victim b. Age of perpetrator c. Knowledge by the perpetrator that the victim is a child d. Communication must relate to sexual activity OR a reasonable person would consider any part of the communication to be sexual	- Oral evidence - Birth notification/certificates/baptismal card/immunization card/age assessment report - Photographic/electronic evidence section 78 of Evidence Act - Certificate for production of electronic evidence section 78A of the Evidence Act - Documentary evidence including, report from mode of communication

5.14 Exploitation of Prostitution

Section 17

Ingredients	Evidence
a. Intention of the perpetrator b. Cause or incite another to become a prostitute c. Controls such person's activities relating to prostitution d. Financial gain, reward favor or compensation for accused person or a third party	- Medical evidence (Post Rape Care Form, P3 form, treatment note etc. - forensic evidence (hair, nail clippings, saliva, blood, debris, semen collected from scene or clothing etc. for DNA analysis) - Photographic/electronic evidence section 78 of Evidence Act - Certificate for production of electronic evidence section 78A of the Evidence Act - Financial records - Communication between the parties involved in the offence - Documents proving ownership, leasing, tenancy and/or occupation of premises used for prostitution - Money and evidence of payment or provision of goods and benefits to the child or his/her parents as consideration (M-pesa, bank statements etc.) - Evidence of moneys or consideration received by the accused (M-pesa, bank statements etc.) - Recognition/visual identification of assailant(s)

5.15 Prostitution of Persons with Mental Disabilities

Section 19

Ingredients	Evidence
a. Victim has mental disability b. Intention of the perpetrator c. Financial gain, reward favor or compensation to such person with mental disability or any other person d. Invitation, persuasion or inducement of person with disability for purposes of committing an offence under the SOA e. Making offers or engaging such person with disabilities	- Medical evidence (Post Rape Care Form, P3 form, treatment note, Psychiatric report etc. - Forensic evidence (hair, nail clippings, saliva, blood, debris, semen collected from scene or clothing etc. for DNA analysis) - Photographic/electronic (pornographic) evidence section 78 of Evidence Act

- | | |
|---|--|
| <ul style="list-style-type: none"> f. Supplying, recruiting, transporting, harboring or receiving such person with disability within or across the borders of Kenya, for purposes of the commission of any offence under the SOA g. Aiding and abetting the commission of any offence under this Act against a person with disabilities h. Knowingly or intentionally owning, leasing; renting, managing, occupying or having control of any movable or immovable property used for the commission of any offence under the SOA with such person with disabilities by any person i. Detaining such persons with disabilities by use of; threat(s), coercion, deception, abuse of power or force so as to commit of any offence under the SOA with any person; or j. Participating in, being involved in, promoting, encouraging or facilitating the commission of any offence under the SOA with such persons with disabilities by any person k. Living wholly or partly depending on earnings obtained from the gains of prostitution of a person with disabilities; or either through rewards compensations or favors obtained from the commission of any offence under the SOA with a person with disabilities | <ul style="list-style-type: none"> - Certificate for production of electronic evidence section 78A of the Evidence Act - Communication between the parties involved in the offence - Advertisements - Documents proving ownership, leasing, tenancy and/or occupation of premises used for prostitution - Evidence of moneys or consideration received by the accused (M-pesa, bank statements etc.) - Passport and other travel documents - Recognition/visual identification of assailant |
|---|--|

NB: Juristic persons also culpable and may be charged with this offence

5.16 Sexual Offences Relating to Position of Authority and Persons in Position of Trust

Section 24

Ingredients	Evidence
a. Accused in a position of authority or a position of trust b. Use of the position of authority or position of trust, to seduce, induce the victim or complainant to have sexual intercourse c. Such sexual intercourse does not amount to rape or defilement	- Medical evidence (Post Rape Care Form P3 form, treatment note etc.) - Forensic evidence (hair, nail clippings, saliva, blood, debris, semen collected from scene or clothing etc. for DNA analysis) - Photographic/electronic (pornographic) evidence section 78 of Evidence Act e.g. screen shot text - Certificate for production of electronic evidence section 78A of the Evidence Act - Birth certificate/age assessment report - Communication between the parties involved in the offence (where the victim is a child) - Documents proving the link and connection to the position of authority or, and, position of trust eg; letter of employment, committal order, school admission letter, medical/doctors notes, and any that may be deemed relevant - Recognition/visual identification of assailant(s)

5.17 Sexual Harassment

Section 23 (1)

Ingredients	Evidence
a. Being in a position of authority, or holding a public office b. Persistently making any sexual advances or requests c. Having reasonable grounds to know the sexual advances or requests are unwelcomed d. The submission or rejection of the sexual advances or requests used as a basis of the victim's employment or as a decision relevant to their career e. That sexual advances have effect of Interfering with the victim's work, or educational performance: • Created an offensive working or learning environment for the victim OR • Denial of a service due to the member of the public from a public office	- Documents and/or oral evidence proving the person is in a position of authority or holds public office - The persistent sexual advances/requests through communication (any form of electronic records/documents/evidence of rejection of sexual advances/requests) - The adverse actions as a result of rejection by the victim (e.g. demotions, career stagnation, denial of service, failing grades)

5.18 Deliberate Transmission with HIV and other Life Threatening Sexually Transmitted Disease

Section 26

Ingredients	Evidence
a. Actual knowledge of infection by suspect/accused b. Intentionally, knowingly and willfully doing anything or permitting anything which he or she knows or ought to reasonably know: i. will infect another person with HIV or any other life-threatening STD ii. is likely to lead to another person being infected with HIV or any other life-threatening STD iii. will infect another person with any other STD c. Intention to infect another with HIV or an STD	- Previous HIV positive medical records for the accused (if available) - Current HIV positive medical records for the accused and complainant (if available) - Laboratory test results for Venereal Disease Research Laboratory test (VDRL), serologic test for syphilis (STS), Gonorrhoea Nucleic Acid Amplification (NAAT) testing and screening for other STDs for both accused (previous and current) and complainant (current) - Medical reports or P3 form - Needles, syringes or other drug injection equipment (as the case may require), circumcision tools etc. - DNA analysis of body fluids (such as breastmilk, blood, semen, peri seminal fluid, rectal fluids and vaginal fluids) and other forensic evidence

Explanatory Note 9

In AIDS Law Project -vs- AG & DPP Petition No 97 of 2010 (High Court), the High court declared the offence of deliberate transmission of HIV under s. 24 of the HIV & Aids Prevention and Control Act unconstitutional. It however remained silent on s. 26 of the SOA

5.19 Administering a Substance with Intent

Section 27

Ingredients	Evidence
a. Intentionally give or cause a substance to be administered to another person b. The substance stupefied or overpowered the victim/complainant c. The intention of enabling any person to engage in sexual activity the victim	- Samples of substance administered to the victim - Toxicological report - Post Rape Care Form/P3 form - Any forensic evidence analyzed by government chemist (hair, nail clippings, semen collected from genitalia or clothing etc.) - Electronic evidence/still photos - Certificate for production of electronic evidence - Recognition/visual identification of assailant

5.20 Distribution of Substance by Juristic Person

Section 28

Ingredients	Evidence
a. Juristic person b. Intentionally distribute or administer a substance or cause a substance to be distributed by other persons c. With intention of stupefying or overpowering victim and to perform sexual act(s) with the victim	- Certificate of incorporation/registration of entity - Samples of substance administered to the victim - Toxicological report - Distributorship agreement/contract - Post Rape Care Form/P3 form - Any forensic evidence analyzed by government chemist (hair, nail clippings, semen collected from the scene etc.) - Electronic evidence/still photos - Certificate for production of electronic evidence - Recognition/visual identification of assailant

5.21 Cultural and Religious Offences

Section 29

Ingredients	Evidence
a. Force another person to engage in a sexual act or a sexual offence under SOA b. Done for cultural or religious reasons	- Proof of religious organization (registration certificate (where applicable) or cultural beliefs, expert witness, scholarly writings/oral evidence - Post Rape Care Form/P3 form - Any forensic evidence analyzed by government chemist (hair, nail clippings, semen collected from scene or clothing etc.) - Electronic evidence/still photos - Certificate for production of electronic evidence - Recognition/visual identification of assailant

5.22 Non-disclosure of Conviction of Sexual Offences

Section 30

Ingredients	Evidence
a. Previous conviction of a sexual offence b. Failure to disclose conviction when applying for employment c. Employment offering or agreeing to take care of or supervise children or any other vulnerable person d. Such employment is for a position of authority or care of children or vulnerable person	- Evidence of previous conviction for sexual offences - Application letter for employment - Nature of employment through contract or letter of offer - Identification of accused

5.23 Obstructing the Course of Justice

Section 36 (8)

Ingredients	Evidence
a. No reasonable excuse b. Hinder, obstruct the taking of appropriate samples ordered by the court	- Court order for collection of samples - Evidence of obstruction - Recognition/visual identification of assailant

5.24 Interference with Crime Scene

Section 37

Ingredients	Evidence
a. Intentionally interfering with a scene of crime or evidence b. Interference or intimidation of witnesses c. Any other act or omission that would hinder or obstruct investigations or materially misrepresent any evidence NB: the list of acts that amount to interference in section 37(2) is not exhaustive	- The tampered evidence - The evidence of witness intimidation or/ interference - Recognition/visual identification of assailant

6. OFFENCES UNDER THE MARRIAGE ACT

6.1 Child Marriage

Section 87

Ingredients	Evidence
a. A marriage has been contracted b. One party is under the age of 18	- Proof of age – birth certificate, birth notification vaccination records, baptism cards, school admission records, age assessment - Evidence of the marriage ceremony- dowry negotiations, payments, invitations, photographs, agreements, eyewitness - Evidence of cohabitation - issue(s) to marriage, pregnancy of the girl child

Explanatory Note 10

- When charging for the offence of Child Marriage, the prosecutor should consider having it as a second count and charge the perpetrator with the offence of defilement under the SOA as the first count.
- Where there is insufficient evidence to charge under [section 87 of the Marriage Act](#), the Prosecutor may consider charging the perpetrator under [section 14](#) as read together with [section 20 of the Children Act](#).

6.2 Marriage through Coercion, Fraud/Forced Marriage

Section 89

Ingredients	Evidence
a. A marriage has been contracted b. Knowledge that: i. the consent of the other party was induced by coercion, fraud or by a mistake as to the nature of the ceremony or ii. the other party was suffering from any mental disorders or mental disability whether permanent or temporary or iii. was intoxicated or under the influence of drugs, so as not fully to appreciate the nature or purport of the ceremony	- Evidence of the marriage ceremony- invitations, marriage certificate, photographs, dowry negotiation/ agreements, eyewitness, local administration - Evidence of cohabitation - Toxicological report, mental assessment Report, oral evidence - Evidence of coercion, fraud or mistake - Identification of the perpetrator

7. OFFENCES UNDER THE PROHIBITION OF FEMALE GENITAL MUTILATION (FGM) ACT

Explanatory Note 11

Refer to ODPP's Standard Operating Procedures Manual and Rapid Reference Guide on Prosecution of Female Genital Mutilation Cases, 2021

7.1 Conducting FGM

Section 19 (1)

Ingredients	Evidence
a. Act of FGM b. The accused person conducted the FGM	- P3 form, treatment notes - Tools used to conduct the FGM - Eyewitness - Expert witness - Photographs - Recognition/visual identification of assailant

7.2 Causing Death through FGM

Section 19 (2)

Ingredients	Evidence
a. Act of FGM	- Postmortem report
b. The accused person conducted the FGM	- Death certificate
	- Tools used to conduct the FGM
c. Death occurred as a result of FGM	- Expert witness
	- Photographs
	- Eyewitness
	- Recognition/visual identification of assailant

7.3 Aiding and Abetting, Counseling or Procuring FGM

Section 20

Ingredients	Evidence
a. Act of FGM	- Medical Treatment notes/P3 form/proof of alternative treatment
b. The accused person aided, abetted, counseled or procured	- Possession of FGM paraphernalia(tools)
i. A person to commit an act of FGM on another	- Tools used to conduct the FGM
ii. Another person to perform an act of FGM on that other person	- Proof of money, goods or other consideration paid for the FGM
	- Proof of communication between the principal offender and the person who aid, abets, counsels or procures
	- Eyewitness
	- Expert witness
	- Photographs
	- Recognition/visual identification of assailant

7.4 Procuring a Person to Perform FGM in another Country

Section 21

Ingredients	Evidence
a. Entry or Exit into or from Kenya	- Proof of travel- passport, visa, bus ticket or any other documents
b. Intention to committing the act of FGM and/or aid or abet FGM	- Communication between the parties involved in the FGM
	- Documents of ownership, leasing, tenancy and/or occupation of premises used for FGM
	- Evidence on motor vehicle used to transport victim
	- P3 form, treatment notes, (where the mutilation occurred)

- Paraphernalia used to commit the act of FGM
- Proof of Money, goods or other consideration paid for the FGM
- Eyewitness
- Expert witness (to demonstrate trends)
- Photographs
- Certificate for production of electronic evidence
- Recognition/visual identification of assailant

Explanatory Note 12

- The offences under sections 19 (1) and 19 (2) also apply to persons who undertake FGM while undergoing training under the supervision of a medical practitioner or midwife or midwife with a view to becoming a medical practitioner or midwife.
- Where a death occurs in an offence under section 19 (2), the Prosecutor may consider charging the perpetrator with murder.

7.5 Possession of Tools or Equipment for FGM

Section 23

Ingredients	Evidence
a. Possession of a tool or equipment b. Purpose of tool or equipment is connected with the performance of FGM	- Inventory of items seized - Tools or equipment for FGM - Expert witness - Eyewitness - Recognition/visual identification of assailant

7.6 Failure to Report Commission of Offence

Section 24

Ingredients	Evidence
a. Knowledge that FGM has been, is in the process of being, or intends to be, or has been committed b. Failing to report to a law enforcement officer	- Proof of communication (written, oral or in any form of medium) - Eyewitnesses - Proof of opportunity to report but fails to report

7.7 Use of Derogatory or Abusive Language

Section 25

Ingredients	Evidence
a. Derogatory or abusive language b. An intention to ridicule, embarrass or harm i. a woman for having not undergone FGM, or ii. a man for marrying or otherwise supporting a woman who has not undergone FGM	- Proof of communication (written, oral or in any form of medium) - Translation where required with certificate of translation - Witnesses

8. OFFENCES UNDER THE COMPUTER MISUSE AND CYBER CRIMES ACT

Explanatory Note 13

“Child pornography” includes data which, whether visual or audio, depicts:

- (a) A child engaged in sexually explicit conduct;*
- (b) A person who appears to be a child engaged in sexually explicit conduct; or*
- (c) Realistic images representing a child engaged in sexually explicit conduct;*

“Publish” includes to:

- (a) Distribute, transmit, disseminate, circulate, deliver, exhibit, lend for gain, exchange, barter, sell or offer for sale, let on hire or offer to let on hire, offer in any other way, or make available in any way;*
- (b) Having in possession or custody, or under control, for the purpose of doing an act referred to in paragraph (a) or*
- (c) Print, photograph, copy or make in any other manner whether of the same or of a different kind or nature for the purpose of doing an act referred to in paragraph (a).*

Explanatory Note 13A

Section 22 of the Children Act has recognised cyber-facilitated abuse

8.1 Child Pornography

Section 24(1)

Ingredients	Evidence
a. Intention to commit child pornography b. Publishing child pornography through a computer system OR c. Producing child pornography for publication through a computer system OR d. Downloading, distributing, transmitting, disseminating, circulating, delivering, exhibiting, lending for gain, exchange, barter, sell or offer for sale, let on hire or offer to let on hire, offer in another way, or make available in any way from a telecommunications apparatus pornography OR e. Possessing child pornography in a computer system or on a computer data storage medium	- Proof of victim's age (inventory of items seized) - Electronic device from which material retrieved - Computer downloads of the pornographic material - Original content (videos, photographs etc.) - Proof of sale exchange, batter - Photographs of the crime scene - Recognition/visual identification of perpetrator

8.2 Wrongful Distribution of Obscene or Intimate Images

Section 37

Ingredients	Evidence
a. Transferring, publishing, disseminating, making a digital depiction available for distribution or downloading through a telecommunications network or through any other means of transferring data to a computer b. Intimate or obscene image of another person	- Photographs - ICT expert witness - Electronic evidence where retrieved - Download of the material - Certificate of production

9. OFFENCES UNDER THE COUNTER TRAFFICKING IN PERSONS ACT

9.1 Trafficking for Sexual Exploitation

Section 3	
Ingredients	Evidence
a. Recruits, transports, transfers, harbors, i. or receives another person b. For purpose of exploitation (see section 2 for definition of trafficking for sexual exploitation) c. Through threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power, giving payments or benefits to obtain the consent of the victim of trafficking in persons, giving or receiving payments or benefits to obtain the consent of a person having control over another person or in case of a child victim, through any means d. Could be within or outside the country e. Consent of the victim is immaterial	- Passport, Visa and other travel documents/ travel history - Communication data - Advertisements through print or other media, oral advertisements or other means - Documents proving ownership, leasing, tenancy and/or occupation of premises used for child prostitution - Money and evidence of payment or provision of goods and benefits to the child or his/her parents as consideration - PRC form and other relevant medical examination reports/P3 form - Forensic evidence analyzed by government chemist (hair, nail clippings, semen collected from scene or clothing etc.) - Certificate for production of electronic evidence - Recognition/visual identification of perpetrator

9.2 Promoting Child Trafficking

Section 4	
Ingredients	Evidence
a. Adopting a child or offering a child for adoption b. Fostering a child or offering a child for fostering OR c. Offering guardianship to a child or offering a child for guardianship OR d. Initiating or attempting to initiate adoption, fostering or guardian process	- Proof of victim's age - Court proceedings, certificates and documentation from relevant government authorities and non-state actors to prove adoption, guardianship or fostering - Proof of benefits as consideration for trafficking the child - Passport, Visa and other travel documents/travel history - Communication data - Advertisements through print or other media, oral advertisements or other means - Documents proving ownership, leasing, tenancy and/or occupation of premises used for child prostitution

e. Purpose of trafficking in person (see section 3 for ingredients of trafficking in person)	- PRC form and other relevant medical examination reports/P3 form - Forensic evidence analyzed by government chemist (hair, nail clippings, semen collected from scene or clothing etc.) - Certificate for production of electronic evidence - Recognition/visual identification of suspect(s)
--	---

9.3 Promotion of Trafficking in Person

Section 5

Ingredients	Evidence
a. Knowingly leasing or being the occupier of any house, building, or other premises used for promoting trafficking in persons b. Publishing, exporting or importing, any material for purposes of promoting trafficking in persons OR c. Managing, running or financing any job recruitment agency for the purposes of promoting trafficking in persons d. Promoting trafficking in persons by any other means	- Documents proving ownership, leasing, tenancy and/or occupation of premises used for trafficking - Documents/receipts/material possessions etc. proving proprietorship, management, financing or employment in the recruitment agency - Advertisements through print or other media - Contracts between recruitment agency and the victim/or any other person/any other agency - Money and evidence of payment/benefits by the victim to the recruitment agency as consideration - Communication records relevant to the offence - Certificate for production of electronic evidence - Recognition/visual identification of accused

Explanatory Note 14

The victim shall not be charged for offences arising out of this offence (by dint of [section 14](#))

10. OFFENCES UNDER THE PENAL CODE

10.1 Defilement of Idiots or Imbeciles

Section 146

Ingredients	Evidence
a. Knowledge that a person is an idiot or imbecile b. Having or attempting to have unlawful carnal connection c. The circumstances do not amount to rape	- Psychologist/psychiatric report/evidence of surrounding circumstances/medical history/ Post Rape Care Form/Medical report/P3 form - Any forensic evidence analyzed by government chemist (hair, nail clippings, saliva, blood, debris, semen collected from scene or clothing etc.) - Photographs of the crime scene - Certificate for production of electronic evidence - Recognition/visual identification of assailant

10.2 Detention of Females for Immoral Purposes

Section 151

Ingredients	Evidence
a. Detention of persons for immoral purposes against one's will b. Intention for the person to have unlawful sexual connection with another c. Withholding a person from wearing their own apparel or property d. Threatening legal proceedings should one take away apparel that has been lent or supplied	- Proof of detention - Post Rape Care Form/Medical report/P3 form - Any forensic evidence analyzed by government chemist (hair, nail clippings, saliva, blood, debris, semen collected from genitalia or clothing etc.) - Photographs of the crime scene - Communication between the parties - Certificate for production of electronic evidence - Recognition/visual identification of assailant

10.3 Conspiracy to Defile

Section 157	
Ingredients	Evidence
a. Conspiracy with another b. To induce a woman, girl, boy or man to permit a man have unlawful carnal knowledge or unlawful sexual connection respectively, with them c. Inducement through false pretenses or other fraudulent means	- Post Rape Care Form/Medical report/P3 form - Any forensic evidence analyzed by government chemist (hair, nail clippings, saliva, blood, debris, semen collected from scene or clothing etc.) - Photographs of the crime scene - Communication report between the parties - Certificate for production of electronic evidence - Recognition/visual identification of assailant

10.4 Unnatural Offences

Section 162	
Ingredients	Evidence
a. Having carnal knowledge of another against the order of nature or b. Having carnal knowledge of an animal or c. Permitting a male person to have carnal knowledge of one (whether male or female) against the order of nature NB: For 1 above, lack of consent is an aggravating circumstance	- Consent to conduct medical examination on accused²⁰ - Victimized animal medical report/veterinary report - P3 form - Any forensic evidence analyzed by government chemist (hair, nail clippings, saliva, blood, debris, semen collected from scene or clothing etc.) - Photographs of the crime scene - Certificate for production of electronic evidence - Recognition/visual identification of assailant

Explanatory Note 15

The meaning of the word 'defile' in section 157 of the Penal Code is the dictionary meaning of 'to sexually violate'. It is not related to the offence of 'defilement' under section 8 of the SOA.

²⁰ Civil Appeal 56 of 2016 COI & another v Chief Magistrate Ukunda Law Courts & 4 others [2018] e-KLR

10.5 Bigamy

Section 171

Ingredients	Evidence
a. There is a legal marriage in existence b. Marriage contracted does not allow for polygamy c. Spouse contracts a subsequent marriage during the subsistence of the “first” marriage d. Both spouses are alive and no divorce decree has been issued by a court of competent jurisdiction e. “First” marriage has not been declared void by a court of competent jurisdiction f. Continually absent and has not been heard from their spouse for 7 years	- Marriage certificates for both marriages - Evidence of the marriage ceremonies - invitations, photographs, dowry negotiation/ agreements, eyewitness etc. - Identification of perpetrator

11. OTHER OFFENCES WITH SGBV COMPONENT

The following offences qualify as SGBV offences where they are motivated by gender considerations or where the victim’s gender or sex is the primary motive for the violent act. The list is in no way exclusive as most offences are capable of being committed in gendered circumstances:

11.1 Sections on Offences under the Penal Code

- Assault - [Sections 250 and 251](#)
- [Threats to Kill - Section 223](#)
- Murder - [Section 203](#)
- Arson – [Section 332](#)
- Malicious Injuries to Property – [Section 339](#)
- Insulting Modesty by forcible Stripping - [Section 251 A](#)
- Stupefying in order to commit felony or misdemeanor - [Section 230](#)

11.2 Sections on Offences Under the Election Offences Act No. 37 of 2016

- Use of Force or Violence During Election Period - [Section 11](#)
- Offences relating to elections - [Section 13](#)

11.3 Sections on Offences under the Counter Trafficking in Persons Act No. 8 of 2020

- Acquisition of travel documents by fraud or misrepresentation - [Section 6](#)
- Facilitating entry into or exit out of the country - [Section 7](#)
- Interfering with travel documents and personal effects – [Section 8](#)
- Committing an Offence under the Act under life threatening circumstances or death – [Section 9](#)
- Trafficking in persons for organized crime – [Section 10](#)

11.4 Sections on Offences under the Computer Misuse and Cyber-Crimes Act No. 5 of 2018

- Cyber Harassment – [Section 27](#)
- Wrongful Distribution of Obscene or Intimate Images - [Section 37](#)

PART C:

PROCEDURAL AREAS OF CONCERN IN SGBV PROSECUTION

1. INTRODUCTION

- 1.1 Where accused persons are unable to fight the facts, they attack the process. The slightest inattention to detail in the process can therefore lead to an acquittal after trial or a successful appeal. The prosecutor is therefore required to be keen to detail from the pre-charge stage to any post sentencing proceedings. This part lays out the nuts and bolts that may be useful in tightening the process of prosecuting an SGBV case.
- 1.2 It is divided into two sections:
 - a. The first part flags out key procedural areas of concern that a prosecutor should pay special attention to in order to avoid attrition and maximise convictions in SGBV cases.
 - b. The second part points the prosecutor to relevant agencies that they must engage to achieve the desired result.

2. INVESTIGATION AND EVIDENCE GATHERING AND MANAGEMENT

- 2.1 Although the mandate of conducting investigations belongs to the NPS, the prosecutor has the responsibility to ensure that the same is carried out adequately and thoroughly. Where the prosecutor forms the opinion that investigations in an SGBV case are incomplete or unprocedural, they must give appropriate and clear directions to the investigating officer, in writing, pointing out the gaps to be covered. The prosecutor should further exercise their prosecutorial mandate to ensure that SGBV cases that meet the two-stage test i.e., evidential and public interest test, are registered in court.

- 2.2 The prosecutor should ensure that all the process of gathering evidence, including the collection of samples and searches, is in compliance with set legal standards in order to guarantee its admissibility in court.²¹
- 2.3 The prosecutor should always confirm that the relevant exhibits are available and are consistent with the description in the exhibit memo. Where no exhibits are provided, the prosecutor should seek an explanation from the IO.
- 2.4 Expert opinion in medical documents should be perused in advance as it may be a potential frontier for reasonable doubt. This includes conclusions like ‘hymen intact’, ‘hymen broken’, ‘long standing perforated hymen’, ‘no bruises found’, ‘no spermatozoa found’ etc. Where the prosecutor finds comments that may weaken the case, they should seek clarification from the expert at the earliest possible opportunity.
- 2.5 Where forensic evidence is part of the evidence, the prosecutor should instruct the IO to forward evidence and exhibits that require forensic analysis to the relevant government institutions and ensure that the relevant reports are compiled and availed for production in court as evidence.
- 2.6 Where the prosecutor is involved in prosecution-led investigations, they should ensure that the collection, acquisition, preservation, and analysis of exhibits, together with the reporting and transmission of the same, is carried out accurately and comprehensively. This includes ensuring that any collection of DNA samples from a suspect is in compliance with Section 122A, 122B, 122C, and 122D of the Penal Code.
- 2.7 Once plea is taken, the prosecutor may only collect DNA samples from the accused with leave of the court. The leave must be sought before the accused is put on their defense.²²
- 2.8 Delayed reporting, which is common with SGBV cases, should not necessarily lead to attrition of the case. The prosecutor should consider involving an expert like a psychologist to explain the circumstances under which the delay may have occurred and the effect thereof.

21 Guidelines on Decision to Charge, 2019

22 Section 36 SOA, *Boniface Kyalo Mwololo v Republic* Nairobi Court of Appeal Criminal Application No. 1 of 2016 [2016] eKLR

- 2.9 Where the prosecution relies on electronic evidence, the prosecutor should ensure that the same complies with Section 106B of the Evidence Act. This includes confirming that it is accompanied by a certificate duly signed by a person holding a responsible position with respect to the management of the device in question.
- 2.10 Before registering a case in court, the prosecutor should ensure that:
- a. The statement of the offence discloses the offence and particulars support the statement of the charge.
 - b. Privacy and confidentiality of the victims and any minors is maintained by concealing their identity using initials, abbreviations and non-identifiable information throughout.
 - c. Where possible, the plea is only taken after investigation is complete and all evidence is available and sufficient to support a conviction.
- 2.11 Consider if the interest of fair administration of justice would be served by prosecuting some SGBV categories or if alternatives to prosecution are applicable as better options.

3 BAIL AND BOND

- 3.1 In arriving at a decision on whether or not to oppose a bail application, the prosecution shall be guided by the Constitution 2010, the Bail and Bond Policy²³ the Child Offender Rules and Case Law in addition to the following:
- a. Pre bail reports by PACS or children officers reports in case of minors
 - b. The circumstances under which the crime was committed
 - c. The safety and security of victims and witnesses
- 3.2 Where a perpetrator resides with the victim at the same residence, the prosecutor should ensure that this aspect is brought to the attention of the court at the earliest and in any event before or during the bail application. This is for purposes of ensuring that appropriate orders are sought including applying for the removal of the accused person from the residence in accordance with the provisions of Section 22 (4) of SOA. In the alternative, the prosecutor may apply to have the testimony of the victim and key witnesses taken at the earliest possible before the release of the accused person on bail.

23 [Bail and Bond Policy Guidelines 2015](#)

4. PLEA BARGAIN

- 4.1 Offences under the Sexual Offences Act are not eligible for plea bargaining.²⁴ No law, however, bars a prosecutor from engaging in plea bargain in respect to other SGBV offences outside the SOA.
- 4.2 In undertaking plea negotiation, the prosecutor shall be guided by the [ODPP Plea Bargaining Guidelines, 2019](#)²⁵ and Section 137N of the Criminal Procedure Code (CPC).
- 4.3 The prosecutor should ensure that all parties, including the victim, are involved and understand what a plea bargain entails to enable them make an informed decision.

Explanatory Note 16

Summary of procedural specificities of offences under SOA:

- *Excluded from plea bargain*
- *Exempt from the general rule on corroboration*
- *Spouses are compellable witnesses*
- *Withdrawal only with consent from DPP*
- *Evidence of previous sexual experience or conduct not admissible*
- *Provides for mandatory minimum sentences*

5. DIVERSION

- 5.1 In considering whether or when to refer an SGBV case for diversion, the prosecutor should be guided by the [ODPP Diversion Policy and Diversion Guidelines, 2019](#).
- 5.2 An SGBV case is eligible for diversion in the following instances:
- a. Where the case involves children in conflict with the law, the prosecutor must first consider diversion. In making the consideration, the prosecutor shall take into account the seriousness of the offence and the personal circumstances of the

Explanatory Note 17

Definition of vulnerable person

Includes persons with a physical challenge or disability, mental disorder, mental impairment, women or men in abusive situations, elderly person(s), a person with an underlying issue of drug or alcohol addiction. A person may show obvious signs of vulnerability.

A physical disability may be very obvious on an objective level. If not, a public prosecutor can seek verification from a reliable source. Evidence of vulnerability may be required in more complex cases. (VPA)

²⁴ CPC s 137 N

²⁵ [ODPP Plea Bargaining Guidelines](#)

child. These include the best interest of the child and their development, and the likelihood of reoffending.²⁶

- b. In making decisions on whether a case falls under the ‘Romeo and Juliet’ category, the prosecutor shall be guided by Clauses 48 and 49 of the Prosecutor’s Guide to Children in the Criminal Justice System.
- c. Where the SGBV case involves vulnerable persons, it is mandatory for the prosecutor to consider diversion irrespective of the nature of the offence. The prosecutor should consider whether the ‘exceptional circumstances’ test is applicable where the vulnerable person is charged with a felony.²⁷

- 5.3 The prosecutor should ensure that all parties to an SGBV case, including the victim or their representative, are involved and understand what diversion entails, and the expected outcome in order to make an informed decision. The victim’s opinion is however not binding on the prosecutor.

6. TRIAL

- 6.1 The trial of an SGBV case should be preceded by a pre-trial conference as laid out in the [ODPP Decision to Charge Guidelines, 2019](#) and the [NCAJ Active Case Management Manual and Guidelines](#).²⁸ This is to canvass preliminary issues such as evidence disclosure,²⁹ identification of vulnerable witnesses, need for intermediaries and such other issues as may emerge during trial causing unnecessary delays.
- 6.2 While it is the mandate of the court to initiate the pre-trial case management, a prosecutor should nonetheless take the initiative to propose to the court holding pre-trials in all SGBV cases.
- 6.3 The prosecutor should liaise with the IO to ensure that witnesses are bonded to attend court and exhibits are availed on time.
- 6.4 In addition to any communication between the IO and witnesses, the prosecutor is strongly encouraged to communicate directly with witnesses especially the victims for their ease of court attendance. The communication should preferably be in writing.

²⁶ [ODPP Prosecutor’s Guide to Children in the Criminal Justice System](#)

²⁷ Clause 47 & 48 of the ODPP Diversion Guidelines and Explanatory notes, 2019

²⁸ Paragraph 4.5, Clause 2.2.3

²⁹ Paragraph 5.1 of ODPP Guidelines on the Decision to Charge, 2019 and Appendix 5 ODPP Disclosure Form

6.5 The prosecutor should commence all SGBV cases with an opening statement. This is to bring out to the court the essence of the case in order to assist the court in framing and contextualizing the issues.

6.6 SGBV cases require utmost confidentiality and privacy. The prosecutor should at the earliest make an application to have the hearings take place in camera and where possible virtually.

6.7 Where the prosecutor detects odd behaviour in the victim or any of the witnesses, such as silence or any other behaviour inconsistent with their narrative, or forms the opinion that a witness or victim is too traumatized to testify, they should consider calling the relevant expert like a psychologist. The role of the expert is to assist the court in interpreting and evaluating the said behaviour.

6.8 Offences under the SOA can only be withdrawn by the DPP under [Section 40 of the SOA](#) as read with [Section 87\(a\) of the CPC](#).

6.9 In prosecuting SGBV cases, the prosecutor should be cognizant of a local community's affinity to AJS and ensure that justice is not compromised or frustrated by the informal justice systems. The existing legal framework is not, however, accommodative to AJS for offences under the SOA.

Explanatory Note 18

The presiding officer has sole control of the content of the court record. It is important for the record of proceedings to be captured without gaps that can create basis of appeal.

Some of the critical record that must be captured in an SGBV case includes but not limited to the following:

- *Where, in an offence under the SOA, the prosecution relies on uncorroborated evidence of the victim, the record must clearly capture the reasons why the court is satisfied that the victim is telling the truth. (Section 124 of the Evidence Act and R v Mohammed)*
- *In voir dire examinations, failure to record the reasons that persuades and satisfies a court that a child understands the nature of the oath is fatal to conviction. (Johnson Muiruri vs Republic [1983] KLR 445)*

7. VICTIM AND WITNESS MANAGEMENT

7.1 The prosecutor should appreciate the realignment in the traditional adversarial system that has enhanced the role of the victim from a passive witness to a more active player endowed with a host of rights. These rights are principally contained in the (Article 50 (9) of the Constitution 2010, Victim Protection Act, the Victim Protection (General) Regulations, Witness Protection Act, the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of

Power (1985), and expounded in the Supreme Court decision of *Joseph Lendrix Waswa v Republic*.³⁰

7.2 The Supreme Court prescribed the following guiding principles on the extent of victim participation during trial:

- a. Participation is limited to the direct victim or their legal representative in the case being tried by the court;
- b. Each case should be examined according to its special nature to determine if participation is appropriate, at the stage participation is applied for;
- c. The victim's participatory rights should not occasion an undue delay in the proceedings;
- d. The victim's presentation should be strictly limited to "the views and concerns" of the victim in the matter they have specifically been allowed by the court to participate;
- e. Victim participation must not be prejudicial to or inconsistent with the rights of the accused;
- f. The victim or their legal representative may pose questions to a witness or expert who is giving evidence before the court that have not been posed by the prosecutor;
- g. The right to ask questions is not unlimited as the court has a duty to ensure that neither the victim nor the accused are not subjected to unsuitable treatment or questions that are irrelevant to the trial;
- h. The victim and their legal representative must be made to understand that prosecutorial duties remain solely with the DPP;
- i. While the victim's views and concerns may be persuasive; and no doubt in the public interest that they are acknowledged, these views and concerns are not to be equated with the public interest;
- j. The court may hold proceedings in camera where necessary to protect the privacy of the victim;
- k. While the court has a duty to consider the victim's views and concerns, the court has no obligation to follow the victim's preference of punishment.

Explanatory Note 19

The rights of victims, properly understood, do not undermine those of the accused or the public interest. The true interrelationship of the three is complementary.

*The Supreme Court in *Joseph Lendrix Waswa v Republic**

³⁰ *Joseph Lendrix Waswa v R* [2020] eKLR

- 7.3 The prosecutor shall prioritize the protection of the victim and/or witnesses from the onset. In seeking witness protection, the prosecutor shall be guided by the Witness Protection Act and the Witness Protection Rules (2008).
- 7.4 An SGBV victim has a right to be informed by the prosecutor, of any decision or action that impacts on the case including interlocutory applications to transfer a case or merge charges. The victim should equally be informed of the outcome of their court attendance and extent of facilitation and support available to them.
- 7.5 The prosecutor must always ensure that the privacy, confidentiality, respect and safety/security of victims of SGBV are given paramount consideration during their interaction with the criminal justice system. This includes privacy from the media, unreasonable intrusion from health professionals; and confidentiality of their communication with victim support service providers.³¹
- 7.6 All victims of SGBV are vulnerable, however the extent/degree of vulnerability may differ on a case-by-case basis. Some victims may approach the justice system with multiple vulnerabilities e.g. in terms of age, disability, immigration status, economic status etc. The prosecutor has a duty to bring to the attention of the court the presence of such vulnerable witnesses at the earliest possible opportunity.
- 7.7 In addition to the measures laid out in the Witness Rules, Child Offender Rules and Victim Offender Regulations, the prosecutor may consider applying the following measures to assist vulnerable victims and witnesses give their evidence more effectively:
- a. Use of a voice distorter or disguised dressing to conceal their identity;
 - b. Actively object to aggressive cross-examination based on negative gender stereotyping or propagation of myths or past character;
 - c. Ensure that all documentation relating to the case provide privacy and confidentiality of the victim and witnesses as per the provisions of the Victim Protection Act. More particularly ensure that the name of the victim, their identity, residence, school and other identifiable information does not appear in the charge sheet, statement and any other court documents;
 - d. Apply to have the case heard in camera and on priority basis;
 - e. Explore the option of testimony through intermediaries;
 - f. Enrol in the Witness Protection Program and providing other safeguards to their safety and well-being pursuant to the Victim Protection Act;

31 Section 8 of the VPA

- g. Use video conferencing where appropriate;
 - h. Refer the victim for psychosocial support and trauma counselling.
- 7.8 Where a witness is refractory or hostile, apart from responding as provided for in the Evidence Act, the prosecutor should consider engaging a counsellor to assist in determining the reason for their conduct. The declaration of a witness as hostile should be a last resort.
- 7.9 The prosecutor should make appropriate referrals and follow up mechanisms to facilitate the victim's recovery, rehabilitation and reintegration into the community without stigma and discrimination.

8. CHILDREN IN THE JUSTICE SYSTEM

- 8.1 In procedural matters of concern involving children in the justice system, the prosecutor shall be guided by A Prosecutor's Guide to Children in the Criminal Justice System, the Children Act 2022 and the Third and Fifth Schedule to the said Act:
- a. The best interest of the child shall be a primary consideration in all decisions regarding children;
 - b. Ascertain the age of any victim who is a child at the earliest possible opportunity;
 - c. For a child in conflict with the law, the prosecutor should confirm whether they have attained the age of criminal responsibility and if between the age of 12 and 14 years to only be held criminally liable for an act or omission if it can be proved that the minor had the capacity to understand that what he/she did or omitted was unlawful;
 - d. Liaise with the DCS where a child is in need of care and protection;
 - e. Completion of the case expeditiously and without unnecessary delay;
 - f. Protect the identity of the child by using initials and witness protection measures like witness boxes. Where unavailable, the same can be improvised using cartons and bedsheets, or alternatively, have their testimony taken in camera;
 - g. For children in contact and conflict with the law, ensure a care and protection file is opened alongside the criminal case court file more so where they have been placed in shelters. This will enable the court to issue orders for reintegration back to the community at the conclusion of the case;

- h. Deal with discretionary adolescent sex (“Romeo and Juliet”) as proposed in the guide;
- i. Consider the need for an intermediary.

9. SENTENCING

- 9.1 The prosecutor shall actively participate in sentencing hearings as guided by the Constitution, the Penal Code, the relevant statutes and the Sentencing Guidelines and make submissions based on the following:
 - a. Victim impact assessments
 - b. Aggravating factors
 - c. Antecedent circumstances including previous record or entry in sex offender register
 - d. Pre-sentencing reports
 - e. The opinion of any expert that the prosecutor may call during the sentencing hearing
 - f. Availability of the option of restitution and/or compensation of the victim as per the Victim Protection Act (Section 24, 25 and 26 of the VPA)
 - g. Any other considerations relevant to the case
- 9.2 Where the offender is convicted for an offence under the SOA, the prosecutor shall apply and follow up for their inclusion in the Sex Offender Register.

10. REVIEW, REVISION AND APPEAL

- 10.1 The prosecutor should make timely applications for review, revision and appeal of any order or decision where there are justifiable reasons. ³² Conversely, the prosecutor should ensure timely and prompt filing of responses in defense of any appeals and applications for review or revision.

³² Sections 362 – 367 and 347-379A of the CPC respectively.

PART D:

LINKAGES AND COLLABORATION

This part summarizes, in tabular form, the key agencies involved in the legal response to SGBV. It also highlights the part played by each and identifies inter agency referral pathways. No two SGBV cases are similar. The combination of the agencies will differ depending on the nature and gravity of the case and the geographical location it takes place:

Procedural concern	Procedural law/ policy	Role	Agency /Players to come before
Investigations and evidence management	- Criminal Procedure Code - Evidence Act - Sexual offences medical regulations - SOP on management of child survivors of sexual violence - Case law	- Chain of forensic evidence (e.g., medical, forensic, scientific)	- NPS (DCI/AHTCPU/ Cybercrimes Sub unit/ Internal Affairs Unit) - Health care providers - Government Chemist - IPOA - KNCHR
Plea and charge	- ODPP Guidelines on the Decision to Charge, 2019 - Relevant Statute	- Decision to Charge - Drawing charges	- ODPP
Bail and bond	- Bail and Bond Policy, 2015 - Pre bail reports & bond terms	- Bail/bond terms and conditions	- NPS (IO) - PACS - ODPP - DCS - Judiciary
Plea bargain	- ODPP Plea Bargaining Guidelines, 2019	- Alternatives to trial	- Judiciary - ODPP - PACS - Defence Counsel - Victim/complainant
Diversion	- ODPP Diversion Policy and Guidelines, 2019	- Alternatives to prosecution	- ODPP - PACS - Judiciary - Defence Counsel - Diversion support structures - Victim/complainant

Procedural concern	Procedural law/ policy	Role	Agency /Players to come before
Victim and witness vulnerability	- Victim Protection Act - Protection Against Domestic Violence Act - Sexual Offences Act - Intermediaries - Witness Protection Act - Mental Health Act - Community reintegration - Children's Department - Toll free numbers - County Gender Policy - Counter Trafficking in Persons Act	- Victim and witness protection and support	- ODPP - WPA - Safe houses/shelters - Child welfare services - NGOs - County Government - National Government (Administration) - CBOs - NGEC - State Department of Gender - KNCHR - Psychosocial support providers - Counter Trafficking in Persons Secretariat
Children in the justice system	- A Prosecutor's Guide to Children in the Justice System, 2021 - ODPP Diversion Policy and Guidelines, 2019 - Children Act - Protection against Domestic Violence Act - National SOP for the Management of Sexual Violence against Children, 2019	- Best interest of minors in the criminal justice system	- ODPP - DCS - NPS (AHTCPU - WPA - Shelters - Child welfare services - Cybercrimes Sub unit) - IPOA - NGAO - CBOs - CAK
Legal aid	- Legal Aid Act - Legal Aid Regulations - Children Act - LSK Act, 2016 - Case law	- Legal support	- NLAS - NGOs - Judiciary

Procedural concern	Procedural law/ policy	Role	Agency /Players to come before
Extradition and international cooperation	- Mutual legal assistance - Caselaw	- SGBV in the realm of international law/ cross borders	- ODPP - Judiciary - Ministry of Foreign Affairs - Respective country embassies - INTERPOL
Health concerns	- National Guidelines on Management of Survivors of Sexual Violence - Sexual Offences Act - Medical regulations	- Medical management of survivors and perpetrators of SGBV	- Health care facilities - Gender violence recovery centres - Psychosocial support providers
Mitigation and sentencing	- Previous records - Victim Impact Assessments - Pre-sentence report - Sex Offender Register - TSC Sex Offender Register	- Support submissions on sentencing - Compensation	- ODPP - Judiciary - DCS - NPS - PACS - Experts
Revision and Appeal	- CPC - Case Law - Relevant Court Statutes	- Prosecute/ Defend Appeal/ Application for review	- ODPP - Judiciary - NPS - KPS - NCAJ - Community Service Order Committee
Community reintegration	- KPA - PACS - Children Act - VPA - POM Act	- Victim's recovery, rehabilitation and reintegration into the community without stigma and discrimination	- Probation and After Care Service - Community structures (chief, village elders, religious leaders) - NGOs - NCAJ - POMAC

CONTACTS OF REFERRAL AGENCIES

Agency/ Players	Role	Contact Details
National Police Service	- Provide assistance to the public in situations of emergency or need - Maintain law and order; investigate and prevent crimes - Enforce laws, among other functions - Reports to the police can be made at the nearest police station. In case of a complaint against a police officer, report to the Officer in Charge of the police station/division or the Internal Affairs Unit of the police or any other recognized human rights institution - Reports of death or serious injury caused by a police officer should be made to the Independent Policing Oversight Authority	Jogoo House 'A' Ground Floor, West Wing, Nairobi Twitter: @NPSOfficial_KE Website: www.nationalpolice.go.ke Email: nps@nationalpolice.go.ke @ Hot line 999 or 112 or 911 +254-020-222196 Internal Affairs Unit Tel: 020 2221969, 0798474619. Email: Internalaffairsunit@gmail.com iau@nationalpolice.go.ke
Directorate of Criminal Investigations	- Collect and provide criminal intelligence - Undertake investigations on serious crimes including homicide, narcotics crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organised crimes, and cybercrime among others - Maintain law and order - Detect and prevent crimes - Execute the directions given to the Inspector General by the Director of Public Prosecutions pursuant to Article 157(4) of the Constitution - Investigate any matter that may be referred to it by the Independent Police Oversight Authority	Kiambu Road, Opp. Forestry Department Headquarters, Karura Twitter: @DCI_Kenya P.O. Box 30036 -00100 Nairobi +254 020 7202000/ +254 020 3343312/ +254 020 7202000 Fax: +254-020-2716160 www.cid.go.ke
IPOA	IPOA investigates: - Complaints of misconduct or neglect of duty by the police - Incidents of death and serious injury caused by police action - NB: You can make a complaint to IPOA in person, by telephone, in writing, via email.	1st Ngong Avenue, ACK Garden Annex P.O. Box 23035-00100, Nairobi, Kenya complaints@ipoa.go.ke +254792532626/627; +254 773999000; +254772333000; +254 780490600/601 https://www.ipoa.go.ke/

Agency/ Players	Role	Contact Details
Internal Affairs Unit of the National Police Service	- Internal Affairs Unit is a unit within the National Police Service established to receive and investigate complaints against police	(Jogoo House 'A' Ground Floor, West Wing, Nairobi P.O. Box 44249 - 00100 Nairobi iau@nationalpolice.go.ke internalaffairsunitkenya@gmail.com
Anti– Human Trafficking & Child Protection Unit (AHTCPU)	- This is a unit in the Directorate of Criminal Investigation - Its main function is to carry out investigation and give advice in cases of child abuse and exploitation including child trafficking	DCI Anti– Human Trafficking & Child Protection Unit Located at the South C DCI Academy P.O. BOX 30036 -00100 Nairobi Email: info@dcicpu.co.ke Tel: 116, 112 Toll free
Cybercrimes Unit	- This is a sub unit of the Serious Crimes Unit of the DCI. It specializes in the investigation of cyber related crime	Directorate of Criminal Investigations P.O. Box 30036 - 00100 Nairobi Mazingira Hse, Kiambu Road. Opp. Forestry Department Headquarters, Karura Tel +254 020 3343312 020 7202000 Toll-free number 0800 722 203
Government Chemist Department	- Provision of forensic science and analytical laboratory services	Nairobi branch Physical Address: Hospital Road next to Kenyatta National Hospital P.O. Box: 20753-00202 Telephone lines: +254 20 2725806/7/73/4, +254 20 2336300 Email: gchemist@interior.go.ke Kisumu branch Physical Address: Government Chemist Building P.O. Box: 20753-00202 Telephone lines:057 2021985 Email: gchemistkisumu@interior.go.ke Mombasa branch Physical Address: Kengeleni Rd, off Nyali Rd P.O. Box: 81119-80100 Mombasa Telephone lines:041 2242000707 818 633 Email: gchemistmombasa@interior.go.ke

Agency/ Players	Role	Contact Details
Probation and After Care Service	- Facilitation in the administration of criminal justice through generation of social inquiry reports to inform decision making regarding bail, sentencing and penal release - Supervision of offenders on probation orders, community service orders and other penal release licenses - Re-integration and re-settlement of offenders in the community - Provision of services for victim protection and promotion of rights and welfare - Participation in social crime prevention activities	State Department for Correctional Services Teleposta Towers, Nairobi P. O. Box 30478 Kenya E-mail: ps@correctional.go.ke Telephone: Tel. +254 020 2228411 http://www.correctional.go.ke Kenya Prisons Service Magereza House, off Bishops Road P.O. Box 30175-00100 Nairobi Probation and After care Service Re-Insurance Plaza, 11th Floor P. O. Box 42335 00100 Nairobi
Department of Children's Services	- Provide appropriate services to children in need of care and protection - Establish and manage statutory children institutions (Section 47 of CA) - Safeguard the welfare of any child or children placed under care, by virtue of a court order - Provide assistance and procure accommodation for any child not in proper custody, any child who is abandoned or any child who is in need of refuge or safety - Trace, re-integrate and provide after care services to children in need of care and protection - Respond to cases of child abuse, neglect, exploitation and intervene on behalf of any child who is in need of care and protection and is in danger of imminent injury or harm, where possible by securing the removal of such child to a place of safety - Provide and co-ordinate alternative family care services locally and internationally - Strengthen the capacities of families taking care of vulnerable children, separated children and children at risk	Ministry of Labour and Social Protection, State Department for Social Protection Bishops Road, Social Security House P.O. Box 40326 – 00100, Nairobi Telephone: +254 (0) 2729800 Fax: +254 020 2726497 Email: ps@socialprotection.go.ke info@socialprotection.go.ke Website: www.socialprotection.go.ke

Agency/ Players	Role	Contact Details
	- Provide emergency response and rescue services to children - Mediate, in so far as permitted under this Act, in family disputes involving children, and their parents, guardians or other persons who have parental responsibility in respect of the children, and promote family reconciliation - Provide psychosocial support services for children and their families - Build the capacity of children to participate in national, regional and international affairs - Establish and coordinate area advisory councils - Prepare and present Kenya's state report under international and regional treaties	
Witness Protection Agency	- Provides special protection on behalf of the state to persons who have important information and are facing potential/real risk or intimidation due to their cooperation with the prosecution, the police and other law enforcement agencies	Liaison Office Milimani Law Courts, 4th floor, Room 413: P.O. Box 28801-00100, Nairobi info@wpa.go.ke ; wpakenya@gmail.com Toll-Free: 0800 720 460 Hotlines: 0711222441/0725222442 Twitter: @KenyasOmbudsman www.wpa.go.ke
Attorney General's Office	- Facilitates the realisation of good governance and respect for the rule of law through the provision of public legal services, protection and promotion of human rights and upholding of ethics and integrity	State Law Office and Department of Justice Sheria House, Harambee Avenue +254 020 2227461 / 2251355/ Mobile: +254 700072929/ +254 732529995 www.statelaw.go.ke FAX: +254 020 213956 AG Office, Kenya

Agency/ Players	Role	Contact Details
The Judiciary	- The institution is mandated to deliver justice in line with the Constitution and other laws - It is expected to resolve disputes in a just manner with a view of protecting the rights and liberties of all, thereby facilitating the attainment of the ideal rule of law	Judiciary Headquarters, Supreme Court Building City, Hall Way, Nairobi P.O. Box 30041 – 00100, Nairobi Email: info@judiciary.go.ke Twitter: @Kenyajudiciary +254 20 2221221/Mobile: www.judiciary.go.ke 0730 181600/1700/1800
Kenya National Commission on Human Rights (KNCHR)	- One of the functions of the Commission is to investigate and provide redress for human rights violations	CVS Plaza 1st Floor, Kasuku Lane, off Lenana Road or the regional offices P.O. Box 74359 – 00200, Nairobi Email: complaint@knchr.org/ haki@knchr.org Twitter: @hakiKNCHR Mobile phone: +254733780000/ +254736780000/+254724256448/ +254726610159 Telephone: +254-020-3969000 WhatsApp: +254798849871 Fax: +254-020-2716160 Website: www.knchr.org SMS: 22359 Toll-Free: 0800-720-627
National Gender and Equality Commission	- NGECE investigates complaints from any person who alleges that their fundamental rights against discrimination and gender equality have been violated	1st Floor, Solutions Tech Place, Longonot Road, Upper Hill (Next to Shelter Afrique) P.O. Box 27512-00506, Nairobi Headquarters Reception +254 7093 75100 Twitter: @NGECKenya https://www.ngeckkenya.org/
Ministry of Health	- Health policy - Health regulation - National referral Health facilities - Capacity building and technical assistance to Counties	Ministry of Health, Afya House, Cathedral Road, P.O. Box:30016–00100, Nairobi, Kenya. Telephone: +254-20-2717077 Email: ps@health.go.ke

ANNEX 1

NOTABLE SGBV CASES

A. Offences		
1.	<i>Abraham Otieno vs Republic</i> Kisii High Court Criminal Appeal 53 of 2009 (2011) eKLR	Inchoate offences
2.	<i>Moses Kabue Karuoya v Republic</i> Nyeri High Court Criminal Appeal No 88 of 2015 [2016] eKLR	Ingredients of inchoate offences
3.	<i>B O O v Republic</i> Machakos High Court Criminal Appeal No. 5 of 2017 [2018] eKLR	Essential ingredients of defilement
4.	<i>John Irungu v Republic</i> Mombasa Court of Appeal Criminal Appeal No 20 of [2016] eKLR	An accused person charged with a major offence may be convicted of a minor cognate offence that flows from the same facts Where it is not possible to ascertain the age of the victim in defilement, the accused may be convicted of an offence which is defined without reference to age such as sexual assault
5.	<i>Pauline Robi Ngariba v Republic</i> Migori High Court Criminal Appeal No. 6 of 2014 [2014] eKLR-	Proving offences under Prohibition of FGM Act When sentencing a person for practising FGM, the court may consider the convict's propensity to recidivism as warranting the imposition of a deterrent penalty
6.	<i>Peter Kiio Kyuli v Republic</i> Machakos High Court Criminal Appeal No 45. of 2015 [2017] eKLR	Essential ingredients of an indecent act with an adult
7.	<i>Joan Bett v Republic</i> Kericho High Court Criminal Appeal No. 10 of 2017 [2018] eKLR	A person who owns premises in which FGM occurs may be guilty of knowingly allowing their premises to be used for FGM even if they are not physically present in the premises when the FGM took place
8.	<i>BNM v Republic</i> Mombasa High Court Criminal Appeal No 232 of 2009 [2011] eKLR 3.	Incest: scope of prohibited relationship
9.	<i>Republic v Cornelius Thuku Mbugua</i> Nairobi High Court Criminal Case No. 3 of 2018 [2020] eKLR	Definition of Domestic violence and where domestic violence leads to murder

10.	<i>Sheikh Ali Samoja v Republic</i> Nakuru High Court Criminal Appeal No 170 of 2015 [2016] eKLR	In child sex tourism case, proving actus reus is not enough. Prosecution must prove mens rea that the dispatcher of the child organized the travel with intent to facilitate a sexual offence against the child
11.	<i>CM.B.O v Republic</i> Nakuru Court of Appeal Criminal Appeal No 342 of 2008	In a charge of indecent assault, 'buttocks' fall within the definition of private parts A count of indecent assault may appear as an alternative to a main count of defilement in a charge sheet

B. Rape and Sexual Violence as an International Crime

12.	<i>Prosecutor v. Anto Furundžija</i> , Case No. IT-95-17-1, Judgment (Trial Chamber), 10 December 1998	Rape and sexual assault as war crime
13.	<i>Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu</i> SCSL-04-16-T, 22 February 2008 (AFRC case)	Rape as genocide
14.	<i>Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic</i> Case No. IT-96-23-A and IT-96-23/1-A, 12 June 2002	Rape as a form of torture and sexual enslavement as crimes against humanity
15.	<i>Prosecutor v Jean Paul Akayesu</i> Case No. IT-96-4-T, Judgment, T 597 (Sept. 2, 1998)	Defined rape and sexual violence as an international crime of genocide and crimes against humanity. This includes deliberately impregnating women during rape in a patriarchal society where children belong to their fathers
16.	<i>Prosecutor v. Sesay, Kallon & Gbao</i> Case No. SCSL-04-15-T, Trial Judgment	Rape and sexual assault as a crime against humanity

C. Evidence

17.	<i>Benjamin Mwangi & another v Republic</i> Nairobi Court of Appeal Criminal Appeal No.100 of 1984 [1984] eKLR	On penetration; absence of spermatozoa does not negate penetration and vice versa
18.	<i>Fappyton Mutuku Ngui v Republic</i> Nairobi Criminal Appeal No. 32 of 2013 [2014] eKLR	DNA evidence in sexual offences not mandatory

19.	<i>Dennis Osoro Obiri v Republic</i> Nairobi Court of Appeal No 279 of 2011 [2014] eKLR	Corroboration of a child's evidence is not mandatory in sexual offences. The testimony of a victim alone will suffice if the court is satisfied that the victim is a truthful witness and indicates as much in the judgment
20.	<i>David Mwangi Njoroge v Republic</i> Nairobi High Court Criminal Appeal No. 193 of 2013 [2015] eKLR	Mental impairment needs to be proved by an expert A charge of defilement can be brought only where the complainant is under 18 years old A conviction for rape cannot merely be substituted because it is not a minor and cognate offence of defilement
21.	<i>Shaban Mutua Kiptui v Republic</i> Kabarnet High Court Criminal Appeal No. 92 of 2017 [2017] eKLR	Voire dire examination
22.	<i>Johnson Muiruri v Republic</i> Nairobi High Court Criminal Appeal No. 354 of 1983 [1983] eKLR	Voire dire examination
23.	<i>COI & another v Chief Magistrate Ukunda Law Courts & 4 others</i> Mombasa Court of Appeal, Civil Appeal No. 56 of 2016 [2018] e-KLR	Mode of gathering evidence should be constitutional
24.	<i>Republic v Nzaro Chai Karisa & 3 Others</i> Mombasa High Court Criminal Case No 5 of 2011[2011] eKLR	Rule 12 (4) of Child Offender Rules superseded by art. 49 (h) of the Constitution
25.	<i>Boniface Kyalo Mwololo v Republic</i> Nairobi Court of Appeal Criminal Application No. 1 of 2016 [2016] eKLR	Obtaining DNA samples from suspect after plea
26.	<i>Edward Shivanji Makanga v Republic</i> Nakuru High Court Criminal Appeal No. 313 of 2010 [2015] eKLR 6.	Proving age of victim in defilement case
27.	<i>Phidesio Nthiga Kithumbu v Republic</i> Embu High Court Criminal Appeal No. 67 of 2011 [2014] eKLR 4	Medical evidence not mandatory for offence of indecent assault

D. Victim Rights and Management

28.	<i>Joseph Lendrix Waswa v Republic</i> Supreme Court of Kenya, Petition 23 of 2019 [2020] Eklr	The scope of victim participation during trial
-----	---	--

E. Discretionary Adolescent Sex		
29.	<i>Eliud Waweru Wambui v Republic</i> Nairobi Court of Appeal No. 102 of 2016 [2019] eKLR-	On discretionary adolescent sex
30.	<i>The Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another</i> Constitutional Court of South Africa Case CCT 12/13 [2013] ZACC 35	The South African Constitutional Court held that the sections of the country's Sexual Offences Act that impose criminal liability for sexual offences on adolescent children under 16 years of age are invalid
F. Constitutional Issues		
31.	<i>C.K. (A Child) & 11 Others v. Commissioner of Police/ Inspector-General of the National Police Service & 2 Others</i> Meru High Court Petition No. 8 of 2012 [2013] eKLR	The responsibility of the state to investigate and prosecute SGBV cases
32.	<i>Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission (Interested Party); Kenya National Commission on Human Rights & 3 others (Amicus Curiae)</i> High Court Constitution and Human Rights Division Petition No. 122 of 2013 [2020] eKLR	Consequences of failure to prosecute post-election violence related SGBV cases
33.	<i>Aids Law Project v Attorney General & 3 others</i> Nairobi High Court Petition No. 97 of 2010 [2015] eKLR	Section 24 of HAPCA declared unconstitutional
34.	<i>CKW v Attorney General & DPP</i> Eldoret High Court Petition No. 6 of 2013 [2014] eKLR.	Court decried criminalization of discretionary teenage sex
35.	<i>Tatu Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)</i> Nairobi High Court Constitutional Petition 244 of 2019 (Formerly Machakos High Court Petition 8 of 2017) [2021] eKLR	Constitutionality of the Prohibition of Female Genital Mutilation Act and the Anti FGM Board

36.	<i>CP.O.O.(Minor) v Director of Public Prosecutions & Another</i> Homa Bay High Court Constitutional Petition No 1 of 2017 [2017] eKLR	In a defilement case arising out of discretionary teenage sex involving two minors, it is discriminatory and hence unconstitutional to take charge the male child alone
37.	<i>G.O v Republic</i> Siaya High Court Criminal Appeal No 155 of 2016 [2017] eKLR	In discretionary teenage sex, action should be taken against both the boy and girl. Charging the boy alone is discriminatory Sentencing a child even for an SOA offence outside the Children Act, is illegal

G. Sentencing

38	<i>Edwin Wachira & 9 Others Vs. Republic</i> Mombasa High Court Pet No. 97 & 57,90, 88 OF 2021 [Consolidated]	Minimum mandatory sentences under SOA were found to violate the rights of the accused persons under Article 27 of the Constitution
39.	<i>Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)</i> Supreme Court of Kenya Petition No. 15 & 16 of 2015 (Consolidated) [2021] eKLR	The inapplicability of the SC's pronouncement on unconstitutionality of mandatory death sentence to cases other than murder; including SOA offences
40.	<i>Republic v Cornelius Thuku Mbugua</i> Nairobi High Court Criminal Case No. 3 of 2018 [2020] eKLR	Sentencing hearing
41.	<i>Katet Nchoe & Another v Republic</i> Nakuru High Court Criminal Appeal No 115 of 2010 consolidated with Criminal Appeal no 117 of 2010 [2011] eKLR	Combination of custodial sentence with a period of probation, during which the perpetrator was required to attend seminars on the eradication of FGM
42.	<i>Republic v Benard Ondigi Rianga</i> Kisii High Court Criminal Case No. 9 of 2014 [2015] eKLR	Value of Probation report in sentencing
43.	<i>Philip Mueke Maingi & 5 Others v DPP & Another</i> Machakos High Court Petition No EO17 of 2021	Minimum mandatory sentences under SOA found to be in contravention of Article 28 of the Constitution Those convicted under SOA on the basis that the trial Courts had no discretion but to impose the said mandatory minimum sentence given the liberty to petition the High Court for orders of resentencing in appropriate cases

MONITORING AND EVALUATION

There is need to monitor and evaluate how this guide is being implemented, more particularly if it is useable and to identify the emerging needs of its users. There is also need for amendment and also document its successes and shortcomings and thereby advise the ODPP if the mechanisms in place are productive or not. This shall be done by periodic random analysis of concluded SGBV cases. A data base of SGBV cases handled annually shall also be developed to keep track of the outcome of the cases.

At the conclusion of each case, prosecutors will be obligated to fill in the exit questionnaire (see below) to collect information to ascertain whether this RRG was used and if so if it was useful, identify gaps, best practices and room for improvement.

Exit Questionnaire

Introduction

The office of the Director of Public Prosecution has developed the SGBV Rapid Reference Guide (RRG), 2022 (hereinafter referred to as the tool) to facilitate quick access to information to prosecutors handling SGBV cases they are handling.

Through this survey, we would like to monitor and evaluate the usage of the said tool by documenting your experience as a prosecutor and identify any challenges, gaps and/or emerging issues that need to be addressed to make the tool more effective and user friendly.

All staff are mandated to fill in the questionnaire below on a quarterly basis and to send it back via the email addresses info@odpp.go.ke and sgbv@odpp.go.ke. Feel free to be as open as possible because your honest answers will assist us improve on service provision and further ensure access to justice to survivors/victims of SGBV.

Bio data

Name _____

Position _____

Work station/court _____

Period you have been with the ODPP _____

Date of survey _____

Date of last survey _____

Part 1: Details of SGBV Cases Handled

This section focuses on questions about the number and nature of SGBV cases you handled in the last quarter

1. Have you handled any SGBV cases in the last quarter? (tick where appropriate)

☐ Yes

☐ No

If no, skip to part 2.

2. Kindly elaborate on the number of SGBV cases you handled in the last quarter by filling in the table below.

Type of SGBV case	Total no. of cases handled
Offences under the Sexual Offences Act	
Offences under the Prohibition of FGM Act	
Offences under the Counter Trafficking in Persons Act	
Offences under the Penal Code	
Offences under the Children Act	
Offences under the Computer Misuse and Cyber-crimes Act	
Offences under Counter Trafficking in Persons Act	
Other Ordinary Offences with SGBV Component	
Total	

3. Did you utilize the SGBV RRG in prosecuting the cases? (tick where appropriate)

☐ Yes

☐ No

If no, skip to question 4.

Kindly fill in the table below to elaborate on the SGBV cases handled.

	Case No.	Date filed in court	Date concluded	Findings of the court	If SGBV RRG utilized
a.					☐ Yes ☐ No
b.					☐ Yes ☐ No
c.					☐ Yes ☐ No
d.					☐ Yes ☐ No ☐ Yes ☐ No
e.					☐ Yes ☐ No
f.					☐ Yes ☐ No

4. If you answered “NO” to question 3 or any of the questions in no 4 above, kindly elaborate on the reasons why you were not able to use the tool. (tick where appropriate)

☐ Did not know about the tool

☐ Did not know where to find the tool

☐ Tool not user friendly (please elaborate) _____

☐ I had other options/ tools to refer to (please elaborate) _____

☐ I did not find the tool useful (please elaborate) _____

☐ Other reasons (please elaborate) _____

Part 2: User Experience with the Tool

This section focuses on your experience in utilizing the tool.

5. Did the tool make your work in prosecuting cases easier?

☐ Yes

☐ No

(Kindly elaborate) _____

6. Kindly use the table below to rate the different sections of the tool. *(tick where appropriate)*

- ☐ Excellent (9-10) ☐ Good (7-8) ☐ Fair/ Average (5-6) ☐ Below Average (3-4)
☐ Poor (0-2)

	Section of the Tool	Rating	Comments
1.	Part A Overview, scope and framework on SGBV	☐ Excellent ☐ Good ☐ Fair/Average ☐ Below Average ☐ Poor	
2.	Part B SGBV offences (ingredients and evidence)	☐ Excellent ☐ Good ☐ Fair/Average ☐ Below average ☐ Poor	
3.	Part C Procedural areas of concern in prosecuting SGBV cases	☐ Excellent ☐ Good ☐ Fair/Average ☐ Below average ☐ Poor	
4.	Part D Linkages and collaborations	☐ Excellent ☐ Good ☐ Fair/Average ☐ Below average ☐ Poor	
5.	Monitoring and evaluation	☐ Excellent ☐ Good ☐ Fair/Average ☐ Below average ☐ Poor	

7. Would you use the tool again? (tick where appropriate)

- ☐ Yes ☐ No

(Kindly elaborate) _____

8. Which section of the tool did you find most useful and why?

9. Which section did you find least useful and why?

Part 3: Conclusion/ Recommendations

10. What in your view could be done to improve the content and usage of the SGBV RRG by your fellow prosecutors?

11. Any other recommendation(s)?

Thank you for taking time to complete the survey. We value your feedback!

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

OUR CONTACTS:

Office of The Director of Public Prosecutions
ODPP House, Ragati Road, Upper Hill
P.O. Box 30701 -00100
Nairobi Kenya
Email: info@odpp.go.ke
www.odpp.go.ke
