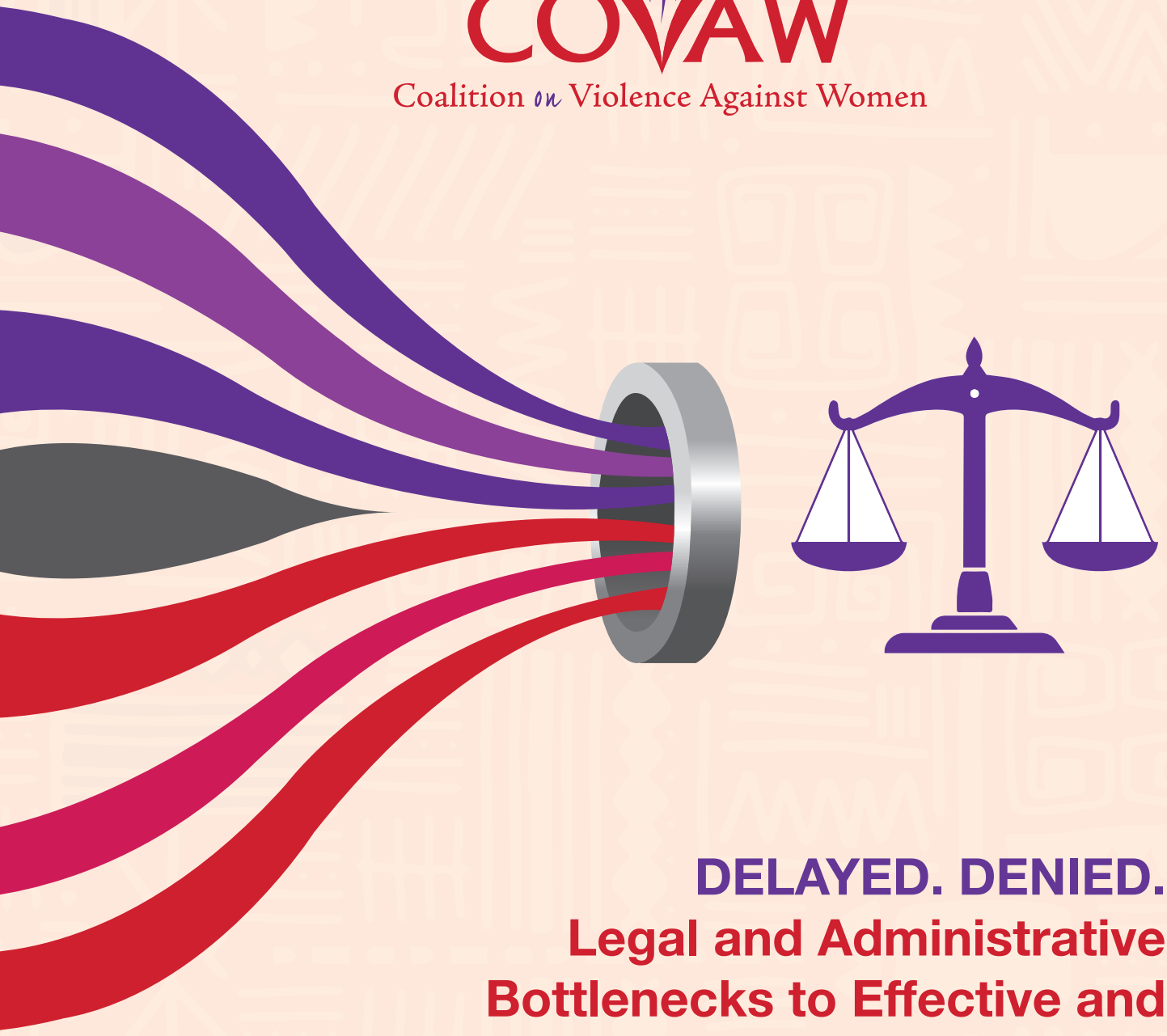
COVAW

Coalition on Violence Against Women



DELAYED. DENIED.
Legal and Administrative Bottlenecks to Effective and Efficient Delivery of Justice for Survivors of SGBV in Kenya

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ACRONYMS AND ABBREVIATIONS

CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
COVAW	Coalition on Violence Against Women
CPC	Criminal Procedure Code
CRPD	Convention on the Rights of Persons with Disabilities
JTI	Judiciary Training Institute
KAIH	Kenya Association for the Intellectually Handicapped
KNCHR	Kenya National Commission on Human Rights
OSIEA	Open Society Initiative for Eastern Africa
SDG	Sustainable Development Goals
SGBV	Sexual and Gender Based Violence
SOA	Sexual Offences Act
SRHR	Sexual and Reproductive Health Rights
VAWG	Violence Against Women and Girls

PREFACE

Kenya has a robust national legal and policy framework to prevent and combat Sexual and Gender-Based Violence (SGBV). The Bill of Rights affords progressive constitutional safeguards that guarantee the right to access to justice, right to fair administrative action (including judicial processes); right to equal protection and equal benefit before the law, right to dignity and the right to a fair hearing. The Constitution also secures the rights of vulnerable groups including children and persons with disabilities. Every state organ is obliged to put in place measures to ensure the full enjoyment of the rights. Furthermore, there is in place various laws and policies that secure the rights of victims of sexual violence. The judiciary also has in place judicial guidelines that relate to case management.

Despite the constitutional and statutory provisions, access to justice remains elusive to most of the victims of SGBV. The inordinate delays in conclusion of cases have led to untold trauma with the attendant social-economic consequences to the victims, their families and the society at large. COVID-19 pandemic worsened the situation by exacerbating the hitherto gaps in case management in the judiciary. As the Coalition on Violence Against Women (COVAW) has established in its previous reports, women and girls, particularly those with intellectual and psychosocial disabilities remain the most adversely affected.

It is against this backdrop that COVAW with the support of Open Society Initiative for Eastern Africa (OSIEA) undertook this current project. Access to justice is one of the strategic focus areas of COVAW, in line with its strategic plan (2018-2023). This study was part of a 2-year project entitled "Promoting an Enabling Legal Environment for SGBV Victims". It is hoped that the findings and recommendations emanating from this study will serve to remove the existing barriers in accessing justice for SGBV survivors.

COVAW urges all the concerned duty bearers including the judiciary, the executive and parliament to urgently put in place measures, within their respective mandates, in line with the recommendations espoused in this report, so as to ensure the full realisation of the rights of SGBV survivors and ensure that no one is left behind.

COVAW will continue to play its role in advocating for and collaborating with relevant stakeholders in the quest to ensure realisation of the much needed legal and administrative reforms that promote an enabling environment for the prevention, timely and effective response to sexual and gender-based violence and indeed, all forms of violence against women and girls.

Wairimu Munyinyi-Wahome

Executive Director,
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ACKNOWLEDGEMENTS

This report was as a result of collaborative efforts of many stakeholders and partners. COVAW deeply appreciates all those whose contribution in one way or other shaped the study.

COVAW is especially grateful to the survivors, caregivers and families of the survivors who opened up to narrate their lived experiences of their interactions with the justice system. Special thanks to all the advocates and judicial officers whose experiences and rich insights shaped this report.

COVAW is indebted to the court staff in all the eight court stations subject of this study including court administrators and staff at the respective criminal registries in Makadara, Kibera, Kiambu, Thika, Ruiru, Kitui, Narok and Nyahururu law courts for their hospitality and invaluable assistance in accessing the required data that was critical to the analysis of the report.

This research study was made possible with the great coordination and support of the COVAW staff led by a dedicated project team comprising of the Executive Director, Wairimu Munyinyi- Wahome and the Programmes Manager Naitore Gituma.

COVAW greatly appreciates the consultant Petronella Mukaindo who conducted the research study and report writing alongside the research support team comprising Cyrus M. Maweu and Faizah Sidi.

Lastly, COVAW remains grateful for the continued valued partnership with the Open Society Initiative for Eastern Africa (OSIEA) whose financial support made this study possible.

EXECUTIVE SUMMARY

This research study was part of a 2-year project entitled "Promoting an Enabling Legal Environment for SGBV Victims" that COVAW undertook with the support of OSIEA. The overall goal of the project was to improve response to SGBV against women and girls. The study aimed to *inter alia* review the law, policy and administration structures within the judiciary that govern management of cases of sexual violence so as to establish the causes of delays in delivering justice to survivors of SGBV particularly those with intellectual disabilities. The study also sought to evaluate the social, legal and economic implications of delay in cases and propose appropriate legislative, policy and administrative measures to address the problem of delayed justice. The impact of COVID-19 on delivery of justice in SGBV cases was also assessed.

To achieve the study objectives, a desktop review was conducted to examine the existing policies, laws and administrative procedures in place at national level and their impact on efficiency in disposal of sexual offence matters. Sample case studies were done of courts across eight court stations: Kibera, Makadara, Thika, Ruiru, Kiambu, Nyahururu, Narok and Kitui. Data in the Sexual Offences case registers in the respective court stations was examined. In order to establish an all-rounded assessment of the subject matter of study, respondents were drawn from practising lawyers and magistrates as well as the survivors of sexual violence and/or their caregivers. Twenty (20) respondents were interviewed for the purpose of the study.

General Findings

The study established the following general findings:

- That defilement cases form the bulk of the sexual offences reported under the Sexual Offences Act as filed in the court stations subject of this study, standing at an average of 75.7 % of the total caseload under the Sexual Offences Act, 2003 (SOA) from the year 2017 to 2020. The offence of rape comes a distant second at 13%. Incest stands at 3.8% followed closely by the offences of sexual assault and indecent act with a child at 3.7% and 3.4% respectively.
- That there is indeed inordinate delay in the determination of cases under the SOA. An analysis of the raw data obtained from the respective Sexual Offences Case Registers reveal that in four out of seven court stations, the percentage of the 2017 SOA cases concluded was below 50% as at the end of October/early November 2021. This means that 4-5 years on, more than half of the case load for 2017 SOA cases are still clogging the criminal justice system and will thus be carried forward and ploughed back into the system in the year 2022 clocking the 5th and others 6th year.
- The study also established, and curiously so, that more than one half of the number of closed files highlighted above were actually withdrawn, mostly under section 87(a) of the Criminal Procedure Code (CPC). Section 87(a) allows a public prosecutor to withdraw prosecution of any person at any time before judgment is delivered.

Legislative and Policy Gaps

In terms of law and policy, the following were the main findings:

- That generally, there is in place an enabling national framework that safeguards the rights of victims and that provides for expeditious disposal of cases of sexual violence. This includes the Constitution of Kenya, 2010, Section 38 (4) of the Persons with Disabilities Act, 2003, Section 31 of the Sexual Offences Act, 2006, Sexual Offences Rules of Court, 2014, Victim Protection Act, 2014 and Fair Administrative Action Act, 2015.
- That besides the statutes, there is place internal Judicial guidelines that foster expeditious disposal of cases. These include the Judiciary Criminal Procedure Bench Book as well as the Active Case Management Guidelines.
- That the lack of clear standard guidelines to guide the treatment of witnesses with intellectual disabilities as well as onboarding of intermediaries has occasioned uncertainties and delays in the trial of sexual violence cases.
- The fact that the Sexual Offences Act, 2006 does not provide for a cap on the timelines for the conclusion of SGBV cases particularly where minors and persons with intellectual disabilities are witnesses means that these sensitive matters are left to compete within the same Court diary. Majority of the advocates and judicial officers interviewed favoured putting a time gap within which these cases are concluded.
- Section 200 of the Criminal Procedure Code that allows for the retrial in case of transfer of magistrates is not only a cause for retraumatising victims but also contributes to delays in conclusion of cases and elusive justice.
- Section 146 of the Penal Code, section 125(2) of the Evidence Act, section 18(3) of the Persons with Disabilities Act and section 166 of the Criminal Procedure Code among other statutes still retain offensive and derogatory terminologies against persons with intellectual disabilities. This serves to further perpetuate stigma, indignity and discrimination for the witnesses with intellectual and psychosocial disabilities. The offensive terminologies also implicitly set the stage on how the trial process progresses henceforth and the handling of the witness evidence during the trial process.

Factors Influencing delay in conclusion of SOA Cases

The following emerged as the key barriers to expeditious delivery of justice in sexual offence matters: Numerous adjournments occasioned by all the parties to the trial process; unavailability of witnesses, non-appearance of expert witnesses such as the Investigation Officers and medical doctors; missing police files and compromise of witnesses. Advocates from both sides (accused and prosecution) are also responsible for the increase in adjournments for one reason or other (whether on account of being indisposed, appearing before other courts amongst other common reasons given). Other causes of delays included court diaries whereby the trial courts adjourned last minute on account of professional training and other

official duties. Poor investigations and transfer of officers involved in the criminal trial including judicial officers, prosecutors and investigating officers contributed to further delays.

The study further established that COVID-19 pandemic contributed to uncertainty, delayed justice and far off dates for the trial of matters. This made some of the complainants lose interest in their cases. In some cases, availability of witnesses also became a challenge as some took advantage of the travel restrictions to evade court process. A number of the advocates interviewed were of the view that the ensuing virtual hearing of matters did not work well in criminal cases. This was partly because of lack of access to smart phones and internet access by a section of litigants. On a positive note, however, it was established that the result to the virtual courts 'accidentally' served to mitigate victim trauma as the hearings were literally on camera, hence minimising the frequent physical interactions between the victim and the accused.

Impact of delayed justice

The study determined the following to be the key consequences of prolonged delay in conclusion of SOA cases: Increased and prolonged mental torture/ psychological trauma visited on the victims and their caregivers which affects their general wellbeing; denial of justice as evidence is lost or weakened over time more so where vulnerable witnesses like children and persons with intellectual disabilities are concerned. Other resultant repercussions included economic constraints and loss of livelihood as a result of several fruitless trips to the court stations over time and social challenges including heightened stigma in communities and threat to the right to education for school-going children. The delays have also encouraged compromise of cases due to frustrations and increased withdrawal of matters. The sum consequence is that people and communities lose faith in the judicial system. This would further encourage underreporting, promote alternative justice means in communities which ultimately perpetuates a culture of impunity by fostering an environment where sexual violence is tolerated.

Key Recommendations

To address the highlighted challenges, the study recommends the following legislative and administrative interventions:

a. That the Penal Code, the Criminal Procedure Code and the Evidence Act be amended to repeal the derogatory terminologies used against persons with intellectual and psychosocial disabilities as these contravene Articles 27, 28 and 54 of the Constitution as well as other international human rights commitments made by Kenya such as Articles 4, 5, 7, 13 and 34 of the Convention on the Rights of Persons with Disabilities.

b. That the Sexual Offences Act 2006 be amended to provide for a time period within which sexual offence matters involving vulnerable witnesses more specifically minors and persons with intellectual disabilities should be concluded. This should be accompanied by enlarged human resource and number of court rooms.

c. Even in the absence of the amendment proposed above, there is an opportunity for the courts to leverage on the Sexual Offences Rules of Court, 2014 allowing for expedited

testimony of witnesses where it is necessary to meet the ends of justice. The caveat here is that an expedited process is not synonymous to a hasty process that risks compromising on the ends of justice as stipulated in the Criminal Procedure Bench Book.

d. That the judiciary sets up specialised sexual offences courts across the court stations with specialised personnel in registries, courts and prosecution that handle SOA cases, this would allow for specialisation and expedition of the cases.

e That further to section 31 of the Sexual Offences Act, that the Judiciary formulates clear standard guidelines on dealing with vulnerable witnesses. There is need to provide clear guidelines on the recognition, admission and role of intermediaries whilst being cautious to respect the legal capacity of the victims to equal recognition under the law. In consultation with the relevant stakeholders, these can be in form of practice directions that stipulate practical options for support and accommodations for the victims that can be adjusted in circumstances of the case.

f. Increased capacity building of magistrates, prosecutors and advocates on handling of SOA cases and more so, on relevant provisions of Victim Protection Act 2014 and handling of witnesses with intellectual and psychosocial disabilities in the trial process. The National Council on Administration of Justice (NCAJ) through the court users committees can serve as entry points for further conversations and sensitisation.

g. That under the umbrella of NCAJ, that the Judiciary, Office of Director of Public Prosecutions (ODPP) and National Police Service steers conversations and action points geared at creating a seamless justice chain and addressing the bottlenecks identified such as missing police files and gaps in evidence collection and exercise of prosecutorial powers.

h. As far as possible, case mentions should be confined only to the minimum necessary to ensure a just and fair trial. This requires cooperation of all the parties involved and conscious and proactive oversight by the courts who take charge of the case management at the stations.

i. When granting bail and bond terms, whilst it is a constitutional right, all circumstances should be taken into consideration including proximity of the accused to the victim and their likelihood of intimidating and compromise of witnesses. Furthermore, and in line with sections 10 and 20 of the Victim Protection Act 2014, courts should actively involve victims and/or their intermediaries and victim advocates in bail hearings and offer them an opportunity to address the court.

j. That the Judiciary should invest in improving court facilities as a matter of priority to allow for a more friendly ambience for court users particularly child victims of sexual offences. Adequate witness protection boxes and children courts should be provided across the court stations.

k. The court should further embrace and actively encourage use of technology; for instance, more actively utilise the protections afforded under the Sexual Offences Act as read with the Sexual Offences Rules of Court, 2014 such as the use of video pre-recorded testimonies as appropriate. Furthermore, the Judiciary should maintain

automated versions of the sexual offences case registers in respective court stations to enhance security, data retrieval, use and efficiency.

l. Psychosocial support should be provided and easily availed to the victims and their families free of charge.

m. The Judiciary should work to improve management of court diaries and ensure prompt and effective communication regarding court dates and status of cases to all the parties concerned.

n. The Kenya Judiciary Academy (formerly Judiciary Training Institute) should provide annual training calendar to court stations way in advance to ensure early planning and management of court diary to avoid last minute adjournments on account of training.

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PART I

PROJECT BACKGROUND

1.1 Introduction

Coalition on Violence Against Women (COVAW) is a national Kenyan not-for-profit women's rights organization. We are committed to advancing women's rights; and work towards achieving a society free from all forms of Violence Against Women and Girls (VAWG). COVAW was founded in 1995 as a response to the silence of the Kenyan society to addressing VAWG. COVAW implements projects under five (5) strategic focus areas including: Access to Comprehensive Sexual and Gender Based Violence (SGBV) and Sexual and Reproductive Health Rights (SRHR) Services; Women's Economic Empowerment; Women's Leadership Development and Access to Justice.

Access to justice is one of the strategic focus areas of COVAW, in line with its strategic plan (2018-2023). The other is comprehensive access to SGBV and SRHR services.

Kenya's judicial system for administration of justice falls short of legitimate expectation especially as it relates to case management in sexual violence matters. It is evident that there is inordinate delay between the inception and conclusion of cases in court especially in cases of rape and defilement. For survivors, the delays in their case progression, poor communication, the uncertainties and last-minute changes to trial dates are very problematic. A range of adverse consequences are caused by inordinate delays, impacting on the personal, domestic, professional and financial lives of survivors which prevent them resuming their ordinary lives. These consequences extend to the families of the survivors.

Kenya has a robust national legal and policy framework to prevent and combat SGBV. Kenya's expansive bill of rights secures various rights and fundamental freedoms that relate to expeditious delivery of justice. Article 48 of the Constitution of Kenya 2010 secures the right to access to justice. Other relevant provisions include Article 47 that guarantees the right of every person to fair administrative action (including judicial processes)[1]; right to equal protection and equal benefit before the law (Article 27), the right to human dignity (Article 28), right to freedom and security of the person (Article 29) and the right to a fair hearing (Article 50). Notably, the right "to have the trial begin and conclude without unreasonable delay" is one of the cardinal tenets of a fair hearing secured under Article 50(2)(e). Survivors of SGBV continue to face several obstacles in their quest to access to justice in the courts.

1 Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. This right is further expounded by the **Fair Administrative Action Act, 2015 (No. 4 of 2015)** which is the Act of Parliament that gives effect to the provision.

The research study identified the existing legal, policy, administrative and institutional gaps that are hindering survivors of sexual violence, including those with intellectual disabilities from enjoying speedy resolution of cases. Great attention has been paid to the length of time the case files to be concluded to assess delays. Sample case studies from eight law courts; that is Kibera, Makadara, Kiambu, Thika, Ruiru, Kitui, Nyahururu and Narok have been used. Besides the causal elements, the study assesses the resultant impact of the delays from social, legal and economic dimensions to the survivors and their families. Finally, based on the findings, the study makes recommendations on viable interventions that need to be undertaken by the Judiciary to ensure efficient and effective resolution of sexual violence cases by courts.

1.2 Objective of Study

The research is aimed at contributing to the overall goal of the project which is ***improving response to sexual and gender-based violence against women and girls***. The study aims at achieving the following specific objectives:

i. Establishing the existing gaps that result in the delay in justice

ii. Review of the laws, policies, codes, court rules, directions and relevant regulations that govern management of cases of sexual violence in court

iii. Review of the administration structures within the judiciary that govern management of cases of sexual violence

iv. Assessment of the causes of delays in delivering justice to survivors of Sexual Gender based violence including those with intellectual disabilities

v. Evaluation of the social, legal and economic implication of delay in cases on the right to access justice for survivors of sexual violence including those with intellectual disabilities

vi. Evaluation of the impact of COVID-19 on Access to Justice for SGBV survivors

vii. Consideration of the appropriate legislative, policy and administrative measures to address the problem of delay in justice

viii. Providing recommendations on interventions to be undertaken by the judiciary in ensuring the management of cases by courts is efficient and effective so that the criminal caseload can be adjudicated fairly, appropriately, and promptly.

1.3 Research Methodology

The research largely relied on primary sources of data including direct interviews with respondents and review of relevant statutes, existing guidelines and court documents. In the first instance, an indepth desktop review was conducted to examine the key existing policies, laws and administrative procedures in place at national and international level and their impact on the efficiency of disposal of sexual offence matters. Review of the various Sexual Offences case registers in the respective court stations was conducted on site to establish the number of cases filed under the Sexual Offences Act and the trend in the speed of conclusion of the cases between the period 2017 and 2020.A literature review was

also conducted of relevant secondary material with a bearing on the efficient and effective disposal of sexual offence cases particularly for persons with intellectual disabilities.

Sample case studies was done of courts across five counties; that is Nairobi City; Kiambu, Kitui, Narok and Laikipia counties. These are the counties within which COVAW has had its operations under the project. More specifically, eight court stations, that is, **Kibera, Makadara, Thika, Ruiru, Kiambu, Nyahururu, Narok and Kitui** were assessed.

In order to establish a 360 degrees assessment of the issue, the study sought to draw the response from advocates and magistrates as well as the survivors of sexual and/or their caregivers. Interviews with respondents who practice law across the 8 identified court stations were conducted. Advocates who represent the SGBV victims in court with experience averaging 3 years and one interviewee of 17 years'. Some of the advocates interviewed were drawn from COVAW's scheme of probono advocates and others were reached through direct contact and chain referrals of advocates who work mainly in the identified stations. In order to elicit and test corroborative perspectives, an additional two advocates outside the study area covering Ngong and Ogembo law courts were interviewed. Judicial officers whose practice averaged 8 years were also interviewed to elicit views and experience from the bench in the handling of cases under the Sexual Offences Act (hereafter "SOA cases"). Twenty (20) respondents in total were interviewed in the study.

Given that majority of the matters involved minors, interviews with their caregivers who were parents was also conducted to bring out respondents' perceptions, lived experiences and interaction with the court system. One survivor who was by the time of interview above 18 years of age was also interviewed.

1.4 Data Research tools and Analysis

For advocates, telephone interviews and zoom calls were conducted and questionnaires administered. For the magistrates and caregivers, face to face physical interviews were conducted as well as guided questionnaires. Physical visits to the 8 court stations were conducted in which the study team had a one on one interaction with court administrators and registry staff and judicial officers.

Semi-structured questionnaires were developed and shared with the advocates and judicial officers. A separate tool was used for the caregivers of SGBV. The tools were tailored in such a way as to encourage participatory engagement by respondents. The questionnaires are provided as **annexures I and II**.

Data collected from the field was transcribed and analysed using thematic induction approach into a report. Data from the other primary sources and that from the direct interviews was triangulated to buttress and validate the findings. Analysis of the data was done using MS Excel spread sheets and the findings presented in form of narratives, tables, graphs as appropriate. To preserve confidentiality of the respondents particularly caregivers, anonymization of respondents was done and care taken to minimise on identifiers provided that might effectively identify them.

1.5 Study Limitations and Challenges

Data collection and disaggregation: The records as kept in court registries do not expressly indicate cases involving victims with intellectual disabilities; besides the entries where the offence was one under section 7 of SOA.[2] This meant, it was not possible to establish the number of cases involving persons with intellectual disabilities.

Notably, the court stations are still using manual forms of Sexual Offences case registers. While this is commendable as the data on SOA cases is available on one stop shop, it was time-consuming and challenging to peruse and manually count the hand written entries over the years. In two court stations, there were some few gaps in the entries on the offence column of the registers which made it impossible to establish the nature of offence committed outside the individual court files. One of the study assumptions is therefore that the entries made in the sexual offences case registers, including the actions indicated were accurately captured in the register and up to date.

The scope of the study: The research study was limited to the disposal of SOA cases with a bias towards defilement matters. Whilst there may be overlaps in the causes, experiences and similarity in trends, it is worth pointing out that the sexual offence matters were examined by their own right; comparison between the experience in disposal of cases with other criminal cases was therefore not subject of the current study. Another limitation for the study was the small sample size of the respondents.

Scheduling Interviews: The delays in some of the respondents confirming interview dates as well as postponement of interview dates affected the speedy conclusion of the field research. Some of the judicial officers declined to be interviewed without authorization from the headquarters.

2 Section 7 of Sexual Offences Act states, *"A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years".*

PART II

NORMATIVE FRAMEWORK FOR EFFECTIVE AND EFFICIENT DISPOSAL OF SOA CASES

This section presents the findings of desktop research. **It succinctly highlights the international and regional frameworks governing SGBV in Kenya**, with a bias towards access to justice and redress for sexual violence cases. It also evaluates the national framework Constitution of Kenya and relevant laws and guidelines that foster expeditious and effective disposal of SOA cases while identifying any extant gaps that contribute to delay in conclusion of sexual offences as analysed from primary and secondary material.

2.1 International Frameworks

Kenya has ratified international and regional treaties relating to human rights which guarantee the right to access to justice. By dint of article 2(6) of the Constitution of Kenya, these treaties and conventions form part of Kenyan law.

The Protocol to the African Charter on Human and Peoples Rights (Maputo Protocol) is perhaps the most significant regional human rights instrument that specifically mentions access to justice as a right. Article 8 of the Maputo Protocol provides that men and women are equal before the law and have the right to equal protection and benefit of the law. The provision binds State parties to provide effective access by women to judicial and legal services including legal aid.

Key to access to justice for victims and survivors of SGBV is the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). Article 2 of CEDAW obligates State parties to take all appropriate measures to guarantee substantive equality of men and women in all areas of life. Article 15 of CEDAW provides that men and women are entitled to equality before the law and the benefit from equal protection of the law.

The CEDAW Committee in its General Recommendation No. 33 on women's access to justice, has noted that deficiencies in the justice system including delays and excessive length of proceedings are factors that prevent women to gaining access to justice hence violating the standards contained in CEDAW.[3]

3 CEDAW General Recommendation No. 33 on Women's Access to Justice (CEDAW/C/GC/33) 3 August 2021, accessible at https://www.ohchr.org/en/hrbodies/cedaw/pages/recommendations.aspx.

Kenya has also ratified the Convention on the Rights of Persons with Disabilities (CRPD). Under article 12 of the CRPD which safeguards the right to equal recognition before the law Kenya, as other State Parties is duty bound to "ensure that the barriers to exercising legal capacity are removed and that the supports are in place for people with disabilities to fully enjoy and exercise their legal capacity, "that appropriate measures are taken to "provide access by persons with disabilities to the support they may require in exercising their legal capacity" and that "persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life".

Article 13 of the CRPD requires State parties to ensure access to justice for persons with disabilities on an equal basis with others. The provision specifically requires State parties to provide procedural and age-appropriate accommodations for persons with disabilities to facilitate their effective participation throughout the justice system. The Special Rapporteur on the Rights of Persons with Disabilities has issued International Principles and Guidelines on Access to Justice for Persons with Disabilities which provides an elaboration of the CRPD standards in relation to access to justice for persons with disabilities. Key interpretative guidelines issued to State parties relevant to delayed justice during criminal trials processes include the need to repeal or amend laws, regulations, policies, practices and guidelines that restrict or exclude witnesses with disabilities from testifying based on an assessment of their capacity to testify. State parties are urged to provide for an actionable and enforceable right to individually determined accommodation necessary to participate in court proceedings.

The Committee on the Rights of Persons with Disabilities in its review of Kenya in 2015 expressed concern on obstacles in prosecution of cases where the victim or witness is a person with a disability including legal provisions that restrain the validity of corroborated evidence of persons with intellectual or psychosocial disabilitie and the absence of accommodations and communication supports throughout court proceedings. The Committee on the Rights of Persons with Disabilities recommended that Kenya:

(a) Adopt measures to ensure that all persons with disabilities have access to justice, including by establishing free legal aid for persons with disabilities who claim their rights, and information and communication in accessible formats, including the Kenyan sign language;

(b) Define explicitly in legal instruments the duty of the judiciary to provide procedural accommodations for persons with disabilities in accordance with article 13 of the Convention; and

(c) Develop a capacity building strategy within the judicial branch on the rights of persons with disabilities, including lawyers, magistrates, judges, prison staff and the Police.[4]

Under the Sustainable Development Goal 5, States including Kenya have committed to "End all forms of discrimination against all women and girls everywhere" and to "Eliminate all forms of violence against all women and girls in the public and private spheres, including

4 United Nations Convention on the Rights of Persons with Disabilities 'Concluding observations on the initial report of Kenya' CRPD/C/KEN/1 para 25, 26 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fKEN%2fCO%2f1&Lang=en>

trafficking and sexual and other types of exploitation". In addition, goal 16 of the Sustainable Development Goals (SDGS) calls on States to promote just, peaceful and inclusive societies in order to achieve *inter alia* the following specific targets:

> "16.1 Significantly reduce all forms of violence and related death rates everywhere
>
> 16.2 End abuse, exploitation, trafficking and all forms of violence against and torture of children
>
> 16.3 Promote the rule of law at the national and international levels and ensure equal access to justice for all
>
> 1.6 Develop effective, accountable and transparent institutions at all levels".

During the third cycle review under the Universal Periodic Review in 2020, Kenya committed to *inter alia* set up specialized courts that enable the speeding up and the effective treatment of gender-based violence cases as well as to, 'Intensify efforts to secure redress for survivors of sexual violence following 2007 and 2017 Presidential elections, and establish mechanisms to ensure such crimes are never repeated'.[5]

2.2 National Frameworks on access to justice for victims and survivors of sexual violence

The Constitution of Kenya 2010

The Constitution contains several provisions that touch on access to justice. Article 48 of the Constitution provides for the right to access to justice and obligates the State to ensure that any fee required is reasonable and shall not impede access to justice. Article 50 of the Constitution guarantees the right to a fair hearing including the right to have a trial begin and conclude without unreasonable delay. In addition to article 48 and 50 of the Constitution, other relevant provisions include Article 47 that guarantees the right of every person to fair administrative action (including judicial processes)[6]; right to equal protection and equal benefit before the law (Article 27), the right to human dignity (Article 28), and the right to freedom and security of the person (Article 29).

Section 38 (4) of the **Persons with Disabilities Act, 2003**[7] obligates the Chief Justice to ensure that suits involving persons with disabilities are expeditiously handled. Section 186 (c) of the Children Act, 2001[8] requires that trials involving child offenders be determined without delay.

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5 Human Rights Council Report of the Working Group on the Universal Periodic Review(A/HRC/44/9) available at https://www.ohchr.org/EN/HRBodies/UPR/Pages/KEindex.aspx.

6 Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. This right is further expounded by the Fair Administrative Action Act, 2015 (No. 4 of 2015) which is the Act of Parliament that gives effect to the provision.

7 Persons with Disabilities Act No 14 of 2003 available at http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=-No.%2014%20of%202003

8 Children Act No 8 of 2001 available at http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%208%20of%202001

The **Judiciary Criminal Procedure Bench Book ("The Bench Book")**[9] re-emphasizes the constitutional right of an accused person to have a trial concluded without delay. Courts are guided to carefully plan and organize trial with the intention of avoiding unnecessary delay. The Bench Book further guides courts on its obligation to ensure expeditious conclusion of cases involving children and persons with disabilities.[10] The Bench Book further notes that an expeditious trial is not a hasty trial which carries the risk of unfair outcomes for the accused person.[11] As part of case management the Bench Book guides Courts to hold pre-trial conferences to make necessary arrangements for trial in order to minimize unnecessary adjournments and interlocutory applications which may cause undue delay during trial.

The **Active Case Management Guidelines** provide guidance to court on the conduct of criminal proceedings. It identifies as an overriding objective that criminal cases must be dealt with justly and expeditiously. The guidelines reemphasize need for pre-trial conference as essential to ensuring expeditious criminal trial process.

The **Sexual Offences Act, 2006**[12] is the specialised governing the prevention and the protection of all persons from harm from unlawful sexual acts. According to Section 2 of the Sexual Offences Act, complainant 'means the Republic or the alleged victim of a sexual offence and in the case of a child or a person with mental disabilities, includes a person who lodges a complaint on behalf of the alleged victim where the victim is unable or inhibited from lodging and following up a complaint of sexual abuse'. The Act not only defines sexual offences but also provides the procedure for dealing with vulnerable witnesses and victims during trial. A child, a person with mental disabilities or an elderly person is identified as a vulnerable witness under section 2 of the Act. Upon declaration as a vulnerable witness, the Court under section 31 (5) may direct that the witness is protected by providing evidence under the cover of a witness protection box or provide evidence through an intermediary. In addition, the court can order court proceedings do not take place in open proceedings. Section 40 of the Act provides the Attorney General with the power to determine whether a prosecution or investigation if a sexual offence can be discontinued.

In its analysis of state obligations under article 12 of the CRPD on legal capacity, the Kenya National Commission on Human Rights (KNCHR) has however found section 31(10) to be problematic and contrary to article 12 of the CRPD to the extent that it provides that an accused cannot be convicted solely on the uncorroborated evidence of an intermediary. In recommending a review of the section, the KNCHR report concludes that, "Subsection 10 of the section 31 makes reservations on the credibility of a person with disabilities as a witness and portrays them as persons without legal capacity".[13]

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9 Judiciary of Kenya *Criminal Procedure Bench Book* (February 2018) page 60

10 Ibid

11 Ibid

12 Sexual Offences Act No 3 of 2006 available at http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%203%20of%202006

13 Kenya National Commission on Human Rights and Open Society Initiative for Eastern Africa, *How to Implement Article 12 of Convention on The Rights Of Persons With Disabilities Regarding Legal Capacity In Kenya: A Briefing Paper* pp 68, 140; available at https://www.knchr.org/Publications/Thematic-Reports/Group-Rights/Rights-of-Persons-with-Disability-PWD.

The **Sexual Offences Rules of Court, 2014** allows for expedited testimony of witnesses where it is necessary to meet the ends of justice.[14] The Rules allow the Court to make orders or make directions to 'ensure victims and vulnerable witnesses are treated in a manner that recognizes their vulnerability'. Such orders include the use of intermediaries, including admitting in evidence a statement of facts-in-issue made by a vulnerable witness to an intermediary; expedited testimony of witnesses; admitting in evidence a recorded statement made by a vulnerable witness as the evidence-in-chief of the vulnerable witness; making an audio-visual recording of the examination, in full or in part, of a vulnerable witness; and excluding an accused person from being present in court, and instead having proceedings transmitted to the accused persons.

The **Victim Protection Act, 2014** seeks to implement article 50 of the Constitution on the rights of victims of crime.[15] The Act places the dignity of victims at the core of the criminal justice system by requiring that they be provided with better information which includes information about bail and bond. The courts are duty bound to ensure that the victim is given an opportunity to be heard and to respond before any decision affecting him/her is made including the release of the perpetrator on bond and also ensure the victim and their families are safe before determining the conditions of bail and release the offender. This has been reaffirmed in the case of ***Joseph Lendrix Waswa vs Republic[16],*** the Court of Appeal in Kisumu reiterated lawyers who act for victims have a role to play in representing victims and their interests during trial. The Act establishes a Victim Protection Board which has several roles including to ensure that the victims is accorded all rights during trial process.

The Supreme Court in **Joseph Lendrix Waswa v Republic** pronounced itself on the importance of concluding criminal trials expeditiously thus:

> *In the instant matter, the delay of over six years in our opinion, defeats the intention of the framers of the Constitution and of Parliament to have criminal trials concluded expeditiously. The guarantee to have a criminal trial conducted without undue delay relates not only to the time by which a trial should commence but also the time by which it should end, judgment rendered and any applicable appeals or reviews completed….*
>
> *Therefore, although criminal trials are not timebound like election petitions, there is need to have them determined expeditiously in line with the constitutional prescriptions.*[17]

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14 Rule 3 Sexual Offences Rules of Court, 2014 available at http://kenyalaw.org:8181/exist/kenyalex/sublegview.xql?subleg=No.%203%20of%202006#KE/LEG/EN/AR/S/NO.%203%20OF%202006/SUBLEG/HC_000

15 Victim Protection Act No. 17 of 2014 available at http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2017%20of%202014.

16 Joseph Lendrix Waswa v Republic [2019] eKLR; Kisumu Criminal Appeal No 132 of 2016 available at http://kenyalaw.org/caselaw/cases/view/174350/.

17 *Joseph Lendrix Waswa v Republic* [2020] eKLR; Supreme Court Petition No. 23 of 2019; paras 91 & 92 available at http://kenyalaw.org/caselaw/cases/view/200397/

Critical to realising justice to the victims is the establishment of a victim protection trust fund under Part V of the Act. As at the time of conclusion of the study, the draft regulations meant to fully operationalise the Act including the fund had not been finalized.

The **Fair Administrative Action Act, 2015** provides a framework for fair administrative action and applies to any person performing judicial proceedings under the Constitution.[18] Section 4 of the Act provides that every person has the right to administrative action that is expeditious, lawful, efficient, reasonable and procedurally fair.

The **National Policy for Prevention and Response to Gender Based Violence** adopted in 2014 provides the policy framework to guide executive response to gender-based violence. The policy's overall goal of the policy is to accelerate efforts towards the elimination of GBV in Kenya. The policy puts in place a framework to accelerate the implementation of laws, policies and programs for prevention and response of GBV by state and non-state actors for the realization of a society where men, women, boys and girls are free from all forms of violence.

Kenya's Penal laws still contain archaic and derogatory language against persons with psychosocial and intellectual disabilities. Words such as imbecile, idiot, lunatic are in their ordinary meaning demeaning and strips off the dignity of victims. Noting the negative implication of the provisions on women and girls with intellectual disabilities, COVAW has filed a case in court challenging the constitutionality of sections 146 of the Penal Code as well as section 25(2) of the Evidence Act.[19] A sample of the laws laden with derogatory terms are listed in the table below:

No.	Law	Derogatory Sections and Terminologies
	Penal Code (Chapter 63, Laws of Kenya)	Section 146: Any person who, knowing a person to be an ***idiot or imbecile***, has or attempts to have unlawful carnal connection with him or her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the person was an ***idiot or imbecile***, is guilty of a felony and is liable to imprisonment with hard labour for fourteen years.
	Persons with Disabilities Act 2003	Section 18(3) Special schools and institutions, especially for the deaf, the blind and the ***mentally retarded***
	Evidence Act (Chapter 80, Laws of Kenya)	Section 125(2) A ***mentally disordered person or a lunatic*** is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them. Section 126: ***Dumb*** witnesses

18 Section 3 Fair Administrative Action Act No 4 of 2015 available at http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%204%20of%202015#part_II

No.	Law	Derogatory Sections and Terminologies
	Marriage Act No. 14 of 2014	Section 12 (a) (ii) a marriage is voidable if either party was and has ever since remained subject to recurrent attacks of ***insanity***;
	Children's Act 2001	Part 1(2) "disabled child" means a child suffering from a physical or ***mental handicap*** which necessitates special care for the child;
	Criminal Procedure Code (Chapter 75, Laws of Kenya)	Section 166: Defence of ***lunacy*** adduced at trial

The use of the offensive terms against persons with disabilities is contrary to Articles 4, 5, 7, 13 and 34 of the CRPD. The provisions also violate the Constitution of Kenya, more specifically articles 27(equality and freedom from discrimination), 28(human dignity), 29(freedom and security of the person) and 54(persons with disabilities). Article 54(1)(a) of the Constitution entitles persons with disabilities to be treated with dignity and respect and to be, "addressed and referred to in a manner that is not demeaning". Further, section 11 of the Persons with Disabilities Act, 2003.

Moreover, section 146 of the Penal Code above is discordant with the Sexual Offences Act. The section creates a lesser punishment for persons deemed "idiot" or "imbecile" as compared to that provided under sections 8 of the Sexual Offences Act. This is contrary to Article 27(1) of the Constitution which guarantees the right to equality before the law and right of every person, "to equal protection and equal benefit of the law".

2.3 Literature Review

The international and national legal and policy frameworks behove upon the State to respect, protect and fulfil the rights of victims and survivors of sexual and gender-based violence by ensuring that perpetrators are held to account and that victim's access appropriate remedy. Despite these provisions and progress made, undue delays in hearing and determination of cases has prevented victims from accessing justice. Delays in criminal justice proceedings affect all participants in the justice system. Delay in court cases affects quality of testimony provided and contributes to apathy in victims and witnesses' participation in cases. The impact of delay on complaint or victims of crime can lead to the acquittal of an accused person during trial before subordinate courts or withdrawal if complaint.

Section 202 of the Criminal Procedure Code makes mandatory the appearance of the complainant during criminal trial in subordinate courts failure upon which the accused person is acquitted. With limited State support to victims of crime as mandate under article 50 of the Constitution of Kenya and the Victim Protection Act, delay in court proceedings coupled with expenses in travel to and from court could deter victims/complaints from fully pursuing their cases in court.

The effect of delays is more disproportionate on persons with intellectual disabilities who face unique challenges and barriers that hinders their effective participation in the criminal justice system. Persons with intellectual disabilities may have difficulty recalling information and sequencing events over a period of time. Hence, the more the time lapse between the time an offence occurs and the time taken before testifying, the poorer the quality of evidence received. Non-disabled persons also experience delays in the criminal justice system as well; however, delays present a heightened barrier to access to justice for persons with intellectual disabilities.

According to a study conducted by Kenya Association for the Intellectually Handicapped (KAIH), women and girls with intellectual disabilities face numerous challenges in accessing justice[20] where police and health service providers do not take such cases seriously and do know how to handle them to ensure they communicate effectively and offer the required services and support. They also do not see them as competent witnesses.

> **"A key barrier to accessing justice and cause for delay in providing justice for persons with intellectual disabilities is the non-provision or delay in provision of procedural and other accommodation including communication accommodations necessary to ensure that they participate in the criminal process as victims of crime.**

Persons with intellectual disabilities face barriers in their role as witnesses during the prosecution of sexual and gender-based violence. Attitudes and stereotypes about persons with intellectual disabilities lead to a presumption that their testimony is not reliable or is of lower quality than that of non-disabled persons. This attitude is further reinforced under the Evidence Act. Specifically, section 125 (1) of the Evidence Act assumes that some people lack competency to give evidence in court due to inability to provide rational answers caused by tender years, extreme old age, disease of the mind or body or any other reason.

Section 125 (2) further provides a mentally disordered person or a lunatic is incompetent to testify if they are prevented from understanding the question put to them or giving rational answers. Section 125 (1) & (2) of the Evidence Act is may be applied to the detriment of persons with intellectual disabilities by perpetuating the presumption that their evidence carries less weight and hence less likely to be believed.

Section 125 of the Evidence Act provides the basis upon which a voir dire 'trial within a trial' is carried out to determine whether a witness is competent to testify. It remains unclear whether an adult with intellectual disability should be subject to a voir dire which runs the risk amounting to discrimination against the person with intellectual disability as they are viewed as being incompetent to testify.[21]

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20 Kenya Association for the Intellectually Handicapped, 'Access to the criminal justice system by persons with intellectual disabilities as victims of crime: barriers and opportunities' 2016

21 *Kivevelo Mboloi V R* [2013] EKlr

A key barrier to accessing justice and cause for delay in providing justice for persons with intellectual disabilities is the non-provision or delay in provision of procedural and other accommodation including communication accommodations necessary to ensure that they participate in the criminal process as victims of crime. Communication is key in a witness's ability to provide evidence in court and participate in court process. However, persons with intellectual disabilities are negatively affected by communication difficulties such as difficulties in recalling events, unfamiliar language used in court setting and difficult questioning styles employed by advocates.[22]

As noted by KAIH, there is general failure by actors in criminal justice system to implement laws and policies that allow for the use of accommodation for people with intellectual disabilities. Key amongst these provisions are articles 50(7) of the Constitution which provides for the use of intermediaries and 54(1)(d) which promotes the right of persons with disabilities to use 'other appropriate means of communication. Section 31 of the Sexual Offences Act which authorizes for the use of accommodations including 'allowing a person with mental disability to give evidence under the protective cover of a witness protection box'. The Sexual Offences Rules, 2015 which allows for the use of technology in enhancing access to justice.

It has further been noted that the courts have underutilized section 52 of the Evidence Act which allows the Courts to take expert opinion. Expert opinion would provide a good avenue to take in expert advice on the kinds of accommodations a witness or victim with intellectual disability will need in order to effectively provide evidence in court. Difficulty in taking evidence from victims of sexual violence with intellectual disability is also connected to the failure to capture disability data at the reporting stage. Collection of this data and pre-trial preparation is critical to determine accommodations necessary to facilitate provision of testimony by victims during trial.

It has been observed that there is lack of clarity at trial between judicial officers and prosecutors on whose role it is to expedite taking the testimony of the person with an intellectual disability.[23] As noted above, numerous laws obligate actors in criminal justice system to expedite trials involving persons with disabilities. These laws include Article 159(2)(b) of the Constitution; Section 38(4) of the Persons with Disabilities Act; Section 9(1)(b) of the Victim Protection Act and Rule 3 of the Sexual Offences Rules of Court, 2014). On case management, the Criminal Procedure Bench book guides courts to hold pre-trial conference to address preliminary matters and make arrangements for the trial including how to handle

"Expert opinion would provide a good avenue to take in expert advice on the kinds of accommodations a witness or victim with intellectual disability will need in order to effectively provide evidence in court.

22 J Morrison, J Bradshow, & G Murphy 'Reported Communication Challenges for Adult Witnesses with Intellectual Disabilities Giving Evidence in Court (International Journal of Evidence & Proof Vol 25(4)

23 Kenya Association for the Intellectually Handicapped, 'Access to the criminal justice system by persons with intellectual disabilities as victims of crime: barriers and opportunities' 2016

vulnerable witnesses.[24] A failure to implement these laws and guidelines further contribute to delays in criminal proceedings.

The State of the Judiciary Report 2019/2020 financial year records that whereas success has been recorded in reducing case backlog, shortages of judges and judicial officers have significantly impacted the efforts made.[25] Witness intimidation and pressure to settle matters out of court further contribute to the delays experienced and eventual withdrawal of cases out of court.[26]

24 Judiciary of Kenya *Criminal Procedure Bench Book* (February 2018) page 69

25 Judiciary of Kenya *The State of the Judiciary and Administration of Justice Report 2019/2020FY* page 6

26 COVAW Project Baseline Report: Status of Sexual and Gender Violence on Intellectually Challenges Women and Girls in Nairobi, Narok, and Kiambu Counties page 37

PART III

FORMS AND PROGRESS OF SEXUAL OFFFENCE CASES AND IMPACT OF DELAYED JUSTICE

This Part analyses the causes of delays in the court system based on the findings of the field research. The Part also brings out how the law has been applied in practice and how this has contributed challenges in case management of SGBV cases. This section will also bring out the impact of the delays on the survivors and their caregivers.

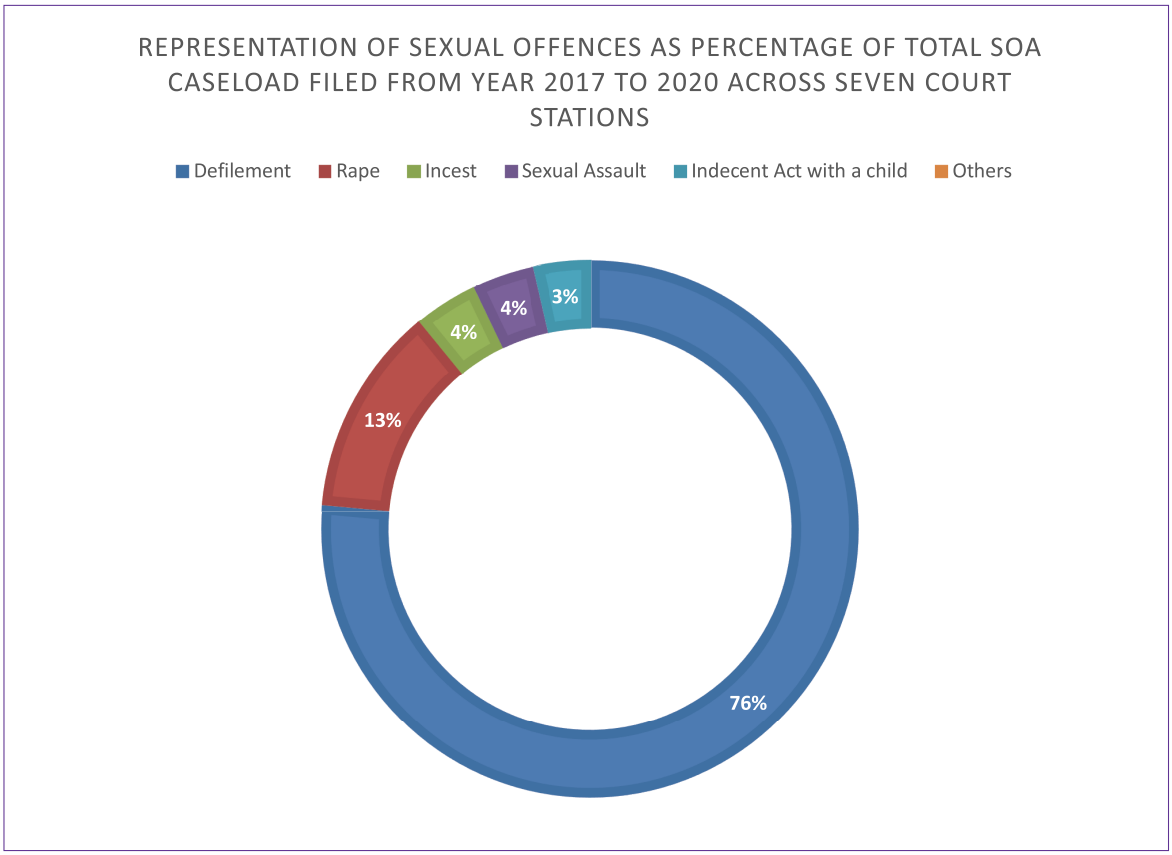
To note is that although the respective court stations each keep special Sexual Offences Case Registers, sexual offences are considered criminal matters and are handled as criminal offences. They are bound by the rules of evidence and criminal procedure.

3.1 Forms of Sexual Offences

The study established that in the four-year period between 2017 and 2020, a total of 3,791 sexual offence cases were filed across the seven court stations; that is Kibera, Makadara, Kiambu, Thika, Kitui, Nyahururu and Narok law courts. Below is a breakdown of the specific offences against which charges were preferred:

	No. of files (2017-2020)	Percentage (of total files)
Defilement[27] cases	2,871	75.7%
Rape	472	12.5%
Incest	144	3.8%
Sexual assault	140	3.7%
Indecent act with a child	128	3.4%
TOTAL NUMBER OF SOA CASES (2017-2020)	**3,791**	

27 The category includes the offence of defilement, attempted defilement as well as gang defilement. For purposes of the exercise Attempts to the offence were classified under the main charge this included attempted rape, gang rape and attempted incest. The raw data was obtained from the respective Sexual Offences Case Registers of the respective Courts.



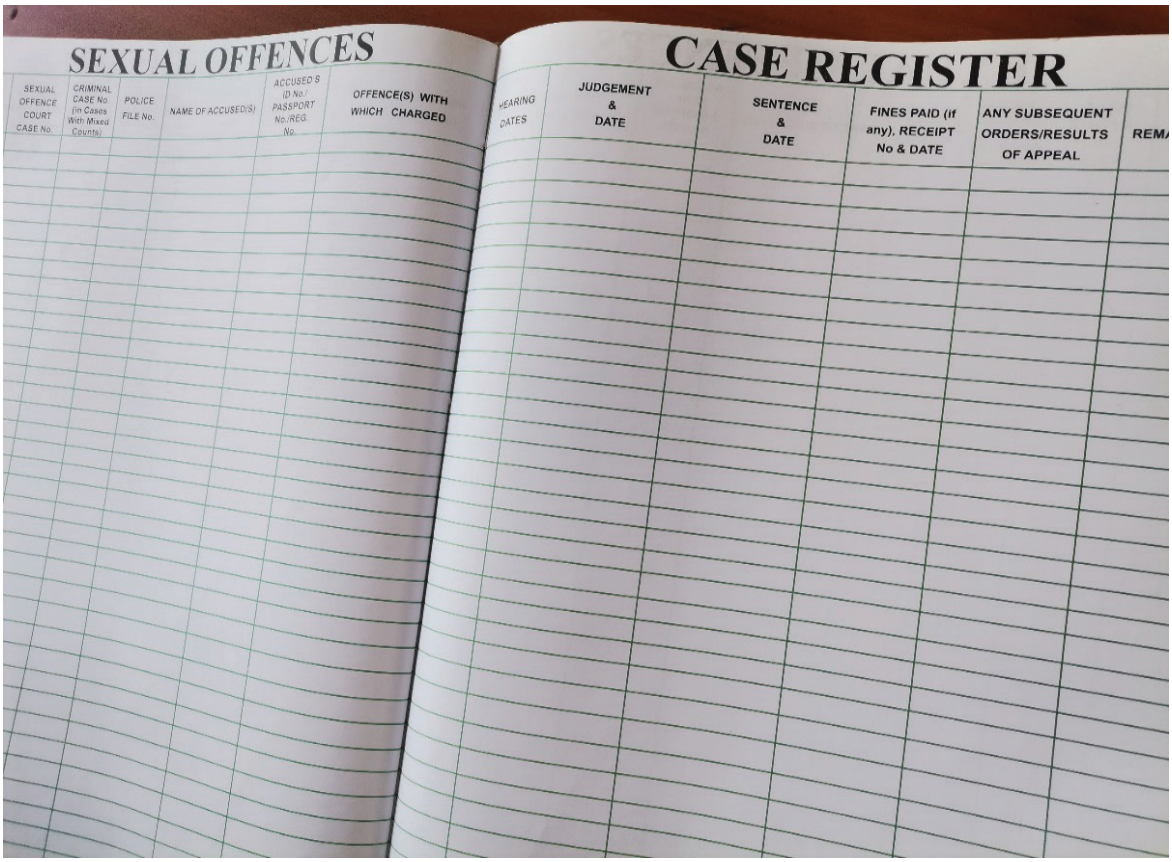


Figure 1: Snap shot of the inside of Sexual Offences Case Register maintained in court stations wherein the entries regarding offences under the SOA are maintained and actions updated.

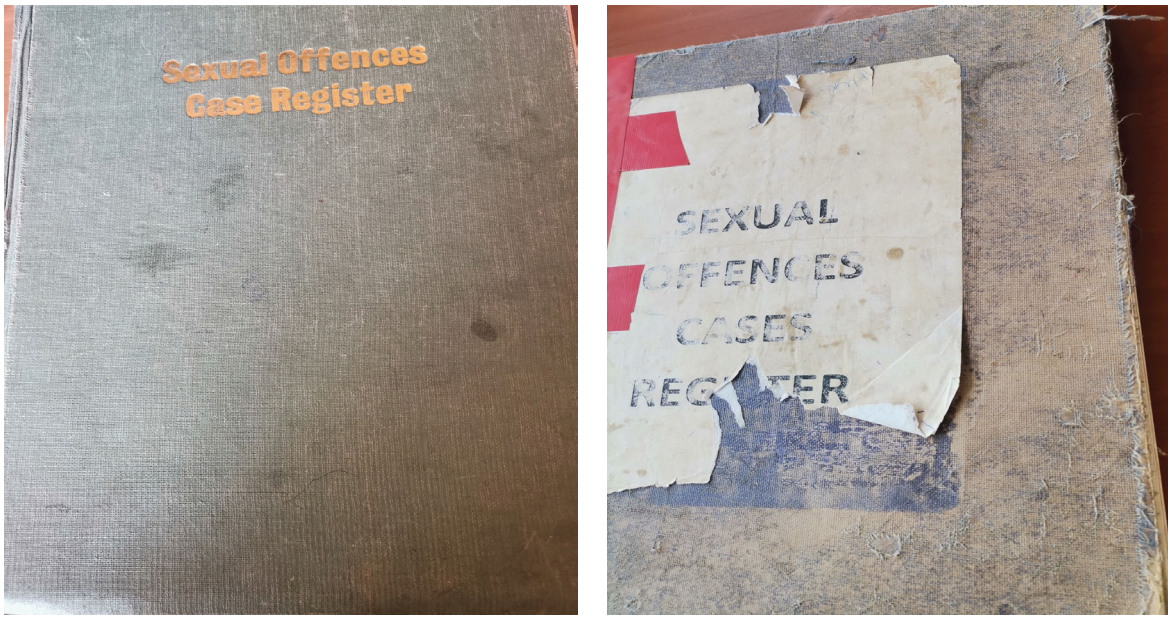
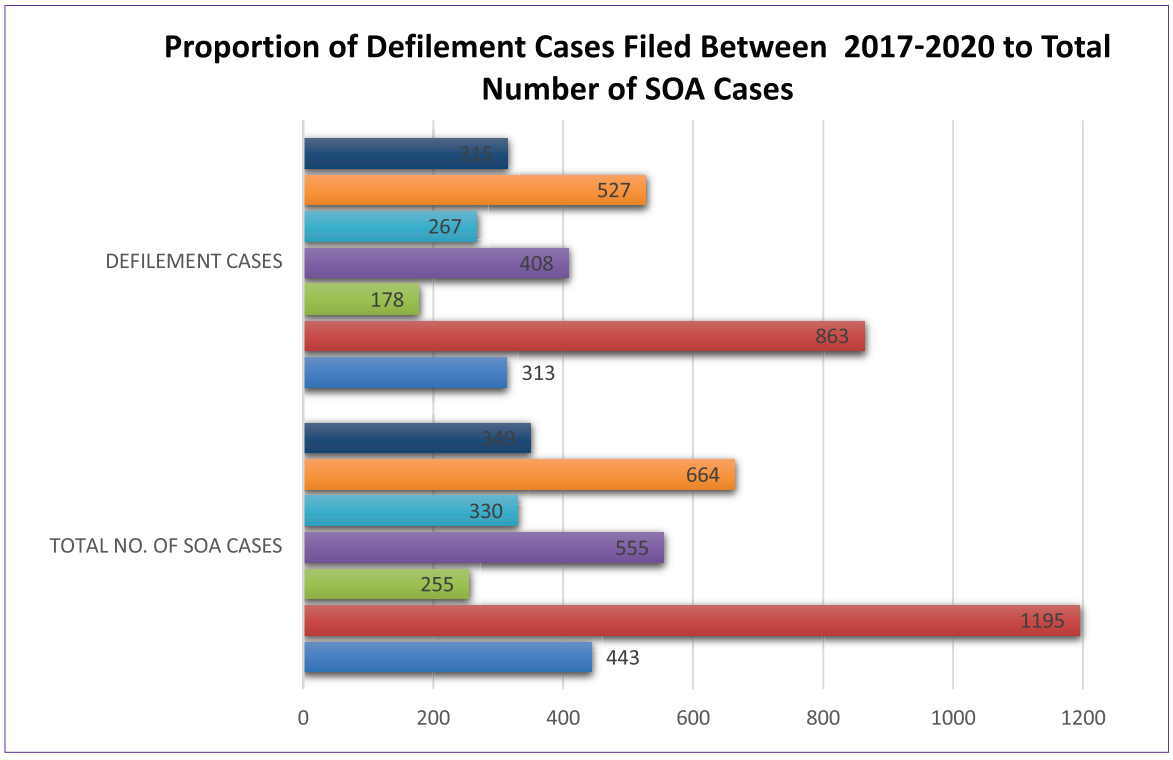
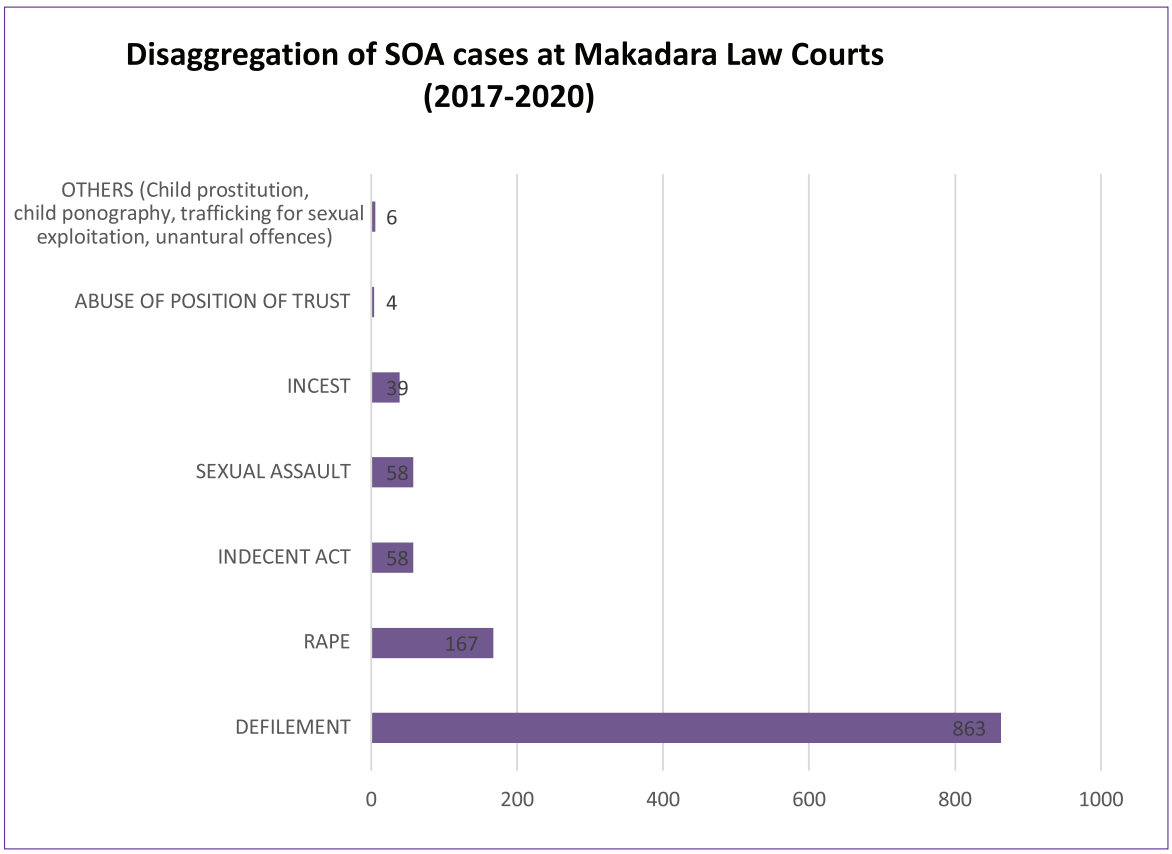


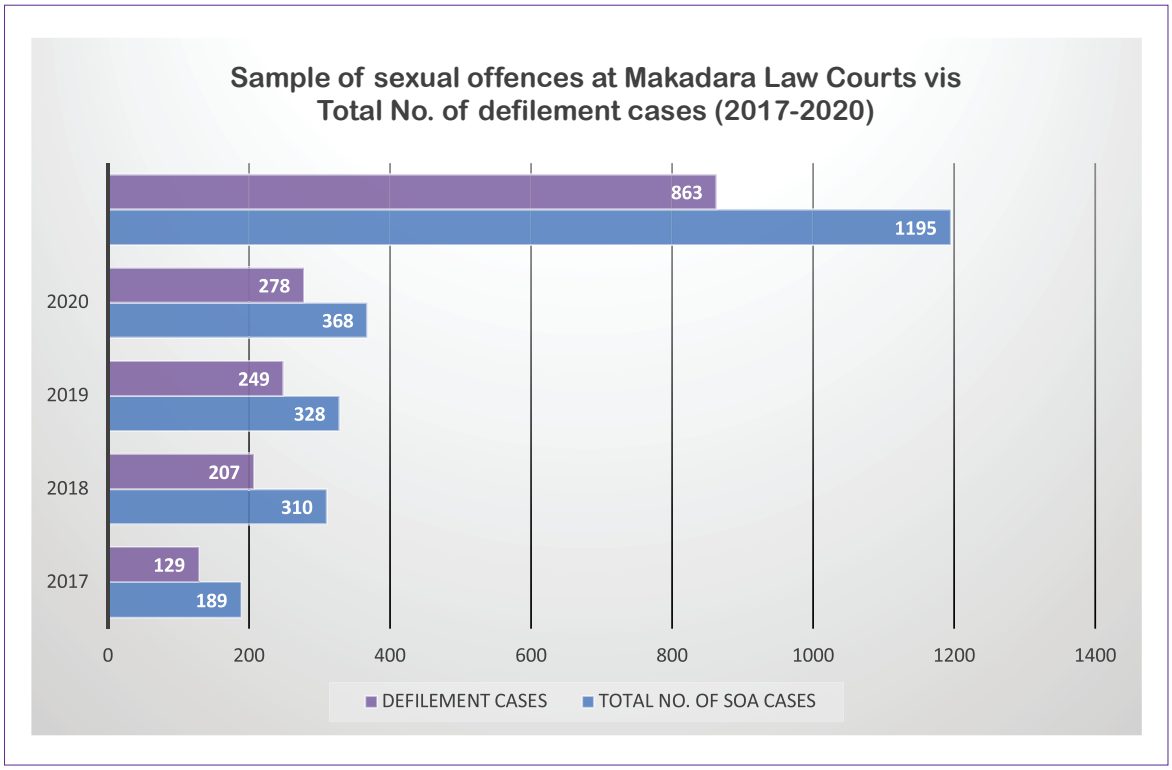
Figure 2: Below: Sample copies of Sexual Offences Case Registers maintained in criminal registries at the Court stations.

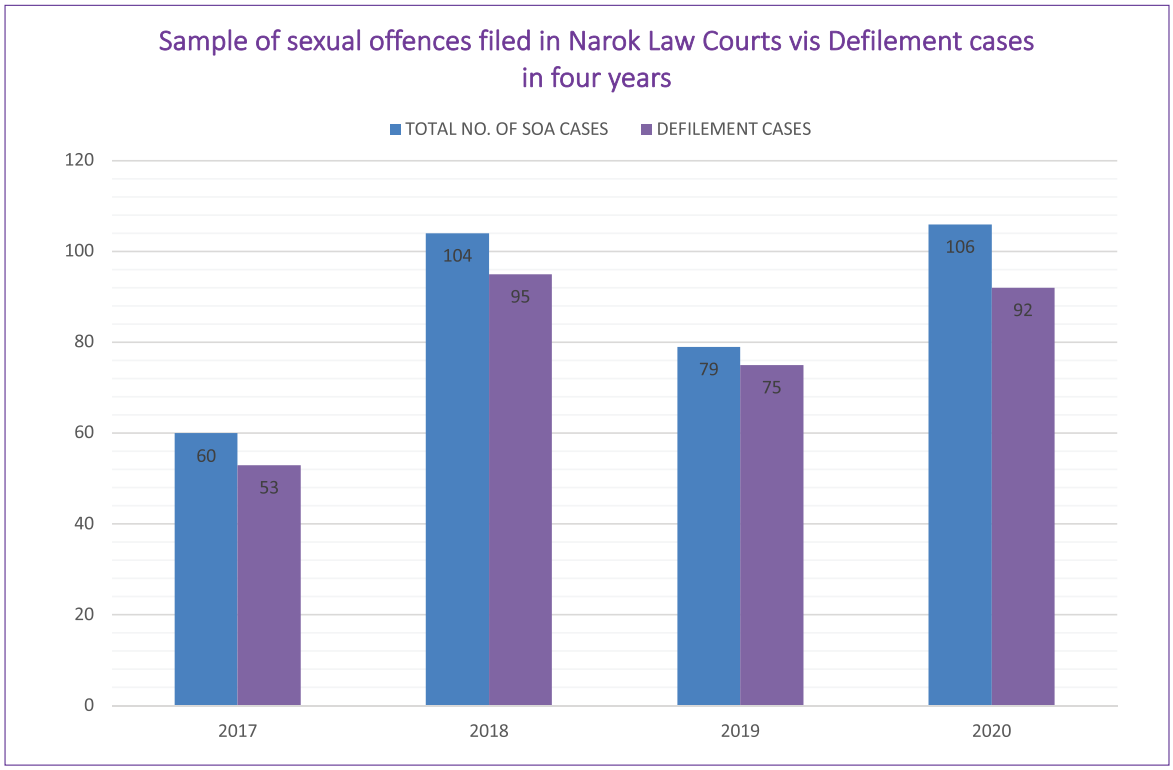


Out of the court stations sampled in the study, Makadara Law Courts had the highest case load on SOA cases standing at 1,195 for the four-year period between 2017-2020. Narok Law Courts reported the highest number of defilement cases in proportion to the number of sexual offences filed at the station at 90% out of which 72.2% were defilement matters, while Kiambu had the least number of sexual offences at 255 matters out of which 69.8% were defilement matters.

Even the newly established Ruiru Law Courts showed a similar trend with the total number of cases for the years 2019 and 2020 standing at 93 of which 70.9% were defilement cases.






Sample of sexual offences filed in Narok Law Courts vis Defilement cases in four years
TOTAL NO. OF SOA CASES
DEFILEMENT CASES
120
100
80
60
40
20
0
60
53
104
95
79
75
106
92
2017
2018
2019
2020


THE JUDICIARY-NAROK LAW COURTS


KIBERA LAW COURTS

3.2 Adequacy of Legal and Policy Framework on Sexual Offences

When asked whether in their view there the is any policy or legal gaps that hinder expeditious disposal of cases, a majority of respondents were of the view that the law on paper was good. According to the respondents, the challenge/gaps lay in the implementation of the existing laws and policies:

> *"The loopholes - disconnect - exists in training and implementation of the laws and policies".*
>
> *{Nairobi-based Advocate}*

Some respondents interviewed however felt that the legal framework could be amended in a number of ways as follows:

I. Amending the Sexual Offences Act, 2006 to provide for timelines within which the SOA cases should be heard and determined. Those who favoured this proposal opined that sexual violence cases are very sensitive in nature and particularly where vulnerable witnesses such as children and persons with disabilities are involved, ought to be resolved within the shortest period possible. When probed further to suggest what would be a reasonable cap period, the respondents felt that six months to one year at the outmost was ideal period to hear and determine all cases. One advocate proffered thus:

> *"I would recommend that Courts do have timelines in these cases especially where minors and persons with mental illness are concerned. Like [that] case began in 2016 and ended in 2019. So by the time some of the witnesses are testifying, the memory is foggy and the court is not able to get the finer details, you know, the proper picture of what transpired…I think these cases should not take more than six months. In most cases the offenders are well known to victims. By the time the case is presented in court, it is presumed that the investigations are complete ... Once the file is complete, then it should be fast-tracked so that the value of that evidence is not lost".*

Another advocate opined that one year was reasonable time span to allow for recovery for trauma and accommodate the trial process; *"On the higher side, a cap of one (1) year is reasonable- which would cater for the back and forth matters and provide adequate time for the recovery of trauma by victims".*

The proposal for putting a cap on the timelines was supported by the judicial officers interviewed. One magistrate however countered that such provision should be matched with requisite expansion of resources including court rooms, judicial officers and the accompanying support staff to expedite those cases. A question was also raised on the practicability of it in the present circumstances and whether such a move would open a pandora's box whereby litigants for other criminal and civil cases might also demand for similar accommodation and timelines further causing chaos in a judicial system that is constrained resource-wise.

II. The second gap identified in the Sexual Offences Act and other laws and policies broadly is the use of language and narrow focus which has served to fuel the perception of sexual violence as being a 'women and girls only affair. According to one respondent;"…***the uneven language of these laws has reduced SGBV into a women/ children and family issue rather than societal and national issue***". Thus, a view was expressed that the law does not adequately address modern day realities of sexual violence:

> *"In the language of all statutes, laws or policies that are meant to give protections to SGBV cases there is deliberate focus/ oversimplification of girls and women as victims and men as perpetrators and that the violence is necessarily physical without focusing on modern realities of the psychological violence that may contribute to these acts, grooming and cultural acts that contribute to these acts and the fact that women play a role in modern day defilement of children and even abuse of men. As minors, boys and girls should be afforded equal protections especially at the prepubescent stage. There is little to no interest in focusing on the mentally challenged which basically makes it an uphill battle to handle such cases. The fact that these areas are barely touched on fails the modern victims of SGBV. There should be regulations and special rules made to address modern realities".*

This observation appears to have been somewhat corroborated by one judicial officer who pointed out the definition of penetration in section 2 of the Sexual Offences Act[28] which effectively assumes the male and not female as aggressor.

III. Mandatory sentences in sexual offences: The Sexual Offences Act provides for mandatory minimum sentences for the various offences more pronounced being in the offence of defilement. One judicial officer interviewed took issue with the nature of mandatory minimum sentences and recommended that the same ought to be removed to afford discretion to judicial officers.

IV. Lack of clear and standard rules on handling of cases of witnesses with intellectual disabilities. Persons with intellectual disabilities face difficulties in communicating with the courts; they will have challenges recalling information and sequencing of

28 Section 2 defines penetration as "the partial or complete insertion of the genital organs of a person into the genital organs of another person".

events. Even though section 31 of the Sexual Offences Act provides safeguards that would enable such a witness to be declared vulnerable, given the challenges expressed in the study, there appears to be a gap on the procedures on what should transpire and at what point to activate the protections. One caregiver to a victim with intellectual disabilities recalled; *"At first I was not allowed into court, my daughter could not speak. I was however allowed on subsequent hearings to stay inside the court"*. Regarding the admission of intermediaries, one advocate remarked:

> ***"In most courts you have to fight to be allowed to bring an intermediary or even have a witness declared vulnerable. In Makadara, they are quick to pick it even without prompting of victim counsel. More training needed to magistrates because most of them are not familiar especially in cases of victims with intellectual disabilities".***

Notably under section 31(2) of the Sexual Offences Act, it is clear that either of the parties to the trial may trigger the declaration- either the court on its own motion, the prosecution or other witness.

In one of the case files, the prosecution is recorded to have stated with regard to one witness with mental illness, "We pray witness is stood down we cannot communicate with her. She is contradicting her statement; she cannot recollect what happened". Two of the caregivers interviewed shared that they were not allowed in with their minor children who were victims of defilement at the initial stages and in one of the cases, the child was so traumatised that she could not utter a word.

V. Laws that use archaic derogatory language against persons with mental illness. The Penal Code, Criminal Procedure Code, the Evidence Act and other laws use derogatory language against persons with mental health conditions.The terminologies used in the laws include ***lunacy, insanity, imbeciles, mentally retarded and idiots***. The use of these terms is demeaning to persons with psychosocial and intellectual disabilities. This has worked to erode the right to dignity of the victims of sexual offences and stigmatization with psychosocial and intellectual disabilities, further reinforcing the culture of stigma and discrimination against persons with intellectual disabilities. This has the ripple effect of impacting on substantive justice as the manner of addressing the victims inevitably spills over to the demeanor, quality of participation accorded to the victims as well as how their evidence is taken henceforth in the criminal trial process.

On the latter, one caregiver, a mother of an SGBV survivor remarked as follows in Swahili:

> ***"Majina zingine wanatumia kwa watoto wetu ni mbaya, haifuraishi kabisa kabisa….wabadilishe wajue ni watoto wetu, tunawapenda. Si kupenda kwao kuzaliwa hivyo wala si kupenda kwetu kuwazaa hivyo; hiyo ni mambo tunawachia Mungu… watumie majina yana utu jameni"***

{"Some of the names they call our children are offensive and not pleasing at all…they need to change the names. Let them know they are our children, we love them; it is not their fault that they were born that way nor is it ours to birth them like that; those are things we leave to God… they should use names that are humane surely"}.

A perusal of the court files and responses received from some of the advocates reveal that the use of language is not only on paper, it is also in usage by the courts and parties to the trial process as well with a mix up on the use of terminologies. The term "mentally challenged" appeared to be fairly common in court papers and in other instances "handicapped" has been used by parties to the cases and the courts as well.

Transfer of Magistrates (section 200 CPC): This was cited by respondents from both the bar and bench as one of the factors that contribute to the delays in conclusion of SGBV cases. Section 200(1) (b) and 201 (2) of the Criminal Procedure Code (CPC) allows a magistrate or judge to hear a case de novo where he/she is unable to understand the evidence recorded.[29]An accused persons has the right to have a witnessed re-summoned and re heard in the event of change in magistrate or judge in a part heard case. A judicial officer recommended that this section ought to be repealed altogether. The flipside is that Judicial officers will not have the opportunity to observe the demeanor of the witness and some would feel more confident acting on their own record. Some don't actually record everything said by a witness. In one of the interviews, a judicial officer admitted to this and revealing of one matter;;"nikiona anaharibu case sikuwa naandika…" {when I determined that they[witnesse] was spoiling the case, I would stop recording"

There was a proposal by one of the judicial officers that the section be repealed as it had the effect of retraumatising the victim.

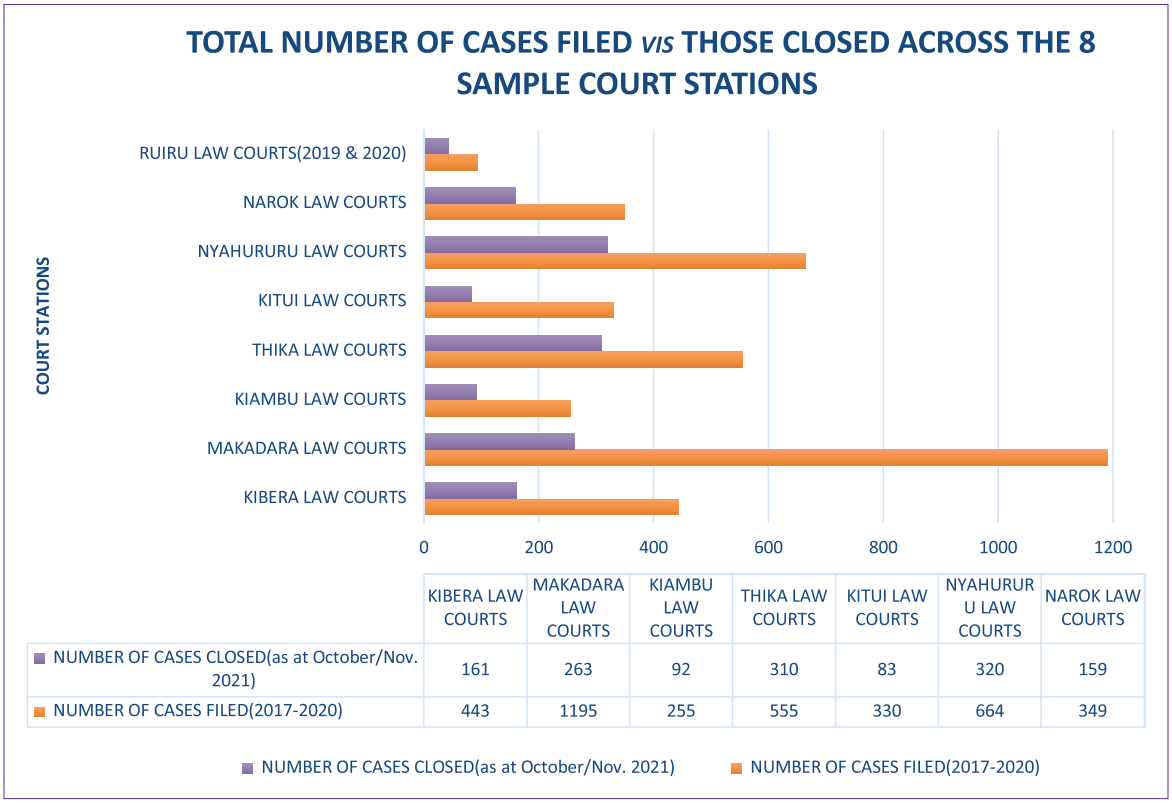
There appears to be tension on the appropriate balance to maintain in safeguarding of the right of the victim and also that of the accused person during the trial process. Indeed, one of the caregivers interviewed was of the view that the courts appear to favour and safeguard the rights of the accused more than those of the victim and their family.

3.3 Disposal of SOA Cases

As highlighted in Part II of the report above, the Constitution of Kenya and the law underscore the need for expeditious disposal of cases. The right to have a trial begin and conclude without unreasonable delay is one of the fundamental tenets of a fair trial secured under Article 50 of the Constitution. Article 47 of the Constitution which is further operationalised by the Fair Administrative Action Act 2015 (guarantees the right of every person to fair administrative action (including judicial processes). Section 38 (4) of the Persons with Disabilities Act, 2003 obligates the Chief Justice to ensure that suits involving persons with disabilities are expeditiously handled. Section 186 (c) of the Children Act, 2001 requires that trials involving child offenders be determined without delay. The Judiciary Criminal Procedure Bench Book re-emphasizes the constitutional right of an accused person to have a trial concluded without delay.

29 *Charles Ogero Bosire versus Republic* (2012) eKLR

Despite the constitutional provisions, the data reveals that cases of sexual violence are dragging in our courts. Majority of respondents interviewed stated that cases take between 4-5 years to conclude, while others indicated that it takes 3 to 4 years. In two of the court stations, the judicial officers shared that majority of court cases handled take between 1-2 and 2-3 years. Perusal of the SOA case registers in most of the court stations appear to corroborate the fact of delay of about half of the sexual violence cases to more than four years. As at November 2021, the percentage concluded SOA cases that were filed in 2017 in four of seven court stations, was below 50% of the case load for the year. Below is a sample of all the cases filed in the seven court stations since 2017 and percentage of those concluded as at November 2021:



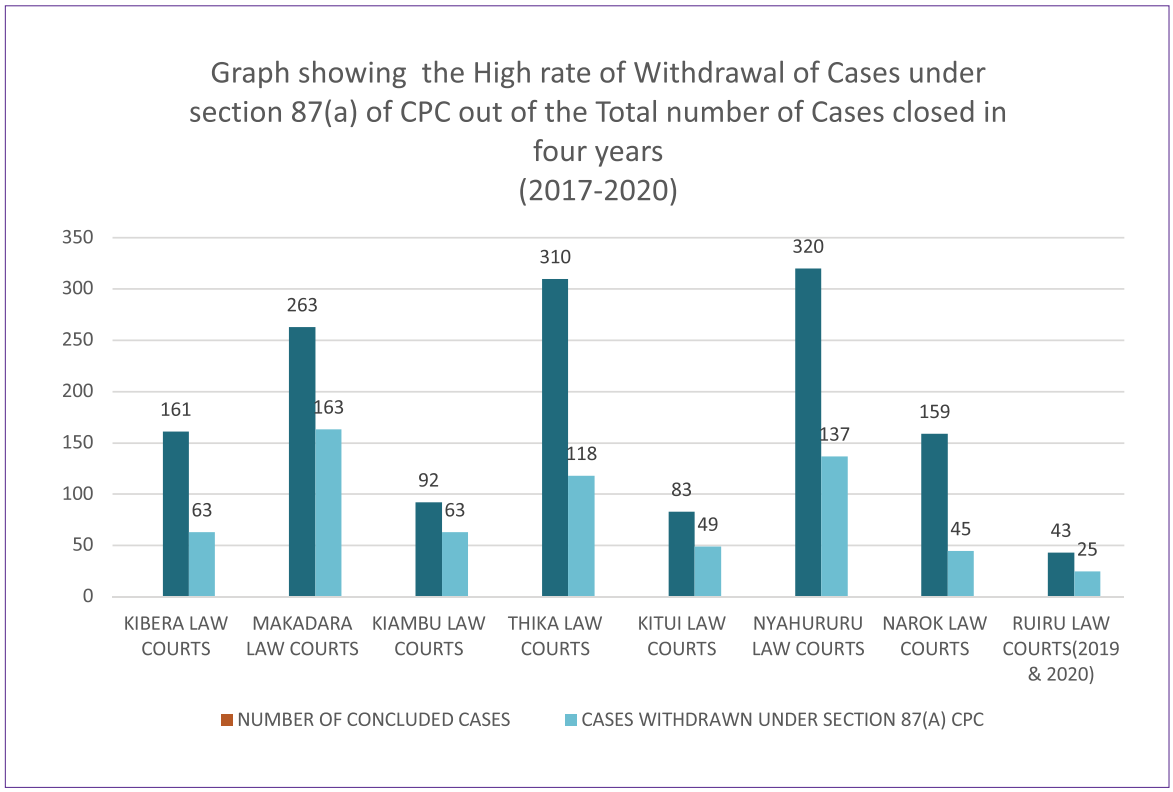
	KIBERA LAW COURTS	MAKADARA LAW COURTS	KIAMBU LAW COURTS	THIKA LAW COURTS	KITUI LAW COURTS	NYAHURURU LAW COURTS	NAROK LAW COURTS
NUMBER OF CASES CLOSED(as at October/Nov. 2021)	161	263	92	310	83	320	159
NUMBER OF CASES FILED(2017-2020)	443	1195	255	555	330	664	349

Figure 1: *Table below showing the number of SOA cases filed in the year 2017 and those closed as at November 2021. This is according to the entries in the respective SOA Case Registers as at November 2021. Closed files for the present purpose means matters whereby either sentences, acquittals, discharges, or withdrawals have been pronounced by court.*

Court Station	Number of cases filed in year 2017	Number of cases closed	Percentage of concluded cases %
KIAMBU	66	49	74.2
KIBERA	97	37	38.1
KITUI	92	26	28.3
MAKADARA	189	83	43.9
NAROK	60	48	80.0
NYAHURURU	113	62	54.9
THIKA	99	80	80.8
TOTAL	**716**	**385**	**53.8%**

The above representation shows that more than half of the SOA cases filed in 2017 are still in the system, 4-5 years on and will thus be carried forward clocking the 5th some 6th year in the year 2022! From the study, Thika, Narok and Kiambu appeared to have the highest rate of clearance of cases standing at 80.8%, 80% and 74.2% respectively. For purposes of this analysis, Ruiru Law Courts was omitted having commenced operations later in the year 2019.

Worth pointing out is that the study further revealed that even then, **more than one half** of the number of closed files highlighted above were actually withdrawn, mostly under section 87(a) of the CPC and not substantively determined. Section 87(a) allows a public prosecutor to withdraw prosecution of any person at any time before judgment is delivered. The graph below depicts the percentage of withdrawal of cases as a fraction of those closed in the respective court stations.



As depicted in the graph above, all the court stations except Kibera, Thika and Narok law courts recorded more than 50% rate of case withdrawals relative to the total number of files closed. This means that more cases are being withdrawn than they are being decided to their conclusive end. This could point to many gaps including the quality of investigations and compromise of cases by either parties. This situation calls for deeper interrogation to establish the sum factors leading to this state of affairs and perhaps further reflection on the constitutional powers and discretion vested on the public prosecutor to withdraw cases. This was not in the scope of the current study.

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3.4 Reasons for the Delay of Cases

When asked whether there existed any procedural, court administrative rules or structural challenges that cause delays thereby hindering the expeditious hearing and determination of SGBV cases, respondents cited various causes. According to one advocate, "delays owing to non-availability of judicial officers, police officers, doctors, witnesses, advocates seeking adjournments for various reasons, withdrawal of suits- rather the witnesses refuse to attend court owing to stigma, frustration from the court system, rejection from family members, settling the matter outside the court".

According to the judicial officers interviewed, all parties in the criminal justice chain have contributed to the delays in the conclusion of the cases. One of the Judicial Officers interviewed identified mentioned unavailability of witnesses, adjournments from both defence and the prosecutions as well as parties compromising on the cases are the key contributors to the delays. Another judicial officer remarked as follows:

> ***"I believe every stakeholder in the criminal justice system has contributed to the delay: Police officers being compromised hence not bonding witnesses; police files not being availed in court during hearings; police being bribed by the accused's families; parties compelled to reconcile; complainant's family being bribed with money; Judicial officers attending JCE trainings".***

The causes are further explained in turn as herebelow:

3.4.1 Adjournments

Adjournments remain the number one major cause of delays in expediting the conclusion of faces. The study established that all the various parties to the trial process have a role to play in this: The court, prosecution, advocates (both complainant and defense side) and witnesses. One respondent summed up the causes of delays in the following terms:

> ***"Absenteeism of police officers caused by transfers, similar position with doctors. These causes increase in adjournments. Absence of police files during the hearing. Judiciary calendar which rends Judicial Officers unavailable as they attend training, transfer of Judicial Officers with the accused seeking the matter be heard afresh."***

As part of the solution, one of the advocates practising in Thika proposed that there should be a law regulating the number of adjournments that can be made in SGBV matters.

3.4.2 Judicial calendars

Cases are sometimes adjourned the last minute on the day when the parties have already appeared before court on account of absence of judicial officers on official duty. This has been attributed to lack of synchronization of the court diary.

> *"Unsynchronized court diary whereby the hearing court will either be on leave, attending continuous legal education, or in some instances a long cause list, for which hearing of the matters cannot be exhausted in a day".* {Advocate}

A perusal of one of the files showed entries on successive dates reading thus, "Trial court on training" and "Trial court on official duty". This, it was noted, not only contributed to delays, but also served as an inconvenience to the parties in terms of time and resources as in many cases, parties only find out of the adjournment on the day of the hearing or mention after spending hours waiting for court to sit. In some cases, livelihood for those in employment is at stake as they have to keep seeking "unexplained" off days, while those in business lose opportunities.

> *"This thing of just issuing notice on the day of the case is very frustrating. Sometimes you travel these long distances to attend court and on the day you are told the court is attending training, the court is not sitting. You call the day before and everything is set but when you appear you are told the magistrate has attended training".* {Advocate}

To address this, one advocate practising in Nairobi recommends that there should be timely communication by the courts to the parties about court dates and attendance.

To address the issue of impromptu absence of magistrates on account of official duty/ trainings, one magistrate recommends that the Judiciary Training Institute (now Kenya Judiciary Academy) ought to provide an annual calendar of trainings way in advance to enable courts diarise better.

> *"JTI needs to give annual calendar when they intend to train judicial officers to enable us manage our diaries in terms of hearing SBGV cases".* {Magistrate}

3.4.3 Non-appearance of medical doctors and investigating officers

The evidence of a medical doctor who examines a survivor/victim of SGBV is a crucial piece of evidence in the trial and conviction of sexual offenders. Failure and delays to attend court affects the speedy resolution of cases.

> *"You find even a doctor attending is an uphill task. And you may have even up to five adjournments on account of absence of a medical doctor".* {Advocate}

Some respondents felt that there was a gap in terms of the procedures governing bonding of witnesses. One of the advocates stated that the lack of legislation that would compel a medical doctor and/or an investigating officer to attend and give evidence is problematic observing that, *"Bonding of witnesses alone is not enough, fines and non-custodial sentences should be imposed against evasive prosecution witnesses."* Further, that *"[t]o expedite justice, courts should consider bonding through phone call, WhatsApp or message provided that the witness acknowledges receipt".*

Regarding meting punitive measures on witnesses who fail to appear, some of the advocate respondents expressed reservation noting that compelling witnesses whom you expect to testify in favour of your case is a tricky affair and a balancing act needs to be struck.

3.4.4 Missing files and scanty investigations

One of the main complaints repeatedly mentioned by both advocates and judicial officers as a cause of delay is case of missing files in court.

> *"Adjournments are many. Most times you will find the police file is not brought to court. A police file may go missing for two even up to five occasions when the case is supposed to proceed, unless the court is very strict and summons the concerned officers".* {Advocate}

Another advocate respondent recounted how in one of the defilement matters he handled whereby his client was finally acquitted; *"the prosecution, while seeking adjournments, indicated on three different occasions that the police file had not been availed to her. This is ridiculous".*

Tied to this is the allegation of poor evidence. Scanty Investigations was cited as a contributor to not only delays but also elusive substantive justice for victims of sexual violence.

> *"The law is fine, it is up to standard. Mostly the gap comes in the collection and presentation of evidence by the concerned agencies"* {Nairobi-based Advocate}

An advocate with nearly 20 years' experience in the handling of SGBV cases notes that failure by the investigating officers to provide witnesses or witness statements to the defence advocate often leads to the defence seeking for adjournments for lack of statements and charge sheet. A judicial officer explained this chain-effect thus:

> ***"If the investigations are not thoroughly carried out, if the victims take long to be taken to hospital for medical examination, if the evidence is tampered with or lost, if the police file is not availed in court and witnesses are not bonded, it delays the conclusion of the cases herein. When the accused persons are not served with witness statements in time as a result there will be numerous adjournments".***

3.4.5 Unavailability of witnesses

Non-attendance of the victim and accused persons: Various reasons are given for this including efforts to compromise witnesses. One of the respondents interviewed who is a caregiver to a minor revealed that she was adamant and did not want her daughter to be subjected to the court process and was strongly opposed to the insistence by the court to have the minor appear in person. One judicial officer interviewed however added that following the COVID 19 pandemic, there was delay in prosecuting the cases as some complainants and witnesses have relocated to their rural homes. This has presented difficulties in contacting witnesses.

Compromise of witnesses: Some of the respondents interviewed revealed that even if there was no express evidence to the same, it was obvious that parties to cases had been compromised leading to frustration of the cases by non-appearance. Several cases were as a result withdrawn on that account. The statutory minimum sentences may have had a hand in this. In order to avoid the definite severe sentences, accused persons and their emissaries will go to any length to have the case negotiated and settled out of court to avoid what they see as definite life-altering sentences upon conviction. One of the magistrates suggested that the mandatory minimum sentences ought to be abolished and courts given discretion on a case-by-case basis.

3.4.6 Transfer of Officers: Magistrates, Prosecutors, Investigating Officers

Transfers and changes in judicial officers and judges in part heard cases prompt hearing of cases de novo further contribute to delays in hearing of cases. Section 200(1) (b) and 201 (2) of the Criminal Procedure Code (CPC) allows a magistrate or judge to hear a case de novo where he/she is unable to understand the evidence recorded.[30] To address this challenge, a judicial officer based in Kiambu county recommends that section 200 of the CPC ought to be repealed as its derails the progress of the case upon transfer of a magistrate.

Transfer of Investigating Officers and prosecutors as well has also been cited as contributing to delay in the speedy resolution of cases.

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30 *Charles Ogero Bosire versus Republic* (2012) eKLR

3.4.7 Other Factors

- **Shared Court Diary/Lack of Specialised courts:** There are no special courts to cater for SOA cases, they share the court diary with other cases. Some of the respondents interviewed proposed the setting up of specialised courts, even one per court station to handle sexual offences. Some also proposed hiring of specialised magistrates on SOA.

- **Lack of preparedness on prosecution:** Proactivity on the part of the prosecution has an implication on the speed and quality of the trial process. Poor evidence collection as well as lack of preparedness on the prosecution side was cited as contributing to delays and ultimately miscarriage of justice. One advocate practising in Nyahururu and Nairobi remarked:

> ***"On the part of the prosecutors, you realise the prosecutor does not conduct a sort of pretrial before trial begins. Prosecutors need to do briefs prior to trial. In conjunction with IO, the Prosecutors should be conducting a pretrial which should prepare witnesses on what to expect, production of exhibits, how it is done, just preparing for the case".***

Another advocate stated that simple things such as checking on the availability of witnesses prior to the hearing would go a long way in expediting the trial process.

- **Recognition and support for vulnerable witnesses:** There is lack of awareness and clear procedures by court as well as the prosecution on how to handle witnesses with intellectual disabilities. The protracted process of making applications for the same, request for medical evaluation in certain instances causes further delays.

- **Role of Victim advocates:** The study established the Victim Protection Act came into force in 2014 and most of the defence lawyers and prosecution have never heard of the Victim Protection.

3.5 Impact of Delay in Determination of SOA Cases

3.5.1 Psychological trauma

Perhaps the largest and immeasurable consequence of delayed justice is the added psychological impact on the victims of sexual violence, who have to bear a dark cloud hanging over their ends indefinitely. Having to repeatedly appear in court to meet the accused person is itself is traumatising. As noted in Part II above, the law (section 202 of the Criminal Procedure Code) makes it mandatory for the complainant during criminal trial in subordinate courts to appear. The Constitution also demands that the accused person is present during their trial as a fundamental tenet to fair hearing. Moreover, in instances where witnesses have to recount their evidence over and over such as is the case with

retrials and incomplete and part testimonies. One judicial officer observed with regard to section 200 of the CPC on retrial where a case is heard a fresh lead to the victims narrating the ordeal repeatedly and this affects them emotionally and psychologically and healing takes long.

The issue of release of accused persons on bail and bond becomes a factor in exerting anxiety and psychosocial trauma to the victims. Notably, most of the offenders are persons in close proximity with the victim's environment. Therefore, chances of continued intimidation, trauma and compromise are imminent. One caregiver narrated that she had been approached about four times by the accused and emissaries to accept an out of court negotiated settlement. It is essential that the victims and or the intermediaries are actively involved in bail hearings and their information considered before granting bail. This is in line with Article 50 of the Constitution and sections 10 and 20 of the Victim Protection Act 2014.

The study further established that caregivers/parents are particularly protective of their minor children from being subjected to the protracted criminal justice process from the reporting/investigations stage to the courts and the attendant trauma. A respondent noted that allowing the interaction between the child survivor and the accused is very traumatizing. One parent shared that it is for that reason that they delayed reporting the defilement until the child had undergone psychosocial support and was satisfied, she was in a stable condition. Even when the case was brought to court, the respondent shared their concern about the magistrate's insistent that the child must appear in court in the absence of a witness box and preferred the option advised by the advocate acting in the case to apply to act as an intermediary as a buffer to the child.

When trauma in relation to sexual offences is mentioned, focus is usually on the victims of sexual offences. However, the study established, parents and immediate family are equally, if not more traumatised than the victim, particularly in the case of child victims. A mother to a defiled minor aptly explained as follows:

> *"The main challenge is the psychological. For child survivors, the primary care givers-[it's] the parents and their kin who bear the weight; they are more traumatized than even the victim. Having to go to court and seeing this person is not pleasant at all. And then the fact that it is taking too long, you have to keep reliving this process all over again... It is like a raw wound and you have to keep reopening it".* {Caregiver}

When asked what in their view could be done to improve the overall experience for victims of sexual violence, many of the respondents cited the need for the judiciary to provide psychosocial support and counselling to the victims and their families a one of the important interventions. Some respondents also mentioned the need for the Judiciary to

improve court facilities so to make them more friendly for the victims and minimise trauma during the trial process. One Advocate had this to say:

> ***"The law requires that cases are heard in camera yet the courts are not fully equipped to handle these cases in camera. They are usually done in chambers which are very small- the interaction between the offender and victim is so close which retraumatizes the victim and they are unable to disclose anything"***.

Another advocate was of the view that infact, the solution is for the courts to get creative and hold hearings in non-formal places, away from the intimidating court environment to places nearer the victims:"

> ***"In my view, the secluded chamber in court is not enough to protect the child or a person with disabilities. The Judicial Service Commission should consider having court sessions held at child friendly or non-court associated places (such as religious office set-ups, open spaces) to allow the survivors/witnesses an opportunity to relax and adequately respond to the questions. This will also reduce instances of trauma…"***

A judicial officer pointed out that even the composition of the court matters. They proposed that where for instance the victim is female, there was value in ensuring that atleast two thirds of the court was female. This would provide psychological comfort to the victims hence reducing trauma.

3.5.2 Denied Justice

One advocate practising in Makadara law Courts observed that the lack of court attendance has led to some giving up on attaining justice and that economic strain has led to limited resources to attend court. As earlier highlighted, persons with intellectual disabilities will often have difficulty recalling information and sequencing events over a period of time. Hence, the more the time lapses between the time an offence occurs and testifying before court, the poorer the quality of evidence received.

In some instances, cases have abated on account of death of parties along the trial process. An advocate recounted how the accused person passed on during the third year of trial in a case he was handling:

> *"We have an experience where the accused passed on during 3rd year of trial, some witnesses cannot be traced after a few years, so access to justice for victims becomes difficult. The case is just derailed on account of the length it takes in the courts".*
> *{Advocate}*

3.5.3 Economic Constraints and loss of livelihood

Defilement has had deep-seated psychological and economic ramifications to families. This is especially so for families of victims with intellectual disabilities. Many of the caregivers mostly parents have had to give up their daily source of income to take care of their grandchildren born as a result of defilement as well as their children. This situation is further complicated by the lengthy walk of uncertainty in search for justice that the families have to trudge for years, which also demands additional resources.

Two of the families of survivors interviewed know this only too well. Margaret (not her real name), a 65-year-old mother and now grandmother explained how she had to stop her job immediately her daughter with intellectual disabilities gave birth to her grandson as both needed full time attention and care.

Margaret explained that her case was brought before Kibera Law Courts in early 2019 and more than two years later, it is yet to be heard. She says she has however attended court more than five times. A number of times, she has had to borrow between Ksh 100-200 ($1-2) from a neighbour for bus fare to attend court accompanied by the victim and grandson and upon return, look for means to repay the debt.

> *"The case has been very draining financially. I used to work as a casual labourer at a nearby school. When my daughter gave birth I had to slow down on my casual work, when she delivered. I couldn't help but worry about my new born grandson. The new born was not breastfeeding. I had to stop working on the fourth day. This incident has greatly affected me psychologically. I cannot leave my daughter with the child. They both need constant attention as she loses consciousness at times."* {Caregiver}

Another family of a survivor shares a similar story. Fiona (not her real name) had to leave her salon and boutique business to keep watch over the newly born grandchild (now six years old) as well as her daughter with intellectual disabilities: *"Ni kama kuwa na mapacha"* ("it's like having twins"). This added alongside the burden of following up with investigations and several court attendances which have further drained the family resources. Her husband Sylvester (not his real name) had to take a loan from work to deal with the escalating expenses. His wife's loss of employment as the primary caregiver only made the situation worse for the nuclear family of seven children. In the words of Sylvester:

> ***"Nilichukua loan kutoka kazini ndio mtoto kwenda hospitalini Kenyatta, na mahitaji ya chakula. Ile tatizo iliyoko mwathiriwa ni mtoto wako. Mwenye kuletwa lazima nimshughulikie kwa shule. Nyanyake alikuwa anamshughulikia. Alikuwa anafanya kazi ya salon na boutique na hiyo ikaisha…Nilikuwa hata najenga nyumba lakini wa leo haijaisha"***

{"I took a loan from work to take my child to Kenyatta hospital as well as cater for other needs like food. The challenge that is there, the victim is your child. I have to take care of education expenses for the additional child. His grandmother was the one taking care of him. She had a salon business and kept a boutique but it ended… I was even building a house but up to date, it has never been completed"}.

With each passing birthday of their grandson, now six years old, is a stark reminder of an unfinished business in their quest for justice. Fiona and Sylvester disclosed that they were not aware at what stage their case was at. Six years on.

Although section 35 of the Victim Protection Act 2014 shields an employee from any negative consequences from employer for absenteeism from work to testify or cooperate in investigations, it still remains a dicey situation especially where the court adjourns repeatedly and therefore several off-work days. Even where off days are given, there is still a pricey discomfort that the caregiver or survivor have to navigate in explaining the reasons for increase in their off days and thereby risking stigma and their privacy and/or that of their household.

One mother of a victim knows this predicament all too well and although she says she is lucky her employer understands and allows her time off, it is still a cause for worry:

> *"I have to take time off work to go to and from court for all these sessions and nothing substantive is happening. Having to take time off work severally and explain to employer is problematic. And on the other side if you don't appear in Court, then the court staff start to say you appear not committed".*
> **{Caregiver}**

3.5.4 Social Implications

The protracted court processes cause tension in communities and heightens the continuing stigma for victims of sexual violence and their kin. It also increases chances of witness intimidation and compromise, particularly where the accused person is out on bail and within proximity of the victim family. A mother to one of the victims observed:

"The matter has delayed and the community doesn't know what happened. The defilement has psychologically affected my child. She is quite fearful. I have had to seek counselling services for her".

Another respondent pointed out that continued delays result in people seeking out of court settlements in the face of persistent frustrations:

> *The Court really retraumatizes the victim further and that is why people result to alternative means of resolving it community means of redress. I have seen how much more harm it takes to go through it".* **{Caregiver}**

For minors, it has repercussions in terms of the right to education. Emily (not her real name), a victim of defilement with intellectual disabilities had to quit special school after the defilement and attendant protracted investigation and court processes. Another caregiver was grateful that the court made considerations in allocating hearing dates for her daughter during school holidays so as not to interfere with her studies.

The delay in dispensation of justice has left some of the victim families in abeyance and disillusioned. They cannot for instance relocate to the rural/or urban areas as they do not know when the next mention or hearing date will be called. One grandmother expressed her fear of travelling and getting "trapped" in her rural home in Western Kenya and lacking bus fare to travel back to Nairobi in time for the court attendance. Thus, some literally become hostages to the process.

3.6 Impact of Covid-19 On Determination of SOA Cases

Respondents from both the bar and bench and even the survivors were in consensus that Covid-19 generally slowed down the hearing of cases. There was temporary closure/ scaling down of court operations. Cases were kept in abeyance for a while and far away dates were subsequently given. The parties particularly the complainants were also in the dark on the progress of their cases. Some have since lost interest in their cases as a result. One judicial officer noted that at the onset of COVID-19, there was no clarity on how to proceed. Furthermore, the shortened school holidays meant less time period to listen to cases involving school-going children (either as accused persons, witnesses or victims) and an overload of the court diary in an attempt to cover them all within the small window of holiday. This meant that any adjournment at that point could only be subsequently slotted for the next school holiday.

Moreover, following the onset of the COVID 19 directives, judicial officers worked in shifts and this also meant reduction in human resource available to conduct trial. Asked what challenges they encountered in their interaction with the courts, one complainant observed, *"I wouldn't know what stage [my] case is at. The last time we were there we were told our case was before the wrong magistrate as they were working in shifts during Covid".* Another advocate practising in Nairobi observed that the attendant travel restrictions were exploited by some witnesses to delay and subvert justice.

> *"The lockdowns and cessation of movement orders, especially in 2020, were exploited by many accused persons to delay the hearing of cases on the basis that they could not travel to court. Several of my clients abused this loophole".*
>
> **{Advocate respondent}**

Besides the speed in resolution of the cases, the issue of accessibility has been a major concern for parties without access to smart phones and internet coverage for virtual court sessions. This has meant that while the use of technology enhanced access to justice of some cases, it also paradoxically occasioned inaccessibility as a result of skewed access by the pupulace owing to socio-economic disparities. According to some respondents, the technology is more useful in civil matters and not criminal cases. One advocate practising in Nairobi and Nyahururu had this to say:

> ***"COVID 19 directives have served the civil and commercial cases because they can afford technology. But for criminal cases, it is really tough to conduct the cases online. Unless where people are being facilitated even the mentions and rulings it has been tough to proceed because most of the parties are not able to access. Where you have a mention, sometimes you have to bring the client to the Office so you can log in with them. Not everyone can afford it. Answering personal questions in cyber cafes would be quite uncomfortable. If in a public place it is abit invasive".***

Another advocate in Makadara underscored the fact that accessibility for virtual mentions is not possible for some and this had led them to be in the dark concerning the progress of their cases.

> *Accessibility of online proceedings is the main challenge; if you don't have smart phone you have to go to a cybercafé which may be several kilometres away and need to ask someone to assist you if you are not tech-savvy hence issues of confidentiality arise."* **{Advocate respondent}**

Owing to the resultant socio-economic impact, the COVID-19 pandemic triggered a lot of internal migration- urban-rural; urban-urban. This led to difficulties in contacting some of the witnesses, who may have relocated to other towns before presenting their testimony thus leading to delays and in some cases withdrawal of cases even acquittals.

Despite the challenge of delay in progression of cases and the valid concerns on inaccessibility; the use of technology has resulted in unintended positive outcomes. It has safeguarded the victims of sexual violence, who no longer have to physically face/encounter the accused persons repeatedly. This is critical especially in the face of the absence of witness boxes and child-friendly court ambience. In the words of one advocate, the use of online platform like zoom has, "*somewhat helped in safeguarding the victims by reducing contact with accused as it is literally on camera*".

One of the trial magistrates interviewed expounded on how he has leveraged on the platform to enhance victim protection during the proceeding, for instance, by directing that the video camera on the side of the accused person remains at all times muted/off. This would ensure that accused persons are able to follow the proceedings without the victim even realising; an all-critical reprieve that physical appearances does not afford. Another collateral advantage cited by ones of the respondents was that with virtual proceedings, the recording affords a good back up in the event of missing files.

PART IV

CONCLUSION AND RECOMMENDATIONS

In general, Kenya boasts a robust enabling national framework that provides for the safeguard of the rights of victims of sexual violence and expeditious disposal of sexual violence cases. This comprises the Constitution of Kenya, 2010, Persons with Disabilities Act, 2003, Sexual Offences Act, 2006, Sexual Offences Rules of Court, 2014, Victim Protection Act, 2014 and Fair Administrative Action Act, 2015. Additionally, there is in place Judicial guidelines that foster expeditious disposal of cases such as the Judiciary Criminal Procedure Bench Book as well as the Active Case Management Guidelines.

Regionally and internationally, Kenya has ratified several international and regional treaties relating to human rights which guarantee the right to access to justice and which by dint of article 2(6) of the Constitution of Kenya, form part of Kenyan law. These treaties oblige State Parties to ensure access to justice and equality before the law. Among them is the Protocol to the African Charter on Human and Peoples Rights (Maputo Protocol); Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD). As noted by The CEDAW Committee in its General Recommendation No. 33 on women's access to justice, deficiencies in the justice system including delays and excessive length of proceedings prevent women to gaining access to justice. Under Articles 12 and 13 of the CRPD, Kenya, through the Judiciary is obligated to provide procedural and age-appropriate accommodations for persons with disabilities to facilitate their effective participation throughout the justice process.

The research study has established that sexual offences, particularly defilement cases are still rampant in the country. Even so, the staggering figures, do not accurately represent the complete picture of the prevalence of the menace on the ground since many cases go unreported owing to the stigma and the daunting legal process from investigations to the trial process. It is therefore critical that measures are put in place to prevent these offences from occurring, and put in place measures to ensure that when they occur, victims and their caregivers feel safe enough to submit to an efficient and effective justice system for appropriate remedies.

The study has established that there is indeed inordinate delay in the determination of SOA matters. An analysis of the raw data obtained from the respective Sexual Offences Case Registers reveal that in four out of seven court stations, the percentage of the 2017 SOA cases concluded was below 50% as at end of October/early November 2021. This means that by the next year (that is 2022), close to half of the 2017 cases will be unresolved 5-6 years after they began. The study also established, that more than one half of the number

of closed files highlighted above were actually withdrawn, mostly under section 87(a) of the CPC. The section allows a public prosecutor to withdraw prosecution of any person at any time before judgment is delivered.

Factors Influencing delay in conclusion of SOA Cases

The following emerged as the key barriers to expeditious delivery of justice in sexual offence matters:

i. Numerous adjournments occasioned by all the parties to the trial process;
ii. Unavailability of witnesses;
iii. Non-attendance of expert witnesses such as the Investigation Officers and medical doctors;
iv. Missing police files;
v. Adjournments from advocates from both the accused and prosecution side;
vi. Court diaries whereby the trial courts postpone trial to attend judicial training and other official duties;
vii. Poor investigations; and
viii. Transfer of officers including magistrates, prosecutors and investigating officers.

The study further established that COVID-19 pandemic contributed to uncertainty, delayed justice and far off dates for the trial of matters. This made some of the complainants lose interest in their cases. In some cases, availability of witnesses also became a challenge as some took advantage of the travel restrictions to evade court process. A number of the advocate respondents interviewed opined that the ensuing virtual hearing of matters did not work well for criminal cases partly because of inaccessibility of internet and smart phones by some parties. Positively, it was however established that the result to online mitigated victim trauma due to minimal physical interactions between the victim and the accused.

Impact of delayed justice

The study determined the following to be the key consequences of prolonged delay in conclusion of SOA cases:

i. Increased and prolonged mental torture/ psychological trauma visited on the victims and their caregivers which affects their general wellbeing;
ii. Denial of justice as evidence is lost or weakened over time more so where vulnerable witnesses like children and persons with intellectual disabilities are concerned;
iii. Economic constraints and loss of livelihood as a result of the several fruitless trips to the court stations over time;
iv. Social challenges including heightened stigma in communities;
v. Threat on the right to education for school-going children; and
vi. Compromise of cases due to frustrations and increased withdrawal of matters.

The **sum consequence of the above is that people and communities lose faith in the national judicial system of resolving disputes and providing redress.** This would result to underreporting of these cases, promote alternative justice means in communities which ultimately perpetuates a culture of impunity by fostering an environment where sexual violence is tolerated in communities.

Key Recommendations

To address the highlighted challenges, the study recommends the following policy, legislative and administrative interventions:

Legislative reforms

1. Parliament should review the Penal Code, the Criminal Procedure Code and the Evidence Act to repeal the derogatory terminologies used against persons with mental illness as these are contrary to Articles 27, 28 and 54 of the Constitution of Kenya as well and other human rights commitments that Kenya has undertaken regionally and globally.
2. Parliament should amend the Sexual Offences Act 2006 to provide for a time period within which sexual offence matters involving minors and persons with intellectual disabilities are determined.
3. The Office of the Attorney General and Parliament should expedite review and the adoption of the draft regulations under the Victim Protection Act; to ensure effective redress to victims of crime.

Application of existing Law and Guidelines

4. In consultation with relevant stakeholders, the Judiciary should formulate practice directions guiding the application of section 31 of the Sexual Offences Act that the Judiciary formulates clear standard guidelines on dealing with vulnerable witnesses. There is need to provide clear guidelines on the recognition, admission and role of intermediaries whilst being cautious to respect the legal capacity of the victims to equal recognition under the law.
5. Courts to more proactively apply the Sexual Offences Rules of Court, 2014 and other guidelines that allow for expedited testimony of witnesses where it is necessary to meet the ends of justice. Worth emphasis is that an expedited process is not synonymous to a hasty process that risks compromising on the ends of justice. This is well documented in the Criminal Procedure Bench Book.
6. In granting bail and bond terms, judicial officers should ensure that all circumstances should be taken into consideration including proximity of the accused to the victim and their likelihood of intimidating and compromise of witnesses; courts should more proactively involve victims and/or their intermediaries and victim advocates in bail hearings and throughout the trial process. This is in line with the Constitution and sections 10 and 20 of the Victim Protection Act 2014 as well as the Judiciary Bail and Bond Guidleines.

Court Facilities and Personnel

7. Court Facilities and Ambience: The Judiciary should work to make court rooms more friendly to its users and particularly to vulnerable ones. All the respondents interviewed shared this view. This includes improving on communication facilities, witness protection boxes, children courts and the general ambience of court rooms. These should be spread across all court stations and not be confined to urban but especially courts in rural areas.
8. There is need to increase court rooms and judicial officers and the accompanying support staff to ease case backlog and facilitate prioritisation of SOA matters.
9. The Judicial Service Commission, through the Kenya Judiciary Academy should intensify training all magistrates and judges on the provisions of the Sexual Offences Act, the Victim Protection Act with more focus on the treatment of vulnerable witnesses including persons with intellectual disabilities. Such trainings should address communication, accommodations generally and other necessary protections to be afforded to such witnesses. Such trainings could be done in conjunction with relevant agencies and institutions working in these matters including organisations of/for persons with disabilities.
10. That the judiciary sets up specialised sexual offences courts across the court stations with specialised personnel in registries, courts and prosecution that handle SOA cases to allow expeditious disposal of SOA cases This would allow for specialisation and targeted trainings for the personnel. This calls for rationalisation and enhancement of human resource and court rooms within the judiciary in view of existing case load in other matters.
11. Psychosocial support: Within itself, the Judiciary should set up a robust mechanism of providing counselling to victims and their families; similar to the accommodations made to say in language interpretation and sign language. Much time and trauma could be saved by having such facilities readily available within the judicial system.

Figure 2: *Above: A children Court at Kitui Law Courts. Below, a witness protection box within the court.*

Figure 3: A witness protection box within Kitui Law Courts

Figure 4: A Children's Court at Thika Law Courts. There is need for the Judiciary to invest in adequate court facilities that are more friendly particularly for minors and persons with intellectual and psychosocial disabilities across all court stations in the country including the rural areas.

Case Management

12. The Judiciary, through the Heads of Court Stations to put in place/sustain a rapid response schedule of expediting the cases beginning with ones that have been stuck in the system longest. The initial initiative under the Office of the Chief Justice to identify and fast--track files from 2016 is a positive move that ought to be sustained.

    Section 38 (4) of the Persons with Disabilities Act, 2003 obligates the Chief Justice to ensure that suits involving persons with disabilities are expeditiously handled.

13. The Judiciary should work to improve management of court diaries and ensure prompt and effective communication regarding court dates and status of cases to all the parties concerned. This will save litigants resources in form of time and finances as well as the mental anxiety involved.

14. The Kenya Judiciary Academy (formerly Judiciary Training Institute) should provide annual training calendar to court stations way in advance to ensure early planning and management of court diary to avoid last minute adjournments on account of training.

15. As far as possible, case mentions should be confined to the minimum number necessary to ensure a just and fair trial. Relatedly, judicial officers should work to discourage adjournments by parties in cases taking charge of the progress of court cases. This requires cooperation of all the parties involved and conscious and proactive oversight by the courts who take charge of the case management at the stations.

16. Embracing Technology: The Judiciary should invest in and encourage uptake of technology in its operations in line with the law. This includes in use of video pre-recorded testimonies as appropriate as provided under the Sexual Offences Rules.

17. The Judiciary should maintain automated versions of the sexual offences case registers in respective court stations as opposed to only manual Registers. Furthermore, regular returns on the Registers should be made to a central repository to monitor and track the movement and of the cases across all the court stations. This will enhance security and safe storage of the data, as well as data retrieval and its use. The Registers contain valuable data that could inform policy on SOA in the country based on the trends. The ongoing discussions regarding the national Sex Offenders Register could initial the momentum.

Other Interventions

18. Increased capacity building of prosecutors, the police and even advocates on handling of SOA cases and more so, on the provision of Victim Protection Act 2014 and handling of witnesses with intellectual and psychosocial disabilities in the trial process. The National Council on Administration of Justice (NCAJ) through the court users committees can serve as entry points for further conversations and sensitisation. For the advocates, the Law Society of Kenya could consciously take up this in the annual CPD calendar. For the police, ultimate target should not only be only those 'seconded' to the Gender Desk but all law enforcement officers.

19. That under the umbrella of NCAJ, that the Judiciary, Office of Director of Public Prosecution and National Police Service steers conversations and action points geared at creating a seamless justice chain and addressing the bottlenecks identified including missing police files and gaps in evidence collection and prosecutorial powers.

ANNEXURE I

QUESTIONNAIRE FOR ADVOCATES AND COURT OFFICIALS

Introduction

Hello, my name is ..... working on behalf of the Coalition on Violence Against Women (COVAW). COVAW is currently undertaking a research study to assess the causes of delays in delivering justice to survivors of sexual and gender-based violence including those with intellectual disabilities.

Through this study, COVAW also seeks to evaluate the social, legal and economic implications of delay in cases on the right to access justice for survivors of sexual violence including those with intellectual disabilities for the purposes of informing appropriate recommendations on interventions to be undertaken by the judiciary in ensuring the management of cases by courts is efficient and effective so that the criminal caseload can be adjudicated fairly, appropriately, and promptly.

As an advocate/officer with expertise and interest in this field, I kindly request your consent to take part in this research study. I assure you that the data and any other information you will provide will be treated in strict confidentiality, and your personal details will not be used in the report to identify so feel free to share any information that may help COVAW come up with accurate and comprehensive information to inform and improve case management in the courts for SGBV survivors. Please note that your participation in this study is voluntary and will not attract any direct material benefit, and that you are free to opt out at any stage of the interview.

CONSENT

I ……., an adult of sound mind, ID No. ……..., having been clearly explained to and fully understood the terms of participation in the study, hereby voluntarily consent to take part in the research, for which I append my signature thereto.

……(Signature)

Date and time …… ……

RESPONDENT' DETAILS/DEMOGRAPHICS

Name of Respondent (optional).....

Sex .....

Contacts: Email ..... Telephone .....

Age bracket:

☐ 20-30 ☐ 31 – 40 ☐ 41-50 ☐ 51- 60 ☐ 61 and above

Court Station .....

1. How many years have you been involved in representing [or prosecuting or adjudicating] cases of rape or defilement in the courts? .....

2. How many cases of rape and defilement have you handled/are handling thus far? .....
.....

3. What (if any) do you see as the loopholes in existing laws and policies that hinder expeditious disposal of cases in courts in rape and defilement cases?

4. From your experience, are there any procedural, court administrative rules or structural challenges that cause delays thereby hindering the expeditious hearing and determination of SGBV cases? If yes, please expound.

5. Please briefly explain your experience on the following parameters:

   a. When was/were the case(s) in question filed in court?

   b. What stage of the hearing is/are the case(s) in question?

   c. When and what was the last action/direction concerning the file/s in question?

   d. When was the case concluded? If not yet concluded, how many years since the filing in court?

What in your view has caused the delays?

6. How long, on average do/have the cases of rape and defilement (that you have handled) taken in the courts?

☐ Below 1 year ☐ 1-2 years ☐ 2-3 years ☐ 4-5 years ☐ above 5 years

7. From your experience, what can you tell me concerning the factors that have generally contributed to the delay in the delivery of justice in the courts in Kenya particularly the sexual and gender-based violence cases?

8. What impact has the COVID-19 pandemic had on the delivery on justice for SGBV victims in the courts?

9. What measures should the Judiciary put in place to address the challenges you have highlighted above, in order to streamline the adjudication of cases in our courts and ensure expeditious delivery of justice for victims of rape and defilement?

10. What, in your view should be done to improve the overall experience of victims of SGBV including children victims and persons with intellectual/psychosocial disabilities in the court system?

Thank you very much for your time and exhaustive responses.

ANNEXURE 2

INTERVIEW GUIDE FOR SGBV SURVIVORS AND/OR THEIR GUARDIANS

Introduction

Hello, my name is ..... working on behalf of the Coalition on Violence Against Women (COVAW). COVAW is currently undertaking a research study to assess the causes of delays in delivering justice to survivors of sexual and gender-based violence including those with intellectual disabilities.

Through this study, COVAW also seeks to evaluate the social, legal and economic implications of delay in cases on the right to access justice for survivors of sexual violence including those with intellectual disabilities for the purposes of informing appropriate recommendations on interventions to be undertaken by the judiciary in ensuring the management of cases by courts is efficient and effective so that the criminal caseload can be adjudicated fairly, appropriately, and promptly.

I kindly request your consent to take part in this research study. I assure you that the data and any other information you will provide will be treated in strict confidentiality, and your personal details will not be used in the report to identify so feel free to share any information that may help COVAW come up with accurate and comprehensive information to inform and improve case management in the courts for SGBV survivors. Please note that your participation in this study is voluntary and will not attract any direct material benefit, and that you are free to opt out at any stage of the interview.

CONSENT

I ....., ID No. ....., having been clearly explained to and fully understood the terms of participation in the study, hereby voluntarily consent to take part in the research, for which I append my signature thereto.

.....(Signature)

Date and time ....

RESPONDENT' DETAILS/DEMOGRAPHICS

Name of Respondent (optional) .....

Sex .....

Contacts: Email ..... Telephone .....

Age bracket:

☐ 20-30 ☐ 31 – 40 ☐ 41-50 ☐ 51- 60 ☐ 61 and above

1. Please tell me when did you get to report to the authorities regarding your/ your child's violation?

.....

.....

2. When was your matter brought before court? Which court station?

.....

.....

3. Have you been involved in the court process in any way? If yes, how many times have you personally attended court?

.....

.....

4. What challenges if any have you encountered in your interaction with the court?

.....

.....

.....

5. Were you given any procedural accommodations [e.g access to an intermediary, supporter, camera] provided in adducing evidence in court?

.....

.....

.....

6. How long since your matter was brought to court has it been? Would you know what last happened in court concerning your file?

.....

.....

.....

7. What impact has the matter had on you and your family?

.....

.....

.....

8. What measures, would you recommend that courts take into consideration to improve the court experience of survivors of SGBV?

.....

.....

.....

9. Is there anything else you would like to tell me concerning this matter or your experience in interacting with the courts generally?

.....

.....

.....

COVAW

Coalition on Violence Against Women

@covaw @covaw

END GBV

Report Gender Based Violence
Toll free line:
0800 720553