"R A P E: A JOKE OR A SCANDAL?"
A CASE FOR LEGAL REFORM

A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE LL.B DEGREE, UNIVERSITY OF NAIROBI.

BY

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EDUCATION: Must not be divorced from life: the school must not be confined within its four walls: It must be exposed to all the storms that rage over the Vast Sea of life, it must be in the Mainstream of human affairs: everything that stirs the minds of men, that makes the ground quake beneath our feet, that lights up the firmament of ideas: All these must be allowed to sweep freely through schools. Let pupils experience all these, let it excite their minds and be a basic ingredient of the fare they receive at school.

LUNACHARSKY

Learning by study must be won; 'Twas ne'er entailed from son to son.

From GAY, Fables

DEDICATION

To the Late,

BEN. OJIAMBO OCHIENO,

My dear 18 year old friend whose mysterious and tragic death in 1981, just when he was blossoming with youth, has left me deserted ever since; this dissertation is DEDICATED:

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N.B. Any errors in this dissertation are solely borne by the writer and are in no measure to be attributed to the people mentioned above.

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QUOTE

Learning by Study must be Won; 'Twas ne'er
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From GAY, Fables

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LIST OF ABBREVIATIONS

Books and Periodicals

Cal. L.R	California Law Review
C.L.R.	Criminal Law Review
Col. L.R.	Columbia Law Review
Cr. L.J.	Criminal Law Journal
M.L.R.	Modern Law Journal
Y.L.J.	Yale Law Journal

Cases

A.C.	Appeal Cases 1935
All.E.R.	All England Reports 1974 (7)
Cox C.C.	Cox Criminal Cases 1859, 1872
E.A.C.A.	East African Court of Appeal Reports 1936, 1953
E.A.L.R.	Eastern Africa Law Reports 1961, 1967, 1971.
K.B.D.	Kings Bench Division 1916
K.L.R.	Kenya Law Reports 1976
Q.B.D.	Queens Bench Division 1977
W.L.R.	Weekly Law Reports 1975

TABLE OF STATUTES

(1) The Constitution of Kenya

(2) The Criminal Procedure Code (Cap 75, Laws of Kenya.)

(3) The Evidence Act (Cap 80, Laws of Kenya)

(4) The Kenya Law Reform (Commission Act. 1982)

(5) The Penal Code (Cap 63, Laws of Kenya).

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INTRODUCTION

0.1 THE PROBLEM

Mention the word "rape" either in a casual discussion or out of the blue and you are sure to get in response from your audience one of the following: Mirthful outbursts, sneers of abhorrence or reminiscences of stupor. Indeed the discussion will be doomed to an abrupt end at the mere mention of the word! A rude joke or scandal (?) will have been unveiled. You can only be left wondering, more so because, behind those infinite reactions, inside this seemingly theatrical term, lies one of the most slippery problems in our law. It is a problem because as it will be shown, or attempted to be shown in the following analysis, rape and its gruesome aspects has been misconstrued and/or ignored by society and the law from the context of a Kenyan perspective.

The misperception of the offence has been largely due to the socio-economic and cultural conflict between our Kenyan society and that of England from where we have inherited most if not all of our laws. This conflict stretches beyond England to other European countries and even the United States. The conflict has to loom on because despite the ravages of colonialism, some of our traditional institutions still crave for recognition and preservation. They stand undetered by the wind of "modernity".

Unfortunately however, the socio-economic orientation of our society has brought about a split in attitude among those that are affected by the penal laws.
Hence there is an acute difference in opinion as to how the offence of rape should be viewed from legal glasses. This can be summed up as (and sadly so) "the epitome of different environmental upbringing." More often than not one hears the urbanised populace especially the womenfolk talk of rape within the framework of Laisser Faire attitudes about freedom, justice and

equality which are prevalent in Britain and the United States - consequently, the question as to how the law relating to rape should be reformed to acquire or attain satisfaction becomes more complex. This should not be taken to mean that the ideas of freedom, justice and equality are undesirable for the purpose of re-examining the law. Far from it; rather, talking about or criticising the law in Kenya on the basis of views prevalent in foreign countries and entirely ignoring the historical background and views about the same with their attendant socio-economic and cultural attitudes is an illusory exercise.

Guidance could be found in the words of Sally Lloyd Bostock when she asserts;

> "Non legal rules must supplement, modify and contribute to the making of legal rules, and it is as well if this is sometimes explicit. At some level, standards and criteria of justice embodied in and enforced by the law in a democratic society must presumably come from and respond to the wider norms of the society of which the legal system is a part, and on the whole appear just to its citizens". (1)

But Mr. Gibson Kamau Kuria is even more specific and succinct in an examination of the problem of reform in Kenya when he writes:

> "A real danger exists that the current Kenya political theory which one finds in Chapter 5 of the Kenya Constitution may be seen by lawyers with the kind of legal training in England and the United States as a vehicle for westernising Kenya laws by arguing that ideas of equality and discrimination have a universal meaning which will be taken to be English and American ones. If that Chapter is viewed that way it will be seen as yet another way of reforming Kenya laws through the introduction of foreign standards". (2)

This it is submitted, is the problem which those who have dealt with the intractable problem of rape from a Kenyan perspective (3) have found themselves confronted with.

The law relating to rape has consequently been widely criticised on the ground that it fails to protect women, is biased against them and rests on derogatory assumptions about them. There is a widespread belief that the treatment of rape victims by the legal process discourages them from reporting crimes and the rules of evidence which apply in rape cases permit rapists to avoid conviction. One would be rash to disagree with such observation. But the problem does not stop there. The criticisms have been made with an apparent assumption of a raging struggle between men and women. Thus, one has to take one of the so called "chauvinist" sides either male or female if he/she wishes to study the law relating to rape. "Chauvinism" (sexist) a much overused and misused term has become the basis of analysis. The few available material on the Kenyan scene have been snared in this pattern. Ironically however for the reader and reformist this approach has had its advantages in that it has exposed some if not most of the short comings and problems pertaining to the law of rape.

Given this development therefore, this study should not be looked at as a radical departure from what has been promulgated by outstanding scholars. Rather, it is in its most humble way a supplement to the existing literature and an attempt albeit a timid one to attain satisfaction. It proceeds from the conviction that rape being a crime that is deeply rooted in the socio-economic and political tenets of society and their consequent historical background should be reconsidered in light of the same. Making the issue degenerate into a clearly knit struggle between men and women as a result of their unending grope for dominance over each other is to simplify the problem and miss the crux of the matter. This, it is submitted, is what the study hopes to disentangle.

0.2 REASONS AS TO WHY THE STUDY IS UNDERTAKEN:

From the foregoing analysis, this study is undertaken with an intention of adopting what is hoped will be a largely Kenyan approach to the problem of rape. It must be added with haste that there is no intention to ignore the available literature

by eminent legal scholars on the issue. Indeed the study would not be possible without constant consultation of such literature. Persistent reference to the Kenyan situation is however the major thrust of the thesis. This will necessitate a revisitation of what the attitudes in Kenya were before the colonial incursion about rape. What the sanctions were in our traditional society and what they intended to protect. The study will therefore try to harmonise our historical background with law reform, the present ideas about the issue in Kenya and those in England will also be considered - since the latter is the bastion of Kenya's legal system and its attendant contraditions and inconsistencies. This balancing process is necessary, lest, we take upon ourselves the mantle of initiating reform and in so doing end up destabli-sing even the little that there was. The study hopes by this to achieve a compromise between the warring ideas and cater for the majority of those to whom the law is applicable.

The second motivating factor to the study is to widen the scope of the analysis of rape. As has been already pointed out, the thesis is intended to avoid the structural approach, which has been the preoccupation of some of those who have written.(4) They have construed the problem as a conscious sexist class - struggle between men and women. This approach should not be encouraged because it can for the purposes of the law, reduce the exercise to belligerent intellectualism based on gender. This should not be allowed to happen because men and women are human beings and must share the responsibility of erasing the vices that tend to threaten and wreck the very fabric on which society is woven. If society in its totality (to a certain extent) does not condone certain ideas, the law should take note of that irrespective of whether those advocating for the introduction of such ideas happen to fall in one sexist class. If some women feel for example that they should be allowed to have untrammeled freedom in the ordering of their affairs while on the other hand, society (composed of both men and women) fear that such a development would disrupt essential institutions such as marriage, the law should hesitate before it grants such freedom. Likewise if some men feel that they should be allowed to dominate and control women in all spheres

of life, while society fears that such control would subject women to abject slavery, the law should not grant such power.

If this purpose were to be achieved, a lot of caution should be taken with regard to statements such as the following:

> "Without a biologically determined mating season, a human male can envince sexual interest in a human female at any time he pleases, and his psychologic urge is not dependent in the slightest on her biologic readiness or receptivity. What it all amounts to is that the human male can rape."(5)

Soberly scrutinised, it will be seen that the above assertion is a strong statement which lacks a correlative. By this it is meant that the author does not see it necessary to swop the roles of the male and female. But still more to come; "Rape has become not only a male prerogative but man's basic weapon of force against woman, the principle agent of his will and her fear."(6) Thus a man is portrayed as a barbarous animal who takes pride and satisfaction out of his conscious choice in brutal and cruel sexual assaults over a woman. Man is nothing but a beast who should be vigorously checked by the law if a woman is to exist. It will be sought to be shown that if we were to view the problem of rape in the above way, then seldom shall the offence be checked. We undertake without too much idealism, but with maximum sobriety to adopt and pursue an insight into the most deep seated and revolting features of reality about rape. This would not be possible if we do not free ourselves from the gender based analysis.

The third reason as to why this study is undertaken is, like the other works, to attempt a search of what the major causes of rape are in Kenya and to adjoin a realistic approach to its curtailment. To consider whether it is desirable to require the courts to punish offenders with a maximum severity as has been suggested in some quarters.(7) Or to encourage a system of punishment which would be rehabilitative as well as deterrent in outlook. In other words suggest what is the best way of checking the crime.

The study is also undertaken with the intention and hope of stimulating scholarly responses which are more Kenyan and lead to further penetrating studies. This is because so far there are very few works on the issue. It is also in realization of the fact that, however probing, the thesis could at the end of the da be found wanting and hence the need for more material. It is humbly submitted that this won't be due to negligence but to the inevitable inadequacies of man.

Finally is the reason that being aware of the newly formed Kenya law Reform Commission[8] and having no doubt that the Commission will address itself to the offence under discussion; we can only hope that the study will appeal to the Commissioners or atleast serve as one of the various sources to which they will turn if need should arise.

0.3 CHAPTER BREAKDOWN

The thesis is divided into four main chapters which are not mutually exclusive. Occassionally the reader will notice some kind of overlap. This trend is operative throughout the study. This is due to the fact that the nature of the topic under discussion dictates this particular format. A part from chapter headings, there will be few subheadings. Otherwise each question under a chapter will be dealt with in one or so many paragraphs as the situation may demand. This has as its object or aim the desire not to interrupt the stream of thought of the reader and pigeon hole it.

Chapter one: deals with the definitional aspects of rape. It will probe into the societal attitudes pertaining to rape in traditional Kenya and trace the development up to the present day and see whether the ideas of those days still survive or have been swept away by the "modernity" revolution. We shall also consider the ideas pertaining to rape in feudal Britain. Having made an inference, we shall consider what consequences such a development has on our law. Obviously under the same chapter, we shall examine what rape is as defined by the Penal Code and consider whether such a definition is exhaustive for the purpose of the recommendations we shall make. Under the

same heading we shall seek to establish what point of departure legal scholars should adopt while suggesting reforms.

Chapter two: deals with various types of rape as created under the Penal code. The chapter will also consider whether new heads should be introduced such as "Marital rape" in Kenya or not. We shall also boldly delve into an examination as to wether women are capable of raping men. This still remains a very debatable point in academic circles. If it turns out that women and not only men are capable of raping, the orthodox formular will be sent tumbling into dust. In the event that this unfolds, we shall be called upon yet again to unveil the implications of such an occurence for our law. Finally, under this chapter will also be discussed the issue as to whether there is need to abolish all the other crimes related to rape and have just one head termed "rape". The discussion hinges on the question whether rape should be widened to cover situations beyond those defined in the Penal Code.

Chapter three: concerns itself with the issue of responsibility and rape. In a nutshell, who and what is responsible for rape in Kenya? We shall attempt to furnish an explanation to the question. In so doing we try to identify the major causes of rape and having done that prescribe solutions in the framework of legal flexibility. The issue as to whether rape shall be considered as a crime of passion or violence will be central to this scrutiny. The chapter rounds off with a consideration of two points, the first being whether the reduction of rape should be left to the law alone or whether it is the duty of both men and women through their conduct always to endeavour and check its escalation. The second point is that just as there are mental offenders (persons who commit the offence due to their mental defects) In other crimes, so also are there mental offenders in rape, how should the law treat them?

Chapter four: is what could be termed as "the long awaited chapter". It looks at rape and the courts. What happens outside the court and inside the courtroom in relation to rape? How have the policemen responded to rape victims and how have they encouraged (or discouraged?) the prosecution process?

What about the judges and the magistrates that are charged with the duty of determining the innocence or guilt of accused persons? This will call for a revisitation of the rules of evidence and a consideration as to whether they are too technical with the effect of hampering convictions. Chapter four is then followed with a reappraisal of the whole thesis in a summary and recommendatory manner. What all this means is that a firm statement on the writers position about the intricacies of the problem will be made available.

0.4 METHODOLOGY OF RESEARCH

The research is largely archival for the one reason that we don't intend to drift into purely sociological patterns of analysis. More time is devoted to the views of legal scholars on the issue that are considered relevant. But the nature of the topic under discussion being what it is, a little field research becomes necessary - within the framework of the law. No questionaire is however prepared for this purpose because some of those who have written have used a questionaire, and much reliance is placed on their results. Inferences and criticisms are also made on the basis of such questionaires. A few interviews are conducted with different people in areas where we fail to get access to authoritative literature. The interviews are not uniform as they change with the demand of circumstance. Views of men and women espoused in Kenyan dailies and other Continental magazines are taken into consideration.

The methodology appears a disjointed one and if this should cause some anxiety to the reader; the only explanation is that necessity and expediency require so.

CHAPTER ONE

1. THE DEFINITIONAL AND DEVELOPMENTAL ASPECTS OF THE LAW OF RAPE IN KENYA: A HISTORICAL SURVEY.

Not much has been written on sexual crimes or "rape" in particular within the context of traditional Kenyan Society i.e before the advent of the colonial legacy. The effect has been that there is scanty authoritative material dealing with the issue. The literature available either mentions the offence in passing or dwells more on the sexual life of the African in general. However, regarding rape at this level as the violation of human genitalia and the interference with the sexual integrity of the individual and society as a whole, the analyses about the sexual life of the traditional Kenyan become very important. We have to venture into the sexual life of the traditional society as this serves as indicia to what could have been the attitudes towards offences connected with the same and the punishments thereof.

This study proceeds from the view that traditional African societies, despite the attributes of super-masculinity and iron-handedness towards women, boast one of the greatest respect and regard for the institution of sex. The sex life of a man and woman was treated with utmost reverence. Sex was not just used for biological purposes alone. It had also religious and social uses. For procreation and pleasure, sex played an important and obvious role in any normal marriage and in any society. To this date, there are some people among whom rituals are solemnly opened or concluded with the actual or symbolic sexual intercourse between husband and wife or other officiating persons. This is like a solemn seal in and sacred action, as "sacrament" signifying inward spiritual values. Professor John Mbiti strengthens this view when he tells us;

> "In many societies, it is a great offence on the part of children to look at or talk (joke) about the genitals of their parents. Sexual organs are the gates of life. For many African

> peoples, the genitals and buttocks are the parts of the body most carefully covered; their lack of covering constitutes 'nakedness' in the eyes traditional African (sic)"(9)

The kinship system involved among other things, relationships in which physical avoidance between given individuals was carefully observed. This avoidance even stretched beyond specific individuals. The object of seperation was to promote the sacredness with which sexual life was endowed. This was made possible by the protection of individuals concerned from sexual contact. Bryk, F, in his book Voodoo - Eros with the characteristic lack of perception which is the case with most white anthropologists who set themselves the task of examining the complex aspects of the African society; has the following to say;

> "In daily intercourse a certain more or less sharp accentuation of the sex is perceptible. In this respect Negro society resembles a sysnagogue, where men and women are seperated as if in different worlds. Wherever one looks he is met with this social delimitation. Even in going out men and women form two seperate groups; girls and women have their circle, men and boys another."(10)

Further on while talking about the dance styles of the Nandi, he exhibits the same disbelief as he says;

> "Among the Nandi, where men and women do not dance together, but only in close proximity, the dance forms of the femme sex are quite different from those of the men. While girls and women stand in a row or in a circle, singing gaily, gently swaying their legs to and fro ... , the men do actual high jumping so that one is reminded rather of gymnastic exercises than of dancing."(11)

Perhaps of more relevance to our study is the fact that with most societies ordering the conduct of their youth, it will be seen that pre-marital sex was discouraged if not prohibited in some ethnic groups. This factor had the inevitable consequences of discouraging and inhibiting the youth from involving themselves in activities that could invoke the wrath and ire of the community. Boris de Rachewiltz throws some

light on the issue by saying that "among the Kikuyu, pre-marital sex takes the form of Ngweko, 'caresing'".(12) He then goes on to discuss at length what form such Ngweko takes and rounds it off by quoting the late President of the Republic of Kenya, Jomo Kenyatta who points out that "the chief concern in this relationship is enjoymennt of the warmtn of the breast and not the full experience of sexual intercourse."(13)

None of the writers alludes to the issue of rape specifically and we are left to draw our own inferences as to what the law was. It is hard to resist the conclusion that in a society which approaches sexual relationships with utmost hesitation, any departure from accepted norms concerning all aspects of sex is not likely to be tolerated. It logically follows that sexual offences were treated with maximum severity. Rape which would in this case constitute the obtaining of sexual intercourse by forceful means could not stand a chance of escaping unnoticed and unpunished. Sexual offences arose where on account of taboos and ritual regulations, people were forbidden to have sexual relations at given times, when adultery was discovered for example, it was severely dealt with. In some societies the guilty person (particularly a man) would be whipped, stoned to death, made to pay compensation or have his head or other part of his body mutilated. Professor Mbiti provides the link in the gap we have hitherto been faced with by making a reference to the offence of rape and there is no option but to quote his incisive statement in extenso

> "Fornication, incest, rape, seduction, homosexual relations, sleeping with a forbidden "relative", or domestic animals, intimacy between relatives, children watching the genitals of their parents, all constituted sexual offences, and African peoples are very sensitive to any departure from the accepted norm concerning all aspects of sex. This is a fundamentally religious attitude, since any offence upsets the smooth relationships of the community which includes those who have already departed. For that reason, many of the offences must be followed by a ritual cleansing whether or not the offenders are physically punished otherwise misfortunes may ensue. (Emphasis mine)".(14)a(14)b

This is a forceful assertion which dispels any doubts that may be still lingering in one's mind as to the watertight safeguards given to the sexual relationships between individuals. Generally speaking then, that rape constituted a serious offence in traditional society is undeniable, that the offenders were punished with severity is also undeniable. Rape was but one of the various sexual offences of one kind or another. This variety shows clearly that Africans consider the proper uses of sex to be sacred and must therefore be safeguarded. The most fundamental attributes to the laws relating to sexual offences in the traditional society were not the sexist one sided provisions that are to be seen in Europe as we shall see later. On the contrary our laws were an integral whole, they were meant to preserve the chastity of both men and women. The practices and norms apartenant to relationships were a labyrinth of sacredness.

From this general summation what should not be lost sight of is that the objective of the offence of rape and its attendant sanction was to safeguard an institution which society - considered as fundamental to social cohesion, the institution of sex as a whole and not the status of one sexist class. The laws applied indiscriminately; this should be appreciated against the background of the communal mode of production so far uninterrupted by the effects of the steam engine. The attainment of social cohesion and harmony could not be realized if important institutions like marriage were not clothed with a continuity hence the recognition of the role sex could play in such continuit The insistence on virginity by society as a virtue was not necessarily due to the fact that prospective husbands liked virgin women but because there was a symbolic role played by such virginity in ensuring the continuity and harmonial relations that followed such virginity.

Having thus briefly examined the law in our traditional society, we are called upon to centure into the law relating to rape in the common law system since the latter regretfully but unavoidably forms the basis of our criminal law just as it does other branches of the law. Rape laws in feudal England

served diverse and distinct purposes from those served by the laws in traditional Kenya. The term "traditional Kenya" has been and is herein used to denote the Kenyan society as it was before the colonial encroachment. It is interesting to note the arguments by different writers which point to the sectional purposes served by the common law in relation to rape. This should just as in many other matters be viewed against the background of the socio-economic and political conditions then prevailing in England at that period. The feudal mode of production which was the order of the day had a tremendous influence on English law. This is submitted notwithstanding the acquiesence over the matter by most western legal scholars. This is all the more reasonable since the law does not exist in a vacuum.

It has been averred by many writers on the subject that the law of rape did not in the past exist for the protection of women and does not do so today. In the past, it has been stated, the law of rape was there to protect property rights. That the essence of the crime was theft of another man's property. Redress lay in financial compensation. This tends to confirm how entrenched was the view that it was primarily an economic loss which was sustained when a rape rook place. Carol Smart in her Criminology study of women draws attention to the proprietorial nature of the law of rape during that period. She observes that the severe penalty for rape "was a punishment for defilement of another man's property rather than a form of protection for women or recognition of women's rights over their bodies."(15) When looking at rape as an offence Per se, she cannot help but drift into the idealistic realm in which she must place the blame on a man as a man quite independent of the material conditions in the English society at that time. This can be clearly seen when she writes;

> "Male took title to a female, staked a claim to her body as it were, by an act of violence. Forcible seizure was a perfectly acceptable way to men - of acquiring women and it existed in England as late as the 15th century... , rape is nothing more nor less than a conscious process of intimidation by which all men keep all women in a state of fear."(16)

As a consequence of the proprietorial nature of the law of rape in feudal society, Charlotte Mitra concludes perhaps rightly that "once the law had accepted theft as the sine qua non of rape it was only logical that a husband is no more capable of raping his wife than an owner is of stealing his own property."(17)

A part from the purely property rights which the law of rape helped to preserve in feudal society, there is a noticeable social purpose which the law was meant to serve. This can be seen in the writings of Barbara Toner(18) which reveal that in the middle ages, the law was preoccupied on the one hand with the preservation of virginity and the provision of legitimate heirs, and, on the other, with the protection of family interests and the succession to landed property. The penalty for rape was loss of life and member, but this savage punishment applied only when the victim was a virgin. The evil that the law tried to prevent was the abduction of propertied virgins, who, to the detriment of family rights in their disposal were thus compromised into marriage. This concept of virginity could be termed the "treasure concept" following the example by the celebrated English Playwright and poet William Shakespeare. Writing about the palace life in Denmark and the palace coups that were common in such royal places, shakespeare made reference to the virginity issue preferring to call it a treasure in a scene where a brother before setting out for College cautions his sister to beware about her virginity thus:

> "Then weigh what loss your honour may sustain,
> If with too credent ear you list his songs,
> or lose your heart, or your chaste treasure open
> To his unmastered importunity. (Emphasis mine)"(19)

But it becomes difficult to isolate the so called preservation of virginity concept from that of property. For why should this virginity be preserved? In Kenya we saw that it was meant to serve a symbolic task of ensuring continuity in marriage - perhaps one of the most important social institutions in Africa. So that a man who got "so and so's daughter

intact" must live in harmony with her for the rest of her life besides any other wives". In feudal society however, this was seen in monetary terms. Camille Le Grand though exclusively talking about statutory protection of young people in the present American society seems to point to the same argument while stating that, "because only the sexual activity of yound women not young men, is regulated, it may be argued that the value served by statutory rape laws is the preservation of the 'market value' of virginal young women, as potential brides, rather than the protection of the naive from sexual exploitation....."(20)

Today, it is claimed that the common law and indeed rape law in other western European countries is there for the protection of male interests. A comment appearing in a Yale Law Journal could not have been more crystal in clarity;

> "Rape laws bolster, and in turn are bolstered, by a masculine pride in the exclusive possession of a sexual object, they focus a male's aggression based on fear of losing his sexual partner, against rapists rather than against innocent competitors, rape laws help protect the male from any decrease in the value of his sexual possession which results from forcible violation."(21)

Such an assertion could as well be correct, but left at such a puritan level of inherence, it is not likely to shed any light on the reasons as to why this male interest pervades the law. It would be uncalled for to deny the truth in the above adumbration since the position is that it is the English talking about English laws in England, it is the Americans talking about America and so on. One has to ultimately agree that rape laws in these parts of the world exist Inter Alia to protect male interests.

This brief historical survey of the development of rape laws in Kenya and England respectively leaves us with a glaring conflict between the societal attitudes to rape in the two legal systems. It is a socio-economic and cultural conflict. The law of rape in Kenya existed to preserve the sacred institution of sex;

it existed not for the protection of the 'freedom' of women but for the enhancement of the chastity of both men and women. Its shape and content was to be found more in the communal mode of production and the socio-political and religious superstructure that arose out of it - than in the private ownership of property prevalent in feudal society. The attitude towards rape as an offence is to be found in the cultural values embraced by the African community. With the advent of colonialism this structure was destroyed in the most extravagant manner. The series of mistakes perpetrated in Africa by colonial administrators and missionaries alike may be attributed in no small measure to a perverted view of sex, which led them either to suppress existing beliefs or to upturn traditional ethical values. The traditional African concept of sex, which was directed towards the achievement of both physiological and psychological adjustment, was totally disregarded.

English law existed for the advancement of the conceptions of private ownership of property. The protection of a woman from violent and unscrupulous attacks and violations was seen in terms of property protection, this can be seen from the emphasis placed on the virginity of the woman. The common law existed to advance and protect male interests in a society in which the owners of property were predominantly men. Despite the apparent reluctance by writers on this subject, the factors which shaped the law are to be found in the material conditions of the feudal mode of production which was the order of the day. The conflict between the two historical periods then unfolds clearly.

It is from this conflict that the law relating to rape in Kenya as embodied in the Kenya Penal Code[22] emerges. Its origin is that of conflict and transplantation. The law in complete disregard of the customary attitudes to rape, the customary law relating to rape and the general cultural background embodies the common law attitudes in feudal England; with the consequent fears and criticisms by sociological and legal scholars.

The criticisms about the law in Kenya as it stands have tended to entirely ignore our historical background. They have followed almost in toto the arguments adopted by western scholars.

Today, the substantive offence is solely concerned with the sexual violation of women. But it doesn't escape criticism because different writers argue that in its procedural aspects traces of former attitudes survive. The major aim for the law, it has been argued should be the protection of a woman's right to her bodily integrity. In furtherance to their proposition, Jenniffer Temkin argues as follows:

> "Certainly the fact that there is no liability for rape by a husband of his wife suggests that the purpose of the law is not unequivocally the protection of a female's right to her bodily integrity. Yet this is what it should be. Given man's greater physical strength and woman's consequent vulnerability, the overriding objective which, it is submitted, the law of rape should seek to pursue is the protection of sexual choice, the right to choose whether, when and with whom to have sexual intercourse."(23)

In the face of all these developments, what should be the approach to be adopted by Kenyans? Should we follow the above approach? Before endeavouring to suggest some guidelines to this pertinent question, it is now the time we took a look at the law as stated in the Penal Code. Section 139 of the Penal Code of Kenya defines "rape" as follows,

> "Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act. Or in the case of a married woman, by personating her husband, is guilty of the felony termed rape."

Any person who commits the offence of rape is liable to be punished with imprisonment with hard labour for life, with or without corporal punishment.(24) The law at present is a clear manifestation of the legal development in England from the medieval ages to the present times. It has only echoes of the

Kenyan historical development.

Bearing in mind that the Kenyan society is no longer what it was at the visitation of colonialism, but not forgetting that some of our cultural institutions and societal attitudes towards the issue still march undeterred by the clanking bells of modernity; what should be the approach for us? It is humbly but firmly submitted that the Kenyan scholars cannot hope to achieve satisfaction if they abdicated their analytical function to western legal scholars. This is not to mean the criticisms as levelled against the present date of the law in England are not relevant to the Kenyan situation. Indeed the reader will notice in the succeeding chapters that some if not most of these criticisms are also advocated for Kenya without alteration. But any reforms should not overlook those cultural values that are still surviving for this will only worsen the problem further. Nor should this proposition be seen by some as an appeal to outdated traditionalism and custom or even superstition, it is only a cry for recognition of the vital role played by cultural values; Reimut Reiche tells us:

> ...., the manifestations of the sexual urge in earliest childhood are not governed by the child or experienced by him as sexual tension or pleasure. They arise independently of the child's own volition, as do his other physical or emotional reactions. The ability to control the sexual drive is acquired in the same way as sphincter control. This is a biological phenomenon, which only occurs when a certain age is reached, <u>but the cultural superstructure - socialization, demands it, mediates it, and endows it from the beginning with specifically cultural forms</u>. (Emphasis mine)"(25)

This cultural overtone in our reformist function is all the more important since one cannot talk about a peoples culture without a reconsideration of their economic institutions. This is necessary since the sexual behaviour of individuals is influenced down to its most subtle form and innate characteristics, by their economic position, in particular by their work situation. We are ofcourse aware that it would be superflous for scholars to go back to the practises which have been

by far overtaken by the present societal development. We know for example that most males and females actually accept pre-marital intercourse, and, believe it to be a desirable part of normal human development. It would be disastrous to expect the law to abolish this rampant practise.

In this colossal task, the Kenyan legal scholars should avoid what was referred to in the introduction as a "Laisser Faire attitude." They are not for example expected to follow chapter and verse the reforms which have been introduced in the developed countries. They should not for instance be overwhelmed by the reforms being made in the scandinavian countries like Sweden where the most modern variants of bourgeois sexual reform come from.(26) Sweden is the capitalist welfare state per excellence. Nowhere else do sexual taboos and repression carry so little weight in social norms and the law, no where else has individual sexual education become so much a matter for the community, no other place has a greater traditional concern for the bourgeois freedom of the individual, and for the protection of political, racial and sexual minorities There is a tendency in capitalist countries which its proponents see as radical and progressive to permit any kind of human or human/animal sexual manifestations, to regard them all as equal, and to encourage their occurence, even down to acts involving physical cruelty to people and animals.

By the same token let us avoid the kind of ambivalence in opinion such as that exhibited by Charlotte Mitra who while writing from the position exposited above has this to say;

> "By contrast, the Soviet Union, whatever may be its record in other fields of humanitarian concern, seems to value the dignity of women and accords them the rights to be protected from the invasion of their bodily integrity. The law of rape applies to the husband as to any other man and Russian courts view any violation of sexual freedeom as a violation of the right to self determination, as an attack on the dignity of man and thus on socialism itself ... "

In other words we must have no illusions as to our priorities

in terms of what we consider to be "human rights or in Charlotte's words "fields of humanitarian concern". We should not loose sight of the basis upon which these fields of humanitation concern are dependent. What constitutes a desirable record of humanitarian concern? One may ask.

Finally, it is beyond argument that a radical reform in the law of rape cannot be expected to bring about an overhaul in our stuttering legal system leave alone the criminal law - itself. We are inevitably reformists within the system, and cannot ignore individual cases that appear to reason unfair in the name of structure and uniqueness of approach. Thus where a situation is so manifestly of traumatic consequences to a victim, it is the duty of the law to take its vengence not necessarily through severity of sentences but also through ensuring that technical rules of procedure do not accentuate the tendency towards commission of like offences.

In this way, through the limits of our operation can we hope to achieve something Kenyan. The question as to whether the definitional section on rape is inadequate or inexhaustive gets its answer in the developments that have been expostulated above. The section is grossly inadequate in so far as it does little to contemplate the above developments in history. This will become clear when we come to grips with more specific areas of rape in the succeeding chapters.

C H A P T E R T W O

2. WHAT IS AND WHAT OUGHT TO BE RAPE UNDER THE LAW IN KENYA: A RESTATEMENT.

2.1 WHAT IS RAPE?

Rape has been called various names and defined in differing ways by various people. It has been termed as "as an offence of violence and aggression," while the law and many people have traditionally defined it as to ultimately mean "an unlawful act committed by men against women." The offence has been dubbed by some legal writers as " a crime sui generis" due to its unique character. This unique character has been given judicial notice by the law as will be seen in chapter four when we shall examine what special requirements the law of evidence sets if the prosecution is to prove the commission of the offence beyond reasonable doubt. The offence is also unique because it rests on assumptions which have their origin in society. Whether these assumptions are justifiable or not is a matter which will hopefully unfold in the course of this study. Yet other writers have alleged that "rape is an accusation easily to be made and hard to be proved and harder still to be defended by the party accused though never so innocent."(28)

Be that as it may, our primary concern in this chapter is to consider what is meant by rape under the law in Kenya as provided for in the Penal Code and enunciated in the relevant case law. This task is rendered necessary so as to enable us keep a breast with the acts that constitute rape in the eyes of the law as it stands. Rape is an offence whose gravamen is lack of consent and we can only confirm this if we take a dissective look at the provisions of the penal code. Section 139 of this statute reads in part ;

> "Any person who has unlawful carnal knowledgeof a woman or girl, without her consent... "

To constitute an offence of rape therefore one has to have unlawful carnal knowledge of a woman or girl without her consent. It is the lack of consent that makes the unlawful carnal knowledge rape. In other words, there must be actual vaginal penetration by the penis of a man without the woman's consent. The emphasis and crux of the offence is laid on consent so much so that, without an unequivocal proof of lack of it, the case for the prosecution fails without scrupple. How the defence goes about infering the presence of consent and in what circumstances the court sustains such inference is an issue beyond the scope of this chapter.

The courts in East Africa have underscored the importance of lack of consent in sustaining a conviction for the offence. Some of the learned judges have even it is submitted over stretched the importance of consent to unjustifiable limits. In the case of Nakholi V. Republic,[29] a Kenyan case, the appellant, a schoolmaster, was convicted of the offence of rape and sentenced to five years imprisonment. The complainant's age at the time of the incident was recorded at the trial. In his address to the assessors, and in his judgement, the trial judge stated that the question of the consent or otherwise of the complainant was not important as she was incapable at her age of giving consent. On appeal, it was held that lack of consent is an essential ingredient in the proof of rape, and although a girl may be of such tender years that mere proof of her age is sufficient to establish lack of consent, this must be proved before convicting. Consequently the appeal was allowed, conviction quashed and sentence set aside. Duffus J.A pointed out the essentials of rape at page 338 thus:

> "The two essentials are therefore carnal knowledge of a woman or girl and lack of consent and both these elements must be established by the prosecution and accepted by the court before a conviction for rape can be arrived at. It is a fact that age of the girl is material and that in some cases the girl may be of such tender years that mere proof of her age may be sufficient to establish the lack of consent on her part, as the girl would on account of her age be unable to understand what was

> happening and would not be able to consent as she would not know what she was consenting to. In such a case then, the age of the child would be evidence from which the court could arrive at the conclusion that the act was done without her consent, but the court would still have to find this as a fact before convicting or rape."

The words of the learned justice of appeal above leave no doubt whatsoever as to what in general terms constitutes the offence of rape under the law. That consent is at the core of the offence is undeniable. In fact so fundamental it is that the mere failure to refer to it specifically by a trial judge while summing up the case for assessors was not treated kindly on appeal in a Ugandan case of Upar V. Uganda,(30) there, the appellant was tried for rape by a judge and assessors. In his statement to the police, he made consent a issue, but he did not pursue this in his unsworn statement at the trial. The judge made no notes of his summing up to the assessors and did not deal specifically with the issue of consent. The appeal was dismissed on the grounds that no failure of justice had occurred as the evidence proved lack of consent. But the court pointed out that lack of consent always remains an essential element of the crime of rape and should have been specifically dealt with. Per Duffus, P at page 99

> "Then there is the second point that the judgement does not directly deal with the question of consent. The appelant made consent an issue in his statement to the witnesses and to the police. It is true that the appellant did not pursue this defence in his unsworn statement at the trial, but lack of consent still remained one of the essential elements of the crime and should have been specifically dealt with in the judgement. (Emphasis mine)"

It is as a result of this insistence on the role of consent that the law makes it illegal to have carnal knowledge of an "idiot" or "imbecile" woman or girl, since she would be incapable of giving consent due to defect of understanding. This provision finds itself expressed in section 146 of the Penal code, it provides:

> "Any person who, knowing a woman or girl to be an idiot or imbecile has or attempts to have unlawful carnal knowledge of 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 woman or girl was an idiot or imbecile, is guilty of a felony ... "

The wording of the section just quoted indicates that the draftsman of the Penal Code does not appear anxious to term such carnal knowledge rape but refers to it just as "a felony". As was earlier contended in Chapter One, our Penal Code has its origin in the 19th Century legal developments in England. It is interesting to note that Section 146 has its origin in a 19th Century English rape case. The case of R V Fletcher[31] where a man who had carnal knowledge of a girl (aged thirteen) of imbecile mind and the jury found that it was by force, and without her consent, she being incapable of giving consent from defect of understanding was held to have committed the crime of rape, although the jury did not find the offence to have been against the will of the girl. The words of Lord Campbel C. J. at P. 134 being one of the judges who reviewed the case show us the link between the Penal Code and the case; The learned Chief Justice said

> "I am of the opinion that the conviction must be affirmed. The case has been very well argued. The definition of rape may now be considered res adjudicata. The question is, what is the proper definition of the crime of rape? Is it carnal knowledge of a woman against her will, or is it sufficient, if it be without the consent of the prosecutrix? If it must be against her will, then the crime was not proved in this case; but if the offence is complete where it was by force and without her consent, then the offence proved what was charged in the indictment, and the prisoner was peoperly convicted.
> .....
> The law, therefore, must now be taken to be settled and ought not to be disturbed. It would be monstrous to say that these poor females are to be subjected to such violence, without the parties inflicting it being liable to be indicted. If so, every drunken woman returning from the market and happening to fall down on the roadside, may be ravished at the will of the passers by."

Thus it is evident that S. 146 of the Penal Code traces its origin in a rape case of Nineteenth Century England. Having sexual intercourse with a mentally defective person is conceived of as rape in that case because of the incapability of the woman to give consent due to her mental situation.

There are of course serious human questions surrounding this statutory "protection" offered mentally defective women. Some scholars may question whether in fact it is a "Protection" from unwarranted attacks by opportunist merry makers on these women or it is a "deprivation" of the sexual need by these rejects of sanity - by the law in the name of protecting them. This however is not of concern to us in this study not because we consider it unnecessary but because the issue would derail us from our major target into extraneous subtleties of human need for sex. What we can infer from the provision in the Penal Code is that the law presumes absence of consent. What need be proved is whether the accused knew the mentally defective condition of the woman (mens rea) at the time of the commission of the offence.

2.2 THE VARIOUS HEADS OF RAPE UNDER THE PENAL CODE.

Having considered albeit briefly what prima facie constitutes the offence of rape under the law in Kenya, it is appropriate to determine the question as to whether the Penal Code creates distinct heads or types of rape or whether the crime is couched in a generality form so that mere proof of the essential elements we have discussed above affords conviction. It is submitted that there are various types of rape arising out of different circumstances and which the law recognises as such. To lend credence to this assertion we shall be forced to critically revisit the definitional section that is Section 139 of the Penal Code. The Section talks of:

> ".....Unlawful carnal knowledge of a woman or girl, without her consent, or with her consent if the consent is obtained by force or by means of threats, ... "

This is what can be termed "rape by violence" or "rape by threats of violence" or simply "violent rape". It is the most known and common form of rape either by the lawyers, courts or the ordinary man. When one talks of rape, it is very easy to connect the crime with some kind of violence. The presence of consent is negatived by the violence which attends, or precedes the sexual act. The consent or choice of the rape victim is also eliminated where the defendant invites the victim to opt either for sexual intercourse with him or alternatively for a violent beating. Her choice is similarly eliminated since there is no way she can be sure that the violent assault will not be accompanied by forced sexual intercourse.

A man who elicits a sexual union from a woman through the use of force or threat of force cannot be heard to say logically that she consented to the sexual act since the consent would have been forced and would not legally amount to consent as such as she would have been deprived of exercising her choice.

The cases of "violent rape" can be classified in three groups viz the type of cases where the complainant submits to coitus out of fear of injury if she refuses to submit. Her consent is said to have been obtained through "threats of violence or intimidation." No real injury is sustained on her part as she consents before the rapist implements his threats. She does it without resistance out of fear of being hurt. We shall have occasion to see how hard it is to prove such kind of rape in a court of law later.(32)

Then there are the cases where the complainant actually resists but is overpowered by her "attacker" or "attackers". This is usually the case in what is known as "group rapes" where one or two women are confronted by a number of men who through their concerted efforts finally overpower the woman/women's efforts of resistance. Most of these men are after satisfying their sexual needs and once that is done, they let go of the woman unharmed in most cases. The only physical injury if any is incurred during the struggle which ensues as a result of the man's over-zealous efforts to subdue his victim and the latter's attempts to resist and free herself. The injury in

such cases therefore is not physical as such but rather, the psychological trauma which the victim(s) of such an attack experiences both during and after intercourse.

We then come to grips with the worst form of the "violent rape" cases. These are the cases in which the victim actually sustains physical injury some of the cases in this group occur in circumstances of extreme brutality as to occasion untold injury and suffering to the victim. The attacker in some instances for reasons inexplicable subjects the victim to a brutal beating or thrashing or even a mutilation of her body either before or after raping her. Some of these types of rape have resulted in physical disability or even death of the victims! Although it is still early to point this out, it is submitted that the courts in Kenya should not fall victim to the disconcerting state of affairs which is expressed in a comment to be found in a prominent Journal which states:

> "The law of rape does not punish even the most brutal beating of a woman; the only behaviour punished by the law of rape is the sexual penetration that follows. Although proof that the defendant used force commands a guilty verdict, the legal conclusion probably assumes that if physical violence was a necessary overture to the act; the woman did not submit willingly." (33)

A part from "rape by violence" are there cases that can be termed "rape" where the use of force is wanting? As has already been observed, violent rape is the most common and known form of rape that one sometimes finds it difficult to envisage a situation where sexual intercourse is achieved without force as amounting to rape. Vivian Berger expresses this "unfortunate connection of violence and proof of rape strongly as follows:

> "Unfortunately, the injection of a concept of "force" over and above the coercion implicit in denying freedom of sexual choice, led to the rather illogical idea that the victim, had to 'resist to the utmost!' Thus an offence whose gravamen was non consent acquired a gloss that shifted the focus from the woman's subjective state of mind, as affected by the man's actions, to her behaviour in respect." (34)

Section 139 of the Penal Code contemplates cases of rape other than those achieved through violence when it provides in part:

> ".....Unlawful carnal knowledge of a woman or girl without her consent,..... by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband ..... (Emphasis mine)."

The issue at stake is that the carnal knowledge is had without the consent of the woman or girl. From the wording of the section, one can talk of "rape by fraud" and also "rape by personation" in cases where a man fraudulently presents himself as the husband of the potential victim although the latter type is technically part of the former. The circumstances in which rape by fraud may occur are not very few.

In some rape cases for example, a presumption of non consent supplies the legal requirement of a woman's attitude of opposition. When a man has sexual intercourse with a sleeping or stuporous woman, she can have no attitude towards the act because she is unaware that it is about to occur. The law seems to assume that had the woman been apprised of the facts, she would have opposed coitus. So, the law speaking for the woman, denies her consent. Moreover since the act itself deprives the woman of her right to withhold consent, the man is guilty, even if not responsible for inducing the woman's stuporous condition.

This presumption which is implicit in Section 139 as quoted, has its genesis in nineteenth century English judicial decisions. In the crown case reserved, of the Queen V. William Camplin[35] a prisoner was convicted of rape under the following circumstances:- He made the prosecutrix quite drunk, and whilst she was insensible violated her person; but the jury found that he gave her liquor for the purpose of exciting her, and not with the intention of rendering her insensible, and then having sexual intercourse with her; and the conviction was held right by a majority of the judges, on the ground that this was a case in which fraud supplied the want of force and violence.. Defence

counsel vigorously but vainly argued at Page 220; and I quote:

> "To constitute the offence of rape, there must be actual resistance on the part of the woman, and actual force employed on the part of the man; and the facts here negative both; there was neither force nor resistance- nor was there any intention on the part of the prisoner, to render the woman insensible, for the purpose of having connection with her against her will."

Lord Denman, C. J. one of the judges who reviewed the case responded to counsel's argument firmly as follows: Page 221

> "The word 'resistance' has been introduced, as though it were necessary to constitute rapes; but that is not so, however strong it may be as evidence."

For the sake of clarity and benefit of those who might have their doubts the words of Patterson J. who delivered judgement on behalf of his brethren are handy. The learned judge stated:

> "William Camplin,
> .....
> It appeared upon the evidence that the young woman upon whose body the offence was committed refused her consent so long as she had sense or power to express such want of consent but that you made her quite insensible by administering liquor to her, and whilst she was in a state of insensibility, took advantage of it,
> .....
> Whatever your original intention was in giving her the liquor, you knew that it was calculated in its natural consequences to make her insensible
> .....
> Your case, therefore, falls within the description of those cases in which force and violence constitute the crime, but in which fraud is held to supply the want of both
> ....." (36)

Likewise if a man has or attempts to have sexual intercourse with a woman while she is asleep, it is no defence that she did not resist, as she is incapable of resisting.

The man can therefore be found guilty of rape, or an attempt to commit rape. This can be demonstrated by yet another English case decided at about the same time as the preceding cases: The case of Regina V. Mayers[37] there, a one Richard Mayers was indicted for having committed a rape on Sarah Ann Mayers, on the 12th of August, 1872, at Manchester. The prosecutrix stated the facts of the incident in court as follows:

> "On the 12th of August at 7 a.m. I got up to get my husband's breakfast and went to bed again directly afterwards and fell asleep; the first thing after that which I remember was finding the prisoner in bed with me, he was agate of me when I woke; I said nothing but turned away from him; I cannot say he did it altogether; his person was next to mine; I cannot say he did more, he was only a moment in that position; ....."

Lush J. then stated the law to the jury at P. 312.

> "In this case there is no evidence of actual rape. You may however, find the prisoner guilty of the attempt; for I shall lay down the law to you, that if a man gets into bed with a woman while she is asleep, and he knows she is asleep, and he has connection with her, or attempted (sic) to do so while in that state, he is guilty of rape in the one case and the attempt in the other."

It is submitted that the law relating to rape as enunciated in these decisions despite their old age, is also the law in Kenya and it is given statutory sanction.

Often overlapping this category of rape by fraud and involving a similar presumption, are the few cases of rape by false respresentations. Section 139 of the Penal Code as quoted in part is very specific about these type of cases. Typically, the woman agrees to the act because of the man's false representations - that sexual intercourse was say a necessary medical treatment or that he was her husband. The law assumes that the woman's awareness of the "nature" of the act was so impeded by the defendant's misrepresentations that she was incapable of giving operative consent.

This was the case in R. V. Flattery[38] where the prisoner professed to give medical and surgical advice for money. The prosecutrix, a girl of nineteen, consulted him with respect to illness from which she was suffering. He advised that a surgical operation should be performed. The record reveals that he said that "nature's string needed breaking." Under pretence of performing the operation, he had carnal knowledge of the girl. She submitted to what was done not with any intention that he should have sexual connection with her, but under the belief that he was merely treating her medically and performing a surgical operation, that belief being wilfully and fraudulently induced by the prisoner. It was held the prisoner was guilty of rape. Per Kelly C.B. at Page 33.

> "I am of the opinion that the conviction should be affirmed. The prosecutrix by the fraud and false representations of the prisoner, was induced and persuaded to allow him to touch and approach her person.
> .....
> There was not only no evidence of consent on the part of the prosecutrix but the case states that she submitted to his treatment solely because she believed that he was treating her medically and performing a surgical operation; as he had advised, to cure her of her illness, and that unless such submission in law constitutes consent there was no consent to the prisoner having connection with the prosecutrix ... "

The rarity of these cases today may be partly explained by the difficulty of presenting a convincing picture of such grossly impeded comprehension to sceptical magistrates. The scene depicted may resemble more an artful seduction than forcible intercourse. In fact it has been argued in other circles[39] that it should cease to be rape where a victim's consent to intercourse is obtained by fraud. Provided, that the victim consents to the defendants penis entering her vagina, it should matter not that owing to the defendants fraud, she is unaware of his true identity or of the true nature of the act. Instead the defendant should be charged with "procuring a woman by false pretences." The exponents

of this view contend that the distress which the victims of such frauds may suffer is not really comparable with the fear and shock that often accompanies "true" rape. Jennifer Temkin takes great exception to the above argument when she tells us:

> "Rape takes many forms and the reactions of victims are likely to be correspondingly diverse. But the majority are surely wrong to suggest that victims of rape by fraud will not suffer fear and shock. It would be hard to envisage any other reactions on the part of the victims in the husband impersonation cases upon discovering that strangers had entered their homes, their beds and their bodies. In the case of rape by fraud as to the nature of the act, since the victim is likely to be a young girl from a sheltered background, the outcome may be particularly grave. The shock and trauma which such a girl will experience upon discovering the truth, the fear of men which the betrayal would engender and the long term psychological damage to her could well be at least as serious as that which befalls certain other rape victims." 40

These are two varying views of high magnitude. The reader will certainly be interested in knowing whether the law in Kenya should remain as it is or should be altered so as to do away with the so called rape by fraud.
All that can be said is that given the great complexities of life which have been occasioned by the unequal material conditions in our society; such frauds are bound to and do occur with unimaginable frequency though they never find their way into the public limelight. Young women who are ill and cannot afford better medical care should not be subjected to sexual frauds by those who struggle to survive through "bogus" medical professions. The law should therefore to that extent remain as it is.
However there needs to be a reconsideration in our law in reference to some rape cases which involve the administration of liquor to the would be victim, not with a view to repealing or amending it but with a view to "discriminate" in sentencing.

We shall have occasion to address ourselves in much detail to these cases in Chapters three and four.

As regards rape by impersonation, one hardly understands why such rape should be restricted to married women alone. If a person who presents himself as a husband and has sexual intercourse with a woman on the strength of that impersonation; is guilty of rape; is it not also possible for a man to present himself as or impersonate someone's boyfriend and to solicit coitus as a result? If so aren't the effects which are experienced by the unmarried girl of the same gravity as those experienced by a married woman?

Sex has become increasingly commercial in our society. The medium of acquisition especially in the urban areas is more often than not money. Therefore, where the man procures a woman through the use of money, it is not uncommon for him to arrange "a group enjoyment of the woman" in the name of maximum utilisation of the "purchased commodity," for the night. He could arrange for his friends to slip into the room where the woman is and to have intercourse with her without her consent and knowledge. Apart from the party to the "contract," the poor woman may end up "serving" five other men! It is contended that the five should be guilty of rape by fraud on the same lines as the "husband impersonation cases."

On the other hand, due to the scarcity of women who are willing to take part in intercourse on purely Bona fide friendship lines without some proprietorial or other considerations, a successful man in this field may decide to extend his generous to his less successful companions to partake without the woman's consent and knowledge in the sexual act.

Irrespective of the intention of the successful young man and the human factors involved, such acts should amount to rape by fraud.

Finally a cunning man may outwit another, that is to say the rightful "candidate" or boyfriend, find his way into the bed of the waiting and expectant woman or girl, who, quite unaware of the fraud and thinking the man to be her boyfriend submits to sexual intercourse only to discover later the bitter truth. The sordid details on circumstances under which these acts

could take place are left to the imagination of the reader. It is suggested that though the courts could recognize these situations as amounting to rape, the statutory provisions should be explicitly extended to cover such situations. One is not to be denied the protection of the law just because she is not married.

Another problem is that under the present law a man commits rape where he compels a woman to consent to sexual intercourse by threatening her with force. But what about the intercourse obtained by threats of a different nature, for example a threat to terminate a woman's employment or to give information to the police about her husband? Does it and if not should it amount to rape?
Temkin offers her opinion thus;

> "The distinction between threats of violence and lesser threats of the type mentioned above is best perceived in terms of the principle of sexual choice. Rape, it is submitted, should be confined to cases where the victims sexual choice is eliminated. The defendant who threatens his victim with violence denies her the choice of whether to have intercourse with him or not ....., on the other hand, where the threat is to terminate a woman's employment, she is left with a choice, albeit an unpalatable one, as to whether to have intercourse with the defendant or not. In cases such as this where sexual choice remains but is unacceptably limited or confined, liability for an offence which is less serious than rape is appropriate."(41)

With all due respect the above argument is unconvincing and proceeds in ignorance of the working situation of a people who depend for their livelihood on the sale of their labour, more so if opportunities for selling the labour are so limited as to be unconfortably competitive.
The assertion cannot therefore be taken to present the true Kenyan picture on the employment scene. Job opportunities have become so scarce in Kenya that the search for and maintenance of employment has become a cut-throat arena. The relations of production have developed in such away as to put the would

be sellers of labour virtually at the mercy of the "owners" and controllers of the means of production or their agents. Most of the workers are employed on terms which can be nothing but exploitative, insecure and uncertain.
It is out of this background that intercourse obtained through threats of termination of employment is to be envisaged as rape. To talk of "sexual choice" in a situation where either one consents to intercourse or looses her only means of livelihood becomes superfluous.

So rampant are cases of intercourse obtained in the way just discussed in Kenya that the September issue of VIVA Magazine(42) carries a lengthy article on the issue entitled; "Sexual harassment in the office." The introductory of which reads;

> "The Secretary is busy typing. Suddenly a large hand appears and starts stroking her thigh. She rushes to the other side of the room. 'Sir, please stop you know that I'm your Secretary, not ...'
> "You WERE my Secretary," comes the swift retort.
> 'You're fired!' "

There is hardly any reason why these cases should not be treated as "rape in the office" since a first job, lack of confidence in being able to cope, needing the job desperately for the income it brings in, all affect the judgement of the victims of such harassment . Women who are struggling to survive in offices and other work places becasue of the harsh realities of the economic system should not be subjected to harrowing demands of sex from men they have no feelings for. The men, most of whom are in high positions because of the historical accident should be put under surveillance by the law. In fact one could argue authoritatively that the law regards intercourse achieved in the above way as rape when it talks of (S.139)

> "..... unlawful carnal knowledge of a woman or girl, without, her consent if the consent is obtained by ....., intimidation of any kind ..... (Emphasis mine)"

Apart from all these types of rape which have been hopefully exposed satisfactorily; the law as is usually the case in most if not all criminal offences provides for what is known as "attempted rape" in S. 141 of the Penal Code which provides:

> "Any person who attempts to commit rape is guilty of a felony and is liable to imprisonment with hard labour for life, with or without corporal punishment."

There is no doubt then that the Penal Code creates various distinct types of rape in Section 139.

2.3 IS THERE NEED FOR NEW HEADS OF RAPE? (A CONSIDERATION OF "MARITAL RAPE.")

The next question that falls for analysis is whether apart from the types of rape which have been discussed so far, there is a desirability for new heads or types of rape to be created under the law. When one talks of new types of rape, what exactly could he be referring to? There are two areas touching upon this matter that have received or if not are bound to receive considerable attention in future from academic circles in their variety. These are the areas in which scholars be they legal or otherwise have asked themselves and will continue asking whether it is possible for a husband to rape his wife and also whether it is possible for women to rape men. In a nutshell, should we have what is known as "marital rape" and "rape by women" in Kenya? Should the two types be given legal recognition?

Attention is directed first to marital rape. It is befitting to point out at the outset that some legal systems (43) in the world have recognised the rape of a wife by her husband. This is an area where women have spent their energies to exhaustible limits in advocating for the introduction of marital rape in the law. We are confronted with the pain staking task of venturing into the diverse views by people from different environments on this pertinent problem. Writers, especially women in common law systems have termed the exemption

of a husband from presecution as a fundamental departure from the purpose which the law of rape was meant to achieve.

The leading statement about the issue and which as many of the advocates of the marital rape have argued have a far-reaching effect on the law of rape in England; was made by Sir Mathew Hale [44] more than three hundred years ago. Sir Mathew said: "The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."(45) various writers contend that this statement has had the effect of influencing the legal position which as it were is governed by the old common law attitude towards the married woman, which denies her bodily autonomy and deprives her of any protection against her husband's forced sexual attentions. This doctrine has become the inheritance of criminal law systems throughout the commonwealth and United States of America.

Charlotte L. Mitra is one of the leading advocates for marital rape amongst common law writers on the matter. She argues in response to the statement attributed to Sir Mathew Hale, that it would be totally unreasonable to infer from such "vague promises" that a wife intends to make her body accessible to her husband at all times. She is of the opinion that by marrying, she indicates no more than that she will usually consent to intercourse and it is fanciful in the extreme for the law to imply that by her vow she has deprived herself of the right to decline the act at any given time. According to Charlotte "a woman may suffer no less pain, humiliation, or fear from forcible sexual penetration by her husband than by a relative, a boyfriend, or stranger." With characteristic fervour Mitra submits:

> "Rape ... , is recognised by the law as a crime, one of the most serious known. This same act, if perpetrated within marriage is no offence and carries no sanctions, it is merely the exercise of the husbands right in pursuance of the marriage contract. By thus exempting the husband from prosecution for rape

> on his wife, the law has granted him an immunity which is based solely on status. The reason for this exemption raises fundamental questions about the true nature of the law of rape and the institution of marriage ... "(46)

Temkin sides with the opinion just expressed when she writes thus:

> "The view taken here is that the principle of sexual choice ought not to cease to apply once the marriage vows are taken. A married woman should be as free as her unmarried counterpart to determine whether and when to have sexual intercourse ....., there is no reason for the law to seek to encourage a woman to reconcile with a sexually brutal man."(47)

Camille Le Grand throws in her lot with the rest when she summarily says that "the legal impossibility of rape of a wife by her husband is another indication that rape laws are not aimed at protecting women from sexual assault. If the laws were destined to protect women, this exception would make no sense."(48)

It is submitted that the foregoing arguments are true to the extent that they refer purely to the origin of the common law of rape and the purposes which it was meant to serve and which it now serves. In reference to the law in Kenya, they are only sustainable to the extent that they perceive of the law as a pure transplantation from the legal developments in England in total disregard of the traditional attitudes towards rape in Kenya that is before the colonial legacy. Otherwise it is with all due respect, sheer intellectual extravagance.

Some women in Kenya especially those that are either undergoing or have undergone higher levels of "education" also have favoured with equal zeal and fervour the introduction of marital rape under the law. This they have done purely within the medium of their obsession with the so called "Women's Lib." Not all women are however in favour of the introduction of rape by a husband. John F. Nganga writing on purely psychological and sociological lines exposes the results of his field research as he writes:

> "The women studied also stated emphatically that forced sexual intercourse by a husband, or boyfriend is certainly rape but many of them could not decide whether this type of offender should be punished by law or not. A dubious majority however, wanted to see punishment meted out to the violent husband ....."(49)

Before seeking either to agree or disagree with the views so far expressed, it is logical that we address ourselves to the Kenyan situation in a historical context once more. It was established in Chapter one of this study that the purposes which customary rape laws in Kenya were meant to serve clearly differred in both form and priority from those in England. The law in Kenya then was meant to protect the institution of sex as a whole, it was all embracing contrary to the English law (which unfortunately is the law in Kenya) which was sexist and discriminatory. It has become common to talk of the "protection of women" and "sexual choice" by women largely due to the historical development of the law in England It was also stated in the introduction that some traditional institutions in Kenya still crave for recognition despite the effects of "modernity." The law should afford sanctity to these institutions as long as they still prove necessary for societal cohesion in the face of enveloping economic severity. One such institution which is still fundamental in Kenya and to which the rape laws endowed with a continuity is the institution of marriage. The importance of marriage for African peoples is well demonstrated in the words of Professor Mbiti:

> "For African peoples, marriage is the focus of existence. It is the point where all the members of a given community meet; the departed, the living and those yet to be born. All the dimensions of time meet here, and the whole drama of history is repeated, renewed and revitalised. Marriage is a drama in which everyone becomes an actor. Therefore marriage is a duty, a requirement from the corporate society, and a rythm of life in which everyone must participate."(50)

It is our contention that we should not be rash in this matter. It is felt that it would be improper to introduce the rape by a husband of his wife in the law, not because of

the common law argument by Sir Hale to the effect that the wife "totally submits herself unto her husband," but because it is felt such type of rape for obvious reasons would destabilise and even destroy the marriage institution. With numerous divorces in Kenya today due to intolerance on the married parties, an intolerance which has been occasioned by a confusion of values, we should not hasten the death of this institution by introduction of marital rape. The English view their marriage as a "contract" between man and woman to stay together for life. The main term of such contract inter alia is the submission by the woman to sexual intercourse. The arguments for and against the introduction of marital rape revolve around this contractual conception of marriage. The Africans who are the majority in Kenya do not conceive of a marriage as a contract, they view it as a union a sacred one at that. Issues like sexual intercourse are presumed and not much talked about. Both the man and woman must join efforts to make sure the sexual intercourse is a success. There are no principles of a "bargain" in this process, one can only assume that should disagreements occur about this fundamental exercise, they are settled amicably in bed. The parties get to know each other over a period of married life.

By the same token, it should not be assumed that the husband is the always "willing partner" to take part in the act and the wife the only one with capacity to decline or resist the advances of the husband. The roles could be reversed with the woman demanding and the man declining may be because the "spirit is willing and yet the flesh isn't or vice versa, if we may be allowed to use the favourite phrase in biblical parlance. All these are matters which should be settled by the married couple itself. They are not capable of supervision. Sexual issues in the bedroom, on a matrimonial bed, should not be turned into questions of public inquiry in a courtroom. The bed must be free from legal encroachment. The criminal law is not the best instrument for dealing with family matters, as it is ill-equipped.

To lend credence to the contention just made, it is worthy noting that apart from the major reason for exempting marital rape from Kenyan statutes- there are other technical problems

which would attend such type of rape. The rape would be too vexatious as proof of the offence would be almost impossible to acquire. Evidence would be quite difficult to adduce, unless the law expects the children to testify as they would be in a position may be due to the fact of sleeping in the same room or building. It would be monstrous and damaging to expect "issues" of a marriage (children) to bear the burden of being witnesses in such cases!! No good would come to children, husband or wife if she were given the protection of the criminal law. If a wife reported the matter to the police, her children might resent what she had done to their father. The husband would have to face questions which would be greatly resented by him. The impetuous conduct of the wife in reporting the matter would most likely impede reconciliation - which is a desirable goal in such situations.

In view of all these, marital rape i.e. rape of a wife by her husband should not be introduced in Kenya. There is no suggestion though that a man who beats up or injures his wife in the name of sex should not be prosecuted for assault. Brutality as a means of acquiring coitus should be discouraged in the homes but not within the realm of rape. The law should punish the act of beating itself and not the reason why such beating was rendered necessary. Other matters should be catered for by the law of divorce.

2.4 CAN WOMEN RAPE MEN?

By far the most vexing problem in the law of rape is whether it is possible for a woman to rape a man as it were. It is a problem which has received very little judicial attention. It is considered in this study to be just as important as other issues pertaining to the crime - as it remains the subject of heated controversy even up to exciting limits. Ours is to consider whether there is a possibility of a woman raping a man.

There is not a single reported case of a woman convicted as principal. This may be explained by the usual statutory construction of the sexual act involved as a "genital pene-

tration." This conception of rape has led to the law leaving a man without any protection whatsoever. The conception of rape as a genital penetration has been given academic recognition by some writers. These words give a clear picture and I quote:

> "Because of their anatomical structure, women are subject to non-consensual penetration of their vaginas by men's penises. By contrast, it is physically impossible or virtually so for men to have hetero-sexual intercourse thrust upon them involuntarily. Therefore, not only the criminalization of rape itself but also the use of certain evidence to show consent - a fact at issue only where females complain of hetero-sexual intercourse implicates one sex characteristics. (Emphasis mine)"(51)

It is difficult to agree with this opinion as expressed for, it is submitted, it runs contrary to human experience as we shall seek to show by reference to equally if not more authoritative and convincing opinions later in this discussion.

A woman may however be guilty of rape as an accessory if she helped a man commit the crime. This can be illustrated by a very recent case in which a woman was charged with rape, a case which caught the eye of a reporter of the KENYA SUNDAY TIMES.(52) The report for purposes of illustration ran as follows:

> "A married woman has appeared before a Nakuru court charged with rape.
> .....
> Nakuru resident Magistrate, Mr. William K. Tuiyot, said he had never heard of a case in which a woman was charged with rape.
> Mr. Moses Muganbi, prosecuting, rose to clarify the charge. He stated that the contention of the prosecution, Was that there was evidence that the woman assisted the two men by catching the complainant for them."

This report should serve as a concrete evidence that a woman may be guilty of rape as an accessory. The fact that a woman can actually take part in assisting men to rape another woman should be taken note of by the reader for purposes of estab-

lishing whether rape always entails women victims and male rapists.

And now back to the real question can women rape men? We are called upon to examine what in a society as ours, rape laws should protect. To this is the reply that just as customary rape laws protected the institution of sex as a whole, rape law in Kenya should protect something more than just women who are assaulted by men. There is need for a departure from the common law sexist view implicit in our Penal Code. The offence actually consists of a sexual outrage to the person and not simply a vaginal penetration of a woman by the man. There is surely an integrity and pride which the law is after protecting such integrity and pride is possessed and valued by both men and women.

It is interesting to note that we do not recognise the function of sex in the man. He is not considered to have the same "economic" right in his sexual capacities and the law does not protect him from the invasion of the "right" by a woman. The role of a man as the initiator of sexual relations and the active partner in the act, which is perhaps contrary to fact in many instances, also contributes to the assumption that a man cannot be "raped." Dr. David M. Ndetei proves this assumption wrong when he talks of the possibility of a woman raping a man in the November issue of the DAILY NATION in very convincing and practical terms. Dr. Ndetei observes:

> "Rape is one of several forms of sexual assault. Rapists are usually males with female victims, but in some cases the rapists are males with other males as victims (homosexual male rape) several cases have been reported in which a female rapes a male, although this type of rape has been a subject of legal and social controversy. However, it is possible considering the fact that erection can be induced in a male through mechanical stimulation even if the male wishes not to erect. If this is achieved and he is adequately intimidated, he can be positioned in such a way that the female rapist can insert his penis into her vagina. (Emphasis is mine)."(53)

Dr. Ndetei here is viewing rape in a much more wider sense than the law accords it and in so doing is able to arrive at the true picture of things. In fact so convinced is he that he reiterates his finding in the next issue of the FRIDAY NATION in which he says, "in my last discussion on rape, I pointed out that although rapists are usually males with female victims, rape can also occur between two females, between two males and a male can be raped by a female."(54) John F. Nganga also reveals that "a very interesting piece of information was the almost 50 - 50 agreement - disagreement by women that it was possible for them to rape men. It seems therefore, that rape might not be entirely a male prerogative."(55)

One of the very few submissions by a legal scholar on the issue is that by Camille Le Grand who boldly admits that a woman can rape a man. She makes the following contribution:

> "Consideration should also be given to whether it makes sense to limit rape to cases of penetration of the vagina by a penis. Since the offence actually consists of a sexual outrage to the person, that outrage should probably include a broader range of sexual contact. In any case, there is no sound reason for restricting rape to male offenders and female victims. Men who are sexually assaulted should have the same protection as female victims, and women who sexually assault men or other women should be as liable for conviction as conventional rapists. Considering rape as a sexual assault rather than as a special crime against women might do much to place rape law in a healthier perspective and to reduce the mythical elements that have tended to make rape laws a means of re-inforcing the status of women as sexual possessions."(56)

We find it difficult to difer in any way with this highly penetrating submission.

The efforts of field-research through random interview on our part came up with two equally convincing stories. One story was as a result of an interview with a young man of 25 who related vividly how he was forced one night to engage in

sexual intercourse with a girl (his former girl friend) whom he had sworn never to entertain sexually due to what he termed as her "outrageous conduct." According to the story the girl came to his apartment and insisted on staying the night despite the "gentle protestations" of the young man. On discovering later that the man could hear nothing of her entreaties, she stipped herself naked and threw her nude body onto the man in what she justified as "love play." The man, quite overpowered by the biological reflex response, finally did what he had sworn never to! "If I were to tell someone that I did it unwillingly, he/she wouldn't believe me" the young man painfully concluded.

The other story was as a consequence of an interview with a group of secondary school boys. The boys related in turn how a man who by a connivance between himself and a certain girl friend of his in a prominent girl's boarding school in Western Kenya were caught having sexual intercourse in the girl's dormitory by other school girls who had been awakened by the noises which normally attend the act. The girls menacingly demanded that the man "do to each of them what he had been caught doing to his girl friend or face the music!" The fracas which ensued as each girl sought to get her "share" ended in the man being unconscious. At the end of it all the poor man was thrown over the school fence after becoming disfunctional. What remedy lay open to this man? Of course none.

The arguments and results of the interviews can only lead one to make an inference; that it is possible for a woman to rape a man. These attacks are not just "indecent assaults", they are rapes. In view of this development, it is suggested that the law be redrafted as to recognize such rape and accordingly afford protection to men as it does women. Under such general approach, classification for purposes of equal protection analysis would not divide the world into victims of rape and "others", but rather would distinguish between male and female targets of forcible sexual assault. Since men, like women are susceptible to this type of attack, one need no longer confine the argument to the rubric of single sex characteristics and the gloss the court has engraft upon it.

This gulf between myth and reality necessitates a re-evaluation of the law. A re-construction of the law with careful attention to the reality of rape could not only make the disposition of rape charges and convictions more efficient and more fair, but it could also do much to promote a much needed change in society's attitude towards rape. Our customary laws did it why not the law at present?

2.5 THE DESIRABILITY OR OTHERWISE OF CO-OPTION.

Finally, in this Chapter, we examine the question as to whether it is desirable to abolish all other sexual crimes recognised by the law and incorporate them under the head of rape. This question is inevitable due to the fact that rape is a sex-specific crime. It also overlaps with the problem as to whether rape should be extended to cover situations which are not contemplated by the provisions of the Penal Code. This subject has been largely answered by the foregoing analysis.

The law makes it illegal to

a) have sexual intercourse with a woman or girl who is an idiot or an imbecile[57]

b) have sexual intercourse with a girl under fourteen years of age (defilement[58]

c) indecently assault a woman or boy[59]

d) engage in homesexuality e.t.c.[60]

It is not easy to determine why it was necessary to categorise these offences under different heads and not to compartmentalise them under rape. Whether it was for the sake of avoiding confusion or whether the law considered these other acts not as serious as rape is a moot point. The fact is that some of these offences <u>but not all</u> bear a resemblance or close relationship to rape, for example defilement and to <u>some</u> extent indecent assault. Before proposing an incorporation or retention of the offences as they are, one should ask himself whether the present distinction causes a miscarriage of justice.

The leading authority on the issue as relates to defilement and which demonstrates that sometimes the prosecution and the court are faced with a danger of confusing these offences due to the fact of their close affinity in substance is the Kenyan case already referred to in the early stages of this Chapter. The case of Nakholi v. Republic. The appellant's conviction of rape and sentence to five years' imprisonment were quashed and set aside respectively on appeal the court holding inter alia that a girl under the age of sixteen years (which was the statutory age for defilement by then as opposed to today's fourteen) is capable of consenting to sexual intercourse. The accused was not charged with indecent assault under S. 144 of the Penal Code or with carnal knowledge of a girl under sixteen years of age under S. 145 Penal Code, on which latter charge evidence of consent by the girl is no defence. The accused could not therefore be properly convicted of rape under section 139 Penal Code unless lack of consent by the girl is proved.

This decision by the Appellate court was arrived at as a result of a misdirection by the learned trial judge to the assessors which it considered "very" serious. The record shows the trial judge to have said:

> "He threw her down and, according to the complainant, had intercourse with her twice without her consent which is really of no importance, even though the accused is not charged with defilement for the complainant then was only about thirteen years of age. She could not consent legally. (Emphasis is mine)"(61)

The Court of Appeal did not take kindly to this statement by the learned trial judge and considered it a very serious misdirection. The court observed at Page 339

> "In this case it is quite possible that the girls were in fact willing participants in what occurred, ... The final conclusion of the learned judge was that intercourse was forcible, and he accepted, the complainants' evidence that the act took place against her will and without her consent, but the learned judge only arrived at this conclusion

> after having had the opinions of the assessors based on the misdirection as to consent ... "

But we must nonetheless sympathise with the judge because of the dilemma he found himself in. It is submitted that the misdirection was only made possible because the trial court did not see any serious difference between a person being charged with rape under Section 139 and defilement under Section 145 of the Penal Code respectively as long as the evidence showed the fact of intercourse as having taken place in the latter case (defilement). This is a case in which the distinction between rape and defilement and enacting them in separate provisions wreaks a confusion which can only result in glaring injustice to the complainant and yet which the courts can do nothing about.

The Criminal Procedure Code[62] recognises such a posibility and confers a power on the court to substitute the offence of rape as charged with either defilement or indecent assault as the case may be. But in the event of a misdirection by the court of first instance such as we have seen, the time lag on appeal has the effect of rendering such power of substitution useless. The court of appeal acknowledges this fear we have just expressed in the case under consideration at Page 340. I quote:

> "In this case the trial court undoubtedly had the power to have convicted the appellant either for an indecent assault under S. 144 of the Penal Code or of defilement under S. 145 of the Penal Code and this court could now exercise this power. In considering this matter there are two factors to be borne in mind. First there is the fact that age is not really an issue in case of rape, and secondly the appellant would now be deprived of the possibility of raising the defence that he had reasonable cause to believe that the complainant was of or above the age of sixteen years."

It is observed that this is a case in which injustice was undoubtedly occasioned to the complainant by virtue of the technicality of charges.

This technicality of seperation is based on the ground that under the offence of rape lack of consent must be proved while under defilement the complainant need not prove absence of consent since the law presumes such absence due to the age of the complainant which stands at 14 years as of today. The court concluded that "in our view there is a very real possibility that the court might have come to a different conclusion if the learned judge had properly directed the assessors and himself on this question and we do not consider that this would be a proper case in which to substitute a conviction under any of the other sections of the Penal Code." By the same token and with all due respect to the learned Justice of Appeal there is very real possibility that the Court of Appeal might have come to a different conclusion but for the technicality. In other words, had the original charge that came to the High Court been under Section 145 (defilement) the outcome could have been different.

Carnal knowledge of a girl under 14 years of age should be regarded as being among the worst kind of "rape" more so if it is acquired through forceful means. It should not be subjected to rif raf treatment because of a tecnicality of calling it "defilement." There can be no guarantee that such other cases will not come up, and that such other well intentioned misdirections on the part of magistrates might not occur. Given this, it is proposed that the offence of defilement should be incorporated into the general offence of rape under the same section, with the former (defilement) being termed as "statutory rape" where in contradistinction with the general offence proof of lack of consent is unnecessary. But should such rape be committed in circumstances which reveal lack of consent on the part of the complainant (a girl under 14 years in this case) it should be treated more severely than that which is committed with consent of the complainant. A young girls future sexual life should not be forcefully brought to a traumatic disruption.

Yet it is proposed that the other offences like "unlawful carnal knowledge of an idiot girl or woman, homosexuality, and many others should remain independent as they are

since it is feared incorporating them into tne offence of rape would widen it to limits which can only result in further confusion. In this group are included those that the law refers to as offences against "nature" not vaginal but oral or anal and many other acts of sexual agression to the person.

Out of this group though, should be singled those acts which involve a vaginal or anal penetration otherwise than with the penis (e.g. a protruding object like a stick, a dry cell, etc). It is suggested that such acts should come within tne ambit or rape since they constitute severe violations of the integrity of the person, violations which society cannot and must not tolerate. They should not just be "indecent assaults."

It becomes evident then that the law dealing with rape as stated in the Penal Code is glaringly inexhaustive in so far as it fails to take care of the situation just discussed.

CHAPTER THREE

3. THE QUESTION OF RESPONSIBILITY AND RAPE IN KENYA: WHAT BE THE CAUSE?

In this Chapter, we are faced with the colossal and inescapable question as to who and what is responsible for rape in Kenya. In our endeavour to attempt an answer, we take the plunge into the sea of emotionalism and sexism. The sphere of academic analysis in which a social scientist either consciously or unconsciously deviates from his/her role of enquiry into the field of social scrutiny based on his manhood or her womanhood and not his or her humanity. By this we mean a situation where one speaks as a man or woman and not a human being.

We also, being part of men and women, do not arrogate to ourselves a position of impartial observers free from such sectional approaches; but having set from the outset to extricate ourselves as much as possible from such biases, intend to cut through these emotions and arrive at a rationalization. We shan't feel inhibited however to point out something specifically touching upon a man or a woman in society if it be necessary. In this no easy task, we shall bank on a variety of views drawn from writers in different societies with a view to comparing with the Kenya situation.

Before venturing to consider the major causes of rape in Kenya, we find it appropriate to examine the question as to whether rape should be regarded as a crime of "passion" or "violence." This issue is central to the inquiry because most scholars while attempting to give reasons for rape in a society proceed from the basis of what they consider rape to be. This is also intended to lay a background of the offence in the limelight of social criminality. Is it an offence just as any other e.g. theft, manslaughter, or robbery with violence? Or is it an offence of a strange and peculiar kind, whose explanation can only be found with the help psychiatry and psycho-analysis?

Those who regard rape as a crime of passion look at it as emanating from an uncontrollable sexual urge which is set loose at the slightest provocation. They therefore explain rape as a male prerogative and attack its cause to what they term as "male chauvinism." Thus men rape women, because they ar men and women are mere sexual objects to satisfy their desires. Of course the implication of this argument is that men cannot help themselves, that sexually they are at all times very nearly out of control and so it's the duty of women to cover themselves if they want to stay out of trouble. This kind of situation is drastically summed up in the words of Jill Tweedie who writes that "... inside every male is a seething volcano of sex, a churning stream of lava kept under control only by dint of iron discipline on the man's part and extreme caution on the woman's."(63) That all parts of the woman's body have no normal functions that do not also carry the added weight of being designed to glare men's nostrils and start that inner volcano on its way to eruption.

This is a classic exposition by those who lay emphasis on the passion element of rape. It would not be rash if it one argued that such a view of rape is as perverted as it is derogatory in the Kenyan context. If it would be true that men are sent mad, and go tearing at any woman who exposes her body, life would be unbearable. All men would have to be put under lock and key if women were to have the slightest movement. It is our contention that such a blue print reduction of a man to a point of beastly sexuality must be rejected at the outset. In fact the writer just referred to rejects this traditional approach to rape and takes her side with those who consider rape as a crime of violence.(64) She argues that in many cases, violence appears to be the Sine qua non of the act. This argument is influenced by the fact that in many instances, women are beaten up, mutilated, and even killed after being raped. Resistance on the part of the woman, she says, does little to help. In no way however is it contended that sexual desires bear no relationship to the rape that ensues. Indeed, without a certain amount of sexual desire however strange, rape would not be possible in many instances.

Most writers are of the view that rape is a crime which is rooted in violence. They regard the crime as an expression of violence by men towards women. Rape, they say, is "sexual expression of aggression by men." According to this school of thought which is more popular with writers in the United States, men rape women because they are stronger. These writers have a tendency of attaching psychological reasons for the commission of the crime. They (exponents of this view) are mostly medical practitioners and psychiatrists. They argue that usually, the rapists are not sexually deprived people, that they rape for power, as they are insecure, inadequate people who don't feel in control of their own lives or themselves. Maureen Dowd writing about rape in the TIME Magazine says that "sex is not the chief thing that motivates rapists."(65)

Among the exponents of the "violence" opinion about rape, we also find that argument to the effect that men rape because they are men implicit. These scholars though rejecting the "passion" notion of rape all the same associate violence with ones manhood. It is contended by some(66) that it is probably unwise to look for a stereo type rapist and that it is perhaps better to see most men as potential rapists, or to see the rapist as a relatively normal male who, as a result of socially learned attitudes to women is likely to rape in certain circumstances. Even legal scholars find it hard to extricate themselves from this trend of associating rape with the "natural" violence of man. This trend is, as has been already pointed out, due to the overall picture of the relationship between the rapist and his victim. In many an instance, this picture shows rape to be a brutal, violent event in which the rapist has as his aim not only forcible sexual gratification, but also subjugation and humiliation of the victim. One such writer(67) rather interestingly rejects the psychological explanation of such violence but presents the desire for violence as the drive engine for rape - all the same.

Closely allied to this group of analysts are those who consider rape as a purely violent act through sexual intercourse but just as the above, refuse to furnish the psy-

chological and family background explanations for such violence. On the contrary, they take sides with those of the passion school. They consider such violence to be part of the male dominance over women through the pages of history. Rape is not explained by the rather mild concept of the "natural violence of man" but as a weapon (a political weapon!) in the "class struggle" between men and women. The crime then, is the violent sexual expression of the political desire by men to keep women under their feet. The champion of this view is non other than that polemic and incisive writer with the feminine touch, Susan Brown Miller. According to her, the penis has been used as a weapon in the power struggle between the sexes. In her famous book on the subject with her characteristic flair for language, she says

> "Man's structual capacity to rape and woman's corresponding structural vulnerability are as basic to the physiology of both our sexes as the primal act of sex itself ... When men discovered they could rape they proceeded to do it. Later, much later under certain circumstances, they even came to consider rape as a crime."(68)

Within this cluster of writers are those[69] who will point to such things as drunkenness, obstinacy and indignancy of men as factors which make them have intercourse with reluctant wives because they want to, or because it is their right or just because they feel they are stronger. We have already pronounced strongly on the issue of marital rape and have no wish to say more; but such reasoning serves to show how rape is conceptualised within the political struggle between men and women with little or no attention being paid to any underlying factors in society.

It is our hope that this brief exposition of the variant schools of thought about what rape really is in society, will help the reader draw his or her own logical inferences. Having discussed the "passion" and violence strands of rape, it is high time we made our position clear on the matter. It is our strongest contention which runs through tha pages of this study, that to look at rape as a crime of passion or violence

as if they existed in a vacuum and prescribe reasons for it on the basis of such conceptualisation, is to engage in gross mystification of the issue. Rape should not be regarded as if it were a unique offence which has not its roots in society but disrupted lives of individuals. To look at rape as a problem of the mind is to remove the crime from the fold of other crimes in society and to inevitably grope dumbfoundedly into psycho-analytic prescriptions.

Psycho-analysis assumes that the sexual drive is present from earliest childhood and has an important part in the child's first acts of self expression, its early capacity for reacting to its immediate surroundings, the control of its body and its preparation of what in later life will be called "consciousness" or ego-achievement. Besides, psycho-analysis and structuralism, if they contain an appeal to science against the claims of a purely humanistic culture, are at the same time permeated with anti-materialist ideology. Our argument against these approach is directed at its total indifference towards the socio-economic dimension of human - relationships. It is true to say that some rape cases exhibit very deviational characteristics which cannot be adequately understood without an appeal to psychiatry. But this need not be used as the basis for analysis in Kenya.

By the same token at the risk of appearing too repetitive, we do not subscribe to the view that rape is purely a crime of passion such a theory leads to the notion that men rape women because they are victims of uncontrollable emotions and passions, unexplainable urges,and fierce desires which can be considered impossible to control once they have been aroused. Apart from reducing men to beastly instincts, this kind of reasoning not only diminishes the amount of blame-worthiness society is willing to ascribe to rapists, but also mystifies the real cause of rape in Kenya.

Understanding rape as a crime of violence leads us to no better solution for it does not answer the question "why the violence?" The explanation of such violence in terms of male politics against women and male chauvinism inherent in their masculinity does not help us much either as it only answers

the question in a fraction and leaves the major part of it gaping. It plunges the efforts of inquiry into sexism which can only confuse the issue further. The public imagination has seized on the issue of rape with particular fervour and has nourished and been nourished by great media interest in the subject, ranging from full length works and collected essays to magazine and newspaper pieces; yet this mystic approach still hangs over the study of rape like the sword of Damocles.

In our attempts at demystification, there is need for us to understand rape within the general sphere of criminal conduct. The reasons for the offence are to be found more in the general reasons of crime in society than in rape itself. It is our submission that rape being a sex-specific crime is a combination of both passion and violence whose background is to be seen in the material conditions in society. Dr. Ndetei gives us the lead albeit mildly thus:

> "The third group of rapists tends to go for adult victims ... their anti-social sexual behaviour is only a small (but significant) part of their general criminality. In this group, the majority are criminally inclined men, who take what they want, whether money, material or women and their sexual offences are by-products of their general criminality. They will break in to rob but on finding a suitable female, they rape her and then rob her."(70)

Thus, more often than not, walking in the streets of urbanised areas, a man stands the risk of being harassed and robbed of whatever he has in his possession, while a woman will be sure to be assaulted sexually by these same street wanderers. Sex has become commoditised so much so that a group of thugs rate it at the same level with property. One can wonder why riot police storming into the peace of college life opt to beat up and roughen the male students, snatch them some of their belongings like watches, radio cassettes, etc, while the female students are spared for something special, something they have to forcefully supply - sex. Why should this be so? Policemen on patrol duty who happen to net a few "vagrants" (without proper documents of identification) will make the

males pay out their way through bribes or go to the cells, while the women revellers will be made to engage in snappy sexual intercourses and go "free." One wonders why in war situations or breakdown of peace a group of gun trotting soldiers on the loose should gun-butt male civilians, beat them up and deprive them of their property while the women are subjected to gruesome and inhuman sexual experiences which might stigmatise them for the rest of their lives.

Some scholars have argued that in group rape, the motive is one of male camaraderie that is experienced by the rapists. There is the psychological satisfaction amongst the rapists of sharing the "loot." This group rape, it is argued, can only be understood in terms of group behaviour, in which people conform to or even condone group behaviour, a thing they would not do if they were alone. The best example of group behaviour is a riot or mob "justice." But even with this explanation, we need not loose sight of the material force behind it.

We shall now attempt, using the background aforeset, to identify the causes of rape in a society like Kenya's. We shall in the same vein indicate which among these are the most powerful within the framework of our socio-economic and political organisation. All that the reader need be aware of is that the reasons which are offered trace their origin from whether one belongs to the passion and violence gymnastics or the socio-economic and political scrutiny of the offence.

It has been suggested that some men rape as a way of expressing anger. Such men tend to come from disrupted family backgrounds in which they had particularly bad relationships, with their mothers and usually broken homes. Ofen, these rapes include beatings - and the anger is directed at the whole female sex. The rapists tend to view women with a mixture of reverence and resentment. They choose random women on whom to vent their roilling rage about mothers who mistreated them or women who rejected them. "I was angry with my wife for having a crush on my brother, and I was angry with

the first girl I went out with when I was 17 who told me I wasn't assertive enough ... I felt judged by women"(71) One rapist is alleged to have said. Most psychologists agree that rape is not a form of mental illness but a behaviour problem rooted in emotional immaturity. This explanation of rape fits in with the schools of thought we have just considered. Those that do not address themselves to the economic conditions in society.

Can we say with certainty that men in Kenya rape women as a way of expressing anger due to the emotional hurt they suffered during their youth? We don't intend to give a wholesale answer to this question. The most we can say is that there are some rape cases which include beatings that are inexplicable in the circumstances. These can be partly explained by the "expression of anger" concept. But this is not, it is submitted, the major cause of rape in Kenya. In any case it accounts for just a fraction of the rape cases one comes in contact with or reads about daily.(72)

Another reason that has been advanced as being the motive behind rape and which is closely allied to the foregoing one, is, a desire for an experience of power and control over a victim. Those who subscribe to this view hasten to point out that this motive is indeed evident even in normal human (even animal) sexual relationships in which the male puts up a calculated fight or insistence to have sexual intercourse with his female partner, who in turn puts up a calculated resistance (the "no" that means "yes"), a phenomenon sometimes casually referred to as "love fight." We have little or no sympathy with this theory since in a rape situation it is abundantly clear that the victim is saying no in no uncetain terms. We can however spare it for what are sometimes termed "date rapes" or "acquaintance rapes" which will be examined exhaustively in Chapter Four.

The third reason that has been advanced as the motive force behind the offence of rape is what is known as "sadistic sexual behaviour." It is a bit difficult to differentiate this form of behaviour with the first one which

has been discussed, but closer observation shows us that this particular one under consideration is wider than the first one. Wider in the sense that it is rooted in a general cruelty on the part of its perpetrator. It is also more of "a mental situation," than the first two. Dr. A. Hartwich in his book entitled Aberrations of Sexual Life, defines sadism as "the experiencing of sexual desire up to the pitch of orgasm when accompanied by humiliations, chastisement and all manner of cruelties inflicted upon a human being or an animal and also the impulse to evoke such feelings of desire by means of the appropriate treatment."(73) Sadism then, involves sexual stimulus via cruelty. An experience in which the man achieves excitement only in the awareness that he is harming a woman as evidenced by her struggles and anguish.

It is said however that not all violent sexual crimes are sadistic in origin. Some rapists for example are aggressive criminals primarily engaged in other crimes such as robbery or burglary to which rape is incidental. To this explanation of rape, we have little to say other than that it serves to explain some of the violent rape cases in which the assailant beats up and even mutilates the woman. More often than not such a rough and brutal treatment finds no place at all in the faculty of ordinary explanation.

Finally, the major cause of rape in Kenya is to be found in the socio-economic conditions prevailing in our society at the present day. The economic conditions in Kenya are such that crime of which rape is just but part is the logical result. It is our contention that poverty is the raw material from which rape is manufactured. Some recent statistics(74) lend support to this contention. According to the data, the majority of rapists are relatively young, about 60 percent of rapists are under the age of 25 years and about 40 percent are 20 or under. They tend to come from the less privileged groups of society and often they are the "drop outs" of society. Most of these are standard seven and form four drop outs condemned to the rigours of fending for themselves in a society characterised by intense and severe economic competition. They are "easily" sexually aroused, agressive in their behaviour, seeking only the gratification of today. They are "happy"

go lucky sexual adventurers and looters, with a special "appetite" for young teenage girls; with attractive feminine features. These are boys who in their social existence go for what they feel has been denied them by society. With the entire cultural ambit of the sexuality of the traditional Kenyan thrown overboard by colonial inflitration, they feel it is their right to get what other people seem to be getting so freely because of their "purchasing power."

We may ask, is it true that as the economic competition intensifies, there are less and less sexual release mechanisms for the unemployed and therefore more incidences of rape? We do not hesitate to answer in the affirmative. By so doing, we should not be taken to mean that men are victims of uncontrollable sexual lusts. Rather, our answer is given in view of the fact that, the whole sphere of sexuality is today biased in favour of the system. Sex is reduced to a commodity, the human body is de-eroticised, and a false sexuality imposed on life in general and on peoples relation to their products; the free expression of instinctual drives is turned into controlled aggression. All these forms of sexual manipulation are typical of contemporary economic exploitation in Kenya, but they are only <u>one</u> aspect of it.

Women have not only fallen victims of rape but have become actors in this "economic drama." In these days of cut-throat survival, there are few women who fail to understand that their sexual charms can secure for them "a position in life," which puts them above the need for independent exertion. When calculating her chances in the struggle for existence, a girl puts on her credit side her personal attractions, the "sex appeal" which will induce a man to work for her so that, forthwith or by degrees, she will secure money, status, leisure. Far from being ashamed of her sex as some facile theorists would have us believe, a woman has become extremely proud of her genital organs. They are the centre of her power to give men incomparable pleasure. She would be amazed if they were neglected, under valued, despised; and she counts on them to provide for her future, and perhaps lead her to unexpected heights. A report appearing in the NEW AFRICAN Magazine serves to indicate the truth or strength of this assertion. The

report goes:

> "Bleach use appears to be claiming new victims among the less affluent urban women. With a big push from the advertising, there is a real risk that the use of dangerous skin creams may invade the vulnerable pastures of village life. From Kisumu come reports of a new slogan going the rounds in Dholuo vernacular - 'Lando Jaber' or "Brown is Beautiful." In response, more and more women are said to be plastering their ebony skins with concoctions of up to five different creams. From shanty town Nairobi newspapers report of women bathing in and even drinking a venomous mixture of Omo washing powder and household bleach in order to achieve the desired 'brighter skin' ... "(75)

Some observers consider the desire for a lighter skin as a hangover from the colonial past when whiteness conferred status- or as a part of the lingering inferiority complex through which so many Kenyans define all that is imported as good and all that is home grown as poor and mean. But in the contortion of such reasoning, it is easy to lose sight of the link between materialism and such conduct. Whatever these women do is part of their struggle for existence.

We may then ask, does this process of modernisation encourage rape? J. F. Nganga[76] notes that women do not think that society encourages rape by it's permissiveness. It seems to them the vices usually accompanying modernisation have not caught up with Kenya yet. We do not wish to be drawn into the type of argument whereby we talk of "modernisation" as if it existed in the abstract. It has been argued that the process is part of the vicious cycle in the relations of production. The economic conditions in society therefore are largely responsible for the high incidence of rape in Kenya.

Having arrived at the above conclusion, it is imperative that in thinking about reform of the law of rape we address our mind to the question as to whether law reform alone can reduce or eliminate the crime. Or whenever it is the duty of

both men and women always to endeavour and check its ascalation - within the economic umbrella of exploitation.

CHAPTER FOUR

4. RAPE AND THE COURTS: SCENE OUTSIDE AND INSIDE THE COURTROOM.

One of the most vexing problems in the law of rape is how to fairly try the alleged rapist in conformity with the constitutional provisions(77) and other criminal law safeguards while at the same time not unfairly "trying" his accuser. The substantive law in the Penal Code as examined(78) seems to offer a wide ranging protection to the rape victim in terms of its open-handedness pertaining to the definition of the offence. However, if there is any area where reform of the law is needed, then that area is the long and grueling road stretching from the police station to where the judge or magistrate sits in readiness to hear evidence and deliver judgement. That time when the prosecutrix painfully bears her "burden of proof" from the recording police desk, through the labyrinth of prosecution tactics and defence probity unto the time when the occupant of the bench pronounces "I find the accused person guilty/not guilty!"

We have all along noted and continue to, that, the offence of rape is or has been treated as peculiar. It's oddities are procedural and evidentiary as well as substantive. Rape trials have from time to time been marked out for criticism with a candour born out of deep concern by various writers and women's organisations. In this Chapter, it follows, we direct our last efforts towards identifying and "disentangling the syntactical webs" of this problem. It is from this exercise that we can safely suggest reforms. We consider a "trial" as encompassing that which happens both outside and inside the courtroom, for justice is ensured not only by the fair hand of a fact finder but also by the procedural and substantive safeguards available in the law. That is why this study is intended to examine the attitudes of the policemen towards those who come up to report rape cases (mostly the victims) the enigma and fascinations of those who sit to determine the innocence or guilt of the accused, just as it discusses the consent strand and the special rules of evidence that attend a rape trial within the framework of

the deep seated assumptions in our society.

Our task is monstrous because in the interests of objective scholarship, we are aware of the fact that reform should not go too far in the opposite direction as to sacrifice legitimate rights of the accused person on the alter of women's liberation; a fact which is as disturbing as it is fundamental. The discussion revolves around five major questions viz

(i) The question of consent.
(ii) The introduction of the sexual history of the complainant in a rape trial.
(iii) The corroboration requirement in rape trials.
(iv) The under - reporting of rape offences and the police.
(v) The issue of sentence in rape.

The issues under consideration are so connected that instances of overlap won't be few. They are not to be treated as mutually exclusive.

4.1 CONSENT: A NIGHTMARE TO THE LAW

We address ourselves first to the vexatious problem of consent in rape. One of the cardinal elements of the offence of rape under many Penal Codes of the world[79] and indeed Kenya is the want of consent of the rape victim which must be proved by the prosecution beyond reasonable doubt. It is common experience though that many alleged instances of rape have failed for want of such proof. This difficulty of proving the want of consent has been occasioned by the requirements of corroboration which will be discussed in more detail later. The proof of want of consent has also been made difficult by the courts' "over sensitivity" about the purity and consistency of the complainant's testimony. The courts are inclined to feel that it would be "unsafe" to convict in the event of any contradiction in the complainant's story. The cardinal common law principle as enunciated in the case of Woolmington V. D. P. P.[80] has been it is submitted, raised to a degree of "excellence" in rape cases.

A standard far beyond that required in other criminal cases. This insitence on a higher standard is perhaps rightly or wrongly due to the complex and uncertain nature of sexual relationship.

The attitude by the courts to consent seems also to have been affected by the pervasive belief in common law systems that women all like to be raped. More often than not, one hears or reads about such adages as,
"Man can't rape because woman with skirt up can run faster than man with trousers down"(81) or
"One cannot thread a needle when the needle doesn't stand still."(82) or even statements like,
"you can't stick a truncheon in a moving pint glass"(83)
All these statements imply that there is no such a thing as rape, for the woman somehow is a willing participant. For whatever they are worth, they have had a marked effect on the courts' mind in rape trials as regards consent. Two East African cases will suffice to demonstrate how pure and flawless a prosecution case must be if a conviction is to be entered.

In the case of Abasi Kibazo V. Uganda(84) the appellant was convicted of rape mainly on the evidence of the complainant. There were contradictions in her evidence and the statement she made to the police, and the evidence of the medical assistant who had examined her. The trial judge found that there was abundant corroborative evidence implicating the accused from the fact that the appellant and the complainant were together at the time in a house where the assault was alleged to have taken place and that afterwards the complainant went straight to her home and made a report to her mother. The facts leading to the alleged assault are vividly reported in the law report. So convinced was the trial judge (Udoma C. J.) at the hearing that in delivering judgement he said at P. 509

> "If her evidence had stood alone, I would still have been inclined to accept her story and to act upon it. As it is her evidence has been reinforced by the medical evidence given by Erifasi Matwaro (P.W. 2)

> particularly on the issue of sexual intercourse. I agree with the submission that the evidence of her complain to her parents cannot amount to corroboration. It is clearly evidence of the consistency of her conduct with the story told by her in this court and it must be accepting it as I do, negative her consent ..."

On appeal however, it was held that the trial judge placed a far greater reliance on the evidence of the complainant than was "desirable" in view of the contradictions and "falsehoods" in her evidence. The Appellate Court felt that it was unsafe to allow the conviction to stand and went ahead to quash it. It is interesting to note, for purposes of illustration of the consent problem how the learned Justice of Appeal (Sir Samuel Quashie Idun) was at variance with the trial judge. At P. 511, he stated:

> "The learned Chief Justice, however, accepted the opinion of the witness that in view of the bruises found on the complainant, the intercourse with her took place by force and without her consent. But such bruises have been known to occur to women who have given their consent to sexual intercourse depending of course, on the size of the male organ and the manner in which intercourse takes place."

Of more importance to the reader regarding the effect of the complainants testimony on the issue of consent and the court's reaction to the same; is the statement by the learned Judge of Appeal at P. 512 when he said:

> "To revert to the evidence which the complainant gave, she said that after she had been raped, the appellant took her outside the room and asked her to wash her private parts and that when she refused to do so, the appellant washed her private parts. It seems to us quite strange that a woman who has been assaulted in the manner described by the complainant and who must have suffered indignation, would agree to the assaulter washing her private parts. She does not say that this was done with force and it must be assumed that she must have stooped down for her private parts to be washed. <u>This, surely was a fact which should have been considered</u>

by the learned Chief Justice on the issue of consent. (Emphasis Mine)"

It is clear from this case that what the Appellate Court saw as flaws in the complainant's story went along way to destroy the likelihood of lack of consent.

In the case of F. W. Cowrie V. R.,[85] among the numerous grounds of appeal, the appellant also submitted that the case for the defence was not adequately put before the jury since inter alia, the trial judge in his direction did not refer either to the complainant's emerging with the appellant from the room where the alleged rape had accurred with his arm round her neck and to their subsequent amicable, conversation, or to the state of the complainant's knickers, which were inconsitent with the complainants story. And on this ground, it was held that the failure of the trial judge to put to the jury evidence which merited careful consideration and "tended" to disprove the complainant's story constituted a "major" defect in the summing up and since the jury might well have reached a different conclusion if their attention had been drawn to this fact, the conviction would not be allowed to stand. Sir Alastair Forbes V. P. stated on behalf of the court at P. 46 thus:

> "It was however a very important part of the defence case that the complainant's conduct in emerging from the room where the rape was alleged to have taken place hand in hand with the appellant and with his arm around her neck, and her subsequent apparently amicable conversation with him, were not consistent with her story that intercourse had taken place by force. ... There's force in the appellant's contention that these are matters which tend to disprove the complainants ... In the circumstances we think that the non-direction is vital and that it would be unsafe to allow the conviction to stand."

These cases show us that the court is too keen on the "purity" of the complainants testimony and any discrepancy strictly so speaking is likely to be disastrous - to her case. This appears to have raised the standard higher than the normal

one in criminal cases, "beyond reasonable doubt." Of course it cannot be said with certainty that guilty men are being acquitted nor is one craving for convictions in rape cases without due regard being paid to the due process of law; all that is taken note of is that the problem of proving lack of consent so far remains a nightmare in the law. Somehow, a solution is necessary to restore confidence in the system of trials.

These attitudes could as well relate to situations where the complainant had not consented but the man at the time believed she had. Of course it would be quite difficult for a person accused of violent rape, corroborated by physical proof, to maintain in any convincing fashion that somehow he thought his advances were welcome. But one can imagine circumstances involving roughness rather than threats or clear violence, in which the defendant interpretes his targets resistances as "token" - the obligatory "no, no, no" preceding the final, implicit "yes." This is a problem touching on consent compounded by the belief by some men that women who push them back and say no are actually, fundamentally, pulling them forward and saying yes. The leading English decision which demonstrates how the view that women like to be raped and that their resistance is an invitation in disguise, has nurtured and tendered injustice in the courts, is the celebrated case of D. PP V. Morgan.[86] There, a senior Royal Air Force Officer invited three companions home for the purpose of sleeping with his wife. In order to surmount their not unnatural incredulity, Morgan (the husband) told them stories of the woman's alleged sexual quirks and provided them with contraceptives. Notwithstanding the victim's protests, the night culminated in an orgy that according to one of the presiding lords "might have excited unfavourable comment in the court of Caligula or Nero."[87] Charged with rape, the "guests" asserted as one defence their belief that Mrs. Morgan was willing - a notion based (so the young men stated) on Morgan's assertions that "they must not be surprised if she struggled a bit, since she was "kinky" and this was the only way in which she could get "turned on." In hearing the appeals from the verdicts of guilt, the House of Lords

determined that an honest though mistaken belief in the victims consent constitutes a defence to rape.[88]

This case is relevant to the Kenyan situation and could lead to far-reaching consequences if the holding were followed by our courts. It's importance is based on the fact that many Kenyan - "rural" women and others who have not yet taken to foreign fantasies, more often than not do not give in to sexual intercourse "willingly." This conduct should not be mistaken with the white woman's preliminary known as the "love play" where the woman entertains aggressive overtures by the man. It has been suggested[89] that the "erotic pleasure of such women may be enhanced by or even depend upon an accompanying physical struggle. The love bite is a common, if not mild, sign of the aggressive component of the sex act. For most African women however, giving in to sexual intercourse without any sign of resistance is viewed by them as having the effect of "cheapening" them in the eyes of their beholders. The resistance serves to salvage their integrity and pride. Another explanation is that due to their cultural conditioning, the youth tend to feel that sex outside marriage is "dirty." Due to this, a woman's need for sexual satisfaction may lead to the unconscious desire for forceful penetration, the coercion serving neatly to avoid the guilty feelings which might arise after willing participation. Should our courts follow the holding in Morgan if this situation were to confront them?

The problem of consent does not only work unfairly against the victim of a rape. In some instances it could operate against the accused person. In some cases the woman's conscious response to the sexual demands of a man may not accurately be labelled either "consent" or "non consent" - in the sense of a definite positive or negative reaction. Consent, like any other conscious attitude, results from a particular organisation of needs in an individual at any given moment, but especially where sexual stimuli are involved a person may have no clear attitude. The complex set of personality needs, many of them rooted in the unconscious and often competing with each other, may produce

an ambivalent and unclear mixture of desire and fear even in the "normal" person.

Where such an attitude of ambivalence exists, the woman may nonetheless, exhibit behaviour which would lead the fact finder to conclude that she opposed the act. To illustrate: a woman, whose sexual desire and super ego are in conflict may alternate rapidly between "approach" and "rejection" responses to the man, first scratching and pushing him, at the next moment soliciting his caress. In other women, the anxiety resulting from this conflict of needs may cause her to flee from the situation of discomfort either physically by running away, or symbolically by retreating to such infantile behaviour as crying. The scratches, flight and crying constitute admissible and compelling evidence of non consent. But the conclusion of rape in this situation may be inconsistent with the meaning of the consent standard and unjust to the man. There is no explicit provision in the law for the woman's attitude of ambivalence. However after all is said and done, it is felt that this danger is not so imminent as to warrant the introduction of any provision in the law.

Another situation pertaining to the question of consent which is bound to prove a problem in atrial for rape is where the woman agrees to engage in some "sexual" act with her partner short of sexual intercourse. In the event that the man spurred on by the excitement acquired from such play breaches the "condition" and goes on the have sexual intercourse "against" the woman's consent, should he be guilty of rape? This situation is considered relevant to the discussion of the consent requirement because it is connected to the problem noted in Chapter two about women who end up being "raped" after engaging in some kind of "dating relationship" with men they are acquainted to. Known parties would after a drinking outing proceed to the man's apartment where given the excited environment in which they find themselves, they engage in sexual intercourse under circumstances short of mutual consent. An exercise which later the woman disproves of and conceives of as rape. It has been argued[90] that in the event of a situation where

a woman has not objected to some degree of sexual familiarity or has agreed to go to a quiet place with a man; the latter should not be free from a prosecution for rape. The basis of this argument is that if the man were to be absolved from guilt, this would undermine a woman's right to choose whether to have sexual intercourse no matter what the circumstances and would condone in some measure the conduct of a man who denies her that choice.

There is no reported authority in Kenya to guide us on this matter, but a Tanzanian case (unreported) of Amri s/o Ahmed V.R.[91] grapples with this problem. In that case, the accused was convicted of rape. According to one version of the fact, the girl in question, a virgin of fifteen or sixteen years had agreed to participate in some sex-play with the accused, but said from the start that there would be no intercourse. The couple undressed and got into bed. After some time together, the accused did in fact have intercourse - with the girl, apparently having to overcome some resistance on her part by force. In convicting the accused, the court noted that loss of virginity was the only damage done, for no violence was used and the girl moreover, knew the accused, and presumably liked him enough to permit him every kind of sexual intimacy short of intercourse itself; so likely she suffered little or no emotional damage. Though sustaining the conviction, this observation by the court is indicative of the fact that the court did not seriously treat the factual situation as constituting rape stricto sensu.

A more direct and athoritative source of information is the decision in the Appellate Division of the South African Supreme Court concerning an allegation of rape.[92] In the case, the judge Francois Petrus Van Dlen Heever said inter alia:

> "... However the main ground upon which I feel bound to differ from the judgement of the court aquo is this. It assumes that where a man and a woman make a pact to indulge in sexual acts with each other short of natural sexual intercourse and, overcome by the stimuli so experienced, the woman succumbs, permits full copulation

> and comes to her senses only when it is too late, the man is guilty of rape because of his breach of the condition: 'thus far and no further.' In our law rape is a subspecies of vis ... It is essential that the victim's resistance be overcome by fear, force or fraud. When it is overcome by the prompting of her own passions, to the stimulation of which she consented, there can be no question of rape. I do not wish to suggest that once the male is sexually roused by lascivious acts permitted by the woman he may resort to vis and rape her with impunity. But excitation acquiesced in by an adult does not amount to vis. In my judgement the court aquo erred in convicting the appellant and the conviction and sentence should be set aside."

This factor in the consent jig saw as discussed by the two cases carries alot of relevance in the law of rape in Kenya and any suggestion of reform cannot overlook it.

4.2 HOW RELEVANT IS THE SEXUAL HISTORY OF THE COMPLAINANT IN A RAPE TRIAL?

The second issue that falls for consideration is the introduction of the sexual history of the complainant in a rape trial by the accused person for the purpose of impeaching her credit. We ask ourselves the question: Is the past "immorality" of the prosecutrix relevant in a rape trial? If so to what extent? This question has to be answered because S 163 (1) (d) of the Evidence Act[93] provides as follows:

> "When a man is prosecuted for rape or an attempt to commit rape, it may be shown that the prosecutrix was of generally immoral character."

The above provision in the Evidence Act has been the subject of much heated criticism. Why should the introduction of the sexual history of the complainant in a rape trial be given statutory sanction? Such allowance of sexual evidence to show that the prosecutrix consented to the sexual contact obviously flies in the face of the usual bar against circumstantial use of character for the sole purpose of demonstrating the probability that one with a certain moral trait

acted conformably with his nature at the specific time in question. This bar is embodied in S. 57 (1) of the Evidence Act which save for the few exceptions stated thereafter states:

> "In criminal proceedings the fact that the accused person has committed or been convicted of or charged with any offence other than that with which he is then charged, or is of bad character, is inadmissible ... "

Section 57 (1) (c) provides that such use of character against an accused person is acceptable if:

> "The nature or conduct of the defence is such as to involve imputations on the character of the complainant or of a witness for the prosecution ... "

Yet this safeguard is not available to a complainant in a rape trial as it is defeated by S. 163 (1) (d).

Defence counsel have not infrequently found this law of evidence rich in providing escape devices for their clients. This is more so since given the general wording of the section, it can be safely inferred that it is not confined to the past immoral relations of the prosecutrix with the accused, but is wide enough to encompass sexual conduct in relation to others. Clearly, the accused person has the right to frame questions designed to impugn his accusers story. On the other hand how far may he or his lawyer go in exploring the complainant's sexual conduct at other times and with other persons? Can the rape complainant's conduct with persons other than the accused bear so directly on consent as to override dangers of confusion and prejudice? Defence counsel not only scrutinize the matter of previous intercourse but also delve into issues like the victim's use of birth control, her attendance (unescorted) at bars, the existence of any illegitimate children, and the number of her prior sexual experiences. And all this with a view to injuring her credit and establishing that she consented to sexual intercourse.

This provision in the law of evidence traces its origin in the assumption in countries with a common law tradition that it is more probable that an unchaste woman would assent to sexual intercourse than a virtuous woman. The law considers the victim's character for chastity pertinent to whether or not she consented to the act that led to the charge of rape. Unchastity bears not only on the substantive issue of consent but also on the woman's credibility, promiscuity imports dishonesty. The assumption would lead to the tragic conclusion that a prostitute or harlot has no capacity of withholding consent to sexual intercourse with anyone! Such a conclsion is unfortunate since it seems to import the notion that a prostitute cannot hate anyone when it comes to sexual intercourse.

This myth can even be traced to the code of Hammurabi engraved in stone four thousand years ago (Babylonian law); where a man was slain for raping a betrothed virgin but a married woman who had the misfortune to get raped had to share the blame equally with her attacker. They were bound and thrown into the river.(94) In People V. Abbot(95) judge Cowen talks of a woman

> "Who has already submitted herself to the lewd embraces of another, and the coy and modest female severely chaste and instinctively shuddering at the thought of impurity ... ,

then rhetorically inquires,

> And will you not more readily infer assent in the practised Messalina, in loose attire, than in the reserved and virtuous Lucretia?"

This assumption is damaging to a rape victim in court; surely a woman may be "a vestal virgin" or "Salome of the seven veils" - raped she is if she didn't want and did oppose sexual intercourse. We entirely agree with one writer when she registers her disatisfaction with this assumption in these terms:

> "But of course it is deeply ingrained in us that only a virgin can truly be raped: as the old saw puts it so endearingly, a slice from a cut cake is never missed ... Any girl who would sink so low as to practise what society in general considers a sexual perversion has no right to that society's help when she is forced to do the same thing to a total stranger. It follows, therefore, that if one can prove a woman promiscous, give evidence that she has intercourse with the men she chooses, she has stepped outside the pale and is fair game for any man."(96)

This is exactly what the law as embodied in section 163(1)(d) of the Evidence Act implies.

We can only identify the unfairness played by the section against the prosecutrix-in court. The fact that a woman may have been guilty of illicit intercourse with one man is too slight and uncertain an indication to warrant the conclusion that she would probably be guilty with any other man who sought such favours of her. The admission of particular instances unfairly surprises the prosecuting witness, who comes to the trial prepared to defend her relationship with the defendant, but not to respond to charges, possibly fabricated - regarding her total life and history. Introduction of sexual history, arguably impinges upon the victim in ways that differ in kind and degree from the ordinary rigors of being a witness. For many people, the trauma of baring ones intimitate past to the eyes of the world turning one's bedroom into a show case, overshadows the usual discomfort of testifying, or having others testify, to one's biases, lies, or even convictions of criminal acts.

Evidence of specific acts infects distracting collateral matters into the trial as the parties squable over whether the victim dated Jack or Slept with John or attended "Wild Parties" with Jim. For one thing, this kind of proof is quite remote. It assumes perhaps wrongly in some instances that people posess "fixed characters" at least

for particular moral qualities, and that these determine their conduct in many different sets of circumstances. The section in question is also unfair to the rape victim in that it injures the character of the prosecutrix and is in any event not directly related to the issue of consent which is the gravamen of the charge of rape. In the absence of clear proof to the contrary, one can presume that a woman will freely choose her partners, picking some and rejecting others, in line with highly personal standards not susceptible of generalization.

Before considering the possibility of amendment in view of the above observations, one is confronted with the question as to whether there are situations where the victims sexual history bears so strong a relationship to matters at issue in the case that limiting or excluding the proof might well infringe the accused's rights? It is necessary to draw a distinction between the relevancy of evidence concerning past sexual relationship with the accused and others. Where as evidence of acts of intercourse with persons other than the accused indicates a remote likelihood of the woman the case of the accused, past sexual relationship with him raises a probability that a woman having consented to sexual relationship in the past is unlikely to dissent at a later stage such evidence is relevant as it is based both on merit and logic.

A history of intimacies with the accused would ordinarily tend to bolster a claim of consent to yet another sexual encounter. The inference from past to present behaviour does not as in cases of third party acts rest on highly dubious beliefs about "women who do" and "women who don't" but rather rests on common sense and practical psychology. Admission of the proof supplies the accused with a circumstance making it probable that he did not obtain by violence what he might have secured by persuasion. This evidence is by its nature self contained and lacks potential for expansion into the rest of the victim's life.

There are few other situations that merit consideration in relation to the proposed amendment. Take for example a case where the prosecution, in attempting to prove the rape's

occurence, offers evidence that semen was found in the victim's vagina shortly after the alleged assault. The accused wishes to make a showing that on the very same day and prior to the medical examination, the woman had intercourse with X. If the accused is not conceding that he committed the act but rather is striving to point the finger at someone else, the law should not deny him crucial proof on these issues merely because it has the effect of revealing some of the victim's history. Placed on the scales of due process, the defendants need to use this matter will in the absence of special factors, clearly outweigh other interests. Such evidence covers a very limited range of conduct occuring over a brief period, not a life time's worth of experience.

What if the accused were offering to show that the victim habitually goes to bars on Saturday nights, picks up strangers and takes them home to bed with her, and that over the past twelve months she has done so on more than twenty occasions? Now could one assert with assurance that this particular sexual record does not substantially reinforce the accused's version of the night's events? And if he does should he not be permitted as a matter of constitutional right to place this evidence before the court? In the above situation, where proof of prior sexual conduct pertains narrowly to acts evincing a pattern of voluntary encounters characterised by distinctive facts similar to the current charges, one cannot cavalierly assume that a woman's behaviour on one occasion has no relationship at all to her conduct and state of mind on another. On the contrary her actions tend to prove that consent to intercourse for her has lost its unique non-transferable character when these particular conditions obtain.

4.3 THE ENIGMA OF THE "CORROBORATION" REQUIREMENT.

We move on to the next issue i.e. "Corroboration." Requirements of corroboration which occupy a border land between substantive law and evidence comprise yet another oddity in the law of rape. Before proceeding to analyse the desirability or otherwise of corroboration in prose-

cutions for rape, it is important at the outset that we understand the legal meaning and implication of the term "corroboration."

In D. P. P. v. Kilbourne[97] Lord Hail Sham L.C. said the following of corroboration

> "The word corroboration by itself means no more than evidence tending to confirm other evidence; in my view evidence which is (a) admissible and (b) relevant to the evidence requiring corroboration and if believed confirming it in the required particulars is capable of being corroboration of that evidence and when believed is infact such corroboration."(98)

While in the same case Lord Simon was of the view that "corroboration is nothing other than evidence which confirms or supports, strengthens other evidence, it is in short evidence which renders other evidence more probable."[99] In the King V. Baskerville[100] Lord Reading C. J. talking about the same issue stated:

> "We hold that evidence in corroboration, must be an independent testimony which affects the accused by connecting or tending to connect him with the crime: In other words it must be evidence which implicates him or confirms in some material particular not only the evidence that a crime has been committed but also that a prisoner committed it."(101)

Mr. Ringera[102] adopts a more fused and precise approach to the concept of corroboration. According to him, "corroboration is evidence which supports or confirms or strengthens other credible evidence adduced by a witness or witnesses that the accused person committed a crime wherewith he is charged." Thus unless the court is satisfied that the evidence of a witness is reliable, it need not be corroborated. There appears to be little difference in approach between Mr. Ringera and the law lords we have quoted in Kilbourne's case. The only difference is that the former is of the view that the evidence to be corroborated must be credible. This stems from the argument that it would be superflous to engage in an exercise of corroborating evidence which from

first instance is not credible.

The inference to draw from these definitions is that one can either look at corroboration in a rigid and technical way or in a more flexible manner. Thus to adopt the first approach (technical) would be to side with Redding C. J. (as quoted) who looks at corroboration as an "independent" testimony which confirms material particulars of the offence and not only shows that a crime was committed but that the accused committed it. The prosecution therefore cannot rest on the mere word of the rape victim, it must adduce some other evidence tending to support its case. Depending on the common law rule or statute in question, the state may have to corroborate each material element of the crime or only some particular aspect of the prosecutrix's story. The material particular or particulars are (in abstract) identified by the constituent elements of the crime. In rape for example, it would be intercourse, absence of consent and accused being the assailant. This leads to the objectionable result that the accused can by his defence determine on which particular(s) corroboration need be found. An accused who admits intercourse, but claims consent, forces the prosecution to provide corroboration on the allegation of non-consensuality and he puts out of reckoning in strict terms evidence which supports the victim's story in other particulars.

The second and more flexible approach would be to allow corroboration to be found in any item of evidence which makes the victim's story more probable: That would mean one ignores the numerous and accepted dicta in various decisions saying that corroboration must be as to a material particular in the case. This is the kind of approach that does not clothe corroboration with the "magic" of independence. We shall soon find out that what constitutes corroboration varies from case to case.

Corroboration is not required in all criminal trials, it is only a requisite part of the evidence in some cases where the legislature or the courts feel it would be unsafe to enter a conviction without it for various reasons.

Corroboration could therefore be required by a statutory provision or as a rule of practice by the courts. S.124 of the Evidence Act for example provides that,

> "Notwithstanding the provisions of S.10 of the Oaths and Statutory Declarations Act, where the evidence of a child of tender years is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him."

This provision stems from the fact that children live in a dream world and their memories are frail. These, plus the fact that their evidence always faces the danger of being coached, made the legislative feel that it would be unsafe to convict on their testmony alone without some other evidence tending to support or confirm such testimony.

In rape cases, it is not a rule of law that a conviction should not be entered without corroboration, but it has always been a practice by the courts in Kenya to warn themselves of the "danger" of convicting without such corroboration. It is our contention that this practice as we shall see has acquired the force of law and without such warning and in fact such corroboration, a conviction will almost certainly be quashed at the appellate level. Why should the courts require corroboration in rape cases and not be contented with the testimony of the prosecutrix as in other criminal trials?

The principal justification for the corroboration rule is that women have a tendency to make false allegations of rape. To counter this, men accused of rape must have protection over and above that which is afforded to most defendants. Underlying it is the fork-loric assumption that women are by nature peculiarly prone to malice and mendacity and particularly adept at concealing it. This overriding fear has shaped the courts' responses to this crime. Fears

have been expressed to the effect that "there is no other class of prosecutions attended with so much danger, or which afford so ample an opportunity for the free play of malice and private vengeance." Dean Wigmore is the leading exponent on the issue of revengeful mistresses and his writings have had a tremendous effect on the common law. Vivian Berger who appears to have a special dislike for him (Wigmore) has the following to say:

> "Leading scholars and commentators have persistently echoed the apprehension, lending to actavistic suspicion the imprimatur of 'science' and "reason." Dean Wigmore, never a great friend of women, warns darkly of the 'evil of putting an innocent man's liberty at the mercy of an unscrupulous and revengeful mistress.....,' while judge Ploscowe advises that "prosecuting Attorneys must continually be on guard for the charge of sex offences brought by the spurned female that has as its underlying basis a desire for revenge, or blackmail or shakedown scheme."[103]

These notions which have been strongly embedded in the common law contain it is submitted, at least a germ of truth which the myth purveyors regrettably have twisted or exaggerated. This fear of false charges finds a demonstration in the Bible, one of the sources of the common law. In the Book of Genesis[104] the reader will find the well known story of potiphars wife who lusted after the young Joseph and when she was spurned, turned the tables and charged that he had assaulted her. Surely, as a parable of one form of male female interaction, this tale reflects human experience. The problem comes in however when society views extreme types of women as prototypes of the rape complainant.

The second justification for corroboration in rape cases is that in addition to voicing anxiety over deliberate lies, writers have expressed extreme concern about unintentional fabrications stemming from perverted or "Overripe" female sexual fantansies. A great deal of ink has been spilled on the subject of female psychic diseases supposedly causing the afflicted woman to imagine all sorts of sexual