



A SIMPLIFIED HANDBOOK ON
**THE SEXUAL
OFFENCES**

ACT, 2006 AND OTHER RELEVANT LAWS



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Toolkit for WHRDs in Nairobi's Urban Settlements

A Simplified handbook on
THE SEXUAL OFFENCES Act, 2006
and other relevant laws

PURPOSE OF THIS HANDBOOK

This simplified Act and all the content herein relating to sexual and gender based violence prevention and response and court processes is intended for use as a simplified guide for awareness creation in the Nairobi urban settlements and the public at large. Peace Brigades International appreciates its Women Human Rights Defenders (WHRDs) Toolkit Organizers for their invaluable work towards prevention and response to sexual and gender based violence in the Nairobi urban settlements. Special thanks go to Alberto Fait, PBI Kenya Country Coordinator, Virry Schaafsma, PBI Kenya Program Manager and Florence Mwikali, WHRD Toolkit Project Officer for their leadership and contribution in the development of the handbook, in collaboration with Mercy Oseko, the Legal Consultant.



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CHAPTER 1: SIMPLIFIED VERSION OF THE SEXUAL OFFENCES ACT, 2006 AND OTHER RELEVANT LAWS

Part 1: Definitions

Section 2 provides for the following definitions:

Act

Doing something that causes penetration.

Child

Any person UNDER the age of eighteen (18) years.

Adult

Any person OVER the age of eighteen (18) years.

Complainant

In criminal cases, a complainant is one who sues the perpetrator. This will be the Republic (state) and the survivor will be a witness in such a case.

Consent

To agree to and/or give permission for an act to be done to oneself. It is also the free will to participate in an act.

It is important to note that children and persons with mental incapacity cannot consent to sexual acts under the law.

DNA

This is contained in the genetical make up of an individual and it differs from person to person.

This is very important in medical evidence that is needed to convict one on a sexual offence charge. The perpetrator's fluids are compared to the fluids found (if any) on the victim of sexual violence.

Gang

Two or more persons.

Gang rape

Rape or defilement in association with another or others.

Genital Organs

The whole or part of a male sex organ (penis) or female sex organ (vagina) and for purposes of the Sexual Offences Act includes the anus (the opening in the buttocks through which solid waste leaves the body).

HIV

Is the Human Immunodeficiency Virus which causes AIDS.

HIV test

Is the test conducted in someone to determine whether they are infected with HIV.

Indecent Act

Any unlawful intentional act done on purpose that causes any contact between the genital organs of a person, his or her breasts and buttocks with that of another person, but does not include an act that causes penetration.

It may also include exposure or display of any pornographic material to any person against his or her will.

Intermediary

This is a person authorized by a court, because of his or her expertise or experience, to give evidence on behalf of a vulnerable witness. This may include a parent, relative, psychologist, counselor, guardian, children's officer or social worker.

Law enforcement officer

Means any person whose duties involve law enforcement and includes police officers.

Person with mental disabilities

Means a person affected by any mental disability and at the time of if the offence in question, was unable to understand what was happening, the consequences of the actions and was unable to resist.

Penetration

The partial or complete insertion of the genital organs of a person into the genital organs of another person. (Refer to definition of genital organs)

Sexual Offence

Any offence contained in the Sexual Offences Act.

Vulnerable Witness

A witness whose quality of evidence is likely to be compromised due to mental disability or fear/distress in connection with giving evidence at the trial e.g. a child or an elderly witness.

Intentional and Unlawful Acts

Any act committed in any coercive circumstance, under false pretence or by fraudulent means; or sexual acts against persons with mental disabilities.



Part 2: Offences Created by the Act



1. Rape (Section 3)

This is the deliberate penetration of one's private parts onto another person's private parts without their consent and uses force, threats, coercion or intimidation. This is punishable by ten (10) years jail term or more and can be increased to life imprisonment.

This section also looks at cases where a man can be raped by another man and also by a woman.

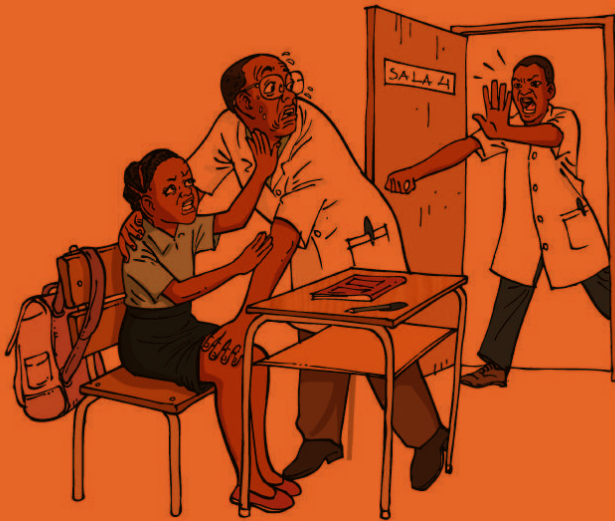
2. Attempted rape (Section 4)

This is described as trying to rape someone. This is punishable by a minimum of five (5) years in jail and can be increased to life imprisonment.

Men can also be victims of rape and it can also occur among people who are having a mutual relationship.

3. Sexual assault (section 5)

This is the intentional use of an object or any part of his body (except their private parts) or any part of an animal, to penetrate the private parts of another person without permission. This is punishable by a jail term of at least ten (10) years and can be increased to imprisonment for life. This includes cases where fingers, sticks or bottles are used to penetrate the sexual organs by use of force.



Exception

The only exception is where such penetration is carried out for proper and professional hygienic or medical reasons e.g. where a doctor during examination causes penetration (with the patients permission) using medical equipment or his fingers.

4. Compelled or Induced Indecent Act (Section 6)

This is the intentional use of force causing another person to take part in an indecent act with him/herself, or another person, or an object, or any body part of an animal.

This is punishable by a jail term of not less than five (5) years.

Exception

The exception to this section is in cases where an act which may be perceived as being indecent is actually done to save a life or in the cause of a medical procedure.

5. Acts which cause penetration or indecent acts committed within the view of a family member, a child or person with mental disabilities (Section 7)

This is the act of raping or engaging in an indecent act with another within the view of a family member, a child or a person with mental disabilities and is punishable by a jail term of not less than ten (10) years.

6. Defilement (Section 8)

Defilement is defined as having sexual intercourse with a child (even if the child agreed to have intercourse with that person).

The punishment for defilement shall depend on the age of the child and anyone who is found guilty of defiling a child

Of eleven (11) years and below shall be sentenced to life in jail.

Between the ages of 12-15 years shall be jailed for twenty (20) years or more.

Between the ages of 16-18 shall be jailed for fifteen (15) years or more.

Defences to the offence of defilement

A person accused of defilement can defend himself / herself by showing that:

The child made him/her believe that he/she was above 18 years at the time; and

The accused person reasonably believed that the child was above 18 years

The accused person must also show the court the steps they took to find out the age of the child before committing the act.

Exceptions to the defence

Such a defense will not work where the accused person is related to the child by blood e.g. a brother, cousin, uncle, aunt.

Where a child is accused of defiling another child, the accused child shall not be punished under the Sexual Offences Act, 2006 but under the Children's Act and the Borstal Institutions Act and shall be sent to an institution for children and not to prison.



7. Attempted defilement (section 9)

This is the act of trying to defile a child and is punishable by ten (10) years in jail or more.

A person accused of attempted defilement can defend himself in the same way as someone who has been accused of defilement (see section 8 above)

8. Gang rape (section 10)

This is rape or defilement by two or more people and is punishable by a jail term is fifteen(15) years or more.

Each offender will be charged with 2 offences; the first being rape (individually) and second being gang rape (jointly).

9. Indecent Acts (section 11)

This means touching another person with one's private parts, breasts or buttocks.

Indecent Act with a child is punishable by a jail term of ten (10) years or more.

Indecent act with an adult is punishable by five (5) years jail term or more or fined up to fifty thousand shillings or both.

Where a child commits an indecent act and is found guilty he/she shall be punished under the Children's Act and the Borstal Institutions Act.

A person who rapes or does an indecent act with another person in front of a family member, a child, or a mentally disabled person shall be jailed for ten (10) years or more if found guilty.

Defences

An offender can defend himself/herself by showing the court that the child made him/her believe he or she was above 18 years at the time. However this defence shall not work wherethe child is a blood relative to the accused person.

10. Promotion of a sexual offence with a child (Section 12)

This is the manufacturing or distributing of any pornographic material that is planned to promote a sexual offence or to be used in the performance of a sexual act or to encourage or allow a child to perform a sexual act. The crime is punishable by five (5) years jail term or more and if it is a company making the materials, it shall be fined five hundred thousand shillings or more.

11. Child sex tourism (Section 14)

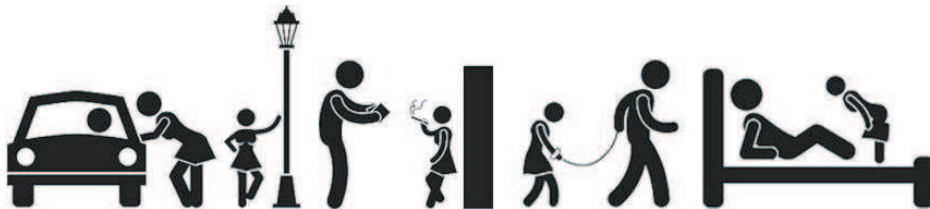
This is the exploitation of children for sexual purposes by persons or companies that travel. It is also the printing or publishing of information that would help another person commit a sexual offence to a child. It is also the organization of meetings for sexual acts against children by tourism companies.

This is punishable by a jail term of term (10) years for persons and a fine of two million shillings for companies.

12. Child prostitution (section 15)

The following are acts of prostitution and are punishable by a jail term of not less than 10 years:

- a. Keeping a child in a place for the purpose of sexual abuse or indecent exhibition or show.
- b. Giving out a child for sex or any form of sexual abuse or indecent exhibition or show.
- c. Using printed materials, TV, radio, or advertisements for purposes of sexual abuse, indecent exhibition or show.
- d. Giving out a child for purposes of sexual intercourse or any other form of sexual abuse, indecent exhibition or show.
- e. Threatening or being violent to a child to force them to enter into sexual intercourse or any other form of sexual abuse, indecent exhibition or show.
- f. Giving a child or its parents money or gifts so that the child can be used for sexual intercourse, sexual abuse or an indecent exhibition or show.
- g. Owning, leasing, renting, managing, occupying or controlling any moveable property e.g. a car or a house which that person knows is used for committing sexual offences with or to a child.



13. Child Pornography (Section 16)

Any person who is found guilty of child pornography shall be jailed for six (6) years or more or made to pay a fine of at least five hundred thousand shillings or both.

If a person is found guilty for a second time of child prostitution he/she can be jailed for seven (7) years or more without being allowed to pay a fine.

Child pornography includes doing the following with the intention of encouraging a child to engage in a sexual act:

- a. Having an indecent photograph of a child.
- b. Making any immoral book, pamphlet, paper, drawing, painting, art, picture, figure or representation for sale, hire, letting, distribution, public exhibition, circulation of a child.
- c. Bringing into Kenya any obscene object which depicts the image of a child for hire, letting, distribution, public exhibition, circulation.
- d. Taking part in a business or receiving profits from a business which one knows or believes, makes, buys, keeps, imports, exports circulates or publicly shows obscene materials.
- e. A person advertising in the newspaper, radio etc. that he/she takes part or is ready to take part in making obscene materials.

Exceptions

Publications and activities intended for educational and religious use will not be considered child pornography materials e.g. a biology text book which has pictures of naked human body is not child pornography.

The Act also says that activities between two persons who are above 18 years and who agree to do such activities are not acts of child pornography.

14. Sexual Communication with a child (Section 16A)

If an adult communicates with a child in a sexual manner or in a manner intended to encourage the child to communicate in a sexual manner i.e. the communication relates to sexual activity or a reasonable person would consider such communication as sexual, then he/she will be guilty of an offence and can be jailed for a minimum of five (5) years or be fined five hundred thousand shillings or both.



15. Exploitation of prostitution (section 17)

Any person who makes another person become a prostitute and controls or makes money from that prostitute is guilty of gaining from prostitution and can be jailed for five (5) years or more or made to pay a fine of five hundred thousand shillings or more or be both jailed and made to pay a fine.

16. Prostitution of persons with mental disabilities (section 19)

Making a mentally disabled person take part in prostitution is a crime punishable by jail term of ten (10) years or more and a fine of two million shillings if it is a company.

Acts amounting to prostitution of persons with mental disabilities include:

- a.** Inviting or persuading the person with disability to come to a place for a sexual act.
- b.** Supplying, recruiting, transporting or harbouring persons with disabilities for purposes of a sexual act.
- c.** Allowing the commission of sexual acts against persons with mental disabilities
- d.** Knowingly or intentionally renting, leasing, managing or occupying property used for sexual acts against persons with mental disabilities.
- e.** Detaining such persons with mental disabilities under threats, coercion and deception for purposes of sexual acts.
- f.** Participating, getting involved in, promoting, encouraging or facilitating sexual acts against persons with mental disabilities.

17. Incest (sections 20 and 21)

Having sexual intercourse with a close relative including;

Daughter or son,
Granddaughter or grandson,
Sister or brother,
Half-sister/half-brother,
Adoptive sister/ adoptive brother
Mother/ father,
Niece / nephew,
Aunt/ uncle,
Grandmother / grandfather.

18. Sexual harassment (Section 23)

This is the use of one's authority or position at work to try and make another person have sexual intercourse with them against their will. The crime is punishable a by three (3) years jail term or more or pay a fine of one hundred thousand shillings or both.

However the person claiming that he/she has been sexually harassed must prove that the harassment:

- a. Was to determine whether he/she was to get employment or assistance from the person harassing them.
- b. Was to determine the conditions of their employment.
- c. Affected their performance at work or school.

19. Sexual offences relating to persons in position of authority (Section 24)

This is where a person in position of authority uses his/her position to make a person he/she is in charge of have sexual intercourse with him or her e.g. head teacher and teacher, senior staff and junior staff etc. This is punishable by ten (10) years jail term or more.

However, if there existed a sexual relationship before the acquisition of these positions, then this section shall not apply.

20. Deliberate transmission of HIV and sexually transmitted diseases (Section 26)

This is the deliberate transmission of HIV or any other life threatening disease. It is punishable by a jail term of fifteen (15) years or more.

The Court is allowed to order for a test of the accused person's blood, urine or any other tissue to find out if he/she is really infected with HIV or a life threatening disease.

21. Administering a substance with intent (Section 27 and 28)

This means purposely trying to have sexual intercourse with another person by using a substance like drugs to overpower that person, and is punishable by ten (10) years jail term or more.

Any company which purposely makes or sells these drugs or substances is guilty of this offence and shall be made to pay a fine of five million shillings or more and its directors can also be jailed for five (5) years or more.



22. Cultural and religious offences (Section 29)

Forcing a person to take part in a sexual act for cultural or religious reasons is an offence and prescribes a minimum sentence of ten (10) years.

This clause is important in helping curb harmful cultural practices like early child marriages and cultural rites of passage.

23. Non-disclosure of conviction of sexual offences

Failure to disclose a previous conviction of a sexual offence when seeking employment especially when the job involves children or vulnerable persons is a crime punishable by three (3) years jail term or more or a fine of fifty thousand shillings or both.

Vulnerable witnesses



Children



Elderly persons



Disabled persons

Part 3: Provisions relating to presenting evidence

24. Vulnerable witnesses (Section 31)

The court declares a witness helpless or vulnerable because they are the victim, a child or a person with mental disabilities.

A person can be declared a vulnerable witness because of;

- Age
- Trauma
- Race
- Religion
- Possibility of intimidation
- Cultural differences
- The witness being threatened
- Physical and psychological damage that the witness has suffered
- Relationship of the witness to any party in the case
- Nature of the evidence or any other factors that the court may consider important

For vulnerable witnesses, the court may appoint an intermediary to support in giving evidence.

25. Protection of vulnerable witnesses (Section 31 and 32)

A vulnerable witness like a child can be allowed to give evidence under protective cover, in camera (private) or by talking through another person called an intermediary.

The Court can order the names of the witness and his/family be kept secret and anyone who reveals those names shall be jailed for 3 years or more or made to pay a fine of fifty thousand shillings or more, or both.

Any person who reveals the names of a witness who is under 18 years shall be punished by being jailed for three (3) years or more or made to pay a fine of two hundred thousand shillings or both.

The prosecutor in a case must tell a witness that he/she has the right to apply to the court to be treated as a vulnerable witness.

26. Forensic evidence (section 36)

The Act gives the Court power to order for DNA tests to find out if the accused committed the crime or not.



Part 4: Dealing with sexual offenders

27. Treatment and rehabilitation orders for survivors and perpetrators (section 35)

The Court has the power to order that a person who is found guilty of having committed a sexual offence because of drugs or alcohol abuse shall in addition to going to jail for the crime also go for treatment and professional counseling which the government shall pay for.

However if the Court sees that the accused person can afford such treatment then it will ask him to pay something also for the treatment and counseling.

The court also has the power to order that a survivor of sexual violence be treated for free at a public hospital.

28. Sexual offenders register (Section 39)

This is a special register made and kept at the High Court that has the details of sexual offenders and can be read by any person who shows that he/she has a good reason to read it.

It may also be kept in electronic form and the registration period for a sex offender shall lapse upon the sex offender's death. A sex offender shall notify the Registrar of his whereabouts, employment and whenever he leaves the jurisdiction of the court.

OTHER PROVISIONS

29. Keeping scene of crime secure (Section 37)

Anyone who on purpose interferes with a crime scene (a place where a crime happened) or with any evidence in a case, is guilty of an offence and can be jailed for three (3) years or more or be made to pay a fine of one hundred thousand shillings or more

A person is said to interfere in a case if he/she

- Messes around with a scene of crime
- Threatens witnesses
- Does anything which would interfere with police investigations
- Does anything which will change evidence in a case against him/her

Powers of Attorney General to terminate cases (Section 40)

Only the Attorney General can stop a case of a sexual offence from continuing.

Example: Martin has been charged with defiling Doris. Martin agrees with his mother to pay Mama Doris 50,000/= to stop the case. The Court will not allow Mama Doris to stop the case against Martin because only the Attorney General has the power to stop a case of a sexual offence.



**TABLE 1:
SUMMARY OF OFFENCES AND SENTENCES UNDER THE ACT**

Section	Offence	Sentence (Imprisonment)
3	Rape	Minimum 10 years can be enhanced to life
4	Attempted Rape	Minimum 5 years can be enhanced to life
5	Sexual Assault	Minimum 10 years can be enhanced to life
6	Compelled or induced indecent acts	Minimum 5 years
7	Acts which cause penetration or indecent acts committed within the view of a family member, a child or a person with mental disabilities	Minimum 10 years
8	Defilement	If victim aged 11 or less mandatory life If victim aged between 12 and 15 minimum 20 years If victim aged between 16 and 18 minimum 15 years.
9	Attempted Defilement	Minimum 10 years
10	Gang Rape/ Gang Defilement	Minimum 15 years can be enhanced to life
11(1)	Indecent act with a child	Minimum 10 years
11(6)	Indecent act with an adult	Maximum 5 years or fine not exceeding Kshs. 50,000 or both
12	Promotion of sexual offences with a child	Minimum 5 years where accused is a company fine not less than Kshs. 500,000

Section	Offence	Sentence (Imprisonment)
14	Child sex tourism	Minimum 10 years, where accused is a juristic person fine of not less than Kshs. 2,000,000
15	Child prostitution	Minimum 10 years
16	Child pornography	Where it a first conviction – minimum 6 years or to a fine of not less than Kshs. 500,000 or to both For subsequent convictions minimum 7 years no option of a fine.
16(a)	Sexual Communication with a child	Minimum of Kshs. 500,000 or fine of Kshs. 500,000 Or both
17	Exploitation of prostitution	Minimum 5 years or to a fine of Kshs. 500, 000 or to both
19(1)	Prostitution of person with mental disabilities	Minimum 10 years
19(2)	Benefiting from prostitution of person with mental disabilities	Minimum 10 years
19(3)	Promoting sex tourism with persons with disabilities	Minimum 10 years or to fine not less than Kshs.2M Where accused is juristic person fine not less than Kshs. 2M
20(1)/21	Incest by male and female persons	Minimum 10 years, where victim under 18 mandatory life sentence.
20(2)	Attempted incest	Minimum 10 years
23	Sexual harassment	Minimum 3 years, fine of not less than Kshs. 100,000 or to both

Section	Offence	Sentence (Imprisonment)
24(1)	Sexual offence relating to a position of authority (by superintendent/ manager of a jail, remand home or children's institution or any institution or place of custody established by law.)	Minimum 10 years
24(2)	Abuse of position of authority (by law enforcement officer)	Minimum 10 years
24(3)	Abuse of position of authority (by manager of hospital or staff of a hospital)	Minimum of 10 years
24(4)	Abuse of position of authority (by head teacher, teacher, employee in a primary or secondary school or special institution of learning)	Minimum of 10 years
24(5)	Abuse of position of trust	Minimum 10 years
26	Deliberate transmission of HIV or any other life threatening STD	Minimum 15 years can be enhanced to life
27	Administering a substance/drugs with intent of sexual violence	Minimum 10 years
28	Distribution of a substance by a company	Fine of not less than Kshs. 5M or imprisonment of directors for minimum of 5 years or both
29	Forcing person to engage in sexual act for cultural or religious reasons	Minimum 10 years
30	Non-disclosure of conviction of sexual offences	Minimum 3 years or fine of not less than Kshs. 50,000 or to both

Part 5: Other relevant laws

1. Penal Code, Chapter 63, laws of Kenya

The Penal Code was previously used to prosecute sexual offences before the existence of the Sexual Offences Act of 2006. After 2006, most of the sections in Penal Code were repealed and a few left relating to sexual offences and are referred to as crimes against morality in the Act. These are:

- a. Section 146 – Attempting or having sexual intercourse with an idiot or imbecile (persons with mental disability) is punishable with at least fourteen (14) years in jail. This section is widely contested as being unconstitutional due to its discriminatory nature against persons with mental disabilities as compared with the provisions of the Sexual Offences Act.
- b. Section 151 – Detaining a person against their will for purposes of having sexual intercourse with them is a crime punishable by imprisonment of three (3) years or more.
- c. Section 153 & 154 – Knowingly living on the earnings of prostitution or in any public place to persistently solicit for immoral purposes is a crime punishable by imprisonment of three (3) years or more.
- d. Section 156 – Running a brothel is a crime punishable by imprisonment of (3) years or more.
- e. Section 157 –conspiring to induce any female, by false pretence or fraudulent means, to permit any man to have unlawful sexual intercourse with her is a crime punishable by imprisonment of three (3) years or more.
- f. Section 162 – Engaging in same sex sexual relations is a crime punishable by a jail term of fourteen (14) years. If there was no consent for the same sex relations or consent was obtained by force, the guilty persons will be sentenced to twenty one (21) years.
- g. Section 163 – Attempting to engage in same sex sexual relations is a crime punishable by seven (7) years imprisonment.
- h. Section 165 Engaging in any act of gross indecency with another man is a crime punishable by 5 years imprisonment.

It is noteworthy that the provisions of the Sexual Offences Act, 2006 supersede any existing provisions of any other law with respect to sexual offences.

2. THE SEXUAL OFFENCES (MEDICAL TREATMENT) REGULATIONS, 2012

The regulations:

- i. Define the designated persons for medical purpose a nurse, a clinical officer and medical practitioner.
- ii. Provides that a victim, a suspect, a person convicted or a witness of a sexual offence has the right to medical treatment in a public hospital, private hospital or any other medical facility.
- iii. A court may order the collection of the appropriate samples from any person who has been charged with a sexual offence, at such place and subject to such conditions that the court may specify. The medical practitioner or designated person shall determine the samples to take, the parts of the body from which the samples shall be taken from and the quantity that is reasonably necessary in accordance with the national guidelines for the management of sexual violence.



CHAPTER 2: PROCEDURES FOR SEXUAL AND GENDER BASED VIOLENCE VICTIMS

The National Guidelines on Management of Sexual Violence² in Kenya recommends the following procedures to be followed by victims of sexual violence.

What should I do if I am raped?

Get to a safe place and go the nearest health facility within 72 hours.

At the hospital you will get: Medical evaluation and attention for your injuries, counseling support for yourself and your family, treatment to prevent infection with HIV and pregnancy which only works within 72 hours of the incident, treatment to prevent other sexually transmitted infections and referral for other services you may require.

What should I NOT do if I am raped?

- Do not wash yourself no matter how much you want to before you visit a hospital and are examined by a medical officer.
- Do not destroy or wash your clothing. Wrap them in a non polythene bag or in plain cotton clothes and not plastic bags or newspapers. This because plastic bags may destroy the evidence while newspapers have chemicals which interfere with the protozoa.
- Take them to the hospital with you and let the doctor examine them.
- DO NOT tamper with anything at the crime scene.

After rape you may experience feelings of shame, guilt and blame.

Remember: It is the person that raped you who is wrong. What has happened is NOT your fault

What happens at the hospital?

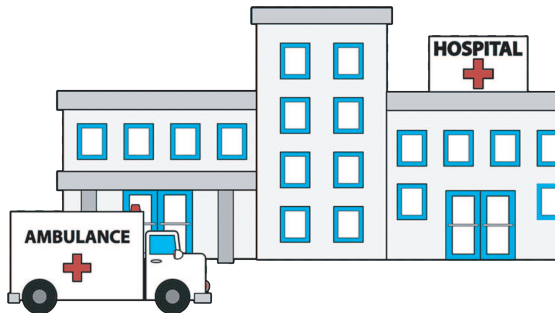
- A health care provider will examine your whole body for marks, bruises and wounds. The examination may be uncomfortable, embarrassing and sometimes painful, but it is necessary
- The health care provider will ask questions about the rape experience. You will need to answer all questions asked frankly
- The health care provider will record this information in detail in a form (Post Rape Care Form- PRC) already available at the hospital which the healthcare provider will sign

² Ministry of Health, National Guidelines on the Management of Sexual Violence in Kenya (2014), <https://bit.ly/3D162s4> (last accessed on 6th August 2021).



- If possible take a family member or a friend with you to support you.

Remember: keep the medical notes and any documents that the doctor writes in a safe place. You may require them at a later date.



What treatment do I need if I have been raped?

Treatment of your physical injuries (if there are any) is most important³

Drugs that could reduce exposure to infection with HIV are referred to as PEP (Post Exposure Prophylaxis)

- PEP must be started soonest possible after rape and certainly with 72 hours
- PEP is taken for a period of 28 days
- PEP is prescribed and managed by a qualified medical officer
- PEP will benefit you ONLY if you were HIV negative before being raped
- Taking PEP when you are HIV positive is not useful and increases your body resistance to any future ARV treatment
- A HIV test is therefore necessary to determine whether or not you can take PEP

Drugs to prevent pregnancy (emergency contraception) with the most commonly used drug being Postinor 2 (P2). If this is not affordable or available, pharmacists can give a combination for emergency contraception from normal oral contraceptive pills

You will also be referred:

- For counseling at the Voluntary Counseling and Testing (VCT) site for support and preparation to undertake a HIV test
- To the laboratory for necessary blood tests

Remember: it is entirely an individual's choice to be tested for HIV and is only necessary in hospitals and clinics where PEP is available

What tests do I need to take if I am raped?

Tests to be done right away include;

- A vaginal swab or an anal swab in case of sodomy– will attempt to show sperm in your vagina/anus. This can be used as evidence. However, the absence of sperms does not mean you were not rape.
- A pregnancy test – to make sure you are not already pregnant. If a pregnancy test cannot be done, you should get emergency contraception (Pregnancy prevention). If you suspect that you may already be pregnant it is alright to take emergency contraception since it does not interfere with established pregnancies.
- Test for Sexually Transmitted infections. (these tests are not very necessary if drugs to reduce the possibility of STI infections are provided)
- HIV test

What if I choose to report to the police?

At the police station, you will report and a record will be made in the occurrence book (OB). You will get an OB number.

You will be asked questions about the incident. The police will cross-examine what you say in detail and may sometimes ask questions that are difficult for you. It may be uncomfortable or even painful, but necessary. You may speak the absolute truth of the situation.

If you have not been to the hospital, it is important that you go there immediately after reporting. Other procedures such as writing a statement or obtaining a P3 form can be undertaken after you have received initial treatment.

You will also be asked to record a statement and sign it. Do not sign this statement until you are happy and comfortable with what has been written in it.

You will be provided with a P3 form. This is a legal document that will be provided for you to sign.

If you have already been to the hospital, take it back with you to the health care provider to fill in.

You may be accompanied by a police officer. Remember to carry the notes written by the medical officer as they will be used to fill in the P3 form.

Remember: you have the right to ask for a female or male police officer to go with you.

Remember: the P3 form is an important document that provides a link between your statement and prosecution, where the perpetrator is arrested. The P3 form is a free document and this should not be paid for.

What are my likely reactions to rape?

There are reactions commonly referred to as rape trauma syndrome (RTS):

- Shock can make you cry, laugh, shake or stay very calm.
- Guilt and shame – you may feel and think that you could have done things differently to avoid or stop the rape. You may feel that others are faulting you.
- Fear – this may immobilize and dysfunction you and can be triggered by different things – a word, a film, a book, a smell etc. Counseling support can help your fear go away
- Silence – you may feel like you want to keep quiet and may be afraid of disclosing rape.
- Nightmares, hallucinations and depression.
- Anger and sense of loss – you may have lost your sense of safety, being in control and certainly the right to your bodily integrity. It is important to speak to someone to begin to heal. Your counselor will maintain confidentiality. Breaking the silence will help you and others to conquer the fear and regain strength.

It is important to speak to someone to begin to heal. Your counselor will maintain confidentiality. Breaking the silence will help you and others to conquer the fear and regain strength.

Remember: you have done nothing wrong. It is not your fault. It is OK to be angry and feel what you are feeling.

What are my rights as a survivor of sexual violence?

You have a right to:

- Choose when, where, how and with whom to have sex
- Engage in consensual sex in all situations at all times
- Have your choice respected and protected by society and the law
- Willingly decide to lay a charge of rape with the police
- Access termination of pregnancy and post abortion care in the event of pregnancy from rape⁵
- Legal representation



TABLE 2: MYTHS AND FACTS ABOUT SEXUAL VIOLENCE ⁵

Myth	Fact
Rapists are strangers in the dark streets	Rapists are more often than not people known to the survivors. They include husbands, boyfriends, relatives, neighbours, friends or dates
When a woman says “NO” to sex, she means “YES”	This belief is based on some cultures where women are expected to be shy and resist when approached by a man. A “NO” means “NO” and it has to be firm
Men cannot be raped	Men and particularly young boys are vulnerable to rape and require as much care and support as women who have been raped
Men cannot control themselves when they get provoked and excited	All men and women can control themselves and their sexual activity. Rapists CHOOSE to use sex as a weapon of power. It does not matter how women are dressed whether they are children in nappies and women in long robes. Women have the right to dress as they so wish
Husbands cannot rape their wives	Both women and men have a right to bodily integrity and choose when to have sex. Whether they are married or not

⁵ UNODC, *Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-Based Violence against Women and Girls*(2019) <https://bit.ly/3sDGStF> (last accessed on 6th August 2021).

Myth	Fact
<p>If the victim did not physically struggle with or fight the assailant or scream it wasn't really rape.⁶</p>	<p>A “freeze” response is a normal response to trauma, rendering a victim unable to physically fight back. Furthermore, offenders are not looking for a fight and they use many forms of coercion, threats and manipulation to commit sexual violence. Many victims do not fight back because they are afraid or feel compelled to cooperate. Alcohol and other drugs are often used to incapacitate victims.</p>
<p>A woman cannot sexually assault a man.</p>	<p>Although the majority of perpetrators are male, people of all genders can be both victims and perpetrators of sexual violence.</p>
<p>Sexual arousal, including climax, erection or ejaculation during a sexual assault means the survivor wanted it or consented to the sexual contact.</p>	<p>Sexual arousal, including climax, erection and ejaculation are physiological responses that may result from mere physical contact or even extreme stress. These responses do not imply the survivor wanted or enjoyed the assault and do not indicate anything about sexual orientation.</p>



CHAPTER 3: COURT PROCESSES IN CASES OF SEXUAL VIOLENCE

Article 48 of the Constitution of Kenya, 2010 provides that the state shall ensure access to justice for all persons.

Further, article 50 of the Constitution provides that every person has a right to a fair trial through a public hearing before the court. In doing so, criminal cases of a sexual nature are reported and through following due process, the police arrest and arraign suspected perpetrators in court for their cases to be heard and determined.

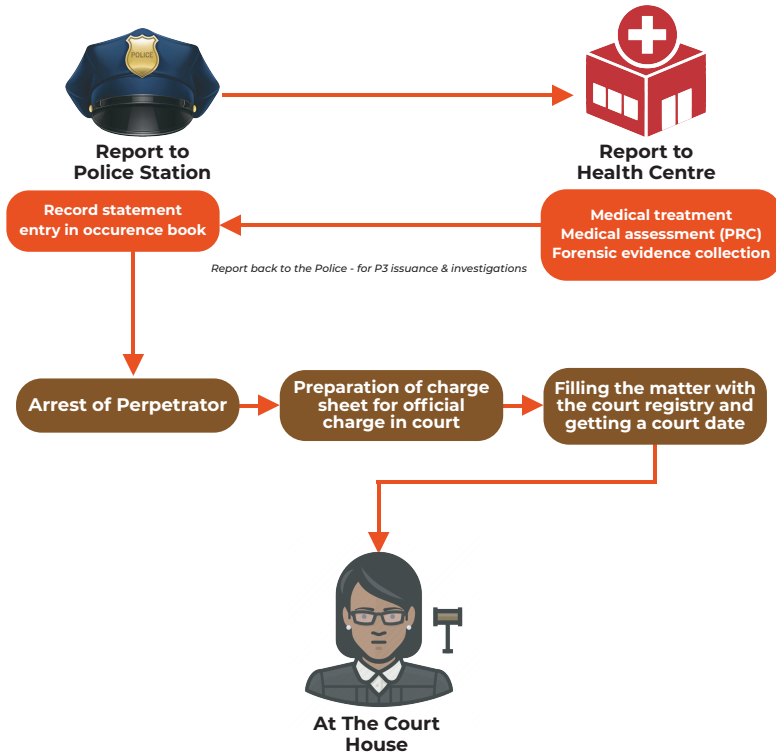
Refer to Chapter 2 for steps to be followed during the reporting stage.

The following are the steps to be followed during the court stage:

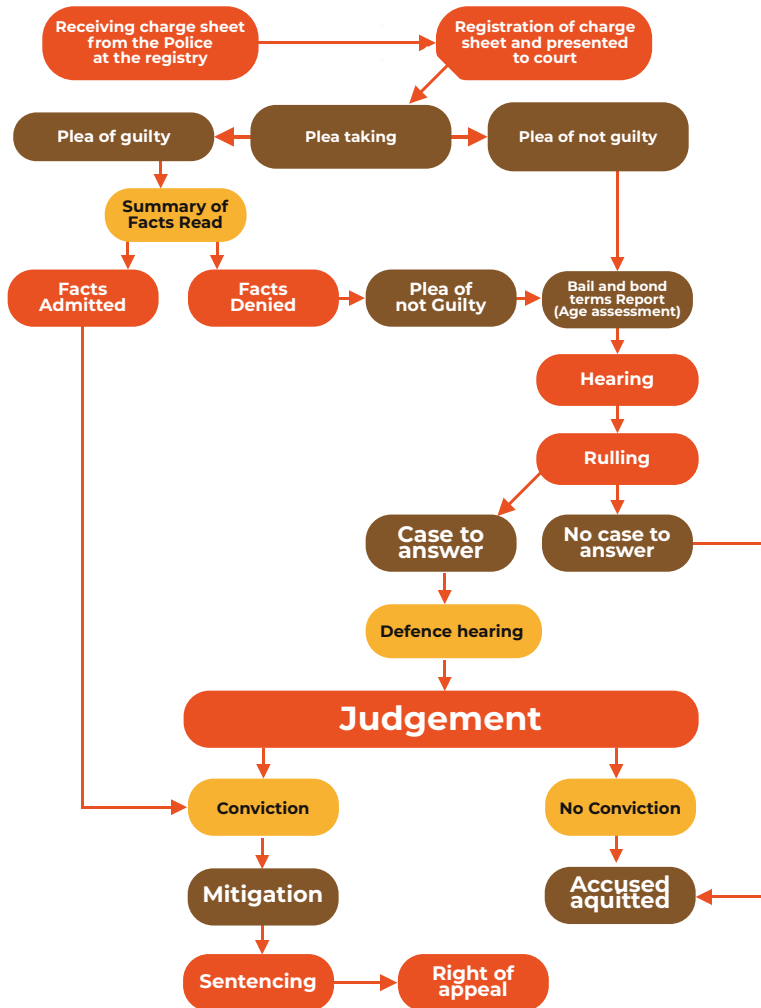
- 1.** The charge sheet is received at the court registry from the relevant institutions i.e. The Police
- 2.** The Charge sheet is registered and case file is opened and numbered then presented to court.
From this point, all issues relating to the case will be addressed by the trial magistrate.
- 3.** The accused is then presented before the trial magistrate by the police on a date set by the court for plea taking. The offence with which the accused is being charged will be read and he can plead in three ways: Guilty, not guilty or choose to keep quiet. Where one keeps quiet, the court process proceeds as if he has pleaded not guilty.
 - a)** Where the accused pleads guilty, the summary of facts of the case is read to him.
If he admits the facts he is then convicted.
After conviction, the mitigation process takes place where victim impact statement(s) (statement of how the offence affected the victim's life) are submitted to the trial magistrate by the victims. The prosecution can also submit previous criminal records if the accused is a repeat offender. The purpose of mitigation is to provide reasons to the court why the accused should receive a lesser or harsher sentence.
The accused will then be sentenced
The accused may appeal to a higher court if he/she is dissatisfied with the sentence.
 - b)** Where the accused pleads guilty but after the summary of facts are read to him/her, he denies the facts; a plea of not guilty will be entered.
- 4.** If the accused pleads not guilty during plea taking or a plea of not guilty is entered after contesting the facts of the case, a bail/bond hearing is held.
 - a)** The survivor may contest the issuance of bail or bond by the court to the accused. Note that Bail/ bond is a constitutional right per article 49 (1) (h) though the same may be denied by the court if there are reasonable grounds to do so.eg. The accused is a flight risk/ will run away and/or the accused will intimidate and tamper with the witnesses.

- b)** Where bail is given, the accused is expected to submit a specified amount of money with the court to guarantee his court attendance.
 - c)** Where bond is issued, the accused is expected to have a surety, who is a third party who will submit assets equivalent to a specified amount to guarantee the accused's attendance in court.
 - d)** Where the accused is denied bail/ bond or when is given bail/ bond but is unable to raise the amounts given or find a surety, then the accused will be held in remand for the duration of the case or until he is able to raise the bond money or find a surety as per the bond terms.
 - e)** Where the accused breaches the bail/bond terms through acts like failure to attend court without a justifiable reason, the bail and bond will be forfeited and a warrant of arrest issued.
- 5.** The main case hearing will then commence with the prosecution presenting its case and witnesses.
In cases of sexual violence, the witnesses include the survivor, the medical doctor, investigating officer and any other relevant witnesses like the guardian when the survivor is a vulnerable witness (a child, elderly person or person with mental disabilities).
- 6.** The court will then determine whether the accused has a case to answer through a ruling.
- a)** Where the accused has no case to answer, meaning that the prosecution could not prove that the accused might have committed the offence, then the accused will be acquitted meaning that the charges against the accused will be dropped.
 - b)** If it is found that the accused has a case to answer, the case will then proceed to defence hearing.
- 7.** During the defence hearing, the accused will present his evidence and any witnesses he may have.
- 8.** The judgment will then be issued by the case concerning the case against the accused.
- 9.** In the judgment, if the accused is found not to be guilty, he will be acquitted, meaning that the charges against him/her will be dropped
- 10.** If the accused is found to be guilty, he will be convicted.
- After conviction, the mitigation process takes place where victim impact statement(s) (statement of how the offence affected the victim's life) are submitted to the trial magistrate by the victims.
The prosecution can also submit previous criminal records if the accused is a repeat offender. The purpose of mitigation is to provide reasons to the court why the accused should receive a lesser or harsher sentence.
 - The accused will then be sentenced
 - The accused may appeal to a higher court if he/she is dissatisfied with the sentence.

SUMMARISED CASE REPORTING AND COURT PROCEDURE FLOW CHART ⁷



⁷The Judiciary, *Criminal/ Traffic Case Flow chart in Subordinate Courts (2018)*, < <https://bit.ly/3kbaPlc> (last accessed on 7th August 2021)



During the Court Trial

A human rights defender working with the victim and/or his/her family should take note of the following pointers and advise the victims or caregivers accordingly.⁸

1. Advise the caregivers that a Police Officer may reach out to them for purposes of asking them to appear in Court or serve them with witness bond.
2. Advise the parents or caregivers of the victim that they may have to wait for a long time in Court and should carry some money for lunch.
3. Advise the caregivers to carry copies of the medical forms such as P3 form, PRC form, birth certificate, and any other supporting documentation.
4. Trial Courts conduct the hearings of cases affecting children and other sexual violence cases in closed courts or chambers.
5. In the case of a child victim, the Court may block the view of the accused from the child. In other cases, the courts assess each case based on the circumstances.
6. A Prosecutor can request priority in hearing of cases affecting children, the elderly, or a person with disabilities.
7. The Court can appoint an intermediary to assist the victim to testify in cases of Vulnerable witnesses.
8. The Court can appoint an interpreter in cases where a victim only speaks the local language. Ask victims to address the Court in the language they are most comfortable speaking.
9. Inform the caregivers and victims that accused persons have a constitutional right to bail, and courts may release accused persons on bail, but that does not mean the case has ended.
10. Ask the caregivers to inform the Police, the Court, or Prosecutors in case of threats from the accused person.
11. Advise the caregivers that court cases may take one (1) to three (3) years or more before completion.
12. Inform the victims or caregivers to follow up with the Court registry or the Investigating Officer (I.O) on the progress of the case. Inform the victims to always have a copy of the court file number—for example, criminal case number 10 of 2021, Republic v. Robinson X.

⁸ COVAW, *Paralegal's Manual on Sexual and Gender Based Violence, 2020*



TABLE 3: SEE THE TABLE BELOW FOR THE ROLES AS OUTLINED IN THE NATIONAL MONITORING AND EVALUATION FRAMEWORK TOWARDS RESPONSE TO SEXUAL AND GENDER-BASED VIOLENCE IN KENYA

Actor	SGBV Response Role and responsibilities
Police	<p>Establishment of functional gender desks at the police stations/posts. Investigating cases of ICWGs victims of SGBV. Arresting the suspect or perpetrator of SGBV. Providing a P3 form to the survivor. Collecting and preserving exhibits from the survivor. Ensuring security for the survivor and his/her family. Submitting to and collecting the exhibits from the government chemist. Availing exhibits and witnesses for the prosecution when required. Giving evidence in court as required.</p>
Health Care Provider	<p>Providing treatment and psychological care to SGBV survivors including Post Exposure Prophylaxis (PEP). Collecting and giving evidence in court (expert witnesses). Referral and linkage of survivors to police and community interventions.</p>
Prosecution	<p>Supervising the Police in the investigation of sexual offenses. Ensuring the drafting of correct charges. Pretrial preparation for survivors and witnesses of SGBV cases. Presenting evidence in court - both exonerating and incriminating evidence. Examining and cross-examining witnesses in court. Making relevant applications in court – for example, protection of vulnerable witnesses, counseling of survivors, treatment of offenders, assessing the survivors or witnesses, and sentencing of the convict.</p>

Actor	SGBV Response Role and responsibilities
Judiciary	<p>Adjudicate cases involving SGBV and implement the various provisions of the SOA in a specific case.</p> <p>Prioritize cases of SGBV, especially those of vulnerable victims such as ICWGs.</p> <p>Create new procedures/practices by providing an interpretation of the various legal provisions in appropriate cases.</p> <p>Adjudicating cases as provided by law.</p>
Government Chemist	<p>Receiving samples on SGBV cases from Police and storing and securing exhibits safely.</p> <p>Conducting, analyzing, examining samples and developing unbiased findings.</p> <p>Submission of the report to the Police.</p> <p>Attending court as expert witnesses.</p>
Probation	<p>Conduct offender assessment and submit an unbiased report to court as ordered.</p> <p>Supervision and aftercare of ex-convicts.</p> <p>Psychosocial support.</p>
Department of Children Services	<p>Provide appropriate services to children in need of care and protection.</p> <p>Respond to cases of child abuse, neglect, exploitation and intervene on behalf of any child who requires 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.</p>

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6. Sexual Offences Regulations, 2008
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