

International Association of Women Judges

9th Biennial International Conference

March 25-28, 2008

**WHERE PRACTICE MEETS POLICY AND THE LAW:
IMPLEMENTATION OF THE SEXUAL OFFENCES ACT No. 3
OF 2006**

-Hon Lady Justice Joyce Aluoch, EBS

Judge of Appeal

Where Practice Meets Policy and the Law: Implementation of the Sexual Offences Act No.3 of 2006

Over the years, the reform of the law against sexual violence has been one of the most pressing areas for legal reform in Kenya. The need for law reform against sexual violence is informed by multifarious factors. The first is based on the idea of law reform, which dictates that the law be reviewed regularly to keep it in conformity with real life as expressed in changing social, economic, political and cultural trends. With time, the socio-economic order has changed, and so has the political and cultural trends, initiating adjustments in the institutions charged with the protection of the society against sexual violence.

Secondly, it relates to the existence of laws, customs, practices and culture which have tended to impair the exercise of rights to equal protection of the law. The reform of the law was prompted by the need to not only to ensure equal protection of the law, but also the need to ameliorate subjective, discriminatory interpretation and implementation framework of laws against sexual violence. Part of this jurisprudence is also to respond to the developments in case law as well as international law, human rights and broader global developments some which demanded incorporation in national legislations.

It is indeed a matter of common observation that after a gale has raged at sea, when the tempest is spent and the winds are once more safely gathered into the fold, that great and unexpected waves constantly arise and roll with devastating violence against the neighbouring shores. The same phenomenon is true of human affairs. Kenya is reeling from the effects of post-election violence which saw a rise in the incidents of sexual violence, particularly against women and children. These immediate events might appear to have a share in what I have to say, but I will not proceed on that line.

The enactment of the Sexual Offences Act, No.3 of 2006 was largely prompted by the rise in sexual violence. This was happening against a backdrop of a system that was slow, deficient or unwilling to redress the monster that sexual violence had become. The laws and administration of justice did not sufficiently address the issue.

The unique characteristic of sexual violence makes it an issue that requires specific legal redress. Indeed the victims expect that the laws and institutions should protect them. However that expectation was not in the past met, at least to the standards required of the law, policy and practice.

Before the enactment of the Sexual Offences Act, No.3 of 2006, the law on sexual violence in Kenya was spread over four different pieces of legislation, which complicated matters for victims, the police and the Judiciary. The principal statute was the Penal Code, Chapter 63 Laws of Kenya. The offences were cobbled up in Chapter XV, not as legal offences, but offences against morality, thus appearing to trivialize the seriousness of sexual violence.

The offences in this Chapter included:

Rape

Abduction of women with intention to rape them

Abduction of girls under the age of 16

Defilement of girls under 14 years

Attempts to have unlawful carnal knowledge

Defilement of imbeciles or idiots

Procuration of girls or women under age of 21 years to have carnal knowledge

Permitting defilement of a girl under 13 years

Detention of women for immoral purposes

Conspiracy to defile
Incest
Indecent assault
Sodomy.

Furthermore, poor prosecution and shoddy investigations of the cases invariably led to acquittals of sexual offenders. The deficiencies here were twin-pronged: the victims themselves would unknowingly destroy crucial evidence, for example, by taking a bath after the ordeal. The police, on their part, were quite often hostile towards victims while reporting the commission of sexual offences at the police stations and did not have the requisite skills and knowledge of the preservation of the relevant evidence.

The courtroom too, was not friendly to the victims. Many magistrates failed to clear the courtrooms when the victims were giving evidence, thus subjecting them to embarrassment and ridicule. This had the effect of intimidating the victims, thus stifling the presentation of crucial evidence.

The judicial officers too had their share of blame once the case reached the stage of sentencing. There was disparity in sentencing even in cases arising from similar facts. The discretionary power granted to magistrates in sentencing meant that the ends of justice would in many cases, not be met. This caused public outcry!

Kenya, like many countries worldwide, is facing new challenges, such as HIV/AIDS, developments in forensic medicine (DNA testing), which needed to be captured in developments in the law as they were not addressed before. We had to deal with this controversial issue of mandatory testing of HIV/AIDS patients in 1998. The issue had the potential of raising serious constitutional implications. Today, the Act is clear at section 26.

A brief Analysis of the Sexual Offences Act, No.3 of 2006

The Sexual Offences Act introduces new offences such as gang rape, child pornography, child prostitution, deliberate transmission of HIV/AIDS or any other life threatening disease, prostitution of persons with mental disabilities, child sex tourism and sexual harassment only to mention a few. It also introduces new concepts such as vulnerable witnesses and intermediaries through whom vulnerable witnesses could give evidence. The Act consolidates sexual offences under one statute. It also introduces minimum sentences, thus taking away a magistrate's discretion in sentencing. In some offences such as defilement, the age of the victim is factored in sentencing. For example, a conviction of a person on a charge of defilement of a child aged eleven years or less calls for a sentence of imprisonment for life. Where the victim is between the age of twelve and fifteen years, a conviction calls for imprisonment for a term of not less than twenty years. A term of imprisonment of not less than fifteen years would be imposed on a person convicted of defilement of a child between the age of sixteen and eighteen.

The Act gives special protection to child victims, persons with disabilities and elderly persons. And for the first time the Act provides that upon conviction of an offender of a sexual offence, the court shall order that a sample or samples taken from the accused be tested for HIV or any other life threatening sexually transmitted disease. The further protection of victims is provided by Section 40 of the Act which stipulates that it is only the Attorney who can discontinue police investigations and prosecutions into a sexual offence, once commenced. This rules out the possibility of reconciliations or settlements in sexual offences.

Implementation

To underscore the importance of this Act, the Government of Kenya through the Attorney General set up a taskforce for the implementation of the Act. The taskforce, which I chair, is

mandated to prepare and recommend a National Policy Framework and Guidelines for the Implementation and Administration of the Act in order to secure accessible and uniform treatment of sexual offenders. It is also mandated to recommend to the Attorney General relevant regulations for the implementation of the Act, and to undertake the training of judicial officers, police investigators and prosecutors and so far, a police Training Manual has been developed. It is also part of our mandate to conduct public awareness and educate Kenyans on the provisions of the Act.

The taskforce has so far developed Draft Regulations which will be subjected to public debate by the stakeholders as soon as they are finalized.

One of our strategies for implementation is the setting up of crisis centres and safe houses for victims of sexual abuse. So far, I have officiated in the opening of at least two safe houses and the US Government has pledged to assist the taskforce in the development of such centres which will be operational on a 24hr basis. They have also expressed a commitment in providing training and equipment for the preservation of forensic evidence by the police

Conclusion

The ideals and standards upon which we can all agree may not be so many at first; but, given an organization in which reason can assert itself, they will multiply and expand with the ever circling years. It is not important whether we have a law against sexual violence or a code of laws at the beginning. What is important is that we have made a beginning and have set up a framework in which a structure of law can be developed in a natural process of evolution as the sexually related offences which have preyed on our society are dealt with.

Owing to time constraints, I will conclude with the words of George Washington: we have raised “a standard to which the wise and honest can repair; the event is in the hands of God.”

Hon. Lady Justice Joyce Aluoch, EBS
Judge of Appeal, Kenya