

July 2019



POLICY BRIEF



**A campaign against the lowering of
the age of sexual consent from
18 years to 16 years**



Executive Summary

The objective of the campaign is to safeguard the age of sexual consent to protect children from sexual abuse and the consequences of early sexual activity. The simple yes given by a child, should not be taken to mean it is informed consent. The proposal to reduce the age of consent is thus ill-advised, illegal, unconstitutional and should not be implemented.

I. Introduction

In Kenya, the age of majority is 18 years. A person under the age of 18 years is deemed by law as being incapable of having the capacity to consent. Article 260 (1) of the Constitution defines a “child” as an individual who has not attained the age of eighteen, and an “adult” means an individual who has attained the age of eighteen¹.

Decisions have been made by various judicial officers that depart from the law. In Criminal Appeal, No 81 of 2013 *J Y v Republic* [2015] eKLR and in Criminal Appeal No 32 of 2013 *James Lekichap v Republic* [2015] eKLR the accused were convicted for the defilement of minors aged 17 and 13 respectively. The convictions were overturned because one voluntarily moved in with the accused person and the other, according to the judge, seemed to have enjoyed the sexual act.

Notably, the case that has stirred up the debate on the proposed reduction on the age of sexual consent is Criminal Appeal No 102 of 2016 *Eliud Waweru Wambui Vs R* [2019] eKLR delivered on the 22nd March 2019. The three-judge bench issued an advisory stating that the time is right for the age of sexual consent to be reduced on the grounds that “young men” are “suffering” in jails. The accused in the referenced case had been convicted to an imprisonment of 15 years for

defiling a female child aged 17 years 5 months.

The Appellate Court observed that other jurisdictions such as the United Kingdom have pegged their age of sexual consent at 16 years. They further contended that while the law expressly states that a child cannot consent, the majority of teenagers are engaging in consensual sexual acts and it is thus unfair to have the “young men” in these instances jailed. They went on to state that adolescents may well have reached the age of discretion and can make intelligent and informed decisions about their lives and their bodies. However, the law in Kenya does not recognize the age of discretion; it only recognizes the age of majority which is 18 years of age at which point a person is deemed to have the capacity to make informed choices.

On the 26th of May 2019, the Chief Justice joined the debate remarking that while the age of consent should not be reduced to 16 years, he is concerned that boys aged between 17 and 20 years are being jailed for “voluntary relations².” The Chief Justice feared that the sexual offences sentencing system is biased against the male teenage sex offenders observing that it is common in Kenya to fill jails with teenage male sex offenders³.

¹. Article 260 of the constitution of Kenya 2010

². https://www.standardmedia.co.ke/article/2001325822/maraga_relook_law_on_sexual_offences

³. Ibid

Conversely, a 26-year-old herds boy who had been jailed for defiling a teenage girl of 15 years was freed by the Court of Appeal after it was found that the sex was “consensual” and that the boy at the time of the commission of the offense was 17 years⁴.

These decisions continue to stir up debate and raise alarm among stakeholders signaling the need for urgent intervention and concrete long-term solutions in safeguarding the best interest of a child in Kenya. There is a legal problem that points to a possible misinterpretation of the law and a social problem that fails to address a lack of age-appropriate sex education.

I. Approach and Results

We sought to answer the following questions:-

- What is consent in reference to the law?
- Is the Sexual offences Act discriminatory to young men?
- Do the national statistics on this concern support a true or a false narrative?
- Are the judges interpreting the law on sexual offences correctly?
- Who does the age of consent reduction favor and is it in the best interest of the child?

Our findings are premised on desk reviews of court judgments, national surveys, primary data from corrective facilities and consultation with legal experts and other relevant stakeholders including the civil society organizations, health professionals, youth organizations, religious leaders and teachers.

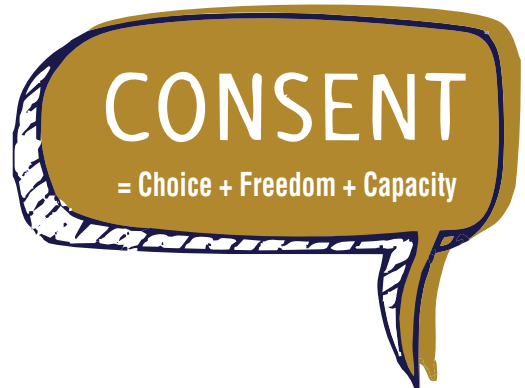
Consent

The age of sexual consent is the legally defined age at which a person is held to have the capacity to voluntarily agree to sexual acts.

Section 42 of the Sexual Offences Act (SOA)⁵ provides that a person consents if he or she agrees by **choice** and has the **freedom** and **capacity** to consent.

Under Section 43(4) a child is deemed incapable in law of appreciating the nature of a sexual act. Capacity entails one's ability to understand the consequences of the said acts for which consent is given.

Consent is defined in Black's Law Dictionary as “**a concurrence of informed and freely given will which is not obtained by coercion or undue influence.**” Consent does not simply mean yes or no. **Informed consent**, therefore, entails having the right information and ability to understand the consequences of giving such consent.



⁴ <https://www.standardmedia.co.ke/article/2001330290/judges-boys-unfairly-punished-for-consensual-sex>

⁵ Sexual Offences Act Kenya eKIR

⁶ <http://kenyalaw.org/kenyalaw/cases/view/171200/>

This gives no basis for acquittal judgments made with references that minors “seemed” to be of age due to their physical maturity and the perception that they “appeared” to enjoy sex.

It is important to note that Section 8(5) of the SOA provides for a defense if the complainant led the accused to believe that he or she was over the age of 18 years and the accused reasonably believed the complainant to be over the age of 18; with the rider in Section 8(6) that the accused person in such an instance took all steps to ascertain the age of the complainant.

Key arguments against the reduction of the age of sexual consent

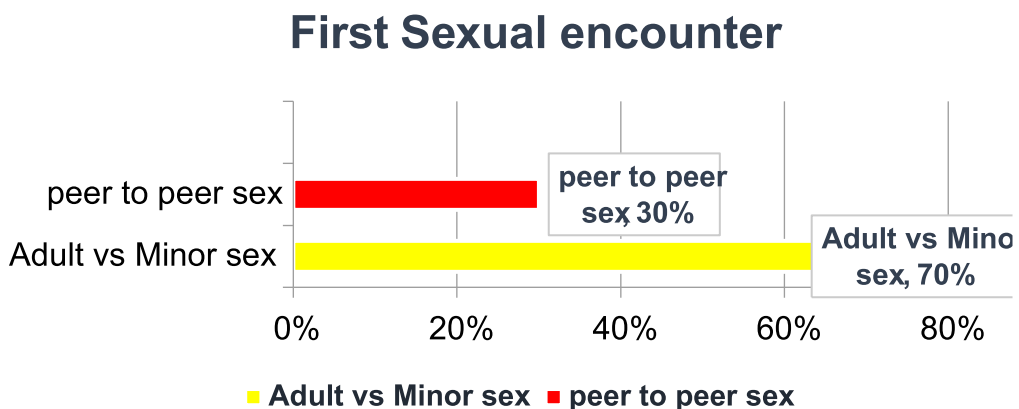
1. Debunking the misconception about the age of first Sexual Encounter

The latest **Kenya Demographic and Health Survey (DHS) report of 2014**⁷, reveals that **62.7% of girls and 59.4% of boys aged 15-19 had never had sex**. It states further, that **10.7% of girls and 19.6% of boys aged 15-19 have had a first sexual encounter**.

This data reveals that contrary to popular belief, the majority of boys and girls are NOT sexually active. Hence, the push to advocate for the lowering of the age of consent to cater for the experimental sex occurrences is invalid.

Further analysis of this data reveals that of the 10.7% who are having sex, **42% of rural girls and 18% of urban girls aged 15-19, have had their first sexual encounter with a man 5-10 years or older**. This means that **70% of girls who have had their first sexual encounter have had it with an adult, while peer to peer sex accounts for 30%**. The likelihood of sexual predators exploiting children will rise should the proposal to lower the age of sexual consent be adopted.

Diagram 1: Illustration of the first sexual encounters



1. The young men narrative

The advisory by the appellate court sought to protect “young men” who are adults between the ages of 18 to 21 years. There is no legal definition for the term “young man”. One is either an adult or a child.

⁷ <https://dhsprogram.com/pubs/pdf/FR308/FR308.pdf>

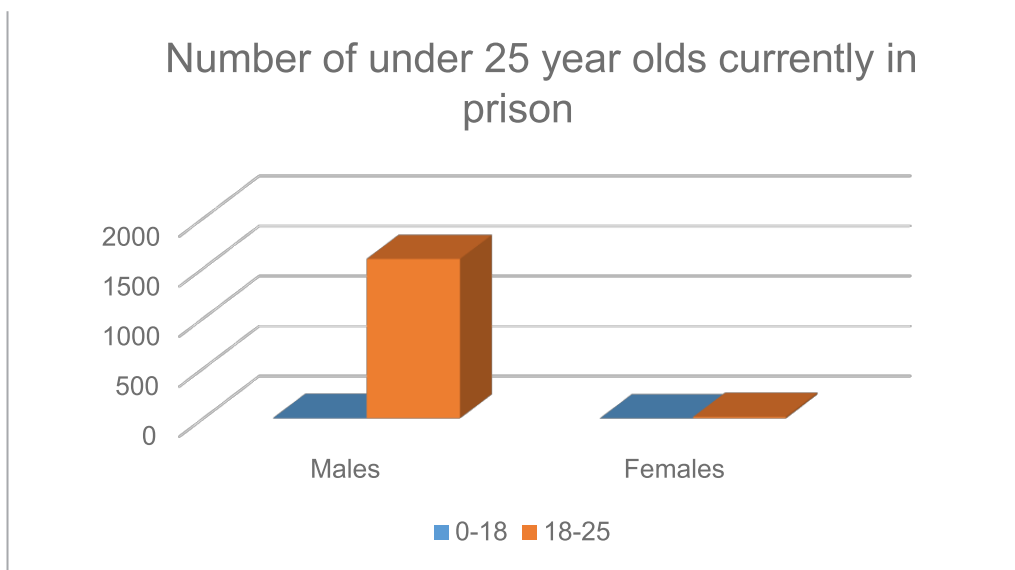
The cry for the young men solely due to the prescribed penalties of the SOA is discriminatory as the same age group that the court seeks to protect is age group of those who are also committing other criminal offences such as robberies yet no similar cry is heard.

The fear that jails are filled with underage boy sex offenders is unwarranted as the SOA in Section 8(7) provides that while a child can be charged under the SOA, sentencing is done as per the Children's Act and Borstal institutions Act. With these provisions, no child should be in jail.

It is also worth noting that a reduction of the age of majority will not have any effect since if lowered, the same minors if found committing the offense, will still be charged according to the law as per the age of majority at the time.

The data availed from prisons reveal that of the sexual offenders convicted under the SOA, 1,614 are below the age of 25. Of this number, there are 5 minors all of whom are male, 16 females and 1593 males between the age of 18-25.

Diagram 2: Number of males under 25 currently in prison



1. The Sexual Offences Act (SOA) is gender-neutral

The SOA is a gender-neutral statute and contrary to its predecessor the Penal Code which provided that only men and boys could be charged with sexual offences, the SOA has no bias as to whether the perpetrator is female or male. Women are increasingly being charged with these offences as shown from the data above.

2. Physical maturity vs psychological development

The physical developments of a child do not correspond to their psychological development. Due to their developmental state, a child cannot fully comprehend the implications of engaging in sexual acts.

Their ability to make informed sound decisions below the age of 18 [is not recognized under the law] and remains relatively poor according to health practitioners consulted.”

3. Age of majority

Kenya's age of majority is 18 years. One needs to attain the age of 18 before they can engage in certain activities such as voting, holding an elective position, driving, working, to marry, to sue and be sued among others. The proposed reduction of the age of sexual consent not only puts a burden on the children but also exposes them to abuse.

Further, the Kenyan Laws do not recognize the age of discretion but only recognize the age of majority, hence the need to emphasize the correct interpretation of the law.

I. Conclusion

Article 53 of the Constitution of Kenya, provides that every child should be protected from abuse, neglect or any form of violence and inhuman treatment. This is to ensure the child's best interests are upheld at all times. The law as presently framed is sufficient and the strict minimum sentences are meant to protect children from predators. Opening this statute for the reduction of the age of consent without taking into consideration the best interest of the Child as provided in the Constitution is a flagrant illegality and unconstitutional conduct and will be a contradiction of the protections guaranteed to children.

II. Implications

Social implications

a) Health

The Population and Development (NCPD) web portal, disclosed that between July 2016 and June 2017, 378,397 pregnant girls aged between 10 and 19 were presented in health facilities in all the 47 counties⁸.

Increased teenage pregnancies and deaths of teenage girls from botched abortions should be expected to increase as will the threat to their reproductive and sexual health.

Access to comprehensive Sexual and Reproductive Health Services (SRHR) for adult women is still a challenge, what more if we add children to this?

Worldwide, around 15 million adolescent girls aged 15 to 19 have experienced forced sex in their lifetime⁹. Boys are also at risk as we are witnessing an increase in sexual violations of boys and men although current statistics are unavailable.

Teenage pregnancies, child marriages, sexually transmitted infections, and HIV rates will also increase.

b) Social stigma and role confusion

Role confusion among children is likely to be intensified with the expected prevalence of sexual

⁸ <http://www.ncpd.go.ke/wp-content/uploads/2018/11/The-Burden-of-Teenage-pregnancies-and-motherhood-in-Kenya-1.pdf>

⁹ http://data.unicef.org/topic/child_protection/violence/sexual_violence/

abuse. The children do not consider themselves children as they are socially seen as adults. Their childhood is cut short early as they cannot engage in children activities neither do they feel that they fit in the adults category in the community. Additionally, reducing age of consent predisposes children to being parents which promotes more poverty in the communities, dropping out of school especially among the urban poor and rural areas contributing to delinquent behaviour within society. The situation points to a macro issue over time especially in regards to security where such victims are encouraged to venture into crime as a means of meeting their needs.

In addition, children who have experienced abuse/defilement and haven't been able to get back on track in pursuing their dreams suffer social stigma and discrimination.

c) Education

Lower transition rates for girls and teenage pregnancies should be expected to rise, with a large number of underage girls dropping out of school due to pregnancies and child marriages will be expected to be on the rise as a result of getting pregnant.

d). Legal implications

1. Initiating the review of the SOA could open up the whole Act which will jeopardize the letter and the spirit of the SOA and its efficacy in combating unlawful sexual acts.
2. The definition of a child is provided for in the Constitution and the Children's Act. The proposal to review the SOA by the reduction of the age of sexual consent will have implications on other laws and the Constitution. It is therefore untenable to amend the age of consent [read the age of majority] in any legislation without an amendment to the Constitution of Kenya 2010. Such an action would be unconstitutional- and void *ab initio*

III. Recommendations

1. Retain the age of consent at 18.
2. Sensitization of the judiciary on the provisions of the SOA and correct interpretation of the law.
3. That the law enforcement agencies in charge of the sexual offenders register work closely with institutions working with children. In addition, ensure the organisations conduct regular checks to track offenders that may have conducted crimes after employment.
4. Sensitization of police officers in handling cases of sexual offences to ensure minors are not taken to court and that a conducive youth/child-friendly gender unit is provided.
5. Provision of age-appropriate sex education administered by schools, by parents in the home, civil society organizations and religious leaders.
6. Formulate policies and regulations providing for counseling services, diversion and borrowing provisions from progressive jurisdictions.

CRAWN Trust would like to appreciate the contributions made from:-

- ☞ The Supreme Court Judiciary
- ☞ Garden of hope foundation
- ☞ Law society of Kenya
- ☞ Kenya law reform Commission
- ☞ Office of the Attorney General and Department of Justice
- ☞ Action AID Kenya
- ☞ Thellesi.co
- ☞ Siasa Place
- ☞ Dada power
- ☞ Bi Kind initiative
- ☞ Accountability Advocates
- ☞ Justice Centres Working Group



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