

ASSESSING FALSE ALLEGATIONS OF RAPE IN KENYA

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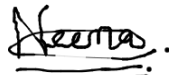
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DECLARATION

I, **NEEMA ACHIENG' OTIENO**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

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This dissertation has been submitted for examination with my approval as University Supervisor.

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MELISSA MUNDI

ABSTRACT

The main objective of this research is to assess Kenya's laws on rape and the impact of its inadequacies on the rights of accused persons. Lack of clarity in law on certain issues may perpetrate instances where innocent people end up being convicted either on the basis of false claims or unclear offences that should not be illegal, for instance, consensual sex between adolescents. This research intends to uncover through case law, analysis of literature and comparative study, what exactly is missing in law that perpetrates this issue and whether or not this issue is prevalent in Kenya. The main focus of this research will be on false allegation of rape, a topic whose discussion is received with high levels of hostility in many jurisdictions even when it has a vital impact on the justice system. Other forms of injustice perpetrated by the inadequacies in Kenya's rape laws will equally be discussed and a comparison made to legal instruments and cases in other jurisdictions. It is hoped that this research will inform policy improvement in the future and contribute to the body of knowledge related to the issues commented on.

LIST OF CASES

Kenyan cases

Achoki v R

Bonu v Republic (2010) eKLR

David Jairo and Ann Achieng v Republic (2012) eKLR

Eliud Waweru Wambui vs the Republic (2019) eKLR.

Hadson Ali Mwachongo vs Republic (2016) eKLR

Lawrence Frank Wanyama & another v Republic (2020) eKLR

Foreign cases

Gillick vs. West Norfolk and Wisbeck Area Health Authority (1985), The United Kingdom House of Lords.

Sheldrake v. DPP (2004), The United Kingdom House of Lords.

Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development (2013) Constitutional Court of South Africa.

LIST OF LEGAL INSTRUMENTS

Constitution of Kenya, 2010.

Children Act, No 8 of 2001.

Evidence Act, Cap 80 of 2014.

Oaths and Statutory Declarations Act, Cap 15 of 2012.

Sexual Offences Act, No 3 of 2006.

South Africa Criminal Law (Sexual Offences and Related Matters) Amendment Act, No 32 of 2007.

The African Charter on Human and Peoples' Rights (ACHPR)

The International Covenant on Civil and Political Rights (ICCPR)

The Penal Code, Cap 63 of the Laws of Kenya.

United Kingdom Sexual Offences Act, 2003.

Victim Protection Act, No 17 of 2014.

CHAPTER 1

INTRODUCTION

1.1. Background

The existing social climate and prevailing discourses over the high rate of rape occurrence in Kenya has propelled a belief that the crime is rife and there exists a moral imperative to secure conviction of perpetrators at all costs.¹ The moral, political and legal agenda to secure convictions can be inferred from many positions of law, an example being the current position that corroboration is not a vitiating factor in proving rape as it was before.² This position was arrived at based on the opinion that, rape is difficult to corroborate as it often occurs in private. Although, logically, this train of thought reduces the chances of perpetrators avoiding prosecution, it risks the chances of innocent people being falsely proven guilty.³

Rape is a very traumatic experience and numerous victims may consider not reporting rape cases in the fear of reliving the traumatic experience in court. It is for this reason therefore, that legislators put substantial measures to reduce the pressure and stress that victims may face during the ordeal of trial.

By pointing out the plight of innocent people being implicated over wrongful accusations, this research does not aim to invalidate the reality that rape exists as a menace to society. Neither is it based on any political dictum 'believe men'. In fact, not all false accusations are filed by the victims themselves, who in most cases are women, but others are filed under parental or spousal influence. Each case is different.⁴

Rape hoax is not a novel phenomenon. The biblical account of Joseph and Potiphar's wife and the ancient Egyptian tale of Bata and Anubis are just but a few examples of ancient tales that clearly highlight how this is a timeless and common human dilemma.⁵ The extent of its

¹ Hoyle C, Speechley N, Burnett R, *The impact of being wrongfully accused of abuse in occupations of Trust: Victim's voices*, Oxford University Press, 2016, 4.

² Lekakeny R, 'The elusive justice for women: A critical analysis of rape law and practice in Kenya' Published LLM Thesis, University of Cape Town, Cape Town, 2015, 31.

³ Hoyle C, Speechley N and Burnett R, *The impact of being wrongfully accused of abuse in occupations of Trust*, 4.

⁴ De Zutter A, Horselenberg R and Koppen P, 'Motives for filling a false allegation of rape', 47(2) *Archives of sexual behavior*, 2018, 458.

⁵ Gabaitse R and Stiebert J, *The Bible and Gender Troubles in Africa*, University of Bamberg Press, 2019, 87.

notoriety in modern times is disputable with some rating it at 2% of reported rape cases and others higher.⁶This rate is about the same false-claim rate that is normal for other serious crimes⁷and the discrepancy in percentages globally is often accredited to a lack of a clear definition of what a false rape claim is.

The Constitution of Kenya envisages the possibility of such miscarriages of justice occurring when it ensures the right of the accused person to a fair hearing.⁸ Isolated parts of the Sexual Offences Act equally mirror this. Whether or not these provisions are adequate is however questionable considering that a number of innocent people eventually get convicted. Even with the insufficient provisions for protection of the accused from unjust imprisonment, it is surprising that most arguments about the non-equal treatment of the defendant and the victim in rape cases during trial lean towards claims of victims being on the suppressed end.

As has been pointed out, this argument is made especially in cases of acquaintance rape such as marital rape considering how difficult it is to prove lack of consent in such cases. It is argued that the extra need for corroboration in such cases makes conviction difficult.⁹ Despite this being a valid argument, it does not substantiate the neglect in law of the fact that in rape cases, equivalent consideration should be taken to guarantee that, accused persons do not get convicted based on false accusations. The accused has a right to a fair hearing. The dire effects of false accusations to an accused person and his family at large warrant intervention and policy improvement. This existing phenomenon therefore forms the prevailing basis of this research.

1.2.Statement of the problem

Rape is arguably the most controversial of the existing violent crimes considering how entangled it is in the politics of gender and sexuality. This unique aspect of the crime makes it susceptible to misuse by malicious persons who concoct allegations for purposes of revenge and other existing motives.¹⁰Although this phenomenon is estimated to be of a lower frequency when compared to the legitimate claims brought before court, the compelling moral imperative to punish rapists does not justify miscarriage of justice. An effective law governing the

⁶ Lisak D, Gardinier L, Nicksa S and Cote A, 'False allegations of sexual assault: An analysis of ten years of reported cases.' *Violence against women*, 2010, 1319.

⁷ Rumney P, 'False allegations of rape', 65(1) *Cambridge Law Journal*, 2006, 143.

⁸ Article 50, *The Constitution of Kenya* (2010).

⁹ Cooperstein E, 'Protecting Rape Victims from Civil Suits by their Attackers',8(279) *Law and Inequality*, 1990, 282.

¹⁰ Lisak D, Gardinier L, Nicksa S and Cote A, False allegations of sexual assault, 1319.

determination of whether an offence occurred is supposed to guarantee that fairness and justice prevails throughout the trial process.

This should apply to both parties given that the rights of accused persons are constitutionally recognized rights. With regards to Kenya's laws on rape, the corresponding assumption would be that even in the pursuit of severely punishing the detestable crime of rape, the accused is not seen to be guilty simply because allegations have been made. Impartiality and fairness should be guaranteed throughout the trial process, a situation which is not completely reflected in Kenya's rape laws and judicial system.¹¹This research therefore attempts to fill the gaps in a bid to aid in the fair application of the Kenyan rape litigations.

1.3. Research objectives

The overall objective of this research is to evaluate the insufficient nature of Kenya's laws on rape in its mandate to curtail false rape claims.

The specific research objectives are:

- i. To determine the sufficiency of provisions of the rape laws that exist to protect the accused persons against wrongful convictions.
- ii. To examine, through case law, the extent of notoriety of the misuse of rape laws by victims in the pursuit of their malicious aims.
- iii. To explore the existing phenomena vis-a-vis other existing jurisdictions from which Kenya borrowed its provisions to inform amicable solutions.

1.4. Research questions

The research sets up to answer the following questions.

- i. To what extent have the provisions of Kenya's laws on rape been sufficient to protect the accused against false accusations?
- ii. What is the extent of notoriety of the misuse of rape laws by victims in the pursuit of their malicious aims?
- iii. What solutions do other jurisdictions present that may assist to remedy these deficiencies in Kenya's laws on rape?

¹¹ Mwimali B, Conceptualization and operationalization of the right to a fair trial in criminal justice in Kenya Unpublished JD Thesis, The University of Birmingham, 2012.

1.5. Justification of the study

From the very onset of there being an allegation of rape, the accusers are treated as victims before any truth in the abuse is found. The corresponding assumption is that those alleged against are abusers and during their trial, the prejudice may continue to the very end.¹² This phenomenon exists due to the compelling moral imperative not to leave sex offenders to cause further harm. Although this thought process reduces the chances of exonerating the guilty, it increases the chances of the innocent being proven guilty which is contrary to the aim of both social justice and the Constitution of Kenya, 2010. This research will contribute significantly as a reference literature to academicians, legal practitioners, and researchers in the development of future policies on rape cases. It will also contribute towards existing debates focused on the narratives of those wrongfully accused of rape.

1.6. Research design and methodology

The research will apply a qualitative approach in the analysis of Kenya's laws on rape and its application. This approach will involve the examination of a range of primary and secondary sources including statutes, case law, books, journals, newspapers, and online resources. There shall be an analysis of major bodies of law governing the trial of rape cases in the Kenyan court process.

A couple of decided cases will be reviewed to determine the underlying common factors that have led to the prevalence of convictions based on false accusations of rape. To further understand the legal framework regarding the issue in Kenya, this research shall consider a brief comparative analysis with the UK considering how advanced the research on this area is in the country, and South Africa considering the similarity of its socio-economic background with that of Kenya.

1.7. Theoretical framework

This section highlights the theories pertinent and relevant to the topic of research with an aim of gaining a deeper understanding of the perspectives from which the research has systematically been analysed. Studying underpinning theoretical discourse is meant to guide the research in achieving its objectives.

1.7.1 Moral Rights Theory

Rights exist in both the context of morality and the legal system. The moral rights theory was expounded by Jefferson to include three things, the rights to "life, liberty and pursuit of

¹² Hoyle C, Speechley N, Burnett R, *The Impact of Being Wrongfully Accused of Abuse in Occupations of Trust: Victim's Voices*, Oxford University Press, 2016, 12.

happiness” all which are to be secured by the government. This goes to show that even from a moral perspective, one’s liberty should not be deprived unjustly.¹³ Moral rights are conceptually related to legal rights as expounded by Mill who asserts that “When we call anything a person’s right, we mean that he has a valid claim on society to protect him in the possession of it, either by the force of law, or by that of education and opinion.”¹⁴ The right to a fair trial fits in this theory in that it calls for justice and fairness. Its premise is that all beings ought to be treated fairly by having their matters decided by an impartial entity.

Fairness for all is equally the basis for the principle of the presumption of innocence, which is an inalienable human right that every person is entitled to regardless of their race, tribe, political affiliation, religion, and other differentiating factors common with human beings. It is a right that forms the basis upon which the burden of proof being placed on the prosecution, stipulated in most human rights declarations and constitutions is premised.

Internationally, several instruments stipulate this. The International Covenant on Civil and Political Rights for instance, stipulates in Article 14(2) of its provisions that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty.¹⁵ The African Charter on Human and Peoples' Rights further solidifies this position by stating that every individual shall have the right to have his cause heard. The right to be heard comprises the right to be presumed innocent until proved guilty, and the right to an impartial and competent tribunal.¹⁶

Kenya, other than inculcating these rights by virtue of Article 2(6) of the Constitution, has several articles underlying the presumption of innocence especially under chapter 4 on the Bill of Rights.

Each person should have access to justice, be treated fairly and have their matters impartially determined.

¹³ Pattakos A, ‘Life, liberty and the pursuit of meaning’, 3 April 2018 <https://www.psychologytoday.com/us/blog/the-meaningful-life/201802/life-liberty-and-the-pursuit-meaning> on 20 March 2020.

¹⁴ West H, ‘Mill’s ‘Proof’ of the Principle of Utility, *An Introduction to Mill’s Utilitarianism*’, Cambridge University Press, New York, 2004.

¹⁵ Article 14(2) The International Covenant on Civil and Political Rights, 16 December 1966, 999.

¹⁶ Article 7(1) African Charter on Human and Peoples' Rights, 27 June 1981, CAB/ LEG/67/3 REV.5, 21 I.L.M.58 (1982).

1.7.2. Deterrence Theory

According to the deterrence theory, people are unlikely to commit an offence if there is a punishment stipulated for it, and the punishment is certain and severe. Being certain of the punishment may deter potential perpetrators for fear of being apprehended while the severity of the punishment may influence their behaviour when they weigh the consequences of their action to the severity of punishment.¹⁷

Deterrence theory can be attributed to have originated from early classical philosophers like Jeremy Bentham and Thomas Hobbes. To Jeremy Bentham, before making a deliberate decision to do something, a perpetrator usually weighs between a benefit that would arise from committing a crime and the punishment for that crime.¹⁸ Nevertheless, human beings are still susceptible to making irrational decisions that may not be in the public interest.

To correct this, Bentham suggests a remedy through the application of a punishment that is proportionate to the crime committed. This way, the criminal activity that a perpetrator was about to engage in would end up looking unattractive to him or her.¹⁹ Thomas Hobbes supports this when he views human beings as people who are driven by self-interest and this ultimately leads to conflict.

To avoid this war and conflict, Hobbes suggests that there should be a social contract where people enter a social contract with the government so that the government protects them from crime and conflict. By agreeing to the social contract, a citizen consents to the use of force by the government as they perform their duties. Hobbes differs from Bentham in that he suggests that the punishment given to perpetrators be more severe than the crime that they committed.²⁰ Cesare Beccaria Cesare Beccaria supports this position as well.²¹

The main aim of deterrence is to discourage potential perpetrators from committing the crime. Making a false allegation with malicious intent is a crime referred to as perjury under the Penal Code of Kenya.²² This is a section of the law that applies to all crimes in general. For sexual offences, in section 38 that was subsequently deleted, the Act tried to address this by granting that whoever makes a false rape claim against another is guilty of an offence and is liable to a

¹⁷ Carlsmith K and Darley J 'Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment', 83 *Robinson Journal of Personality and Social Psychology*, 2002, 285.

¹⁸ Carlsmith K and Darley J, 'Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment', 284.

¹⁹ Carlsmith K and Darley J 'Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment', 285.

²⁰ Hobbes T, 'Leviathan', Renaissance Editions, 1999, 79.

²¹ Beccaria C, 'An essay on crimes and punishment', The federalist papers project, 13.

²² Section 108, *Penal Code* (2009).

punishment equal to that for the offence complained of.²³ A provision that is seemingly inadequate hence more stringent and effective deterrence measures are needed.

1.7.3 The Ecocultural Theory

This theory asserts that human beings are products of their ecoculture. This means that their development is subject to the people they grew around, the culture and the physical environment. A person becomes who they are, not only as a result of innate predisposition, but as a combination of this and the influences of their physical space. This by extension means that whatever environment or culture a person has been exposed to greatly influences their interpretation of the law and policies.²⁴

Considering how much rape as a crime is controversial in nature and entangled in the politics of gender and sexuality, evolving perceptions perpetrated by the media may influence how decisions are made, given that judges themselves are citizens of their own environment. Media as part of the environment informs us about what is happening in the world, what is right from what is wrong, and in turn forms our knowledge of what is acceptable in society.²⁵

Generally, it has been proven that human beings suffer from limitations in their decision making due to their limited information processing capabilities.²⁶ This leaves to question whether or not judges in an adversarial court system, who are sole decision makers are exempt from this rule.²⁷ All persons have the right to have any dispute to be settled by the application of law decided fairly, publicly and before an independent and impartial court.

Ecocultural influences may however cultivate biases such as confirmation bias which states that, when people have a previous exposure to a certain state of affairs and form conclusive hypotheses based on them, they tend to favour information that corresponds with their prior beliefs and disregard evidence pointing to the contrary. In relation to judges, confirmation bias can be illustrated when the judges are in favour of evidence that confirms their prior hypotheses and might disregard evidence that does not correspond with their previous assumptions.²⁸

²³ Section 38, *Sexual Offences Act* (2006).

²⁴ Mbiti D N, *'Foundations of school administration'*, Oxford University Press, Upper Hill, 2007,62.

²⁵ 'Kiaialiisa: Media ecology: How media and new media influence life ', 3 December 2012 <https://kaialiisa.wordpress.com/2012/12/03/media-ecology-how-media-and-new-media-influences-life/>. 12 November 2020.

²⁶ Kang J, Bennet M, Carbo D, Casey P, Dasgupta N, Faigman D, Godsil R, Greenwald A, Levinson J, Mnookin J, Implicit bias in the court room, 59 *UCLA Law Review*, 2012, 1126.

²⁷ Peer E and Gamliel E, 'Heuristics and biases in judicial decisions', 49 *Court Review*, 2001, 114.

²⁸ Peer E and Gamliel E, 'Heuristics and biases in judicial decisions', 49 *Court Review*, 2001, 115.

Another form of bias that judges are susceptible to is implicit bias. Implicit bias is different from explicit bias such as racism and sexism which have become less prominent and public with time. implicit bias is less overt but still important. This form of bias cultivates attitudes and stereotypes which affect our understanding, decision-making, and behaviour, without us realizing of it. This, in judges, may influence how they interpret evidence, understand facts and ultimately affect their judgement.

1.8. Literature Review

False rape allegations and its impact on accused persons has not been a major area of study in Kenya. Studies around reform on policies on rape and other forms of sexual violence usually focus on protection of the victims.²⁹ Keith Findley in his article ‘Defining Innocence’ focusing on the American jurisdiction outlines that the past years have seen a rise in discovery of hundreds of wrongful convictions exposing the deception in our long-term belief that the criminal justice system does all it can to guard against convicting the innocent.³⁰

Webster asserts that, although this phenomenon is not as prevalent in rape cases, aspects of it exists due to the compelling moral imperative not to leave sex offenders to cause further harm. To him, even though this thought process reduces the chances of guilty persons avoiding prosecution, it equally increases the likelihood of the innocent being proven guilty which is contrary to the aim of both social justice and the constitution.³¹The wrongfully accused thereby become victims of a miscarriage of justice.

Davis describes the wrongfully accused persons as being victims of a range of “perpetrators” that may include the accusers themselves, the police, lawyers and ultimately the state.³² Their belief in the state gets shattered since most times the state wherein being alert to the needs of those claiming to be victims of abuse effectively overlook those who are victims of false allegations.³³

²⁹ Couillard V, 'The Nairobi Declaration: Redefining reparations for women victims of sexual violence' *The International Journal of Transitional Justice*. (2007), 7.

³⁰ Findley K, Defining innocence, 74(3) *Albany Law Review*, 2011, 1157.

³¹ Webster R, *The Secret of Bryn Estyn: The making of a modern witch hunt*, The Orwell Press, Oxford, 2005.

³² Davis J, ‘Victim narratives and victim selves: False Memory Syndrome and the power of accounts’, 4(52) *Social Problems*, 2005, 530.

³³ Hoyle C, Speechley N and Burnett R, *The impact of being wrongfully accused of abuse in occupations of trust: Victim's Voices*, Oxford University Press, 2016, 6.

Mwimali attributes the existence of this phenomena in Kenya to the problem of conceptualization of the right to fair hearing in the Kenyan justice system. In particular, he examines how and why implementation of these universal set of values which have always been enshrined in Kenya's constitution since independence, has been difficult. Among the things he looks at include an inquiry into the factors that hinder the full realization of the right to a fair trial and explores some approaches that may be used to address these factors.³⁴

Lastly, in her analysis of Kenya's laws of rape and the trial procedure, Lekakeny outlines critical evidentiary and procedural aspects of the law that the study found to be problematic such as the repeal of section 38 of the Sexual Offences Act which subsequently repealed section 124 of the Evidence Act. These sections and more were essential in the protection of the accused from false accusation as shall subsequently be discussed. Analysis of her research indicates a clear imbalance in the balancing of the victim's rights with the rights of accused persons.

Through reviewing all this, the study aims to establish that wrongful allegation of rape, which is an established genre of miscarriage of justice, has not adequately been curtailed in Kenya.

1.9. Limitations

This paper is limited by the lack of published statistics and case studies regarding wrongful convictions based on false allegations of rape in Kenya, the lack of adequate information to assess the strength or weakness of the prosecution process and the lack of information on whether there have been successful appeals based on false rape allegations. It is further compounded by the lack of personalized views of the victims of false rape accusations who have interacted with Kenya's judicial system. Their views would have been important to accurately assess their view regarding their trust in the judicial system.

1.10. Chapter Breakdown

Chapter 1: Introduction

Chapter 2: Legislative Framework on the Rape Laws of Kenya

³⁴ Mwimali B, Conceptualization and operationalization of the right to a fair trial in criminal justice in Kenya Unpublished JD Thesis, The University of Birmingham, August 2012.

Chapter 3: Analysis of False Rape Claims in Kenya

Chapter 4: Comparative analysis of false rape claims of Kenya with the UK and South Africa

Chapter 5: Summary and Conclusion

CHAPTER 2

LEGISLATIVE FRAMEWORK ON THE RAPE LAWS OF KENYA

2.1 Introduction

This section aims at examining the legislative framework in Kenya that regulates rape to determine the extent to which it has been effective in preventing the false accusation of innocent persons and the imprisonment of essentially innocent persons.

2.2. Legal instruments

2.2.1. *The constitution of Kenya 2010*

Article 2 of the constitution of Kenya affirms the Constitution as the supreme law of the Republic that binds everyone and any statute that is inconsistent with it is void to the extent of its inconsistency. The article equally gives effect to international instruments that Kenya has ratified by virtue of subsection (5) and (6).³⁵ The main international instruments with a bearing on issues of rape is the UN Convention on Elimination of all forms of Discrimination Against Women (CEDAW) that determines discrimination to include any form of violence against women.³⁶ Rights stipulated in this Convention are to be balanced against provisions that safeguard the rights of the accused such as Article 14(2) of the International Covenant on Civil and Political Rights which stipulates that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty.³⁷

Kenya's Constitution is an integral legal instrument in the topic under discussion because of the rights and freedoms enshrined in the bill of rights that are relevant to the protection of the rights of both victims of rape and accused persons. Of particular importance to the rights of the accused are Article 49 and Article 50(2) of the Constitution. Article 49 stipulates the rights of an arrested person such as the right to be informed of the reason of arrest, to communicate to an advocate and not to be compelled to make a confession while article 50 provides for the right to a fair trial and the specific rights that constitute this right are stipulated under Article 50(2). These rights are not to be derogated from or limited by virtue of Article 25 of the

³⁵ Article 2, *The Constitution of Kenya* (2010).

³⁶ The UN Convention on Elimination of all Forms of Discrimination Against Women, December 1979.

³⁷ Article 14(2) The International Covenant on Civil and Political Rights, 16 December 1966, 999.

constitution. Within Article 50(2) certain specific rights of an accused are not entirely safeguarded in rape cases.

Article 50(2)(a) of the constitution provides for the right of the accused to be presumed innocent until the contrary is proved but this is not always the case. For instance, the Victim protection Act, Section 9 (1) (e) provides that a victim has a right to be informed in advance of the evidence the prosecution and defence intends to rely on, and to have reasonable access to that evidence. This gives the impression that the accused has already been determined to have a case to answer to, while in criminal trials, the defence is ordinarily not required to disclose its evidence and defence except if the prosecution satisfies the court that the accused has a case to answer.³⁸

2.2.2 *The Sexual Offences Act of Kenya*

In 2006, Kenya's Sexual Offences Act was enacted to specify actions that qualify as sexual offenses and to establish more strict ways of punishing perpetrators. Prior to this, the Penal Code provided for sexual offences and categorized them as offenses against morality alongside homosexuality and abortion. Notable reforms in the Act that was enacted in 2006 include the criminalization of sexual harassment, criminalization of the deliberate transmission of HIV, minimum sentences for various sexual violence acts and a total of 14 new sexual offenses that had previously not existed were elaborated in the Act.³⁹

The Sexual Offences Act defines rape as an offense committed when, without the consent of the other person, or if the consent is obtained by force or by threats or intimidation, a person intentionally and unlawfully commits an act that causes penetration into the other using his or her genital organs.⁴⁰ The sentence imposed for rape is at least 10 years in jail, which may be extended to life imprisonment.⁴¹ The Sexual offences Act also provides for attempted rape with a minimum sentence of 5 years,⁴² as well as gang rape in cases where rape is committed in

³⁸ Section 9(1) *The victim Protection Act* (Act No. 17 of 2014).

³⁹ Kamau W, 'Legal treatment of consent in sexual offences in Kenya', University of Nairobi, Nairobi, 2013, 3.

⁴⁰ Section 3, *Sexual Offences Act* (Act No. 3 of 2006).

⁴¹ Section 3, *Sexual Offences Act* (Act No. 3 of 2006).

⁴² Section 4, *Sexual Offences Act* (Act No. 3 of 2006).

conjunction with two or more others. The criminal sentence for gang rape is 15 years which can be increased to life imprisonment.⁴³

For this research, the scope of rape will be made to include defilement, which is different from rape, as it pertains to acts that cause sexual penetration with a child.⁴⁴

Child sexual abuse under Kenyan law is referred to as defilement and the Children's Act describes a child to be a minor below eighteen years. The presumption in Kenyan law is that persons below the age of eighteen are unable to consent to sexual activity because they are unable to understand the essence of the act.⁴⁵ Any sexual penetration of an infant is illegal. Kenyan Courts have repeatedly ruled that there is no legal capacity for all children to give informed consent to sex. The appellant was convicted in **Bonu v. the Republic** of defiling a ten-year-old despite him arguing that they were in a relationship, and she was prepared to indulge in sex with him.⁴⁶ The court was of the view that any act of sex with people below the age of 18 was an offence.

Sexual contact with an infant is a strict liability crime punishable on a phased scale, depending on the age of the victim. Defiling a child below the age of 11 attracts the sentence of life imprisonment.⁴⁷ If the child is between 12 and 15 years old, the term of conviction shall not be less than 20 years,⁴⁸ and if between 16 and 18 years old, the sentence shall not be less than 15 years.⁴⁹ It is important to prove the age of the child in defilement cases as reiterated in the case of **Hadson Ali Mwachongo vs Republic** as the sentences prescribed in the Sexual Offences Act are dependent on the victim's age.⁵⁰

2.2.2.1. Scoping consent under the Sexual offences Act

Consent is fundamental in defining rape since it is crucial in determining culpability in rape cases. As indicated in the Sexual offences Act, consent can only be inferred if it is shown that

⁴³ Section 10, *Sexual Offences Act* (Act No. 3 of 2006).

⁴⁴ Section 8, *Sexual Offences Act* (Act No. 3 of 2006)

⁴⁵ Section 2, *Children's Act* (Act No. 8 of 2001)

⁴⁶ *Bonu v Republic* (2010) eKLR.

⁴⁷ Section 8(2), *Sexual Offences Act*, (Act No. 3 of 2006).

⁴⁸ Section 8(3), *Sexual Offences Act*, (Act No. 3 of 2006).

⁴⁹ Section 8(4), *Sexual Offences Act*, (Act No. 3 of 2006).

⁵⁰ *Hadson Ali Mwachongo vs Republic* (2016) eKLR.

an individual chose to engage and had the freedom and capacity to make that choice.⁵¹ The Court of Appeal in **Achoki v. R** emphasised the importance of proving lack of consent in rape cases as it is an essential part of the charge. The appellant in this case had his conviction for the crime of attempted rape set aside and he was convicted of the alternative charge for indecent assault simply because of the failure of the charge to specify that there was lack of consent.⁵²

Consent is often the only disputed issue in many rape cases since it often involves perceptions and interpretation of sentiments and reactions. Such feelings and reactions are often determined by societal attitudes, values and gendered power relations.⁵³

In both a legal and ethical arguments, consent has led to much intellectual controversy. One part of the divide involved in the argument suggests that consent relies majorly on the mental attitude of the accused towards the activity, ranging from their intention to participate in sexual interaction to their acquiescence or ambivalence. Consent is an exercise of the will in this line of reasoning and thus must be reasonably free. The refusal to give this permission typically constitutes part of the *actus reus* for the offence of rape.⁵⁴

The other divide of the scholars suggest that consent is performative. This means that in addition to exercising consent in a psychological sense, there is need to infer from the victims conduct whether consent was given or not. The performative aspect is what permits the defendant to proceed with the activity, something which is relevant when assessing the defendant's *mens rea* as to the victim's consent.⁵⁵

The sexual offences Act tries to cover these aspects through introducing two tests. The evidential presumption test and conclusive presumption test. The Evidential presumption test is ingrained in Section 44 of the Sexual Offences Act and provides that if in proceedings for an offence under this Act, it is established that circumstances set out in subsection (2) existed.⁵⁶

⁵¹ Section 42, *Sexual Offences Act* (Act No. 3 of 2006).

⁵² *Achoki v R* (2008) eKLR

⁵³ Gibson M, 'Deceptive sexual relations: A theory of criminal liability', 4(1) *Oxford Journal of Legal Studies*, 2020, 92.

⁵⁴ Gibson M, 'Deceptive sexual relations: A theory of criminal liability', 93.

⁵⁵ Gibson M, 'Deceptive sexual relations: A theory of criminal liability', 93.

⁵⁶ Circumstances specified are that: a) Threat of violence was used on the complainant during or immediately before the assault; b) The complainant feared that during or immediately after the act, harm was or would be inflicted on someone else ; c)The defendant had detained the complainant ; d) The complainant was asleep or

and that the accused person knew that they were present, it shall be taken that the complainant did not consent to the act except if enough proof is adduced to prove they consented. Section 44 therefore places the burden of proof upon the defendant to provide evidence supporting the claim that they did not know of the circumstances in question.⁵⁷ In **Sheldrake v. DPP** it was determined that this evidential burden is not that of the burden of proof.⁵⁸ If, however, the accused fails to adduce enough evidence to raise questions, the court will itself have to convict him, as there is no jury system in Kenya.⁵⁹

The danger arising from this instance where the judge, instead of a jury is left to determine the case is severe. This is especially true in cases where gender stereotypes on male aggression are evident on the part of the judge. This can for instance be inferred during cross examination, for example, when the accused person is giving account of kissing, a judge assumes that the person, being male, had in mind the agenda of sex.⁶⁰

2.2.2. The Criminal Procedure code, Evidence Act and Victim Protection Act.

In its application, the Sexual Offences Act is complemented by other laws regulating the criminal justice system. These laws include the Criminal Procedure Code, the Evidence Act and the Victim Protection Act of 2014.⁶¹ Kenya being a country following the adversarial system, it is notable that a judge's implicit or explicit bias and stereotypes influenced by contemporary issues and culture might also influence the outcome of a trial process.⁶²

The Evidence Act and the criminal procedure code are equally relevant especially throughout rape trial processes as they outline procedures to be followed in order to ensure a fair trial.

otherwise unconscious at the time; e) The complainant, being disabled, was unable to communicate consent to the defendant; f) Intoxicating substances capable of stupefying the complainant were involuntarily administered to them at the time of the act.

⁵⁷ Section 44, *Sexual Offences Act* (Act No. 3 of 2006)

⁵⁸ *Sheldrake v. DPP* (2004), The United Kingdom House of Lords.

⁵⁹ Kamau W, 'Legal treatment of consent in sexual offences in Kenya', University of Nairobi, Nairobi, 20138.

⁶⁰ Elliot C, De Than C, 'The case for a rational construction of consent in Criminal Law', 70(225) *Modern Law Review*, 2007, 243.

⁶¹ Lekakeny R, 'The elusive justice for women: A critical analysis of rape law and practice in Kenya' Published LLM Thesis, University of Cape Town, Cape Town, 2015, 12.

⁶² Kang J, Bennet M, Carbado D, Casey P, Dasgupta N, Faigman D, Godsil R, Greenwood A, Levinson J and Mnookin J, 'Implicit bias in the courtroom', 59(1124) *UCLA Law Review*, 2012.

In recent times, more attention is being paid to victims of crimes, with an emphasis being placed on allowing them to actively participate in the justice system as opposed to just testifying in court as witnesses. There has been a move from the earlier stand in most common law jurisdictions that adding a 'third party' in a criminal process would disrupt the balance of the criminal process thereby jeopardizing the right of the accused to a fair trial. In Kenya, adoption of this move can be inferred from the enactment of the Victim Protection Act of 2014 that aims to recognize the rights of victims of crime and to protect their dignity by taking measures such as provision of better information.⁶³

The Victim's Protection Act is a necessary bold move to ensure justice to victims of crime. It is however notable that some provisions of the Act go against the basic principles that guide our justice system. For instance, Section 9 (1) (e) which states that, a victim has a right to be informed in advance of the evidence the prosecution and defence intends to rely on, and to have reasonable access to that evidence.⁶⁴

In criminal matters, the defence is ordinarily not required to disclose its evidence and defence except if the prosecution satisfies the court that the accused has a case to answer. Therefore, a law that makes it necessary for the accused's defence to release their evidence to the complainant before the trial jeopardizes the defence's ability to defend the case and their right to due process and a fair trial.⁶⁵

2.3. Practice rules in Rape Trials.

In most cases of alleged rape, the physical evidence of a crime is scarce, if any and there are often no eyewitnesses to testify regarding the event in question. This state of events complicates the task of discerning the truth of a claim. Without clear physical evidence, the decisions of the legal system are based merely on the relative credibility of the narratives of the persons involved and medical evidence which may be ambiguous given that it only determines whether sexual intercourse occurred, and perhaps whether the intercourse was "rough," but not whether that sexual contact was consensual.⁶⁶

⁶³ Section 9, *The victim Protection Act* (Act No. 17 of 2014).

⁶⁴ Section 9(1) *The victim Protection Act* (Act No. 17 of 2014).

⁶⁵ Mwale D, 'Beyond watching brief and court testimonies: A new dawn for restorative and reparative criminal justice in Kenya' <https://www.mwalelegal.co.ke/beyond-watching-brief-court-testimonies/> on 3rd November 2020.

⁶⁶ Pumphrey J, 'The Unseen Impact of False Allegations in Sex Crimes' 10 June 2019 <https://www.pumphreylawfirm.com/blog/the-unseen-impact-of-false-allegations-in-sex-crimes/> on 23rd November 2020.

Factors relating to the evidential law on consent and its inadequacies have already been discussed. Other evidentiary issues related to rape that may at times lead to wrongful convictions include the recent non-requirement for corroboration in rape cases and the repeal of section 38 of the Sexual offences Act.

2.3.1. Corroboration of evidence not a requirement anymore

Prior to the promulgation of the Sexual Crimes Act, corroborating evidence was needed in cases of rape. The courts therefore insisted that additional material facts concerning the perpetrator should be used to corroborate the evidence of the plaintiff.⁶⁷ The enactment of the Sexual Offences Act however, introduced changes to the legislation by requiring that section 124 of the Evidence Act be changed to replace the term 'child' with the word 'alleged victim.'⁶⁸ The result is that the legislation establishing that corroboration is not a prerequisite in cases of sexual assault is now applicable to all victims of rape.

As it relates to children, even though the law requires that a *voir dire* be conducted on the child before such testimony is taken, lack of corroboration of the child's testimony still poses the danger of conviction to accused persons who are innocent.

2.3.2. Repeal of Section 38 of the Sexual Offences Act

Previously, under Section 38 of the Sexual Offences Act, it was illegal for a person to make false claims about another party in relation to sexual offences. The false accuser would then be entitled to a sentence equal to that of the crime of which the accused had been convicted. The uncertainty of the section led to the presumption that the loss of the case meant that the defendant had made false claims. Arguments against this section were based on the claim that it prevented reporting of cases because if the claimant were convicted of false accusation, she would face the highly severe and harsh penalties required for rape.⁶⁹

Six years since the passage of the Sexual Offences Act, this section was deleted on the basis mentioned above as well as on the grounds that the Penal Code includes a crime of perjury and other falsification crimes.⁷⁰ The deletion of this section instead of clarifying the ambiguity

⁶⁷ Lekakeny R, 'The elusive justice for women: A critical analysis of rape law and practice in Kenya' Published LLM Thesis, University of Cape Town, Cape Town, 2015, 31.

⁶⁸ Section 124, *Evidence Act* (Cap 80 of 2014)

⁶⁹ Kithaka A, 'Enforcement of the Sexual Offences Act in Kenya' 392 *Pambazuka, Pan African Voices for Freedom and Justice*. 2008.

⁷⁰ Section 108, *Penal Code* (Cap. 63 of 2018).

reflects the priority placed on ensuring the persecution of perpetrators at all costs over the legitimate rights of falsely accused persons to argue that they were victims of a wrongdoing. False rape accusations almost never have serious consequences, and it is extremely rare for a false rape accusation to end in prison time.

2.4. Conclusion

In conclusion, this chapter aims to highlight the legal requirements necessary during rape trials and tries to pinpoint the deficiencies in law that are likely to perpetrate the imprisonment of innocent persons falsely accused of rape. It focuses on both rape and defilement and the various legislations affecting them both.

CHAPTER 3

ANALYSIS OF FALSE RAPE CLAIMS IN KENYA

3.1. Introduction

This section aims to examine the extent of the notoriety of the misuse of rape laws in Kenya by claimants who have malicious aims or claimants who bring claims where a crime did not essentially occur. When such incidences occur, there is a risk that an innocent person may end up in jail. This discussion will therefore try and delve into the notorious contexts of sexual relations that often lead to the lodging of false allegations in the Kenyan context.

3.2. General attitude towards the discussion on false allegations of rape in Kenya

The main argument against discussing the issue of false rape allegations has been the very valid notion that societal myths about women as deceitful and vindictive can feed into.⁷¹ It is likewise contended that discussing false rape allegations may prompt a reaction against believing victims and that such beliefs may indirectly impact the investigation process from the time a case is lodged at the police station to when it is presented in court. A further contention has been that zeroing in on false allegations is a redirection from the considerably more adverse problem of sexual violence and propagates the risk of all other rape complainants being undermined.⁷²

It is, however, clear that the argument against this discussion fails to differentiate carefully between evidence-founded approaches to the topic and baseless discussions that are often informed by stereotypes and confusion around the topic.⁷³ In addition, the risk argument fails to take the interests of those who are falsely accused into account. There is a legitimate basis for the falsely accused to argue they are victims of wrongdoing.

The law has in some instances tried to recognize this victim status of falsely accused persons by legislating punishments through codifying criminal charges relating to perverting the course

⁷¹ Kelly L, 'The (in)credible words of women: False allegations in European rape research' 16 *Violence Against Women*, 2010, 1345.

⁷² Purported false allegations of rape, child abuse and non-sexual violence: Nature, characteristics and implications,

⁷³ Rumney P, 'False Allegations of Rape' 65 *The Cambridge Law Journal*, 2006, 128.

of justice.⁷⁴ This has however not prevented instances where false allegations, though few, have been lodged for various reasons.

3.3. General contexts in which false Allegations of rape occur in Kenya

A false accusation brought before court is usually made in a bid to sway the court with emotion in cases where the claimant's word is bound to be given priority over that of the accused at face value in the absence of adequate evidence.⁷⁵ Consequently, the incidents of false accusations of rape that we see most often are those associated with child abuse where it is easy for the court to believe the narrative brought forth by the child over the accused.

The same applies to cases of rape of women. In these cases, it is difficult to imagine that anyone could bring forward a false accusation considering how much the personal identity and privacy of the claimant are severely violated during a trial process and the severity of the consequences of being found guilty of such a crime.⁷⁶ It is, therefore, often believed that the supposed victims who come forward and report the crimes do so to truly seek the help of the law. And regardless of the substance of the offences, we tend to stand side by side with the victim largely because the danger of challenging them may be detrimental to our social capital and reputation. However, this gives way to a huge void that could be exploited by individuals who have extreme hostility against others.⁷⁷

It is important to note that there are several types of non-malicious false allegations likely to involve the majority of the cases. There is a difference between maliciously orchestrated false assertions and good-faith mistakes by experts or complainants who truly believe that they have been raped. These claims are different from the false claims that arise from a need for sympathy, publicity, or some sort of assistance. They could be claims lodged by a third party who is sincerely worried about the welfare of another person they think has been abused and

⁷⁴ Section 117(a) *Penal Code* (Cap 63 of the Laws of Kenya)

⁷⁵ Paliyath J, 'What is a False Accusation and how can a False Accusation impact the life of the accused?', University of Florida, 2019, 1.

⁷⁶ Paliyath J, 'What is a False Accusation and how can a False Accusation impact the life of the accused?', University of Florida, 2019, 1.

⁷⁷ Pumphrey J, 'The Unseen Impact of False Allegations in Sex Crimes' on 10 June 2019.

<https://www.pumphreylawfirm.com/blog/the-unseen-impact-of-false-allegations-in-sex-crimes/> on 23rd November 2020.

may therefore mount a mistaken accusation in good faith.⁷⁸ Or an accusation by a claimant who goes to the authorities but is uncertain if non-consensual intercourse happened while they were heavily intoxicated and there seems to be no evidence to corroborate the suspicion after further inquiry.⁷⁹

False accusations of rape are serious in the highest respect, where a penalty for defilement, a crime known as statutory rape in other jurisdictions, can be passed out for a term of 20 years,⁸⁰ and certain cases of child exploitation can lead to one being sentenced to life imprisonment. So, in simple terms, a false conviction can commit the wrongfully accused suspect to the justice facility for the remainder of his life.

3.3.1. Alleged Child Abuse

The argument of a child versus the word of an adult when the child claims to be the victim has considerably greater weight than that of the adult, and thus the child can often be granted the benefit of the doubt regarding some of their claims.⁸¹ As shown in the case of Julius Mbugua Musyoki, criminal trials involving allegations of the child sexual abuse are particularly susceptible to wrongful convictions. In this case, Julius' daughter, under the guidance of the mother for malicious reasons, lodged a false complaint resulting in the father being imprisoned. Years later, despite the daughter confessing to having falsified the claims, the appeal of the father was refused based on the fact that it is not unique for the victims of a crime like rape or molestation to want to protect the abuser by withdrawing an accusation.⁸²

Wrongful convictions based on accusation of child abuse have been attributed to factors like sympathy for the child victim, extreme disgust caused by the charges' nature, and the ineffectiveness of traditional *voire dire* questions asked to child witnesses during trial.⁸³

⁷⁸ Kelly L, Lovett J, Regan L, 'A gap or a chasm? Attrition in reported rape cases', *Home Office Research Study* 293, London, 2005, 46–47.

⁷⁹ Rumney P, 'False Allegations of Rape' 65 *The Cambridge Law Journal*, 2006, 130.

⁸⁰Section 8(3) *Sexual Offences Act* (Act No 3 of 2006).

⁸¹ Pumphrey J, 'The Unseen Impact of False Allegations in Sex Crimes' 10 June 2019 <https://www.pumphreylawfirm.com/blog/the-unseen-impact-of-false-allegations-in-sex-crimes/> on 23rd November 2020.

⁸² Oloo A, Courts decline to allow confession of daughter who framed father in rape case, 14 May 2019 <https://citizentv.co.ke/news/court-declines-to-allow-confession-of-daughter-who-framed-father-in-rape-case-247573/> on 23rd November 2020.

⁸³ Shanks L, 'Cross examination of a child witness', 58 *Cleveland State Law Review*, 2011, 575.

According to section 19 of the Oaths and Statutory Declarations Act, *voire dire* examinations are conducted on child witnesses to check whether they have adequate knowledge to understand the need to tell the truth.⁸⁴ Questions asked during this hearing have time and again been labelled incompetent as they make next to zero endeavour to understand the child's level of formative development or capacity to dependably narrate a series of events. Rarely do the questions endeavour to find out whether the child witness is capable of distinguishing reality from imagination. Instead, the child is often allowed to testify upon conducting a brief test inquiring into her knowledge of colours and ability to differentiate a lie from the truth.

It is however notable, as seen in the case of **David Jairo and Ann Achieng v Republic**, that issue of the evidence of a child can be hampered by a myriad of things such as the delays in trial dates.⁸⁵ Such an event can cause inconsistencies in the child's account of things when they are expected to testify on events that occurred almost 5 years from the day of the occurrence of the event.⁸⁶

3.3.2. Adolescence

There is a justifiable inner conflict with respect to the guidelines for regulating adolescent sexuality, the age at which sex and different types of sexual experimentation ought to be viewed as legitimate, admittance to contraception, abortion, and the age gap that should exist between the parties to warrant intervention by the law.⁸⁷ The issue of age gap was particularly discussed in the high court case of **Eliud Waweru Wambui vs the Republic** where the accused had been convicted for 15 years imprisonment in previous courts despite evidence proving that he reasonably believed that the accused was of the rightful age and it was clear that the complainant had consented given that the two had subsequently been living together as a 'married' couple.⁸⁸

In its statement, the court stated that it is reasonable that a person is more likely to be misled into believing that a child is over 18 years of age if the child is between 16 and 18 years old

⁸⁴ Section 19, *Oaths and Statutory Declarations Act* (Cap 15 of 2012)

⁸⁵ *David Jairo and Ann Achieng v Republic* (2012) eKLR

⁸⁶ Mukuhi R, Application of the Best Interest Principle to the Criminal Justice Juvenile System: A Review of Emerging Case Law, 1(1) *Interdisciplinary Journal on the African Child*, 2019, 9.

⁸⁷ *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* (2013) ZACC

⁸⁸ *Eliud Waweru Wambui vs the Republic* (2019) eKLR.

and that the closer to 18 years the child is, the more likely the deception, and the more likely the belief that he or she is over the age of 18 years.

The court further noted how in many jurisdictions, the prescribed age of consent is 16 years given that it is unreasonable to assume that teenagers do not engage in or seek sexual activity as reiterated in the case of **Gillick vs. West Norfolk and Wisbeck Area Health Authority**.⁸⁹ In this sense, therefore, adolescents are a historically suspect category of complainants commonly assumed to be prone to lodging false complaints. In some cases, false rape allegations are lodged by parent or caregiver who found out that the complainant is pregnant as seen in the facts of **Eliud Waweru Wambui vs the Republic**.⁹⁰

3.3.3. False allegation of rape in the adult context

While false accusers often have similar histories, they have varying motives. The motives can roughly be divided into four categories which are: for revenge purposes, for monetary gains, due to a mental illness and the need for an alibi which for adults is usually intending to cover up infidelity. For some cases it is clear why the false complaint is made, and the reasons are fairly transparent.⁹¹ In others, the setting gives a layer of confusions that, in the event that it tends to be revealed, points more towards exploitation and abuse.⁹²

A narrative perpetrated by the media is that false allegations dependent on most of these motives occur at a one-off instance when compared to instances of false accusations that occur in today's hard-drinking culture where consent lines have been blurred.⁹³ Most controversies and discussions around the issue of consent and whether or not sexual activity amounted to rape usually occur in this context as in the case of **Lawrence Frank Wanyama and Another v Republic** that reflected public opinion division on this issue. In this case, the two accused persons, Lawrence Frank Wanyama and Alex Mahaga Olaba who had been charged and convicted with gang rape, were appealing on the account that both them and the victim were

⁸⁹ *Gillick vs. West Norfolk and Wisbeck Area Health Authority* (1985), The United Kingdom House of Lords.

⁹⁰ *Eliud Waweru Wambui vs the Republic* (2019) eKLR.

⁹¹ De Zutter A, Horselenberg R and Koppen P, 'Motives for filling a false allegation of rape', 47(2) *Archives of sexual behavior*, 2018, 458.

⁹² Smythe D, '*Rape Unresolved: Policing Sexual Offences in South Africa*', UTC Press, Claremont, 2015, 145.

⁹³ Carline A, Gunby C and Taylor S, 'Too Drunk to Consent? Exploring the Contestations and Disruptions in Male Focused Sexual Violence Prevention Interventions', 27(3) *Social and Legal Studies*, 2017, 299-322.

drunk during the incident.⁹⁴ The appeal was allowed but upon retrial, the duo was found guilty and sentenced to 15 years imprisonment.

According to the law, which is neutral, if either party is under the influence, there can be no consent. A party must be entirely sober to give consent.⁹⁵ Regardless of this provision, the chances of both parties being charged with counts of sexual assault are narrow. The intoxicated male person is in most instances expected to be responsible for his consent as well as the female's consent in his intoxicated state. The possibility of a party being charged ought be more reliant on the scenario, whereby, if either party is intoxicated to the point where they cannot communicate opposition with a reasonable mindset, it would be viewed as rape.

While intoxicated, legally, a person cannot consent to sex, and even if consent had been obtained prior to the first instance of ingesting the intoxicating substance, the act of having sex while intoxicated may later be deemed to be non-consensual.⁹⁶ Likewise, in criminal cases, determination of whether the complainant wilfully or unwilfully used the drugs is important. The person who drugged the complainant probably had calculated plans to accost the claimant if the drugs were not voluntarily consumed, regardless of whether the perpetrator assaulted the claimant.⁹⁷

It is important to note, however, the truth in the role that alcohol and drug use plays in sexual victimisation where if female victims were drinking at the hour of the supposed assault, and especially if they were drinking with the said culprit, they are less likely to be believed. Such victims are additionally considered to bear greater responsibility for their victimisation.⁹⁸

3.4. Rape culture rooted in patriarchy.

It will be imprudent to discuss false rape claims in Kenya without acknowledging the rape culture that is supported by patriarchal ideals, media narratives and an ingrained culture of victim blaming that exists in the country. Most ethnicities and cultures in Kenya still adhere to

⁹⁴ *Lawrence Frank Wanyama & another v Republic* [2020] eKLR.

⁹⁵ Section 42, Sexual Offences Act, (Act No. 3 of 2006).

⁹⁶ Engle J and O'Donohue W, 'Pathways to False Allegations of Sexual Assault, *Journal of Forensic Psychology Practice*', 2012, 107.

⁹⁷ Engle J and O'Donohue W, 'Pathways to False Allegations of Sexual Assault, *Journal of Forensic Psychology Practice*', 2012, 107-108.

⁹⁸ Carline A, Gunby C and Taylor S, 'Too Drunk to Consent? Exploring the Contestations and Disruptions in Male Focused Sexual Violence Prevention Interventions', 27(3) *Social and Legal Studies*, 2017, 299-322.

the mentality that women are subordinate to men and therefore view them as property belonging to men rather than autonomous individuals. Cultural practices such as the payment of dowry and arranged marriages are responsible for skewed concepts of sexual relations such as marital rape and the failure to acknowledge that this practice amounts to rape.⁹⁹

Intrinsic misogyny and the patriarchy propel ideas that encourage sexual aggression of men and support the violence being meted upon women. They spread the ideology that women are responsible for controlling a man's sexual urges hence in many cases, victims of rape end up being blamed for either dressing scantily or for miscommunicating their intentions.¹⁰⁰

The formation of the idea of human rights in Kenya's legislation is enough evidence of intrinsic misogyny. The dominance of male figures in the legislature is responsible for the continued violation of certain sexual autonomy rights related to women. One such case as has been mentioned, is the concept of marital rape. Marital rape is not recognised in Kenya due to the skewed belief that women are expected to give their husbands sex on demand. Omissions such as these provide scenarios where it is not legally possible to claim rape has occurred in certain cases¹⁰¹.

3.5. Conclusion

In conclusion, this chapter aims to analyse false rape accusations in the Kenyan context by inquiring into people's general outlook towards the topic and examining contexts in which major cases of the sort occur. The contexts discussed include the cases child abuse, adolescent sexual relations and the adult context and it has been revealed that various unique motives and factors contribute towards the prevalence of false accusation in the different contexts.

⁹⁹ Cusmano D, 'Rape Culture Rooted in Patriarchy, Media Portrayal and Victim Blaming' *Writing Across the Curriculum*, 2018, 2-8.

¹⁰⁰ Cusmano D, 'Rape Culture Rooted in Patriarchy, Media Portrayal and Victim Blaming' *Writing Across the Curriculum*, 2018, 5-11

¹⁰¹ Cusmano D, 'Rape Culture Rooted in Patriarchy, Media Portrayal and Victim Blaming' *Writing Across the Curriculum*, 2018, 2-8.

CHAPTER 4

A COMPARATIVE ANALYSIS OF FALSE RAPE CLAIMS IN KENYA WITH SOUTH AFRICA THE UNITED KINGDOM

4.1. Introduction

This chapter aims to explore the existing phenomena vis-a-vis other existing jurisdictions from which Kenya borrowed its provisions from. The research shall conduct a comparative analysis to the United Kingdom which has a common law system same as Kenya and from which extensive research on the topic has been done, as well as South Africa considering the similarity in cultural context between Kenya and the country.

4.2 State of False rape Allegations in the United Kingdom

From an analysis made between 2009 and 2014, it was found that at least 109 women had been prosecuted in the five years for lodging false allegations of rape in the United Kingdom. Most of the convictions involved charges for perverting the course of justice, a charge whose punishment considerably more severe than the lesser offence of wasting police time.¹⁰²

The manner in which false allegations on rape are treated in the UK is said to be more forceful than in nations such as the United States, Australia and Canada, where in the US for instance, an allegation on false rape is treated as misdemeanour offence rather than a felony and most women were not imprisoned when found liable.¹⁰³ Over the most recent thirty years, the issue of sexual assault has consistently been debated on in the UK Parliament and the issue of false rape claims has regularly emerged as a component of these discussions.

For starters, in 1976 as the Sexual Offences (Amendment) Bill was being passed, a change was discussed which would have abrogated the marital rape exemption. Throughout the debate the

¹⁰² 'False Allegations of Rape and/or Domestic Abuse: Guidance for Charging Perverting the Course of Justice and Wasting Police Time in Cases Involving Allegedly False Allegations of Rape and/or Domestic Abuse | The Crown Prosecution Service.' On September 2019 <https://www.cps.gov.uk/legal-guidance/false-allegations-rape-and-or-domestic-abuse-see-guidance-charging-perverting-course> on 23 November 2020.

¹⁰³ Laville S, '109 Women Prosecuted for False Rape Claims in Five Years, Say Campaigners.' The Guardian, December 1 2014 on 23 November 2020.

issue of false rape claims was conspicuous, and it gave the premise for repeated claims that the marital rape exception was logical.¹⁰⁴

When compared to Kenya, a similar history of ideas can be traced. The marital rape exception is reflected in Kenya's legislation specifically in section 43(5) which summarily states that section 43 shall not apply to married people.¹⁰⁵ This provision has the effect of excluding the application of the rape provisions from spouses.

While the sexual offences Act of Kenya was still a Bill in parliament, similar debates to those in the UK were prominent among traditionalists. The debates ended up in a compromise where marital rape was excluded from the Act in exchange for the deletion of section 38 of the Sexual offences Act. The section, as has previously been discussed, made it illegal for a person to make false claims about another party in relation to sexual offences. The false accuser would then be entitled to a sentence equal to that of the crime of which the accused had been convicted.¹⁰⁶

4.2.1. Debates concerning suspect and defendant rights in the United Kingdom

More recently, debates concerning the balancing of suspect and defendant rights during trial have been the norm. The Sexual Offences Amendment Act of (1976) protects a complainant's right to anonymity by granting automatic long-life anonymity to an individual who alleges that they have been a victim of rape.¹⁰⁷ The position of those accused of rape is however different from this as the disclosure of a defendant's identity is only prohibited when it would result to identity of the complainant or due to the defendant's vulnerability. Previously, the 1976 Act granted anonymity to both the complainant and the defendant, but the provision was later repealed in 1988 to protect complainants only.¹⁰⁸

During the passage of the Sexual Offences Bill in 2003, an amendment that would have allowed for anonymity of suspects and defendants in sexual offence cases was tabled in the House of Lords. Supporters of this alteration essentially founded their support on the effects of claims of sexual offences on the life of suspects, especially the individuals who are eventually never

¹⁰⁴ Rumney P, 'False Allegations of Rape' 65 *The Cambridge Law Journal*, 2006, 147.

¹⁰⁵ Section 43(5), Sexual Offences Act, (Act No. 3 of 2006).

¹⁰⁶ Kamau W, Nyaundi P and Serwanga J, *The legal impunity for marital rape in Kenya: A women's equality issue*, 2016, 12.

¹⁰⁷ Taylor L, 'The role of human rights in determining whether complainants of a sexual offences and/or defendants charged with an offence under the Sexual Offences Act 2003 should receive anonymity', Published M. Jur, Durham University, Durham, 2014, 10.

¹⁰⁸ United Kingdom Sexual Offences Act 2003.

charged. In contrast to debates of earlier years, there was little, if any, reference made to the issue of false rape claims.¹⁰⁹ Subsequent debates on the issue were lodged in parliament in 2004, 2006 and 2010, where the latter was a report on a research conducted by the Ministry of Justice which found that the research evidence on which to base an intelligent choice on the significance of offering anonymity to rape defendants were insufficient thus unreliable.¹¹⁰

Ever since, vast researches have been carried out to determine the rate of false rape allegations compared to other crimes, the percentage of rape claims that are false, the effects of these claims on those blamed, the reasons false accusers lodge false claims and the police perceptions of false allegations.¹¹¹ The researches that have been conducted have bore a specific solutions that has been hailed as the ultimate means necessary to help the police to more accurately distinguish between false and true claims. One such solution is the “Statement Validity Analysis” technique that has been advocated as a neutral means of assessing the truthfulness of rape complaints in the UK. It involves assessing a complainant’s allegation of rape according to a set of criteria gathered from a base of actual false and truthful rape allegations.¹¹²

4.2.2. Lessons from the UK

In essence, what can be learned by Kenya from the UK in its endeavour to curtail false accusation of rape is the effort being put to place strict sanctions on the crime. The sanctions proposed include imprisonment for wasting the police time contrary to section 5(2) of the Criminal Law Act 1967 and the crime of preventing the course of justice.¹¹³ Perverting the course of justice is a serious offence that harbors a maximum sentence of life imprisonment. During prosecution of these crimes, the prosecution has to ensure that it strikes a balance between believing genuine claimants and protecting innocent people from false claims. It therefore puts down measures to ensure cases are examined meticulously by highly experienced prosecutors.

¹⁰⁹ Rumney P, ‘False Allegations of Rape’ 65 *The Cambridge Law Journal*, 2006, 147.

¹¹⁰ Taylor L, ‘The role of human rights in determining whether complainants of a sexual offences and/or defendants charged with an offence under the Sexual Offences Act 2003 should receive anonymity’, Published M. Jur, Durham University, Durham, 2014,11. Durham E-Theses Online: <http://etheses.dur.ac.uk/9477/>

¹¹¹ Rumney P, ‘False Allegations of Rape’ 65 *The Cambridge Law Journal*, 2006, 147.

¹¹² Rumney P, ‘False Allegations of Rape’ 65 *The Cambridge Law Journal*, 2006, 151.

¹¹³ Section 5, The UK *Criminal Law Act* (1967)

During trial, the prosecution is expected to handle false rape claims and to be familiar with societal myths on rape and sexuality to ensure a just outcome.¹¹⁴

4.3. The Case of South Africa

Rape in South Africa has constantly been reported as being at a pandemic level such that the country has been branded ‘rape capital of the world’ in the press.¹¹⁵ It is reported that rape cases increased by more than 28,000 between 1993 and 2005, mirroring a pervasiveness that is among the highest revealed anywhere on the planet.¹¹⁶

This situation has been connected to the malicious impacts of apartheid in destroying family structures and perverting masculinities.¹¹⁷ However, it is likely that this increase originates from a blend of other variables, for example, increased reporting, better recordkeeping and maybe an actual increase in the prevalence of criminal offences.¹¹⁸ By 2001, South Africa had the most elevated numbers of announced cases in the planet.¹¹⁹

Amendments to South Africa’s major legislation on rape came just a year after Kenya’s Sexual Offences Act was affected and it reflects similar changes as that of Kenya. For instance, South African courts just like many other Anglo-American jurisdictions, had previously held tightly to the cautionary rule in assessing the evidence of rape complainants, a rule that was subsequently abolished, in 2007.¹²⁰ The sexual offences Act of Kenya of 2006 similarly did the same thing. The cautionary rule continues to apply to child testimony in both countries.

Section 15 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, imposes the age limit of consent to be 16 for and thus introduces the gender-neutral offence of ‘consensual sexual penetration with a child’.¹²¹ This section was repealed in 2013

¹¹⁴ ‘False Allegations of Rape and/or Domestic Abuse: Guidance for Charging Perverting the Course of Justice and Wasting Police Time in Cases Involving Allegedly False Allegations of Rape and/or Domestic Abuse | The Crown Prosecution Service.’ On September 2019 <https://www.cps.gov.uk/legal-guidance/false-allegations-rape-and-or-domestic-abuse-see-guidance-charging-perverting-course> on 23 November 2020

¹¹⁵ Larkin N, ‘Now ‘Rape Town’ can’t fund own crisis centre, Cape Argus’, July 14, 1999. [South Africa: Now ‘Rape Town’ can’t fund own crisis centre - allAfrica.com](https://www.allAfrica.com), accessed 23 December 2020.

¹¹⁶ Burton P, Plessis A, Leggett T, Louw A, Mistry D, Van Vuuren M, National Victims of Crime Survey: South Africa, 2004, 47-49

¹¹⁷ Smythe D, ‘*Rape Unresolved: Policing Sexual Offences in South Africa*’, UTC Press, Claremont, 2015, 16.

¹¹⁸ Section 3, Criminal Law (Sexual Offences and Related Matters) Amendment Act (Act 32 of 2007)

¹¹⁹ Smythe D, ‘*Rape Unresolved: Policing Sexual Offences in South Africa*’, UTC Press, Claremont, 2015, 17.

¹²⁰ Section 60, Criminal Law (Sexual Offences and Related Matters) Amendment Act (Act 32 of 2007).

¹²¹ Section 15, Criminal Law (Sexual Offences and Related Matters) Amendment Act (Act 32 of 2007).

by the Constitutional Court of South Africa insofar as it criminalized consensual sex in children who are above the age of twelve,¹²² a decision that does not affect the strict liability of adults who have consensual intercourse with children under aged children . In June 2015 a Bill was adopted by the National Assembly (still to be ratified by the National Council of Provinces) to decriminalise consensual sexual behaviour between adolescents.¹²³

In contrast to this, the age limit for consent in Kenya is 18 years and there seems to be confusion on whether or not consensual sexual relations between adolescence is a crime given that there is no provision regarding this in the Sexual Offences Act.

4.3.1. False allegations of Rape in South Africa

Just like in other jurisdictions, although false rape claims are rare in South Africa, they are not merely rhetoric. For instance, in 2003, a man named Shezi was condemned to life imprisonment on allegations of defiling his daughter, a sentence that many saw as fairly merited. Ten years into serving his term, Shezi's daughter who was eight years old at the time of the allegations, withdrew her accusation and admitted that her mom had coached her to lie about the assault. She confessed to falsely testifying at trial because she was scared of her mother who had a bad temper. Shezi was later released having served ten years of his sentence.¹²⁴

The narrative had been so carefully manufactured to align with the circumstances that it was difficult to imagine that it was a lie. This, as well as the natural inclination towards the need to believe and protect a child's innocence led the appellate court, at the time of trial, to uphold the convictions.

The accused maintained his innocence all through but was only released from prison when the complainant confessed. Such a case demonstrates societies readiness to condemn a crime regardless of the relevant circumstance of a case.

4.4. Conclusion

¹²² *Teddy Bear Clinic and Another v Minister of Justice and Constitutional Development and Another* [2013] ZACC 35.

¹²³ Smythe D, *Rape Unresolved: Policing Sexual Offences in South Africa*, UTC Press, Claremont, 2015, 16.

¹²⁴ Lubaale E, 'Taking the incidence of false child sexual abuse allegations more seriously' 49 *De Jure*, 2016, 79-80.

In conclusion, the comparative analysis has revealed that the issue of false rape allegations is not a unique issue globally as both South Africa and the United Kingdom have documented instances of it. It has further, outlined very advanced discussions regarding false allegations of rape in the United Kingdom that have yielded solid solutions that Kenya can borrow.

CHAPTER 5

SUMMARY AND RECOMMENDATIONS

5.1. Summary

Chapter one of this study deals with introduction. It begins by setting up the background by briefly discussing the issue of false rape allegations and explaining why it should not be viewed as a fringe matter of little worry to those genuinely worried about the manner in which the criminal justice framework handles rape cases. It further explains how this issue does not only have ramifications to accused persons but to complainants also and goes on to give a rough overview of its prevalence worldwide. The chapter goes on to outline the statement of the problem by noting the need to balance the rights of the accused and accuser throughout trial, leading to the formulating of the objectives which form the topics of discussion for subsequent chapters, the justification of the study, theories used, limitations experienced and finally a chapter breakdown.

Chapter two deals with Kenya's legislative framework on rape and tries to pinpoint a number of issues in the various laws that perpetrate false allegations of rape claims. It highlights the key elements that are necessary to determine an offence occurred during trial and the loopholes in them. The chapter elaborates that the scope of rape being discussed extends to include statutory rape which is referred to as defilement in Kenya.

Chapter three analyses the major contexts in which false rape allegations occur in Kenya. It elaborates through caselaw the major motives for the false claims and the circumstances which lead to the ultimate wrongful conviction of some innocent people.

Chapter four focuses on comparing the situation in Kenya to that in other jurisdictions in particular the UK and south Africa with the objective of understanding their efforts in curtailing the rate of false accusation of rape in the jurisdictions.

Chapter five ultimately presents a concise summary of the chapters, states the conclusion and provides recommendations for policy improvement.

5.2. Recommendations

Given the lack of serious documentation of this issue in Kenya, there is need for reform. The factual rate of false claims could be of importance to the future course of legal policy. There is therefore a need for a registry to document its prevalence or not, in Kenya. This is important for example, in the instance where it is determined that the rate of false allegations is

significantly higher in rape cases than in other felonies. A situation that may necessitate the re-evaluation of legal provisions relating to rape cases.

Once a determination on the creation of a registry is made, the next substantive reform may be the determination of the meaning of a false allegation given that the definition of ‘false complaints’ is one of the key reasons for the wide discrepancy in statistic worldwide. The difficulty in defining this term has been proved given that there are many questions that arise from it. For instance, should a case classified by the police as unfounded be included and are decisions made by police regarding particular cases based on merit or stereotypes that they conform to.¹²⁵

Regardless of this difficulty, there is need for a definition which needs to be narrow so as to only include cases where there has been a no sexual offence committed by the accused.¹²⁶

¹²⁵ Smythe D, ‘*Rape Unresolved: Policing Sexual Offences in South Africa*’,142.

¹²⁶ Smythe D, ‘*Rape Unresolved: Policing Sexual Offences in South Africa*’,143.

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