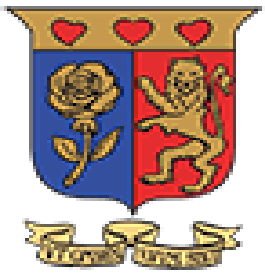

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DISSERTATION TITLE: **THE PIVOT POINT OF SEXUAL OFFENCES: ISSUE OF CONSENT IN RAPE CASES.**

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CHAPTER 1: INTRODUCTION AND BACKGROUND

1.BACKGROUND OF THE STUDY

Rape as per the legislation is defined as any act of sexual intercourse that is forced upon a person.[1] It can be done against an adult or a child (defilement). Rape has been closely associated and even sometimes used in the place of gender-based violence, or sexual violence, although they are not the same thing. The act may be carried out by physical force, coercion[2], abuse of authority or against a person who is incapable of valid consent, such as one who is unconscious, incapacitated, or below the legal age of consent.[3]

Consent on the other hand, is when someone agrees, gives permission, or says 'yes' to sexual activity with someone else. At the heart of consent is the idea that every person, man, or woman, has a right to personal sovereignty – not to be acted upon by someone else in a sexual manner unless he or she gives clear permission to do so. It is the duty of anyone initiating the sexual activity to get this permission from the other party. Absence of clear permission means you cannot go ahead and engage her or him in the act-this is the first step in maintaining the 'very basic right to bodily integrity. Consent plays a great role in the determination of guilt in sexual offence cases. This is because the proof of lack of consent is an essential element in determining whether to proceed with a sexual offence charge against any alleged offender in any court of law.

Despite the issue of consent being well defined by the respective legislations, the issue of consent is one that is really discombobulating especially in an unequal society, where women and men are not on the same level, inter alia socially, politically, economically unequal. Over the recent years, rape has become a common crime in Kenya as per a current study which showed that the rape rate for Kenya as per 2015 was 1.9 cases per 100,000 population.[4] Day after day a woman comes out claiming to have been raped.

This issue of consent has been addressed by both the local (the penal code and the sexual offences act) and international legislation such as The Statute of the International Criminal Court (ICC)

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[1] :www.dictionary.com accessed on 3rd January 2020.

[2] Section 43, *Sexual offences Act* (Act No. 3c of 2006)

[3] Section 43, *Sexual offences Act* (Act No. 3c of 2006)

[4] <Kenya Rape rate, 2003-2020 - knoema.com> accessed on 3rd January 2020.

[5]and the Rome statute[6]. This goes a long way to show its importance. Consent takes several forms but the best one is where it is expressed freely and unequivocally[7]. There are several types of consent which include express consent where the person directly says yes to the act; implied consent which can be inferred from the conduct of the person[8]; informed consent where a person agrees to allow it to happen, in full knowledge of the outcome.[9]

2. STATEMENT OF THE PROBLEM

In an ideal legal system, the issue of consent should be clear. That is to mean that there should be a clear way of proving whether consent was given. As stated in the Sexual Offences Act, so long as there was no consent or that consent was obtained under duress, the crime of rape was committed, and the offender is liable upon conviction to imprisonment of a term not less than ten years.[10] It goes on further to explain that a person can be said to have consented if he or she agrees by choice and has the freedom and capacity to make that choice.[11].

The law however does not expound on what exactly amounts to this consent or exactly how it can be proved. By doing so, it leaves a loophole that led to lack of a just outcome in some rape cases as most victims are likely to tell false stories which are easy to fabricate. This has become easy as the courts have become less rigid and have accepted that corroboration is no longer a mandatory requirement but that the prosecution may rely on medical evidence or circumstantial evidence to prove its case.[12] The medical evidence only goes far as showing use of force as was in the case *David Bundi Mararo v Republic* where a rape conviction was upheld because medical evidence showed the victim had a stiff neck and scratches on her which showed there was a struggle between her and her attacker.[13] This shows that the presence or absence of consent is proved by the

[5]Article 2 (5), *The Statute of the International Criminal Court (ICC)*

[6] Article 7(1), *The Rome Statute*

[7] Wanga C, 'Rape in Kenya: the boundaries of consent' Unpublished LLB thesis, Moi University, July 2016.

[8] Wanga C, 'Rape in Kenya: the boundaries of consent' Unpublished LLB thesis, Moi University, July 2016.

[9] Wanga C, 'Rape in Kenya: the boundaries of consent' Unpublished LLB thesis, Moi University, July 2016.

[10] Section 3, *Sexual Offences Act* No.3 of 2006

[11] Section 42, *Sexual Offences Act* No.3 of 2006

[12] Kamau W, 'The legal treatment of consent in sexual offences in kenya', 10 Law society of Kenya journals (2014),14.

[13] *David Bundi Mararo v Republic* (2009) eKLR

circumstances which are not very reliable. At the time of the trial, it all narrows down to the word of the victim against that of the accused.

To improve access to justice ~~equally~~ to ~~both~~ the victim and the accused, the existing laws should be amended to include a way that consent is proved vividly without having to rely on circumstances or word of mouth of the parties involved.

3. OBJECTIVES OF THE STUDY

The aim of this study is to look deeper into the issue of consent by looking at what the law has provided, the loophole left and how this loophole can be unjustly exploited. Some of the objectives include:

a. To establish that the use of circumstantial and medical evidence to prove consent as provided in section 45 of the Sexual Offences Act is ineffective and likely to prejudice the accused person.

b. To demonstrate that other means of determining/ proving consent such as the parties' history of relations and contributory behavior are more effective.

4. RESEARCH QUESTIONS

Some of the questions this paper will try to answer include:

a. Is the use of medical and circumstantial evidence to prove consent as per section 45 of SOA ineffective and likely to prejudice the accused person?
b. Are other means of determining/ proving consent such as the parties' history of relations and contributory behavior more effective?

5. HYPOTHESIS

a. The use of medical and circumstantial evidence as methods of proving consent in section 45 of SOA is ineffective and likely to prejudice the accused person.
b. Other means of determining/ proving consent such as the parties' history of relations and contributory behavior are more effective than the use of medical and circumstantial evidence.

5. THEORETICAL FRAMEWORK

The definition of the offence of rape in most jurisdictions is usually done around the will of the victim, that is their consent. This tends to encourage criminal trials to focus problematically on the conduct and sexual history of the complainant rather than the conduct of the accused.[14] This complainant-focused conception of the offence, contributes to the limited efficacy of the justice system in ensuring due justice is served to both the accused and the victim. It also reduces the risk of the accused not accessing due justice as the whole trial is biased against them. Hence, there is need for sexual offences to be defined with precision to prevent them from being manipulated by defense counsel or subject to problematic interpretation in the light of prejudices of participants in the criminal process.[15] It is worth noting that the concept of consent is open to manipulation as well as constraining the worst effects of prejudices of participants in the criminal trial.[16]

Liberal feminists argue that the presence or absence of consent is the difference between legitimate sexual intercourse and rape. However, that would only work if the social conditions in which a woman gives or refuses consent were those of equality of power and freedom of choice.[17] They go on to say that the conditions in which sex is negotiated in our society are not at all like that; the far–reaching gender inequality and the domination of women by men in all areas of social life vitiate any consent that may be given.[18] As such, the very idea of consent is no longer helpful nor meaningful. They consider the lack of consent to be redundant and should not be a separate element of the crime of rape instead use of force or compulsion should be considered an integral part.[19] I strongly disagree with this view because they portray women as victims in all circumstances and do not even consider that there might be an instance where the woman played a role in the perpetuation of the act, like for an instance where her conduct is provocative or where there is history of relations between her and the accused. They simply view the woman as a having less power than the men and having limited freedom of choice which is far from the truth especially in the world we live in today.

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[14]Tadros V, 'Rape without consent', 26 *Oxford Journal of Legal Studies* (2006) 515-543, 516

[15]Tadros V, 'Rape without consent', 26 *Oxford Journal of Legal Studies* (2006),515-543, 517

[16] Tadros V, 'Rape without consent', 26 *Oxford Journal of Legal Studies* (2006), 515-543, 520

[17] Igor P, 'Radical feminism on rape', *The Hebrew University journal* (1998), 501

[18] Igor P, 'Radical feminism on rape', *The Hebrew University journal* (1998), 502.

[19] Igor P, 'Radical feminism on rape', *The Hebrew University journal* (1998), 502.

6. RESEARCH METHODOLOGY

I will approach this study using the doctrinal methodology. This approach will involve the review of relevant primary and secondary sources. These include statutes, case law, books, journals, newspapers, and online internet resources. Documents will be read and analyzed in depth to avail information relevant to the study.

7.LITERATURE REVIEW

The *Penal Code* has made it very clear that it is the lack of consent on the part of the woman or the girl that is at the core of the crime. Indeed, lack of consent is so vital that even if there was apparent consent obtained by force or personation a charge of rape would still suffice.[20] I confer with this provision as it greatly shows the importance of consent in any rape case.

The *Sexual Offences Act* No.3 of 2006 is the mother legislation on rape and other sexual offences in Kenya. It provides the definition of rape and the elements thereof. The act is also relied on to understand the concept of consent and the vitiating factors of rape. [21]

The *constitution of Kenya,* 2010 provides for the Bill of Rights under its Chapter Four.[22] It shall be of relevance to this study as the act of rape is an offence against the person and the constitution seeks to protect this person. The Kenyan Bill of Rights is compiled in such a way that it truly reflects the provisions of various international legal instruments like the Universal Declaration of Human Rights, African Charter on Civil and Political Rights, among others. The same constitution under its article 2, also makes the international conventions and treaties that have been ratified by the state to form of the laws of this country.

Statute of the International Criminal Court Article 6 (b) brings the offence of rape under the umbrella of the crime of genocide. Under its Article 7 rape among other crimes is considered a crime against humanity. It has listed these crimes as **rape**, sexual slavery, enforced prostitution, forced pregnancy…other form of sexual violence of comparable gravity.' Considers rape as a grave crime that can be prosecuted in the International Court of Justice.

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[20] Section 161, *Penal Code*, Cap 63, Laws of Kenya

[21] Section 2, *Sexual Offences Act* No.3 of 2006

[22] Chapter 4, *Constitution of Kenya* (2010)

Victor Tadros in his journal '*Rape without Consent'* states that rape is defined around the will of the victim and hence tends to encourage criminal trials to focus problematically on the conduct and sexual history of the complainant rather than the conduct of the accused.[23] This complainant-based conception of the offence reduces equal access to justice and equality of both the victim and the complainant as it is more biased towards the complainant. This shows that most jurisdictions, including Kenya, tend to conceive the offence more in favor of the victim and in the end suppresses the accused, which is what I will be focusing on in this paper.

He goes on to say that the way the concept of rape is defined and the evidential strategies put in place to prove rape, they are done in such a way that the concept of rape is left open to manipulation as well as constraining the worst effects of prejudices of participants in the criminal trial.[24] This clearly shows the loophole left in the concept of rape which make it easy for it to be manipulated and used to subject the accused persons to unfairness in the trial. Despite the steps that have been taken by the law specialists to reform the concept of law, there still exists that chance that it can still be manipulated in favor of the accused which is what I will be focusing on in this paper.

As I will later show, proving of the presence or absence of consent in rape cases is based on use of circumstantial evidence, presumptions and medical evidence which are not effective methods. On this Tadros says that evidential presumptions are of limited value in telling us what is constitutive of a lack of consent. They tell us what is insufficient for a lack of consent. For evidential presumptions indicate that there are instances where the circumstance is present but where the defense may be able to show that the complainant consents. But they do not tell us what consent is or when it is absent. They do not tell us what is constitutive of an agreement, of freedom, choice, or of capacity.[25]

Dr Winfred Kamau in her paper '*The legal Treatment of consent in sexual offences in kenya'*mens rea in rape is primarily an intention and not a state of mind. The mental element is t he intention to have intercourse without consent or without caring whether the woman consented or not. Where a woman,yields through fear of death or through duress, it is rape and it is no exc -

[23] Tadros V, 'Rape without consent', 26 *Oxford Journal of Legal Studies* (2006) 515-543, 516
[24] Tadros V, 'Rape without consent', 26 *Oxford Journal of Legal Studies* (2006) 515-543, 516
[25] Tadros V, 'Rape without consent', 26 *Oxford Journal of Legal Studies* (2006) 515-543, 530

use that she consented.first, if the offence was afterwards committed by force or against her will; nor is it any excusethat she consented after the fact. The courts in Kenya have distinguished bet ween true consent and mere submission.[26]

She also looks at how proof of lack of consent is done in the Kenyan legal system. She looks at how it was done in the earlier times where Kenyan courts used to insist that the complainant's evidence must be corroborated. That is, the material facts of the rape case had to be proved by evidence from two independent sources, be it witnesses or circumstances.[27]This was borne out of the belief among judges that women and girls are inclined to tell false stories "which are easy to fabricate but extremely difficult to prove." It was a general rule that women and girls give false testimony or fabricate cases against men in sexual offences however this was not supported by any scientific or legal evidence. Hence, corroboration was abolished as it was seen to constitute discrimination against women based on their sex which was contrary to article 82 of the then constitution[28] and article 27 of the current constitution.[29]

However, the courts have now become less rigid and have accepted that corroboration is no longer a mandatory requirement but that the prosecution may rely on medical evidence or circumstantial evidence to prove its case.[30] This is to mean that the courts no longer need some other evidence that is relevant and admissible to support evidence brought before it that the accused committed the rape crime he is accused of. They just rely on medical and circumstantial evidence without need of more evidence as to the facts. As we shall later see, this lack of corroboration has led to miscarriage of justice especially against the accused persons. This is because in the use of circumstantial evidence, the witness or in this case the victim, cannot testify directly about the fact that is to be proved, but presents to the court evidence of other facts from which it is then asked to draw reasonable inferences about the fact which is to be proved.[31] In this paper I will look

[26] Kamau W, 'The legal treatment of consent in sexual offences in kenya', 10 Law society of Kenya journals (2014),27
[27] Kamau W, 'The legal treatment of consent in sexual offences in kenya', 10 Law society of Kenya journals (2014), 14.
[28] Maina v Republic [1970] eKLR
[29] Article 27, Constitution of kenya (2010)
[30] Mukunga v. R [2002] 2 EA 482
[31] <www.mass.gov › doc › 2240-direct-and-circumstantial-evidence › accessed on 10th September 2020.

deeper into this as I totally agree with the fact that it is because of such evidential strategies in the rape law framework that most of the accused persons suffer injustices.

8. LIMITATIONS

some of the limitations that I will face in this study include:

1. strict statutory provisions that make it hard to dissect and look deeper into the loophole left.
2. Conflict between my own personal moral objective and the legal provisions.

9. CHAPTER BREAKDOWN

Chapter 1: Introduction and background of the study

Chapter 2: The use of circumstantial and medical evidence to prove consent as provided in section 45 of the Sexual Offences Act is ineffective.

Chapter 3: use of history of relations to prove consent is more effective in proving rape

Chapter 4: role of contributory behavior in proving consent and how it is more effective.

Chapter 5: conclusions and recommendations.

10. SIGNIFICANCE OF THE STUDY.

This study is meant to improve the equal access to justice for all people regardless of their sex, race, religion, or sexual orientation. That is, ensure both the victim and the suspect are accorded equal justice.

CHAPTER 2: THE USE OF CIRCUMSTANTIAL AND MEDICAL EVIDENCE TO PROVE CONSENT AS PROVIDED IN SECTION 45 OF THE SEXUAL OFFENCES ACT.

a. CIRCUMSTANTIAL EVIDENCE

Circumstantial evidence is also referred to as indirect evidence and is defined as the evidence of relevant facts from which the existence and non-existence of facts may be inferred[32] or as Peter Murphy put it, it is evidence from which the desired conclusion may be drawn but which requires the tribunal of fact not only to admit the evidence presented but also draw an inference from it.[33] That is, it is the evidence that give rise to a logical inference that a fact though not directly evident does exist. It relates to a series of facts other than the particular fact sought to be proved.[34] It is the evidence that is drawn not from direct observation of a fact at issue but from events or circumstances that surround it. Circumstantial evidence is proof of a fact, or a series of facts, which tends to show whether something is true.[35] It is evidence that is based on one's conclusion and not in personal knowledge or information.[36] More light was shed on this by Steve Uglow who defined it to consists of evidence of circumstances, none if which speak directly to the fact in issue but from which those facts may be inferred ." hence feelings of animosity towards the victim , presence in the area of attack, the victim's blood on the accused's clothing can all be considered as circumstantial evidence.[37]

Due to the uncertainties that were been experienced in the admission of circumstantial evidence, a test was developed that would guide the court on when to admit this type of evidence. This was in the case of *Abanga alias Onyango v Republic* [38]where the appellant was the last person to be seen with the deceased when he was still alive. He was thereafter found dead under a bed in a hotel

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[32] Mbobu K, *The law and practice of evidence in kenya*, 2nd ed, Law Africa publishing(k) ltd, Nairobi, 2016, 4
[33] Myeni R, *The Law of Evidence*, Asia law house, Hyderabad, 2007, 20
[34]Neetji R, *Circumstantial evidence, its elements and application*, Kathmandu School of Law, 2011,> https://ssrn.com/abstract=1841383 or http://dx.doi.org/10.2139/ssrn.1841383> on 2nd december 2020.
[35] Neetji R, *Circumstantial evidence, its elements and application*, Kathmandu School of Law, 2011,> https://ssrn.com/abstract=1841383 or http://dx.doi.org/10.2139/ssrn.1841383> on 2nd december 2020
[36] Garner B, *Black's Law Dictionary*, 9th ed, West publishing Co, USA, 2011,636
[37] Myeni R, *The Law of Evidence, Asia law house*, Hyderabad, 2007, 20
[38] *Abanga alias Onyango v Republic* (1990) eKLR

room, which had been booked by the appellant. There was proof beyond all reasonable doubt that the deceased was killed in that room and the appellant was the only person in actual physical charge of the room. The appellant was convicted of murder and an appeal against the conviction was dismissed. All circumstances pointed to the appellant being the killer from being the last person to see the deceased alive to the deceased's body being found in a hotel room under his name.

The court in admitting circumstantial evidence stated that "It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests. Firstly, the circumstances from which an inference of guilty is sought to be drawn, must be cogently and firmly established. That is to mean that before relying on the circumstantial evidence to conclude that the accused is guilty, the court should be sure that there are no other co-existing circumstances which would weaken or destroy the inference.[39] Secondly, those circumstances should be a definite tendency unerringly pointing towards guilt of the accused. That is, those circumstances should beyond reasonable doubt point to the accused person as being guilty. Lastly, the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else."[40] This is the test that has been applied in the Kenyan legal system while admitting circumstantial evidence in any case.

Circumstantial evidence in rape is of no exception. In most rape cases, injury and bruising of the victim is seen as circumstantial evidence of having been raped. This comprises of what is referred to as the rape trauma syndrome which is a diagnostic condition. It was a phrase coined in 1974 to describe the behavioral, somatic, and psychological reactions of rape and attempted rape victims.[41] It involves two-phase process, the acute phase, and the long-term reorganization phase. The acute phase involves either the "expressed style" in which fear, anger, and anxiety are manifested, or a "controlled style" in which these feelings are masked by a composed or subdued behavior.[42] The long-term reorganization stage typically begins two to six weeks after the attack and is a period in

[39] Simon Musoke v Republic (1958) eKLR
[40] *Onyango v republic* (1990) eKLR
[41] Giamelli P,*' Rape Trauma Syndrome'*, Case western university school of law journal, 1997,270, <https://scholarlycommons.law.case.edu/faculty_publications/346 > on 2nd December 2020.
[42] Giamelli P,*' Rape Trauma Syndrome'*, Case western university school of law journal, 1997,271 <https://scholarlycommons.law.case.edu/faculty_publications/346 > on 2nd December 2020

which the victim attempts to reestablish her life. This period is characterized by motor activity, such as changing residences, changing telephone numbers, or visiting family members. Nightmares and dreams are common. Rape-related phobias, such as fear of being alone or fear of having people behind one, and difficulties in sexual relationships also are prominent.[43]

Rape Trauma Syndrome is introduced in a trial as circumstantial evidence to prove lack of consent. The court infers that the victim has indeed suffered rape if they manifest any of the symptoms accompanied with this syndrome. It was first admitted in the *State v. Marks* [44]case, where the Kansas Supreme Court became the first state supreme court to uphold the admission of RTS evidence. A psychiatrist, who examined the victim two weeks after the attack, testified that the victim had suffered a "frightening assault" and was "suffering from the post-traumatic stress disorder known as rape trauma syndrome."[45] It is generally accepted as a reaction of a sexual assault victim. It requires the court to keenly assess the health and physical condition of the victim and from it reach a conclusion of whether the victim has suffered rape. This is where there are no facts that can directly show the court that the victim was indeed raped hence the court must rely on several existing circumstances such as the victim's physical health to reach this conclusion. The circumstances must be conclusive enough to leave you with a moral certainty, a clear and unsettled belief that the defendant is guilty and there is no other reasonable explanation of the facts as proven.

INEFFECTIVENESS OF CIRCUMSTANTIAL EVIDENCE

However, it is worth noting that this method of proving lack of consent has some weaknesses which if not well addressed lead to an injustice to the defendant. This type of evidence can easily be manufactured to make an innocent person appear guilty. This was shown in the *Teper v republic* case where the appellant was tried for arson- maliciously setting fire to a shop with intent. The court was provided with hearsay and circumstantial evidence by the prosecution. The court did not admit the hearsay evidence because words spoken by the woman did not form part of the res gestae and were not therefore excepted from the fundamental rule against the admission of hearsay evidence. And the circumstantial evidence which alone the Crown had to rely on to connect the

[43] Giamelli P,' *Rape Trauma Syndrome'*, Case western university school of law journal, 1997,271 <https://scholarlycommons.law.case.edu/faculty_publications/346 > on 2nd December 2020
[44] *State v Marks* (1982), Kansas Supreme Court.

appellant with the commission of the crime was inconclusive for the purpose, and as such the conviction was set aside in the appeal court.

In disregarding the circumstantial evidence, the court said that it was also necessary before drawing the inference of the accused person's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances that would weaken or destroy the inference [46] this shows that there might be other circumstances that can be easily manipulated to falsely accuse someone. This is possible in rape cases especially in the use of the rape trauma syndrome which cannot be the only evidence that the court relies on as its symptoms can easily be the result of another traumatic experience hence the need for expert opinion to ascertain that the cause of the said symptoms is rape. This brings up the need for corroboration of circumstantial evidence. That is the need for the prosecution to provide the court with additional supporting evidence to strengthen the previous fact or evidence adduced before the court which is where medical evidence comes in.[47]

2.**use of medical evidence and how it is ineffective.**

Medical evidence obtained by examination of the victim is of crucial importance in the investigation and trial of rape offences. The outcome of a prosecution is likely to depend on this type of evidence to prove guilt of the accused. As there is usually no eyewitness of the act, and the accused and victim used to say in their interest only, the medical evidence is one of the ways which help to find out the fact.[48] Medical Examination of the victim as per section 45 of the Sexual offences Act of kenya is a mandatory requirement in any rape case. The victim bears important medical evidence, which, with passage of time, is lost. The examination of the victim should, therefore, be carried at the earliest time possible to be able to obtain viable evidence.[49]

Obtaining of this evidence from the victim involves various steps. To start with, the medical officer must obtain consent from the victim.[50] The medical examination of the victim cannot be done

[46] Teper v republic (1952) eKLR
[47]< https://legal-dictionary.thefreedictionary.com/corroboration >accessed on 4th December 2020.
[48] Shivangi V and Shubham K,' Critical analysis of the relevancy of the medical and forensic evidences in the rape cases', Bharati law review, 2016, 222, > www.manupatra.com > on 4th december 2020.
[49]Shivangi V and Shubham K,' Critical analysis of the relevancy of the medical and forensic evidences in the rape cases', Bharati law review, 2016, 222, > www.manupatra.com > on 4th december 2020.
[50] Temkin J, 'Medical evidence in rape cases: a continuing problem for criminal justice' 1998, 839, > http://www.jstor.com/stable/1097352 > on 4th December 2020

without the requisition from the court or from the police officer, but the court cannot force a woman to undergo the medical examination. The consent of the victim is required for the medical examination and in case where the victim is underage of eighteen or is of unsound mind the consent of the legal guardian is required.[51] Secondly, obtaining information. The medical examiner then gets the details of what happened either directly from the victim or from the accompanying officer or guardian.[52] The doctor limits their questions on the physical side of the event which will be relevant in their medical examination. The doctors obtain information on the medical history of the victim like whether she was a virgin before the incident, whether she was sexually active and her periodic cycle.[53]

Thirdly, the medical examination is carried out. This is mainly done using the rape kit. This involves the collection of trace evidence from the victims clothing which are later stored as exhibits. The examiner then collects biological samples of blood and of her body fluids from the victim's genitals and other body surfaces. If the victim allows the examiner can even take pictures of her genitals for further evidence. This entire process can take two to five hours. While the exam is going on, the victim has the right at any point to ask questions or stop the examination completely.[54]

The fourth step is the examiner advices the victim on pregnancy and sexually transmitted diseases and it is at this point that they administer morning after pills to the victims for prevention of contracting any diseases.[55] The examiner then gives a written statement of his findings to the police which is if great help to the prosecutor's case.[56] The examiner may be required to disclose his findings to the defense and even appear as a witness before the court.[57]

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[51] Temkin J, 'Medical evidence in rape cases: a continuing problem for criminal justice' 1998, 831, > http://www.jstor.com/stable/1097352 > on 4th December 2020
[52]Temkin J, 'Medical evidence in rape cases: a continuing problem for criminal justice' 1998, 831, > http://www.jstor.com/stable/1097352 > on 4th December 2020
[53]Temkin J, 'Medical evidence in rape cases: a continuing problem for criminal justice' 1998, 831, > http://www.jstor.com/stable/1097352 > on 4th December 2020
[54]Baker, Thomas E.; Roberts, James C, rape (March 2015). *Rape (forensics)*. Salem Press Encyclopedia.
[55] Temkin J, 'Medical evidence in rape cases: a continuing problem for criminal justice' 1998, 835, > http://www.jstor.com/stable/1097352 > on 4th December 2020
[56] Temkin J, 'Medical evidence in rape cases: a continuing problem for criminal justice' 1998, 837, > http://www.jstor.com/stable/1097352 > on 4th December 2020
[57] Temkin J, 'Medical evidence in rape cases: a continuing problem for criminal justice' 1998, 839, > http://www.jstor.com/stable/1097352 > on 4th December 2020

INEFFECTIVENESS OF MEDICAL EVIDENCE

This type of evidence however also has some weaknesses which make it ineffective. One of such witnesses is the time factor. As earlier said the viable evidence on the victims can easily be lost if a lot of time is allowed to lapse before a medical examination is carried out on the victim. Also, this type of evidence is inconclusive as it is likely to cast doubts on the injuries of the victim. This is where it can be argued that the injuries on the victim can easily have been caused by vigorous consensual sexual intercourse or in some instances self-inflicted.[58] Also due to the high cases of corruption, there are doubts on the integrity of the, medical examination results where some doctors are paid off to forge these results and in other instances, the doctors might be lacking neutrality and working with the prosecution.[59]

Another weakness is the inconvenience of court appearances. Doctors are busy people who are on call all day long, so it is a great inconvenience for them to be asked to appear as witness before a court on working days especially when they are given short notices. As a result, some doctors fail to appear before the court leading to a case hearing being postponed or even cancelled.[60] This is a great disadvantage to the accused persons who have to spend more time behind bars despite there been a chance of them being innocent. Hence a court cannot fully rely on just medical evidence to convict an accused person because as we have seen it is unreliable and inconclusive and can easily be manipulated against the accused

[58]Temkin J, 'Medical evidence in rape cases: a continuing problem for criminal justice' 1998, 840, > http://www.jstor.com/stable/1097352 > on 4th December 2020
[59]Temkin J, 'Medical evidence in rape cases: a continuing problem for criminal justice' 1998, 841, <http://www.jstor.com/stable/1097352 > on 4th December 2020
[60]Temkin J, 'Medical evidence in rape cases: a continuing problem for criminal justice' 1998, 840, > http://www.jstor.com/stable/1097352 > on 4th December 2020

CHAPTER 3: USE OF HISTORY OF RELATIONS TO PROVE CONSENT IS MORE EFFECTIVE IN PROVING CONSENT.

In most rape cases, the issue of lack of consent is usually used in favor of the complainant. However, there is a way that the same can be used in favor of the accused as in the case where there is history of relations between the two parties. Sexual history evidence is mostly introduced to support inferences of consent and/or to challenge credibility.[61] That is, it is introduced to determine whether the testimony given by the victim is worthy of belief based on the victim's competence as a witness and the likelihood that it is true.[62] In relation to consent, adducing sexual history evidence relies on an assumption that previous consent is indicative of consent on the occasion in question. such a rationale profoundly challenges the notion of consent being person and situation specific. Specifically, in relation to sexual activity with the accused, it assumes that consent can be inferred from prior consent.[63]

This position was articulated by Lord Steyn in the case *R v A* [64]where he stated that: As a matter of common sense, a prior sexual relationship between the complainant and the accused may, depending on the circumstances, be relevant to the issue of consent. It is a species of prospectant evidence which may throw light on the complainant's state of mind. In a similar vein, analysing R v A, Di Birch claims that the 'complainant's prior sexual behavior with A makes her non-consent highly unlikely'. That is, if the two had a sexual relationship before to which the victim consented then it is very hard to believe that in this one instance in question she did not consent.[65]Not only does this suggest that prior consent may be relevant but indeed claims that it makes consent more likely.

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[61] McGlynn C, 'Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence' *the journal of criminal law*, 2017, 369-< https://doi.org/10.1177%2F0022018317728824> on 7th December 2020.

[62]<*legal-dictionary.thefreedictionary.com/credibility*> accessed on 7th December 2020.

[63] McGlynn C, 'Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence' *the journal of criminal law*, 2017, 369-< https://doi.org/10.1177%2F0022018317728824> on 7th December 2020.

[64] R V A (2001), The United Kingdom House of lords.

[65]McGlynn C, 'Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence' *the journal of criminal law*, 2017, 369-< https://doi.org/10.1177%2F0022018317728824> on 7th December 2020.

This distinguishes normal rape from ideal rape. Adler has described ideal rape as rape 'where the victim is sexually inexperienced and has a "respectable" lifestyle, whose assailant is a stranger and whose company she had not willingly found herself in. She will have fought back, been physically hurt, and afterwards, promptly reported the offence. In such an instance the victim's witness statement will be more credible and there will be higher chances of the conviction of the accused as opposed to where the complainant and the defendant had prior relations.[66] The relevance of such evidence however rests on the proximity in time between consensual sexual behavior and the alleged rape, and on superficial similarities between the alleged rape and another as was held in the *R* V *Viola case*.[67] This evidence relies on the argument that the 'task of the defense' is to 'normalize rape into sex'.[68]The more the defense can assimilate the activities under scrutiny in the trial to normal, everyday sexual behavior, the less likely the court is to consider the events to constitute rape. In this way, evidence of a complainant's sexual proclivities can distract the court's attention from the consideration of 'rape', directing them towards that of normal sex.[69] It helps in shifting the focus of the trial from the defendant's actions to those of the complainant, thereby also shifting legal and moral blame from the defendant to the complainant.[70] That is, the burden of proof is no longer on the defendant but on the complainant following the common doctrine, 'he who claims must prove.'

Sexual history evidence however has some limitations. It risks introducing irrelevant or prejudicial material which may distort rather than promote the truth-finding role of the trial and rectitude in its decision-making.[71] It diverts the attention of the trial from the relevant facts to other petty issues such as the morality of the woman. Instead, the main focus should be on the particular incidence when she did not consent and not on other times when she consented. This was emphasized by

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[66] Mc Colgan, 'Common Law and the Relevance of Sexual History Evidence' Oxford journal of legal studies, 1996, 278-< https://www.jstor.org/stable/764745> on 7th December 2020.
[67] *R v Viola* (1982), The United Kingdom House of Lords.
[68]McGlynn C, 'Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence' *the journal of criminal law*, 2017, 371-< https://doi.org/10.1177%2F0022018317728824> on 8th December 2020
[69] McGlynn C, 'Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence' *the journal of criminal law*, 2017, 371-< https://doi.org/10.1177%2F0022018317728824> on 8th December 2020
[70] McGlynn C, 'Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence' *the journal of criminal law*, 2017, 371-< https://doi.org/10.1177%2F0022018317728824> on 8th December 2020
[71]

Justice Gonthier in the Canadian case of *R V Darrach*,[72]who stated that sexual history evidence distorts the truth-seeking function of a trial and rectitude in decision making of the judge.

Also sexual history evidence has harmful effects on the complainant's privacy, dignity, and emotions, as their previous sexual encounters which are intimate moments that should be kept private are brought to scrutiny of the court.[73] Its relevance in relation to third-party evidence is limited.[74] This was well articulated by Lord Coleridge who noted all those years ago, that there is no probative connection between consenting to one person and consent to a different person.[75] This was further emphasized by Lord Clyde in *R v A* case who stated that evidence of the victim's behavior with other men should not be accepted as relevant for the purpose of proving her consent to the sexual encounter with the accused.[76] Sexual history evidence does not acknowledge that consent is given afresh on each occasion.

Despite these limitations for which it is considered a rape shield law, the admission of such evidence has been allowed in various legislations around the world. For instance, in Britain, it was allowed following the Ched Evans case judgement,[77] but only when the lawyer is seeking to look out for the best interest of the defendant. It was later made into law through the Sexual Offences (amendment) Bill.[78] Also in New Zealand as was shown in a recent study that showed that questioning about the complainant's prior sexual history (including with third parties) was introduced in 43% of recent cases.[79] The most recent Scottish statistics reveal that applications to

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[72] *R v Darrach* (2000), The Supreme Court of Canada.
[73] Levanon L, 'sexual history evidence in cases of sexual assault: a critical evaluation' university of Toronto law journal, 2012, 610-< https://www.jstor.org/stable/23362365> on 8th December 2020.
[74] McGlynn C, 'Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence' *the journal of criminal law*, 2017, 370-< https://doi.org/10.1177%2F0022018317728824> on 8th December 2020
[75] McGlynn C, 'Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence' *the journal of criminal law*, 2017, 370-< https://doi.org/10.1177%2F0022018317728824> on 8th December 2020Sage all three
[76] McGlynn C, 'Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence' *the journal of criminal law*, 2017, 370-< https://doi.org/10.1177%2F0022018317728824> on 8th December 2020
[77] Ferguson K, 'Alleged rape victims 'being quizzed about sexual history' in court' independent newspaper, 5th February 2017-< https://www.independent.co.uk/news/uk/home-news/> on 8th December 2020.
[78] Ferguson K, 'Alleged rape victims 'being quizzed about sexual history' in court' independent newspaper, 5th February 2017-< https://www.independent.co.uk/news/uk/home-news/> on 8th December 2020.
[79] McGlynn C, 'Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence' *the journal of criminal law*, 2017, 374-< https://doi.org/10.1177%2F0022018317728824> on 8th December 2020

admit sexual history evidence have been made in 72% of sexual offence trials (one-fifth relating to third parties) and only 7% of the applications were refused.[80]

Attempts have been made in some African countries to apply sexual history evidence but due some challenges in the process it has not been successful. For instance, in South Africa in the case *S V Jacob Zuma*[81] in which a woman, whose name the judge decided not to disclose, had laid a charge of rape against Zuma – the deputy president of the ruling African National Congress (ANC) and former deputy president of the country. The charge was essentially that on 2 November 2005 Zuma raped the complainant in his home in Johannesburg. The accused was found not guilty.the court failed in applying sexual history evidence in the case. The court's decision to allow Zuma's lawyers to cross-examine the complainant about her sexual history (governed by section 227 of the Criminal Procedure Act) flanked. This is because the court did not properly deal with or interpreted section 227. While giving the judgement, it did not look at the impact of allowing this evidence t on the complainant's right to human dignity, privacy and equality. This means the court missed an opportunity to align section 227 with the constitutional dictates that now govern the administration of justice in South Africa.[82]

Even in our country it can be applied but under some strict restrictions to avoid humiliation and violation of the complainants' constitutional right to privacy. Before inclusion of this type of evidence in the Kenyan rape laws, the legislators should make sure that it is formulated and will be implemented in a way that upholds constitutional rights of both parties in the case and their dignity. They should ensure that despite the limitations that come with admission of sexual history evidence it will help ensure that justice is served to both parties in the trial. The legislators should benchmark and learn from the mistakes made by other countries in applying sexual history evidence and look for ways to avoid such mistakes been made while allowing sexual history evidence in Kenyan courts.

[80] McGlynn C, 'Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence' *the journal of criminal law*, 2017, 374-< https://doi.org/10.1177%2F0022018317728824> on 8th December 2020

[81] *State v Jacob Zuma(2006)*, High Court of South Africa.

[82] *State v Jacob Zuma*(2006), High Court of South Africa.

CHAPTER 4: ROLE OF CONTRIBUTORY BEHAVIOUR IN PROVING CONSENT AND HOW IT IS MORE EFFECTIVE.

For justice to be served in any trial, the court looks at any case from the point of view of both the complainant, in our case the victim, and that of the defendant. By looking at the contributory behavior of the victim the court looks at how the defendant could have inferred consent from the conduct or behavioral characteristics of the victim. This can be traced back to these, *Morris v. Yogi Bear's Jellystone Park Camp Resort*,[83] which involved the gang rape of thirteen-year-old Sherry Morris by three seventeen-year-old boys in Jellystone Park Inn the decision made by the court of appeal, the court was of an unanimous opinion that there was no doubt, that each of the parties were at fault to some degree.[84]The court defined Morris's fault as willingly participating in the original beer drinking, and apparently willingly and voluntarily leaving her friend to go to a secluded place with a strange boy.[85] According to the appellate court, the victim's actions undoubtedly set the stage for the terrible events which followed.[86] This type of evidence as shown in the above does not seek to fully exonerate the defendant but to reduce degree of crime committed by the defendant.

It is associated with the attribution theory. It supposes that people attempt to understand the behavior of others by attributing feelings, beliefs, and intentions to them.[87] It is the only way they can explain the causes of their behavior and events. Furthermore, the way people assign responsibility for events consists of a complex amalgamation of personal, psychological, and situational factors, hence the subjective nature of this theory.[88] It is theorized that people make attributional judgements about rape by assessing the logical association or degree of covariation

[83]. *Morris v. Yogi Bear's Jellystone Park Camp Resort (*1989), Court of appeal of Louisiana.
[84]Bublick E, 'Citizen No-Duty Rules: Rape Victims and Comparative Fault' *Columbia law review*, 1999, 1429-< https://doi.org/10.2307/1123546> on 28th December 2020
[85] Bublick E, 'Citizen No-Duty Rules: Rape Victims and Comparative Fault' *Columbia law review*, 1999, 1429-< https://doi.org/10.2307/1123546> on 28th December 2020
[86] Bublick E, 'Citizen No-Duty Rules: Rape Victims and Comparative Fault' *Columbia law review*, 1999, 1429-< https://doi.org/10.2307/1123546> on 28th December 2020
[87] <Attribution theory - Oxford Reference>accessed on 28th December 2020. Oxford dictionary.
[88]Grubb R and Turner E,' Attribution of blame in rape cases: A review of the impact of rape myth acceptance, gender role conformity and substance use on victim blaming' university of Worcester law journal, 2012, 7-< https://www.researchgate.net/publication/235652013> on 28th December 2020.

between two variables, the cause, and the effect. This is the so-called covariation principle.[89] It is said to derive from the natural sciences and represent an important method of formal science inquiry and was first identified by John Stuart Miller, greatly known for his philosophical views.[90]

It has been appropriated in explaining how a layperson, albeit 'naively', searches for causal explanations for social behavior in everyday life.[91] In relation to social attributional reasoning, this principle states that a behavior is attributed to a condition which is present when the reaction is present and absent when the reaction is absent, as they say for every action there is a reaction. [92] Consistency over time establishes a relationship between condition and reaction while consistency over persons establishes whether the reaction or behavior in question is caused by the person-actor or the environment.[93] This shows that there is a correlation between contributory behavior evidence and sexual history evidence. One of the weaknesses of this theory is that it can be influenced by a vast plethora of cognitive and motivational biases which results in a less than factual interpretation of the events in question.[94]

Contributory behavior is often confused with victim blaming but the two are very different. Victim blaming is defined as the situation where rape victims, despite being "victims" of a crime are often blamed and denigrated for their role in the rape, even to the extent whereby the victim is held entirely responsible for the assault.[95] This is mostly due to the negative rape victim perception

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[89] Beattie G and Spencer C, 'Can blaming victims of rape be logical? attribution theory and disclosure analytic perspectives' sage journals, 2001, 447-<https://doi.org/10.1177/0018726701544003> on 28th December 2020.

[90] Beattie G and Spencer C, 'Can blaming victims of rape be logical? attribution theory and disclosure analytic perspectives' sage journals, 2001, 447-<https://doi.org/10.1177/0018726701544003> on 28th December 2020

[91]Beattie G and Spencer C, 'Can blaming victims of rape be logical? attribution theory and disclosure analytic perspectives' sage journals, 2001, 447-<https://doi.org/10.1177/0018726701544003> on 28th December 2020

[92] Beattie G and Spencer C, 'Can blaming victims of rape be logical? attribution theory and disclosure analytic perspectives' sage journals, 2001, 447-<https://doi.org/10.1177/0018726701544003> on 28th December 2020449

[93] Beattie G and Spencer C, 'Can blaming victims of rape be logical? attribution theory and disclosure analytic perspectives' sage journals, 2001, 447-<https://doi.org/10.1177/0018726701544003> on 28th December 2020449/

[94] Grubb R and Turner E,' Attribution of blame in rape cases: A review of the impact of rape myth acceptance, gender role conformity and substance use on victim blaming' university of Worcester law journal, 2012, 2-< https://www.researchgate.net/publication/235652013> on 28th December 2020.

[95]Grubb R and Turner E,' Attribution of blame in rape cases: A review of the impact of rape myth acceptance, gender role conformity and substance use on victim blaming' university of Worcester law journal, 2012, 8-< https://www.researchgate.net/publication/235652013> on 28th December 2020.

which places the entire blame of a rape on the victim because of their prior-rape conduct. It is influenced by the just world theory which states that negative rape victim perception occurs as a result of overcompensation for a seemingly undeserved act. According to this perspective, one has a motivational need to believe that the world is a fair place and that behavioral outcomes are deserved ("people get what they deserve and deserve what they get"), thus maintaining a sense of control and efficacy over the environment. [96]To believe that unfortunate things happen to people without any apparent reason would prove chaotic and would subsequently threaten one's sense of control. Consequently, to perceive the victim as deserving of the misfortune helps to restore the comfortable view of the world as being ordered, fair, and just.[97] This shows the difference between attributing some blame on the victim and victim blaming where the entire blame of a rape falls on the victim.

There are a number of variables which have been found to influence the degree to which blame is allocated to the victim of a crime, including perceiver's beliefs, victim characteristics and situational aspects.[98] Attribution of blame by observers of rape cases is therefore subject to an infinite number of fluctuating variables which are likely to influence every situation in a unique and unpredictable manner. In order to help understand why individuals attribute blame in the way they do and account for some degree of blame on the victim it is vital to identify the contributing factors, for example the victim's behavior and variables such as intoxication levels of the victim which may result in the propagated social milieu of rape victim denigration and blame.[99]

Take an instance where the victim prior to the rape had been drinking and as a result was highly intoxicated, she is likely to be more promiscuous, seductive, flirtatious, and sexually provocative than a victim who had not consumed alcohol prior to the attack. It is likely that a man may

[96] Grubb R and Turner E,' Attribution of blame in rape cases: A review of the impact of rape myth acceptance, gender role conformity and substance use on victim blaming' university of Worcester law journal, 2012, 8-< https://www.researchgate.net/publication/235652013> on 28th December 2020.
[97]Grubb R and Turner E,' Attribution of blame in rape cases: A review of the impact of rape myth acceptance, gender role conformity and substance use on victim blaming' university of Worcester law journal, 2012, 8-< https://www.researchgate.net/publication/235652013> on 28th December 2020.
[98] Grubb R and Turner E,' Attribution of blame in rape cases: A review of the impact of rape myth acceptance, gender role conformity and substance use on victim blaming' university of Worcester law journal, 2012, 9-< https://www.researchgate.net/publication/235652013> on 28th December 2020.
[99] Grubb R and Turner E,' Attribution of blame in rape cases: A review of the impact of rape myth acceptance, gender role conformity and substance use on victim blaming' university of Worcester law journal, 2012, 9-< https://www.researchgate.net/publication/235652013> on 28th December 2020.

misinterpret her friendly or ambiguous cues as signals for sexual interest, therefore, facilitating sexual violence.in such an instance the man though in the wrong should not be held entirely responsible, some blame should be attributed to the victim for placing/putting themselves at risk by becoming intoxicated.[100] Such a woman who has consumed alcohol or drugs should be held guilty of contributory negligence and, therefore, to some extent blameworthy for her own victimization.[101] This is however a question of substantive law.

Contributory behavior evidence recognizes that the fault is not entirely on the defendant, and the victim is to some extent responsible for what happened to them hence defendant should not suffer maximum penalty. It puts the burden of proof on the defendant to show beyond reasonable doubt that he inferred consent from the provocative behavior of the victim. The victim is supposed to take reasonable care of themselves by not putting themselves in dangerous or risky situations that can warrant rape. If the rape takes place despite them taking reasonable care of themselves, then this defense does not apply. Showing contributory behavior by the victim is effective in that it does not only look at the interests of the victims but seeks to look more into the interest of the defendant. It shows that though the defendant was in the wrong, his or her actions were provoked by the actions of the complainant(victim) prior to the rape incident.

[100] Grubb R and Turner E,' Attribution of blame in rape cases: A review of the impact of rape myth acceptance, gender role conformity and substance use on victim blaming' university of Worcester law journal, 2012, 26-< https://www.researchgate.net/publication/235652013> on 28th December 2020.
[101]Grubb R and Turner E,' Attribution of blame in rape cases: A review of the impact of rape myth acceptance, gender role conformity and substance use on victim blaming' university of Worcester law journal, 2012, 26-< https://www.researchgate.net/publication/235652013> on 28th December 2020.

CHAPTER 5: RECOMMEDATIONS AND CONCLUSION.

The Kenyan law has tried to be clear on what should constitute laws in Kenya. First in the 2010 Constitution which is considered the supreme law of the land, protects the dignity of every citizen through its article 19 which states that the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.[102] This provision ensures that every single person is treated with utmost respect. The constitution also provides for freedom of expression which necessitates the ability of a woman or a man to give her consent before any sexual encounter.[103]

Also, through the Sexual Offences Act which as earlier said recognizes the offence of rape, offers a definition of what it encompasses, and even offers ways in which it can be proved in a court of law. The Sexual Offences Act provides for use of medical evidence[104] to prove lack of consent in a rape incident. Despite the fact that it can be easily retrieved at the hospital and many other disadvantages, it comes with some limitations that hinder its reliability as evidence. As earlier said the whole process of obtaining this evidence is long and highly intrusive to the privacy of the victim, it is also highly inconvenient to the medical experts who are expected to take time form their busy schedules to present this evidence in court.[105] Also it is easily corruptible in that the doctor can easily be paid off to forge the results.[106]Because of this shortcomings it is not advisable that the courts should rely on it as the one of the main ways of proving lack of consent.

The same act also provides for use of circumstantial evidence in which an inference is drawn from a series of facts in a case. This evidence serves to corroborate medical evidence obtained from the victim. The law has even developed a test that evidence must pass for it to be admissible in court through the *Abanga alias Onyango v Republic*.[107] Despite its strengths, this type of evidence has limitations which outweigh the strengths. Circumstances can easily be manipulated to favor the

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[102] Article 19, *Constitution of Kenya* (2010)
[103] Article 33, *Constitution of Kenya* (2010)
[104] Section 45, Sexual Offences Act (Act No.3 of 2006)
[105] Temkin J, 'Medical evidence in rape cases: a continuing problem for criminal justice' 1998, 841, <http://www.jstor.com/stable/1097352 > on 4th December 2020
[106] Temkin J, 'Medical evidence in rape cases: a continuing problem for criminal justice' 1998, 840, <http://www.jstor.com/stable/1097352 > on 4th December 2020
[107] *Abanga alias Onyango v Republic* (1990) eKLR

victim and there might be other coexisting circumstances that would destroy the inference.[108] There are too many inconsistencies associated with obtaining this type of evidence which render it quite ineffective.

The above liaises with my first objective which was to establish that the use of circumstantial evidence and medical evidence to prove consent as provided in section 45 of the Sexual Offences Act are ineffective and likely to prejudice the accused person.

RECOMMENDATIONS.

Despite the law providing the two aforementioned methods of proving consent in the Sexual Offences Act, there is need for this law to be reformed or amended, particularly section 45 of the Sexual Offences Act, to include other more reliable, efficient, and effective ways of proving consent as per my second objective. Methods that look at the interests of both sides, that is the defendant and the complainant. Such methods include looking at the sexual history evidence of the complainant(victim) to ascertain the credibility and reliability of their witness statements. As earlier stated, it relies on the assumption that previous consent is indicative of consent on the occasion in question. It is probable that the defendant inferred the victim's consent from his or her previous sexual encounters with the victim to which he or she consented. Hence, it would be unfair to hold the victim guilty of rape without looking at his past relationship with the victim as a mitigating factor. The defendant could still be found guilty, but this fact should serve to alienate the severity of the punishment he or she is to receive. It has been successfully practiced in other countries as shown in chapter 3 hence the Kenyan legal system should try and enumerate the models used by these countries this type of evidence. However, strict guidelines need to be put in place to guide the application of this type of evidence to avoid it been more disadvantageous than it is advantageous.

The court can also look at the contributory behavior of the victim, which as earlier said is based on the attributive theory. In any rape case brought before the court, the court should look at the behavior of the victim prior to the rape. Was she dressed provocatively? Was she intoxicated? Such are the questions the court should ask. This is not so that the entire blame

[108] *Teper v Republic* (1952) eKLR

may fall on the victim as that would now amount to victim blaming. Instead, it should be so that some blame, not entirely, may fall on the victim as it her reckless conduct that provoked the non- consented sexual encounter with the defendant. It would be unjust and unfair to let the entire blame fall on the defendant in such a situation. Instead, they both should share the blame as they were to some extent responsible for what transpired.

In conclusion, despite our law having given provisions on how lack of consent can be proved in a court of law, the given methods are not sufficient, reliable, and efficient especially in light of the moral decay in our societies today. This warrants the legislators to go back to the drawing table and come up with new and better methods of proving consent that will look at the interests of both the accused and the defendant, which is the aim of every well-functioning legal system. They should look for ways in which the current methods of proof, circumstantial and medical evidence can be supplemented to be become more effective

11. BIBLIOGRAPHY.

PRIMARY SOURCES

Constitution of Kenya, 2010

Criminal Procedure Code

Evidence Act, Cap 80 Laws of Kenya

Penal Code, Cap 63, Laws of Kenya

Sexual Offences Act No. 3 of 2006

The Rome Statute

The Statute of International Criminal Court.

CASE LAW.

K K R V Republic [2010] eKLR

Bonu vs. Republic (2010) eKLR

*Morris v. Yogi Bear's Jellystone Park Camp Resort (*1989), Court of appeal of Louisiana.

Teper v Republic (1952) eKLR

Oyier V Republic (2008) eKLR

Rex Vs Amkeyo (1917) 7 EALR 14

Solomon V. Republic (2010) eKLR

Achoki v. R [2008] 1 KLR (G & F)

Abanga alias Onyango v Republic (1990) eKLR

leiman v. R (Criminal Appeal 2004, High Court at Machakos)

Wafula v. R (Criminal Appeal 2005, High Court at Bungoma)

State v Jacob Zuma(2006), High Court of South Africa

R v Darrach (2000), The Supreme Court of Canada

State v Marks (1982), Kansas Supreme Court.

ARTICLES

Myeni R, *The Law of Evidence, Asia law house,* Hyderabad, 2007, 20

Giamelli P,' *Rape Trauma Syndrome',* Case western university school of law journal,

1997,271

Wanga C, 'Rape in Kenya: the boundaries of consent' Unpublished LLB thesis, Moi University, July 2016.

Kamau W, 'The legal treatment of consent in sexual offences in kenya', 10 *Law society of Kenya journals* (2014)

Scott K, 'sexual violence, consent and contradictions: a call for communication scholars to impact sexual violence prevention' 8 *The Journal of undergraduate research at the university of Tennessee* (*2017)*

Westen P, ‘Some common confusions about consent in rape cases’ 2 Ohio *State Journal of criminal law* (2004)

Kessler K, ‘Consent and coercion’ 4 *Arizona state law journals* (2019)

Temkin J, ‘Medical evidence in rape cases: a continuing problem for criminal justice’ (1998)

Grubb R and Turner E,’ Attribution of blame in rape cases: A review of the impact of rape myth acceptance, gender role conformity and substance use on victim blaming’ *university of Worcester law journal,* 2012

Beattie G and Spencer C, ‘Can blaming victims of rape be logical? attribution theory and disclosure analytic perspectives’ *sage journals,* 2001, 447

Bublick E, ‘Citizen No-Duty Rules: Rape Victims and Comparative Fault’ *Columbia law review,* 1999, 1429.

McGlynn C, ‘Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence’ *the journal of criminal law,* 2017, 374

Levanon L, ‘sexual history evidence in cases of sexual assault: a critical evaluation’ *university of Toronto law journal,* 2012, 610

Shivangi V and Shubham K,’ Critical analysis of the relevancy of the medical and forensic evidences in the rape cases’, *Bharati law review,* 2016, 222