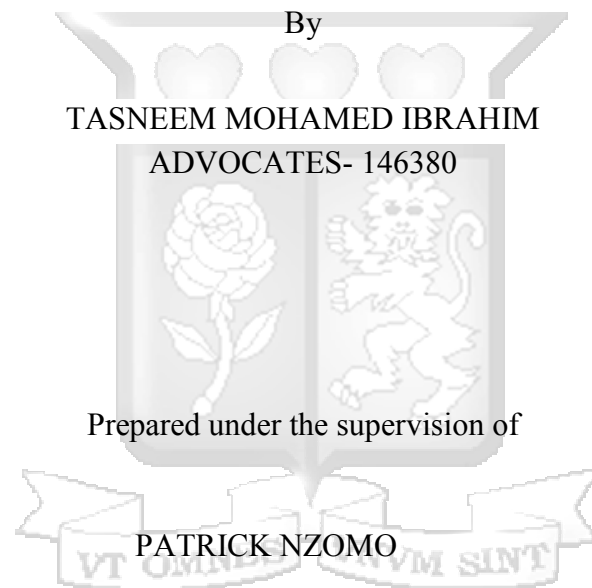


**Redefining The Ingredients of Penetration and Identification in Rape and Defilement Cases  
in Kenya: A Case for Mandatory DNA Testing in Cases Involving Bodily Fluids and  
Epithelial Cells**

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



January 2025

**DECLARATION**

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

Signed:  .....

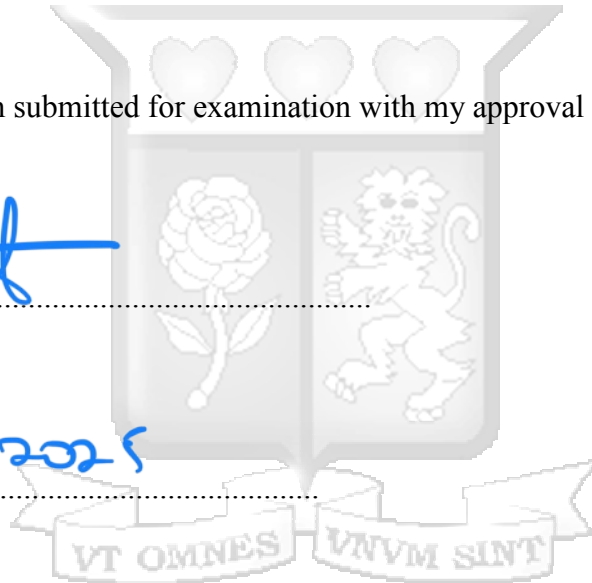
Date: 25/01/2025 .....

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

Signed:  .....

[PATRICK NZOMO]

Date: 25/01/2025 .....



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First and foremost, I thank the Almighty God for granting me strength, wisdom, and perseverance throughout this research journey.

I acknowledge the net worth contribution of my supervisor, Patrick Nzomo, whose guidance during this research process has been immeasurable.

I also express my heartfelt gratitude to my family, whose unwavering support and constant encouragement have been my source of strength and motivation to complete this project.



## LIST OF CASES

1. *AML v Republic* (2012) eKLR.
2. *Coalition on Violence Against Women & 11 others v Attorney General & 5 others; Kenya Human Rights Commission (Interested Party); Kenya National Commission on Human Rights & 3 others (Amicus Curiae)* (Petition 122 of 2013) [2020] KEHC 9208 (KLR)
3. *Erick Onyango Ondeng v Republic* (2014) eKLR.
4. *Julius Kiunga M'birithia v Republic* (2013) eKLR.
5. *Kassim Ali v Republic* (2005) eKLR.
6. *Kirk Noble Bloodsworth v State of Maryland* (1988), Court of Special Appeals of Maryland.
7. *Mark Oiruri Mose v R* (2013) eKLR.
8. *Paul Muhoro Wangechi v Republic* (2023) eKLR.
9. *Ripples International (suing as next friend of 8 minors) vs. the Inspector General of Police* (2013) eKLR.
10. *State of North Carolina v Ronald Junior Cotton* (1987), Supreme Court of North Carolina.
11. *Thuita Mwangi & 2 others v EACC & 3 others*(2013) eKLR.
12. *Francis Owino Ringo v Republic* (2023), Kibera Law Court (unreported).
13. *Dismas Wafula Kilwake v Republic* (2018) eKLR.
14. *Robert Mutingi Mumbi v Republic* (2014) eKLR.
15. *People v Wise* (2002), Supreme Court of the United States.

## LIST OF LEGAL AUTHORITIES

### List of Kenyan Legal Instruments

1. Constitution of Kenya, 2010,
2. Sexual Offences Act, Cap 63A, Laws of Kenya.
3. Evidence Act, Cap 80, Laws of Kenya.
4. The Sexual Offences (Dangerous Offenders DNA Data Bank) Regulations, Legal Notice 133 of 2008.
5. Children's Act 29 of 2022, Cap 141, Laws of Kenya.

### List of Foreign Legal Instruments

1. Criminal Procedure Act 51 (1977) (South Africa).
2. Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007).
3. Criminal Law (Forensic Procedures) Amendment (Act 37 of 2013).

### List of International Instruments

1. United Nations Convention on the Rights of the Child (signed 20 November 1989, entered into force 2 September 1990); 1577 UNTS 3.
2. The International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976); 999 UNTS 171.
3. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)) (adopted 18 December 1979, entered into force 3 September 1981); 1249 UNTS 13
4. African Charter on the Rights and Welfare of the Child (ACRWC) adopted 11 July 1990, entered into force 29 November 1999.

## LIST OF ABBREVIATIONS

DNA	Deoxyribonucleic Acid
SOA	Sexual Offences Act Cap 63A
GBV	Gender-Based Violence
NFDD	National Forensic DNA Database
P3 FORM	Medical Examination Form
PRC	Post Rape Care
COVAW	Coalition on Violence Against Women
CODIS	Combined DNA Index System
SGBV	Sexual and Gender-based Violence
SAECK	Sexual Assault Evidence Collection Kit
NFOEB	National Forensic Oversight and Ethics Board
SAPS	South African Police Service
FIL	Forensic Investigative Lead
SOPs	Standard Operating Procedures
PCR	Polymerase Chain Reaction
STR	Short Tandem Repeat (STR)

## **ABSTRACT**

*Defilement and rape is the predominant forms of abuse in Kenya, and it exacts severe mental and physical tolls on victims. It not only exposes the victims to early pregnancies but also to the risks of HIV/AIDS and other sexually transmitted diseases. However, addressing both defilement and rape cases are fraught with challenges such as the possibility of coaching children victims, fabrication of rape allegations, the denial of exculpatory evidence for accused persons. Additionally, the non-operationalization of Kenya's DNA database hinders the effective prevention, investigation and investigation of such cases. The current Kenyan law and practice does not mandate for DNA testing in defilement and rape cases and the resultant effect is the increased possibility for mistaken identity hindering the ability to establish innocence. This study aims to interrogate the Sexual Offences Act No. 3 of 2006 Cap 63A to determine whether or not mandatory DNA testing can help alleviate the above mentioned challenges with regards to defilement and rape cases involving bodily fluids and epithelial cells. Anchored on the rational theory of crime, this study utilizes a doctrinal research methodology to scrutinize primary sources alongside secondary data to assess the legal landscape surrounding defilement cases in Kenya. Further, the study undertakes a comparative study of the legislation and practice of DNA testing in South Africa. South Africa is selected as a comparator country because of its progressive legislation and jurisprudence, from which Kenya can draw some valuable lessons. Ultimately, the findings of this study have the potential to provide valuable insights for policymakers and legal practitioners highlighting the imperative of integrating provisions on mandatory DNA testing in defilement and rape cases involving bodily fluids and epithelial cells into the existing legal framework. This integration could significantly bolster the protection of children from sexual abuse and ensure that perpetrators are only held accountable for their actions.*

***Key words:*** (Defilement, Rape, Sexual Offences Act, and Mandatory DNA testing.)

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## 1.0 CHAPTER 1: INTRODUCTION

### 1.1 Background

Tali (a pseudonym name used for privacy purposes) was defiled by an 82-year-old man in February 2021. The perpetrator would often commit this crime and threaten her to not expose him lest she would be cursed. As a result of the constant defilement, Tali lost her jovial nature, she became more reserved and could not concentrate in class anymore. She is one of many examples of survivors of rape and defilement to exist all over the world.<sup>1</sup> The Economic Survey of 2023 *reported* that defilement cases constituted 76.4 percent of all crimes against morality.<sup>2</sup> Furthermore, the survey also showed that the number of defilement cases had increased by 6.1% to 5860 in 2023 from 5530 in 2022. The survey also highlighted that men were the primary offenders and were responsible for 5731 cases in 2023. Similarly, rape cases had increased by 13.5% in 2023 and this figure represented 12.2% of all crimes against morality.<sup>3</sup> Rape and defilement are two of the most traumatic experiences for any person to go through.<sup>4</sup> Many women and young girls face this threat of violation at the hands of intimate persons, such as their fathers, or even strangers they meet in their daily lives. This research seeks to make a case for introducing mandatory DNA testing in rape and defilement cases that involve bodily fluids and epithelial cells. This introduction would aid survivors in getting the justice they all deserve while diminishing instances of mistaken identity.

#### 1.1.0 The Ingredient of Penetration in Defilement and Rape Cases in Kenya

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”<sup>5</sup> Penetration means “the partial or complete insertion of the genital organs of a person

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<sup>1</sup> Obiria M, ‘Defilement trauma: ‘I failed because that man messed me up.’ The Daily Nation, 4 October 2023 <<https://nation.africa/kenya/news/gender/defilement-trauma-i-failed-because-that-man-messed-me-up--4389526>> on 21 August 2024.

<sup>2</sup> Osen G, ‘Grim tales as data shows rise in rape, defilement,’ The Star, 28 May 2024 < <https://www.the-star.co.ke/news/2024-05-28-grim-tales-as-data-shows-rise-in-rape-defilement/>> on 21 August 2024

<sup>3</sup> Osen G, ‘Grim tales as data shows rise in rape, defilement,’ The Star, 28 May 2024 < <https://www.the-star.co.ke/news/2024-05-28-grim-tales-as-data-shows-rise-in-rape-defilement/>> on 21 August 2024

<sup>4</sup> Haskell L, Randall M, *The Impact of Trauma on Adult Sexual Assault Victims*, Report Submitted to: Justice Canada, 2019, 7.

<sup>5</sup> Section 8, *Sexual Offences Act*, 2006.

into the genital organs of another person.”<sup>6</sup> To secure a conviction for the offence of defilement, the prosecution has to prove the following three ingredients: age of a victim, penetration, and identification of the perpetrator.<sup>7</sup>

For the offence of rape, a person is said to have committed this offense if; he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs, the other person does not consent to the penetration, or the consent is obtained through force, threats, or any form of intimidation.<sup>8</sup> The current approach in handling rape and defilement cases in Kenya shows that courts rely exclusively on the already established ingredients of the two offences and hold proof of such ingredients as conclusive evidence ultimately leading to convictions. Furthermore, the courts seem to have adopted the view that in some cases, a perpetrator may not necessarily complete the entire sexual act. This view seems to aid courts in arriving at the conclusion that the possibility of not completing the act explains why the law does not mandate evidence related to spermatozoa.<sup>9</sup> In this sense, the courts seem to suggest that provided there is penetration, even if it is superficial, the essential element of penetration is established.

Consequently, the law only requires proof of penetration, and penetration does not necessarily mean that sperm must be present. The depth of penetration inside the female genital organ is also not a requisite. Even the slightest penetration of a female sex organ by a male sex organ is deemed adequate to prove the ingredient of penetration and ultimately the offense of defilement.<sup>10</sup> The court noted that the offense of defilement does not require the sexual act to be fully completed, as many attackers may not fully consummate the act during the offense. Therefore, the absence of spermatozoa does not negate the occurrence of penetration, which is the crucial ingredient of the offense.<sup>11</sup>

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<sup>6</sup> Section 2, *Sexual Offences Act*, 2006.

<sup>7</sup> Section 8, *Sexual Offences Act*, 2006.

<sup>8</sup> Section 3, *Sexual Offences Act*, 2006.

<sup>9</sup> *Mark Oiruri Mose v R* (2013) eKLR.

<sup>10</sup> *Erick Onyango Ondeng v Republic* (2014) eKLR.

<sup>11</sup> *Mark Oiruri Mose v R* (2013) eKLR.

### 1.1.1 Challenges Arising from the Omission of DNA testing in Defilement and Rape Cases

The current approach to dealing with rape and defilement cases leaves no space for mandatory DNA testing, despite the potential it offers to significantly aid survivors in attaining justice by bolstering the prosecution's case, while offering the accused person the benefit of any resultant exculpatory evidence. In *AML v Republic*, the court affirmed that proving rape or defilement relies not on DNA testing but on substantive evidence.<sup>12</sup>

From this perspective, various challenges arise from the omission of DNA testing including the possibility of victim coaching and the resultant reliance on such victim testimony as the sole basis for a conviction, as highlighted in some cases like *Julius Kiunga M'birithia v Republic*.<sup>13</sup> Other challenges include the denial of exculpatory evidence to an accused person and the proper collection and preservation of medical evidence. These challenges pose a great risk to the criminal justice system as discussed below:

First, convicting an accused person solely based on the victim's testimony, as per Section 124 of the Evidence Act,<sup>14</sup> in rape and defilement cases poses a significant risk of coaching, potentially leading to false statements and allegations. The practice of relying on a victim's testimony adamantly was reiterated in the case of *Kassim Ali v Republic*, where the court emphasized that the absence of a medical examination does not definitively negate the occurrence of rape.<sup>15</sup> Instead, the court asserted that rape can be substantiated through the victim's testimony or circumstantial evidence. This is the same position for defilement cases.<sup>16</sup>

On the one hand, it is vital to recognize that children can be coached into making false claims of sexual abuse, while on the other hand, adults can fabricate rape allegations.<sup>17</sup> Just as thousands of children in Kenya have endured the devastating reality of defilement, some accused individuals also bear the consequence resulting from coaching and manipulation of children by adults pursuing

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<sup>12</sup> (2012) eKLR.

<sup>13</sup> (2013) eKLR.

<sup>14</sup> Section 124, *Evidence Act* (2012).

<sup>15</sup> (2005) eKLR.

<sup>16</sup> *Francis Owino Ringo v Republic* (2023), Kibera Law Court (unreported).

<sup>17</sup> 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>> on 19 July 2024.

a vendetta against such accused persons. One defilement case that shows the consequence of coaching involves a man who was falsely accused of defiling his daughter. After serving eight years in prison, he secured a fresh trial that was supported by his daughter's confession of lying, with the court acknowledging coercion or coaching by her mother in the fabricated testimony.<sup>18</sup> Similarly, adults can fabricate evidence as was the case involving a woman named Mercy, who falsely accused her local chief of rape to cover up their affair after her husband discovered it.<sup>19</sup>

Secondly, the failure to conduct DNA testing, especially in cases involving bodily fluids and epithelial cells, arguably denies an accused person the benefit of any resultant exculpatory evidence. Exculpatory evidence within a criminal trial is the evidence that supports the case of a defendant by either proving their innocence or suggesting their lack of guilt.<sup>20</sup> Use of exculpatory evidence is necessary to ensure a fair trial occurs, for it allows the accused to have access to and adduce evidence that could absolve them of responsibility for the alleged crime.<sup>21</sup> DNA evidence includes bodily fluids like semen, saliva, and blood, and epithelial DNA that is derived from skin cells such as hairs. Failure to conduct DNA testing may violate this requirement to disclose the exculpatory evidence. This is because it could hinder the defense's ability to establish innocence or challenge mistaken identity, ultimately impacting the fairness of the trial.

Furthermore, in *Paul Muhoro Wangechi v Republic*, the appellant raised a key argument stating that the lack of DNA testing to establish whether the spermatozoa that was found on the complainant originated from him.<sup>22</sup> The appellant contended that the absence of DNA evidence should have indeed weakened the prosecution's case and he further criticized the trial court for having not mandated such testing. The court rejected the appellant's argument by citing that as per Section 36(1) of the Sexual Offences Act, 2006, which provides that the court **may** (but is not required to) direct that DNA samples be taken for forensic testing.

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<sup>18</sup> Wambulwa A, 'Man falsely accused of defiling daughter gets fresh trial', The Star, 16 December 2020, <<https://www.the-star.co.ke/news/2020-12-16-man-falsely-accused-of-defiling-daughter-gets-fresh-trial/>> on 2 March 2024.

<sup>19</sup> Vidija P, The Standard, 2021 <https://www.standardmedia.co.ke/national/article/2001424398/be-cautious-while-reporting-rape-cases-dci> on 2 March 2024.

<sup>20</sup> Jeffrey L and Shirelle P, *West's Encyclopedia of American Law*, 7 Thomson/Gale, 2005,286.

<sup>21</sup> Thuita Mwangi & 2 others v EACC & 3 others(2013) eKLR.

<sup>22</sup> (2023) eKLR.

This section is couched as discretionary, rather than mandatory, terms, meaning that DNA testing is not obligatory for securing a conviction. The court relied on precedents, including *Robert Mutingi Mumbi v Republic*, to reinforce that DNA evidence is not the only means to prove a sexual offence.<sup>23</sup> It pointed out that the law allows other forms of evidence—such as the complainant's testimony—to support a conviction if the court finds it credible and cogent. Thus, the court emphasized that even in the absence of DNA testing, the prosecution had sufficiently proven the elements of defilement, specifically penetration, age of the victim, and identification of the perpetrator. The complainant's detailed and consistent testimony, combined with medical evidence of the injuries and presence of spermatozoa, was sufficient for a conviction. Therefore, the lack of a DNA test did not lead to a miscarriage of justice.

Eyewitness identification is prone to errors which may result in a wrongful conviction.<sup>24</sup> Illustrating the potential dangers of mistaken eyewitness identification, one case of Kirk Noble Bloodsworth in 1985 serves as an example. Bloodsworth was wrongly convicted of murder and sexual assault based on the testimony of five eyewitnesses. After spending nine years on death row, DNA testing in 1993 conclusively proved his innocence.<sup>25</sup> Another instance is the case of Ronald Cotton, who, in 1987, was convicted of rape primarily relying on eyewitness identification from a photo array and a lineup. It was the presence of testable DNA evidence at the crime scene that ultimately led to Cotton's exoneration after a decade of imprisonment, emphasizing the crucial role of exculpatory evidence in correcting wrongful convictions.<sup>26</sup>

In this regard, scientific journals, including psychology, public policy, and law, have made mention of the risks associated with unreliable eyewitness identification, often influenced by various methods employed in constructing and conducting lineups and photo arrays.<sup>27</sup> These risks are arguably present in the use of dock identification and identification ID parades employed in Kenya as methods of identification.

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<sup>23</sup> (2014) eKLR.

<sup>24</sup> Rosenthal, L., Eyewitness Identification and The Problematics of Blackstonian Reform of The Criminal Law. *110, The Journal of Criminal Law and Criminology* 2, 2020,181.

<sup>25</sup> Kirk Noble Bloodsworth v State of Maryland (1988) Court of Special Appeals of Maryland.

<sup>26</sup> State of North Carolina v. Ronald Junior Cotton (1987), Supreme Court of North Carolina.

<sup>27</sup> Gary L. Wells, Eyewitness Identification: Psychological research and legal policy on lineups, *1, Psychology, Public Policy, And Law*, 1995, 765-791.

Lastly, another significant challenge stems from the non-operationalization of The Sexual Offences (Dangerous Offenders DNA Data Bank) Regulations which mandates the establishment and functioning of a DNA database for dangerous offenders.<sup>28</sup> These rules were gazetted within the Legal Notice No. 133 of 2008 and required that the Director of Criminal Investigations (DCI) be the officer that is mandated to maintain the data bank.<sup>29</sup> Despite this regulatory framework, the DNA database remains non-operational. The failure to operationalize the above mentioned regulations not only renders the envisioned database ineffective but also undermines its critical role in facilitating the collection, storage, and retrieval of genetic evidence. Without its operationalization, the DNA database cannot fulfill its intended purpose of aiding in the prosecution of offenders and the exoneration of innocent individuals. This in turn weakens the criminal justice system's ability to effectively handle these cases.<sup>30</sup>

In Kenya, many cases involving forensic specimens often do not collect samples from either the victim or the suspect.<sup>31</sup> Additionally, when samples are collected, they frequently suffer from inadequate preservation.<sup>32</sup> Furthermore, law enforcement officers may fail to retrieve these samples from healthcare facilities, leading to their eventual disposal due to insufficient storage space after a few days or weeks.<sup>33</sup> When samples are gathered from the victim or suspect, they are frequently incomplete or inadequate.<sup>34</sup> Kenya had clearly aspired to have a functioning DNA database that would allow for mandatory DNA testing to occur. Therefore, there is room to learn from other jurisdictions like South Africa which has a DNA Act that allows for the creation of a DNA database that will serve as a tool to effectively eliminate suspects.<sup>35</sup> The resultant effect is that there is no miscarriage of justice.

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<sup>28</sup> The Sexual Offences (Dangerous Offenders DNA Data Bank) Regulations, Legal Notice 133 of 2008.

<sup>29</sup> Section 2, The Sexual Offences (Dangerous Offenders DNA Data Bank) Regulations, Legal Notice 133 of 2008.

<sup>30</sup> Kara N C, 'Enforcing and Implementing the Law on Defilement in Kenya: A Critique' Published LLM Thesis, University of Nairobi, Nairobi, 2013, 37.

<sup>31</sup> Shako K, Kalsi M, Forensic observations and recommendations on Sexual and Gender-Based violence in Kenya. 1 *Forensic Sci Int Synerg*, 2019, 185-203.

<sup>32</sup> Bundi M, The State Of Forensic Investigation In Kenya, Published MA Thesis, University of Nairobi, Nairobi 2016, 45.

<sup>33</sup> 'Corrupt Security Officials to Blame for Rising Cases Of Defilement– 29 December 2018.

<https://www.kenyanews.go.ke/corrupt-security-officials-to-blame-for-rising-cases-of-defilement/> on 10 December 2023.

<sup>34</sup> National Policy On The Prevention, Response And Protection From Unlawful Sexual Acts and The Administration Of Justice In Sexual Offences Matters, Office of The Attorney General And Department of Justice And The National Council on The Administration of Justice 2021.

<sup>35</sup> Section 15J (6), *Criminal Law (Forensic Procedures) Amendment (Act 37 of 2013)*.

### 1.1.2 A Case for Mandatory DNA Testing in Defilement and Rape Cases Involving Bodily Fluids and Epithelial Cells

As earlier alluded to, South Africa has the Criminal Law (Forensic Procedures) Amendment (Act 37 of 2013) also referred to as the 'DNA Act' was assented to by the Presidency and was published in the Government Gazette (Vol. 583 No. 37268) on January 27, 2014. It allows for the collection of DNA samples from people who have been arrested or found guilty of offenses under Schedule 8 of the Criminal Procedure Act 51 of 1977.<sup>36</sup> Some of the offenses including murder, rape, sexual assault, and acts of public violence, are included within the schedule of offenses.<sup>37</sup> An offender's or arrestee's DNA will be archived in South Africa's National Forensic DNA Database (NFDD) after analysis and the creation of a DNA profile.<sup>38</sup> This means that the DNA profiles of all individuals arrested under suspicion of committing an offence under Schedule 8 and those already convicted will be stored in the database. Furthermore, DNA discovered at crime scenes, even if the source is unknown, will also be retained in the database. The use of the database aids in accurately eliminating suspects, therefore preventing a situation of wrongful convictions or the miscarriage of justice.

Furthermore, the utilization of DNA testing has been a staple in the United States since 1986.<sup>39</sup> Reports indicate that 72% of jurors expect the inclusion of DNA evidence in a sexual assault trial and the likelihood of jury conviction increases by 33 times when presented with such DNA evidence.<sup>40</sup> Forensic experts examine DNA and compare the profile in an attempt to correlate the findings with records of offenders within the FBI's Combined DNA Index System (CODIS).<sup>41</sup> This proves beneficial in cases where the identity of the perpetrator is not known. DNA analysis is also advantageous for endeavoring to link DNA with an individual who has been accused.

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<sup>36</sup> Schedule 8, *Criminal Procedure Act 51*,(1977).

<sup>37</sup> Schedule 8, *Criminal Procedure Act 51*,(1977).

<sup>38</sup> Section 15J (6), *Criminal Law (Forensic Procedures) Amendment (Act 37 of 2013)*.

<sup>39</sup> Roman, J.K., Reid, S.E., Chalfin, A.J The DNA Field Experiment: A Randomized Trial of the cost-effectiveness of using DNA to solve property crimes, *J Exp Criminol* 5, 2009, 345–369.

<sup>40</sup> Donald E. Shelton, Young S. Kim, and Gregg Barak. "A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the 'CSI Effect' Exist?" 9 *Vanderbilt Journal of Entertainment and Technology Law*, 2006, 331-368.

<sup>41</sup> U.S. Department of Justice Office of the Inspector General Audit Division, Audit Report 06-32, *Combined DNA Index System Operational and Laboratory Vulnerabilities*, May 2006, 2.

## **1.2 Statement of the Problem**

The ideal situation in a criminal trial is one where both the victim and the accused person receive justice. Victims can have the opportunity to bolster their case and simultaneously, accused persons can benefit from any resultant exculpatory evidence reducing any risk of mistaken identity. The current reality in Kenya is that there is no DNA testing in rape and defilement cases, even when the evidence is available. Within the Kenyan legal landscape, rape and defilement have various ingredients including the aspects of penetration and identification. Typically, the ingredient of penetration is established through medical evidence which is documented in the medical examination form (P3 form) and the Post Rape Care form (PRC). Furthermore, Section 124 of the Evidence Act allows for the possibility of conviction in sexual offences based solely on a victim's testimony if the court believes the victim to be truthful. This mechanical application of Section 124 of the Evidence Act runs the risk of giving room for false accusations either through coaching of child victims or fabrications by adult rape victims. Additionally, accused persons are subsequently denied the chance to use exculpatory evidence respectively which would be concrete scientific data. What compounds the challenges of not mandatory DNA testing is that Kenya has a Sexual Offences (Dangerous Offenders DNA Data Bank) Regulations that is not operational which would have aided in the collection, storage, and retrieval of DNA evidence. The regulations not being operational undermines its effectiveness in ensuring justice for both victims and accused persons through the accurate identification of perpetrators and increasing the credibility of criminal proceedings.

## **1.3 Research Objectives**

1. To discuss the challenges arising from the omission of DNA testing in rape and defilement cases that involve bodily fluids and epithelial cells in Kenya.
2. To assess whether the challenges arising from the omission of DNA testing in rape and defilement cases involving bodily fluids and epithelial cells in Kenya can be remedied through mandatory DNA testing.
3. To offer recommendations based on a comparative study with South Africa.

## **1.4 Research Questions**

1. What are the challenges arising from the omission of DNA testing in rape and defilement cases involving bodily fluids and epithelial cells in Kenya?
2. Can mandatory DNA testing alleviate the challenges arising from the omission of DNA testing in defilement and rape cases involving bodily fluids and epithelial cells in Kenya?
3. What recommendations can be offered based on a comparative study with South Africa?

## **1.5 Hypothesis**

This study will proceed on the hypothesis that mandatory DNA testing alleviates the challenges arising from the omission of DNA testing in rape and defilement cases involving bodily fluids and epithelial cells in Kenya.

## **1.6 Justification of the Study**

This research paper will play a crucial role in illuminating the inadequacies encountered in the application of the law. The findings and recommendations will aid legal practitioners, the judiciary, victims of sexual offenses, policymakers, and academics to appreciate the importance of mandatory DNA testing in certain cases. The study will also advocate for the prompt amendment of Sections 3 and 8(1) of the SOA to allow for mandatory DNA testing in rape and defilement cases involving bodily fluids and epithelial cells. Mandatory DNA testing in specific cases is not unreasonable but is indeed significant for it has a potential to impact the lives of both accused persons and survivors. This research will therefore aid in bridging the existing gaps in the law and provide recommendations Kenya can draw from other jurisdictions including South Africa. The goal is therefore to enhance knowledge, especially given the inadequacy of domestic literature on this aspect.

## **1.7 Theoretical Framework**

### **1.7.1 Rational Choice Theory of Crime**

The rationale behind the rational choice theory of crime is often employed in criminology and is from the utilitarian philosophy of one Cesare Beccaria. The main idea of this theory is to

understand that all individuals will make rational decisions that will optimize their personal gain and reduce any consequences.<sup>42</sup> Rationality is the cornerstone of this theory as it shows the significance of reasoned decision making in human actions.<sup>43</sup> According to this theory, crime is a product of individuals balancing the potential benefits of their actions *vis a vis* the potential drawbacks should they engage in the criminal behavior.<sup>44</sup> If the benefits outweigh the drawbacks, individuals will opt to commit the crime so as to seek the immediate gratification they will get from crimes like rape and defilement and thus, they calculate the risks accordingly.<sup>45</sup>

Sex offenders often engage in a process of decision making, like other criminals, which is often influenced by either personal factors or external situational components.<sup>46</sup> With regard to this research, offenders, particularly defilers, and rapists, prioritize sexual gratification regardless of the age of their victim, allowing them to assess the risk of detection as minimal, thus reducing their chances of being apprehended. According to Daniel S. Nagin and Raymond Paternoster, there is a correlation between a measure of criminal propensity (specifically, poor self-control) and self-reported decisions to commit three offenses: drunk driving, theft, and sexual assault.<sup>47</sup> Moreover, even after accounting for variations in self-control, their findings indicate that factors such as the allure of the crime target, the ease of perpetrating the offense with minimal risk, and perceptions of the costs and benefits of committing the crime all significantly influence decisions to offend.

The rational theory of crime is crucial to this research as Kenya's current approach to preventing rape and defilement cases is reliant mainly on deterrent laws. As per this theory, implementing mandatory DNA testing could influence how potential offenders make their decisions due to the perceived risk of being caught and convicted of a crime. Awareness of DNA evidence linking them

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<sup>42</sup> Pratt T, Rational Choice Theory, Crime Control Policy, and criminological Relevance, 7(1) *Criminology & Public Policy*, 2008, 43-44.

<sup>43</sup> Beaudry-Cyr M, Rational Choice Theory, The Encyclopedia of Crime & Punishment, University of South Florida, 2015.

<sup>44</sup> Sato Y, Rational choice theory, Sociopedia, 2013, 3.

<sup>45</sup> Verbora R A, Rational Choice Theory

—<<https://kpu.pressbooks.pub/introcrim/chapter/16-6-rational-choice-theory/#:~:text=The%20rational%20choice%20regarding%20how,frequency%20is%20still%20a%20choice>> on 19 February 2024.

<sup>46</sup> Beauregard E and Leclerc B, 'An Application of the Rational Choice Approach to the Offending Process of Sex Offenders: A Closer Look at the Decision-making, 19(2) *Sexual Abuse a Journal of Research and Treatment*, 2007, 118.

<sup>47</sup> Nagin S. D and Paternoster R, 'Enduring Individual Differences and Rational Choice Theories of Crime, 27(3) *Law & Society Review*, 1993, 467-496.

to a crime scene may deter individuals from engaging in criminal behavior. This is because the increased likelihood of detection and subsequent punishment raises the risks associated with such actions.

A key argument of the study is that establishing a DNA database upon testing is essential for enhancing law enforcement's effectiveness in solving crimes, particularly in cases of defilement and rape. This aligns with rational choice theory by increasing the perceived risk of detection for potential offenders. This can be achieved by expanding the pool of DNA samples collected from individuals arrested or convicted of specific offenses.

## **1.8 Literature Review**

Rape and defilement are a violation of one's bodily integrity, and without a doubt, leave unerasable scars in a victim's life.<sup>48</sup> In Kenya, there is a need for a prompt reevaluation of the current ingredients regarding penetration and identification in defilement and rape cases. This literature review aims to explore the importance of mandatory DNA testing during the investigation of rape and defilement cases involving bodily fluids and epithelial cells. Kenya and many other nations grapple with the challenge of dealing with rape and defilement effectively.<sup>49</sup>

The investigation process of such heinous crimes will have enhanced accuracy as a result of DNA testing, transparency and more importantly justice will prevail for both accused persons and victims.

### **1.8.1 The Ingredient of Penetration in Defilement and Rape Cases in Kenya**

The origins of the Sexual Offenses Bill in Kenya can be traced back to the 1990s when various human rights advocacy groups ended up recognizing the inadequacy of the country's legal framework when dealing with sexual and gender-based violence against women and children.<sup>50</sup> The Bill became law in Kenya in July 2006. Undeniably, the Sexual Offences Act in

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<sup>48</sup> Mutavi T, Mathai M, Kumar M, Nganga P, Obondo A. Psychosocial Outcomes Among Children Following Defilement and The Caregivers Responses to The Children's Trauma: A Qualitative Study from Nairobi Suburbs, Kenya. *Afr J Trauma Stress* 5(1) 2016, 38.

<sup>49</sup> Sampson F and Hart S, '160 Girls' Making Legal History: Overview of the Development and Implementation of a Strategic Equality Initiative to Achieve Legal Protection from Defilement for All Girls in Kenya, 1.

<sup>50</sup> Onyango-Ouma W, Ndung'u N, Baraza N and Birungi H, 'The making of the Kenya Sexual Offenses Act, 2006: Behind the Scenes' *Kwani Trust*, 2009, 4.

Kenya has improved access to justice for victims of gender-based violence in Kenya.<sup>51</sup> Prior to the introduction of the Sexual Offences Act, sexual violence was a widespread epidemic that posed significant challenges for prosecution as laws criminalizing such offenses were scattered across different sections of the Penal Code.<sup>52</sup> The SOA currently contains fourteen offenses, including defilement, attempted defilement, and rape among others. It also introduces minimum sentences and provides for the setting up of a DNA data bank which is not currently enforced. This paper aids this study by providing a more comprehensive historical background of the SOA as it shows how the laws evolved to what it is now.<sup>53</sup> However, the paper fails to discuss in depth about the DNA data bank that has not been operationalized and which would have addressed sexual violence more effectively.

Christine Njeri Kara critiques the enforcement of defilement laws in Kenya as well as their implementation by highlighting several issues.<sup>54</sup> She argues that oftentimes, cultural norms dissuade victims from seeking any legal recourse and thus, many cases go through traditional justice systems which also undermines the integrity of formal legal process.<sup>55</sup> Kara also emphasizes how the current legal framework is ineffective. She argues that despite there being comprehensive laws, minimal progress has been made in reducing defilement cases. She also mentions that there are also institutional challenges for example delays in forensic testing within the government chemist laboratory which then causes case backlogs and evidence loss.<sup>56</sup> This ends up impeding the pursuit of justice. Kara's work is vital to this research because it underscores the shortcomings of Kenya's current defilement and rape laws, particularly in the failure to mandate DNA testing. However, the limitation of the author's paper is that she doesn't directly

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<sup>51</sup> Lugalia L M, 'The Sexual Offences Act 2006 And its Role in Enhancing Access to Justice for Survivors of Sexual Violence in Nairobi, *Institute of Advanced Studies*, 2011.

<sup>52</sup> Kamunya M, Human Rights and Justice Rights Approaches to Gender-Based Violence (GBV): The Case of Kenya's Sexual Offences Act (KSOA) Violence, Published, Graduate Master Theses, University of Massachusetts Boston, 2019, 42.

<sup>53</sup> Onyango-Ouma W, Ndung'u N, Baraza N and Birungi H, 'The making of the Kenya Sexual Offences Act, 2006: Behind the Scenes' 4.

<sup>54</sup> Kara N C, 'Enforcing and Implementing the Law on Defilement in Kenya: A Critique' Published LLM Thesis, University of Nairobi, Nairobi, 2013.

<sup>55</sup> Kara N C, 'Enforcing and Implementing the Law on Defilement in Kenya: A Critique' Published LLM Thesis, University of Nairobi, Nairobi, 2013, 18.

<sup>56</sup> Kara N C, 'Enforcing and Implementing the Law on Defilement in Kenya: A Critique', 58.

address the issue of utilization of mandatory DNA testing within both rape and defilement cases involving epithelial cells and bodily fluids.

### **1.8.2 Challenges Arising from the Omission of DNA testing in Defilement and Rape Cases**

Kathleen Coulborn's paper highlights a potential challenge that is coaching of children with regards to sexual abuse and this raises significant concerns.<sup>57</sup> The author implores on the importance of critically evaluating the accuracy of these allegations while bringing out the complexities that are usually involved in the disclosures and testimonies of children. Evidence shows that most of these allegations are genuine and credible. Nonetheless, there are instances where a child might falsely accuse someone of sexual abuse.<sup>58</sup> The study also shows that while professionals acknowledge encountering coaching cases, they do view these as rare. Most people have the belief that abuse allegations often result from coaching by parents, especially mothers, within divorce or custody disputes.<sup>59</sup>

Kathleen's work also brings to light that professionals will often focus more on the child's account rather than the mother's behaviour when assessing coaching. This ends up challenging the idea or belief that a mother's actions are a primary indicator of coaching.<sup>60</sup> The author's work is crucial to this paper because it aids in highlight the contentious issue of coaching with child sexual abuse allegations which is a topic that has a significant number of legal, social and psychological effects. The reality of coaching by alleged child victims shows the importance of preventing miscarriage of justice through the imposition of mandatory DNA testing in defilement cases. A limitation of the paper, however, is its focus on custody cases rather than explicitly addressing defilement and rape cases.

While children can be coached to lie about sexual abuse, adults can make false allegations regarding the same. To illustrate this point, the paper "False Rape Allegations" by Eugene J. Kanin investigates the frequency and motivations behind false rape accusations.<sup>61</sup> A nine-year study

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<sup>57</sup> Faller C. K, 'Coaching Children About Sexual Abuse: A Pilot Study of Professionals' Perceptions', 31(9) *School of Social Work, Family Assessment Clinic, University of Michigan*, 2007, 951.

<sup>58</sup> Cyr M, Bruneau G, False allegations of child sexual abuse, *The Psychology of Criminal Investigations: The Search for the Truth*; In: St-Yves M, Tanguay M, eds, 2008,199-228.

<sup>59</sup> Faller C. K, 'Coaching Children About Sexual Abuse: A Pilot Study of Professionals' Perceptions', 956.

<sup>60</sup> Faller C. K, 'Coaching Children About Sexual Abuse: A Pilot Study of Professionals' Perceptions', 957.

<sup>61</sup> Eugene K, "False Rape Allegations, 23 *Archives of Sexual Behavior* 1, 1994, 81.

conducted within a small Midwestern U.S city showed that forty-one percent of the one hundred and nine reported rape cases were false. The study identified that there were three primary motivations or reasons for reporting these false claims. Firstly, false reporting was used to create an *alibi* to fabricate allegations to explain one's whereabouts or the actions they were doing. Secondly, such reporting was used to seek revenge by falsely accusing someone in order to retaliate when in conflict with them. Lastly, false reporting is used to gather attention or sympathy from others and therefore get emotional support or concerns from them. Kanin's findings ended up challenging the misconception of thinking that false allegations of rape are rare and that there is need for careful consideration in the handling of such cases.<sup>62</sup>

Undeniably, false allegations of rape can drastically affect the falsely accused person. These accusations can also lead to family strain, social stigma and the disruption of one's personal and professional life which can thereby lead to severe emotional and psychological distress.<sup>63</sup> Kanin's work is vital to this paper as it provides much needed empirical evidence on the likelihood, prevalence and motivations behind false sexual assault allegations. The introduction of mandatory DNA testing can aid in curbing and reducing the likelihood of false allegations of rape within Kenya. However, the limitation of the paper is that the data is from a small Midwestern city that may not fully represent broader and more diverse populations and thus limiting the generalizability of findings. The data from the study also relied on police resorts and case files which could introduce biases and not fully capture relevant details or perspectives.

### **1.8.3 A Case for Mandatory DNA Testing in Defilement and Rape Cases Involving Bodily Fluids and Epithelial Cells**

A paper co-authored by Kimberly A. Lonsway, Sergeant Joanne Archambault, Patrick O'Donnell, and Lauren Ware highlights the critical role of DNA evidence in identifying or excluding suspects in criminal investigations. When biological evidence is collected, DNA profiles can be developed and, if the suspect is unknown, such profiles can be uploaded to a national DNA database to identify potential matches.<sup>64</sup> Furthermore, the authors mention that where a suspect is known,

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<sup>62</sup> Eugene K, "False Rape Allegations, 23 Archives of Sexual Behavior 1, 1994, 85

<sup>63</sup> Tawa U, 'Victims of False Accusations of Rape', 4 Int J Law Human 3,2021.

<sup>64</sup>Lonsway K, Sergeant Archambault J, O'Donnell P, Ware L, Role of DNA Evidence in Sexual Assault Investigations Part 1: The ABC's of DNA Evidence, 2016,7.

their DNA can be compared to the evidence that is collected to confirm or exclude their involvement in the crime. Through the exclusion of a suspect through DNA testing, the evidence helps ensure that the correct person is held accountable and convicted for the crime committed.<sup>65</sup> DNA evidence can be instrumental and helpful in exonerating wrongfully accused individuals.

Furthermore, the authors state that having a DNA database can help reveal prior convictions of a suspect as well as their arrests which can be introduced in the prosecution ultimately influencing the trial's outcome.<sup>66</sup> All investigative information including the victim's account and the crime scene details alongside DNA evidence can help provide a more complete understanding of a case such as the nature of the assault and whether multiple suspects were involved.<sup>67</sup> The authors' views are crucial to this study since they underscore the significance of DNA evidence in sexual crime trials such as rape and defilement. Their discussion shows how DNA evidence supports both victims and accused persons by ensuring the rightful offenders are convicted and provides exonerating evidence which would prevent wrongful convictions. However, the study's limitation is that its findings are primarily based on data from the US, which may affect the generalizability of its conclusions to other contexts.

In defilement cases, one of the key ingredients is identifying culprits, as is the case in all criminal investigations. Difficulty in some cases is enhanced in this task because of the absence of eyewitnesses. Innocent Makasa and Laura Jane Heathfield<sup>68</sup> argue in their article that despite high incidences of sexual abuse in Zambia, particularly defilement cases, the use of DNA evidence in resolving these crimes is at an all-time low. They highlight that there is significant underutilization of DNA evidence in sexual offence cases in Zambia since only 0.1% of cases have forensic samples actually collected.<sup>69</sup> A gap is then created in the investigative process due to the underutilization of DNA evidence that could aid in identifying perpetrators. Consequently, there

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<sup>65</sup> Lonsway K, Sergeant Archambault J, O'Donnell P, Ware L, Role of DNA Evidence in Sexual Assault Investigations Part 1: The ABC's of DNA Evidence, 2016, 8.

<sup>66</sup> Lonsway K, Sergeant Archambault J, O'Donnell P, Ware L, Role of DNA Evidence in Sexual Assault Investigations Part 1: The ABC's of DNA Evidence, 2016, 8.

<sup>67</sup> Lonsway K, Sergeant Archambault J, O'Donnell P, Ware L, Role of DNA Evidence in Sexual Assault Investigations Part 1: The ABC's of DNA Evidence, 2016, 41.

<sup>68</sup> Makasa I and Heathfield, Laura, A Retrospective Study of Sexual Offences in Zambia, *Journal of Forensic and Legal Medicine*, 2017.

<sup>69</sup> Makasa I and Heathfield, Laura, A Retrospective Study of Sexual Offences in Zambia, *Journal of Forensic and Legal Medicine*, 2017, 2.

are low prosecution and conviction rates, that is 28.1% and 12.4% respectively for sexual offenses since there is the lack of DNA evidence.<sup>70</sup> Furthermore, the absence of forensic corroboration tends to lead to insufficient evidence for prosecution, which shows that DNA evidence could potentially improve these rates. The authors also discuss the need for standardized protocols within the collection step and analysis of DNA evidence and failure to have such protocols will contribute to inconsistencies and missing data.<sup>71</sup> Lastly, the authors call for training and capacity building among law enforcement and legal personnel since without trained professionals, the potential of DNA evidence can't be fully realized.<sup>72</sup>

The importance of using DNA evidence can be illustrated through the Locard's Exchange Principle' as per the authors' reference. In the field of forensic science, the Locard's Exchange Principle asserts that an individual who is responsible for a crime will most likely bring something and take something from the crime scene.<sup>73</sup> This principle shows that the interactions between individuals will serve as crucial evidence due to the fact that there is recoverable materials thus identification becomes easier and there are insights about the specifics of the crime. Van Niekerk<sup>74</sup> discusses that the foundation of forensic biological analyses lies in the Locard' Principle of cross-transfer. In sexual crimes, investigative methods such as semen analysis, examination of genital injuries, DNA analysis, and reliance on victim or eyewitness testimonies are commonly employed.<sup>75</sup> The authors' arguments show that the lack of DNA evidence in sexual offenses in Zambia is impacting prosecution rates. However, the limitation of the paper is that it presents plausible arguments, but it is predominantly applicable within the Zambian landscape.

In South Africa, DNA evidence is vital in criminal investigations, emphasizing the power of its unique genetic information for identification and its ability to link suspects to crime scenes.<sup>76</sup> It is also crucial to understand the scientific principles behind DNA analysis according to the author, noting that DNA is unique to individuals (except identical twins) and can be extracted from

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<sup>70</sup> Makasa I and Heathfield, Laura, A Retrospective Study of Sexual Offences in Zambia, 9.

<sup>71</sup> Makasa I and Heathfield, Laura, A Retrospective Study of Sexual Offences in Zambia, 2.

<sup>72</sup> Makasa I and Heathfield, Laura, A Retrospective Study of Sexual Offences in Zambia, 12.

<sup>73</sup> Mummery D, 'Every contact leaves a trace', Br J Gen Pract. 28 October 2021, 512.

<sup>74</sup> S de Wet, H Oosthuizen and J Visser, 'DNA Profiling and The Law in South Africa', 14(4) *PER / PELJ*, 2011,174.

<sup>75</sup> Makasa I and Heathfield, Laura, A Retrospective Study of Sexual Offences in Zambia, *Journal of Forensic and Legal Medicine*, 2017.

<sup>76</sup> Lirieka Meintjes-van Der Walt, 'An Overview of the use of DNA evidence in South African Criminal Courts' 21 *South African Journal of Criminal Justice* 1, 2008.

various biological materials.<sup>77</sup> The unique nature of DNA evidence, especially for laypersons, is that much of the material is highly technical, leading to difficulties in understanding the data presented in court.<sup>78</sup> This complex nature requires ongoing training for legal professionals and forensic experts.<sup>79</sup> The author also emphasizes that DNA evidence could be used to impeach an accused person's version of events or support the testimony of a complainant.<sup>80</sup> The author's argument would enhance this study by offering critical insights into South Africa's handling of DNA evidence, which will be valuable for comparative analysis in a later chapter of the research. However, the paper fails to address defilement cases specifically.

From the reviewed works above, it is evident that there exists some literature that exists on the topic of mandatory DNA testing in rape and defilement cases but it is not sufficient. For example, some studies discuss DNA evidence in a broader sense or have more focus on rape mostly which leaves a gap in understanding the application in defilement cases. Other studies discussed in depth about the use of DNA evidence but it was more relevant in other jurisdictions.

## **1.9 Research Methodology**

This study adopts a doctrinal research methodology, involving the examination of data from primary and secondary sources. Primary sources include statutes, reports on sexual offenses various conventions, treaties, statutes, government papers, and case law related to rape and defilement. Secondary data relied on in the paper encompasses literature such as books, journal articles, and online sources. These sources are suitable because they encompass a wide range of legal materials thereby enhancing the depth of analysis in the study. Furthermore, the paper employs the comparative study methodology to analyze DNA testing legislation and practices in South Africa. South Africa is chosen as a comparator nation due to its progressive legal framework and judicial precedents, providing valuable insights for Kenya to learn from.\

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<sup>77</sup> Lirieka Meintjes-van Der Walt, 'An Overview of the Use of DNA evidence in South African Criminal Courts', 2008.

<sup>78</sup> Lirieka Meintjes-van Der Walt, 'An Overview of the Use of DNA evidence in South African Criminal Courts', 39.

<sup>79</sup> Lirieka Meintjes-van Der Walt, 'An Overview of the Use of DNA Evidence in South African Criminal Courts', 39.

<sup>80</sup> Lirieka Meintjes-van Der Walt, 'An Overview of the Use of DNA evidence in South African Criminal Courts' 24.

## **1.10 Chapter Breakdown**

The study is organized into five chapters, each addressing a specific topic as follows:

### **1.10.1 Chapter One: Introduction**

This chapter is an introductory overview that delves into the background of rape and defilement issues in Kenya and offers the rationale for the use of mandatory DNA testing. It encompasses the statement of the problem, research objectives and questions, hypothesis, theoretical framework, and literature review.

### **1.10.2 Chapter Two: Challenges Arising from the Omission of DNA Testing in Rape and Defilement Cases Involving Bodily Fluids and Epithelial Cells in Kenya: An Analysis of the Legislative, Policy, and Regulatory Frameworks**

Chapter two addresses the first research question being the challenges arising from the omission of DNA testing in rape and defilement cases involving bodily fluids and epithelial cells in Kenya. In doing so, the chapter analyzes the various challenges of the current legislative, policy, regulatory and regulatory frameworks in addressing these offenses and how the absence of mandatory DNA testing contributes to these challenges.

### **1.10.3 Chapter Three: Does Mandatory DNA Testing Alleviate the Challenges Arising from the Omission of DNA Testing in Defilement and Rape Cases Involving Bodily Fluids and Epithelial Cells in Kenya?**

Chapter three addresses the second research question on whether mandatory DNA testing alleviates the challenges arising from the omission of DNA testing in defilement and rape cases involving bodily fluids and epithelial cells in Kenya. In so doing, this chapter discusses how mandatory DNA testing can address the specific challenges highlighted in chapter two.

### **1.10.4 Chapter Four: The Law and Practice of DNA Testing in South Africa.**

Chapter four addresses the third research question by conducting a comparative study with South Africa which has an existing DNA Act. This chapter analyzes the implications of South Africa's framework for mandatory DNA testing in rape and defilement cases and make a case for similar legislation in Kenya.

### **1.10.5 Chapter Five: Research Findings, Recommendations, and Conclusion**

Chapter five presents an overview of the research findings, offering a conclusion as well as practical solutions and recommendations based on the research findings.



## **2.0 CHAPTER TWO: CHALLENGES ARISING FROM THE OMISSION OF DNA TESTING IN RAPE AND DEFILEMENT CASES INVOLVING BODILY FLUIDS AND EPITHELIAL CELLS IN KENYA: AN ANALYSIS OF THE LEGISLATIVE, POLICY, AND REGULATORY FRAMEWORKS**

### **2.1 Introduction**

Chapter two will address the first research question that is the challenges that arise from the omission of DNA testing in rape and defilement cases involving bodily fluids and epithelial cells in Kenya. The chapter will be divided into two parts. The first part will address the whether the current legislative, policy, regulatory frameworks support DNA testing in rape and defilement cases involving bodily fluids and epithelial cells. The second part will discuss what are the challenges in the omission of mandatory DNA testing of rape and defilement cases that have bodily fluids and epithelial cells.

### **2.2 The National Legal, Regulatory and Policy Frameworks on Rape and Defilement**

#### **2.2.1 The Constitution of Kenya, 2010**

The Constitution of Kenya is a key tool in Kenya's framework of protecting each citizen's human rights. The Preamble recognizes the aspirations of Kenyan citizens for a government that is rooted in the essential values of human rights, equality, freedom among others. etc. Article 10 of the Constitution emphasizes the values mentioned above, and the Bill of Rights clearly outlines the norms and mechanisms for the fulfillment of rights.<sup>81</sup> The Constitution of Kenya also shows the emphasis on upholding human dignity and promoting social justice. The Constitution holds that each person has inherent dignity, and said dignity must be protected and respected.<sup>82</sup> Furthermore, each person is required by the Constitution to respect the rights of others within the society, and should one feel that their rights are threatened, they may seek redress.<sup>83</sup>

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<sup>81</sup> Article 10, *Constitution of Kenya* (2010).

<sup>82</sup> Article 28, *Constitution of Kenya* (2010).

<sup>83</sup> Article 75, *Constitution of Kenya* (2010).

Sexual violence is a blatant violation of human rights especially when directed towards children as it inflicts one of the most devastating forms of harm.<sup>84</sup> This phrase encompasses a range of acts including rape, defilement, sexual assault, and indecent acts that occur in settings such as households, workplaces, or even, within conflict zones.<sup>85</sup> Defilement and rape are traumatic experiences, and more often than not, lead to psychosocial problems in children, parental distress, and social strain within families and well-being.<sup>86</sup>

Persons are guaranteed the right to freedom and security and not to be subjected to any form of violence, be it from private or public sources.<sup>87</sup> Furthermore, this protection also includes not being degraded or treated in a cruel and inhumane way.<sup>88</sup> Both men and women, as per the Constitution, are to be treated equally in economic, social, or political spheres.<sup>89</sup> However, the offenses of rape and defilement, violate the aspect of human dignity and directly contravenes the principles enshrined within the Constitution.

Furthermore, Articles 2(5) and 2(6) of the Constitution provide that any treaties or conventions ratified by the country shall form part of the law of Kenya in addition to the general rules of International Law. Therefore, this means that all treaties and conventions ratified by Kenya form part of Kenyan law and give rise to Kenya's international obligations with respect to prevention, investigation and prosecution of rape and defilement cases.<sup>90</sup> The Constitution also recognizes that every child has the right to be protected from abuse ... and all forms of violence, inhumane treatment, and punishment.<sup>91</sup> While the Constitution provides an avenue for the protection of these human rights, both women and children, being vulnerable groups, face a threat to this enjoyment.<sup>92</sup>

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<sup>84</sup> Guidelines & Protocols; Medico-Legal Care For Survivors/Victims Of Sexual Violence, *Ministry of Health & Family Welfare Department of Health & Family Welfare*, 2014, 3.

<sup>85</sup> UNGA, *Inter-Agency Standing Committee Guidelines for Gender-based Violence Interventions in Humanitarian Settings: Focusing on Prevention of and Response to Sexual Violence in Emergencies (Geneva: Inter-Agency Standing Committee*, September 2005.

<sup>86</sup> Mutavi T, Mathai M, Kumar M, Nganga P, Obondo A, 'Psychosocial Outcomes Among Children Following Defilement and The Caregivers Responses To The Children's Trauma: A Qualitative Study From Nairobi Suburbs, Kenya' 5(1) *Afr J Trauma Stress*, 2016,38.

<sup>87</sup> Article 29(c), *Constitution of Kenya* (2010).

<sup>88</sup> Article 29(f), *Constitution of Kenya* (2010).

<sup>89</sup> Article 27(1), *Constitution of Kenya* (2010).

<sup>90</sup> COVAW, IMLU AND OTHERS v Attorney-General of Kenya, (Petition 122 of 2013) [2020] KEHC 9208 (KLR)

<sup>91</sup> Article 53(1), *Constitution of Kenya* (2010).

<sup>92</sup> Article 21(3), *Constitution of Kenya* (2010).

One such example is a case that was decided in Meru where young girls had challenged the Government of Kenya over its failure to adequately address defilement. The case of *Ripples International (suing as next friend of 8 minors) vs. the Inspector General of Police and Others* the petition was filed on October 11, 2012.<sup>93</sup> Though the SOA existed, the law's impact was diminished by the actions of the police enforcement. 11 girls aged from 5 to 15 were the petitioners and from Meru County. Ripples International, which is a charitable NGO, was also a petitioner. The respondents included the Commissioner of Police/Inspector-General of Police, the Director of Public Prosecutions, and the Minister for Justice, National Cohesion, and Constitutional Affairs. The girls argued that they had been defiled by various perpetrators, ranging from family members to neighbors, causing them both physical harm and mental distress. They argued that the failure of the police officers to conduct proper investigations had resulted in a violation of their constitutional rights.<sup>94</sup> The inaction of the police officers, according to the petitioners, created a 'climate of impunity' as it allowed offenders to act without any legal consequences, thereby violating international human rights and norms.

Justice Makau ruled in favor of the petitioners and found that the police had a duty to conduct their investigations timeously and effectively but failed to do so. Their inaction had harmed the petitioners. The judgment held that the State's inaction allowed sexual violence against children to be tolerated, violating fundamental rights under the Constitution and international law. The ruling emphasized the State's duty to protect vulnerable groups and held the government accountable for both direct and indirect harm caused by police negligence. This case set a precedent in holding the relevant parties accountable for the failure to protect children, who are vulnerable, from sexual violence.<sup>95</sup> It also highlighted the need to have proper enforcement of laws and strengthened the protection of children's rights in Kenya.

In the case of *Coalition on Violence Against Women (COVAW), IMLU AND OTHERS v Attorney-General of Kenya*, eight survivors of sexual violence during the 2007/2008 post-election violence in Kenya sought justice through the High Court of Kenya.<sup>96</sup> Eight individuals—two men and six women—who had suffered sexual violence during the 2007/2008 post-election violence in Kenya

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<sup>93</sup> (2013) eKLR.

<sup>94</sup> Article 244, *Constitution of Kenya* (2010).

<sup>95</sup> *Ripples International (suing as next friend of 8 minors) vs. the Inspector General of Police and Others* (2013) eKLR.

<sup>96</sup> (Petition 122 of 2013) [2020] KEHC 9208 (KLR).

sought justice and reparations. The violence which was as result of the election results in December 2007, caused widespread sexual and gender-based violence. Both men and women were affected by this reality. Women mostly experienced rape, gang rape, and attempted rape, whereas men faced sodomy and forced circumcision. The police, similar to the ‘160 Girls’ case, had failed to document as well as investigate the crimes committed against the victims.<sup>97</sup> The victims also argued that they faced barriers in accessing medical care which was a violation of the constitutional right to life.<sup>98</sup> The petition was filed on February 20, 2013, by COVAW, the Independent Medico-Legal Unit (IMLU), Kenyan Section of the International Commission of Jurists (ICJ), and Physicians for Human Rights (PHR). The petitioners accused national authorities of failing to protect, investigate, and provide reparations for the SGBV crimes committed.

December 10, 2020, marked the day that the High Court ruled that the police officers had failed in their obligations to protect, investigate, and prosecute SGBV crimes. The Court also acknowledged that these acts constituted forms of torture and that the State's inaction breached the survivors' rights, thereby contravening their constitutional rights. General damages were awarded to some petitioners, but the judgment did not include other reparations or measures to prevent future violence.

### **2.2.2 Sexual Offences Act**

Before the enactment of the SOA, the Penal Code and the Criminal Law Amendment Act of 2003 prescribed sexual offenses and their punishments but proved to be inadequate in curbing the rising number of these crimes since criminals were becoming more skilled at committing these horrendous acts. The SOA was enacted by Parliament on July 4, 2006 in a bid to address the high levels of concerns by society on how sexual offences were being treated in 2005. The Bill leading to the SOA was introduced by Hon. Njoki Ndung'u.<sup>99</sup> Sexual assault survivors would be deterred from reporting the incidents due to various reasons such as community stigma, trauma, and the criminal justice system being inadequate.<sup>100</sup> Before the SOA was enacted, magistrates and judges

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<sup>97</sup> Article 244, *Constitution of Kenya* (2010).

<sup>98</sup> Article 26(1), *Constitution of Kenya* (2010).

<sup>99</sup> Centre For Rights Education and Awareness (CREAW), *A Simplified Version Of The Sexual Offences Act*, ii.

<sup>100</sup> Centre For Rights Education and Awareness (CREAW), *A Simplified Version Of The Sexual Offences Act*, 7.

tended to give light sentences to offenders and that caused it to be one of the main reasons for supporting the SOA.<sup>101</sup> The SOA became effective on July 21, 2006.

The purpose of the SOA was to provide clarity, define and criminalize sexual offenses, and offer measures for the prevention and protection of all individuals from sexual violence by consolidating various sexual offences into a single legal framework.

### **2.2.2.1 The Offence of Rape Under the Sexual Offences Act**

Rape is undeniably a traumatic experience for victims as well as their communities. The SOA defines this offence as ‘an offence committed when a person intentionally and unlawfully commits an act which causes penetration with his or her genital organs [and] without the consent of the other person, [or] if the consent is obtained by force or by means of threats or intimidation.’<sup>102</sup>

The punishment for rape is a minimum of 10 years’ imprisonment<sup>103</sup> which can also be enhanced to life imprisonment. Rape is related to the offence of attempted rape, which is provided for in the SOA, and which attracts a minimum penalty of 5 years.<sup>104</sup> Another related offence is gang rape which is also provided for by the SOA and occurs in a situation where the rape is committed by two or more persons. The minimum penalty for gang rape is 15 years which can also be enhanced to life imprisonment.<sup>105</sup> However, it is important to note that mandatory minimum sentences that are provided in the SOA have since been declared unconstitutional as they limit the discretion available to the court when it comes to determining the appropriate sentences.<sup>106</sup>

By differentiating between rape and the related offences of attempted rape and gang rape, the SOA provides a nuanced approach during prosecution and sentencing. This allows for a tailored response to various forms of sexual offenses. However, implementing these provisions can be challenged especially when it comes to proving a core aspect, which is consent, which is quite

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<sup>101</sup> Centre For Rights Education and Awareness (CREAW), *A Simplified Version Of The Sexual Offences Act*, 1.

<sup>102</sup> Section 3, *Sexual Offences Act*, 2006.

<sup>103</sup> Section 3(3), *Sexual Offences Act*, 2006.

<sup>104</sup> Section 4, *Sexual Offences Act*, 2006.

<sup>105</sup> Section 10, *Sexual Offences Act*, 2006.

<sup>106</sup> *Dismas Wafula Kilwake v Republic* (2018) eKLR.

subjective in nature.<sup>107</sup> Furthermore, from the definition of rape, gang rape or attempted rape, the SOA does not explicitly mention the use of DNA testing in cases involving bodily fluids and epithelial cells during the investigation and prosecution of the aforementioned offenses. Despite the use of DNA evidence being a crucial tool in establishing the identity of an offender as well as corroborating a victim's testimony, its absence may limit the access of justice for both an accused person and a victim.

### **2.2.2.2 The Offence of Defilement Under the Sexual Offences Act**

Defilement is defined as the act of causing penetration of a minor's genital organ by a perpetrator's genital organ despite the consent of the child.<sup>108</sup> Penetration is also defined in the Act as the partial or complete insertion of the genital organs of a person into the genital organs of another person.<sup>109</sup> The punishment of the offense of defilement depends on the age of the complainant. For example, if the victim is below 11 years old, the minimum sentence is life imprisonment.<sup>110</sup> Where the complainant is between the age of 12 to 15 years, the sentence is a minimum of 20 years.<sup>111</sup> For the ages of 16-18 years, the minimum sentence is 15 years.<sup>112</sup> Gang defilement is an offence related to defilement and aims to punish offenders who commit the offence of defilement in association with each other or who act pursuant to a common intention with a minimum sentence of 15 years.<sup>113</sup> The sentence can be enhanced to life imprisonment.<sup>114</sup> Attempted defilement is an offence related to defilement and covers situations where the offender fails to complete the offence of defilement.<sup>115</sup> This offence carries a mandatory minimum sentence of 10 years.<sup>116</sup>

Section 36 of the Sexual Offences Act addresses the admissibility and handling of medical or forensic evidence in cases of offenses under the Act.<sup>117</sup> The court is empowered to order the collection of suitable samples from the accused person for forensic and scientific testing, including

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<sup>107</sup> Nikki N, 'The Politics of a Definition' in L Artz & D Smythe (ed) *Should We Consent? Rape Law Reform in South Africa*, 2008, 26.

<sup>108</sup> Section 8(1), *Sexual Offences Act*, 2006.

<sup>109</sup> Section 2(1), *Sexual Offences Act*, 2006.

<sup>110</sup> Section 8(2), *Sexual Offences Act*, 2006.

<sup>111</sup> Section 8(3), *Sexual Offences Act*, 2006.

<sup>112</sup> Section 8(4), *Sexual Offences Act*, 2006.

<sup>113</sup> Section 10, *Sexual Offences Act*, 2006.

<sup>114</sup> Section 10, *Sexual Offences Act*, 2006.

<sup>115</sup> Section 9(1), *Sexual Offences Act*, 2006.

<sup>116</sup> Section 9(2), *Sexual Offences Act*, 2006.

<sup>117</sup> Section 36, *Sexual Offences Act*, 2006.

DNA analysis, to establish the commission of the alleged offense. Owing to the discretionary character of this statutory provision, coupled with its non-mandatory status,<sup>118</sup> a substantial number of defilement cases refrain from conducting examinations on any bodily fluids potentially arising from the commission of the offense.

Just like in rape cases, the SOA does not mandate DNA testing in defilement cases involving bodily fluids and epithelial cells during the investigation and prosecution of such cases despite the obvious benefits such testing would offer in addressing mistaken identity situations. The Sexual Offences (Dangerous Offenders DNA Data Bank) Regulations which would require the establishment and operationalization of a DNA database for dangerous offenders would aid in the prosecuting of offenders and the exoneration of innocent individuals. Forensic scientists are pushing for having a DNA database that would help track both murderers and sex offenders. Though there are advanced forensic labs in Kenya, lack of a central database is a gap.<sup>119</sup>

### **2.2.3 Evidence Act**

The Evidence Act Cap 80 provides a legal framework that is for the admissibility, the relevance weight and cogency of evidence that is to be used in judicial proceedings. It also governs how evidence is to be collected, presented and evaluated within courts so as to ensure fair trials and to protect the rights of both accused persons and victims. One key provision is Section 124 of the Evidence Act Cap 80<sup>120</sup> which states that,

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

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<sup>118</sup> Abdi Roba Jillo v Republic (2020) eKLR.

<sup>119</sup> Akumu C, ‘Why Kenya Needs A Reliable Criminal DNA Database, KASH Conference’, 16 February 2024 <<https://healthbusiness.co.ke/7311/kenya-takes-stride-towards-modern-crime-detection-with-proposed-dna-databas/>> on 18 January 2025.

<sup>120</sup> Section 124, *Evidence Act* (2012).

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

This section provides that the court may convict the accused based solely on the testimony of the victim where the court is satisfied that the alleged victim is being truthful in their testimony. This provision seems to protect vulnerable complainants so as to ensure justice is served within cases of sexual violence. However, the reality is that Section 124 of the Evidence Act opens the door for coaching of children victims to lie about false sexual abuse experiences as well as the possibility of adult victims to give false rape allegations.<sup>121</sup>

#### **2.2.4 Children’s Act 29 of 2022, Cap 141.**

The Children’s Act 29 of 2022, Cap 141 is progressive in nature as it seeks to address the needs of all children in this contemporary society. The Children Act also seeks to give effect to Article 53 of the Constitution<sup>122</sup> by providing a comprehensive framework that aims at protecting children’s rights, particularly against sexual violence or exposure to pornography. A child as defined by the Act, is an individual who has not yet attained the age of majority.<sup>123</sup> Both the First and Second Schedule of Children Act, 2022 provide specific considerations for the best interests of the child, including the age of a child, maturity, special needs among others. The goal here is to reinforce that which is provided for in Article 53(2) of the Constitution which seeks to safeguard against treatment that is adverse. Defilement is a clear violation of children’s rights as per the Children’s Act 29 of 2022, Cap 141 and Article 53 of the Constitution.<sup>124</sup>

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<sup>121</sup> Achieng’ O N, Assessing False Allegations of Rape in Kenya, Published LLB Thesis, Strathmore University Law School, Nairobi, 2021, 9.

<sup>122</sup> Article 53(1), *Constitution of Kenya* (2010).

<sup>123</sup> Section 2, *Children’s Act*, 2022.

<sup>124</sup> Ripples International (suing as next friend of 8 minors) vs. the Inspector General of Police and Others (2013) eKLR.

### **2.2.5 Sexual Offences (Dangerous Offenders DNA Data Bank) Regulations, 2008.**

Sexual Offences (Dangerous Offenders DNA Data Bank) Regulations establish a legal framework that is for the creation and management of a DNA data bank specifically for dangerous offenders in Kenya. Section 39 of the SOA defines a dangerous offender in such a way that it shows that the regulations were aimed at sexual offences. Dangerous sexual offenders are thus defined as a ‘person has more than one conviction for a sexual offence; been convicted of a sexual offence which was accompanied by violence or threats of violence; or been convicted of a sexual offence against a child.’<sup>125</sup> The regulations were published in the Kenya Gazette on October 24, 2008, and are to be overseen by the Director of the Criminal Investigations Department. The established data bank consists of two main components which are: a crime scene index and a dangerous offenders index.<sup>126</sup> The crime scene index has DNA profiles that are derived from the bodily substances that are found in crime scenes and are related to sexual offences.<sup>127</sup> The dangerous offenders index includes profiles from individuals that are classified as dangerous offenders.<sup>128</sup>

There are also procedures for the collection, storage and the use of DNA profiles.<sup>129</sup> These procedures are necessary in ensuring that the DNA profiles maintain their integrity and that there is confidentiality of the information. Having access to the data bank is restricted to individuals deemed appropriate by the Director, and unauthorized use of the information is strictly prohibited.<sup>130</sup> Any violation of the regulations would result in penalties such as fines and imprisonment. Furthermore, the regulations specify conditions that the stored bodily substances must be destroyed under, especially in cases where a conviction is quashed or when the individual is discharged.<sup>131</sup>

These regulations seek to enhance the ability of the law enforcement to manage dangerous offenders and utilize DNA technology effectively and efficiently in the investigation of sexual offences. Additionally, the regulations provide a structured approach to handling DNA evidence while ensuring compliance with legal standards and protecting individual rights. Particularly in

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<sup>125</sup> Section 39(1), *Sexual Offences Act*, 2006.

<sup>126</sup> Rule 3, *The Sexual Offences (Dangerous Offenders DNA Data Bank) Regulations* (2008).

<sup>127</sup> Rule 4, *The Sexual Offences (Dangerous Offenders DNA Data Bank) Regulations* (2008).

<sup>128</sup> Rule 4, *The Sexual Offences (Dangerous Offenders DNA Data Bank) Regulations* (2008).

<sup>129</sup> Rule 17, *The Sexual Offences (Dangerous Offenders DNA Data Bank) Regulations* (2008).

<sup>130</sup> Rule 13, *The Sexual Offences (Dangerous Offenders DNA Data Bank) Regulations*, (2008).

<sup>131</sup> Rule 17(8), *The Sexual Offences (Dangerous Offenders DNA Data Bank) Regulations*, (2008).

sensitive cases regarding sexual violence. The framework is designed to support the proper operation and maintenance of the DNA data bank which would then contribute to the safety and security of the community. However, the DNA database remains non-operational.

## **2.2.6 National Policy on the Prevention and Response to Gender-Based Violence**

The National Policy on the Prevention and Response to Gender-Based Violence, 2014 (“the Policy”) is the policy framework that is outlined in Gender-based Violence Action Plan which addresses all forms of sexual violence, including rape and defilement.<sup>132</sup> The policy outlines the government’s commitment in having a stance that is zero-tolerant to GBV and which aligns with various constitutional provisions like Article 28 and 29 of the Constitution<sup>133</sup> which emphasize the rights to human dignity and freedom from all forms of violence. It also reflects the obligations Kenya has under international legal instruments and human rights treaties such as CEDAW.

The Policy targets sexual violence such as rape and defilement, which are considered some of the most pervasive forms of GBV both in Kenya and globally. Not only are they a violation of one’s dignity, but also pose a serious public health concern.<sup>134</sup> The Policy acknowledges that vulnerable groups such as women and children are largely affected, particularly in rural and marginalized areas.<sup>135</sup> To address GBV, the Policy focuses on preventing any form of sexual violence through public education and awareness that will encourage men and boys to be allies.<sup>136</sup> Furthermore, the Policy calls for survivors of GBV to be granted quality services through initiatives such as gender desks within police stations.<sup>137</sup>

The Policy incorporates monitoring and evaluation mechanisms in order to assess how effective the support systems are available to survivors.<sup>138</sup> These include having counselling services or

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<sup>132</sup> *National Policy on the Prevention and Response to Gender-Based Violence*, 2014

<sup>133</sup> Article 28-29, *Constitution of Kenya* (2010).

<sup>134</sup> Ministry of Devolution and Planning, *National Policy on the Prevention and Response to Gender-Based Violence*, 9.

<sup>135</sup> Ministry of Devolution and Planning, *National Policy on the Prevention and Response to Gender-Based Violence*, 13.

<sup>136</sup> Ministry of Devolution and Planning, *National Policy on the Prevention and Response to Gender-Based Violence*, 28.

<sup>137</sup> Ministry of Devolution and Planning, *National Policy on the Prevention and Response to Gender-Based Violence*, 19.

<sup>138</sup> Ministry of Devolution and Planning *National Policy on the Prevention and Response to Gender-Based Violence*, 41.

having access to safe shelters.<sup>139</sup> The Policy also seeks to enhance the enforcement of sexual violence laws, particularly under the Sexual Offences Act, 2006.

The Policy encourages the judiciary to adopt survivor-friendly procedures, such as allowing for testimony through intermediaries for child survivors.<sup>140</sup> The Policy also advocates for the timely investigation and prosecution of cases, acknowledging that delays in the justice system often lead to re-traumatization of survivors and a failure to deter offenders.<sup>141</sup> Lastly, the Policy calls for the development of a County Gender-Based Violence Operational Committee that promotes accountability as well as inform policy and legal reforms relevant for GBV prevention and response at the County levels.<sup>142</sup>

## **2.3 International and Regional Framework on Rape and Defilement**

### **2.3.1 The International Covenant on Civil and Political Rights**

The International Covenant on Civil and Political Rights (ICCPR) emphasizes the inherent dignity of all human beings.<sup>143</sup> States are required to ensure that all individuals are shielded from any unlawful interference with regard to privacy or their honor being attacked.<sup>144</sup> Kenya ratified the ICCPR on 1<sup>st</sup> May 1972 and committed to protecting each Kenya's civil and political rights. Chapter Four of the Constitution of Kenya, 2010 contains the rights found in the ICCPR that have been domesticated.<sup>145</sup> With regards to rape and defilement, these crimes are a clear violation of a victim's right to privacy, bodily autonomy, honor, and dignity for vulnerable groups such as women and children.<sup>146</sup>

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<sup>139</sup> Ministry of Devolution and Planning, *National Policy on the Prevention and Response to Gender-Based Violence*, 23.

<sup>140</sup> Ministry of Devolution and Planning, *National Policy on the Prevention and Response to Gender-Based Violence*, 23.

<sup>141</sup> Ministry of Devolution and Planning, *National Policy on the Prevention and Response to Gender-Based Violence*, 23.

<sup>142</sup> Ministry of Devolution and Planning, *National Policy on the Prevention and Response to Gender-Based Violence*, 38.

<sup>143</sup> Article 6(1), *International Covenant on Civil and Political Rights*, 19th December 1966.

<sup>144</sup> Article 17, *International Covenant on Civil and Political Rights*, 19th December 1966.

<sup>145</sup> Bill of Rights, *Constitution of Kenya* (2010).

<sup>146</sup> Dr Aura R, *Situational Analysis and the Legal Framework on Sexual and Gender-Based Violence in Kenya: Challenges and Opportunities*.

### 2.3.2 Convention on the Elimination of All Forms of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is a key treaty whose main aim is eliminating discrimination towards women, including sexual violence. Kenya ratified this Convention in 1984 without any reservations. CEDAW defines discrimination as against women as "...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."<sup>147</sup>

Article 2 of CEDAW<sup>148</sup> requires all signatory States to enact appropriate laws that will help eliminate discrimination, including GBV, and Article 5 mandates that there must be the elimination of social and cultural patterns that aid or perpetuate any violence against women.<sup>149</sup> Kenya has an obligation to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.<sup>150</sup>

In fulfilling its obligation, Kenya enacted the SOA which sought to criminalize various forms of sexual violence such as rape and defilement, among others. Offenses mentioned in the SOA have strict sentencing provisions that seek to deter potential offenders from committing such heinous acts. For example, gang rape has a minimum of 15 years, but it can also be enhanced to life imprisonment.<sup>151</sup>

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<sup>147</sup> Article 1, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, UNTS 1249.

<sup>148</sup> Article 2, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, UNTS 1249.

<sup>149</sup> Article 5, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, UNTS 1249.

<sup>150</sup> Article 3, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, UNTS 1249.

<sup>151</sup> Section 10, *Sexual Offences Act*, 2006.

### **2.3.3 African Charter on the Rights and Welfare of the Child**

A child, as defined by the African Charter on the Rights and Welfare of the Child (ACRWC) is any human below the age of 18 years.<sup>152</sup> The ACRWC which Kenya ratified on 25<sup>th</sup> July 2000, requires that all children are protected from all forms of abuse including sexual violence. The ACRWC also recognizes the right of every child to their privacy and prohibits any unlawful interference or attack on their honor.<sup>153</sup> States are thus required to take legislative measures that protect children from sexual abuse, thereby upholding their rights.<sup>154</sup> Furthermore, Article 27 addresses sexual exploitation, which creates a duty upon member States to ensure that there are mechanisms in place to protect and provide mechanisms for the rehabilitation of victims.<sup>155</sup>

In response to its obligations under the ACRWC, Kenya has enacted the Children's Act, 2022 which complements the SOA by focusing on the welfare of the child, ensuring that child victims of sexual abuse are provided with protection, rehabilitation, and support. Section 22 of the Children's Act guarantees children protection from all forms of abuse, while specific sections address sexual abuse and exploitation.<sup>156</sup>

### **2.4 Legal Challenges of Omitting DNA Testing in Rape and Defilement Cases Involving Bodily Fluids and Epithelial Cells in Kenya**

The lack of mandatory DNA testing in rape and defilement cases involving bodily fluids and epithelial cells in Kenya has presented legal challenges that are hundering the proper administration of justice. For example, through the use of Section 124 of the Evidence Act, there lies the risk of coaching of child victims and also fabrication of rape allegations by adult victims..<sup>157</sup> These are major challenges as they can lead to the court believing unreliable testimonies hence affecting the credibility of evidence presented in court. Efforts were made to curb this possibility of making false allegations through the SOA. The SOA would have criminalized false allegations and anyone who falsely accused another of committing a sexual

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<sup>152</sup> Article 2, *African Charter on the Rights and Welfare of the Child*, 11 July 1990.

<sup>153</sup> Article 10, *African Charter on the Rights and Welfare of the Child*, 11 July 1990.

<sup>154</sup> Article 16(1), *African Charter on the Rights and Welfare of the Child*, 11 July 1990.

<sup>155</sup> Article 27, *African Charter on the Rights and Welfare of the Child*, 11 July 1990.

<sup>156</sup> Section 22, *Children's Act*, 2022.

<sup>157</sup> Section 124, *Evidence Act* (2012).

offence would receive the same sentence as the accused but it ended up being deleted.<sup>158</sup> These false accusations provided can lead to wrongful convictions of accused persons. The accused persons also are denied the use of exculpatory evidence which may have aided in proving their innocence and thus increase the risk of miscarriages of justice.<sup>159</sup>

All the above legal challenges are compounded by the non-operational DNA database in Kenya which would have the ability to link the true perpetrators to crimes they have committed and exclude innocent persons from being investigated.<sup>160</sup> This absence of mandatory DNA testing in rape and defilement cases prevents the court from accessing crucial forensic evidence that is needed to either corroborate the victim's testimony or exonerate the accused thus ultimately impeding the pursuit of justice.

## 2.5 Conclusion

Kenya has made significant strides in establishing legal, regulatory and policy frameworks that address rape and defilement. However, while these various instruments exist, victims of these heinous crimes as well as falsely accused individuals still face challenges when it comes to accessing justice. With the current approach in how courts deal with rape and defilement cases, there is no room for mandatory DNA testing, particularly for cases involving bodily fluids and epithelial cells. The potential of DNA, for example, is that it bolsters the prosecution's case, while offering the accused person the benefit of any resultant exculpatory evidence.

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<sup>158</sup> Centre for Rights Education and Awareness (CREAW), Cradle-The Children Foundation, Association of Media Women In Kenya (AMWIK) and The Education Centre for Democracy in Women (ECWD), A Simplified Version of the Sexual Offences Act 2006, 16.

<sup>159</sup> Otulo M, Examining Prosecutor's Duty to Disclose Exculpatory Evidence and the Right to Fair Trial in Kenya, Published LLM Thesis, Strathmore University Law School, Nairobi, 2020,1.

<sup>160</sup> Akumu C, 'Why Kenya Needs A Reliable Criminal DNA Database, KASH Conference', 16 February 2024 <<https://healthbusiness.co.ke/7311/kenya-takes-stride-towards-modern-crime-detection-with-proposed-dna-databas/>> on 18 January 2025.

### **3.0 CHAPTER THREE: DOES MANDATORY DNA TESTING ALLEVIATE THE CHALLENGES ARISING FROM THE OMISSION OF DNA TESTING IN DEFILEMENT AND RAPE CASES INVOLVING BODILY FLUIDS AND EPITHELIAL CELLS IN KENYA?**

#### **3.1 Introduction**

In an ideal situation, both the accused and the victim receive justice. However, the pursuit of justice within a rape or defilement trial is often hindered by various existing challenges that can end up compromising the integrity and effectiveness of the legal process. These challenges including coaching of children victims, fabrication of rape allegations (by adults) and the denial of exculpatory evidence for the accused. The non-operationalization of the The Sexual Offences (Dangerous Offenders DNA Data Bank) Regulations compounds the existing challenges. This chapter will delve into these various challenges that arise from the omission of mandatory DNA testing in rape and defilement cases generally. It will further explore whether the challenges discussed can be alleviated with the use of mandatory DNA testing in rape and defilement cases involving bodily fluids and epithelial cells.

#### **3.1 Does Mandatory DNA Testing Alleviate the Challenges Arising from the Omission of DNA Testing in Defilement and Rape Cases Involving Bodily Fluids and Epithelial Cells in Kenya?**

##### **3.1.1 Coaching**

The current practice within Kenya is that an accused person can be convicted solely based on a testimony of a victim of sexual offences as per Section 124 of the Evidence Act.<sup>161</sup> This poses a risk in defilement cases due to the risk of coaching of children. Coaching can be defined as deliberate process by adults who instruct and influence children to make allegations with regards to abuse, particularly sexual abuse.<sup>162</sup> Coaching can occur through suggestive attempts for examples through the use of leading questions or using repeated exposure to false narratives causing children to lie about experiences they actually have not gone through.<sup>163</sup> Coaching

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<sup>161</sup> Section 124, *Evidence Act* (2012).

<sup>162</sup> Faller C. K, 'Coaching Children About Sexual Abuse: A Pilot Study of Professionals' Perceptions', 949..

<sup>163</sup> Faller C. K, 'Coaching Children About Sexual Abuse: A Pilot Study of Professionals' Perceptions', 949.

undermines the fairness of a legal process due to the fact that it introduces false claims.<sup>164</sup> It also results in adding more difficulty in distinguishing between fabricated and genuine sexual assault cases. The resultant effect is eroding the trust of the public in the legal system.<sup>165</sup> An example of a defilement case that highlights the danger of coaching involves a man who was falsely accused of defiling his daughter. He ended up serving eight years in prison but secured a fresh trial after the daughter's confession of lying at the earlier trial came to light. The court acknowledged the use of coercion and coaching in the fabricated testimony.<sup>166</sup>

Another instance was recorded in 2003 where a man in South Africa called Shezi was sentenced to life imprisonment on allegations of defiling his daughter. After ten years into serving his term, his daughter who was eight years old at the time of the allegations, ended up withdrawing her accusation and admitted that her mom had coached her to lie about the assault. She confessed to giving a false testimony at trial because she was very scared of her mother's tempter. Shezi ended up being released, having served ten years of his sentence.<sup>167</sup>

Mandatory DNA testing can help alleviate coaching of children since there is the use of objective scientific evidence that will either help the victim's case or refute any false testimonies.<sup>168</sup> This prevents any room for any manipulated testimonies. DNA evidence directly links bodily fluids and epithelial cells to a suspect as it can either prove the accused person actually did commit the crime or not.<sup>169</sup> DNA evidence serves as an independent corroboration that will strengthen the credibility of genuine allegations and it can also deter individuals from engaging in coaching because they know that it can easily be disproved by scientific evidence.<sup>170</sup>

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<sup>164</sup> Faller C. K, 'Coaching Children About Sexual Abuse: A Pilot Study of Professionals' Perceptions', 950.

<sup>165</sup> Lubaale E, 'Taking the incidence of false child sexual abuse allegations more seriously' 49 De Jure, 2016, 79- 80.

<sup>166</sup> Wambulwa A, 'Man falsely accused of defiling daughter gets fresh trial', The Star, 16 December 2020, <<https://www.the-star.co.ke/news/2020-12-16-man-falsely-accused-of-defiling-daughter-gets-fresh-trial/>> on 2 March 2024.

<sup>167</sup> Lubaale E, 'Taking the incidence of false child sexual abuse allegations more seriously' 49 De Jure, 2016, 79-80.

<sup>168</sup> Dr. Ahmed M, DNA Provides Enough Indications And Help Court To Convict An Accused And Release Innocent, 21 *Migration Letters* 14 , 2024, 207.

<sup>169</sup> Lirieka Meintjes-van Der Walt, 'An Overview of the use of DNA evidence in South African Criminal Courts' 21(1) *South African Journal of Criminal Justice*, 2008.

<sup>170</sup> The Importance of DNA in Sexual Assault Cases' <<https://www.rainn.org/articles/importance-dna-sexual-assault-cases>> on 2 March 2024.

### 3.1.2 Fabrication of Rape Allegations

The offence of rape is considered one of the most controversial and violent crimes which makes it very susceptible to misuse by malicious persons who may concoct allegations for various purposes.<sup>171</sup> Similar to how children can be coached into making false allegations of sexual assault, adults can as well fabricate rape allegations. Such false allegations can stem from having personal vendettas, the need to gain sympathy, societal pressures or through getting financial incentives.<sup>172</sup>

A nine-year study conducted within a small Midwestern U.S city showed that forty-one percent of the one hundred and nine reported rape cases were false. The study had ended up identifying three primary motivations or reasons for reporting these false claims. Firstly, false reporting was used to create an *alibi* to fabricate allegations about one's whereabouts or to explain the actions they were doing. Secondly, the fabrications were also used to seek revenge by falsely accusing someone in order to retaliate when in conflict with them. Lastly, false reporting is used to gather attention or sympathy from others and therefore get emotional support or concerns from them. Kanin's findings ended up challenging the misconception of thinking that false allegations of rape are rare and that there is need for careful consideration in the handling of such cases.<sup>173</sup>

The resultant effect of false rape allegations is that it can ruin the lives and reputation of wrongfully accused persons.<sup>174</sup> For example in Germany, back in 2002, a female teacher (Heidi K.) accused her male colleague (Horst Arnold) of rape.<sup>175</sup> He ended up serving a five year sentence upon conviction. He denied parole for he maintained that he was indeed innocent. Horst Arnold ended up dying due to heart failure in 2012 whereas Heidi K was arrested and convicted on the grounds of deprivation of freedom as a result of her false allegation of rape.

In Kenya, the dangers of false rape allegations can be seen in a case involving a woman named Mercy, who falsely accused her local chief of rape to cover up their affair after her husband

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<sup>171</sup> Lisak D, Gardinier L, Nicksa SC, Cote AM, False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases. Violence against women. 2010, 1318-34.

<sup>172</sup> Eugene K, "False Rape Allegations, 23 Archives of Sexual Behavior 1, 1994, 81.

<sup>173</sup> Eugene K, "False Rape Allegations, 23 Archives of Sexual Behavior 1, 1994, 85

<sup>174</sup> De Zutter AWEA, Horselenberg R, van Koppen PJ. Motives for Filing a False Allegation of Rape. 47 Arch Sex Behav. 2, 2018, 457-464.

<sup>175</sup> De Zutter AWEA, Horselenberg R, van Koppen PJ. Motives for Filing a False Allegation of Rape. 457-464.

discovered it.<sup>176</sup> Where there is no concrete evidence and there is sole reliance on a victim's testimony, it can increase the risk of wrongful convictions.<sup>177</sup> The case of *Kassim Ali v Republic* reiterated the practice of relying on a victim's testimony where the court held that absence of a medical examination does not necessarily negate the occurrence of rape.<sup>178</sup> Instead, the court asserted that rape can be substantiated through the victim's testimony or circumstantial evidence.

Just like coaching of child witnesses, false allegations of rape can also cause various consequences such as misusing judicial resources which would discourage genuine victims from coming forward with the abuse they have faced.<sup>179</sup> Where there is no tangible medical evidence in some cases, it becomes particularly difficult to detect fabricated allegations. Section 38 of the SOA would have criminalized false allegations and anyone who falsely accused another of committing a sexual offence would receive the same sentence as the accused but it ended up being deleted.<sup>180</sup> The current law can be made effective through the introduction of mandatory DNA testing to effectively determine whether the act of rape and defilement has occurred. The law is supposed to ensure that justice and fairness prevails throughout the entire trial process. False rape allegations almost never end up having serious consequences.<sup>181</sup>

Mandatory DNA testing can prove or verify allegations early on in an investigation. Combining both DNA evidence and other investigative information including the victim's account and crime scene details can aid in providing a clear and complete understanding of a case such as the nature of an assault and whether multiple suspects were involved.<sup>182</sup> DNA evidence supports both sides of a case, the victims in seeking justice and defendants by ensuring they have access to more relevant exonerating evidence. Where a suspect is known, their DNA can be compared to the

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<sup>176</sup> Vidija P, The Standard, 2021

<https://www.standardmedia.co.ke/national/article/2001424398/be-cautious-while-reporting-rape-cases-dci> on 2 March 2024.

<sup>177</sup> Albright TD, Why Eyewitnesses Fail, 114 *Proc Natl Acad Sci USA* 30, 2017,7758-7764.

<sup>178</sup> (2005) eKLR.

<sup>179</sup> False Allegations of Rape and/or Domestic Abuse: Guidance for Charging Perverting the Course of Justice and Wasting Police Time in Cases Involving Allegedly False Allegations of Rape and/or Domestic Abuse, The Crown Prosecution Service.' in September 2019.

<sup>180</sup> Centre For Rights Education and Awareness (CREAW), Cradle-The Children Foundation, Association of Media Women In Kenya (AMWIK) and The Education Centre for Democracy in Women (ECWD), A Simplified Version of the Sexual Offences Act 2006, 16.

<sup>181</sup> Achieng' O N, Assessing False Allegations of Rape in Kenya, Published LLB Thesis, Strathmore University Law School, Nairobi, 2021, 18.

<sup>182</sup> Lonsway K, Sergeant Archambault J, O'Donnell P, Ware L, Role of DNA Evidence in Sexual Assault Investigations Part 1: The ABC's of DNA Evidence, 2016,41.

evidence to confirm or exclude their involvement. By excluding a suspect through DNA testing, the evidence helps ensure that the correct person is held accountable for the crime leaving little or no room for any false allegations to be made.<sup>183</sup>

### 3.1.3 Denial of Exculpatory Evidence

An accused person is denied the benefit of using exculpatory evidence in the form of exonerating DNA evidence when DNA testing is not conducted. The use of exculpatory evidence in a criminal trial is the evidence that will support the case of a defendant by either proving their innocence or suggesting their lack of guilt.<sup>184</sup> Exculpatory evidence is vital in ensuring that a fair trial occurs for it allows accused persons to use this form of evidence to help absolve them of the responsibility of the alleged crime. Wrongful convictions have grave effects such as social stigma and psychological trauma.<sup>185</sup>

The scientific strength of DNA testing emphasizes how effective it is.<sup>186</sup> The quest of justice is then hindered for both victims and accused persons. DNA testing has been used immensely in the United States since 1986.<sup>187</sup> According to reports, 72% of jurors expect that there need to be DNA evidence used within a sexual assault trial and thus, the likelihood of jury conviction increases by 33 times when presented with such DNA evidence.<sup>188</sup> Forensic experts will examine the collected DNA and analyze the profiles so as to correlate their findings with records of offenders within the FBI's CODIS.<sup>189</sup>

The Central Park Jogger Case (also known as the Central Park Five case) highlights how the denial of exculpatory evidence, particularly DNA evidence, can cause harm to accused persons. This

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<sup>183</sup> Lonsway K, Sergeant Archambault J, O'Donnell P, Ware L, Role of DNA Evidence in Sexual Assault Investigations Part 1: The ABC's of DNA Evidence, 2016, 8.

<sup>184</sup> Jeffrey L and Shirelle P, *West's Encyclopedia of American Law*, 7 Thomson/Gale, 2005,286.

<sup>185</sup> Hoyle, C., Speechley, N.-E., Burnett, R, The Impact of Being Wrongly Accused of Abuse in Occupations of Trust: Victims' Voices, *University of Oxford Centre for Criminology*, 2016, 36.

<sup>186</sup> Stevens, A P, Arresting Crime: Expanding The Scope of DNA Databases in America 79 *Texas Law Review*, 4, 2001,921-922.

<sup>187</sup> Roman, J.K., Reid, S.E., Chalfin, A.J The DNA Field Experiment: A Randomized Trial of the cost-effectiveness of using DNA to solve property crimes, *J Exp Criminol* 5, 2009, 345-369.

<sup>188</sup> Donald E. Shelton, Young S. Kim, and Gregg Barak. "A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the 'CSI Effect' Exist?" 9 *Vanderbilt Journal of Entertainment and Technology Law*, 2006, 331-368.

<sup>189</sup> , U.S. Department of Justice Office of the Inspector General Audit Division, Audit Report 06-32, *Combined DNA Index System Operational and Laboratory Vulnerabilities*, May 2006, 2.

case involved the rape and assault of one Trisha Meli who was jogging in New York's Central Park during the crack epidemic.<sup>190</sup> Six teenagers were all charged with the crime. Their names are Antron McCray, Kevin Richardson, Yusef Salaam, Raymond Santana, Korey Wise, and Steven Lopez. Steven Lopez had accepted a plea deal for a different assault leaving the remaining five to be convicted and serving their sentences between seven to thirteen years. The serial rapist Matias Reyes, in 2002, ended up confessing to the crime through the use of DNA evidence which linked him. The five men, who were wrongfully accused and imprisoned, were exonerated. This is a landmark case within the space of inequality and justice showing the importance of using DNA evidence to rightfully convict the actual offenders.

Mandatory DNA testing can prove to be beneficial since DNA evidence is methodically gathered, examined and presented within the investigative process. It reduces the necessity to rely on eyewitness identification or any circumstantial evidence since DNA evidence offers a more sound and scientific foundation for supporting or disputing claims. Using eyewitness identification is usually prone to errors, and it may result in a wrongful conviction.<sup>191</sup> DNA testing, for example, might directly refute unfounded or flimsy allegations by demonstrating that the accused was not present at the crime site or that no contact had taken place.<sup>192</sup> DNA evidence also proves beneficial in cases where the identity of the perpetrator is not known. Mandatory DNA testing upholds the concept of fair disclosure since the prosecutors must take into account all available evidence. This promotes fairness and keeps the legal system unbiased all while bolstering the accused's ability to have a convincing defense.

### **3.1.4 Non-operalization of The Sexual Offences (Dangerous Offenders DNA Data Bank) Regulations**

One critical challenge in the efforts to combat sexual violence within Kenya is the non-operationalization of The Sexual Offences (Dangerous Offenders DNA Data Bank) Regulations which mandates the establishment and functioning of a DNA database for dangerous offenders.<sup>193</sup>

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<sup>190</sup> People v Wise (2002), Supreme Court of the United States.

<sup>191</sup> Rosenthal, L., Eyewitness Identification and The Problematics of Blackstonian Reform Of The Criminal Law. *110, The Journal of Criminal Law and Criminology* 2, 2020,181.

<sup>192</sup> Turman M.K, Understanding DNA Evidence: A Guide for Victim Service Providers ,U.S. Department of Justice Office of Justice Programs Office for Victims of Crime,2001,1-12.

<sup>193</sup> Rule 13, *The Sexual Offences (Dangerous Offenders DNA Data Bank) Regulations*,(2008).

These rules require that the DCI be the officer that is mandated to maintain the data bank.<sup>194</sup> These regulations could significantly enhance the country's ability to track repeat offenders and strengthen the justice system but the DNA database remains non-operational. The DNA database is thus undermined in its critical role to facilitate the collection, storage and retrieving of genetic evidence. Law enforcement officers and judicial authorities thus are unable to effectively compare the DNA evidence that would be gotten from crime scenes and victims alongside profiles of known offenders without a functional database. Perpetrators are thus harder to identify.

As earlier discussed, the absence of a centralized DNA database leaves room for the justice system to be disadvantaged in that there is reliance on less reliable methods of evidence collection and evaluation. This not only hinders how sexual violence cases like rape and defilement are prosecuted but also compromises the integrity of the legal process. The legal process would otherwise benefit from the objective and scientific nature of DNA evidence. The lack of an operational DNA database contributes to the broader challenge of underutilized forensic science in Kenyan criminal trials. This perpetuates a situation where victims and accused persons alike are denied the full potential of modern investigative techniques.

### **3.2 Conclusion**

Several obstacles have led to the lack of obligatory DNA testing in rape and defilement cases in Kenya which has weakened the fairness and the effectiveness of the justice system. Implementation of mandatory DNA testing would address these issues among others, through clear and dependable corroboration, therefore reducing the threat of unlawful and mistaken convictions as well as discouraging false allegations. DNA testing ensures that both the victim's claims and accused's defense are supported by concrete scientific data. More accurate legal outcomes would result from proper running of forensic evidence through proper collection, preservation, and analysis.

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<sup>194</sup> Rule 2, *The Sexual Offences (Dangerous Offenders DNA Data Bank) Regulations*, (2008).

## **4.0 CHAPTER FOUR: THE LAW AND PRACTICE OF DNA TESTING IN SOUTH AFRICA**

### **4.1 Introduction**

DNA evidence has since revolutionized the justice system by providing a more objective and scientifically reliable means of identifying perpetrators worldwide and especially in sexual crimes such as rape and defilement. South Africa currently has a DNA Act which establishes a framework on how to collect DNA, analyze and store such DNA evidence. Both the prosecution and the defense secure justice and it acts as a way of deterring future sexual offences. However, in Kenya, there is no functional legal framework for DNA testing which has resulted in creating gaps in evidence collection and justice delivery. This chapter shall conduct a comparative analysis with South Africa which is a common law system, same as Kenya, so as to make a case for the prompt re-evaluation of the current ingredients of rape and defilement within the SOA or to have a similar legislation tailored to the Kenya's legal context.

### **4.2 Rape and Defilement in South Africa**

South Africa has one of the highest rates of rape globally and has been deemed 'the rape capital of the world.'<sup>195</sup> 40,000 cases, in South Africa, on average have been reported in the past decade with women and children having been subjected to the horrendous crime of rape and defilement.<sup>196</sup> In the fiscal year of 2022/2023, nearly 53,500 South Africans reported being a victim of a sexual crime. Around 80 percent of the 53,500 registered having been raped, and close to 7,500 South Africans disclosed being sexually assaulted. Many of these victims have also failed to report the cases of defilement and rape or receive any form of post-rape care.<sup>197</sup>

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<sup>195</sup> Naidoo K., Rape in South Africa a call to action., 103 S Afr Med J 4, 2013,210–211.

<sup>196</sup> Willan, Samantha & Shai, Nwabisa & Majola, Thobeka & Mabhida, Mpumelelo & Mngadi, Sinqobile & Gounden, Tholsie & Jewkes, Rachel & Abrahams, Naeemah & Machisa, Mercilene, South African Rape Survivors' Expressions of Shame, Self-Blame and Internalized-Stigma, 5 SSM Mental Health, 2024, 2.

<sup>197</sup> Willan, Samantha & Shai, Nwabisa & Majola, Thobeka & Mabhida, Mpumelelo & Mngadi, Sinqobile & Gounden, Tholsie & Jewkes, Rachel & Abrahams, Naeemah & Machisa, Mercilene, South African Rape Survivors' Expressions of Shame, Self-Blame and Internalized-Stigma, 5 SSM Mental Health, 2024, 2.

The attitude of society towards women and girls contributes largely towards the violence perpetrated against them.<sup>198</sup> Eight in ten young men within the region of Gauteng, South Africa's most populated area, believe that women were indeed responsible for the sexual violence and three in ten men also believed that women who are raped experience it because they have 'asked for it'.<sup>199</sup>

### 4.3 Legal Framework of Sexual Offences in South Africa

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

The Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 was a significant legislative reform that had aimed to address the legal framework on sexual offences in South Africa. This Act provided the definition of sexual offences for a wide range of acts, such as rape<sup>200</sup>, compelled rape,<sup>201</sup> consensual sexual penetration with certain children (statutory rape)<sup>202</sup>, sexual assault<sup>203</sup>, compelled sexual assault<sup>204</sup>, and sexual exploitation<sup>205</sup> among others. This Act emphasizes the importance of consent in sexual activities. It establishes that consent must be informed, voluntary, and given freely, thereby criminalizing any sexual act performed without consent.<sup>206</sup> The Act includes specific provisions to protect vulnerable individuals, particularly children and persons with mental disabilities. It criminalizes sexual acts with minors and provides for harsher penalties for offenders who exploit these vulnerable groups. It also mandates the creation of a national register to track individuals convicted of sexual offences. This register serves as a tool for law enforcement and helps to prevent further offences by monitoring offenders.<sup>207</sup> The Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 prescribes severe penalties for sexual offences, reflecting the gravity of these crimes and the need for deterrence.

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<sup>198</sup> Lisa Vetten, "Roots of a Rape Crisis," *Crime and Conflict* 8, 1997.

<sup>199</sup> Andersson et al, *Beyond Victims and Villains*, 53-57.

<sup>200</sup> Section 3, *Criminal Law (Sexual Offences and Related Matters) Amendment Act* (2007).

<sup>201</sup> Section 4, *Criminal Law (Sexual Offences and Related Matters) Amendment Act* (2007).

<sup>202</sup> Section 15, *Criminal Law (Sexual Offences and Related Matters) Amendment Act* (2007).

<sup>203</sup> Section 5, *Criminal Law (Sexual Offences and Related Matters) Amendment Act* (2007).

<sup>204</sup> Section 6, *Criminal Law (Sexual Offences and Related Matters) Amendment Act* (2007).

<sup>205</sup> Part 2, *Criminal Law (Sexual Offences and Related Matters) Amendment Act* (2007).

<sup>206</sup> Section 1(2), *Criminal Law (Sexual Offences and Related Matters) Amendment Act* (2007).

<sup>207</sup> Section 42, *Criminal Law (Sexual Offences and Related Matters) Amendment Act* (2007).

#### 4.3.2 Criminal Law (Forensic Procedures) Amendment (Act 37 of 2013)

Due to the high incidences of sexual violence within South Africa, there was a great need for a more effective use of DNA profiling within the investigate process.<sup>208</sup> The Criminal Law (Forensic Procedures) Amendment (Act 37 of 2013), commonly referred to as the ‘DNA ACT’. It allows for mandatory collection as well as the DNA profiling of samples from arrested or individuals convicted of the various offenses under Schedule 8 of the Criminal Procedure Act 51,(1977).<sup>209</sup> The Schedule 8 offences include; rape or compelled rape as contemplated in Sections 3 and 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively as well as consensual sexual penetration with certain children (statutory rape)<sup>210</sup>. There is also sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007), respectively.<sup>211</sup> Any sexual offence against a child or a person who is mentally disabled as contemplated in Part 2 of Chapter 3 or the whole of Chapter 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007), respectively.<sup>212</sup>

The DNA Act offers a framework for the collection, analysis, and use of DNA evidence which provides valuable lessons for Kenya to enhance its criminal justice system. The DNA Act aids in establishing clear regulations and procedures for the DNA sampling, storage, its usage, ensuring both effectiveness in crime-solving and protection of individual rights. The DNA profiles are then stored within the NFDD and this database is crucial in identifying repeat offenders as well as linking individuals to unsolved crimes.<sup>213</sup> Since the inception of the NFDD in 2015, the NFDD has been able to aid in the investigation of specific and violent crimes which has helped in increasing conviction rates.<sup>214</sup> The NFDD has specific indexes such as the Crime Scene Index, which stores profiles from crime scene samples, the Convicted Offender Index, which holds profiles of individuals convicted of crimes, and the Missing Persons Index which aids in the

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<sup>208</sup>Swanepoel N D, Joining the ranks: South Africa on track to adopting DNA Legislation 4 Forensic Science International: Genetics Supplement Series 1, 2013.

<sup>209</sup> Schedule 8, *Criminal Procedure Act 51 (1977)*.

<sup>210</sup> Section 15, *Criminal Law (Sexual Offences and Related Matters) Amendment Act*, (2007).

<sup>211</sup> Schedule 8, *Criminal Procedure Act 51 (1977)*.

<sup>212</sup> Schedule 8, *Criminal Procedure Act 51 (1977)*.

<sup>213</sup> Section 15J (6), *Criminal Law (Forensic Procedures) Amendment (Act 37 of 2013)*.

<sup>214</sup> Smith JH, Horne JS, The Value of Forensic DNA Investigative Leads in South Africa 17 *Forensic Sciences Research* 4,2023,1.

identification of missing individuals or unidentified remains.<sup>215</sup> This approach allows law enforcement to link suspects to crimes and solve cases more efficiently.<sup>216</sup> The establishment of South Africa's NFDD has become a vital investigative tool. It facilitates the generation of forensic DNA leads, thereby improving crime resolution, reducing crime rates, and increasing conviction rates.

To maintain public trust and accountability, the Act imposes strict penalties for misuse of DNA samples or profiles.<sup>217</sup> Unauthorized handling of DNA evidence can lead to severe penalties, including imprisonment or fines. Anyone who illegally loses, damages, or destroys information on the NFDD is guilty of a crime and faces up to 15 years in prison for a natural person and a fine for a legal person.<sup>218</sup> Any individual who causes information on the NFDD to be unlawfully lost, damaged, or destroyed without authorization is guilty of an offense and faces up to 15 years in jail for a natural person and a fine for a legal person.<sup>219</sup>

### **4.3 Institutional Framework guiding Sexual Offences in South Africa**

#### **4.3.1 South African Police Service (SAPS)**

The South African Police Service (SAPS) is responsible for the initial collection of DNA evidence at crime scenes.<sup>220</sup> Police officials are trained to collect and preserve DNA samples properly to ensure their integrity for forensic analysis. After collection, SAPS is responsible for the proper storage and preservation of DNA samples. This involves using appropriate containers and conditions to prevent degradation or contamination of the samples before they are sent to the Forensic Science Laboratory (FSL) for analysis.<sup>221</sup> SAPS are also required to carry the cost of all the training and the cost of the buccal and bodily sample kits.<sup>222</sup>

For the survivors of rape and defilement, the collected DNA evidence during the medical examination can help verify any allegations and thus support the prosecution's case. Furthermore,

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<sup>215</sup> The DNA Act Explained: What Does It Mean for Accused Persons, Wits Justice Project, 2015, 14.

<sup>216</sup> The DNA Act Explained: What Does It Mean for Accused Persons, Wits Justice Project, 2015, 12.

<sup>217</sup> Summary of Criminal Law (Forensic Procedures) Amendment Act 37 Of 2013 - The DNA ACT, 2014, 18.

<sup>218</sup> Section 15S (e), *Criminal Law (Forensic Procedures) Amendment (Act 37 of 2013)*.

<sup>219</sup> Section 15S (2), *Criminal Law (Forensic Procedures) Amendment (Act 37 of 2013)*.

<sup>220</sup> Section 7, *Criminal Law (Forensic Procedures) Amendment (Act 37 of 2013)*.

<sup>221</sup> Section 36D (4), *Criminal Law (Forensic Procedures) Amendment (Act 37 of 2013)*.

<sup>222</sup> Summary of Criminal Law (Forensic Procedures) Amendment Act 37 Of 2013 - The DNA ACT, 2014, 5.

there has also been a dramatic reduction in South Africa's DNA backlog from 241,000 to 1,600 samples which shows the further commitment by the Government of South Africa in improving the nation's forensic capabilities.<sup>223</sup> There are standard protocols that commanders and investigators are required to adhere to for handling investigations. A management information system is utilized to monitor both current and past investigations, ensuring that buccal swabs are collected from individuals arrested and charged under specific provisions of the DNA Act.

#### **4.3.2 National Forensic Oversight and Ethics Board (NFOEB)**

The National Forensic Oversight and Ethics Board, commonly referred to as the DNA Board, is a statutory body established under section 15V (1) of the Criminal Law (Forensic Procedures) Amendment Act, No. 37 of 2013.<sup>224</sup> It ensures compliance, addresses complaints, and protects individual rights throughout the process.<sup>225</sup> The Board provides regular independent and effective governance and oversight over the operations of the NFDD.<sup>226</sup> It ensures that the ethical, legal, and social implications of using forensic DNA in criminal investigations are taken into account.<sup>227</sup> The Board receives and assesses complaints from affected individuals regarding alleged violations related to the abuse of DNA samples and forensic DNA profiles and any security breaches in the database or its processes.<sup>228</sup>

To ensure the proper use and integrity of DNA evidence, the Criminal Law (Forensic Procedures) Amendment (Act 37 of 2013) mandates the development of Standard Operating Procedures (SOPs) and regulatory frameworks overseen by the National Commissioner in consultation with relevant boards.<sup>229</sup> These measures govern database access, protect stored information, and uphold the ethical collection and analysis of DNA samples.<sup>230</sup> The DNA Act requires the Minister of

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<sup>223</sup> Tshikalange S, SAPS has reduced DNA backlog to 1,600 cases, says Cele Police Minister, Crime Stats, 17 February 2023

-<<https://www.timeslive.co.za/news/south-africa/2023-02-17-crime-stats-saps-has-reduced-dna-backlog-to-1600-cases-says-cele/>> on 16 December 2024.

<sup>224</sup> Section 15V (1), *Criminal Law (Forensic Procedures) Amendment* (Act 37 of 2013).

<sup>225</sup> Section 15Z, *Criminal Law (Forensic Procedures) Amendment* (Act 37 of 2013).

<sup>226</sup> Section 15Z (b) (i), *Criminal Law (Forensic Procedures) Amendment* (Act 37 of 2013).

<sup>227</sup> Section 15Z (b) (ii), *Criminal Law (Forensic Procedures) Amendment* (Act 37 of 2013).

<sup>228</sup> Section 15Z (d), *Criminal Law (Forensic Procedures) Amendment* (Act 37 of 2013).

<sup>229</sup> Section 15U (4), *Criminal Law (Forensic Procedures) Amendment* (Act 37 of 2013).

<sup>230</sup> Summary of Criminal Law (Forensic Procedures) Amendment Act 37 Of 2013 - The DNA Ac, 2014, 24.

Police to submit regular reports to the National Assembly and conduct periodic reviews to assess the effectiveness and propose legislative improvements so as to maintain transparency.<sup>231</sup>

#### 4.4 A Snapshot of DNA Evidence in South Africa: Practices and Procedures

The NFDD has helped criminal investigations and increased the conviction rate since there are more leads and linking of perpetrators through crime scene samples.<sup>232</sup> The NFDD supports two main types of forensic investigative lead (FIL) searches: person-to-crime and crime-to-crime DNA matches. Person-to-crime FILs link a suspect's DNA profile to one or more crime scenes, while crime-to-crime FILs establish connections between DNA profiles from multiple crime scenes without an identified suspect.<sup>233</sup> There have also been comparison searches on the NFDD that have yielded 20141 DNA person-to-crime and linking persons on the database) and 9 155 DNA crime-to-crime (forensic).<sup>234</sup> The DNA database has also identified 4 313 serial sexual offenders.<sup>235</sup>

Furthermore, through the analysis of DNA evidence such as hair, skin cells, blood, semen, forensic specialists and scientists can establish a direct link and connections between suspects and the crime scene. This is done through the use of technologies such as Polymerase Chain Reaction (PCR) and Short Tandem Repeat (STR) which has enhanced how reliable and applicable DNA evidence is. Law enforcement personnel are therefore able to build stronger cases when investigating sexual assault cases.<sup>236</sup>

PCR can amplify even minute quantities of DNA samples and STR analysis allows the precise comparison of DNA profiles between suspects and crime scene evidence.<sup>237</sup> The use of these forms of technologies alongside a national DNA database, there is the accurate identification of perpetrators which help exonerate wrongfully accused individuals. There are also emerging

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<sup>231</sup> Section 15U (5), *Criminal Law (Forensic Procedures) Amendment (Act 37 of 2013)*.

<sup>232</sup> Smith JH, Horne JS, The Value of Forensic DNA Investigative Leads in South Africa ,1.

<sup>233</sup> JH Smith, JS Horne, The Value of Forensic DNA Investigative ,17 *School of Criminal Justice 4*, University of South Africa, 2023, 2.

<sup>234</sup> Smith JH, Horne JS, The Value of Forensic DNA Investigative Leads in South Africa ,1.

<sup>235</sup> Smith JH, Horne JS, The Value of Forensic DNA Investigative Leads in South Africa,1.

<sup>236</sup> Burg A, Kahn R, Welch K, DNA testing of sexual assault evidence: the laboratory perspective, 7 *J Forensic Nurs.* 3, 2011,145-52.

<sup>237</sup> Burg A, Kahn R, Welch K, DNA testing of sexual assault evidence: the laboratory perspective, 7 *J Forensic Nurs.* 3, 2011,145-52.

advancements, such as Next-Generation Sequencing (NGS), which can reconstruct complete DNA profiles from limited or degraded samples.<sup>238</sup> There is also forensic genetic genealogy, which leverages genealogical databases to trace suspects, have further expanded the potential of DNA evidence in solving cold cases and ensuring justice for survivors.<sup>239</sup> Another innovative tool is DNA phenotyping which predicts physical characteristics like eye and hair color, aiding in suspect identification.<sup>240</sup>

The collection of DNA samples under the Act is a regulated process conducted by authorized personnel, including trained police officers, medical practitioners, and registered nurses.<sup>241</sup> Samples, often collected through non-invasive methods like buccal swabs from specific groups, including convicted individuals, detainees, and those under investigation are sent to the Forensic Science Laboratory (FSL) for analysis.<sup>242</sup> According to the Criminal Law (Forensic Procedures) Amendment (Act 37 of 2013), buccal samples must be submitted to the laboratory within 30 days of collection.<sup>243</sup>

The FSL also processes evidence provided by investigating officers or crime scene examiners, such as sexual assault evidence kits. Through an automated system, DNA testing laboratories transfer the resulting forensic DNA profiles to designated indexes within the NFDD. The analysis that is done generates unique DNA profiles, which are then compared to profiles in the NFDD to identify matches that can link suspects to crimes or exonerate the wrongfully accused.<sup>244</sup>

When a rape incident occurs, there are usually three crime scenes: the location of the crime, the victim's body, and the perpetrator's body. DNA evidence is thus collected so as to be tested and help identify who the perpetrator is as well as to confirm that there was indeed sexual contact.<sup>245</sup> In South Africa, the biological and non-biological evidence is typically collected after a rape

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<sup>238</sup> Serrano C A, Forensic DNA phenotyping: A Promising Tool To Aid Forensic Investigation: Current Situation, 46 *Spanish Journal of Legal Medicine* 4,2020, 183-190.

<sup>239</sup> Serrano C A, Forensic DNA phenotyping: A Promising Tool To Aid Forensic Investigation: Current Situation, 46 *Spanish Journal of Legal Medicine* 4,2020, 183-190.

<sup>240</sup> Serrano C A, Forensic DNA phenotyping: A Promising Tool To Aid Forensic Investigation: Current Situation, 46 *Spanish Journal of Legal Medicine* 4,2020, 183-190.

<sup>241</sup> The DNA Act Explained: What Does It Mean for Accused Persons, Wits Justice Project, 2015, 11.

<sup>242</sup> The DNA Act Explained: What Does It Mean for Accused Persons, Wits Justice Project, 2015, 11.

<sup>243</sup> Section 15Q, *Criminal Law (Forensic Procedures) Amendment (Act 37 of 2013)*.

<sup>244</sup> The DNA Act Explained: What Does It Mean for Accused Persons, Wits Justice Project, 2015, 12.

<sup>245</sup> Magalhães T, Dinis-Oliveira RJ, Silva B, Corte-Real F, Nuno Vieira D, 'Biological Evidence Management for DNA Analysis in Cases of Sexual Assault', *Scientific World Journal*, 2015.

incident through the use of a Sexual Assault Evidence Collection Kit (SAECK).<sup>246</sup> There have been concerns about these kits not being fully analyzed and the lack of trained personnel to conduct clinical and forensic medical examinations.<sup>247</sup> However, when properly collected and analyzed, forensic DNA evidence can play a critical role in criminal investigations, court proceedings, and the legal outcomes of rape cases.<sup>248</sup> The use and presentation of forensic DNA evidence alongside other necessary and supporting evidence can lead to a higher conviction rate as compared to other cases where DNA evidence has not been utilized.<sup>249</sup>

#### **4.5 Lessons for Kenya**

In the more recent years, DNA analysis has aided in transforming how crimes are investigated.<sup>250</sup> DNA evidence collection and its analysis have become a staple as a standard procedure in rape investigations within developed countries and some of the developing countries.<sup>251</sup> Kenya has an opportunity to learn from South Africa's successes and fully integrate the various advancements in order to address the existing gaps in the legal framework.

##### **4.5.1 Introduction of Mandatory DNA testing in rape and defilement cases.**

Currently, Kenya does not mandate for the mandatory DNA testing in rape and defilement cases involving bodily fluids and epithelial cells. South Africa, on the other hand, allows for mandatory collection as well as the DNA profiling of samples from arrested or individuals convicted of the various offenses under Schedule 8 of the Criminal Procedure Act 51(1977).<sup>252</sup> The gap that Kenya has in not mandating DNA testing limits the potential of DNA evidence to bolster prosecutions,

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<sup>246</sup> Malema B S, 'Investigating the Impact of Sexual Assault Evidence Collection Kits (SAECKS) as Evidence in Rape Cases Prosecuted in the Western Cape High Court Between 2012 And 2016', Published Thesis, University of Cape Town, 2020, 13.

<sup>247</sup> Fouché L, Bezuidenhout, J, Liebenberg C, Adefuye A O, Medico-Legal Documentation Of Rape Or Sexual Assault: Are Community-Service Doctors Equipped For The Task? 60 *South African Family Practice* 1, 2018, 8-12.

<sup>248</sup> Johnson D, Peterson J, Sommers I, Baskin, D, Use Of Forensic Science in Investigating Crimes of Sexual Violence: Contrasting Its Theoretical Potential With Empirical Realities , 18 *Violence Against Women* 2, 2012, 193–222.

<sup>249</sup> Malema B S, 'Investigating the Impact of Sexual Assault Evidence Collection Kits (SAECKS) as Evidence in Rape Cases Prosecuted in the Western Cape High Court Between 2012 And 2016', Published Thesis, University of Cape Town, 2020, 13.

<sup>250</sup> Bright J.A, Taylor D, Curran, J, Buckleton, J, Searching Mixed DNA Profiles Directly Against Profile Databases, 9 *Forensic Science International Genetics* 1, 2014.

<sup>251</sup> Smith, L L, Wetton, J H, Lall G.K.M., Flowe H.D, Jobling M.A, Forensic Science And The Right To Access To Justice: Testing The Efficacy Of Self-Examination Intimate DNA Swabs To Enhance Victim-Centred Responses To Sexual Violence In Low-resource Environments, 57 *Science and Justice* 5, 331–335, 2017.

<sup>252</sup> Schedule 8, *Criminal Procedure Act* 51,(1977).

ensure justice for victims as well as exonerate wrongfully accused individuals. Making DNA testing mandatory in rape and defilement cases will also open room for other forms of sexual violence to also use DNA testing. The key lesson to be drawn here by Kenya is to use and mandate DNA testing and also have a national DNA database that will store all the collected data so as to enhance accuracy and efficiency of investigations.

#### **4.5.2 Enactment of a Comprehensive law**

Kenya lacks a comprehensive law on the use of DNA evidence exclusively and this creates a gap in the criminal justice system. As earlier discussed, this absence is grave as it undermines the systematic collection, analysis and the useful application of DNA evidence in criminal investigations, particularly in sensitive cases such as rape and defilement.<sup>253</sup> In contrast, South Africa has the Criminal Law (Forensic Procedures) Amendment (Act 37 of 2013) which is commonly referred to as the ‘DNA ACT’. This law acts as the cornerstone for how DNA evidence is regulated as it provides a detailed framework for its collection, storage, and use.

The DNA Act in South Africa mandates for the collection of DNA samples from persons that are arrested, convicted, or have been suspected of committing specific crimes, such as sexual offences and violent crimes. The DNA Act has also established a national DNA database to store profiles for investigative purposes, enabling law enforcement to solve crimes more efficiently and connect offenders to past cases.<sup>254</sup> This law is a model of how legislation can standardize the use of forensic evidence while ensuring the rights of individuals are protected through oversight and accountability measures.

What Kenya can learn from the DNA Act is to enact a similar comprehensive law. Such a legislation should include the offences for which DNA evidence is required, such as rape and defilement cases where bodily fluids and epithelial cells are involved. It should also include the procedures for collecting and analyzing DNA samples, and also establish a national DNA database

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<sup>253</sup> Cross TP, Laura Siller L, Vljajnic M and Megan Alderden M, The Relationship of DNA Evidence to Prosecution Outcomes in Sexual Assault Cases, *Violence Against Women*, 2022, 3910-3932.

<sup>254</sup> Section 15J (6), *Criminal Law (Forensic Procedures) Amendment* (Act 37 of 2013).

that will be managed. There should also be provisions to address privacy concerns and ensure the ethical handling of DNA profiles similar to what South Africa does with its NFDD.<sup>255</sup>

Additionally, the law must also address the challenge that could possibly arise during implementation. For example, there may be concerns about ensuring the quality and reliability of DNA evidence, particularly in rural areas where forensic infrastructure is limited.<sup>256</sup> Furthermore, safeguards should be established to prevent the misuse of DNA profiles, such as unauthorized access or use for purposes beyond the scope of criminal investigations. By anticipating and addressing these challenges, Kenya can ensure that its legal framework is both effective and equitable, promoting public confidence in the justice system.

By enacting a comprehensive law on use of DNA evidence, Kenya would help solve the challenges of coaching of child victims and have no room for false rapes allegations to be fabricated. This in turn will help bolster the prosecution's case and ensure victims get justice as well as exonerate innocent individuals.

#### **4.5.3. Operationalization of the DNA Database**

Kenya currently has a Sexual Offences (Dangerous Offenders DNA Data Bank) Regulations that establishes a legal framework that is for the creation and management of a DNA data bank specifically for dangerous offenders. The regulations have procedures for the collection, storage and the use of DNA profiles.<sup>257</sup> These regulations seek to enhance the ability of the law enforcement to manage dangerous offenders and utilize DNA technology effectively and efficiently in the investigation of sexual offences. South Africa's NFDD since 2015 its DNA Act of 2013.<sup>258</sup> The database has been fully integrated into the criminal justice system, allowing for the storage of DNA profiles from convicted offenders, arrestees, and crime scene samples.<sup>259</sup> It has played a pivotal role in solving sexual offence cases, identifying repeat offenders, and providing leads in unsolved investigations.

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<sup>255</sup> Section 15Z (b) (ii), *Criminal Law (Forensic Procedures) Amendment (Act 37 of 2013)*.

<sup>256</sup> National Forensic Science Technology Center (NFSTC), National Institute of Justice, Office of Science and Technology, *DNA Evidence: Enhancing Law Enforcement's Impact From Crime Scene to Courtroom and Beyond Victim's Roundtable Report*, 2003, 6.

<sup>257</sup> Rule 17, *The Sexual Offences (Dangerous Offenders DNA Data Bank) Regulations*, (2008).

<sup>258</sup> Smith JH, Horne JS, Establishing forensic DNA databases in Africa, 9 *Forensic Sci Res* 2, 2024, 1.

<sup>259</sup> Smith JH, Horne JS, The Value of Forensic DNA Investigative Leads in South Africa, 1.

Furthermore, South Africa, on the other hand, has developed detailed SOPs as part of the DNA Act. These procedures outline the proper methods for collecting DNA samples from crime scenes, suspects, and victims, as well as guidelines for the secure storage and transportation of samples.<sup>260</sup> These SOPs establish protocols for DNA analysis to ensure consistency and reliability in forensic results. These measures are critical in maintaining the integrity of DNA evidence and ensuring that it is admissible in court.

Though Kenya has the regulatory framework, the DNA database remains non-operational. This failure on Kenya's part leaves the envisioned database ineffective and undermines its vital role in the facilitation of the collection, storage, use of DNA evidence. Without it being operational, the DNA database cannot fulfill its intended purpose of aiding in the prosecution of offenders, curbing coaching instances and fabrication of false rape allegations and the exoneration of innocent individuals.

The lesson Kenya can learn is to operationalize its DNA database so that Kenya can enhance its ability to solve crimes, prosecute offenders, and strengthen public confidence in the criminal justice system. Additionally, Kenya needs to also have a more detailed standardized operational procedures (SOPs) for the collection, handling, and analysis of DNA evidence. This absence of clear protocols increases the risk of contamination, loss, or mishandling of DNA samples, which can compromise investigations and weaken prosecutions. Without SOPs, forensic evidence may fail to meet the evidentiary thresholds required in court, leading to potential miscarriages of justice.

#### **4.5.4 Prescribing Penalties for Misuse of DNA Samples and Profiles**

Rule 18 of Sexual Offences (Dangerous Offenders DNA Data Bank) Regulations, addresses the penalty for contravenes any of the regulations by stating that one would be held liable for imprisonment for a term not exceeding six months. They could also be liable to pay a fine of not exceeding six thousand shillings or both.<sup>261</sup>

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<sup>260</sup> Summary of Criminal Law (Forensic Procedures) Amendment Act 37 Of 2013 - The DNA Act, 2014, 24.

<sup>261</sup> Rule 18, *The Sexual Offences (Dangerous Offenders DNA Data Bank) Regulations*, (2008).

South Africa's DNA Act imposes strict penalties for misuse of DNA samples or profiles.<sup>262</sup> Any unauthorized handling of DNA evidence can lead to severe penalties, including imprisonment or fines. Anyone who illegally loses, damages, or destroys information on the NFDD is guilty of a crime and faces up to 15 years in prison for a natural person and a fine for a legal person.<sup>263</sup> Any individual who causes information on the NFDD to be unlawfully lost, damaged, or destroyed without authorization is guilty of an offense and faces up to 15 years in jail for a natural person and a fine for a legal person.<sup>264</sup>

The lesson for Kenya here is to have a more stricter approach like South Africa when it comes to misuse and tampering of DNA evidence. A comprehensive legal framework should also explicitly define and state what constitutes misuse, such as unauthorized access, sharing, or manipulation of DNA profiles, and outline strict penalties for these offences. Such penalties should include fines, imprisonment, or both, depending on the severity of the violation. The resultant effect will thus act as a way to deter people from misuse and tampering of DNA evidence and thus safeguard the integrity of its DNA evidence

#### **4.5 Conclusion**

The use of DNA evidence has transformed criminal investigations, particularly in cases of sexual violence. South Africa's DNA framework has proven effective in improving the collection, analysis, and storage of DNA samples, promoting the solving of serious crimes and securing convictions. However, Kenya's lack of express requirement for DNA testing has created gaps in evidence collection and justice delivery. Kenya can strengthen its capacity to combat crime and improve its justice system by adopting key aspects of South Africa's DNA Act. Implementing a structured DNA database, ensuring ethical handling of DNA evidence which provide a solid foundation for leveraging forensic science in criminal investigations while safeguarding individual rights.

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<sup>262</sup> Summary of Criminal Law (Forensic Procedures) Amendment Act 37 Of 2013 - The DNA ACT, 2014, 18.

<sup>263</sup> Section 15S (e), *Criminal Law (Forensic Procedures) Amendment (Act 37 of 2013)*.

<sup>264</sup> Section 15S (2), *Criminal Law (Forensic Procedures) Amendment (Act 37 of 2013)*.



## **5.0 CHAPTER FIVE: RESEARCH FINDINGS, CONCLUSION AND RECOMMENDATIONS**

### **5.1 Introduction**

This chapter concludes the research done to emphasize how necessary mandatory DNA testing is in rape and defilement cases involving bodily fluids and epithelial cells within Kenya. The chapter below will highlight all key research findings and offer possible recommendations in dealing with these serious sexual crimes.

### **5.2 Research Findings**

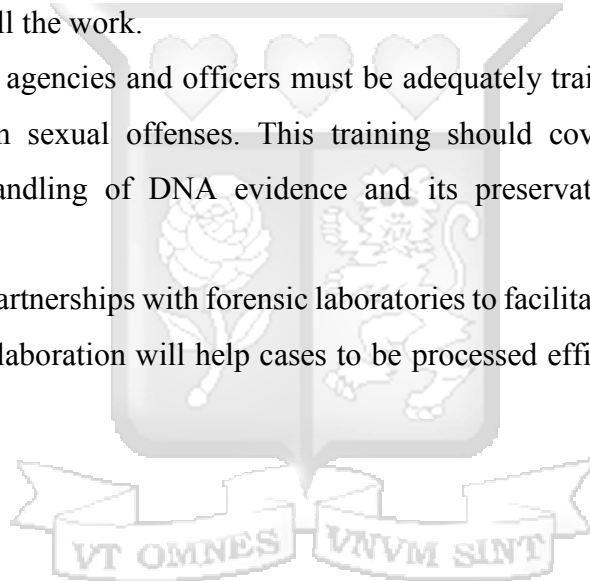
As discussed in Chapter Two, it is clear that Kenya has the legal, regulatory and policy frameworks in place to address rape and defilement cases. Though this may be the case, victims of these horrendous crimes coupled with wrongfully accused persons still face challenges when it comes to accessing justice. The current approach in how courts deal with rape and defilement cases involving bodily fluids and epithelial cells has no room for mandatory DNA testing yet there could be.

In Chapter Three, it is evident that the implementation of mandatory DNA testing could address the earlier alluded to challenges that result with the omission mandatory DNA testing in rape and defilement case involving bodily fluids and epithelial cells. DNA testing would ensure that the victim's claims and the accused's defense are supported by concrete scientific data. There would also be more accurate legal outcomes that would result from the use of DNA evidence through proper collection, preservation, and analysis.

Lastly, Chapter Four shows that using DNA evidence has transformed the investigation of sexual violence cases. A good example is South Africa's DNA framework which has shown its effectiveness in improving the collection, analysis, and storage of DNA samples. Kenya currently has no express requirement for DNA testing and it can learn from South Africa. Kenya can thus combat crime and improve its justice system by adopting aspects of South Africa's DNA Act.

### 5.3 Recommendations

1. The Legislature should amend the SOA to have Section 36A to introduce mandatory DNA testing in rape and defilement cases involving bodily fluids and epithelial cells.
2. The DCI should ensure the establishment of a DNA database so as to store specimens from convicted offenders and to facilitate the identification of future offenders.
3. It is recommended to improve the capacity of the Government Chemist in managing its workload effectively. How this can occur is through adequate funding to ensure there is proper maintenance and procurement of essential supplies for the analysis of the submitted samples within a timely manner. Laboratories within Kenya should be upgraded to handle a full range of analyses, including DNA sampling so as to minimize over reliance on one laboratory to do all the work.
4. Law enforcement agencies and officers must be adequately trained on the importance of DNA evidence in sexual offenses. This training should cover areas such as proper collection and handling of DNA evidence and its preservation, in order to prevent tampering.
5. There should be partnerships with forensic laboratories to facilitate timely analysis of DNA samples. This collaboration will help cases to be processed efficiently and reduce delays in justice



## **BIBLIOGRAPHY**

### **Journal Articles**

Adefuye A, Egenasi C and Benedict A, Forensic evidence preservation following an incident of Rape: The Role of the victim, *South African Family Practice*, 2024.

Albright TD, Why Eyewitnesses Fail, 114 *Proc Natl Acad Sci USA* 30, 2017.

Andersson et al, *Beyond Victims and Villains*.

Beaudry-Cyr M, Rational Choice Theory, *The Encyclopedia of Crime & Punishment*, University of South Florida, 2015.

Beauregard E and Leclerc B, 'An Application of the Rational Choice Approach to the Offending Process of Sex Offenders: A Closer Look at the Decision-making, 19(2) *Sexual Abuse A Journal of Research and Treatment*, 2007.

Bright J.A, Taylor D, Curran, J, Buckleton, J, Searching Mixed DNA Profiles Directly Against Profile Databases, 9 *Forensic Science International Genetics* 1, 2014.

Burg A, Kahn R, Welch K, DNA testing of sexual assault evidence: the laboratory perspective, 7 *J Forensic Nurs.* 3, 2011, 145-52.

Cross TP, Laura Siller L, Vljajnic M and Megan Alderden M, The Relationship of DNA Evidence to Prosecution Outcomes in Sexual Assault Cases, *Violence Against Women*, 2022, 3910-3932.

David N. Swanepoel, Joining the ranks: South Africa on track to adopting DNA Legislation 4 *Forensic Science International: Genetics Supplement Series* 1, 2013.

De Zutter AWEA, Horselenberg R, van Koppen PJ, Motives for Filing a False Allegation of Rape. 47 *Arch Sex Behav.* 2, 2018.

Donald E. Shelton, Young S. Kim, and Gregg Barak. "A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the 'CSI Effect' Exist?" 9 *Vanderbilt Journal of Entertainment and Technology Law*, 2006.

Dr Aura R, Situational Analysis and the Legal Framework on Sexual and Gender-Based Violence in Kenya: Challenges and Opportunities

Dr. Ahmed M, DNA Provides Enough Indications And Help Court To Convict An Accused And Release Innocent, 21 Migration Letters 14 , 2024.

Eugene K, "False Rape Allegations, 23 Archives of Sexual Behavior 1, 1994.

Faller C. K, 'Coaching Children About Sexual Abuse: A Pilot Study of Professionals' Perceptions', 31(9) *School of Social Work, Family Assessment Clinic, University of Michigan*, 2007.

False Allegations of Rape and/or Domestic Abuse: Guidance for Charging Perverting the Course of Justice and Wasting Police Time in Cases Involving Allegedly False Allegations of Rape and/or Domestic Abuse, The Crown Prosecution Service.' in September 2019.

Fouché L, Bezuidenhout, J, Liebenberg C, Adefuye A O, Medico-Legal Documentation Of Rape Or Sexual Assault: Are Community-Service Doctors Equipped For The Task? 60 *South African Family Practice* 1, 2018, 8-12.

Gary L. Wells, Eyewitness Identification: Psychological research and legal policy on lineups,1, *Psychology, Public Policy, And Law*,1995.

Haskell L, Randall M, The Impact of Trauma on Adult Sexual Assault Victims, Report Submitted to: Justice Canada, 2019.

Hoyle, C., Speechley, N.-E., Burnett, R, The Impact of Being Wrongly Accused of Abuse in Occupations of Trust: Victims' Voices, University of Oxford Centre for Criminology, 2016.

Jeffrey L and Shirelle P, *West's Encyclopedia of American Law*, 7 Thomson/Gale, 2005.

Johnson D, Peterson J, Sommers I, Baskin, D, Use Of Forensic Science in Investigating Crimes of Sexual Violence: Contrasting Its Theoretical Potential With Empirical Realities, 18 *Violence Against Women* 2, 2012, 193–222.

Kamunya M, Human Rights and Justice Rights Approaches to Gender-Based Violence (GBV): The Case of Kenya's Sexual Offences Act (KSOA) Violence, Published, Graduate Master Theses, University of Massachusetts Boston, 2019.

Lonsway K, Sergeant Archambault J, O'Donnell P, Ware L, Role of DNA Evidence in Sexual Assault Investigations Part 1: The ABC's of DNA Evidence, 2016.

Lugalia L M, 'The Sexual Offences Act 2006 And Its Role In Enhancing Access To Justice For Survivors Of Sexual Violence In Nairobi, *Institute of Advanced Studies*,2011.

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

Lonsway K, Sergeant Archambault J, O'Donnell P, Ware L, Role of DNA Evidence in Sexual Assault Investigations Part 1: The ABC's of DNA Evidence, 2016.

Lisa Vetten, "Roots of a Rape Crisis," *Crime and Conflict* 8, 1997.

Lirieka Meintjes-van Der Walt, 'An Overview of the use of DNA evidence in South African Criminal Courts' 21(1) *South African Journal of Criminal Justice*, 2008.

Lisak D, Gardinier L, Nicksa SC, Cote AM, False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases. *Violence against Women*, 2010.

Makasa I and Heathfield, Laura, A Retrospective Study Of Sexual Offences In Zambia, *Journal of Forensic and Legal Medicine*,2017.

Magalhães T, Dinis-Oliveira RJ, Silva B, Corte-Real F, Nuno Vieira D, 'Biological Evidence Management for DNA Analysis in Cases of Sexual Assault', *Scientific World Journal*, 2015.

Menaker T A, Campbell B.A., Wells W, The Use Of Forensic Evidence In Sexual Assault Investigations: Perceptions Of Sex Crimes Investigators, 23 *Violence Against Women* 4, 2017, 399–425.

Mummery D, 'Every contact leaves a trace', *Br J Gen Pract*. 28 October 2021.

Mutavi T, Mathai M, Kumar M, Nganga P, Obondo A, 'Psychosocial Outcomes Among Children Following Defilement and The Caregivers Responses To The Children's Trauma: A Qualitative Study From Nairobi Suburbs, Kenya' 5(1) *Afr J Trauma Stress*, 2016.

Nagin S. D and Paternoster R,' Enduring Individual Differences and Rational Choice Theories of Crime,27(3) *Law & Society Review*, 1993.

National Research Council (US) Committee on DNA Forensic Science: An Update. The Evaluation of Forensic DNA Evidence. Washington DC, *National Academies Press (US)*,1996.

Nikki N, 'The Politics of a Definition' in L Artz & D Smythe (ed) *Should We Consent? Rape Law Reform in South Africa*, 2008,26.

Onyango-Ouma W, Ndung'u N, Baraza N and Birungi H, 'The making of the Kenya Sexual Offenses Act, 2006: Behind the Scenes' *Kwani Trust*, 2009.

Parks. S, *Compelled DNA Testing in Rape Cases: Illustrating the Necessity Compelled DNA Testing in Rape Cases: Illustrating the Necessity of an Exception to the Self-Incrimination Clause of an Exception to the Self-Incrimination Clause*, 7 *William & Mary Journal of Race, Gender, and Social Justice* 2, 2001.

Pratt T, *Rational Choice Theory, Crime Control Policy, and Criminological Relevance*, 7(1) *Criminology & Public Policy*, 2008.

Roman, J.K., Reid, S.E., Chalfin, A.J *The DNA Field Experiment: A Randomized Trial of the cost-effectiveness of using DNA to solve property crimes*, *J Exp Criminol* 5, 2009, 345–369.

Roman, J.K., Reid, S.E., Chalfin, A.J *The DNA Field Experiment: A Randomized Trial of the cost-effectiveness of using DNA to solve property crimes*, *J Exp Criminol* 5, 2009.

Rosenthal, L., *Eyewitness Identification and The Problematics Of Blackstonian Reform Of The Criminal Law. 110, The Journal of Criminal Law and Criminology* 2, 2020.

Sampson F and Hart S, '160 Girls' Making Legal History: Overview of the Development and Implementation of a Strategic Equality Initiative to Achieve Legal Protection from Defilement for All Girls in Kenya.

Sato Y, Rational choice theory, Sociopedia, 2013.

S de Wet; H Oosthuizen and J Visser, 'DNA Profiling And The Law In South Africa', 14(4) *PER / PELJ* 2011.

Serrano C A, Forensic DNA phenotyping: A Promising Tool To Aid Forensic Investigation: Current Situation, 46 *Spanish Journal of Legal Medicine* 4,2020, 183-190.

Shako K, Kalsi M, Forensic observations and recommendations on Sexual and Gender-Based violence in Kenya. 1 *Forensic Sci Int Synerg*,2019,185-203.

Stevens, A P, Arresting Crime: Expanding The Scope Of DNA Databases In America 79 *Texas Law Review*, 4, 2001.

Smith JH, Horne JS, The Value of Forensic DNA Investigative Leads in South Africa, 9 *Forensic Sciences Research* 2, 2023.

Smith, L L, Wetton, J H, Lall G.K.M., Flowe H.D, Jobling M.A, Forensic Science And The Right To Access To Justice: Testing The Efficacy Of Self-Examination Intimate Dna Swabs To Enhance Victim-Centred Responses To Sexual Violence In Low, 57 *Science and Justice* 5, 331–335, 2017.

Smith JH, Lynch V, Amankwaa AO, Budowle B, Fonseca SA, Shako SK, Molefe I, 4th DNA Forensic Symposium: Challenges and Future directions in Africa, 18 *Forensic Sci Int Synerg* 9,2024.

Tawa U, 'Victims of False Accusations of Rape', 4 *Int J Law Human* 3, 2021.

Willan, Samantha & Shai, Nwabisa & Majola, Thobeka & Mabhida, Mpumelelo & Mngadi, Sinqobile & Gounden, Tholsie & Jewkes, Rachel & Abrahams, Naeemah & Machisa, Mercilene, South African Rape Survivors' Expressions of Shame, Self-Blame and Internalized-Stigma, 5 *SSM Mental Health*, 2024.

## Reports

Guidelines & Protocols; Medico-Legal Care For Survivors/Victims Of Sexual Violence, Ministry of Health & Family Welfare Department of Health & Family Welfare, 2014.

Ministry of Devolution and Planning, *National Policy on the Prevention and Response to Gender-Based Violence*.

National Policy on The Prevention, Response And Protection From Unlawful Sexual Acts and The Administration of Justice In Sexual Offences Matters, Office of The Attorney General And Department of Justice and The National Council on The Administration of Justice 2021.

National Forensic Science Technology Center (NFSTC), National Institute of Justice, Office of Science and Technology, *DNA Evidence: Enhancing Law Enforcement's Impact From Crime Scene to Courtroom and Beyond Victim's Roundtable Report*, 2003, 6.

Office of The Attorney General and Department of Justice and The National Council on the Administration of Justice. *National Policy on the Prevention, Response and Protection from Unlawful Sexual Acts and The Administration of Justice in Sexual Offences Matters*, November 2021.

UNGA, *Inter-Agency Standing Committee Guidelines for Gender-based Violence Interventions in Humanitarian Settings: Focusing on Prevention of and Response to Sexual Violence in Emergencies (Geneva: Inter-Agency Standing Committee, September 2005*.

Understanding DNA Evidence: A Guide for Victim Service Providers, *National Institute of Justice and Office for Victims of Crime*, 2001.

U.S. Department of Justice Office of the Inspector General Audit Division, Audit Report 06-32, *Combined DNA Index System Operational and Laboratory Vulnerabilities*, May 2006.

Summary of Criminal Law (Forensic Procedures) Amendment Act 37 Of 2013 - The DNA Act, 2014, 24.

The DNA Act Explained: What Does It Mean For Accused Persons, Wits Justice Project, 2015, 12.

Turman M.K, Understanding DNA Evidence: A Guide for Victim Service Providers, U.S. Department of Justice Office of Justice Programs Office for Victims of Crime,2001.

### **Theses**

Achieng' O N, Assessing False Allegations of Rape in Kenya, Published LLB Thesis,Strathmore University Law School, Nairobi, 2021, 18.

Bundi M, The State Of Forensic Investigation In Kenya, Published MA Thesis,University of Nairobi, Nairobi 2016, 45.

Malema B S, 'Investigating the Impact of Sexual Assault Evidence Collection Kits (SAECKS) as Evidence in Rape Cases Prosecuted in the Western Cape High Court Between 2012 And 2016', Published Thesis, University of Cape Town, 2020, 13.

Kara N C, 'Enforcing and Implementing the Law on Defilement in Kenya: A Critique' Published LLM Thesis, University of Nairobi, Nairobi, 2013.

Otulo M, Examining Prosecutor's Duty to Disclose Exculpatory Evidence and the Right to Fair Trial in Kenya, Published LLM Thesis,Strathmore University Law School, Nairobi, 2020,1.

### **Internet Sources**

Akumu C, 'Why Kenya Needs A Reliable Criminal DNA Database, KASH Conference', 16 February 2024  
<<https://healthbusiness.co.ke/7311/kenya-takes-stride-towards-modern-crime-detection-with-proposed-dna-databas/>>on 18 January 2025.

'Corrupt Security Officials to Blame for Rising Cases Of Defilement– 29 December 2018.  
<<https://www.kenyanews.go.ke/corrupt-security-officials-to-blame-for-rising-cases-of-defilement/>>on 10 December 2023

Number of sexual offenses in South Africa in 2022/2023, by crime  
<https://www.statista.com/statistics/1362370/number-of-sexual-offenses-in-south-africa-by-crime/>  
on 30 November 2024.

Obiria M, 'Defilement trauma: 'I failed because that man messed me up.' The Daily Nation, 4 October 2023

<<https://nation.africa/kenya/news/gender/defilement-trauma-i-failed-because-that-man-messed-me-up--4389526>> on 21 August 2024.

Osen G, 'Grim tales as data shows rise in rape, defilement, The Star, 28 May 2024

<<https://www.the-star.co.ke/news/2024-05-28-grim-tales-as-data-shows-rise-in-rape-defilement/>> on 21 August 2024

The Importance of DNA in Sexual Assault Cases'

—<<https://www.rainn.org/articles/importance-dna-sexual-assault-cases>> on 2 March 2024

Tshikalange S, SAPS has reduced DNA backlog to 1,600 cases, says Cele Police Minister, Crime Stats, 17 February 2023

—<<https://www.timeslive.co.za/news/south-africa/2023-02-17-crime-stats-saps-has-reduced-dna-backlog-to-1600-cases-says-cele/>> on 16 December 2024.

Verbora R A, Rational Choice Theory

—<<https://kpu.pressbooks.pub/introcrim/chapter/16-6-rational-choice-theory/#:~:text=The%20rational%20choice%20regarding%20how,frequency%20is%20still%20a%20choice>> on 19 February 2024.

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>> on 19 July 2024.

Wambulwa A, ' Man falsely accused of defiling daughter gets fresh trial', The Star, 16 December 2020,

—<<https://www.the-star.co.ke/news/2020-12-16-man-falsely-accused-of-defiling-daughter-gets-fresh-trial/>> on 2 March 2024.

