



**Strathmore**  
UNIVERSITY

**MINOR-TO-MINOR SEXUAL CONSENT IN KENYA: AN ANALYSIS OF THE  
SET PRECEDENT**

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

University Law School

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December 2019

9368 Words

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## Acknowledgements

I would like to thank my supervisor, Dr. Peter Kwenjera for guiding me throughout this process.

I would also like to thank and appreciate my dear parents for supporting me and never giving up.

Declaration

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

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**DR. PETER KWENJERA**

## Abstract.

Rising incidents of consensual sex between minors has been an area of concern in Kenya being a disputable issue until 2014 when the High court in Eldoret set a precedent in *CKW v. Attorney General and Another*.<sup>1</sup> Initially, the position in law was charging the adolescent boy with defilement where he was older than the girl. This was found discriminatory against the boy and the set precedent has been appreciated for its neutrality. However, from the cases decided after this case, the courts are still facing a challenge while dealing with the issue of consensual sex between minors. Furthermore, the *CKW case* failed to take regard of several aspects that surround the life of the adolescent while acknowledging that they are also citizens with rights. The consequences of the criminalisation of consensual sex between minors has proved that the best interest of the child principle was not carefully assessed.

Using mostly legal instruments and case law, this study analysed how both Kenyan legislation and courts have attempted to deal with the issue of consensual between minors. The study then proceeds to make a comparison with South African law. An observation is made from the study which reveals that the criminalisation of consensual sex between minors prevents a good number of adolescents from accessing information such as information on HIV and STDs, that will help them in decision making, raising the number of unwanted pregnancies and HIV infections among them. However, the consequences of allowing adolescents to engage in consensual sex are severe as evidenced by surveys done in South Africa.

This study answers the question regarding the effectiveness of Kenyan courts and Kenyan legislation while dealing with the issue of consensual sex between minors. Being a rampant issue, the parliament had proposed to lower the age of consent to 16 years as a possible solution. South Africa took this approach and the consequences reveal that lowering the age of consent will be endangering the lives of minors. This paper shall therefore analyse the effectiveness and the deficiencies in the set precedent and finally recommend the guidelines on how the state and courts should instead address the issue of minor-to-minor sexual consent to safeguard the future of the minors while guaranteeing their best interests.

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<sup>1</sup> (2014) eKLR

## List of Abbreviations

ACRWC- African Charter on the Rights and Welfare of the Child

BIC- Best Interest of Child

CSE- Comprehensive Sex Education

ESA- East and South African

HIV- Human Immunodeficiency Virus

KDHS- Kenya Demographic and Health Survey

SOA-Sexual Offences Act

SRH- Sexual and Reproductive Health

UNCRC- United Nations Convention on the Rights of the Child

UNESCO- United Nations Educational, Scientific and Cultural Organization

## List of Cases

*Bonu v R* (2010) eKLR.

*CKW v Attorney General & another* (2014) eKLR.

*Ezekiel Cheruiyot Karas v R* (2010) eKLR.

*G O v Republic* (2017) eKLR.

*Kelvin Kaminya v R* (2013) eKLR

*Martin Charo v Republic* (2016) eKLR.

*P O O v Director of Public Prosecutions & another* (2017) eKLR.

*Teddy Bear Clinic for Abused Children & Another vs Minister of Justice and Constitutional Development & another* (CCT 12/13) (2013) ZACC 3

### List of Legal Instruments

African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49.

Children Act, Kenya (Act No. 3 of 2001)

Choice of Termination of Pregnancy Act of South Africa (No 92 of 2007)

Constitution of Kenya (2010)

Constitution of South Africa

Children's Act of South Africa (No.38 of 2005)

Office of the Director of Public Prosecutions Act (No. 2 of 2013)

Penal Code, Kenya (Cap 63).

The Sexual Offences Act, Kenya (Act No.12 of 2006).

The Sexual Offences Act, South Africa (Act No. 32 of 2007).

United Nations Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3.

## 1 CHAPTER ONE: INTRODUCTION

### 1.1 Background.

A child is defined as any person below the age of 18.<sup>2</sup> Adolescents fall under this scope by being children between the ages of 13 and 17 making them part of the vulnerable group whose needs should be addressed by all state organs and public officers.<sup>3</sup>

In 2014, the Kenya Demographic and Health Survey (KDHS), carried out several statistics to determine the age at which people had their first sexual encounter. The survey revealed that, by the age of 15, 22 percent of men and 15 percent of women aged between 20 - 49 years had had their first sexual intercourse.<sup>4</sup> The survey also reported that before the age of 15, 10 percent of girls and 22 percent of men had engaged in sexual intercourse and finally that 46.4 percent of women and 50 percent of men had engaged in sexual intercourse before the age of 18.<sup>5</sup> An inference can be made from this survey to show that a considerable number of minors are engaging in sexual activities.

An analysis of the traditional perspective shows how communities dealt with the issue of sex between minors before English Law brought about the age of consent. During the Traditional era, sexuality was governed by societal norms considering that different genders had different specific roles to play in the society. Different societies' mechanisms controlled the sexual behaviour of minors until they became adults.<sup>6</sup> There was fear that if the society failed to check sexual behaviour among minors, it would tamper with not only the social order but also the general functioning of the society.<sup>7</sup> As adolescents transitioned from childhood to adulthood, ceremonies were conducted where sex education was taught. Some of the mechanisms used by societies to control sexual behaviour among adolescents were however discriminatory against women. In many communities, women were expected to remain virgins until marriage and virginity tests were conducted which was not the same for men.<sup>8</sup>

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<sup>2</sup> Section 2, *Children Act* (Act No 8 of 2001)

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

<sup>4</sup> Kenya National Bureau of Statistics Kenya Demographic and Health Survey, 2014, 248  
<https://dhsprogram.com/pubs/pdf/fr308.pdf>

<sup>5</sup> Kenya National Bureau of Statistics Kenya Demographic and Health Survey, 2014, 248  
<https://dhsprogram.com/pubs/pdf/fr308.pdf>

<sup>6</sup> Kioli F Were A and Onkware K, 'Traditional Perspectives and control mechanisms of adolescent sexual behavior in Kenya, 4(1) *International Journal of Sociology and Anthropology* 4, 2012,6.

<sup>7</sup> Kioli F Were A and Onkware K, 'Traditional Perspectives and control mechanisms of adolescent sexual behavior in Kenya, 1.

<sup>8</sup> Nnazor Al, 'Virginity rituals and national development: Harnessing a traditional virtue to address modern challenges in Africa,' 7(1) *Mediterranean Journal of Social Sciences*, 2016, 156.

A woman was not in a position of controlling her sexuality because the society had this responsibility and as soon as she started menstruating, the fears of her engaging in premarital sexual activity would facilitate the organisation of her marriage.<sup>9</sup> The introduction of English Law during the colonial era tampered with this order and new laws were put into place. Some of the cultural practices such as early marriages and wife inheritance, were abolished.

Following the numerous concerns on human rights post-colonial era, significant changes took place in Kenya. There was an introduction of the age of consent at 21 years which was later lowered to 18 years. However, between 2002 and 2005, there was a significant number of sexual offences against children in Kenya.<sup>10</sup> This prompted the establishment of the 2006 Sexual Offences Act of Kenya (SOA).<sup>11</sup> It was the tool that was created with the aim of protecting children from sexual exploitation. In particular, the laws on defilement were meant to protect them from adult sexual offenders. Before 2014 the law was only clear where an adult defiled a child, but silent on minor-to-minor sexual relationships which left it to the court's discretion. The courts would charge the boy with defilement and the girl would be the complainant in instances where he was older than the girl<sup>12</sup>. This was found to be discriminatory against the boy and there was a need to rationalize this practice.<sup>13</sup> The argument was that there was a disproportionate prosecution of the male child who also has equal rights as the girl. Therefore, this amounted to indirect discrimination against the boy, contrary to Article 27(5) of the Constitution.<sup>14</sup> The United Nations Convention on the rights of the child (UNCRC) which Kenya has ratified, mandates states to take necessary national, bilateral or multilateral measures to protect the child from inducement or coercion to engage in any unlawful sexual activity.<sup>15</sup> The failure of the law to address the issue of consensual sex between minors went contrary to this provision.

Understanding the definition of sex education is essential for this study. The United Nations Educational, Scientific and Cultural Organization (UNESCO) defines Comprehensive Sex

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<sup>9</sup> Mathur, Sanyukta, Greene, Margaret and Malhotra, Anju (2003), 'Too Young to Wed. The Lives, Rights and Health of Young Married Girls,' International Center for Research on Women, 2003

<sup>10</sup> This study was commissioned by Action Aid Kenya. The paper derives the field data from the submitted report by the author entitled "Violence against girls as a structural barrier to her right to and in education"

<sup>11</sup> Kiprop Tracy Kigen, 'Minor, sex and the law; rethinking the regulation on minor sexual consent in Kenya.' 2018, Unpublished LLB Dissertation, Strathmore University, Nairobi, 28 June 2018, 1.

<sup>12</sup> Criminal Case No.19 of 2009 at the High Court of Kenya at Malindi

<sup>13</sup> Dr. Winifred Kamau, 'Legal treatment of consent in sexual offences in Kenya,' February 2013, [theequalityeffect.org/pdfs/Consent PA\] =perKenya.pdf](http://theequalityeffect.org/pdfs/Consent%20PA%20perKenya.pdf), page 20.

<sup>14</sup> Article 27(5), *the Constitution of Kenya*, 2010.

<sup>15</sup> Article 34, *United Nations Convention on the rights of the child*, 20 November 1989, 1577 UNTS.

Education (CSE) as a process of teaching and learning based on a curriculum that encompasses various aspects of sexuality such as the physical, cognitive, social and emotional aspects.<sup>16</sup> The aim of CSE is to enable an adolescent to make conscious decisions about their lives. It involves teaching on the age of consent and contraceptives. However, in this study, sex education will be limited to the teaching on abstinence, the age of consent, HIV and AIDS and STIs.

It was not until 2014, when the High Court of Kenya in Eldoret, in *CKW v Attorney General & Another*<sup>17</sup> set a precedent on the position of minor-to-minor sexual consent in Kenya. In this case, both the boy and the girl were 16 years when they got into a sexual relationship and the petitioner contended that they were in a relationship, adding that the sexual act was consensual. The standing position in law as given by Justice Fred Ochieng' is that where two minors participate in sexual activity, there is no deterrence on the prosecution, and both could be charged with defiling each other if the prosecution has reasonable grounds to charge both minors. Considering that, there is no legislation guiding the courts while dealing with minor-to-minor sexual relationships in Kenya, the court has full discretion in the matter.

The ruling in the *CKW case* was quite unreasonable considering that both parties had consented. The set precedent failed to take account of various issues that this paper discusses.

## 1.2 Statement of the problem.

In 2014, the *CKW case* criminalised consensual sex between minors, promoting gender equality by charging both minors. One of the issues that the court considered when rendering this decision was that minors are unable to give consent. The problem arises where in some of the subsequent decisions, the courts acknowledge that in certain circumstances, such as where a minor assumes an adult's status<sup>18</sup> they can give consent. In addition to this, there is still an issue of gender discrimination in the succeeding decisions.

Considering that minors are still engaging in consensual sex with each other with the view that they can consent despite its criminalisation, a uniform approach to this issue by the courts will be appreciated.

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<sup>16</sup> UNESCO, International Technical guidance on sexuality education: an evidence informed approach, ED.2009/WS/36 REV.3, 2018

<sup>17</sup> (2014)eKLR

<sup>18</sup> *Martin Charo v. Republic* (2016) eKLR

### 1.3 Statement of Objectives.

The purpose of this study is to:

1. Analyse the set precedent on consensual sexual relationships between minors and the challenges that arise from the regulation of minor-to-minor sexual relationships.
2. Analyse whether there is a better alternative that deals with the issue of consensual sex between minors besides juvenile justice
3. Outline the relationship between a child's constitutional rights and their protection against harmful sex and do a comparative study with South Africa. The Comparative study will show how South Africa balances the child's constitutional rights and their protection against harmful sex and compare it to Kenya.
4. Suggest recommendations on the guidelines the courts should adopt while dealing with consensual sexual relationships between minors.

### 1.4 Hypothesis.

1. That the set precedent in the *CKW case* is not an efficient tool in curbing minor-to-minor sexual relationships and that law should be formulated on the same.
2. That minors have constitutional rights that must be considered even when the state seeks to protect them.
3. That some minor-to-minor sexual relationships are not consensual and result to 'wrongful sex' yet the law does not recognize this.
4. That minors engage into consensual sex without knowledge of the consequences.

### 1.5 Research Questions.

1. How have the courts in Kenya dealt with consensual sex between minors?
2. What are some of the considerations that the courts have taken while dealing with consensual sex between minors?
3. Has any other jurisdiction applied a different approach? And if yes, has this approach been effective enough to curb this issue?
4. What is the best approach while dealing with consensual sex between minors?
5. What guidelines can the courts or any other institution(s) establish to curb the emerging issue of minor-to-minor sexual consent?

## 1.6 Justification.

In 8<sup>th</sup> October 2015, eight secondary students were arrested for engaging in sexual activities in Kisumu.<sup>19</sup> So far, no reports have been made as to whether these students were charged with defilement. This is just one of the many incidents that have been reported across the country. Minor-to-minor sexual relationships have existed for a long time now and even after the law in different case laws such as the *CKW case* and *POO v DPP*<sup>20</sup> have set their position on this issue, the problem has not yet been resolved. This is because sexual relationships take place in private and if there are no consequences such as pregnancies or infections, they go unreported. The importance of this study is that the issue of consensual sex between minor's has not yet been resolved causing the state to stray away from its development agenda. The state has an important role of promoting the best interest of the child and protecting their future. It is also important to note that some of the minor-to-minor sexual relationships are not consensual and could form elements of rape. If the law does not acknowledge this, the courts will charge an adolescent with defilement even in instances where one party did not consent, facilitating injustice.

## 1.7 Literature Review

The issue of vulnerability of children is addressed by Oberman, who acknowledges that adolescents go through numerous physical developments which might result to uncertainty among themselves. This makes them vulnerable to coercion and facilitates their failure to effectively assert their decisions.<sup>21</sup>

Chappel suggests that a broader approach should be considered even when prioritizing the protection of adolescents.<sup>22</sup> The approach recognises that adolescents are capable of making personal decisions regarding their sexuality thus dispelling the agentic view bestowed on children and vests in them competency to engage in their social situations.<sup>23</sup> The author also states that a protectionism approach that emphasises on the dangerousness of sexuality to the issue has consequences which include failing to recognise the minor's sexual rights and the

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<sup>19</sup><https://www.standardmedia.co.ke/article/2000179143/eight-secondary-school-students-arrested-for-engaging-in-sexual-activities-in-kisumu>

<sup>20</sup> *POO v. Director of Public Prosecutions & Another*, (2017) eKLR.

<sup>21</sup> Oberman M, 'Regulating consensual sex with minors: Defining a role for statutory rape,' *Buffalo Law Review*, 2000, 48.

<sup>22</sup> Hafen C, "Children's liberation and the new egalitarianism: some reservations about youth to their 'rights'." 1976, 3 *Brigham Young University Law review*, 650.

<sup>23</sup> Hafen C, "Children's liberation and the new egalitarianism: some reservations about youth to their 'rights,'" 139.

impact it causes on their perceptions on sexuality.<sup>24</sup> Tolman places an emphasizes on the importance of adolescents to develop an autonomous sense of self by accepting and appreciating that they have sexual desires as sexual beings because failure of this contributes to dispowerment.<sup>25</sup>

While contending the view that children lack moral capacity and reasoning, Batey uses Kolberg's development stages of moral reasoning. The author's suggestion is that there should be an equal treatment to a decision made by an adolescent and an adult except where the adolescent shows some lack of competence or it is shown that the adolescent decided without carefully assessing the situation.<sup>26</sup> A question on the criteria that will be used to prove that the adolescent decided without carefully assessing the situation might trigger some debate on this view.

Dr. Anna High on the other hand contends that there exists policies and objections in the Constitution against the use of statutory laws against the group of individuals it is meant to protect, minors in this case. She distinguishes 'bad sex' and 'wrongful sex'. The author states that 'Bad sex' involves two consenting minors while 'wrongful sex' being the exploitation of one minor by another. She suggests that there is a need for a reformulation of laws against sexually consenting adolescents so that the law is confined to 'wrongful sex' between minors instead of mere fornication (bad sex).<sup>27</sup>

In 2018, Tracy Kigen wrote a dissertation on consensual sex between minors where she examined the appropriateness of law as a mechanism to regulate minor sexual relationships and aimed to establish an understanding of adolescent behaviour and the need to regulate it. The paper suggested that even though criminal law protects children from sexual abuse by adults, it fails to be effective enough to prevent minors from engaging in sexual relationships.<sup>28</sup>

This paper reviews minor-to-minor sexual relationships but focuses more on whether the best interest of the child was effectively considered while criminalizing consensual sex

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<sup>24</sup>Hafen C, "Children's liberation and the new egalitarianism: some reservations about youth to their 'rights,' 139.

<sup>25</sup> Tolman, D, "Doing desire: Adolescent girls' struggles for/ with sexuality. *Gender & Society*," 1994, 8, 324-342.

<sup>26</sup> R Batey, 'The Rights of adolescents, 'William and Mary Law review, 23, 1982, 363.

<sup>27</sup> Dr. Anna High, Good, Bad and Wrongful Juvenile Sex: Rethinking the Use of Statutory Rape Laws against the Protected Class, 22

<sup>28</sup> Kiprop Tracy Kigen, 'Minor, sex and the law; rethinking the regulation on minor sexual consent in Kenya.' 2018.

between minors. This paper also suggests guidelines on how the courts should handle minor-to-minor sexual relationships and ensure that the best interest principle is guaranteed.

## 1.8 RESEARCH DESIGN

### 1.8.1 Research design & methodology

This study was desk research which involved the use of both primary and secondary data. The primary data included the use of case law that was used in deciding the *CKW case* and other cases that were decided after the case to determine whether the precedent has been an effective tool in dealing with consensual sex between minors, the use of domestic, regional and international legal instruments that discuss the aspects of protecting minors from harmful sexual conduct and international law which will involve the discussion of treaties such as the United Nations Convention on the Rights of the Child (CRC) that address the issue in concern and have been ratified by Kenya. The secondary data on the other hand, was in the form of books that have discussed the issue of consensual sex between minors, surveys that have been carried out to prove that minors are engaging in sexual activity among themselves, journals by different scholars that have discussed the study, articles, dissertations and thesis, internet sources that have addressed current concerns on the issue and reports.

The study incorporated a comparative study with South Africa because it has a reformatory law on the issue of consensual sex between minors and that the set precedent, *CKW case*, borrowed some insights from a South African case. The comparative study entailed a brief description of how South Africa balances the child's constitutional rights and protecting them from harmful sexual conduct.

### 1.9 Assumptions

1. That the secondary data will be up to date
2. That the data will be relevant to the study.
3. That the collected data will guide the study in recommending guidelines that the courts should follow while deciding on consensual sex between minors.

### 1.10 Limitations

The only limitation that this study had was time.

### 1.11 Chapter breakdown

This study shall have five chapters

Chapter One includes: an introduction, background, the statement of problem, the hypothesis, the statement of objectives, the research questions and chapter breakdown.

Chapter Two is the conceptual and theoretical framework. Where the concept of best interest of child principle is thoroughly discussed and the problem behaviour theory is used to further the concept.

Chapter Three analyses the set precedent in the *CKW* case. The deficiencies and ineffectiveness of the case. This chapter encompasses the discussion on the applicable law that are available including International law. This chapter also analyses and discusses the research questions.

Chapter Four constitutes the comparative study between Kenya and South Africa. This includes a study of South African law dealing with consensual sex between minors then compare it to Kenyan law. An analysis of the South African case that guided the Kenyan courts in setting the precedent is then studied and finally an analysis of the effectiveness of both laws in dealing with consensual sex between minors in both jurisdictions.

Chapter Five is be the last chapter consisting of recommendations and conclusions. The conclusion includes a summary of the study. The recommendations on the other hand, sought to guide the courts while deciding on consensual se between minors while ensuring that their best interests are guaranteed.

## 2 CHAPTER TWO: CONCEPTUAL AND THEORETICAL FRAMEWORK

There is a legal line between childhood and adulthood that Hartman focuses on and suggests that different kinds of competencies are demanded under different circumstances.<sup>29</sup> In order to understand the scope of the minor to minor sexual consent, this chapter will extensively analyse the Best Interest of Child principle and further use the problem behaviour theory to expound on this principle.

### 2.1 The Best Interest of Child principle (BIC)

In Kenya, the BIC principle is enshrined in Article 53(2)<sup>30</sup> of the Constitution of Kenya 2010 and Section 4(3)<sup>31</sup> of the Children's Act 2001. Both acknowledge that the child's interest should be paramount when dealing with issues pertaining to a child's welfare. The criminalization of sexual offences against children plays an important role in child protection by addressing issues where children are involved in violence, abuse and exploitation in the hands of people who are not their family members.<sup>32</sup> The existence of special children's court proves that a child's interest should always be put into consideration. However, on reviewing the procedural laws, there are inadequate responses to ensure the implementation of the principle.<sup>33</sup>

The BIC principle is also enshrined in international law such as the United Nations Convention on the Right of the Child (UNCRC) in Article 3(1)<sup>34</sup> which sets the BIC principle as the guiding principle that should be used in the children's court as they address the concept of justice for minors.<sup>35</sup>

The United Nations Committee to CRC emphasizes on the threefold concept of the principle.<sup>36</sup> The first concept being a substantive right which emphasizes on the need to put primary considerations on the best interests of a child whenever there are competing interests at any time. The competing interests in this study are the constitutional rights of the

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<sup>29</sup> Francis X Hartman, *From Children to Citizens; The Role of Juvenile Court* (Springer-Verlag Inv 1987) 7.

<sup>30</sup> Article 53(2), *The Constitution of Kenya* 2010.

<sup>31</sup> Section 4(3), *The Children's Act of Kenya*, 2001.

<sup>32</sup> Anne Catherine, 'Protecting the rights of children in conflict with the law; Research on alternatives to the deprivation of liberty In Eight Countries' (Master of Advanced studies in Children's rights thesis, Institut Universitaire Kurt Bosch- University of Fribourg, 2008) 7.

<sup>33</sup> Omondi Scholastica, 'The Right to a Fair Trial and the Need to Protect Child victims of Sexual Abuse; Challenges of Prosecuting Child Sexual Abuse under the Adversarial Legal System in Kenya,' Volume 2 Issue 3, 2014, *Journal of Research in Humanities and Social Sciences*, 38-60.

<sup>34</sup> Article 3(1), *United Nations Convention on the Right of the Child*

<sup>35</sup> Anne Catherine, 'Protecting the rights of children in conflict with the law; Research on alternatives to the deprivation of liberty In Eight Countries,' 57.

<sup>36</sup> United Nations Committee on the Rights of the Children, 4

adolescents and their protection from harmful sexual conduct. Secondly, the necessity that comes with interpreting a legal principle which dictates that the best interests of child should be selected in a situation where any provision is open to a variety of interpretation. Lastly, as a procedural rule in order to ensure that the process of decision-making involves an evaluation of the possible impact, whether positive or negative on the children involved whenever a finding that involves children or a group of children is to be reached which the courts should have looked into while deciding cases on consensual sex between minors.

Furthermore, certain elements need to be examined when assessing the best interest of child.<sup>37</sup> The first element is the child's views under which McGee argues that due weight should be placed with regards to their age and maturity. This is echoed by Article 12 of the UNCRC. She adds that the view that a child is vulnerable should not exclude them from expressing their right of expression as it will be going against their human rights. In this situation of minor-to-minor sexual consent, the minors should be able to present their views regarding the issue and be open to correction.

The second element is the identity of the child which includes his or her age, beliefs and religion. These factors should be greatly considered when evaluating the best interests of child. Considering that in some cultures, people get married off before attaining the age of maturity and trying to balance this with the law. Under this element, the factors surrounding a minor shall be considered before decision making. This element will also include taking into perspective the religious and societal views on consensual sex between minors.

The third element takes cognisance of the family structure. This extends to the preservation of the family structure in terms of environment and relations. All of these play an important part in actualizing the best interest of the child by acknowledging that a child is influenced by their surrounding and up-bringing. Before a minor is sentenced to 15 years' imprisonment for participating in sexual activities with another minor, the courts should assess whether the child grew up in a family structure and whether the roles their parents or guardians played facilitated how he or she turned out to be.

The fourth element being the child's safety when carrying out the evaluation to determine the best interests. This element poses a duty to the state to ensure that a child has protection

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<sup>37</sup> Yvette McGee et al, 'Chief Justice O'Connor's Juvenile Justice Jurisprudence; A Consistent Approach to Inconsistent Interests,' 2015, Akron Law Review, 13-17.

and care as prescribed by the law and that the law necessitates their development and well-being.

The fifth element is appreciating the child's situation of vulnerability and noting that they belong to a minority group. This means that the state has a duty of bringing the child to some level to enable them to enjoy their rights. The Sexual Offences Act of Kenya that protects the minor is the same tool being used against them. Forgetting that they are vulnerable people in the society and convicting them for 15 years, which means that they will spend most of their productive life behind bars.

Lastly, the sixth element involves affording the child, access to education. Education in this instance of minor to minor consensual sex will enable them to know the consequences that come with such decisions that may be detrimental for the rest of their lives. Education involves sex education which will enable the minor to be conversant with the diseases and emotional effects that come with engaging in sexual activities at a tender age.

Article 40 of the UNCRC protects Kenyan children that are suspected of committing an offense by providing guidelines on how they should be handled and suggesting preferable measures that could be adopted.<sup>38</sup>

### 2.1.1 Problem behaviour theory

The problem behaviour theory developed by Jessor and his colleagues including Finney, Chase and Donovan can be used to further the BIC principle. This theory seeks to explain the behaviour among adolescents which leads to sexual interactions among them. It entails a social-psychological framework which provides an explanation on the variation in minors' involvement in behaviours that are considered a nuisance to the society and are undesirable.<sup>39</sup> Some of the examples of such behaviours include consensual sex between minors that this paper is discussing and the use of illicit drugs such as marijuana. The theory acknowledges that during a certain age or stage of life,<sup>40</sup> adolescents tend to claim an adult status by engaging in activities that depart from the regular norms such as having early sexual experiences. This theory addresses the second element of the best interests of the child principle, where the age of the child and psychological processes surrounding them should

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<sup>38</sup> Article 40, *United Nations Convention on the Right of the Child.*, 1755 UNTS

<sup>39</sup> Donovan J, Problem-Behavior Theory and the explanation of adolescent marijuana use, *sage journals*, 1996,1

<sup>40</sup> Jessor, S and Jessor R, "Transition from virginity to nonvirginity among youth: A social-psychological study over time,"1975, 11(4) *Developmental Psychology*, 473-484.

be put into consideration while seeking to guarantee their best interest. Using this theory while making law reforms on the best way to deal with consensual sex between minors will enable the state to consider their development process.

## 2.2 Conclusion

The analysis of the BIC principle illustrates that various elements must be considered while trying to establish it. A child as a developing being goes through various developmental stages that the law must cater for while trying to achieve the BIC principle in a bid to protect them.

### 3 CHAPTER 3: ANALYSIS OF LEGAL FRAMEWORK AGAINST ENFORCEMENT OF DEFILEMENT LAW ON MINORS IN KENYA.

This chapter will provide an analysis of the legal framework applicable under both the Kenyan law and international law. It will also include the analysis of the *CKW case* and several cases that were decided after the set precedent.

#### 3.1 Application by Kenyan courts.

The High court in Eldoret in 2014 while deciding the *CKW case* relied on a South African case known as *Teddy Bear Clinic for Abused Children & Another vs Minister of Justice and Constitutional Development & Another*,<sup>41</sup> to fill the gap in law on the position of minor-to-minor sexual consent in Kenya. The judge in the South African case held that where two adolescents consensually engage in sexual activity, they will be guilty of having statutory raped each other.<sup>42</sup> This position of Kenyan law on consenting minors on sexual activities was set out under this basis and the courts held that both minors should be charged with defilement.<sup>43</sup>

One of the issues that were looked at in the *CKW case* was the issue of consent which plays a critical role in sexual relationships. The standing position given by the courts is that consent is mandatory in sexual relationships. However, the Sexual Offences Act<sup>44</sup> provides that minors are not able to give sexual consent. This principle was applied in *Bonu v. R*<sup>45</sup> and *Ezekiel Cheruiyot Koros v. R*<sup>46</sup>, where the courts held that a girl below 18 years is unable to give consent. Therefore, this position sets out that consent is not a defence in defilement cases.<sup>47</sup> Furthermore, *Kelvin Kaminya v R*<sup>48</sup> held that the offence of defilement unlike that of rape might occur even if the act was consensual.

In *Martin Charo v. R*<sup>49</sup>, Justice Chitembwe gave a further approach to the issue of consent. The court held that where the child behaves like an adult, the court ought to treat such a child as a grown-up who knows what she is doing. The honourable judge further added that it is important to distinguish law and morals and acknowledged that times have changed, and young people are engaging in sexual intercourse which is not out of defilement. The decision

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<sup>41</sup> (CCT 12/13) (2013) ZACC 35

<sup>42</sup> (CCT 12/13) (2013) ZACC 35

<sup>43</sup> *CKW v. Attorney General & Another* (2014) eKLR

<sup>44</sup> Section 43, *Sexual Offences Act* (No.3 of 2006)

<sup>45</sup> (2010) eKLR

<sup>46</sup> Criminal Appeal 5 of 2010 in the High Court of Kenya at Kericho

<sup>47</sup> Section 43, *Sexual Offences Act* (No.3 of 2006)

<sup>48</sup> (2013) eKLR

<sup>49</sup> Criminal Appeal 32 of 2015

in the Charo case deviates from the reasoning in the CKW case and suggests that adolescents can make autonomous decisions and give consent.

The other issue in contention was the constitutionality of section 8 of the Sexual Offences Act on the basis that it was discriminatory. The courts held that the section does not distinguish between male and female and it therefore cannot be unconstitutional based on gender discrimination.<sup>50</sup>

In 2017, three years after the decision in the CKW case, the High Court of Kenya had another constitutional challenge while prosecuting a defilement charge in *POO v. Director of Public Prosecutions & Another*.<sup>51</sup> In this case, two minors had engaged in sexual activity yet the male was the only one prosecuted. The male petitioner sued the office of the DPP on the basis of gender discrimination arguing that section 3 of the office of the DPP Act mandated the DPP to act with impartiality and to observe gender equality.<sup>52</sup> The courts held that there was indeed discrimination and that instead of prosecuting the accused, both minors should have been victims of the offence rather than perpetrators.<sup>53</sup>

In the same year, 2017, the courts had to deal with another defilement law case on minors. This case was *GO v. Republic* where the male who was 15 years when committing the offence, was charged with defilement yet the girl who was 17 years was not charged. The male petitioner alleged gender discrimination. The courts held that the whole blame should not have been shifted to the appellant but should have been apportioned to both offenders. The courts further averted that both minors should not be sent to prison but protected against harmful sex. The sentence was set aside, and the male was placed on probation.<sup>54</sup>

The cases discussed above outline the effectiveness of the courts in dealing with defilement law on consenting minors. Most judges contend that consenting minors are not criminals but victims of the offence who should not be given custodial sentences.<sup>55</sup> The minors are not sexual predators but individuals exploring their sexuality.<sup>56</sup> Furthermore, it is still clear that the issue of discrimination has not been effectively dealt with in defilement law on consenting minors since it is clear that the boy still bears the consequence where both

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<sup>50</sup> *CKW v. Attorney General & Another*, para.88

<sup>51</sup> *POO v. Director of Public Prosecutions & Another*, (2017) eKLR.

<sup>52</sup> Section 3, *Office of the Director of Public Prosecutions Act* (No. 2 of 2013).

<sup>53</sup> (2017) eKLR

<sup>54</sup> (2017) eKLR

<sup>55</sup> Okwatch, 'The problematic jurisprudence on the law of defilement of adolescents in Kenya,' *Strathmore Law Review*, 2019,58.

<sup>56</sup> Okwatch, 'The problematic jurisprudence on the law of defilement of adolescents in Kenya,'58

offenders were minors.<sup>57</sup> From this analysis, a conclusion can be made that in most decisions regarding this issue, the court assumes that most sexual relationships are initiated by the boy and the girl plays the victim, which might not be the case.

### 3.2 Applicability of Kenyan law

The SOA defines defilement as the act of causing penetration with a child.<sup>58</sup> Laws placed against children should always put the BIC principle into practice.<sup>59</sup> The consequences of juvenile detention would affect their later life because the child would have a criminal record.<sup>60</sup>

Children have rights as independent human beings<sup>61</sup> but still considered dependant on adults.<sup>62</sup> The Constitution of Kenya 2010 guarantees rights to every person and this includes adolescents. The criminalization of consensual sex between minors violates their right to privacy, right to dignity and right to survival and development of the adolescent. Article 31 provides for the right of privacy which stipulates that a person's rights should not be unnecessarily required or revealed.<sup>63</sup> Right to health which encompasses sexual rights<sup>64</sup> is provided for under article 43(1)(a) of the Constitution of Kenya. The protection and fulfilment of sexual health can only be achieved when the sexual rights of the person are respected.<sup>65</sup> The importance of this right is reflected in the emphasis by the African Union to African states to ensure that they address and implement sexual and reproductive health in order to meet their millennial development goals.<sup>66</sup> When consensual sex between minors is criminalized, they shy away from seeking information on their sexual and reproductive health because of fear of arrest and discrimination.

The right of survival and development of the child are provided for in the UNCRC and the African Charter on the Rights and Welfare of the Child (ACRWC)<sup>67</sup> which Kenya has

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<sup>57</sup> Okwach, 'The problematic jurisprudence on the law of defilement of adolescents in Kenya,'60.

<sup>58</sup> Section 8, *Sexual Offences Act* (Act No 3 of 2006).

<sup>59</sup> Article 37(b), *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3.

<sup>60</sup> Goodwin M, 'Law's limits: Regulating statutory rape law' *Wisconsin Law Review*, 2013, 492.

<sup>61</sup> Ezer T, 'A positive right to protection for children,'7(1) *Yale Human Rights and Development Journal*, 2014,1

<sup>62</sup> Ezer T, 'A positive right to protection for children,'1.

<sup>63</sup> Article 31, *the Constitution of Kenya* (2010).

<sup>64</sup> World Health Organisation 'Defining sexual health: Report of a technical consultation on sexual health' (2002) 4

<sup>65</sup> World Health Organisation 'Defining sexual health: Report of a technical consultation on sexual health' (2002) 5

<sup>66</sup> African Union Maputo Plan of Action for the operationalisation of the continental policy framework for sexual and reproductive health and rights 2007 – 2010 (2006) paras 1 & 20.

<sup>67</sup> Article 6, *United Nations Convention on the Rights of the Child*, 1755 UNTS and Article 23, *African Charter on the Rights and Welfare of the Child*, 1990, CAB/LEG/24.9/49

ratified. This right is not expressly provided for in the Constitution of Kenya 2010 but forms part of the Kenyan law through ratification.<sup>68</sup> This right mandates states to receive a positive affirmation on the increasing sexual awareness of the child and their evolving capacity to engage in sexual activity.<sup>69</sup>

Article 10 of the constitution of Kenya also provides for national values<sup>70</sup> which include human dignity, equality and non-discrimination. These values should be used to enact, apply or interpret any law or public policy decisions. The decision in the *CKW case* and some of the decisions after this case did not consider these national values.

### 3.3 Applicability of International Law

This section will discuss the provisions of International Law regarding this matter that have been ratified by Kenya. Taking into consideration that various treaties which are ratified by Kenya, recognizes Human Rights norms and this should be used by states to guide their thinking on the sexuality of minors. Any law or policy regulating the conduct of minors should be consistent with the United Convention on the Rights of a child (UNCRC) and The African Charter on the Rights and Welfare of the Child (ACRWC).<sup>71</sup>

The African Charter on the Rights and Welfare of the Child defines a child as a person below eighteen years.<sup>72</sup> Article 16 of the Charter states that every child should be protected from maltreatment including sexual abuse.<sup>73</sup> The Charter however, does not provide any room for sexual consent for minors as Article 21 mandates the government to take measures in the protection of children from harmful and social practices such as child marriages that affect their wellbeing and dignity.<sup>74</sup> Article 27 of the Charter states that state parties should take measures to protect the child from all forms of sexual exploitation and sexual abuse.<sup>75</sup>

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<sup>68</sup> Article 2(6), *Constitution of Kenya* (2010).

<sup>69</sup> Dalitso G and Skelton A, ' (De)Criminalizing Adolescent Sex: A Rights-Based Assessment of Age of Consent Laws in Eastern and Southern Africa,' 8 <https://journals.sagepub.com/doi/pdf/10.1177/2158244018806036> (accessed on 26 November 2019).

<sup>70</sup> Article 10, *Constitution of Kenya*, 2010.

<sup>71</sup> Kangaude, G., & Banda, T. (2014). Sexual health and rights of adolescents: A dialogue with sub-Saharan Africa. In C. Ngwena & E. Durojaye (Eds.), *Strengthening the protection of sexual and reproductive health and rights in the African Region through human rights* (pp. 251-277). Pretoria, Africa: Pretoria University Law Press.

<sup>72</sup> Article 1, *The African Charter on the Rights and Welfare of the Child*, July 1990.

<sup>73</sup> Article 16, *The African Charter on the Rights and Welfare of the Child*

<sup>74</sup> Article 21, *The African Charter on the Rights and Welfare of the Child*

<sup>75</sup> Article 27, *The African Charter on the Rights and Welfare of the Child*

The four core principles of the UNCRC are Non-discrimination,<sup>76</sup> Best Interest of the Child,<sup>77</sup> Right to life, survival and development,<sup>78</sup> and the Right to be heard.<sup>79</sup> Article 5 of the UNCRC mandates states to consider the rights, duties and responsibilities of children while acknowledging their evolving capacities.<sup>80</sup> This section recognizes that as children evolve, they can make certain autonomous decisions. Furthermore, Article 12 of the convention mandates state parties to accord children with the capability of making autonomous opinions the right to freely express those matters freely in all matters affecting the child while taking into consideration the child's age and maturity.<sup>81</sup> A framework can be established from this article to mean that children may have the capacity of making autonomous decisions regarding their sexuality which the state should not criminalise using criminal law.<sup>82</sup> Accepting that adolescents can make autonomous decisions will raise the question of who bears the responsibility of these autonomous decisions. Parents and guardians will have to take responsibility over the consequences of their adolescent's decisions.

The African Commission's general comment on Article 14(1)(d) and (e) of the protocol to the African Charter on Human and People's Rights on the Rights of women in Africa addressed the right to non-discrimination and the right to health and the right to sexuality education while discussing human rights that impact women's sexual and reproductive rights.<sup>83</sup> These rights should be applicable to adolescents and to guarantee this, states are obligated to develop measures which include transforming their legal and policy frameworks that criminalise consensual sexual conduct between minors.<sup>84</sup>

The United Nation's Beijing Declaration and platform of Actions expounds on the rights provided in binding treaties even though it is non-binding to parties. It addresses the right to

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<sup>76</sup> Article 2, *United Nation Convention on the Rights of the Child*.

<sup>77</sup> Article 3, *United Nation Convention on the Rights of the Child*.

<sup>78</sup> Article 6, *United Nation Convention on the Rights of the Child*.

<sup>79</sup> Article 12, *United Nation Convention on the Rights of the Child*.

<sup>80</sup> Article 5, *United Nations Convention on the Rights of the Child*.

<sup>81</sup> Article 12, *United Nations Convention on the Rights of the Child*.

<sup>82</sup> Minow M, 'Interpreting rights: An essay for Robert Cover' 96(8) *Yale Law Journal*, 1987, 1882.

<sup>83</sup> Article 14(1)(d) and (e) of the *General Comment of the protocol to the African Charter on Human and People's Rights*.

<sup>84</sup> *Legal Grounds: Reproductive and Sexual Rights in Sub-Saharan African Courts*, volume III (Pretoria, PULP, 2017)

privacy as one of an adolescent's essential rights to deal responsibly and positively on issues of sexuality.<sup>85</sup>

A study was commissioned by the United Nations Population Fund (UNFPA) and carried out in the Centre of Child Law which is in the University of Pretoria, of 23 countries in East and Southern Africa. The study was to assess laws, policies and any other related framework that have an impact on the adolescents' sexual and reproductive health and rights.<sup>86</sup> The components of the study included the age of consent and found out that most countries did not stipulate the age of consent which makes the law unclear on the proscribed behaviour. The study also found out that most of the East and South African (ESA) countries have the rights of children embedded in their constitution and have ratified the United Convention on the Rights of a child and the African Charter on the Rights and Welfare of the child. Being cognisant that adolescents have rights, the states have a mandate to ensure that the age of consent does not violate the rights of adolescents for their decision on their Sexuality.<sup>87</sup>

### 3.4 Conclusion

This chapter shows that there is still an improvement that the Kenyan courts need to make while dealing with consensual sex between minors. This is evidenced by not only the issue of discrimination of the boy child but also the different ideologies by different judges: where one judge criminalises consensual sex between minors, yet another judge acknowledges that minors can make autonomous decisions. Kenyan law has no special provision under its Sexual Offences Act and the Penal Code that addresses the issue of consensual sex between minors facilitating discretion in the area.

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<sup>85</sup> United Nations, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995, para 267 available at: <http://www.refworld.org/docid/3dde04324.html> (accessed 20 November 2019).

<sup>86</sup> United Nations Population Fund 2017

<sup>87</sup> Dalitso G and Skelton A, ' *(De)Criminalizing Adolescent Sex: A Rights-Based Assessment of Age of Consent Laws in Eastern and Southern Africa*, ' 3 <https://journals.sagepub.com/doi/pdf/10.1177/2158244018806036> (accessed on 26 November 2019),

## 4 CHAPTER 4: COMPARATIVE STUDY BETWEEN KENYA AND SOUTH AFRICA

This study shall use South Africa for a comparative for two reasons; first because in setting the precedent on consensual sex between minors, the Kenyan courts relied on aspects of a South African case and secondly, South Africa is a progressive country with regards to defilement law among minors.<sup>88</sup> Progressive in terms of making laws accommodating the rights of an adolescent while acknowledging their development and different stages.

This chapter shall first outline how South Africa handles the issue of consensual sex between minors then provide a comprehensive analysis while making a comparison with Kenya.

### 4.1 Analysis of the Teddy Bear Case

The consensual age in South Africa is sixteen years.<sup>89</sup> The *Teddy Bear case* set South Africa's position on consensual sex between minors by not criminalising consensual sex between minors.<sup>90</sup> The Kenyan courts relied on this case when setting precedent in the *CKW case*. This case addressed the issue of the ability of children being able to make autonomous decisions which will be discussed in this chapter. While making the decision, the courts held that the criminalization of consensual sex between minors was inconsistent with the South Africa's child's rights to dignity.<sup>91</sup> Justice Sisi Kampepe also discussed the consequence of criminalizing consensual sex between minors by giving a leeway to state officials to take control on the intimate realm of the adolescents' life which is against their right to privacy.<sup>92</sup>

#### 4.1.1 North Gauteng High Court's decision

An application was made to confirm a ruling by the High Court in Pretoria that several provisions of the Sexual Offences Act of South Africa addressing the issue of criminalization of consensual sex between minors are constitutionally invalid.<sup>93</sup> The position of the High

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<sup>88</sup> Okwach, 'The problematic jurisprudence on the law of defilement of adolescents in Kenya,'66

<sup>89</sup> Section 15, *Criminal law (Asexual offences and related matters) Amendment Act* (No 32 of 2007).

<sup>90</sup> *Teddy bear clinic for abused children and another v. Minister of justice and constitutional development and another* (2013) Constitutional Court of South Africa, para 55.

<sup>91</sup> *Teddy bear clinic for abused children and another v Minister of justice and constitutional development and another*, (2013) Constitutional Court of South Africa, para. 55.

<sup>92</sup> *Teddy bear clinic for abused children and another v Minister of justice and constitutional development and another*, (2013) Constitutional Court of South Africa, para. 60.

<sup>93</sup> *Teddy bear clinic for abused children and another v Minister of justice and constitutional development and another*, (2013) Constitutional Court of South Africa

Court was that the criminalization of consensual sex between minors of a certain age under Sections 15 and 16 of the Act were invalid as they infringed on the rights of the child.

#### 4.1.2 Constitutional Court's decision

The court suggested a remedy by reading into certain words of the provision. The High Court's ruling however, had no force until confirmed by the Constitution Court as set out in section 172(2)(a) of the Constitution of South Africa.<sup>94</sup>

The constitutional court held that sections 15 and 16 of the Sexual Offences Act that criminalized consensual sex between minors were invalid, but the invalidity was suspended for 18 months to allow parliament to correct the Act's defects. The court argued that the two provisions violated the child's right to dignity and privacy and the best interest of child provision in the constitution and could not be saved by the limited clause.<sup>95</sup> The right to dignity is violated by imposing punishment on the forms of sexual expression which are part of their normal development and imposes a state's disgrace on adolescents.<sup>96</sup>

#### 4.2 South African Law

After the Teddy Bear case, Section 15 and 16 of South Africa's Sexual Offences Act was amended to decriminalize consensual sex between minors.<sup>97</sup> Section 56 of its SOA also has a provision that distinguishes bad sex from wrongful sex. This section acts as an exception for minors who are accused of sexual assault.<sup>98</sup>

South Africa has tried to enhance the Sexuality and Reproductive Health Rights (SRH) of its minors through Part 3 of its Children's Act. This part provides for protective measures relating to health of children. The Act permits children to independently consent to HIV testing if they are above 12 years old,<sup>99</sup> have access to contraceptives<sup>100</sup> and carry out virginity tests from time to time. Furthermore, they have the choice of termination of pregnancy Act which allows any girl to terminate pregnancy without any assistance.<sup>101</sup>

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<sup>94</sup> Legal Grounds: Reproductive and Sexual Rights in Sub-Saharan African Courts, volume III (Pretoria, PULP, 2017)

<sup>95</sup> Article 10 *Constitution of South Africa*, 1996.

<sup>96</sup> McQuoid-Mason, 'Decriminalization of consensual sexual conduct between children. What should doctors do regarding the reporting of sexual offences under the Sexual Offences Act until the constitutional court confirms the judgment of the 'Teddy Bear Case'. *South African journal of Bioethics and Law*, 2013.

<sup>97</sup> (CCT 12/13) [2013] ZACC, 38.

<sup>98</sup> Section 56, *The Sexual offences Act (No. 32 of 2007)*

<sup>99</sup> Section 130, *Children's Act of South Africa (No.38 of 2005)*

<sup>100</sup> Section 134, *Children's Act of South Africa (No.38 of 2005)*

<sup>101</sup> Section 5, *Choice of Termination of Pregnancy Act of South Africa (No 92 of 2007)*

This clearly illustrates that South Africa grants adolescents the right to make autonomous decisions which might not be the best approach because if any consequences arise from these autonomous decisions, the parents or guardians will still bear the burden of the responsibilities that come with it. An example would be in a scenario where an adolescent, who is still studying, gets pregnant. The parents or guardian of this adolescent will have to take the responsibility of this child. The consequences of this approach will be outlined in the next section on the comparison.

### 4.3 Comparison between South Africa and Kenya

The court of South Africa while deciding the *Teddy Bear Case* used its domestic laws and the constitution. The decision is revolutionary because it affirms that minors as sexual beings may engage in consensual sexual conduct among themselves. Kenya still criminalises consensual sex between minors and the effect is that adolescents shy away from getting the necessary sexual and reproductive health information and services, making them prone to unwanted pregnancy, sexually transmitted infections and unsafe abortions. Criminalising sexual consent between seems like the best way that a state can safeguard the BIC principle because of the severe consequences that accompany decriminalisation.

A question was raised by the South African case regarding the extent to which African countries are implementing a minor's constitutional rights. Both countries believe that they are advancing the best interest of the child even though Kenya takes a punitive approach while South Africa takes a nonpunitive approach. The different approaches have different consequences on the adolescents' sexual health and therefore, a question can be raised as to which approach is the best in guaranteeing the best interest of the child.<sup>102</sup> By allowing consensual sex between minors in South Africa, there is a higher risk of these minors contracting HIV, Sexually Transmitted Diseases (STDs) and unwanted pregnancies. This is supported by a report which showed that 30 percent of South African adolescents aged between 13-19 years reported being pregnant.<sup>103</sup> The HIV prevalence among the adolescents in South Africa is also alarming at 7.1 percent for youth aged between 12-24 years.<sup>104</sup> Whereas on the other hand, criminalization of consensual sex between minors will affect

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<sup>102</sup> Dalitso G and Skelton A, ' (De)Criminalizing Adolescent Sex: A Rights-Based Assessment of Age of Consent Laws in Eastern and Southern Africa,' <https://journals.sagepub.com/doi/pdf/10.1177/2158244018806036> (accessed on 26 November 2019)

<sup>103</sup> Willan S, " A review of teenage pregnancy in South Africa – experiences of schooling, and knowledge and access to sexual & reproductive health services, ". Partners in Sexual Health, 2013:1-63.

<sup>104</sup> Shisana O, Rehle T, Simbayi LC, et al. South African National HIV Prevalence, Incidence and Behaviour Survey, 2012. Cape Town: HSRC Press, 2014.

their development and expose them to risks caused by ignorance on the effects of engaging in sexual activities. The curiosity and peer pressure to engage in illegal sexual activity will expose them to severe consequences.

Kenya uses a one-tier approach which is the criminalisation of consensual sex between minors as held in the *CKW case*. South Africa on the other hand uses a two-tier approach which sets the age of consent at 16 but does not criminalise consensual sex between the ages of 12 and 16 which seems like a more flexible approach of balancing the protection and support in the sense that the young adolescents are protected from adult predators at the same time allowing them to explore their sexuality which facilitates their sexual health.<sup>105</sup> However, new studies have challenged the lower limit set by South Africa of 12 years stating that 11 years olds are also aware of sexuality issues in the same way.<sup>106</sup> This shows that lowering the age of consent has still not solved the issue of consensual sex between minors. The strong cultural and religious beliefs by the people of Kenya would not permit the adaptation of the two-tier approach which also has severe effects. A balance between the two approaches must be reached. However, some of the lessons Kenya can borrow from South Africa would be enacting a legislation under the Sexual Offences Act that deals with consensual sex between minors.

#### 4.4 Conclusion

A comparison with South Africa shows the consequences of lowering the age of consent which bear more weight than the criminalisation of consensual sex between minors which is the approach that Kenya has taken. Even though the South African law is reformative on the issue and captures different aspects such as the minors' constitutional rights and their development, the consequences clearly show that they have deviated from the BIC principle.

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<sup>105</sup> Dalitso G and Skelton A, ' (De)Criminalizing Adolescent Sex: A Rights-Based Assessment of Age of Consent Laws in Eastern and Southern Africa,' 10

<https://journals.sagepub.com/doi/pdf/10.1177/2158244018806036> (accessed on 26 November 2019)

<sup>106</sup> Strode, A., & Essack, Z. (2017). *Facilitating access to adolescent sexual and reproductive health services through legislative reform: Lessons from the South African experience*. SAMJ: The South African Medical Journal, 107, 741-744.

## 5 CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

### 5.1 Conclusion

The *CKW Case* which is the set precedent on consensual sex between minors in Kenya aimed at setting Kenya's position on the issue. It has been a heavy area of discussion for a long time. The decision sets the position of Kenya which is the criminalization of consensual sex between minors. Some of the factors concerning the issue in question was whether adolescents are in a position of making autonomous decisions, the age of consent and vulnerability of adolescents.

This study concluded that adolescents are not in a position of making autonomous decisions because they cannot bear the consequences of such decisions. If any consequence arises from consensual sex with another minor such as STIs and unwanted pregnancies, it will be borne by the parents or guardians.

The age of consent was one of the issues raised with a debate as to whether lowering the age of consent would be a solution. A comparative study with South Africa reveals that lowering the age of consent endangers the adolescent's life by making them prone to diseases. In instances where the age of consent is too high, the law assumes that adolescents are not engaging in sexual activity and they therefore, don't provide guidance and education on sexual health could lead to severe consequences.<sup>107</sup> The case solved the issue of gender discrimination by charging both minors but the subsequent cases are still charging the boy even where he is younger than the girl. The issue of gender discrimination should be addressed in a legislation and adopted by the courts.

The Best Interest of the Child as an important principle while dealing with matters relating to the welfare of children, must be considered at all costs. The principle traces way back in the traditional era up to date. From the analysis of this principle from both the local and international perspective and the several elements that it entails, achieving the best interest of child is not as easy as it seems.

The issue of sexual development which includes the child's physical, social and mental growth, is not taken into consideration by the Kenyan courts, yet Kenya has ratified treaties that advocate for sexual development. The International legal instruments and studies by different authors have outlined the consequences of failing to take into account the

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<sup>107</sup> Kigera Soila, 'Does Criminalization of consensual sex between minors in Kenya violate the constitutional rights of children? 39.

importance of sexual development of adolescents while recognizing that they have constitutional rights that should be guaranteed to them by the sense of being able to make independent decision. Kenya still has a task of clearly addressing consensual sex between minors.

## 5.2 Recommendations

This is a heavy area of discussion that still has more room for research. Acknowledging that different parties have different roles to play in this issue is salient. The adolescents themselves have the substantial responsibility to play. They must acknowledge that there is time for everything and that they are still not equipped to make autonomous decisions regarding their sexuality. The other role they have is taking the school curriculum by the Ministry of Education seriously, especially Life Skills which will equip them with the recommended sex education. It should also create awareness to adolescents on being charged with defilement as one of the consequences of engaging in consensual sex.

Families have the responsibilities of safeguarding their adolescents from accessing explicit material and facilitating proper morals and good to children even before they grow into adolescents through a conducive environment. Taking into consideration that most parents shy away from discussing such topics with their children, the government or schools can organize forums where parents are taught how to address the issue with their children. The church also has a responsibility to play by teaching adolescents on the significance of abstinence until marriage and engage them in activities that will keep minors busy during holidays.

Lessons can be learnt from the traditional era where; the age of consent was determined by the cultural norms of different communities who took the best interest of the adolescent and aimed at protecting them from sexual exploitations. This is emphasized by the fact that the value of abstinence was highly regarded, and it was mandatory for women to be married as virgins and men who took advantage of children were severely punished either through castration or being sentenced to death.<sup>108</sup>

Kenya as a state should implement new policies after revising the issue of consensual sex between minors which includes a revision on the set policies and legislations including amending section 8 of the SOA to cater for the criminalization of consensual sex between

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<sup>108</sup> Kioli F Were A and Onkware K, 'Traditional Perspectives and control mechanisms of adolescent sexual behavior in Kenya',3.

minors and making the section gender neutral. This will solve the issue of discrimination against the boy.

The country's national values provided for in the Constitution such as non-discrimination<sup>109</sup> should be achieved alongside the religious, social and cultural beliefs of the society. This should also include the clear distinction between 'wrongful sex' and 'bad sex' and the importance and consequences of consent. The government should also enact special legislations for adolescents which addresses consensual sex between them and wrongful sex and providing different sentences for each of them.

The courts while deciding on the issue of consensual sex between minors, should acknowledge the different aspects that govern the life of the child including factors that will facilitate their sexual development.

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<sup>109</sup> Article 10, Constitution of Kenya 2010

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