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KENYA NATIONAL ASSEMBLY

NINTH PARLIAMENT – FOURTH SESSION (2005)

THE DEPARTMENTAL COMMITTEE
ON
ADMINISTRATION OF JUSTICE AND LEGAL AFFAIRS

REPORT ON
THE SEXUAL OFFENCES BILL, 2005

Parliament Buildings
NAIROBI

October, 2005

INTRODUCTION

Mr. Speaker Sir, the Departmental Committee on Administration of Justice and Legal Affairs is established under Standing Order No. 151; its mandate pursuant to Standing Order 151(4) is:-

- a) to investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and departments;
- b) to study the programme and policy objectives of the Ministries and departments and the effectiveness for implementation;
- c) to study and know all legislation after First Reading, subject to the exceptions under Standing Order 101A (4);
- d) to study, assess and analyze the relative success of Ministries and departments as measured by the results obtained as compared with its stated objectives;
- e) to investigate and inquire into all matters relating to all assigned Ministries and Departments as the may deem necessary, and as may be referred to them by he House or a Minister and;
- f) to make reports and recommendations to the House as often as possible, including recommendation of proposed legislation.

On 29th September, 2005 the Sexual Offences Bill, 2005 was referred to this Committee on its First Reading.

Mr. Speaker Sir, on behalf of the Members of the Departmental Committee on Administration of Justice and Legal Affairs, I feel honoured to present to the House the Committee's Report on the Sexual Offences Bill, 2005. First, let me thank the Members of the Committee for their cooperation, dedication and support in compiling this Report.

The following are the Members of the Committee:

- (i) Hon. Paul K. Muite, MP – Chairman
- (ii) Hon. Kenneth Marende, MP
- (iii) Hon. Peter O. Owidi, MP
- (iv) Hon. Enoch W. Kibunguchy, MP
- (v) Hon. Jim Choge, MP
- (vi) Hon. Amina Abdalla, MP
- (vii) Hon. Gideon Ndambuki, MP
- (viii) Hon. Moses Cheboi, MP
- (ix) Hon. Cecily Mbarire, MP
- (x) Hon. Macharia Mukiri, MP
- (xi) Hon. Bifwoli Wakoli, MP

Mr. Speaker Sir, this Report contains the deliberations of the sub-committee which were subsequently adopted by the Committee. The Members of the sub-committee are:

- (i) Hon. Amina Abdalla, MP - Chairperson
- (ii) Hon. Jim Choge, MP
- (iii) Hon. Cecily Mbarire, MP

The sub-committee held one sitting with Hon. Njoki Ndung'u, the mover of the Bill and a Mr. Tom M. Mboya, Principal Parliamentary Counsel, Attorney General's Chambers. The minutes of the deliberations of the Committee and its sub-committee are attached to this Report for ease of reference.

Mr. Speaker Sir, the Committee unanimously agreed on the importance of the Bill which mainly seeks to amend and consolidate the law relating to sexual offences. Currently, such laws are scattered in various statutes. This, the Committee believes will provide clarity to the judiciary in prosecuting sexual offences which will in turn enhance protection of all persons from such offences.

In the recognition of the public outcry on the social menace by sexual offenders, the Committee supports the stiffer and enhanced penalties proposed by the Bill with a belief that this will deter such offences.

Such penalties include life imprisonment and longer prison terms without option of fine. For instance, the Bill seeks for a minimum life imprisonment for those who deliberately transmit HIV or any other life threatening sexually transmitted disease. The categorization of rape, defilement, gang rape and the deliberate transmission of HIV, into non-bailable offences as will be prescribed by a proposed amendment, to Section 123 of the Criminal Procedure Code, is another break through in the matter.

Mr. Speaker Sir, perhaps of paramount importance is the shift of the burden of proof to the accused. This will be a shift from the current position where the victim has the burden of proof. The change will be in conformity with the treatment of the accused in other offences.

The Committee further welcomes the proposed National policy framework to guide the implementation and administration of the Act in order to secure acceptable and uniform treatment of all sexual offences and provide civic education on the contents of the Bill.

Mr. Speaker Sir, finally it is now my pleasant duty, on behalf of the Departmental Committee on Administration of Justice and Legal Affairs, to present and commend this report to the House.

SIGNED:.....

Hon. Paul K. Muite, MP
Chairman, Departmental Committee on Administration of
Justice and Legal Affairs

DATE:.....6/10/05.....

PROPOSED AMENDMENTS TO THE SEXUAL OFFENCES BILL, 2005

NOTICE is given that the Department Committee on the Administration of Justice and Legal Affairs intends to move the following amendments to the Sexual Offences Bill, 2005 at the Committee Stage—

CLAUSE 3

THAT Clause 3 be amended in sub-clause (6) by deleting the word twenty years but which may be enhanced to imprisonment for life “and substituting therefor the words fifteen years, but which may be enhanced to imprisonment for life, or to a fine of not less than two million shillings or to both fine and imprisonment”.

CLAUSE 4

THAT Clause 4 be amended by deleting the expression “twenty years but which may be enhanced to imprisonment for life” and substituting therefor the words “fifteen years, but which may be enhanced to imprisonment for life, or to a fine of not less than two million shillings or to both fine and imprisonment”.

CLAUSE 5

THAT Clause 5 be amended in sub-clause (2) by deleting the expression “twenty” and substituting therefor the expression “fifteen” and by inserting the following words immediately after the word “life” “or to a fine of not less than two million shillings or to both fine imprisonment”.

CLAUSE 6

THAT Clause 6 be amended in paragraph (d) by deleting the expression “five” and substituting therefor the expression “ten” and by inserting the following words immediately after the word “years” “or to a fine of not less than one hundred thousand shillings or to both”.

CLAUSE 7

THAT the Bill be amended by deleting Clause 7 and substituting therefor the following new clause-

7. A person who intentionally commits rape or an indecent act with another within the view of a family member of the victim, a child or a person who is mentally impaired is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than fifteen years or to a fine of not less than two million shillings.

CLAUSE 8

THAT the Bill be amended by-

(a) deleting Clause 8 and substituting therefor the following new Clause 8-

8. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(b) inserting the following new Clauses immediately after Clause 8-

8A. A person who commits an offence of defilement with a child of less than ten years of age shall be liable to imprisonment for life with hard labour.

8B. A person who commits an offence of defilement with a child of more than eleven years of age but less than fifteen years of age shall be liable to imprisonment for a term of not less than twenty years.

8C. A person who commits an offence of defilement with a child of more than fifteen years of age shall be liable to imprisonment for a term of not less than fifteen years.

8D. (1) It is a defence to a charge of defilement if-

(a) it is proved that such a child deceived the accused person into believing that the child was over the age of eighteen years at the time of the alleged commission of the offence;

(b) the accused reasonably believed that the child was over the age of eighteen years.

(2) The belief referred to in subsection (1)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

(3) The provisions of subsection (1) shall not apply if the accused is related to the child within the prohibited degrees of blood or affinity.

CLAUSE 9

THAT the Bill be amended by-

(a) deleting Clause 9 and substituting therefor the following new Clause 9-

9. A person who attempts to commit an act which causes penetration with a child is guilty of an offence termed attempted defilement.

(b) inserting the following new Clauses immediately after Clause 8-

9A. A person who commits an offence of attempted defilement with a child of less than ten years of age shall be liable to imprisonment for life with hard labour.

9B. A person who commits an offence of attempted defilement with a child of more than eleven years of age but less than fifteen years of age shall be liable to imprisonment for a term of not less than twenty years.

9C. A person who commits an offence of attempted defilement with a child of more than fifteen years of age shall be liable to imprisonment for a term of not less than fifteen years.

9D. (1) It is a defence to a charge of attempted defilement if-

(a) it is proved that such a child deceived the accused person into believing that the child was over the age of eighteen years at the time of the alleged commission of the offence;

(b) the accused reasonably believed that the child was over the age of eighteen years.

(2) The belief referred to in subsection (1)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

(3) The provisions of subsection (1) shall not apply if the accused is related to the child within the prohibited degrees of blood or affinity.

CLAUSE 10

THAT Clause 10 be amended in sub-clause (1) by deleting the expression “ten” and substituting therefor the expression “ten”.

CLAUSE 11

THAT Clause 11 be amended in sub-clause (1) by deleting the expression “twenty” and substituting therefor the expression “fifteen”.

CLAUSE 12

THAT Clause 12 be amended by deleting the words “thirty years but which may be enhanced to imprisonment for life” and substituting therefor the words “fifteen years, but which may be enhanced to imprisonment for life, with hard labour”.

CLAUSE 14

THAT Clause 14 be amended –

(a) by deleting the expression (1); and

(b) in paragraph (b) by deleting the words “twenty years” and substituting therefor the words “fifteen years”.

CLAUSE 15

THAT Clause 15 be amended in paragraph (6) by deleting the expression “twenty” and substituting therefor the expression “fifteen”.

CLAUSE 16

THAT Clause 16 be amended by deleting the expression “twenty years” at the end thereof and substituting therefor the words “fifteen years or to a fine of not less than two million shillings or to both”.

CLAUSE 17

THAT Clause 17 be amended in paragraph (e) by deleting all the words “six years or to or to a fine of not less than five hundred thousand shillings or to both upon subsequent conviction to imprisonment for a term of not less than seven years without the option of a fine” and substituting therefor the words “fifteen years or to a fine of not less than two million shillings or to both”.

CLAUSE 19

THAT Clause 19(3) be amended in paragraph (b) by deleting the expression “twenty” and substituting therefor the expression “fifteen”.

CLAUSE 20

THAT Clause 20 be amended in sub-clause(1) by deleting the expression “twenty years;” and substituting therefor the words “fifteen years or to a fine of not less than one hundred thousand shillings or to both.”

CLAUSE 22

THAT Clause 22 be amended –

(a) by inserting immediately after subclause (3) the following new subclause (4) –

“(4) In this Act –

(a) “uncle” means the brother of a person’s parent and “aunt” has a corresponding meaning;

(b) “nephew” means the child of a person’s brother or sister and “niece” has a corresponding meaning;

- (c) “half-brother” means a brother who shares only one parent with another;
- (d) “half-sister” means a sister who shares only one parent with another; and
- (e) “adoptive brother” means a brother who is related to another through adoption and “adoptive sister” has a corresponding meaning.”

CLAUSE 23

THAT Clause 23 be amended in subclause (2) paragraph (d) by deleting the words “sexually suggestive stories or jokes, leering, intrusive sexual remarks”.

CLAUSE 24

THAT Clause 24 be amended—

- (a) by deleting the expression “twenty years” appearing at the end of sub-clauses (1),(2),(c),(3) and (4) and respectively substituting therefor the words “fifteen years or to a fine of not less than two million shillings or to both”.
- (b) by deleting sub-clause (5);
- (c) by inserting the following new Clause immediately after Clause 24—

Gang rape. 24A. any person who commits gang rape or any other offence under this Act in association with others is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for life.

CLAUSE 26

THAT Clause 26 be amended in sub-clause (3) by deleting the expression “ten years” at the end thereof and substituting therefor the words “fifteen years or to a fine of not less than two million shillings or to both”.

CLAUSE 27

THAT Clause 27 be amended in sub-clause (2) by deleting the expression “two” and “fifty” and respectively substituting therefor the expressions “three” and “one hundred”.

CLAUSE 28

THAT Clause 28(1) be amended by deleting paragraph (c) and substituting therefor the following new paragraph –

“(c) will infect another person with any other sexually transmitted disease,

shall be guilty of an offence, whether or not he or she is married to that other person, and shall be liable upon conviction to imprisonment for life but which may be enhanced to death penalty.”

CLAUSE 29

THAT Clause 29 be amended in sub-clause (3) by deleting the expression “twenty years” at the end thereof and substituting therefor the expression “fifteen years or to a fine of not less than two million shillings or to both”.

CLAUSE 30

THAT Clause 30 be amended by inserting the following new sub-clause immediately after sub-clause (11)

“(12) In determining the protective measures or protective programmes to accord to a vulnerable witness under this Act, the court or the prosecution shall have regard to, and take into account, other protective measures or protective programmes that may be accorded to such witnesses under any other Act”.

CLAUSE 45

THAT Clause 45(2) be amended in paragraph (a) by inserting the word “or her” at the end thereof.

CLAUSE 46

THAT clause 46(1) be amended in paragraph (a) by inserting the words “ commission of that act; and” at the end thereof.

GENERAL AMENDMENT

THAT the Bill be amended –

- (a) by repealing clauses 35, 36, 41, 42 and 43;
- (b) by inserting the following new clauses immediately after Clause 29 –

Age of consent for marriage.

29A. (1) The legal age of consent for marriage is eighteen years.

(2) Any person who marries a person under the age of eighteen years commits an offence and is liable upon conviction to imprisonment for a term of not less five years.

Female
circumcision and
wife inheritance.

29B. Any person who—

- (a) engages in or carries out female circumcision on children below eighteen years; or
- (b) carries out forced circumcision on female adults; or
- (c) engages in or carries out forced wife inheritance,

is guilty of any offence under paragraph (a) of engaging in female circumcision, and under paragraph (b) of forced circumcision and under paragraph (c) of forced wife inheritance and is liable upon conviction to imprisonment for a term of not less than five years or to a fine of not less than fifty thousand shillings or to both.

Offences within
precincts or
premises of
corporations,
societies etc.

29C. Where an offence under this Act is committed within the premises or precincts of a company, body corporate, society, or association, any person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society or association shall be guilty of that offence and liable on conviction to imprisonment for a term of not less than fifteen years or to a fine of not less than two million shillings or to both, unless it is proved by such person that, through no act or omission on his or her part, he or she was not aware that the offence was being or was intended or about to be committed, or that he or she took all reasonable steps to prevent its commission.

Extra-territorial
jurisdiction.

29D.(1) A person who, while being a citizen of, or permanently residing in Kenya, commits an act outside Kenya which act would constitute a sexual offence had it been committed in Kenya, is guilty of such an offence and is liable to the same penalty prescribed for such offence under this Act.

(2) A person may not be convicted of an offence contemplated in subsection (1) if such a person has been acquitted or convicted in the country where that offence was committed.

Non-disclosure of
conviction of sexual
offences

29E. A person who has been convicted of a sexual offence and who fails to disclose such conviction when applying for employment which places him or her in a position of authority or care of children or any other vulnerable person or when offering or agreeing to take care of or supervise children or any other vulnerable person is guilty of an offence and liable upon conviction to imprisonment for a term of not less than five years or to a fine of not less than fifty thousand shillings or to both.

SECOND SCHEDULE

THAT the Second Schedule to the Bill be amended by inserting the following new sub-paragraph immediately after sub-paragraph 4—

“(5) Section 123(1) of the Criminal Procedure Code is amended by inserting the words “defilement, indecent act with a child below 18,16 or 9, deliberate transmission of HIV or any other life threatening sexually transmitted disease, gang rape” immediately after the word “treason”.

MINUTES OF THE EIGHTY SEVENTH SITTING OF THE DEPARTMENTAL COMMITTEE ON ADMINISTRATION OF JUSTICE AND LEGAL AFFAIRS HELD ON TUESDAY 4TH OCTOBER 2005 IN THE COMMITTEE ROOM 2ND FLOOR CONTINENTAL HOUSE MAIN BUILDINGS AT 10.00PM.

PRESENT

Hon. Paul Muite, MP - **Chairman**
Hon. Moses Cheboi, MP
Hon. Kenneth Marende, MP
Hon. Amina Abdalla, MP
Hon. Jim Choge, MP
Hon. Cecily Mbarire, MP
Hon. (Dr.) Enoch Kibunguchy, MP
Hon. Macharia Mukiri, MP

ABSENT WITH APOLOGY

Hon. Gideon Ndambuki, MP
Hon. Peter Owidi, M.P
Hon. Bifwoli Wakoli, MP

IN-ATTENDANCE

Hon. Njoki Ndung'u, MP
Mr. Tom M. Mbaya – Principal Parliamentary Counsel Attorney General's Chambers
Ms. Daisy Amdany – Consultant

IN-ATTENDANCE

Mr. Zakayo Mogere
Ms. Edith Imunde

- KENYA NATIONAL ASSEMBLY.

- Clerk Assistant
- Parliamentary Intern.

MINUTE NO. 109/2005

DELIBERATIONS ON THE SUB COMMITTEE REPORT ON THE SEXUAL OFFENCES BILL.

The Committee members went through the sub-committee report on the Sexual Offences and adopted it.

MINUTE NO.110/2005

ADJOURNMENT

There being no other business the Chairman adjourned the meeting at ten minutes to One O'clock until **Wednesday 5th October, 2005 at 10.30am.**

Signed: 
(Chairman)

Date: 6/10/05

MINUTES OF THE FIRST SUB-COMMITTEE SITTING OF THE DEPARTMENTAL COMMITTEE ON ADMINISTRATION OF JUSTICE AND LEGAL AFFAIRS HELD ON MONDAY 3RD OCTOBER 2005 IN THE COMMITTEE ROOM 2ND FLOOR CONTINENTAL HOUSE, PARLIAMENT BUILDINGS AT 3.00 P.M.

PRESENT

Hon. Amina Abdalla, M.P - **Chairperson**

Hon. Jim Choge, M.P

Hon. Cecily Mbarire, M.P

IN-ATTENDANCE

Hon. Njoki Ndung'u, M.P.

Mr. Tom M. Mboya – Principal Parliamentary Counsel Attorney General's Chambers

Ms. Daisy Amdany – Consultant

IN ATTENDANCE

Mr. Zakayo Mogere

Ms. Edith Imunde

-KENYA NATIONAL ASSEMBLY

- Clerk Assistant

- Parliamentary Intern

MINUTE NO.001/2005: DELIBERATIONS ON THE SEXUAL OFFENCES BILL

The Members went through the Bill clause by clause and resolved the following:-

- | | |
|-----------------|--|
| Clause 1 & 2 | Adopted. |
| Clause 3, 4, &5 | Adopted with amendments to have a term of imprisonment of not less than 15 years but which may be enhanced to life imprisonment with an option of a fine. |
| Clause 6 | Adopted with amendments to have a term of imprisonment of not less than 10 years with an option of a fine. |
| Clause 7 | Insert a new clause 7.(b) to include acts which cause penetration or indecent acts committed in the presence of family members and adults of full mental faculties.
This is aimed at reducing cases of sexual assaults in the presence of family members which is more emotionally disturbing.

The term of imprisonment proposed is not less than 15 years with an option of a fine. |
| Clause 8 | Adopted with Amendments to the custodial sentences.
Defilement of a child below 10 years - Life imprisonment with hard labour with no option of a fine. |

Defilement of a child between 11 – 15 years – imprisonment for a term not less than 20 years with an option of a fine.
Defilement of a child between 16 – 18 years - imprisonment for a term not less than 15 years with an option of a fine.

- Clause 9 Provisions of clause 8 apply.
- Clause 10 Adopted with amendments to have a term of imprisonment of not less than 10 years with an option of a fine.
- Clause 11 Adopted with amendments to have a term of imprisonment of not less than 15 years with an option of a fine.
- Clause 12 Adopted with amendments to have a term of imprisonment of not less than 15 years but which may be enhanced to life imprisonment with an option of a fine.
- Clause 13 Adopted.
- Clause 14, 15, 16, 17, 18, & 19 -Adopted with amendments to have a term of imprisonment of not less than 15 years with an option of a fine of Kenya Shillings 2 million or both.
- Clause 20 & 21 Adopted with amendments to have a term of imprisonment of not less than 15 years with an option of a fine not exceeding Kshs.100, 000.
- Clause 22 Adopted with Amendments. Insert a new sub clause (4) immediately after sub clause (3)
“(4) In this Act –
- (a) “uncle” means the brother of a person’s parent and “aunt” has a corresponding meaning.**
 - (b) “nephew” means the child of a person’s brother or sister and “niece” has a corresponding meaning.**
 - (c) “half- brother” means a brother who shares only one parent with another;**
 - (d) “half –sister “means a person who shares only one parent with another; and**
 - (e) “adoptive brother “means a brother who is related to another through adoption and “adoptive sister” has a corresponding meaning.”**

Clause 23	(2) paragraph (d) Adopted with amendment. Delete the words “sexually suggestive stories or jokes, leering, intrusive sexual remarks.”
Clause 24	Adopted with amendments to have a term of imprisonment of not less than 15 years with an option of a fine not exceeding Kshs.2 million or both. (5) Adopted with amendments to have a life imprisonment without an option of a fine.
Clause 25	Adopted.
Clause 26	Adopted with amendments to have a term of imprisonment of not less than 15 years with an option of a fine not exceeding Kshs.2 million or both.
Clause 27	Adopted with amendments to have a term of imprisonment of not less than 3 years with an option of a fine not exceeding 100,000 or both.
Clause 28	Adopted with amendments to have a life imprisonment but which may be enhanced to death penalty without an option of a fine.
Clause 29	Adopted with amendments to have a term of imprisonment of not less than 15 years with an option of a fine of Kenya Shillings 2 million or both.
Clause 30	
Clause 31, 32, 33, 34	Adopted.
Clause 35 & 36	Repealed
Clause 37, 38, 39, & 40	Adopted
Clause 41, 42, 43	Repealed
Clause 44	Adopted.
Clause 45	(2) paragraph (a) Adopted with amendment. Insert the words “or her” at the end thereof.
Clause 46	(1) paragraph (a) Adopted with amendment. Insert the words “commission of that act; and” at the end thereof.
Clause 47, 48, 49 & 50	Adopted.

GENERAL AMENDMENTS

That the Bill be amended –

(a) by repealing clauses 35,36,41,42,and 43;

(b) by inserting the following new Clauses immediately after Clause 29 –

29A. (1) The legal age for consent of marriage is eighteen years.

(2) Any person who marries a person under the age of eighteen years commits an offence and liable upon conviction to imprisonment for a term of not less than ten years.

29B. Any person who –

(a) engages in or carries out female circumcision on children below eighteen years; or

(b) carries out forced circumcision on female adults; or

(c) engages in or carries out forced wife inheritance,

Is guilty of an offence under paragraph (a) of engaging in female circumcision, and under paragraph (b) of forced circumcision, and under paragraph (c) of forced wife inheritance and is liable upon conviction to imprisonment for a term of not less than five years or to a fine of not less than fifty thousand shillings or to both.

29C. Where an offence under this Act is committed within the premises or precincts of a company, body corporate, society, or association, any person charged with, or concerned or acting in, the control or management of the affairs or activities of such a company, body corporate, society or association shall be guilty of that offence and liable on conviction to a term of not less than ten years or to a fine of not less than one million shillings or to both, unless it is proved by such person that, through no act or omission on his or her part, he or she was not aware that the offence was being or was intended or about to be committed, or that he or she took all reasonable steps to prevent its commission.

29D(1) A person who, while being a citizen or, or permanently residing in Kenya, commits an act outside Kenya which act would constitute a sexual offence and is liable to the same penalty prescribed for such an offence under this Act

(2) A person may not be convicted of an offence contemplated in subsection (1) if such a person has been acquitted or convicted in the country where that offence was committed.

29E. A person who has been convicted of a sexual offence and who fails to disclose such conviction when applying for employment which places him or her in a position authority or care of children or any other vulnerable person or when offering or

agreeing to take care of or supervise children or any other vulnerable person is guilty of an offence and liable upon conviction to imprisonment of not less than three years or to a fine of not less than fifty thousand shillings or to both.

SECOND SCHEDULE


THAT the second schedule to the Bill be amended by inserting the following new sub-paragraph immediately after sub- paragraph 4-

“(5) Section 123(1) of the Criminal Penal Code is amended by inserting the word “defilement, indecent act with a child below 18, 16, 9. deliberate transmission of HIV or any other life threatening sexually transmitted disease.” Immediately after the word “treason”.

MINUTE 002/2005:

ADJOURNMENT

There being no other business the Chairman adjourned meeting at fifty minutes past four O'clock.

Signed: 
(Chairman)

Date: *6/10/2005*