

ADDRESSING WRONGFUL RAPE CONVICTIONS IN KENYA: A CASE FOR
CRIMINALIZATION OF FALSE RAPE ACCUSATION

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School



Prepared under the supervision of

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14,685 WORDS

MARCH,2024

DECLARATION

I, **NJOGU ESTHER MUMBI**, do hereby declare that this research is my original work and 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.

Signed.....

Dated.....08/03/2024.....

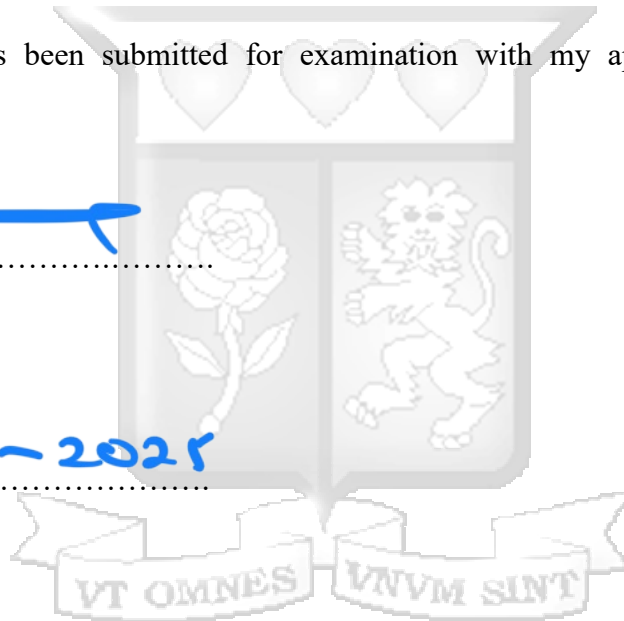
This dissertation has been submitted for examination with my approval as University Supervisor.

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ACKNOWLEDGEMENT

I wish to express my deepest gratitude to my able supervisor, Patrick Nzomo, for his valuable guidance, support, and patience throughout the entire dissertation process. His commitment and criticism strongly added to the success of this dissertation. I acknowledge the support of my family, my mum, dad, and sister, who offered me constant motivation and company throughout the writing process. Special thanks to my mum for constantly anchoring me with her encouragement. Above all else, I thank God for good health and the strength, zeal, and passion to start and finish this dissertation.



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3. Penal Code, Cap 63, Laws of Kenya.
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1. Criminal Procedure Act, No. 51 of 1977.
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1. Penal Code of Botswana, Cap 08:01, Revised Edition 2019.

International Legal Instruments

1. International Covenant on Civil and Political Rights (ICCPR), 19 December 1966, 999 UNTS 171.



LIST OF ABBREVIATIONS

CoK- Constitution of Kenya,2010

UN- United Nations

SOA- Sexual Offences Act, Cap 63A, Laws of Kenya

PTSD -post-traumatic disorder

ICCPR - International Covenant on Civil and Political Rights

CPA – Criminal Procedure Act

SAPS -The South African Police Service

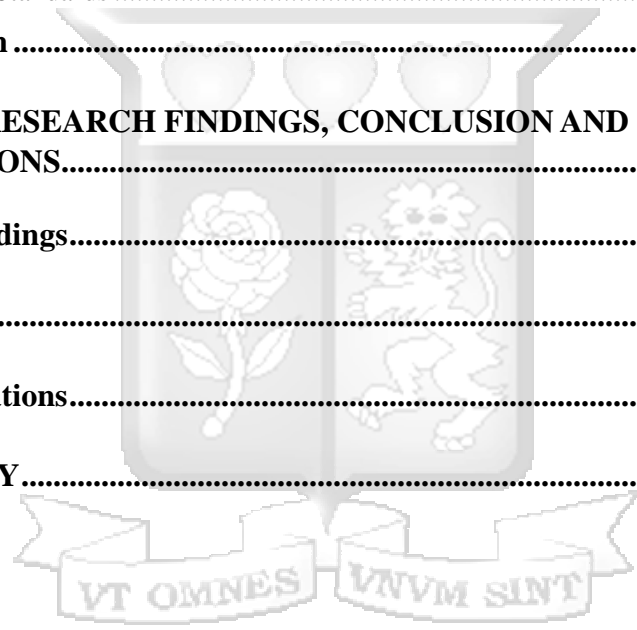


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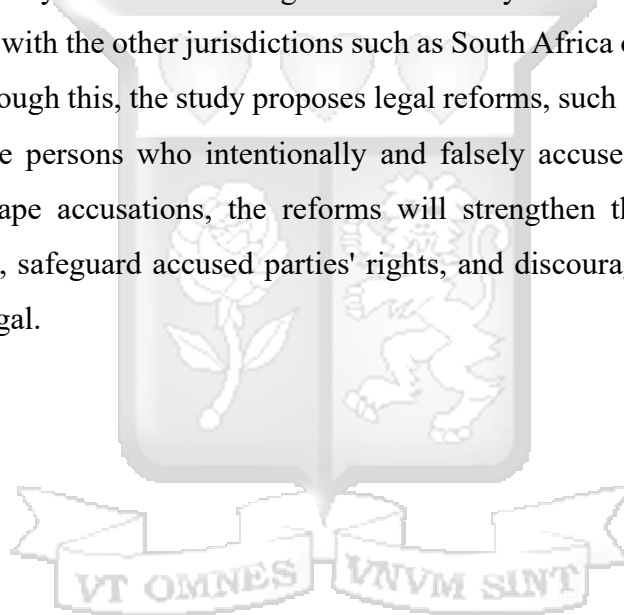
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ABSTRACT

Kenya has witnessed cases involving persons wrongfully convicted of rape as a result of false accusations. Such cases not only undermine the integrity of Kenya's legal system but also the accused person's rights outlined in the Constitution of Kenya 2010. The consequences range from criminal sanction to stigma, damaged reputation, strained relationships, isolation, and lack of faith in the legal system. As a consequence, this study explores the need to criminalize the act of giving false rape accusations in court. It also seeks to explore possible elements that the prosecution ought to prove to convict an individual that makes a false rape accusation. Furthermore, it discusses the suitable punishment that should be given for such an offence. In doing so, the paper analyses the current legislations in Kenya and Kenyan case laws while juxtaposing the same with the other jurisdictions such as South Africa on the question of false rape accusations. Through this, the study proposes legal reforms, such as the adoption of laws that severely penalize persons who intentionally and falsely accuse someone of rape. By criminalizing false rape accusations, the reforms will strengthen the general fairness of Kenya's legal system, safeguard accused parties' rights, and discourage false allegations by making such acts illegal.



CHAPTER ONE: INTRODUCTION

1.1. Background

In recent years, the phenomenon of wrong convictions in rape cases borne out of false accusations has emerged as a pressing concern in the Kenyan legal system. These violates the tenets of Article 29(a) of the Constitution of Kenya which provides for the right not to be deprived of freedom without a just cause.¹ As a result, this undermines the judicial system's primary purpose of enhancing justice. Furthermore, such a miscarriage of justice erodes public confidence, and as a result, people become reluctant to report crimes and to cooperate with law enforcement.² In addition to the above, it creates a risk in society as the actual perpetrator is left scott-free and could strike again at any time.³ As Abraham Lincoln said, truth is the best vindication against slander. This underscores the main objective of a legal system.⁴ In the context of rape cases, where emotions run high and reputations may be severely damaged, the pursuit of truth is paramount. This dissertation aims to make a case for criminalizing false allegations by exploring and adopting certain aspects drawn from the legal framework of South Africa.

There is a myriad of reasons why individuals fabricate lies in rape cases. Some prevalent motives include monetary gain, revenge, anger, generating sympathy, drawing attention, and gaining leverage over a former partner in custody proceedings.⁵ The above is evident in Kenya, as was the case involving Mzee John Mutai. He served a sentence of 15 years for an alleged rape that never happened. His conviction stemmed from personal differences with a neighbour.⁶

Another example is a case involving a lady named Mercy, who fabricated an allegation against a chief to cover up their affair after the husband became aware of it.⁷ Falsifications are not only

¹ Article 29 (a), Constitution of Kenya (2010).

² Ekiru T, 'Wrongful conviction in the Kenyan criminal justice system: a survey of Julius Wambua case,' Academia.edu, 2.

³ Ekiru T, 'Wrongful conviction in the Kenyan criminal justice system', 1.

⁴ Steiner M, 'The lawyer as peacemaker, law and community in Abraham Lincoln's slander cases' *Journal of the Abraham Lincoln Association*, 1996, 1-22-<[The Lawyer as Peacemaker: Law and Community in Abraham Lincoln's Slander Cases](#)>-on 27th November 2024.

⁵ Zutter A, Horselenberg R, Koppen P, 'Motives for filing a false allegation of rape,' Springerlink.com, 2016, 458, 459.

⁶ Ktn News, 'Joy a 61-year-old man wrongfully convicted of rape is free YouTube Video, November 22, 2024, [Joy as 61-year-old man wrongfully convicted of rape is freed - YouTube](#)

⁷ Vidija P, 'Be cautious while reporting rape cases, DCI warns after woman falsely accuses area chief', *The Standard*, 2022-< https://www.standardmedia.co.ke/national/article/2001424398/be-cautious-while-reporting-rape-cases-dci#google_vignette >-on 19 July 2024.

in rape cases but also extend to other sexual offences such as defilement. This was evident in the case involving Julius Wambua, who was incarcerated for ten years at Kamiti Prison for defiling her daughter.⁸ Mwende, the daughter, recanted her testimony, stating that the mother coached her. It later emerged that Wambua and his wife disagreed on many occasions regarding ownership of a parcel of land. This prompted her to make false accusations against Wambua. She went to levels of bribing two medical practitioners who conspired to produce a falsified medical report.

According to a survey done by the Kenya Economic Survey in 2023, 827 people were charged with the offense of rape, with 95.8% being male and 4.2% being female.⁹ Data from the Office of Director of Public Prosecutions showed that, on average, at least 41 women are raped daily.¹⁰ According to the Kenya National Police Service (NPS), there were 939, 941, 882 reported rape cases in Kenya in 2020¹¹, 2021¹² and 2022¹³ respectively. Unfortunately, there are no subsequent sufficient reports on the crime rates in Kenya from the police. For instance, the 2023 NPS report does not mention rape at all.¹⁴ However, there have been other sources that provide statistics on the same though on general terms as sexual offenses where it shows that between 2021 and 2022, Kenya recorded a total of 10,442 cases of sexual offenses.¹⁵ Of these, 2,306 were withdrawn due to poor investigations, victim ignorance, legal issues, and witnesses recanting their evidence.¹⁶ From the above, it is evident that there is no accurate record or statistics on rape cases much less on false rape allegations in Kenya.

The intention of this study is not to invalidate the fight against rape in Kenya, rather it seeks to eliminate a staggering concern that further disparages the plight for actual victims of rape. The United Nations (UN) categorizes rape as a grave and human rights violation. It is a

⁸ Ndunda J, 'Man wrongfully jailed for life for defiling daughter leaves Kamiti Prison,' Nation, 18 December 2020- < <https://nation.africa/kenya/news/man-wrongfully-jailed-defiling-daughter-leaves-kamiti--3232422> >- on 18 December 2020.

⁹ Africa Check, 'How many rape cases are recorded in Kenya in a year?', Info Finder, on 2 May 2024- < <https://africacheck.org/infofinder/explore-facts/how-many-ropes-are-recorded-kenya-year#:~:text=According%20to%20the%20Kenya%20economic,35%20or%204.2%25%20were%20female.>> on 23 September 2024.

¹⁰ Muthoni K, 'Win for survivors after judge rules rape cases must go through court,' The Standard Since 1902, - < [Win for survivors after judge rules rape cases must go through court - The Standard \(standard media.co.ke\)](https://www.standardmedia.co.ke/news/article/5054447) > on 24 September 2024.

¹¹ Kenya National Police, *Annual Crime Report*, 2020.

¹² Kenya National Police, *Annual Crime Report*, 2021.

¹³ Kenya National Police, *Annual Report*, 2022.

¹⁴ Kenya National Police, *Annual Report*, 2023.

¹⁵ Muthoni K, 'Win for survivors after judge rules rape cases must go through court'.

¹⁶ Muthoni K, 'Win for survivors after judge rules rape cases must go through court'.

manifestation of gender-based violence against women and girls that could amount to torture.¹⁷ In Kenya, the ingredients of rape are contained in the Sexual Offences Act (SOA) Section 3, which stipulates that a person commits rape if they unlawfully and intentionally commit an act that causes penetration with their genital organs. The other person does not consent to the penetration, or the consent is obtained through force, threats, or intimidation of any kind.¹⁸ Section 42 SOA defines consent as a choice made by an individual who is free and competent to make that choice.¹⁹ On the other hand, penetration is defined as the partial or complete insertion of the genital organs of a person into the genital organs of another person under Section 2 of the SOA.

This has been highly litigated in a number of cases such as in *Republic v Oyier* where the court emphasized that consent is a critical element in establishing a rape case.²⁰ The same was also reiterated in the case of *Njau v Republic* where the court also addressed the issue of uncorroborated evidence for a conviction.²¹ Corroboration was previously considered mandatory but is no longer required, as highlighted in Section 124 of the Evidence Act. This section made it easier for the victims' cases where their testimony alone is sufficient for conviction, provided the court is convinced that the testimony is truthful.²² Even though this move serves to ease the victims' cases against their abusers, the same has been manipulated through falsification of rape allegations.

Despite efforts in the Kenyan legal system to aid the victim, there is little to no protection for an accused person who has been wrongfully convicted. Attempts to protect an accused can be seen in drafting the Sexual Offences Act. There was an attempt through a proposal in the Sexual Offences Bill which stated that "*Any person who makes false allegations against another person to the effect that the person has committed an offence under this Act is guilty of an offence and shall be liable to punishment equal to that for the offence complained of.*"²³ The section was, however, deleted for the reason that it would be difficult for victims to report

¹⁷ United Nations Human Rights, Rape as a grave and systematic human rights violation and gender-based violence against women, 5 August 2020.

¹⁸ Section 3, *Sexual Offences Act* (No. 3 of 2006).

¹⁹ Section 42, *Sexual Offences Act* (No.3 of 2006).

²⁰ *Republic vs. Oyier* [1985] eKLR.

²¹ *Njau v Republic* (2022) eKLR.

²² Section 124, *Evidence Act* (No. 19 of 2014).

²³ CREAM, AMWIK, ECWD, A simplified version of the Sexual Offences Act 2006, 2006, 16.

assault due to fear of being victimized.²⁴ In the aftermath of the deletion of the said Section and enforcement of the SOA, incidences of false rape allegations have become increasingly prevalent in the Kenyan jurisdiction.

South Africa, on the other hand, has an impressive record of their crime rates. According to the South African Police Service, there were 42,289; 36,330; 41,739; 42,780; and 42,569 in 2020, 2021, 2022, 2023, and 2024.²⁵ Rape cases are prosecuted under the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. Similarly, to the situation in Kenya, s 208 of the Criminal Procedure Act of South Africa allows their courts to convict someone based on the evidence of a single witness.²⁶ However, this has also been misused through false rape accusations. For instance, in 2003, Sifiso Shezi was wrongly convicted based on fabricated false evidence of the alleged victim.²⁷ Likewise to Kenya, there is no record of incidences of false rape accusations in South Africa but some are reported widely in mainstream media.

In Botswana, sexual offences are low with only 9% of the crimes being reported in 2020.²⁸ When it comes to false rape allegations, Botswana has a good record of litigated cases since it has a law that expressly states false allegations in rape cases as a crime.²⁹ This country is relevant in this study because it is a good comparator for what the Kenyan legal regime could be on false allegations in rape cases.

It is trite that rape has as a long-lasting effect on the victim thus causing significant chaos in the life of the targeted person. Though not on equal capacity, persons who are falsely accused of rape allegations also experience a significant disruption of their lives. Once vindicated, individuals still encounter challenges while trying to reintegrate back into society. The individuals face psychological problems such as depression, anxiety and panic attacks, post-traumatic stress (PTSD), insomnia, drug abuse, dissociative disorder, and antisocial behaviour,

²⁴ Onyango W, Ndungú N, Baraza N, Birungi H, 'The making of the Kenya sexual offences act,2006: Behind the scenes,' Kwani Trust, 2009, 25.

²⁵ South African National Police Service, *Police Recorded Crime Statistics, 2023 - 2024 Financial Year Annual Figures* (April 2023 to March 2024), Republic of South Africa.

²⁶ Section 208, *Criminal Procedure Act* (Act 51 of 1977) (South Africa).

²⁷ Syabonga B, 'False rape accusations: Reputation damage and statutory redress for the legally exonerated in South Africa' Unpublished LLM Thesis, University of Kwazulu-Natal, Durban, 2022.

²⁸ Statistics Botswana, 'Percentage distribution of offences in Botswana' 2020.

²⁹ Dambe B, 'A Double-Edged Sword? The Criminalization of False Rape Accusations in Botswana,' Oxford University Press, 2024, 9.

among others.³⁰ Additionally, they suffer severe damage to their reputation and the enduring effect of being wrongfully convicted in rape cases. The stigma persists after liberation as society will never regard the individual as a normal human being. Regardless of their innocence, society views the accused with suspicion.³¹

In addition, the vindicated persons from false rape allegations also have strained relationships with their family, friends, children, and others. They become socially withdrawn and isolated due to a sense of being burdensome. Their attitude towards the justice system is one where trust and confidence are lost. In addition, the accusation negatively impacts their employment. Once convicted, they lose their jobs, and after being acquitted, they struggle to get references from former employees. Furthermore, their records show a criminal record that taints their character when looking for new jobs.³²

This study aims to make the case that even though rape cases have wreaked havoc on many victims in Kenya, it is equally important to wade off hoax rape allegations. The research expounds on the existing legal framework in the discussion and the flaws contributing to wrongful convictions. The study then examines whether criminalizing false allegations can redress the pervasive issue of wrongful rape convictions in Kenya. Finally, the study offers recommendations based on a comparative study of the legal framework of South Africa and Botswana.

1.2. Statement of the problem

An exemplary criminal justice in this context has the attributes of fairness, transparency, and accountability. It is one which serves the interests of both the accused and the victim. The Kenyan justice system has made significant strides in addressing rape cases through laws such as the Sexual Offences Act and Evidence Act. However, the issue of false allegations in rape cases has become a growing concern in the country. Occasionally, you will not miss a story in the media of a man freed after being wrongfully convicted of rape due to false allegations.

³⁰ Darunde R, Bansal H, 'Psychological impact of wrongfully accused and false conviction in sexual assault cases: A systemic literature review,' in Shinde R, Malviya R, Gupta N, (eds) *Industry 5.0 and Paradigm Shift: Emerging Challenges*, Sunil Sachdev, 2023, 86.

³¹ Darunde R, Bansal H, 'Psychological impact of wrongfully accused and false conviction in sexual assault cases', 87.

³² Greenberg N, Brooks S, 'Psychological impact of being wrongfully accused of criminal offences: a systematic literature review,' *SageJournals*, 2021, 47.

Studies show that the motives behind individuals who make false allegations include attention-seeking, revenge, sympathy, and monetary gain.

The Kenyan legal framework lacks laws criminalizing false rape allegations. Consequently, this leaves room for judicial misuse and perpetuates injustices in the country. A wrong conviction in a rape case has grave impacts on the accused. They suffer long-lasting effects, including reputational damage and severe harm to their personal and professional lives. As the person tries to deal with the stigma and anguish of being wrongfully accused and imprisoned, the emotional toll they experience is severe. It frequently results in mental health problems like anxiety attacks, depression, and PTSD, while others commit suicide as they are unable to cope.

The above raises a proportionality question: is it fair that the false accuser is left scot-free while the accused grapples with psychological torture and stigma from society? Failure to address the injustice of false rape accusation erodes public confidence in the justice system and enhances miscarriages of justice. This study aims to make a case for criminalizing false rape allegations. The research explores the impacts of wrongful convictions and how criminalizing false accusations can solve this issue. It does so by carefully investigating South African legislation and recommending what can be adopted to ensure a justice system that protects both the victim and the wrongfully accused.

1.3. Research objectives

The specific research objectives in this paper include the following:

- a. To analyse whether the current legislative, policy, and regulatory frameworks in Kenya guard against false accusations in rape cases.
- b. To assess whether criminalization of false rape accusations can serve as an effective tool to prevent wrongful convictions in rape cases.
- c. To offer recommendations based on a comparative study of the legal systems in South Africa and Botswana.

1.4. Research questions

This research seeks to answer the following questions:

- a) Does the existing legislative, policy, regulatory, and institutional framework adequately guard against wrongful conviction of rape cases resulting from false accusations in Kenya?

- b) Can the criminalization of false accusations safeguard against wrongful rape convictions?
- c) What recommendations can Kenya adopt from a comparative study with South Africa's and Botswana's legal framework?

1.5. Hypothesis

False allegations in rape cases will, to a great extent, be mitigated through stern legislation that seeks to penalize such falseness, thus earning societal trust and confidence in the Kenyan judicial system and saving individuals from the immense consequences brought about by such false allegations.

1.6. Purpose of study

Society expects its members to uphold a standard of moral character, assuming that human beings are rational actors capable of distinguishing right from wrong and choosing the former. The goal of this research is to argue for the criminalization of false accusations to prevent wrongful convictions in rape cases. The study is relevant as it addresses the existing gaps that exist in the laws of Kenya on rape. It seeks to solve the existing literature gap on the topic at hand. Literature on this discussion is relatively minimal as most tend to discuss the rape victim rather than the accused persons.

This study also attempts to fill this void and act as an essential reference for legal practitioners, academics, and lawmakers in developing future legislation and policies aimed at responding to wrongful convictions in rape cases. The study intends to solve this by carefully analysing the existing gaps in rape laws that create leeway for misuse and how the criminalization of false rape allegations can create a justice system that is fair to all. The study aims to do so by comparing the legal framework of South Africa and recommending various best practices on criminalizing false allegations.

1.7. Theoretical framework

This section explores and highlights theories related to the research topic to comprehend the phenomenon of wrongful convictions in rape.

1.7.1. Retributive justice theory

The first proponents of retributive justice theory were ancient philosophers such as Cicero, Immanuel Kant in 1790 and Georg Wilhelm Friedrich Hegel in 1821 in their early works.³³ This theory suggests that individuals who commit crimes ought to be punished. It also suggests that the authorities should only arrest a person if they have broken the law. The key conditions in this theory are proportionality, culpability, and consistency. Proportionality dictates that the severity of the punishment ought to be equivalent to the harm caused by the offense.

Secondly, culpability involves investigating whether the crime committed was intentional, negligent, or a moral fault. This condition ensures that the punishment of a wrongdoer is equivalent to the individual's level of responsibility for the crime. Thirdly, consistency; similar offenses should have the same punishments.

Lastly, personal responsibility proposes that there should be no doubt about who committed the crime.³⁴ Retribution ensures that the guilty are punished and the innocent are protected, thus providing an appropriate moral justification for punishment.³⁵

The impacts of a false rape allegation are permanent and lead to gruesome harm to the individual, their family, and the society at large. The punishment for falsification of rape cases ought to be strict to prevent wrongful convictions. The motive of a false accuser should determine the punishment they should face. The theory aids the study make the argument that criminalizing false rape allegations would significantly reduce wrong rape convictions.

1.7.2. Deterrence theory

The deterrence theory traces its origin to the early works of Jeremy Bentham and Cesare Beccaria who argued that man is inherently bound to commit offenses.³⁶ As a consequence, they argued, the laws existed to deter persons from committing such offences. They also posited that the laws should provide punishment for the offences which ought to be proportional to the crimes. argues that individuals should be punished for the crimes

³³ Walen, Alec, "Retributive Justice", *The Stanford Encyclopedia of Philosophy* (Winter 2023 Edition), Edward N. Zalta & Uri Nodelman (eds.), URL <<https://plato.stanford.edu/archives/win2023/entries/justice-retributive>>.

³⁴ Meyer J, 'Retributive Justice' Encyclopaedia Britannica, 2014.

³⁵ England J, 'Evaluating the case of Joseph McCann using the rehabilitations and retribution philosophies of punishment,' The University of Sunderland, 2023, 7.

³⁶ Johnson B, 'Do criminal laws deter crime? Deterrence theory in criminal justice policy: A primer' *Minnesota House Research Department*, 2019.

committed.³⁷ An example is the use of deterrence theory to develop policies. Legislators apply this theory to prevent individuals from performing such heinous acts. To combat serious crimes, legislators make policies that emphasize offenders being caught rather than simply increasing jail terms.³⁸ Because the fear of being caught is more immediate than the prospect of a longer sentence, it becomes a more substantial deterrent effect.

This theory is essential to this study as it provides a basis for putting in places laws that will deter persons from making false accusations in rape cases. Criminalizing false rape accusations and making laws that raise awareness of the consequences of lying would deter people from making false claims. This would significantly reduce and prevent the injustice of wrong rape convictions.

1.8. Literature review

1.8.1. Introduction

False accusations of sexual assault not only damage the legitimacy of the respective legal system but also cause the wrongly accused severe and sometimes unremitting harm. This section thematically explores existing literature on false accusations. First, it highlights the element of *mens rea* in false accusations to establish a criminal intent. Additionally, it interrogates what forces people to make false accusations, cultural and structural perspectives, and the need for legal and policy changes. Thereafter, it justifies the need for punishing falsification of rape allegations by shedding light on the psychological and social impacts on persons who are falsely accused with rape allegations. The analysis incorporates submissions from academic contributors outlining an in-depth rationale for criminalizing those who make false accusations.

1.8.2. The *mens rea* in false rape accusations

Understanding motivations for false allegations is critical for establishing a criminal case against perpetrators on the basis of the criminality of their intentions. Samuel Demarchi *et al.* identify cognitive dissonance as a psychological mechanism behind some false accusations.³⁹ Their study highlights how individuals may fabricate claims to reconcile personal guilt or social pressures, such as when consensual acts conflict with moral or religious beliefs.

³⁷ Johnson B, 'Do criminal laws deter crime? Deterrence theory in criminal justice policy' 3.

³⁸ Johnson B, 'Do criminal laws deter crime? Deterrence theory in criminal justice policy' 17.

³⁹ Demarchi, S., et al. 'Cognitive dissonance and false rape allegations: A case study.' *La Revue de Médecine Légale* 11.3 (2020): 122-128.

Motivations such as revenge, financial gain, and attention-seeking also emerge as drivers of false allegations.

Similarly, Dambe's work provides two key arguments crucial to this study.⁴⁰ Dambe argues that false accusations in rape cases may result from seeking revenge and obtaining attention.⁴¹ Moreover, he found that some women may make false allegations to extort money from men, others because of bitterness due to failed relationships. He further explains that for a person to be criminalized for making a false accusation, the court should prove that the individual made the accusation knowingly, meaning deliberately.⁴²

The same is reiterated by Matthew Sharp, who posits two main reasons why individuals can make false accusations of rape which include intentionally curated memories and accusations. On memories refers to situations where an individual perceives the assault memory as real. This is a common phenomenon in children's minds. He also argues that children are more susceptible to false memory implantation.⁴³ Intentional false accusations often stem from ulterior motivations such as seeking revenge, financial gain, expressing regret, drawing attention, anger, mental instability, and gaining leverage in divorce cases.⁴⁴

Dambe's second argument is about the ingredients needed to criminalize a false accuser in a rape case. The burden of proof lies on the prosecution to prove beyond reasonable doubt that an allegation of rape was false and misleading. *Mens rea* ought to be shown. The prosecution has to show that the victim at the time of making the allegation was aware that they were not raped or the person identified is not the one who committed the rape. *Actus reus* refers to the action of making a false allegation against another due to various factors. An exception to the law is that persons who exaggerate facts surrounding a rape offense would not be considered to fall under this category. In addition, a mistaken identity where an individual honestly believes they did not consent does not amount to the offence of false accusations.⁴⁵

⁴⁰ Dambe BJ, 'A double-edged sword? The criminalization of false rape accusations in Botswana' Oxford, 2024, 6

⁴¹ Dambe BJ, 'A double-edged sword? The criminalization of false rape accusations in Botswana' 6.

⁴² Dambe BJ, 'A double-edged sword? The criminalization of false rape accusations in Botswana' 6.

⁴³ Sharp M, 'Common reasons for false allegations of rape & sexual assault' The Law Office of Matthew D. Sharp.

⁴⁴ Sharp M, 'Common Reasons for False Allegations of Rape & Sexual Assault'.

⁴⁵ Dambe B, 'A double-edged sword? the criminalization of false rape accusations in Botswana' 4, 5.

In other jurisdictions where different races reside, the racial dimension of false accusations is starkly evident, such as in Patton and Snyder-Yuly's study.⁴⁶ Their analysis of historical and contemporary cases reveals that white women's false accusations against black men often serve to uphold white patriarchal power and reinforce racial hierarchies.

The insights in the works above are crucial for this research as they provide a solid foundation for the ingredients the prosecution ought to determine to identify a false accuser in rape cases. These works are extensive as they cover a broader jurisdictional aspect, providing a wider picture of the semblance and distinction in false accusation cases. However, it is notable that in the context of Kenya, the lack of a legal framework that criminalizes false accusers in rape cases is a huge stumbling block.

1.8.3. The scourge of false rape accusations in Kenya and South Africa

Structural inequities and cultural biases amplify the prevalence and impact of false accusations. Barn and Kumari's examination of complainant credibility within Indian courts reveals how patriarchal legal systems scrutinize victims disproportionately, perpetuating rape myths that harm both genuine victims and those falsely accused.⁴⁷ Similarly, this is evident both in Kenya and South Africa.

In her work, Otieno assesses the issue of age, the culture of patriarchy, and its effects on false rape claims.⁴⁸ The presumption in the Kenyan system is that individuals below the age of eighteen years are incapable of giving consent to sexual activity. She critically analyses the case of *Eliud Waweru Wambui v Republic*, where the girl's age was contested. The argument is that the accused believed the complainant was of the rightful age. He was sentenced to serve fifteen years imprisonment for the crime of rape and defilement. The court later stated that the defence in a rape case is established if the individual rightfully believed that the girl, in this case, was of the right age and consented to sexual activity. It was later determined that the complainant made the allegations due to duress from the parents.⁴⁹

⁴⁶ Patton TO & Snyder-Yuly J, Black Men Will Do: Rape, race and the ultimate scapegoat, *Journal of Black Studies*, 2007, 37(6), 859-895.

⁴⁷ Barn & Kumari, 'Understanding complainant credibility in rape appeals: A case study of high court judgements and judges' perspectives in India, *Research Gate*, 2015, 3.

⁴⁸ Otieno AN, 'Assessing false allegations of rape in Kenya' Unpublished LLB Dissertation, Strathmore University, Nairobi, 2021.

⁴⁹ Otieno AN, 'Assessing false allegations of rape in Kenya' 23.

In South Africa, Sifiso Shezi was a victim of this ordeal in 2003 where he was sentenced to two life sentences on allegations that he had raped his eight-year-old daughter.⁵⁰ During the period of his imprisonment, Sifiso maintained his innocence but the same landed on deaf ears. He was already a condemned man. In 2008, 10 years after Sifiso's sentencing, his daughter retracted her statement stating that her mother had coerced her to lie about the abuse. Additionally, the daughter confessed that her mother coached her to testify that her father had raped her. Fortunately, in 2013, Sifiso was released but no retribution was meted to the mother of the daughter.

The net effect of such cases is that it has created an attitude of disbelief against rape allegations thereby disadvantaging actual victims. On January 2021 in South Africa, two popular DJs Fresh and Euphonik were accused of drugging and sexually assaulting Siphelele Madikizele in 2011.⁵¹ This case became a hot topic in South Africa with majority of the public sided with the two accused persons calling Siphelele a liar.⁵² Later on, the prosecution dropped the charges on grounds that there was insufficient evidence. It is noteworthy that such perceptions do not take into account factors such as insufficient evidence in legitimate cases.

Another incident was when former South African president Jacob Zuma was accused of raping Fezekile Ntsukela Kuzwayo in 2006.⁵³ The trial case was highly politicised whereas the alleged victim was labelled as a 'serial liar' and eventually her case failed. These two cases show the negative effect false rape accusations have on the fight against rape. It becomes exceedingly hard to prove one's case and the general public also tends to take caution whenever someone reports a rape case.

⁵⁰ Geldenhuys K, 'False allegations - the forgotten victims' *Sabinet African Journals*, 111 (2) 2018.

⁵¹ Storm Simpson, 'Police confirm rape case opened against DJ Fresh and Euphonik' *Capetownetc*, 15 January 2021.

⁵² Hazan E and Bridger E, 'The myth of the lying woman: Historical legacies of rape claims and racialized assumptions in South Africa' *South Africa's Hidden War*, 2021. < <https://hiddenwar.exeter.ac.uk/2021/03/18/the-myth-of-the-lying-woman-historical-legacies-of-rape-claims-and-racialised-assumptions-in-south-africa/> > on 2 April 2025.

⁵³ Vilakazi E and Ulin J, 'Intermediating politics through subjectivity in Khwezi: The remarkable story of Fewekile Ntsukela Kuzwayo by Redi Tlhabi' *Florida Atlantic University Undergraduate Research Journal*, 9, 2020.

1.8.4. Psychological and social impacts of false accusations

Victims of false rape accusations are often marred with serious psychological issues due to the turmoil of such an experience. Leslie Scott highlights the need to criminalize false accusers in rape cases.⁵⁴ From her work, it is evident that considering the principle of proportionality, the harm caused to the falsely accused outweighs the intended protection of the victim. John Wilson, a psychologist who is part of her discussion, argues that the injuries caused by wrongful convictions cause permanent scars.⁵⁵ As a result, it is therefore imperative to implement stringent measures to address the issue of false accusations in rape cases.

Leslie's main argument is that the wrongfully convicted suffer tremendous psychological trauma that results from imprisonment and integration into society.⁵⁶ She does this by giving a comprehensive study of six exonerees. The highlighted issues that an exoneree suffers are lack of employment, broken relationships, drug addiction, suicide, change of personality, societal discrimination, hatred, and anger, among others.⁵⁷ One of the exonerees, Kirk Noble, who served nine years in prison, convicted of rape and murder, states that it never ends and it will never end. He further explains that ex-prisoner status prevented him from getting a job. In addition to the trauma of conviction itself, the lack of employment infuses more stress and sadness into the individual, hence compounding the mental health problems.⁵⁸

False accusations inflict severe harm on the accused's reputation and by extension their family members and friends who may equally be shamed for the same. Tracey Patton and Julie Snyder-Yuly explore the racialized implications of such accusations in their analysis of the Katie Robb case at Iowa State University.⁵⁹ The claim fabricated against four black men revived harmful myths about black masculinity, framing them as violent threats to white women. This case underscores how false accusations reinforce systematic racism, entrenching stereotypes that devastate individuals and communities.

⁵⁴ Scott L, "It never, ever ends" 13.

⁵⁵ Scott L, "It never, ever ends" 13.

⁵⁶ Scott L, "It never, ever ends" 10.

⁵⁷ Scott L, "It never, ever ends" 10.

⁵⁸ Scott L, "It never, ever ends" 11.

⁵⁹ Patton TO and Snyder-Yuly J, 'Black men will do: Rape, race and the ultimate scapegoat' *Journal of Black Studies*, 2007, 37(6), 859-895.

Similarly, Teresa Dubois discusses the psychological toll of “unfounding” legitimate sexual assault claims, whereby victims’ experiences are dismissed due to stereotypes.⁶⁰ This practice not only silences actual survivors but also erodes trust in justice systems, making it harder for future victims to come forward. In the context of false allegations, the accused often faces stigma, damaged reputations, and psychological trauma, as highlighted by Leslie Scott’s work on wrongful convictions.

On broken relations, Scott expounds on two exonerees, Michael Anthony and Ronaldo Cruz. Michael was sixteen when he was wrongfully convicted of raping his tutor; he served twenty-four years before being acquitted. He described his life as ‘very lonely’ since his family wanted nothing to do with him.⁶¹ Ronaldo Cruz, also in the same predicament, served twelve years imprisonment for rape. Luckily, he fell in love and got married after he was released. After two years, the marriage broke. According to him, he has been a completely different person since he was arrested. During the marriage, he was unable to cope with his wife’s demanding questions about his whereabouts as it reminded him of the prison where he had to answer to someone on a daily.⁶²

In another case, Earl Charles described his experience as a scar. He later committed suicide by walking into oncoming traffic. He was completely unable to adjust to the outside world after being released.⁶³ In a rather positive light, Gene Gibbons overcame employment and relationship issues. However, this did not prevent the negative attributes of prison from affecting him. He ended up developing a drug addiction, which caused his re-arrest for possession of cocaine.⁶⁴

One stagnant factor in all ex-prisoners is the mental health problems after acquittal. They experience physical suffering, psychiatric disorders such as anxiety and depression, readjustment issues, post-traumatic stress disorder, and personality changes that result from

⁶⁰ DuBois T, ‘Police investigations of sexual assault complaints: How far have we come since Jane Doe?’ in Elizabeth A Sheehy(eds) *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism*, University of Ottawa Press, 2012, 191-210.

⁶¹ Scott L, “‘It never, ever ends’” 11.

⁶² Scott L, “‘It never, ever ends’” 11.

⁶³ Scott L, “‘It never, ever ends’” 1.

⁶⁴ Scott L, “‘It never, ever ends’” 12.

traumatic events.⁶⁵ Neil Miller, who was convicted of ten years for rape, argues that he is often frustrated, extremely moody, and harbours deep resentment towards the court system.⁶⁶

A key strength of Leslie's study is that her arguments are backed with evidence from ex-prisoners; this provides a first-hand account and allows a reader to create a vivid illustration of the real world, hence promoting a great understanding of the impact of false rape accusations. It strengthens the argument that wrongful convictions cause gruesome impacts on the accused individual.

A weakness in her study is that it does not include any counter-arguments to the psychological effects, such as explaining the importance of a legal process that upholds fairness and justice. In conclusion, her study is pivotal in this research as readers can grasp the devastating impacts of wrongful convictions in rape cases hence necessitating the need to criminalize false accusers.

Conclusion

False rape accusations wield significant legal and societal ramifications, highlighting the need for nuanced, evidence-based responses. From the literature above, it is evident that there is a very thin line between intentional false rape accusations and genuine but weak ones. It is therefore imperative to develop a well curated legal frame in this regard to address the intentional false rape accusations. This is essential because the society's perception of the justice system is key in promoting its effectiveness. It therefore invites the efforts to ensure that the justice system is not misused in order to ensure that genuine victims of crimes like rape get justice. This justice is not just a court event but rather one that involves the society's acceptance that the rulings made in such cases are warranted. These gaps in the law, as evidenced above, have significant impact on individuals affected by it and such the criminalization of false allegations needs to be addressed before it becomes a pandemic. This paper aims to establish, through the review the scanty literature above, the false rape accusation is valid legal concern worthy of being deterred.

1.8 Limitations of the study

One of the outstanding limitations to this study is the aspect of lack sufficient of literature on wrongful convictions borne out of false rape accusations, both in Kenya and South Africa. The available information is mostly available through media outlets on reporting exposed

⁶⁵ Scott L, "It never, ever ends" 14.

⁶⁶ Scott L, "It never, ever ends" 11.

exonerations, however, the same has not been debated actively in academic spaces. This absence of research constrains the study's ability to draw from diverse scholarly perspectives, making it reliant on limited sources and comparative frameworks from other jurisdictions. Time constraints provide another challenge to this study. Due to the limited period available, the study might not include comprehensive research or thoroughly examine all possible facets of the problem.

1.9 Research methodology

This research relies on a doctrinal research methodology involving primary and secondary sources. Primary sources such as statutes, case laws, conventions, treaties, and constitutions are utilized. This study relies on secondary sources such as journal articles, books, reports, commentaries on criminalizing false accusations, blogs, and encyclopaedias. Moreover, the research adopts a comparative study methodology by thoroughly examining the South African legislation concerning the criminalization of false accusations in rape cases. South Africa is chosen as a comparator nation due to its progressive legal framework and judicial precedents, which provide valuable insights for Kenya.

1.10 Chapter breakdown

Chapter One: Introduction

This chapter provides an overview of the research topic and highlights the problem's background, the research objectives, the research questions, the hypothesis, and the study's justification. It provides the background of the research and sets the justification for doing this research.

Chapter Two: The adequacy of the existing legal policy and regulatory frameworks in safeguarding against false rape allegations in Kenya

This chapter examines the existing legislative, policy, regulatory, and institutional framework that would potentially guard against wrongful conviction of rape cases resulting from false accusations in Kenya. These include the Constitution of Kenya, 2010, International Instruments and relevant legislations both in Kenya and South Africa.

Chapter Three: Can the criminalization of false accusations safeguard against wrongful rape convictions in Kenya?

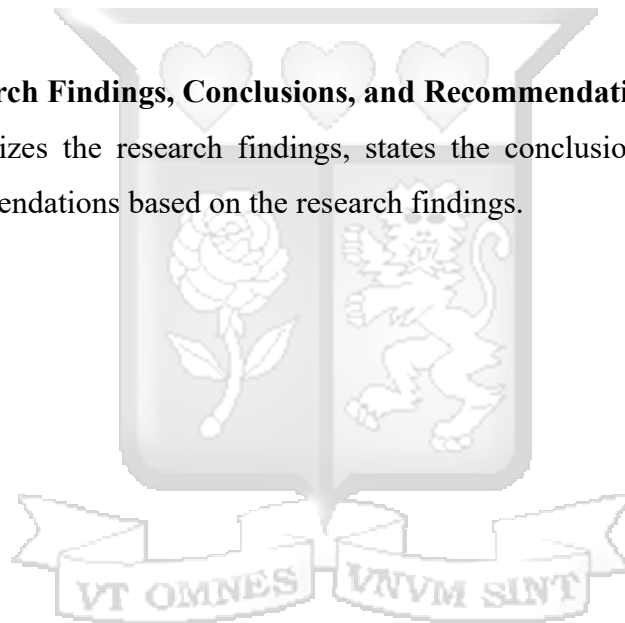
The chapter addresses the second research question on whether criminalization of false accusations safeguards against wrongful convictions. It analyses specific flaws that make it easier for individuals to fabricate false accusations. Through this, a case for criminalization of false allegations of rape is made.

Chapter Four: Addressing False Accusations of Rape: Lessons from South Africa and Botswana

This chapter seeks to answer research question three by doing an in-depth comparative study with South Africa and Botswana, as it has a robust legal framework for addressing false rape allegations. In so doing, the study makes a case for Kenya on the importance of criminalizing false rape allegations by offering some key recommendations.

Chapter Five: Research Findings, Conclusions, and Recommendations

Chapter five summarizes the research findings, states the conclusion and offers practical solutions and recommendations based on the research findings.



CHAPTER TWO: THE ADEQUACY OF THE EXISTING LEGAL POLICY, AND REGULATORY FRAMEWORKS IN SAFEGUARDING AGAINST FALSE RAPE ALLEGATIONS IN KENYA

2. Introduction

This chapter analyses the legal, policy and regulatory framework of the offence of rape in Kenya. It assesses the efficiency of the existing legislative, policy, and regulatory frameworks in safeguarding against false rape accusations. The chapter aims to identify gaps that contribute to wrong convictions in rape cases owing to false accusations. Furthermore, it will investigate how these disparities affect the accused's rights and the legal system's legitimacy.

2.1. Kenyan legal instruments

2.1.1. The Constitution of Kenya

The Constitution of Kenya, being at the top most hierarchy in Kenyan laws, provides a general guide for the justice system in Kenya. The Constitution, under Article 19, provides for fundamental rights and freedoms which are inherent to all persons in Kenya.⁶⁷ This includes the right to fair trial which is provided for as one of the unlimited rights.⁶⁸ Consequently, a wrongful conviction borne out of false accusation is a miscarriage of justice and a violation of the right to fair trial. Whilst it may be argued that this violation does not directly link the State, the Constitution mandates the State and all its organs to observe, respect, protect and fulfil the rights and fundamental freedoms enshrined in the Bill of Rights. This means that the State has the responsibility to ensure that there are laws in places to ensure that an individual's right to fair trial is not curtailed. Due to the nature of rape trials, once someone has filed a case against an individual, the likelihood of success is high. The Constitution therefore, by virtue of Article 25, protects such individuals by bestowing the State the responsibility to protect their rights.

2.1.2. The Sexual Offences Act (CAP 63A) of 2006

The Sexual Offences Act was assented to on 14 July 2006 and commenced on 21 July 2006. The SOA has been amended a total of eight (8) times through the enactment of other Statutes like the Statute Law (Miscellaneous Amendments) Acts of 2007, 2009, 2012, 2023 and 2024. Additionally, it has also been amended by the Counter-Trafficking in Persons Act (CAP 61) of 2012, Computer Misuse and Cybercrimes Act (CAP 79C) of 2018 and the 24th Annual

⁶⁷ Article 19

⁶⁸ Article 25

Supplement (Legal Notice 221 of 2022). The SOA demonstrated a significant step in Kenya's effort to combat sexual offences including rape.

a) Legal Definition of Rape

According to Section 3 of the SOA, an individual commits an offense of rape when they intentionally and unlawfully commit an act that causes penetration with his or their genitals to another without their consent or obtaining consent through force or using threats or intimidation.⁶⁹

i) Consent in Rape

Section 42 of the SOA defines consent as an agreement made by choice, where the individual has the freedom and the capacity to make that choice.⁷⁰ Two fundamental concepts underlie consent in rape cases: performative, which is an individual's actions, and a person's free will. According to Gibson, some Scholars argue that consent depends on the mental attitude of the accused towards the activity, ranging from desire to mere compliance. The absence of free will forms the *actus reus* of the offender.⁷¹ He also argues that other scholars believe that consent is a performative aspect. This implies that in addition to psychologically exercising consent, it is necessary to deduce whether or not consent was granted based on the victim's actions. The performative aspect is crucial in assessing an offender's *mens rea*.⁷²

The above is reiterated in the case of *Oyier v Republic*, where the learned magistrate stated that the *mens rea* is the intention of the accused, rather than their state of mind, to deliberately and purposefully engage in sexual activity without consent from the victim.⁷³ Section 42 states that to consent, a person should have the freedom and capacity to make that choice. While the Act does not necessarily expound on the same, courts have interpreted it to mean age and mental ability.⁷⁴

Section 44 of the SOA guides evidential presumption about consent; the law presumes that in certain circumstances, consent is absent. The situations include where the victim feared violence or was unlawfully detained and was rendered unconscious or incapacitated due to

⁶⁹ Section 3, *Sexual Offences Act* (Act No 3 of 2006).

⁷⁰ Section 42, *Sexual Offences Act* (Act No 3 of 2006).

⁷¹ Gibson M, 'Deceptive sexual relations: A theory of criminal liability', 4(1) *Oxford Journal of Legal Studies*, 2020, 92.

⁷² Gibson M, 'Deceptive sexual relations: A theory of criminal liability' 93.

⁷³ *R v Oyier* (2008) eKLR.

⁷⁴ Kamau W, *Legal Treatment of consent in sexual offences in Kenya*,

disability or drug use.⁷⁵Section 45 of the SOA, which deals with conclusive presumption of consent, guides on an irrebuttable presumption. The court automatically assumes that the complainant had no consent in instances where the accused person intentionally deceived the victim about the nature or purpose of the act and deliberately induced the complainant to consent by impersonating a person known personally to the complainant.⁷⁶

Another crucial aspect of consent is the withdrawal of consent. The legal precedents in Kenya imply that consent only had to be granted before initial penetration. In the case of *Paul Ng'ang'a Kamau v Republic*, the court held that for the defence of consent to succeed, the appellant must prove that the complainant consented to the sexual act up until the time of intercourse. However, it has also been argued that consent can be withdrawn at any point before the act.⁷⁷ *R v Oyier*, the court held that it is no excuse that she consented first if the offense was afterward committed by force or against her will. In addition, it is not an excuse that she consented after the act.⁷⁸The above cases fuel the notion that consent can only exist if given before the act and that once given, it is infinite.⁷⁹

ii) Penetration

Penetration, as defined under section 2 of the SOA, means the partial or complete insertion of the genital organs of a person into the genital organs of another person. The practice of Kenyan courts during trial of rape case in proving penetration has been through the evidence of the P3 Form.⁸⁰ This form is as a result of medical examination conducted by a duly authorised medical officer on the alleged victim with 72 hours of abuse. The report should indicate the physical nature of the act which includes bruises on the vagina of the victim, presence of semen, blood stains and any other form of physical abuse on the alleged victim.

Courts also mandate the medical officer to testify before it on the medical report and intimate the Court on their observation of the victim when they sought medical attention. This piece of evidence is very crucial as it proves one essential element of rape and also serves to corroborate

⁷⁵ Section 44, *Sexual Offences Act* (No. 19 of 2023).

⁷⁶ Section 45, *Sexual Offences Act* (No.19 of 2023).

⁷⁷ Odhiambo C, 'Post Penetration Withdrawal of consent expanding the definition of rape in Kenya within a hegemonic masculinity discourse,' SSRN, 2016, 8.

⁷⁸ *R v Oyier* (2008) eKLR.

⁷⁹ Odhiambo C, 'Post Penetration Withdrawal of consent expanding the definition of rape in Kenya within a hegemonic masculinity discourse' 10.

⁸⁰ *Mahenzere v Republic* (Criminal Appeal 28 of 2024) eKLR.

the victim's testimony.⁸¹ However, it is a general rule in rape cases that the case of rape can be proved without medical evidence but purely on circumstantial evidence or oral evidence of the alleged victim.⁸²

2.1.3. The Evidence Act (CAP 80)

Section 124 of the Evidence Act on corroboration in criminal cases stipulates that an accused shall not be convicted unless other material evidence corroborates the evidence provided. In sexual offences, however, corroboration is not a necessity. A court may proceed to convict an accused person by solely relying on the victim's evidence only if it is satisfied that the victim is telling the truth.⁸³ This provision was relied in *Kassim Ali v Republic* and in *Martin Nyongesa v Republic* where the Court of Appeal stated that the absence of medical evidence to support the facts of rape is not conclusive as rape can be proved by oral evidence of a victim or through circumstantial evidence.⁸⁴

Another relevant provision in the Evidence Act is section 79A where electronic evidence can be accepted in court. There have been a number of incidences where the heinous act of rape is recorded. Similarly, persons can also be recorded when confessing to commit the act of false accusations. In addition, threats through online communication to accuse someone of rape after a fallout can be adduced as evidence in the form of screenshots or screen recordings.

2.1.4. Penal Code (CAP 63)

Chapter 11 of the Penal Code deals with offenses relating to the administration of justice which includes perjury and subordination of perjury. Section 108 of the Penal Code describes perjury as a misdemeanour in which an individual knowingly gives false testimony touching any matter pending in court.⁸⁵ In addition, the offense of perjury cannot be proven unless evidence by two witnesses is provided.⁸⁶ Under Section 110 of the Penal Code, any person who commits perjury is liable to punishment for seven years.⁸⁷

An example of perjury in rape cases can be seen in the matter involving *Joyce Patricia Nzau*, who falsely accused Kiran Siran, a Turkish tourist, of raping her. Significant inconsistencies

⁸¹ *Hillary v Republic* (Criminal Appeal E085 of 2022) 5, eKLR.

⁸² *Kassim Ali v Republic* (Criminal Appeal No. 84 of 2005) eKLR.

⁸³ Section 124, Evidence Act (No 19 of 2023).

⁸⁴ *Kassim Ali v Republic* (2006) eKLR; see also *Martin Nyongesa Wanyonyi v Republic* (Criminal Appeal of 2015) eKLR.

⁸⁵ Section 108, *Penal Code* (No13 of 1982).

⁸⁶ Section 111, *Penal Code* (No13 of 1982).

⁸⁷ Section 110, *Penal Code* (No13 of 1982).

were found throughout the investigations in her testimonies and the medical documents she provided. Consequently, she was charged with making false allegations.⁸⁸ Despite the charges, a gap exists as the outcome is poorly documented or known. This signifies the lack of well-documented information regarding false rape allegations in Kenya, which hinders research and a comprehensive understanding of the topic.

2.1.5. Victim Protection Act (CAP 79A)

The enactment of this Act sought to give effect to Article 50(9) of the Constitution by providing protection to victims of crime and abuse of power. Such remedies include restitution, rehabilitation, restorative justice, psychological treatment and protection from victimization.⁸⁹ This Act is relevant to the extent that it will serve to protect persons who will be the subject of false rape accusations. Such persons qualify to form part of the meaning of the word ‘victim’ in the Act once the act of falsification of rape allegations is prescribed as an offense.

2.1.6. International Covenant on Civil and Political Rights (ICCPR)

Kenya is a signatory to the ICCPR, hence mandated to enforce the provisions in the Covenant. Article 14 (6) of the ICCPR provides that individuals whose criminal offense has been reversed are entitled to compensation.⁹⁰ This is adopted by Article 23 of the CoK which stipulates that in enforcing the Bill of Rights, a court may grant appropriate relief, including compensation, in any way proceedings are brought to court.⁹¹ This provision is relevant in this study because it provides a basis for the argument for compensation for victims of false rape allegations.

2.1.7. Criminal Procedure Act (CAP 75)

The Criminal Procedure Act under section 151 provides that every witness in a criminal matter must be examined under oath. This is the basis for the crime of perjury where it is an offence to lie under oath. In an offence of false allegation in a rape case, this is an important element since it is relevant to establish misuse of the court process. However, this does not extend to cases that only end in the police station.

⁸⁸ Masika C, ‘Cop, medic narrate how woman faked rape case against a Turk.’ The Star, 2nd November 2020- <[Cop, medic narrate how woman faked rape case against a Turk](#)>-on 21st November 2024.

⁸⁹ 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.

⁹⁰ Article 14 (6), *International Convention on Civil and Political Rights*, 16 December 1966, 2200A(XXI).

⁹¹ Article 23, *Constitution of Kenya* (2010).

2.2. Policy and regulations

The Office of the Public Prosecutor (ODPP) has a guide for making decisions whether to charge or not in different case.⁹² This guide requires the prosecutors to be objective and independent in their analysis of cases brought before them. This is because they have the ultimate power to decide whether to charge or not even though they have complementary roles with investigating officers. In the guide, the prosecutors have different basis on which to make the decisions to charge someone in a case. These include:

a) Two-stage test

In this stage, the prosecutor must consider the following:⁹³

- i) Evidential test
- ii) Public interest test

i) Evidential test

Under the evidential test, the prosecution must be satisfied that the evidence produced are sufficient to provide a realistic prospect of conviction.⁹⁴ This means that the evidence must be able to be deliberated in an objective, impartial and reasonable court hearing. The evidence must also be admissible, relevant, reliable, available and the persecutor also considers the strength of the rebuttal evidence. In sexual offences, prosecutors have an additional guide on the ingredients of a case and the type of evidence to consider.⁹⁵ The guide states relevant sections of the SOA to be sections 3(1)(a); 42; and 43.⁹⁶ It also provides that another key component for this crime is the identification of the assailant. Such a case can be prosecuted on the following evidence; oral evidence, medical evidence (P3 Form), forensic evidence, photographic evidence and electronic evidence.

ii) Public interest test

The prosecutor is also required to consider the general public and the net effect of charging that person on the public.⁹⁷ In making this consideration, the prosecutor is guided by the following:

- a. The culpability of the suspect
- b. The impact of harm to the victim or community

⁹² Office of the Director of Public Prosecution (ODPP), Guidelines on decision to charge, 2019.

⁹³ ODPP, Guidelines on decision to charge, 27.

⁹⁴ ODPP, Guidelines on decision to charge, 27 – 29.

⁹⁵ Office of the Director of Public Prosecution (ODPP), Rapid reference guide on the prosecution of sexual and gender-based violence in Kenya, 2022.

⁹⁶ ODPP, Rapid reference guide on the prosecution of sexual and gender-based violence in Kenya, 24.

⁹⁷ ODPP, Guidelines on decision to charge, 29 – 31.

- c. Status of the victim
- d. The suspect's age at the time of the offence
- e. Whether prosecuting the crime is a proportionate response
- f. Whether the source of the information needs protection.

This two-stage test is used generally in all cases and serves to guide the prosecutors in making the decision whether to charge someone. The guide is however subject to the tenets of existing laws including the Constitution of Kenya, particularly the provisions on discrimination and fair trial.

b) Threshold test

This test is used at the early stages of dealing with serious cases such as sexual offences, terrorism and corruption. The use of this test is stricter and can only be invoked when there is a prima facie case or reasonable prospect of additional evidence.⁹⁸ The prosecutor is granted 14 days to review the evidence in that case to evaluate the merit of the case. In the event anticipated evidence is not available within 14 days, a prosecutor is required to escalate the matter to their supervisor for guidance on the next steps.

A prosecutor must look for the following requirements when using this threshold:

- a. Reasonable grounds to believe that the suspect has committed the offence.
- b. Whether additional evidence can be obtained to provide a realistic prospect of conviction.
- c. Whether the seriousness or the circumstances of the case justifies charging decision.
- d. Whether it is in the public's interest to charge.

In addition to these requirements, prosecutors must also satisfy themselves that certain minimum requirements are met. These requirements must be stated in the investigation file which must have the following:⁹⁹

- a. Key evidence or information that raises reasonable grounds to believe that the suspect committed the offence.
- b. A description of outstanding evidence and anticipated timelines.
- c. Summary of facts stating why the case is serious.
- d. Whether the suspect is a flight risk.

⁹⁸ ODPP, Guidelines on decision to charge, 32.

⁹⁹ ODPP, Guidelines on decision to charge, 33.

These minimum requirements only apply to serious cases and as such, the Threshold test will not apply if the requirements are not met.

Conclusion

In light of the laws in Kenya highlighted above, more emphasis is placed on prosecuting rape cases which is warranted. The laws remain ignorant to situations where the allegations may be false supported by fabricated evidence. However, the laws still have significant provisions that can be built on to criminalise false rape accusations. These basis stems from the Constitution which is a guiding lamp on the Kenyan laws. In addition, the ODPP has also tried to address such concerns in its policies. Nonetheless, such efforts may not be fully sufficient to wade off fabricated evidence borne out of collusion with multiple key figures in trial of rape cases such as medical officers. It highlights the important constitutional provisions and pertinent international laws. Therefore, there remains a need to have stringent and specific laws that criminalise false rape accusations.



CHAPTER THREE: THE EFFICACY OF CRIMINALISATION OF FALSE ACCUSATIONS IN SAFEGUARDING AGAINST WRONGFUL RAPE CONVICTIONS IN KENYA

3.1. Introduction

The true meaning of justice, as is globally accepted, is being able to get what is due to oneself. It is therefore imperative of us to introspectively check whether our legal system affords justice to individuals wrongfully imprisoned due to the fabrication of lies. This section aims to show that incorporating laws criminalizing false allegations in the Kenyan legal framework will go a long way in preventing wrongful convictions. To end impunity, this section argues, the government should strengthen enforcement mechanisms and improve access to justice. It further explores the key factors contributing to false rape allegations, including vague definitions, overreliance on witness testimony, police misconduct, and external pressures such as public opinion and media scrutiny.

3.2. Role of evidence in false allegations

Chain of custody refers to the practice of maintaining and documenting evidence. It entails a chronological paper trail maintaining a thorough record of who gathered, handled, moved, or examined evidence.¹⁰⁰ In sexual offence cases, the prosecution has a burden of proof to show that every piece of evidence was handled accurately and in an unbroken chain of custody.¹⁰¹ As was stated in *OKK v Republic*, the standard of proof beyond a reasonable doubt should be well established. It does not require absolute certainty but must be highly convincing. This standard does not entertain unlikely or fanciful possibilities that could obstruct justice. If the evidence against someone is so strong that it leaves only an improbable doubt, which can reasonably be dismissed, it meets the required threshold. Nothing less is sufficient.¹⁰²

In the process of charging cases by prosecutors, as shown above, much emphasis is placed on the evidence produced. Whether the same is readily available and if not, how soon the same can be taken up. In rape cases, some of the crucial evidences include the P3 form and the oral evidence or any other evidence issued by the alleged victim. Often, the police officers move to arrest someone without further probing their authenticity. Whether the alleged victim visited a

¹⁰⁰ Evidence Management Institute, 'The Crucial role of chain of custody: ensuring evidence integrity and quality assurance' 2024.

¹⁰¹ Williams C, 'Chain of custody and why it is important in a criminal case,' *Just Criminal Law*, 2020, 1.

¹⁰² *OKK v Republic* (2021) eKLR.

medical facility and whether the P3 form presented is authentic. For instance, Joyce Patricia Nzau managed to produce a P3 form yet she had not visited the said hospital for medical examinations. Such situations need to be outwitted during the investigation stages even before the case gets to court.

Therefore, in criminalising false accusations, the statement adduced to the police officers, the cooked P3 Form and the investigation officers are sufficient evidence to prove a case for false allegations. Prosecuting a crime of false allegations would not require much investigation since the involved parties are State officers who are involved in the daily Court process.

3.3 Vague definition of terms

Consent plays a fundamental role in criminalizing the offense of rape. Notwithstanding this, consent remains a challenging topic of discussion due to the ambiguity in its definition and intention. A case-by-case analysis is done to determine its interpretation.¹⁰³ Section 45 SOA has been criticized for lacking clarity on the definition of consent, particularly on when the choice can be exercised to protect women against post-penetration rape.¹⁰⁴

This strict approach ignores situations in which consent is withdrawn during the act, which disproportionately impacts ‘non-traditional rape victims’, such as people in marriages or relationships where ongoing or implicit consent is frequently assumed. The above contributes to wrongful convictions as it assumes that consent cannot be revoked once it is given.¹⁰⁵ An easy way to fabricate a lie would be to ensure compliance with the requirements of rape, for example, stating that the sexual act was consensual by both parties.

Despite there being the offense of perjury, false allegations in rape cases remain. This is largely due to the ignorance of both the law and legal practitioners towards such incidences. Most situations are swept under the rug or left unprosecuted without regard to the effect it had on the victim. Additionally, courts take a casual approach to dealing with perjury, failing to recognize the implications of false accusations.¹⁰⁶

¹⁰³ Obora C, ‘Rape in Kenya: The boundaries of consent, Published LLB Dissertation, Moi University, Eldoret, 2016, 37.

¹⁰⁴ Odhiambo C, ‘Post Penetration Withdrawal of consent expanding the definition of rape in Kenya within a hegemonic masculinity discourse,’ SSRN, 2016, 7.

¹⁰⁵ Odhiambo C, ‘Post Penetration Withdrawal of consent expanding the definition of rape in Kenya within a hegemonic masculinity discourse,’ SSRN, 2016, 10.

¹⁰⁶ Kanjama C, ‘Perjury cases fast finding their way into Kenyan Justice System,’ *The Standard*, 2013-
<<https://www.standardmedia.co.ke/article/2000088316/perjury-cases-fast-finding-their-way-into-kenyan-justice-system>>-on 24 November 2024.

Therefore, the existing legal regime is not sufficient to curb the rise of false accusations in rape case. The provision of clear laws specifically criminalising the act will go a long way into curtail false accusation in rape cases. Further, this move will get both the legal practitioners and the court to appreciate the magnitude of the act on its victims.

3.3. Overreliance on victim testimony

Section 124 of the Evidence Act allows courts to rely solely on a victim's testimony in sexual offense cases only if the court is satisfied that the victim alleged is telling the truth.¹⁰⁷ However, because of the common law 'cautionary rule' in sexual cases, even though the complainant's evidence alone may be sufficient for a conviction, the court must still caution itself on the danger of relying solely on such evidence.¹⁰⁸ This was the holding of the court in *Chila v Republic* (1967) where the court stated that a judge may convict in the absence of corroboration if he is satisfied that the victim's evidence is truthful.¹⁰⁹

In *Ali Kassim*, the Learned Judge in the trial court said "...*She was very truthful and described the events that led to her rape in great detail...*".¹¹⁰ This is the practice of the Kenyan courts to simply decide whether a victim is truthful by just looking at them and what they say in testimony. Whilst this has been crucial in helping rape victims' case owing to the nature of the crime, the same has been misused by coached victims in the witness stand. This practice is well established in our legal system and as such, a majority of the public is aware of it. Any person seeking to frame another for rape would certainly be aware that their evidence does not need much corroboration hence motivated to file a false claim. The criminalisation of false rape allegations will, therefore, deter persons who seek to abuse this aspect in our legal regime.

3.4. Police misconduct

Police misconduct can manifest in various ways, including police perjury, which occurs when police lie under oath or fabricate evidence in their reports to secure a conviction.¹¹¹ Another notable cause of wrong convictions under police misconduct is the influence and pressure by the officials on an innocent individual to confess to crimes they did not commit. They employ

¹⁰⁷ Section 124, *Evidence Act* (No 5 of 2003).

¹⁰⁸ Armstrong A, 'Evidence in rape cases in four Southern African countries,' *Journal of African Law*, 1998, 174- < <https://www.jstor.org/stable/745571> >- on 17 December 2024.

¹⁰⁹ *Chila v Republic* (1967) E.A 722, 723, C.

¹¹⁰ *Kassim Ali v Republic* (2006) eKLR.

¹¹¹ Ahuja, Kayli. "Wrongful Convictions by Police-Induced False Confessions" (2018). Celebration of Learning. <https://digitalcommons.augustana.edu/celebrationoflearning/2018/presentations/17>

various coercive tactics to induce false accusations; these methods include intimidation, prolonged and exhausting interrogations, psychological abuse, and sleep deprivation.¹¹²

In 2005, one Richard Muasya, an intersex individual, was wrongfully accused of robbery and rape. Despite the biological impossibility of Richard committing rape due to their intersex condition, the police persisted in him being the primary perpetrator. The individual was imprisoned in Kitui, where their condition was finally recognized. This led to the dismissal of the rape charges. The police's unwavering insistence on the individual's guilt, without thoroughly investigating the case, constituted a severe police misconduct case.¹¹³

The criminalisation of such acts will act as a deterrence to law enforcement officers to refrain from using offences such as rape to frustrate Kenyans. The fact that the law is not very strict on this issue means that individuals, both in authority and common citizen, will always resort to misuse it to achieve their malicious goals. A specifically prescribed offence of false accusation in rape case will significantly reduce such police misconduct.

3.6. Court of public opinion versus the court of law

Sexual offenses are seen as a significant and pervasive crime in society. Contrary to other violent crimes, rape is seen as a very egregious form of criminal behaviour as its consequences harm the vulnerable, such as women and children. Society is always obliged to protect children and women; any crime against them is universally condemned due to the severe impacts on their physical, emotional, and psychological welfare.¹¹⁴

Media outlets are integral in shaping public perceptions and attitudes of rape cases. How a story is presented may potentially have an impact on how witnesses, judges, and the legal system perceive the case. Accused persons also face challenges due to media scrutiny. For instance, where judges have formed strong opinions based on media reports, the right to a fair trial may be jeopardized. The public may take sides causing significant harm to the accused individual. The accused may suffer reputational damage, physical and mental health, and

¹¹² Ahuja, Kayli. "Wrongful Convictions by Police-Induced False Confessions" (2018). Celebration of Learning. <https://digitalcommons.augustana.edu/celebrationoflearning/2018/presentations/17>

¹¹³ Kanali E, 'I underwent sexual abuse as an intersex person in Kenyan prisons,' Orato First-person news,29 August 2021-< <https://orato.world/2021/08/29/i-underwent-sexual-abuse-as-an-intersex-person-in-kenyan-prisons/> >- on 12 January 2025

¹¹⁴ Lisa L, 'The Social Construction of the Sex Offender,' Published, University of Missouri, St Louis, Missouri, 2001, 1.

financial stability. Public opinion is difficult to change and initial judgments remain unchallenged.

The criminalisation of false rape accusations will create a general public awareness that will serve to shape how the public views the victims of false accusations. The process of going through the court process and proving their case against their accusers will retain their standing in the community. Though this may not have a huge effect, the same will go a long way to help the victims to reintegrate back into the society without victimization.

3.7. Reverse on efforts to criminalise false accusations in rape cases

When the Sexual Offences Act was enacted, it had Section 38 which stated that:

“any person who makes false allegations against another person to the effect that the person has committed an offence under this Act is guilty of an offence and shall be liable to punishment equal to that for the offence complained of.”

This section was deleted through the Statute Law (Miscellaneous Amendments) Bill, 2012 which became law in 6th of July 2012. This provision had been applied briefly in some cases for instance in *KM v Republic* where K M was charged with the offence of making false allegations contrary to Section 38.¹¹⁵ The accused had made false allegations against BMM to the effect that BMM had committed rape against her a fact she knew to be false. She was found guilty of the offence, convicted and sentenced for 10 years in 2013. Later on, the conviction was revised and KM was released.

The net effect of this is that it became very clear that people could falsely invoke the court process against another and still be let scot-free. This particular case is a good example of how the criminalization of false allegations in rape cases can work.

Conclusion

It is evident that there is a strong connection between wrongful convictions and false accusations. The enactment of a specific law to curb such acts have significant positive effects on the Kenyan Legal regime. The ambiguities and loopholes highlighted above have evidently been exploited and many persons have been wrongfully convicted due to this. The rise of wrongful convictions has a negative effect on any legal system, as such, the criminalisation of false accusation will be the way of the system to protect itself from such misuse.

¹¹⁵ *KM v Republic* (Criminal Revision No. 6 of 2014).

CHAPTER FOUR: ADDRESSING FALSE ACCUSATIONS OF RAPE: LESSONS FROM SOUTH AFRICA AND BOTSWANA

4.1 Introduction

This chapter aims to provide a comparative analysis of the Kenyan framework on false rape accusations with that of the legal system of South Africa and Botswana. It examines how the legal regimes in the two jurisdictions strike a balance between protecting genuine victims and protecting individuals from malicious accusations. Botswana provides insights through its specific law on false rape allegations, while South Africa is relevant for its constitutional emphasis on justice and dignity. The analysis examines criminal liability, evidentiary standards, and policy measures to identify best practices and suggest changes to strengthen Kenya's approach to false rape allegations.

4.2 False Rape Accusations in South Africa and Botswana

Rape is so rampant in South Africa to the extent that its capital city, Cape Town, is labelled as the rape capital of the world.¹¹⁶ In the fiscal year 2022–2023, about 53,500 South Africans reported having experienced a sexual crime. About 80% of these reported cases are rape.¹¹⁷ Similar to the Republic of Kenya, despite the high prevalence of rape cases, false allegations occur; however, the statistics of the same is unknown.¹¹⁸ The tales of individuals falsely accused and wrongfully convicted of rape are told by domestic initiatives such as the Wits Justice Project (or "WJP"), False Rape SA, and False Rape SA Press, and the media outlets.¹¹⁹ In Botswana, the crime rates are very low, for instance sexual offences only formed 9% of crimes in 2020.¹²⁰ However, there is no reliable source of statistics on false allegations both in South Africa and Botswana. This section aims to make an in-depth analysis of the legal framework of South Africa in three parts: criminal liability, evidentiary standards and policy measures concerning false rape accusations. Subsequently, it looks at the legal regime on rape cases and false rape allegations in Botswana.

¹¹⁶ 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](#)> -9 January 2024.

¹¹⁷ Cowling N, 'Number of sexual offences in South Africa in 2022/2023, by crime,' Statista, 16 August 2024 <<https://www.statista.com/statistics/1362370/number-of-sexual-offences-in-south-africa-by-crime/>> -on 9 January 2025.

¹¹⁸ Maseko S, 'False rape accusations: Reputational damage and statutory redress for the legally exonerated in South Africa' 2.

¹¹⁹ Maseko S, 'False rape accusations: Reputational damage and statutory redress for the legally exonerated in South Africa' 2.

¹²⁰ Statistics Botswana, 'Percentage distribution of offences committed' 2020.

4.2.2. Criminal Liability

Criminal liability is a well-recognized tenet that holds individuals accountable for their actions when found guilty¹²¹ To be criminally liable, an individual must have acted intentionally or negligently. Thus, both *mens rea* and *actus reus* must exist.¹²² In false rape allegations, this principle applies when an individual, in the full knowledge that no offence occurred, otherwise referred to as the *mens rea*, becomes liable for prosecution.¹²³ The components of criminal culpability for false rape charges in South Africa can be found in the application of statutes like *crimen injuria* and perjury.

Perjury in South Africa is considered a common law offence, technically meaning that analysis is derived from precedent and judicial interpretations. This, however, does not preclude the fact that statutes also play a role in addressing the offence.¹²⁴ Section 162 of the Criminal Procedure Act 51 of 1977 of South Africa mandates that every witness be examined under oath.¹²⁵ Section 164(2) provides that any individual who makes a false statement under oath is liable for perjury.¹²⁶ In *Talacar Holdings (PTY) Ltd v City of Johannesburg & others*, the court identified essential elements of the offence: a false statement, an affidavit, an affirmation or attested declaration made before a competent person, and *mens rea*.¹²⁷ The test established to determine the intention to lie under oath is to examine the context of words used in affirmation.¹²⁸ Penalties for perjury include probation, a heavy fine, or a maximum 10-year jail sentence.¹²⁹

Botswana is more advanced in the criminalisation of false accusations in rape cases. The Botswanan Penal Code, under section 168B specifically criminalizes the making of false accusations of sexual offences. This Section states as follows:

¹²¹ Solanki S, 'What is criminal liability,' Thomas Reuters,2024,1.

¹²² Solanki S, 'What is criminal liability,' Thomas Reuters,2024,1.

¹²³ Dambe B, 'A Double-Edged Sword? The Criminalization of False Rape Accusations in Botswana,' Oxford University Press, 2024, 9.

¹²⁴ 'Unravelling the legal maze: perjury and its ramifications,' Gittins Attorneys Law Firm,6 February 2024 -< <https://www.gittins.co.za/post/unravelling-the-legal-maze-perjury-and-its-ramifications#:~:text=Perjury%2C%20the%20intentional%20act%20of%20providing%20false%20statements.legal%20implications%20within%20the%20South%20African%20legal%20framework>. >- on 9 January 2025.

¹²⁵ Section 162, Criminal Procedure (Act 51 of 1977).

¹²⁶ Section 164(2), Criminal Procedure (Act 51 of 1977).

¹²⁷ *Talacar Holdings (PTY) LTD v City of Johannesburg Metropolitan Municipality & others* (2020), High Court of South Africa.

¹²⁸ *Talacar Holdings (PTY) LTD v City of Johannesburg Metropolitan Municipality & others* (2020), High Court of South Africa.

¹²⁹ 'The law around perjury in South Africa and examples,' Lawyers online, June 2019-< [https://www.lawyers-online.co.za/thelawaroundperjuryinsouthafricaandexamples.htm#:~:text=Penalties%20for%20the%20crime%20of,is%20a%20very%20serious%20offence](https://www.lawyers-online.co.za/thelawaroundperjuryinsouthafricaandexamples.htm#:~:text=Penalties%20for%20the%20crime%20of,is%20a%20very%20serious%20offence.).>-on 10 January 2025.

68B (1) A person who knowingly makes false or misleading allegations against another person to the effect that the person has committed a sexual offence under this Part commits an offence and is liable to imprisonment for a term not exceeding five years.

(2) For purposes of this section, an allegation is false or misleading if at any stage of investigation or prosecution, it is proved that the alleged act did not take place.

(3) For the avoidance of doubt, an acquittal for an offence under this Act does not amount to a false allegation.

Under this provision, the criminal responsibility is derived from the mental part where the person 'knowingly' makes the false allegations. In addition, the allegations must be 'false' or 'misleading' and the 'alleged act' did not take place. Furthermore, section 131 of the same Act provides for the offence of giving false information to public officers. This covers public officers such as the police officers and could be used in the prosecution of an individual in false rape accusations. The criminal intent in this offence is knowing that the public officer will officially act upon that false information.

Compared to Kenya, Botswana has a stronger stance on the offence of perjury in both enforcement and prosecution. Similarly, in South Africa, individuals have been indicted for giving false accusations. Case in point is the two Mpumalanga women were guilty of making false rape claims against their boyfriends.¹³⁰ The first lady, Lungile, was sentenced to a fine of R8000 or 12 months imprisonment, while the second lady, Thembekile, was sentenced to R500 or 12 months imprisonment. Another case example is that of a lady residing in Ekurhuleni, South Africa, who claimed that her step-grandfather had raped her. Upon police investigation, it was discovered that she fabricated the claims. She was later charged with perjury and is to appear before court.¹³¹ SAPS often warns the public against making false accusations,

¹³⁰ Maromo J, 'Two Mpumalanga women found guilty of making false rape claims,' IOL News, 18 July 2020-<<https://www.iol.co.za/news/two-mpumalanga-women-found-guilty-of-making-false-rape-claims-51163291> >- on 11 January 2025.

¹³¹ African News Agency, 'Police warn against reporting false cases of rape after woman charged with perjury,' IOL News, 17 November 2019-<<https://www.iol.co.za/news/south-africa/gauteng/police-warn-against-reporting-false-cases-of-rape-after-woman-charged-with-perjury-37368699> >- on 11 January 2025.

highlighting the serious repercussions that follow.¹³² This serves as an important reminder of the seriousness taken by the legislation of South Africa to treat false rape allegations.

Another crime that can be used to prove criminal liability for making false allegations in rape cases is *crimen injuria*. *Crimen injuria* is a common law crime under South African which protects persons from unlawful and intentional impairment of their dignity or privacy of another.¹³³ It traces its inception in South Africa during the 19th Century when the English laws were applicable.¹³⁴ This crime was first popularised in South Africa through the trial of Vicki Momberg.¹³⁵ A first-time offender found guilty of *crimen injuria* may receive a fine and a suspended sentence for a certain time, provided they do not re-offend. Reoffending or contempt of court orders can lead to jail time. Once convicted of *crimen injuria*, a person will have a criminal record.¹³⁶ This common law crime has been applied to criminalize false rape allegations, as demonstrated in the case of the late Bafana Sithole case. He tragically took his own life after being falsely accused of rape by a classmate. In a public statement, a spokesperson for SAPS stated that anyone who falsely accuses another can be held liable for criminal injury.¹³⁷

4.2.3. Evidentiary Standards

In delicate and complex subjects like rape, evidentiary standards play a vital role in determining the credibility and admissibility of evidence in court. These standards ensure that courts evaluate the evidence critically in an effort to balance the rights of the claimant and the accused person. This section highlights the evidential standards applied in the South African legislation that focus on addressing the grave challenge of false rape accusations.

As earlier stated, rape cases cause adverse psychological effects to an individual. As such, a means to solve such cases, the South African legislation has a well-defined and enforcement

¹³² African News Agency, 'Police warn against reporting false cases of rape after woman charged with perjury,' IOL News, 17 November 2019 -< <https://www.iol.co.za/news/south-africa/gauteng/police-warn-against-reporting-false-cases-of-rape-after-woman-charged-with-perjury-37368699> >- on 11 January 2025.

¹³³ Themes A, 'Defamation and *crimen injuria*,' South African Pagan Rights Alliance, 8 August 2017 -< <https://paganrightsalliance.org/defamation-and-crimin-injuria/> >- on 11 January 2025.

¹³⁴ Jonathan Burchell, 'Protecting dignity under common law and the Constitution: The significance of *crimen injuria* in South African criminal law' *SACJ*, 2014 (3).

¹³⁵ *S v Momberg* (2019) 2 SACR 505 (GJ).

¹³⁶ Themes A, 'Defamation and *crimen injuria*,' South African Pagan Rights Alliance, 8 August 2017 -< <https://paganrightsalliance.org/defamation-and-crimin-injuria/> >- on 11 January 2025.

¹³⁷ Moichela K, 'How a false rape accusation can land you in hot water,' IOL News, 20 July 2022 -< <https://www.iol.co.za/news/education/how-a-false-rape-accusation-can-land-you-in-hot-water-7449d82a-224c-4700-af32-b6403abb5763-> 11 January 2025.

structure on the admissibility of expert evidence, including psychological assessments.¹³⁸ In *Holtzhausen v Roodt*, the learned judge underlined the importance of expert evidence in legal proceedings; in addition, the judge pointed out that courts rely on specialists such as psychologists and social workers. The above provided the jurisprudence of admissibility of psycho-social evidence in sexual. Efforts have also been made to admit expert testimony on Child Sexual Abuse Accommodation Syndrome (CSAAS). In the case of *Wheat v State*, the defendant was accused of raping her ten-year-old stepdaughter, she, however, recanted her testimony on several occasions. The state introduced an expert on CSAAS who presented evidence that studies show that children are prone to recant their statements. The court determined that CSAAS helps expound on actions that may appear inconsistent with claims of sexual abuse. As a result, the court determined that CSAAS evidence was admissible since it was pertinent to a major issue in the case.¹³⁹

In South Africa, the Criminal Procedure Act under section 212 (4) (a) (iv) explicitly supports the admissibility of expert findings in human behavioural sciences.¹⁴⁰ This ensures that psychological assessments conducted by qualified professionals are admissible as evidence in a court of law. Part III of the Counsellors and Psychologists Act 2014, however, only ensures that professionals who conduct psychological evaluations are qualified and follow certain guidelines but does not assure admissibility of the same in court.¹⁴¹

South Africa has a well-established legal framework for DNA evidence, known as the Criminal Law (Forensic Procedures) Amendment Act, 2013, commonly referred to as the DNA Act. It provides an exhaustive legal structure to improve justice and prevent crime through the regulation and management of the national DNA database.¹⁴² It serves as a tool for gathering evidence for obtaining information that can be used to connect suspects to crimes or exonerate the innocent. The database is managed to support investigations, and the DNA Act allows for non-invasive DNA samples such as mouth swabs and finger-prick blood. In addition, it only permits the collection of samples by trained police officers, crime investigators and security personnel to preserve evidence and ensure the effective application of the DNA samples.¹⁴³

¹⁴⁰ Section 212(4) (a)(iv), Criminal Procedure Act (No.51 of 1977).

¹⁴¹ Section 23, Counsellors and Psychologists Act (No. 14 of 2014).

¹⁴² General explanatory note, Criminal Procedure (Forensic Procedures) Amendment Act 2013 (No.37 of 2013).

¹⁴³ General explanatory note, Criminal Procedure (Forensic Procedures) Amendment Act 2013 (No.37 of 2013).

The DNA Act, under Schedule 8, includes rape among the offences in which DNA samples must be taken to verify or dispute claims.¹⁴⁴ Such samples, as the DNA Act mandates, can be used to exonerate convicted persons as well as prove the guilt of persons before or during a prosecution.¹⁴⁵

A case example happened in 2011 when a KZN teacher accused of falsely raping a nine-year-old at Umlazi school was exonerated by DNA evidence. He served a sentence of thirteen months and was compensated R1.6m after his release. It was discovered that the child was beaten by her aunt before accusing the defendant, indicating clear evidence of coercion in her testimony.¹⁴⁶ In the case of Njabulo Ndlovu, he was falsely convicted of rape and sentenced to life in prison. After spending thirteen years behind bars, previously suppressed DNA evidence by the presiding magistrate emerged, confirming his innocence. In 2018, the Pietermaritzburg High Court overturned the conviction, leading to his release.¹⁴⁷ The above illustrates that judicial misconduct can lead to an individual's wrongful conviction; however, the implementation of the DNA Act can serve as a force for justice by exonerating those who have been falsely accused.

Another notable case is *Bokolo v S*, where Bokolo was wrongfully convicted of rape due to improperly handled and misinterpreted DNA evidence. The South African Supreme Court of Appeal overturned his conviction, emphasizing the need for proper forensic procedures and the critical role of expert testimony in evaluating DNA evidence.¹⁴⁸ In contrast, while DNA testing is legally recognised in Kenya and is admissible as provided by Section 48 of the Evidence Act, on the opinions of experts, the procedures and regulations for handling are less comprehensive and detailed compared to the provisions outlined in South Africa's DNA Act.¹⁴⁹

Botswana tries to solve this issue of false rape accusations both Statutorily but also through the way rape trials are conducted. During trials in rape cases, the courts interrogate whether the complainant has a motive to lie. The court looks at evidence presented by the accused person

¹⁴⁴ Schedule 8, Criminal Procedure (Forensic Procedures) Amendment Act 2013 (No.37 of 2013).

¹⁴⁵ General explanatory note, Criminal Procedure (Forensic Procedures) Amendment Act 2013 (No.37 of 2013).

¹⁴⁶ Broughton T, 'KZN teacher gets R1.6m after spending 13 months in jail for false rape charge,' Times Live, 6 August 2021-<[KZN teacher gets R1.6m after spending 13 months in jail for false rape charge](#) >- on 9 January 2025.

¹⁴⁷ Maseko S, 'False rape accusations: Reputational damage and statutory redress for the legally exonerated in South Africa,' Published, University of Kwazulu-Natal College of Law and Management Studies Pietermaritzburg, South Africa, 2022, 39.

¹⁴⁸ *Bokolo v S* (2014), South African Supreme Court of Appeal.

¹⁴⁹ Section 48, Evidence Act, (No.10 of 1969).

on whether the complainant had intention to conjure up a false case against them.¹⁵⁰ This practice actively looks for evidences that vindicate an accused person in a rape case and the same can also be used to prosecute an untruthful ‘victim’ in a rape case.

Conclusion

In conclusion, the Kenya serves to learn a lot from the South African and Botswanan legal regime on false rape allegations. From South Africa, this lesson stems from the diversity of legal provisions to prosecute false accusations such as perjury and *crimen injuria*. The mandate to curb false accusations, not just in rape, is spread out thus establishing a better legal regime. This is opposite from Kenya where it is just dependent on perjury which is rarely invoked. Also, perjury is only limited to court proceedings therefore does not account for false accusations that only end up in police stations. In the context of Botswana, Kenya can borrow from the specificity of their laws in criminalising the making of false accusations. The provisions in the Botswanan legal regime on this issue are also very detailed and covers the concerns raised by critics of this proposal. This includes the specificity of the intention and the mental aspect of committing the crime and the caution that acquittals are not a confirmation of false allegations. This protects actual victims of rape who fail to sufficiently prove their cases from unjust prosecution. In addition, these two legal provide guidelines for gathering, examining, and applying of psychological assessments and DNA evidence, which help reduce wrongful rape accusations arising from false claims.



¹⁵⁰ *Mpaku v State* (2010) All Bots 11 (CA). *Gabakbore v State* (2013) All Bots 538 (CA).

CHAPTER FIVE: RESEARCH FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.1 Research Findings

Chapter two examined the current frameworks related to the criminalization of false rape accusations. It analysed existing laws, policies, and legal principles, identifying gaps that can lead to wrongful convictions. The chapter explored key legislation and international obligations, highlighting their impact on the issue. The Kenyan laws such as the Sexual Offences Act only focused on prosecuting rape cases and a significant deletion of section 38 was a clear indication of Kenya's ignorance towards false allegations. Further to this, the chapter exposed the existing gaps in law that have promoted the growth of cases of false allegations in rape case. This includes section 124 of the Evidence Act which allows the court to consider the sole evidence of a victim without corroboration of the same. Through highlighting these gaps, this chapter established the need to criminalize false rape accusations to protect the integrity of the justice system and the rights of the accused.

Chapter three critically analysed the gaps in Kenya's legal framework that contribute to wrongful rape convictions. These gaps can lead to wrongful convictions based on false accusations, undermining justice and the rights of the accused. Such gaps include the practice of prosecutions and courts in making convictions by overreliance on victim testimony. To remedy this, this chapter proposed the adoption of criminalising false accusation in order to create a deterrence. In addition, this chapter explored the effect of these legal gaps and how the same has been misused by persons such as the police. It further showed the level of negative effect it has on the public and the reciprocal effect the public has on the victims of false accusations. Moreover, the chapter highlighted the move to delete section 38 of the Sexual Offences Act and its net effect. Generally, through case law and literature review, the chapter emphasized the urgent need for legal reforms to address these deficiencies and ensure a fair and just legal process for all involved.

Chapter four provided a comparative analysis of Kenya's legal framework for criminalizing false rape accusations to that of South Africa and Botswana. This chapter explored how South Africa has made efforts to curtail false rape allegations by enacting various evidentiary standards and criminal liability measures. In South Africa, their legal regime has more than one legal option to prosecute false accusations in rape cases through perjury and *crimen injuria*. Even though South Africa has no specific law criminalising false allegations just like Kenya, their system has been efficient in prosecuting false rape claims. On the other hand, the chapter

also addressed the legal regime in Botswana which has a very specific provision for criminalisation of false allegations in rape cases. In addition to this, their regime also involves an advanced practice in rape trials where the court seeks to establish whether the complainant has intent to lie.

5.2 Conclusion

In conclusion, the subject study is one which is bound to invite disrepute and probably be pushed over. However, this study has sufficiently proved that it is a genuine legal concern which has been addressed in other jurisdictions. It is therefore this study's rallying call that the aspect of false allegations in rape cases be strictly addressed in Kenya. These laws, if curated well and according to the recommendations in this study, will go a long way to prevent the misuse of rape allegations as weapons to wield against foes. The ripple effect of the same is that the rape cases that will be brought to court will be genuine ones and as such genuine victims will get justice.

5.3 Recommendations

Based on the findings above, this study makes the following recommendations:

- a) The Sexual Offences Act should be amended to include the criminalisation of knowingly making false rape allegations but excluding incidences where there is an acquittal.
- b) The office of the Public Prosecutor to provide a policy guide on prosecuting false rape accusations in order to guide the prosecution of the same and avoid indicting genuine victims.
- c) The adoption of strict evaluation policy for evidences in rape cases by the prosecution and police to filter fabricated evidences and testimonies before it gets to courts.

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