



**NGEC**

National Gender and  
Equality Commission

# Minimum Age of Consent for Sex: Addressing the Dilemma

A summary report of discussions and proposals  
from multi- sectoral stakeholders' fora, 2019



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# Foreword

The National Gender and Equality Commission (NGEC) is a Constitutional Commission established by the National Gender and Equality Commission Act. No. 15 of 2011 pursuant to Article 59 (4) & (5) of the Constitution of Kenya. The Commission’s mandate is to promote gender equality and freedom from discrimination for all people in Kenya with focus on special interest groups, which include women, children, youth, Persons with Disabilities (PWDs), older members of society, minorities and marginalized groups.

Function 8 (b) of the NGEC Act mandates the Commission to monitor, facilitate and advise on integration of the principles of equality and freedom from discrimination in all national and county policies, laws, and administrative regulations in all public and private institutions. Age of consent for sex has been a long winding debate, whose conversations touch majorly on children. It has always been the aim of society through history to regulate inappropriate sexual contact with and among children by setting barriers to sexual conduct with them. World over, the rationale behind laws on age of consent for sex is that minors are incapable of giving consent.

In Kenya, the debate on age of consent for sex was sparked by the Court of Appeal proposal in March 2019 that invited national discussions on mechanisms for dealing with children offenders under provisions within the Sexual Offences Act 2016 while maintaining the best interest of the child. The matter constitutes the ‘dilemma’. In fulfillment of its mandate, NGEC organized a forum drawing stakeholders from different public and private sectors including; academia, justice, education, health, children rehabilitation institutions, children, among others to discuss the substantive issues on age of consent for sex, anticipated consequences of either decisions and make policy recommendations to the State.

NGEC held a multi stakeholder’s forum at the Laico Regency Hotel, Nairobi on 30th April 2019 attended by 116 participants who made oral submissions and generated a 28 point memoranda on the matter. Further, in August 2019, NGEC in partnership with Plan International Kenya organized forums for children from three counties Kilifi, Kisumu and Nairobi to obtain the voice of the children in the matter. The forums were attended by 114 children (58 boys and 56 girls) who presented their understanding on key issues on consent for sex. The Commission also held a one-day validation workshop that brought together 102 stakeholders from across key sectors in government and non-state who deliberated on the findings generated and contained in this report.

This report presents a summary of the proceedings and emerging issues on matter of age of consent for sex in Kenya. It is my hope that the suggested recommendations will be beneficial to Government agencies mandated to protect the rights of the child. The recommendations further seek to inform programmatic interventions necessary to reduce prevalence and incidence of sexual activities among minors and/ or with minors.



**DR. JOYCE M. MUTINDA (PhD)**  
**CHAIRPERSON**

# Acknowledgement

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The Commission is grateful to the Principal Secretary for the State Department of Gender Affairs Hon. Safina Tsungu Kwekwe for her commitment during the opening session of the multi-stakeholder’s forum to spearhead reforms to ensure greater protection of the rights of the children.

We appreciate presentations and submissions by various State and non-State actors as well as the media for the wide coverage of the matter documented in this report. Our special and sincere gratitude goes to the Chief of Party for REINVENT Program, Tetrattech International Development, Ms Jaki Mbogo and the Gender technical lead, Ms. Jacinta Makokha, for their contribution in the validation process of this publication. We further wish to acknowledge the generous financial support from the United Kingdom (UK) Department of International Development (DFID) that were used to publish this report.

The Commission also wishes to acknowledge the policy guidance from the Commissioners particularly from the convener of the division of Youth and Children Commissioner Dr. Florence N. Wachira, MBS during the preparation of these forums and the commitment of the NGEC staff for their management of the adult, children’s and validation forums as well as their tireless effort towards development of this report.



**BETTY SUNGURA-NYABUTO, MBS**  
**COMMISSION SECRETARY/CEO**

# Acronyms

<b>AKAD</b>	AKAD Education Group–Africa
<b>ACRWC</b>	African Charter on the Rights and Welfare of the Child
<b>CA</b>	Court of Appeal
<b>CEO</b>	Chief Executive Officer
<b>CHAK</b>	Christian Health Association of Kenya
<b>CS</b>	Cabinet Secretary
<b>CSE</b>	Comprehensive Sexual Education
<b>CSO</b>	Civil Society Organizations
<b>HIV</b>	Human Immunodeficiency Virus
<b>IRCK</b>	Inter -Religious Council of Kenya
<b>KCCB</b>	Kenya Conference of Catholic Bishops
<b>KEPSHA</b>	Kenya Primary School Heads Association
<b>KESSHA</b>	Kenya Secondary Schools Heads Association
<b>KNCHR</b>	Kenya National Commission on Human Rights
<b>KNH</b>	Kenyatta National Hospital
<b>KIPPRA</b>	Kenya Institute for Public Policy Research and Analysis
<b>KU</b>	Kenyatta University
<b>NAMLEF</b>	National Muslim Leaders Forum
<b>NANHRI</b>	Network of African National Human Rights Institutions
<b>NCAJ</b>	National Council on Administrative of Justice
<b>NCCS</b>	National Council of Children’s Services
<b>NGEC</b>	National Gender and Equality Commission
<b>MoE</b>	Ministry of Education
<b>MoH</b>	Ministry of Health
<b>ODPP</b>	Office of the Director Public Prosecution
<b>PS</b>	Principal Secretary
<b>REINVENT</b>	Reducing Insecurity and Violent Extremism in Northern and Coastal Regions of Kenya Programme.
<b>STI</b>	Sexual Transmitted Infections
<b>SOA</b>	Sexual Offences Act, 2006
<b>SUPKEM</b>	Supreme Council of Kenya Muslims
<b>TSC</b>	Teachers Service Commission
<b>UNCRC</b>	United Nations Convention on the Rights of the Child
<b>UNICEF</b>	United Nations Children’s Emergency Fund
<b>WHO</b>	World Health Organization

# Executive Summary

**T**he age of consent for sex is the minimum age at which an individual is considered legally old enough to consent to participation in sexual activity. Age of consent for sex laws vary considerably around the world with majority of countries requiring young people to be over the age of 14 before engaging in sex. Kenya has provided many legal and policy safeguards for the protection of children from sexual violence and manipulation. The Sexual Offences Act, No. 3 of 2006 gives the minimum age of consent for sex as 18.

In March 2019, the Nairobi Court of Appeal called for a serious re-examination and interrogation of the Sexual Offences Act, No. 3 of 2006, with a view to re-consideration of the age of consent for sex. The National Gender and Equality Commission (NGEC) is a constitutional Commission established by the National Gender and Equality Commission Act, No.15 of 2011 pursuant to Article 59 (4) & (5) of the Constitution of Kenya, 2010.

The Commission's mandate is to promote gender equality and freedom from discrimination for all people in Kenya with a focus on special interest groups, which include: Women, Children, Youth, and Persons with Disabilities (PWDs), older members of the society, minorities and marginalized groups. One of its key functions **is to monitor, facilitate and advise on the integration of the principles of equality and freedom from discrimination in all national and county policies, laws, and administrative regulations in all public and private institutions.**

It is against this backdrop that the National Gender and Equality Commission organized multi-sectoral fora to discuss various proposals to address the shortcomings in the Sexual Offences Act (2016) as it relates to consensual sex among and with persons below age 18 (children).

The forums brought together Government Ministries, Departments and Agencies (MDAs) including health, education, labor, planning, the Council of Governors, associations of persons with disabilities, youth, agencies working with children, research agencies, professional associations, universities, Judiciary, The Kenya Special Taskforce

on children matters, Constitutional Commissions, religious bodies, older members of society, children in and out of school among others.

The stakeholders presented both oral and written submissions on the matter. To guide the discussions, the forums focused on five sectoral perspectives; legal and human rights; health; social-religious; education and research, and children and youth.

The multi-sectoral stakeholder's forums agreed in principle that lowering of the age of consent for sex would have wide and largely negative implications on the educational, social and health development of children. It was therefore generally agreed that it was inappropriate to consider lowering the age of consent for sex. Participants recommended that there was need to consider other mechanisms for averting the crises where young boys as opposed to girls are convicted for engaging in sexual activities including development of clear regulations and establishment of strong child rehabilitation program. In the long term, the country should consider developing and implementing behavioral and educational programs that address the sexual and reproductive health of children.

This report presents discussions and proposals from multi-sectoral stakeholders on the subject matter, it proposes some recommendations to various government agencies, community, private sector and families. Some of the recommendations include: Full operationalization of the Sexual Offences Act (2016) and its attendant regulations; fast-tracking enactment of the Children's Bill (2018); full implementation of the National Children Policy (2010) and commence implementation of the National Family Promotion and Protection Policy (2019).

The report is organized in 4 parts:

**Part 1:** provides background into the consultative forums;

**Part 2:** presents a summary of the contribution of children about age of consent for sex;

**Part 3:** presents the adult perspectives on age of consent for sex;

**Part 4:** presents conclusions and recommendations.

## PART 1: BACKGROUND



*Participants during the consultative forums held in Nairobi and Kisumu.*

## 1.1 About the National Gender and Equality Commission

The National Gender and Equality Commission (NGEC) is a Constitutional Commission established by the National Gender and Equality Commission Act. No. 15 of 2011 pursuant to Article 59 (4) & (5) of the Constitution of Kenya, 2010. The Commission's mandate is to promote gender equality and freedom from discrimination for all people in Kenya with focus on special interest groups, which include: women, children, youth, Persons with Disabilities (PWDs), older members of society, minorities and marginalized groups.

The Commission investigates violations of the principles of equality and inclusion and issues advisories to public and private institutions. Specifically, function 8 (b) of the National Gender and Equality Commission Act, 2011 mandates the Commission to monitor, facilitate and advise on the integration of the principles of equality and freedom from discrimination in all national and county policies, laws, and administrative regulations in all public and private institutions.

The Commission has in recent past undertaken a variety of assessments and activities including those that relate to issues of gender based violence. In its report on the drivers of child pregnancy in Kenya (2016) for example, the Commission sought to establish the magnitude of child pregnancy in Kenya and make recommendations for managing the situation, both to the National and County Governments. A key recommendation to Judiciary was that it (Judiciary) should give appropriate orders and minimum sentences in line with the Sexual Offences Act, No. 3 of 2006 in safe guard of the best interest of the child. The Commission also conducted an assessment and documented on the status of the boy child in the country, access to basic education for children with disability and undertaken various costing studies on economic burden of gender based violence. This is in addition to assessing issues of gender equality and inclusion in the primary schools in Kenya. The Commission efforts have always been consultative and geared towards not only consolidating the voice of children in the overall development process but as in the case of the public inquiry, an attempt to inform the country on the issue of sexual violence directed at children, make recommendations and hold the duty bearers to account.

## 1.2 Defining consent

Consent is defined widely as the agreement, approval, or permission as to some act or purpose especially given voluntarily by a competent person; express consent is defined as consent that is clearly and unmistakably stated (Nwatu, 2010). Implied consent is consent inferred from one's conduct rather than one's direct expression, while informed consent is a person's agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives. In sexual offences, consent or lack thereof is an important factor in order to find an accused person guilty of the offence alleged.

Discussion on the age of consent for sex touch majorly on the best interest of the child. Children's rights are entrenched in domestic, regional and international conventions. It has always been a societal aim to regulate inappropriate sexual contact with children by setting a barrier to sexual conduct with children. The rationale behind age of consent for sex laws is that minors are incapable of giving consent.

Sexual violence takes many forms and may include rape, sexual assault, defilement, incest among others. This type of violence is a reflection of gender inequality in a society where men exercise power over women and girls. Different research findings have presented evidence that nearly one half of all Kenyan teenagers had their first sexual experience by the age of 18. According to the 2014 Kenya Demographic and Health Survey (KDHS), 15 percent of women and 21 percent of men reported having their first sexual experience by age 15. More than one third, (37%) of girls and 44% of boys aged 15 to 19 years reported to have engaged in sex.

Almost a quarter of Kenyan women give birth by the age of 18, and nearly half by the age of 20. Moreover, the rate of child pregnancies is alarming with Narok and Homabay counties taking the lead with 40.4% and 33.3% respectively. Other counties with high child pregnancies include West Pokot (28.6 per cent), Tana River (28 .0 per cent), Nyamira (27.0 per cent) and Nairobi (17.8 per cent) . The National Aids Control Council (NACC) estimates that there are 184,719 HIV-positive youth (15-24 years) and this age group accounts for 17,667 of the total new infections, and 2,830 HIV-related deaths . This is further confirmed by a UNICEF report (2018) which attributes the epidemic's spread among adolescent girls as being fueled by early sex, including with older males, forced sex, powerlessness in negotiating

about sex, poverty, and lack of access to confidential counselling and testing services .

The Sexual Offences Act, No. 3 of 2006 attempts to define consent and offers further explanation on the issue of consent by providing for evidential and conclusive presumptions about consent. Section 42 of the SOA provides that: "a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice". The Act also clarifies on the age of consent for sex that previously varied under different statutes and makes it clear that the minimum age of consent for sex is 18 years. The age of consent for sex is the minimum age at which an individual is considered legally old enough to consent to participation in sexual activity. Section 42 of the Sexual Offences Act, No. 3 of 2006 provides that "a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice". However, it also makes it clear that the minimum age of consent for sex is 18 years

presumably to offer protection to children. The SOA is termed strict and harsh and there has been attempts to amend to the law. One of the example given shows that young boys who engage in sexual relations with equally young girls are increasingly being arrested and charged with defilement, mostly at the behest of the girls' parents.

Age of consent for sex laws vary considerably around the world. Majority of countries require young people to be over the age of 14 before engaging in sex. Among the countries with lower age of consent for sex laws include Nigeria with one of the lowest ages at 11, Angola and Philippines at 12, South Korea and Japan at 13 (although Japan has consent laws that vary in different parts of the country). Most European countries have 16-17 age of consent for sex. Kenya stands at age 18. A country with the oldest age of consent for sex, at 21, is Portugal in Western Europe and Bahrain as summarized in Table 1.

**Table 1: A Comparison of Age of Consent for Sex in selected parts of the world**

Continent	Country	Age of consent for sex	No. of rape/defilement cases as of which year	Additional remarks
				Struggling to lower, raise or comfortable
Africa	Nigeria	11	950,000	There are court cases struggling to raise this age to 18 years
	Angola	12	20,637	Comfortable
	Uganda	18	32,380	Comfortable
	Malawi	14	1,500	Some efforts being considered to push this age to 16 years
	Kenya	18	40,500	Amendments in the supreme court to lower to 16 years
Asia	Philippines	12	11,558	Struggling by senators to raise this age to 18 years so as to reduce number of rape cases and sodomy
	South Korea	13	21,653	Struggling to raise
	Japan	13	601	Comfortable
European Union	Italy	14	7.4 of every 100 women reported cases in 2014	Comfortable
	Portugal	14	An average 375 cases reported per year	Comfortable
North America	Mexico	17	14,993	Comfortable
	Haiti	18	36,000	Comfortable
	United States	16; some states have consent age at 17 and others 18	84,767	Comfortable
	Jamaica	16	470 rape cases were recorded by police in 2017	Comfortable

### 1.3 The Context: Kenya's Experience on Age of Consent for Sex

Kenya has developed laws and policies that prohibit sexual violence to children. Key among them include:

- The Constitution of Kenya, 2010: The Bill of rights in Articles 27, 28, and 50
- Children Act, 2001: Section 15 gives provisions for protecting all children from all forms of sexual exploitation. Section 3 to 22 provides an expansive bill of rights to be enjoyed by the child;
- Protection against Domestic Violence Act, 2015: Section 3 protects children against defilement and sexual abuse.
- Sexual Offences Act, 2006: Gives provisions for protection of children from all forms of sexual violence. Section 8,9,11,12,14,15,16 provide for the protection of children

Several court cases have in the past informed debate on age of consent for sex in Kenya. A few are cited below;

1. In ***Bonu versus the Republic (2010)*** it was held that a minor has no capacity in law to give informed consent to sexual relations no matter how willing the minor may be. That any act of sexual intercourse with persons proved to be below the age of 18 years amounts to an offence
2. In ***the Republic versus Stephen Irungu Mutire Case No. 214/2011*** it was held that a minor cannot be taken to consent to a sexual activity even if the existence of a sexual relationship between the accused and the complainant is proved. In this case the complainant testified of going to the accused person's house twice where they engaged in coitus. The rationale that was used to make the ruling was that persons below the age of 18 have no capacity to consent to sex irrespective of the circumstances.
3. In ***Petition No. 6 of 2013 CKW versus Attorney General and the Director Public Prosecution:*** The petitioner challenged the constitutionality of section 8 (1) of the SOA to the extent that it criminalizes the consensual sexual relations between adolescents while consensual sexual activities by adults were not criminalized hence discrimination against adolescents. The ruling averred that application of the provision promotes inappropriate prosecution of the boy child in consensual sexual acts between minors therefore amounting to violation of the rights of the male child to equal protection and benefit of the law because it constituted indirect discrimination against the male child.
4. In ***Criminal Appeal No. 102 of 2016 Eliud Waweru Wambui versus Republic*** the Appellate judges called for the re-examination of the Sexual Offences Act, No.3 of 2006. They based their argument citing lengthy jail terms imposed on young men convicted of defilement. They made the observation

to the recent child sex cases raising serious concerns and specifically in the case where they reversed a 15-year sentence slapped on a man who had impregnated a 17-year-old girl. They proposed a law change raising the need to discuss lowering the age of consent for sex from 18 years to 16 in light of the realities and challenges of maturity, morality, autonomy and protection of children. The judges cited jurisdictions that criminalize sexual conduct with children below 16 years and inferred the ***Gillick vs. West Norfolk and Wisbech Area Health Authority [1985] 3 ALLER 402*** where the English House of Lords heard the case of a woman against a doctor who offered contraceptives to five 15-year-old girls without their parents' consent.

### 1.4 Emerging Debate and Issues around Age of Consent for Sex

1. The Court of Appeal ruling of ***Criminal Appeal No. 102 of 2016 Eliud Waweru Wambui versus Republic*** pronounced by Hon Justices, D.K Musinga, Hon P.O Kiage, Hon R.N Nambuye in March 2019 generated great national debate and discussion on minimum age of consent for sex. The ruling exposed the predicament regarding implementation of various provisions of the law and invited the country to rethink amendment to sections of the Sexual Offences Act, 2006 and the Children Act, 2001 on the broad consequences and criminal penalties for having sex for boys and girls. The matter constituted the dilemma on how to apply the provisions of the SOA and the Children's Act while maintaining the best interest of the child as advocated for by international and regional instruments, and the supreme law of Kenya.

After the pronouncement of the above ruling, the National Gender and Equality Commission was tasked by the Cabinet Secretary in charge of the Ministry of Public Service, Youth and Gender Affairs Prof. Margaret Kobia to facilitate a structured discussion on the matter of age of consent for sex and issue her Ministry and other government agencies with advisories to help guide the nation to take a position .

Consequently, the Commission held a one-day multi-stakeholder's consultative forum on 30th April, 2019 at Laico Regency Hotel Nairobi, with relevant state and non-state actors representing different Special Interest Groups (SIGs) to discuss the matter. In addition, the Commission in partnership with Plan International Kenya in August 2019 organized forums for children from three counties namely Kilifi, Kisumu and Nairobi to enable their participation in discussions about the age of consent for sex and the anticipated consequences of either decision. A validation forum to discuss the key findings of the forums was thereafter convened.

## PART 2: CHILDREN'S VOICE



Children participants during a consultative forum to gather their views on the subject-age of consent for sex

## 2.1 Forum Objectives

Overall Objective: To consolidate children's views and opinions on the age of consent for sex.

Specific objectives.

1. To explore children's knowledge and understanding about the age of consent for sex.
2. To obtain children's views on the consequences of sex.
3. To voice children's recommendations on the age of consent for sex.

## 2.2 Methodology

Purposive sampling method targeting boys and girls aged between 10 and 17 from different primary schools in the selected counties was applied. The schools sampled from Kilifi and Kisumu counties were drawn from public schools within rural settings. The children sampled from Nairobi County hailed from Kibra, an urban informal settlement within the Capital City of Kenya.

The children were grouped by age and sex; those between 10 and 13 forming one group and those between 14 and 17 were separately engaged in focal group discussions which involved use of visualization and imagery methods including use of songs, drawings, paintings, storytelling and basic writing. These methods allowed the children to express themselves freely, figuratively and emotionally. In Kibra, Nairobi County, specific discussions were also held with young mothers on their experiences with early sexual debut and their experiences as child mothers.

During data collection and analysis each child participating in the forum were issued with a pseudonym and a code. These references have been used in the data reduction and in the writing of this report to protect the children identity and adhere to principles of confidentiality and anonymity.

The findings from the children forums were subjected to a validation that brought together diverse stakeholders.

## 2.3 Key Findings from the Proceedings of the Forums

### 2.3.1 Findings from Boys Aged 10-13 Years

Boys in this age group understood sex to mean an activity of 'love' usually associated with adults (those above the age of 18). From the body maps, the children were able to differentiate separate parts of the body and identify those they felt were private.

The children mentioned that the law prohibits them from engaging in sex. The "Katiba" (Constitution) was mentioned as a law that does not allow children to have sex. A few mentioned a law on children ("Sheria ya watoto."). Additionally, teachers and parents provide strict rules and sanctions against engaging in sex and that they are always reminded not to be lured into sexual contact. They said that they obtain information about sex from school, on media (TV, radios, and newspapers), friends and peers, public meetings and gatherings, teachers and at times in churches and madrassas. They highlighted that majority of girls who have sex do so with boys in school, with older boys out of school, boda-boda operators and sometimes with teachers.

The children mentioned that whenever cases of sex involving children are detected, affected children are usually counselled by teachers, parents or peers. Occasionally such cases end up reported in police stations and legal pursuits explored.

Poverty and peer pressure were cited as contributing to children, especially girls engaging in sex. Children are also sometimes enticed with money which predisposes them to sexual vulnerability, for example girls engage in sex to enable them get money to buy personal effects such as sanitary towels. The children mentioned that some girls engage in sex with adults (some who include their domestic workers, 'makangas' (touts) and boda-boda riders mostly for financial incentive and other favours like 'free rides'.

The children were aware that sex could have negative health effects and cause them to drop out of school. In cases where boys and girls are found to have engaged



A boy in Kilifi draws an illustration



Girls in Kibra during the forum

in sex, boys are likely to suffer criminal liability compared to girls. In case of a pregnancy, children are not economically independent to take care of the unborn child. Children mentioned that sex may also trigger cases of child marriage and affect educational attainment. It is also likely to lead to an increase in cases of drug abuse and truancy among children. There is also a likely increase in conflict between children and their parents, resulting in family instability.

The boys understood the age of consent for sex to mean the age at which persons were allowed to start engaging in sex. They argued that if the age of consent for sex (currently 18) is lowered (say to 16) then it will mean that children start taking up responsibilities that were hitherto a preserve of adults. In addition, it will be abused by adults (mostly men) who will now take further advantage of younger girls (below age 16) to engage them in sex. It is also likely to lead to an increase in sexual violence/activities in school and at home due to enhanced disagreements between children and parents and/or teachers.

**Older men will take advantage and get themselves wives who are 16 years old"**  
-Salim-\*\*\*\* (Not his real name)

### 2.3.2 Findings from Girls Aged 10-13 Years

The children demonstrated a high level of awareness on matters of sex and explained sex as an activity between males and females intended for procreation. Their initial knowledge of sex was from school during science lessons, through media advertisements and during public community campaigns on HIV and AIDS

awareness. For others, knowledge on sex was obtained from discussions with peers or older friends and from parents.

It was established that children engage in sex amongst themselves (with their peers mostly) while others do so with adults, especially with boda-boda operators for financial gain and at times through coercion and threat by adults. Once puberty sets in, girls consider themselves old enough to have boyfriends and thus engage in sex. In the Giriama community, some said, once a boy attains the age of puberty, he is considered a man and a separate house is constructed for him within the compound. It is in these houses that sexual activity happens especially during weekends or when parents are away for long periods of time.

Children reported that those who engaged in sex are frowned upon by parents, neighbours and teachers in school. Adults that engage in sex with children are equally condemned and may suffer legal repercussions. Sex for the girls was mostly triggered by vulnerabilities they experienced in their daily lives. Poverty proved to be the major cause for early sexual debut. Power dynamics play a big role in the case of boda-boda operators and young boys from seemingly well-off families, who take advantage of the girl's vulnerabilities and needs for personal effects such as sanitary towels, underwear, school stationery and books, in exchange for sex.

The children highlighted consequences of sex to include: the risk of getting pregnant and increased school drop-out, risk of contracting HIV and AIDS,



Boys in Kisumu during the children Forum

pregnancy related health risks as the girl's body is not yet fully developed, inability to handle child care related responsibilities, increased family conflicts, and lowered self-esteem.

***‘Girls have been impregnated by boda-boda operators who entice them with gifts such as sweets, transport from one point to another, sanitary towels and food’.***  
***-Rehema-\*\*\* (Not her real name)***

The age of consent for sex was understood by the children to mean the age within which one is considered an adult and is therefore allowed to take part in adult activities, including having sexual interactions. The children said that sex is meant for persons aged above 18.

### 2.3.3 Findings from Boys Aged 14-17

The children understood sex to mean physical contact between a boy and a girl ‘when making love’. Issues of sex are learnt from school and at home. The children consider sex for minors as illegal and that children should abstain from sex. Children mentioned that most sexual activities happen during school holidays and during celebrations such as Christmas.

Majority of the children said that they had been introduced to sex in school during science and life-skills lessons, through peer groups, pornographic movies, written materials like magazines, television and radio. In Nairobi they mentioned organizations such as Shining Hope for Communities (SHOFCO), which carry out counselling fora in schools on topics such as career choices, drug abuse and sex education.

***‘Hii story ya 16, haiingiani.’ Literally translated to (This story of 16 years does not sell, is wrong)***  
***-Brayo\*\*\* (Not his real name)***

In Kisumu, the children mentioned that early sexual

debut is likely to increase child-headed families as some boys and girls drop out of school to take care of their children. The community including parents view children who are said to engage in sex as immoral and truant. Hence, parents neglect them. Boys are likely to suffer more criminal liability compared to girls in cases where boys and girls are found to have engaged in sex. The children also mentioned that conflicts within families sometimes leads to domestic violence, causing some children to run away from their homes seeking protection and security. This exposes such children to potential sexual violence in the new environment.

The children mentioned that sex occurs amongst peers but that adults also engage children in sex including with relatives, neighbours, pastors and sometimes their teachers. In most cases sex among children is assented to and triggered by factors like, poverty, peer pressure, child neglect, drug and substance abuse. Some children in Nairobi however said that if protected, sex is okay even for those below 18 years. The children are aware that the present age of consent for sex is 18 and propose the age of consent to remain at that.



Girls in Kilifi drawing a ‘body map’

### 2.3.4 Findings from Girls Aged 14-17

There is a high level of awareness on matters of sex within this age group. Their knowledge on sex is derived from school, media, friends, peers, phones, internet and movies. Other fora of interaction with the concept is from friends, mothers and during community meetings. They pointed out the body parts they considered private by drawing illustrations in body maps and indicating that sex should be a preserve for adults. Parents, teachers and the church were reported to having spelt out rules against children engaging in sexual activities.

In Kisumu, it was discussed that children sometimes have sex with fellow children and with older persons, with greatest influence pointed at boda-boda operators and teachers who engage girls in sex in exchange for items like sanitary towels, books and food.

Sexual activity was reported to mostly take place in the boy's dwellings (simba) without the knowledge of the parents. Sexual violence is also witnessed during disco matangas in the villages. The girls felt early sexual debut has negative effects whose consequences include pregnancy and school dropout, increased conflict between parents and children and increased incidences of diseases including HIV and AIDS and Sexually Transmitted Diseases.

### 2.3.5 Experiences of young mothers of Kibra

The discussions revealed a general agreement by the young mothers to not lowering the age of consent from 18 to 16. Some of them opined that the age of consent for sex be pushed to 20. The young mothers mentioned that they faced discrimination from friends, community and parents on the basis of being pregnant. Some of the girls mentioned that they found it difficult to return to school even when they were aware of the school re-entry policy.

***‘Let the girls be girls, allow children to be children. We will not have justice for girls. They will not have equal opportunities in the future’***  
***-Brenda-\*\*\* (Not her real name)***

Discrimination from other children was hard to bear as they are no longer perceived as children but referred to as mothers and that nobody wants to play or associate with them. This worsens when they are seen as points of reference including by their teachers and often used as examples of children of bad behaviour. On the other hand, as children, it robbed them of their childhood and they also do not feel comfortable and confident in life.

Often they said that their sexual liaisons saw a few being forced to procure abortions and a majority suffered other pregnancies due to lack of exposure and knowledge. According to some of children mothers when one is below the age of 18, she is still a child and not able to make key decisions about many things in life. Some of the examples given was that at age 18, a girls is still in school pursuing basic education. Further there is a lot of misinformation among the children on sex because nobody takes time to expose them to the right information.

The young mothers said that there is great need to have the right information on sex when one is still in primary school because most of the information shared by peers is often not the right information.

To them, if the age of consent for sex is lowered, a lot of girls will drop out of school therefore affecting their educational attainments and concentration while boys will continue with their education and there will be an upsurge of young mothers. Moreover, perpetrators will continue to take advantage of the lowered age of consent and continue having sex with children and go free without being apprehended. There will also be an increase in child marriages and poverty levels will worsen because many girls will not continue with school and will have limited opportunities to better themselves in future.

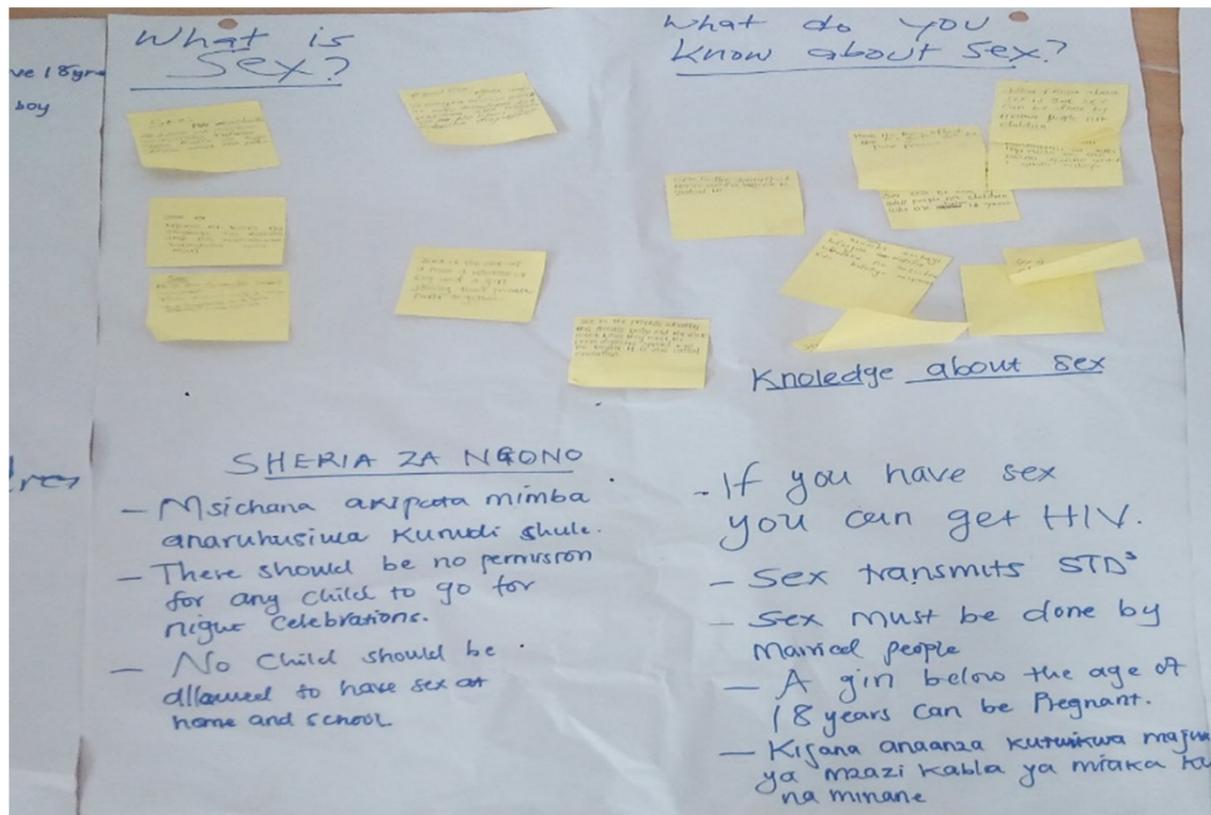
In conclusion there was consensus among the young mothers that the age of consent for sex should not be lowered from 18s.

### 2.3.6 Emerging issues from forum discussions

In Kilifi boys aged 10-13 mentioned that in cases where boys and girls are found to have engaged in sex, both should suffer equal liability. Some boys expressed that girls who drop out of school as a result of pregnancy should be allowed re-entry to school. Sex should only be allowed at the recommended age for marriage. There is also need for schools to have counseling programs targeting girls who have been re-enrolled. This will build their self-esteem and ability to make complex decisions about their sexuality and future. In addition, schools and other appropriate institutions should consider offering comprehensive sex education to enable children understand their sexuality and consequences of early sex.

Girls aged 10-13 in Kilifi agreed that by lowering the age of consent for sex, there will be increased incidences of incest, defilement and sodomy. In Kisumu, the children felt that ‘sheria’ (legal options)

# PART 3: ADULT PERSPECTIVES



Texts of children's views on selected matters of sex during the forums

were the best whenever sexual violations occur. In case of minors engaging in sex with one another they recommended that both children should be treated equally and as in need of care and protection and an alternative system should be used to deal with such cases, instead of exposing the children to the punitive criminal justice system.

The 14-17-year-old boys in Kisumu were also concerned that children with disabilities who suffer multiple discrimination will be placed at great disadvantage and suffer further risk of exploitation by lowering the age of consent for sex.

In Nairobi and Kisumu, the children mentioned adequate food and shelter, access to clean water, educational needs including school fees and school equipment and recreational needs such as playing fields, as priority issues for them. Security, medical care and roads in the estates and informal settlements should also be enhanced. Other priority concerns include addressing drug and substance abuse among children and youth.

In Kilifi, girls aged 14- 17 were concerned that at the ages below 18 one is not in a position to make informed decisions and choices. Such children should receive optimal protection from the state and the family including care givers and teachers. The children generally agreed that the benefits of sex could only be

experienced once one is of age 18 or more and is stable enough to handle the responsibilities that come along with it. The children generally recommended that the age of consent for sex should remain at 18. However, some suggested an increase to 26 years, arguing that at this age they shall have completed school and college and is therefore mature enough to raise a family.

Boys aged 14-17 in Nairobi said that there is need to have more institutions for young sex offenders noting that it will continue to be difficult to attend to cases involving children without exclusive children facilities for handling and rehabilitating child offenders. Other children suggested that the young sex offenders should be sent to same sex schools to reduce the urge to engage in sex.

Girls aged 14-17 in Kisumu strongly suggested that disco matangas should be banned. They also called for fora where parents openly discuss about sex and its consequences with children. The girls also said that government should increase budgetary allocation towards provision of basic requirements to children such as sanitary towels, underwear, and sports activities whose absence predisposes children especially girls to sexual exploitation.

The children strongly felt that the age of consent for sex remain at 18.



Participants during the multi-stakeholders' consultative forums

### 3.1 Forum objectives

General objective: To generate an informed national position on the minimum age of consent for sex.

Specific Objectives:

- a) To enhance stakeholders understanding on international and national legislative and policy framework, on protection of children against sexual activities through setting of minimum age of consent for sex.
- b) To understand age of sex consent in Kenyan law and explore its effects on girl and boy child, as well as care givers including parents and guardians.
- c) To develop a position paper on the age of consent for sex in Kenya to inform required amendments (if any) to the existing legal and policy framework.

- WHO.
- d) United Nations Agencies and development partners including UNICEF, UNFPA.
- e) Learning institutions including universities such as Kenyatta University.
- f) Judicial agencies including LSK and NCAJ.
- g) Research agencies such as Kenya Institute of Public Policy and Research (KIPPRA).
- h) Children based agencies such as department of children services, mtoto news, Children’s Investment Fund Foundation including institutions dealing with children under rehabilitation centers.
- i) Council of Governors and representatives of Nairobi County Government

The findings were subjected to a validation that brought together diverse stakeholders.

### 3.2 Methodology

Participants were purposively selected from different sectors namely, Religious and Social, Legal and Human Rights, Health, Education and Research, and Children and Youth. Oral and written submissions were collected on the day of forum and after.

The meeting brought together stakeholders, who presented oral and written submissions on the matter of age of consent for sex. The participants came from different sectors namely, Religious and Social, Legal and Human Rights, Health, Education and Research and Children and Youth. They included:

- a) Government Ministries departments and agencies including Ministries of Education and Health, State Department of Gender,
- b) Constitutional Commissions and Independent Offices including ODPP.
- c) International organizational including

### 3.3 Proceedings of the Forum

#### Preliminary Remarks

The Commission Secretary informed participants that the age of consent for sex was a global concern and the pronouncement by the Court of Appeal only served to intensify debate around the matter. She reminded stakeholders of the reality that children are having sex and stressed the importance of interrogating issues of access to Sexual Reproductive Health and the consequences for lowering the age. She asserted that the age of consent for sex set at 18 protects children. She noted that it is important to check the criminalization of boys during consensual sex among children. She hoped the forum would provide an avenue for a critical re-look at the Sexual Offences Act No.3 of 2006 and urged participants to present honest views.

The Chairperson of the NGECC while appreciating the stakeholders, gave a brief of the context of the forum by citing the Court of Appeal ruling which proposed



NGECC Chairperson Dr. Joyce Mutinda, giving her preliminary remarks



PS, State Department of Gender Affairs, Ministry of Public Service, Youth and Gender, Hon. Safina Kwekwe Tsungu, giving her keynote address

interrogation of provisions of dealing with child offenders convicted of sexual offences. She indicated that although children might not have attained the age of maturity, boys are many times predisposed to being victimized.

She indicated that some of the radical proposals suggested in public such as lowering the age of consent for sex is likely to have a huge impact on the society since emerging statistics indicate boys are increasingly falling victim to sexual violence. She called for the voices of children in the whole debate noting that the UNCRC and local legislations demands that the Best Interest of the Child is considered first, and that many national and international legal frameworks make it illegal for children to give consent on anything. She asked for a multi-sectoral approach to tackling sexual violence against children noting that some of the perpetrators are persons of great societal influence. She called on discussions at family level to address sexual violence against children.

She asked participants to ensure that the resolutions made will not withdraw the achievements gained in protecting the rights of the child. She indicated that the Commission rejects out of court settlements on matters of sexual offence because these put children and women in great danger and urged the National Assembly to enact the Children’s Bill 2018 into law.

The day’s keynote address was delivered by Hon. Safina Kwekwe Tsungu, Principal Secretary (PS), State Department of Gender Affairs, Ministry of Public Service, Youth and Gender Affairs. She expressed her gratitude to the stakeholders who turned to contribute to the matter.

She reiterated the Constitutional and international legal frameworks that place high consideration on the best interest of the child, urging participants to interrogate the barriers to accessing reproductive health services and consider the consequences of allowing children to engage in sexual activities. She noted that lowering the age of consent for sex would have far reaching consequences that require careful consideration. The PS mentioned that such a move would have an impact on the rights of children as contemplated in the Constitution and undermine the best interests of the child. She noted that the forum was timely and the right avenue for providing critical insights which will help shape the narrative and national agenda in deciding how best to address sexual offenses involving children. The PS expressed commitment of her Ministry in taking the leadership in the reforms and implementation of the recommendations from the forum for greater protection of all categories of children including the homeless, those in school and out of school, children with disability, children from marginalized areas among others.

Mr. Masheti Masinjila, Executive Director, Collaborative Centre for Gender and Development, on behalf of the National Gender Equality Technical Working Group (GETWG) introduced the working group as a multi-sectoral group that brings together state and non-state actors on quarterly basis to discuss priority issues on gender, equality and inclusion, with a special focus on gender based violence and its implications on special interest groups. He pointed out that the GETWG holds the view that any sexual act between a child and adult amounts to violence. He however noted that there are a number of challenges when it comes to underage sexual interaction including;

- a) The boys/young men are serving unfairly long sentences in cases where the minors engaged in sex; boys are discriminated/ blamed in all cases of sex involving minors; there is a wrong assumption that children do not engage in sex willingly; and that full and open deliberations on the issue of dealing with such cases must be considered and that the forum must be ready to discuss all possible options available and tried in other jurisdictions.
- b) Children go through different physical, social and psychosocial development stages that impact their bodies and minds. These influences affect their behavior to involvement in “consensual or forced sex.”
- c) Children’s own perception of sex and sexuality among their peers and with adults is also a strong determinant of sexual behavior and vulnerability and it is thus important that they be consulted.

- years.
- iv. Even when applying the ‘Romeo clause’, consideration should be given for child rape, where one child rapes another and such be differentiated from a situation of other forms of sexual advances between and among minors.
- v. Circumstances of confinement of children in conflict with the law, in conformity with the provisions of the Children’s Act.
- vi. Adults should take responsibility for sex when caught with children/minors at all times. There should be no occasion when a child is said to have enticed an adult into engaging in the sexual act or said to have behaved in a manner to suggest they are adults.
- vii. Consider the Kenyan context of current child socialization where neglect and the number of single parents are on the rise with fathers mostly absent. There are also large numbers of orphans who are forced to mature early by taking adult roles. Alternatives to change of law such as updating/reviewing, sentencing guidelines for children in sexual relationships and giving judicial officers more power to consider individual case circumstances as opposed to complying with minimum sentencing requirements as set out in law.

In view of the above, the GETWG held that it is paramount that the matter of age of consent for sex be thought through objectively considering;

- i. How other countries and jurisdictions have dealt with similar situations
- ii. Provisions of the Children’s Act which emphasize and seek to promote the best interests of the child.
- iii. Introduction of a ‘Romeo clause’ which has worked in many jurisdictions. It should outline circumstances under which children may make affirmative decisions about sex, free of coercion and should have an age cut point and only apply to minors below 18

In her remarks, Ms. Monika Sandvik-Nylund, Chief Child Protection Officer at UNICEF- Kenya admitted that from a global perspective, a variety of legal frameworks exist on the issue of age of consent for sex, ranging from as low as 11 years in Nigeria to 18 years in Haiti. For this reason, UNICEF does not have a position on the age of consent for sex. She said that



Ms. Monika Sandvik-Nylund, Chief Child Protection Officer, UNICEF- Kenya giving her speech.

in considering the age of consent for sex, the primary objective of the minimum age of sexual consent should be to protect children and adolescents from sexual abuse and the consequences of early sexual activity on their rights and development. This objective needs to be balanced with the need to avoid unnecessary criminalization of adolescents engaging in mutually sought, sexual behavior.

As such, the age of consent for sex which a country establishes should respect the evolving capacities of the child and not be set too high. It should also consider as criterion the age difference between the partners involved, as one indication of the balance of power between them and address cases in which two underage adolescents are involved.

She noted that many countries have laws which feature different levels of presumption of consent depending on the age of the persons concerned. Accordingly, they set an absolute minimum age under which consent cannot be given. In these cases, the question of consent is irrelevant and any sexual activity represents a form of rape.

She however noted that, beyond this age, a further legal minimum age for sexual consent is established which allows for a minimal age difference between the partners concerned, usually of not more than 2 or 3 years. These laws allow states to avoid the unnecessary prosecution of adolescents engaging in mutually sought sexual activity. These laws keep children from fear of seeking medical care or advice which may arise from sexual activity, but still allow States to prosecute adults for abusive or exploitative sexual behavior with young people. This approach best protects the rights of children, as it both protects them from predatory and abusive sexual behavior by adults, but respects the right of adolescents, and leaves them free to seek necessary medical advice and guidance without fear of prosecution.

The Chief Executive Officer of the National Council for Children Services Mr. Sheikh Abdinoor read resolutions made by several children sector stakeholders in a different forum organized by the Council. The resolutions agreed that the Sexual Offences Act No.3 of 2006 tended to criminalize the boy child by perceiving them as perpetrators even in situations where it was consensual sex between the boy and the girl. The law has many times failed to treat both as children who needed totally different interventions and not the boy child as the perpetrator and the girl child as the victim.

The children sector stakeholders through the NCCS

had agreed therefore that opening discussion on how to deal with the boy child, when in conflict with the Sexual Offences Act, would be a paradigm shift, since the focus has been on the girl child. The sector noted that the boy child feels isolated and neglected. It was also noted that interpretation of laws, many times is influenced by culture and perception. For example, in many African cultures, men are perceived and expected to approach women for sex.

Lack of sex education for children and young people, and easy access to pornography were identified as main factors that may make children experiment with sex as they were unaware of the full consequences. The meeting further recognized that children have reproductive health rights, which gave them the right to appropriate information. Information and data on issues related to teenage pregnancies, reproductive and health rights for young people were lacking, thus making planning, prevention and provision of services a challenge. The failure of efficient child protection systems was also identified as a challenge, and lack of proper coordination among key actors as well.

### 3.4 Sectoral Perspectives

With the understanding that the matter of age of sexual consent is closely interlinked, multiple issues were addressed by experts from sectors such as health, education, legal, faith and human rights among others. The forum invited submissions from these experts, who brought different perspectives to the conversation including interlinkages between age of consent for sex and the physical, mental, emotional, spiritual and social well-being of the child.

#### A. HEALTH

The sector submissions on the age of consent for sex were mainly derived from the physiological and the mental perspectives. They considered the health implications of lowering the age consent for sex mostly from the reproductive, mental and emotional health of the child.

#### World Health Organization (WHO)

The representative from WHO painted the global challenges of early sex debut. Over 16 million girls give birth every year. Noting with concern the health complications arising from childbirth, girls who give birth at a young age are more likely to die compared to older women. They are also more likely to suffer from birth related disabilities and child deformities.

The early sex debut translates to early child marriage. Evidence shows that reduction by 10% in child

marriage can reduce the mortality rate of a country, thus the need to evaluate the proposal and consider maintaining the age of consent for sex from 18. The expert further drew correlation between childbirth, early child marriages and Human Development Index indicating that lowering age of consent for sex can sometimes significantly negatively affect performance of national development.

### **Ministry of Health, Kenya**

The Ministry of Health representative noted that individuals aged between 10-19 years are considered adolescents, which is a transition period between childhood and adulthood. This stage in the life of an adolescent is associated with rapid physical, emotional and cognitive growth. Brain development continues until the age of 24 years. This is also the period when the pelvic bones of adolescent girls begin to fuse.

Sex at age 16 is termed as early sexual debut that exposes adolescents to various health risks, including; teenage pregnancies, unsafe abortion practices, maternal morbidity and mortality, early child marriages, sexual violence, HIV/STI infection as well as mental health problems. Further, early sexual debut results in increased school drop-out, leading to inability to secure decent economic opportunities thus increasing chances of poverty. This negatively affects the socio-economic status of households and the health of the child born by a teenager.

A failure to protect adolescents in Kenya is also likely to jeopardize investments in maternal and child health and erode future quality and length of life, escalate sufferings, propel inequalities and lead to social instability. The Ministry also noted the financial burden on the health sector that is likely to be increased as preventable conditions requiring treatment increase among adolescents.

### **Kenyatta National Hospital (KNH)**

Kenyatta National Hospital representative argued that physical growth does not translate to maturity and recommended the need for consideration of the holistic human development theorem in the debate. The representative observed that, at the age of 16 most children have not matured psychologically and hence are unable to make informed decisions including how to deal and manage the outcomes of their sexual activities.

## **B. EDUCATION**

Submissions from this sector mostly looked at the implications of reducing the age of consent for sex from an education perspective. The sector admitted

that majority of children who comprise ages 16-18 are learners either in mandatory basic education continuum or in some tertiary level education. The sector submissions affirmed that majority of 16 year olds are still in school and do not therefore have the rights of adults. They are dependent on guardians, families and state to offer all basic needs and should be treated as children who have rights and specific privileges.

### **Ministry of Education (MoE).**

The Ministry of Education quoted the Basic Education Act No. 14 of 2013 which describes a child as an individual who has not attained the age of 18. They further argued that the Act stipulates that it is mandatory for any person below the age of 18 to receive basic education. Article 28 of the Act demands that every child has a ‘Right to free and compulsory education.’

***‘Kenyan society is not prepared for the lowering of the age of consent for sex because the education framework has not provided for sex education so that we say that children who are at the age of 16 have the capacity to make informed decision and judgement’.***  
***A representative from the Ministry of Education***

The representative from the MoE cautioned that it would be wrong for Kenya to compare itself with other countries who have a lower age of consent for sex. The issues the country is grappling with that affect young people, like child pregnancies, high school dropout rates, abortion, rape, low completion and transition rates, truancy, among others cannot be solved by lowering the age of consent for sex. In fact, it may worsen the problems.

***‘Are we protecting children or the adult? Let the team mafisi (sex predators) suffer for their actions’***  
***A representative from Ministry of Education***

Emphasizing that by lowering the age of consent for sex to 16, the country will be putting children, especially girls from economically disadvantaged backgrounds to risks of prostitution and exploitation. The action may also encourage child predators to advance sexual exploitation among poor girls and most disadvantaged children including those with disabilities or from minority and marginalized groups on the account that such children (boys and girls) are ‘mature’ for sex.

The representative reiterated that the context under

which lowering of the age of consent for sex was brought up is also questionable and suspicious. The Ministry proposed the following;

1. Children who have committed sexual offences should be guided and counselled appropriately by teachers if in school, by parents if at home or be referred to appropriate services.
2. Parents/caregivers should be well informed and briefed on the issue under discussion and allow them to weigh in their thoughts on the matter.
3. Children who have committed sexual offences should as much as possible be diverted from the formal justice system to rehabilitation and correctional services.
4. Children who have committed sexual offences should not be discontinued from their studies instead, both girls and boys should be counselled about their responsibilities by the guidance and counselling teacher if in school or be referred to appropriate services. Parents/caregivers should be fully involved, affected girls should start antenatal care and the boy should be allowed to continue with his education too. The children should not be incarcerated because this will deny them right to education.

Sexual encounter between a child and an adult that may or may not result in pregnancy should always result in legal action as prescribed in various legal frameworks. In undertaking all these, the principle of observing the best interest of the child should be underscored.

### **Teachers Service Commission (TSC)**

The Teachers Service Commission is a Constitutional Commission established under Article 237 of the Constitution. Its core mandate is to register trained teachers; recruit and employ trained teachers; assign teachers in its service to teach in various public schools; promote and transfer teachers; exercise disciplinary control over teachers and exit teachers from employment.

***‘By allowing lowering the age of consent for sex to 16, we are acknowledging that they are no longer children but adults. How will we stop them from accessing, sharing and engaging in pornographic matters yet by agreeing to lower the age of consent for sex? The law will regard them as adults. This will eventually lead to their morals being seriously eroded’.***

TSC submitted that the discussion on whether the age of consent for sex should be lowered is one that should bear in mind that majority of children in learning

institutions are minors who need protection and guidance, hence the discourse should be anchored on ‘best interest of the child.’

TSC noted that a change in law would translate to more minors engaging in sexual activities hence keeping them away from school with attendant consequences for example early pregnancies and diseases. Performance of learners is also likely to decline. It was also argued that sexual abuse cases against learners by their teachers are likely to increase. TSC expressed its commitment to continue de-registering teachers and institute approved disciplinary measures to teachers proven beyond doubt that they are involved in child sexual exploitation.

### **Kenya Institute for Public Policy Research and Analysis (KIPPRA)**

KIPPRA emphasized on the court of appeal judges’ statement “What ought to be done concerning the high incarceration rate and plight of young men incarcerated in Kenya on grounds of findings of committing sexual offences.”

They submitted that the following considerations be discussed;

- Whether by lowering the age of consent for sex we are seeking to also alter the age of entry into adulthood and departure from childhood in general.
- Whether such consent ought to meet the threshold of informed consent, as found in the domain of research ethics and participation. In this regard, KIPPRA recommended consideration of whether a child under 18 would possess the comprehension, competence and adequate information to facilitate decision-making on the provision of informed consent.

***‘Let the learners know about the cycles of sexuality.’***

- There is need for optimal caution so as not to effect a policy change that yields the unintended effect of protecting one gender (young males) at the expense of the other (young females) and vice versa.
- Reducing the age of consent would invariably create child safety risks within the schooling or education system, undermining the quality of the educational experience. The submission further interpreted that basic education ought not to be interfered with, not even by sexual self-determination and that capacity to consent to sex should for example coincide with the capacity to engage in full-time employment.

- There lacks a sound policy basis to inform a reduction in the age of consent for sex. KIPPRA noted that the proposal to lower age of consent seems to represent an absurd, simplistic and disproportionate response to complex social challenges. There is need for a structured methodical research to address the matter and ground the recommendation on concrete evidence.

The representative of KIPPRA further asserted that, “besides, in keeping with theological metaphors, have we not been cautioned not to awaken love before its time?”

On the basis of these arguments, KIPPRA observed that there remains a need to exercise caution and prudence in supporting reduction to the age of consent for sex with well- founded policy research and analysis.

#### **Kenya Primary Schools Head Association (KEPSHA)**

KEPSHA is an organization representing primary school head teachers of Kenya. The body argued that by saying “a child is any person who is aged below 18 that person cannot be issued with a Kenyan Citizen identity card because they are considered minors.” A logical argument is required noting that a child joins school at the average age of 6, then spends 8 years in primary school and 4 years in secondary school. Most children leave primary school at the age of 14. At the age of 16 years they are either in Form 2 or 3 and a few are still in primary schools in some parts of Kenya. If the law is changed to lower the age of consent for sex from 18 to 16 years then it means that all those children who are in Forms 2-4 will not be protected by the law and will be treated as adults. This, they submitted will not only increase immorality in the country but also increase teenage pregnancies, indiscipline in learning institutions and lower the education standards in Kenya.

They proposed sex education be introduced in schools but at lower secondary level according to the new competency-based curriculum. KEPSHA alternatively proposed that learners be allowed to know about their sexuality, entire human growth and development, sexual identity and sexual health and reproduction.

#### ***Underage sexual activity presents a number of risks in relation to sexual and reproductive health, including unwanted or early pregnancy and exposure to Sexually Transmitted Infections (STIs).***

Learners should also be taught the true meaning of

love and what it entails. They should be informed about emotional and sexual feelings and what these mean. KEPSHA observed that if children are well guided and trained even at age 16, they can make socially sound decisions. At the moment many children at this age cannot make sound decisions because they lack enough information and guidance.

KEPSHA also submitted that by lowering the age of consent for sex to 16 the society was not offering protection to children. A child of 16 years is not socially capable of supporting her/himself, a family and so should be protected by the law.

Lowering the age of consent for sex to 16 will not only increase immorality which is likely to lead to unmanageable population increase, high rate of crime, insecurity, increase in the number of street families, and growth of slums among other undesired circumstances.

#### **Kenya Secondary Schools Heads Association (KESSHA)**

The KESSHA is a professional organization comprising of about 7,000 members drawn from public and private Secondary Schools in the Republic of Kenya. It was established with the sole purpose of providing professional advice to its members spread in all the 47 counties.

The KESSHA representative submitted that children are not responsible enough to make decisions about their sexuality. The representative noted that if the age of consent is lowered to 16, more children would suffer exploitation, child pregnancies, depression and other consequences. There is also the risk of adults exercising undue influence over children, especially those who interact with children for example teachers and care givers, religious persons among others. The KESSHA representative further noted that society has the responsibility to protect, guide and counsel children involved in sexual affairs. They should also inform and educate the children to enable them make right decisions about their sexuality.

KESSHA observed that at the age of 18, one is considered an adult who can make rational decisions about his or her sex life. The KESSHA submission also highlighted the following;

- Young adolescents may be lured into sexual activity by older adults in exchange for gifts and favors making those from disadvantaged settings at risk.
- Underage sexual activity presents a number of risks in relation to sexual and reproductive

health, including unwanted or early pregnancy and exposure to sexually transmitted infections (STIs).

- Early pregnancy and motherhood is often a major cause for high adolescent girls drop out in schools.
- There is also need to allow children time to grow to maturity. Parents and guardians have a responsibility of preparing children to become responsible citizens.

KESSHA concluded by noting that Kenya should not lower the age of consent for sex to 16. The society should play its role of inculcating values and good morals to children and support children in making responsible decisions about their sexual life. Sex education should be provided from an early age to enable children know about sex and the effects of premature sex.

### **C. LEGAL AND HUMAN RIGHTS**

The proposal by the Court of Appeal judges to interrogate matters of age of consent for sex has major implications to the legal and policy framework and the general human and child rights framework if the State decides to lower the minimum age

#### **Office of the Director of Public Prosecution (ODPP)**

The ODPP stated that the proposal of lowering age of consent for sex was not in accordance with the law. The decision shall violate other existing laws especially the constitutional provisions relating to minors. The ODPP recommended examination of legal gaps and invited participants to suggest better ways of addressing the gaps to ensure children in conflict with the law are protected and rehabilitated. ODPP further noted that the prosecutor depends on evidence provided, and in all matters relating to children, a thorough consideration of evidence presented is made. Often ODPP recommend diversion where the two children admit they had mutually agreed to have sex. Such children are recommended for counseling and on further requests, the court to refer the children to care and protection units.

#### **National Council on the Administration of Justice (NCAJ)**

The National Council on the Administration of Justice made their presentation by looking at the issue from two angles; from the view of the Court of Appeal Judges and from what is currently happening in the society and submitted as follows:

- There are 129 boys in remand homes in Kenya accused of sexual offences. No girl is in any of

the remand homes in the whole country for being accused of any sexual offence under the Sexual Offences Act. Most of the boys in remand were found guilty of being in a consensual non-violent relationship with a fellow teenage girl who is close in age (difference in age is 2-3 years).

- The Sexual Offences Act is very categorical on how to treat sexual offenders. However, the stringent measures do not seclude any child found culpable of any of the offences enlisted in this Act – they are punished just as adults are.

NCAJ noted that the debate of lowering age of consent for sex is not new in the Kenya. In 2016, a bill to lower the age of sexual consent was rejected by the Parliament mostly because there was no civic education and awareness on the issue. NCAJ advised that any decisions and recommendations made on this debate must be carefully thought. NCAJ emphasized that:

1. The age of consent for sexual intercourse in Kenya is 18, therefore, sexual intercourse with a person under the age of 18 is illegal. A defense is available if the minor deceived the accused as to his/her age and the accused reasonably believed he/she was of age. Gay sex is prohibited and criminalized.
2. In the absence of any age restrictions young persons of any age may access contraceptives without parental consent. There is no age restriction on access to emergency contraceptives.
3. The age of consent for sex for HIV testing is 18, while certain exceptions apply in which case the patient can consent by themselves. Test results for a person under 18 years are released to the parents unless the child directly consented to the testing.
4. The law in Kenya is silent on whether consent by a parent is required for access to Anti – Retroviral therapy to a child. However, the law states that it is the responsibility of a parent of the child and Government to ensure provision of access to medical care (including ART).
5. There is no statutory age limit on access to Post-Exposure Prophylaxis (PEP). The general policy of requiring parental consent for medical treatment of persons under 18 may be applied.
6. In Kenya the law requires the Ministry of Health to issue guidelines on PEP, however the law does not deal with age of consent for sex. Access to Pre-Exposure Prophylaxis (PrEP) is determined by the general policy that parental consent is required for patients under 18 years.
7. Abortion is illegal in Kenya and only permitted in limited circumstances, such situations where the life of the mother is at risk. Kenya does not have a policy framework or legislation that specifically speaks to access to Antenatal Care (ANC).

- The existing policy framework gives young girls aged 9-13 access to the Human Papilloma Virus screening and vaccine, but it is unclear as to whether parental consent is required.

The NCAJ noted that there are three categories of children in Kenya's justice system; child victims, children in need of care and protection and children in conflict with the law. It is recommended that children found to be culpable of sexual offences and are close in age engaging in sexual activity that is non-violent, should be treated as children in need of care and protection. The recommendation is that these two children have counseling available to them, or any other non-custodial measures to ensure that the judicial officer instils in the child that sexual activity is prohibited until they are in a position to take full responsibility.

NCAJ further said that the sole reason for this recommendation is to acknowledge that some of them are in experimental years of their lives and should not be treated with such contempt as to deem it a crime worthy of imprisonment.

#### **Network of Africa National Human Rights Institutions (NANHRI)**

The Network of African National Human Rights Institutions (NANHRI) is a regional membership organization of African National Human Rights Institutions (NHRIs) whose Secretariat is based in Nairobi, Kenya, hosted by the Kenyan National Commission on Human Rights. NANHRI works towards establishment and strengthening the capacity of NHRIs in Africa to fulfill their mandate on human rights promotion, protection and advocacy.

NANHRI was represented by a member of the secretariat who observed that the consultative forum on age of consent for sex must have been informed by the current realities that Kenya (and other parts of the African continent) is facing around Adolescent Sexual Reproductive and Health Rights.

***Kenya has ratified various international and regional human rights instruments that guarantee the right to sexual and reproductive health. Hence, Kenya is obligated to work proactively towards attainment of this right***

NANHRI acknowledged that Kenya has ratified various international and regional human rights instruments that guarantee the right to sexual and reproductive health. Hence, Kenya is obligated to work proactively

towards attainment of this right. Further, the right to sexual and reproductive health is enshrined in Article 43(1) (a) of the Constitution (2010) and various national policies. In this regard, Kenya is obligated to avail resources and good will to progressively realize the right to sexual and reproductive health for all in society, with a specific focus on minority groups and vulnerable populations. NANHRI highlighted the following three intersectional issues for consideration while developing a position paper on the issue:

- Adolescents are a group that have been largely left behind in the global AIDS response. The AIDS related deaths declined between year 2000 and 2016 for all age groups except adolescents.
- The lack of clarity on Kenya's abortion laws is particularly harmful to young women. Hence, adolescent girls in Kenya encounter legal risks in accessing post abortive care compounded by delay in seeking the service due to fear of social stigma.
- The lack of meaningful access to a comprehensive range of contraceptive methods puts women and girls at a greater risk of unintended pregnancy .

NANHRI Secretariat made the following recommendations:

- Ensure that all age of consent for sex policies and other national policies pertaining to adolescents and their sexual reproductive health and rights are reviewed and aligned expeditiously, with centrality being the best interest of the child. Make provision for 'close in age' exceptions to the age of sexual consent in place, so that young adolescents having consensual sex with one another are not criminalized.
- Have statutory rape provisions in place to protect adolescents from predatory adults.
- Ensure that all adolescents have access to comprehensive scientifically accurate information and resources that allow them to make informed decisions in all aspects of their sexual and reproductive health.
- Remove barriers to safe and legal abortion; and quality post abortion care services for all adolescents.
- Remove barriers to access contraceptives (including emergency contraceptives) and the full range of reproductive health services for all adolescents.
- According to World Population Review (2019), 14 African countries have the age of consent for sex at 16 years .

#### **Law Society of Kenya (LSK)**

The Society noted that the Sexual Offences Act No. 3 of 2006 was a commendable and timely legislative milestone for the people of Kenya as it finally provided for a legal framework in tackling sexual offences, gender-based violence and the protection of all persons from harm in respect of unlawful sexual acts. Citing several laws that safeguard the rights of children and national obligation of ensuring that children enjoy their rights, LSK stated that children just like adults are individual right bearers and not mere extensions of their parents or guardians. Therefore, on this question of sex and age of consent for sex, the voices of children must also be heard, their opinions considered and their best interests factored. LSK continued to state that the discussion on the age of consent for sex has been brought to the fore by Kenyan Courts which have in different decisions implied that the Act in its application has in some instances led to absurd results. LSK gave a few examples such as in the recent Court of Appeal decision between **Eliud Waweru Wambui v Republic [2019] Eklr**, the Court called out to Kenyans to engage on the subject of age of consent for sex in a sober and pragmatic manner; The Court in **C K W v Attorney General & another [2014] Eklr** commended the Petitioner for bringing to the fore, the need to consider whether or not there are other measures which were more appropriate and desirable, for dealing with children; In the case of **G O v Republic [2017] eKLR** the Court made the following views, "I find that at the time of the commission of the offence, both the appellant and the complainant were minors;" In **P O O (A Minor) v Director of Public Prosecutions & another [2017] eKLR**, the Court made the following remarks in its judgment "...this kind of scenario has bothered my mind ever since the harsh penalties".

Basing arguments from the above cited case law, LSK noted that in the application of the Sexual Offences Act, the country has to grapple with the unintended consequences which are to a large extent related to the criminalization of consensual sexual conduct for adolescents and "young persons." Saying that such criminalization was the subject of the Constitutional Court in South Africa in the *Teddy Bear Clinic for Abused Children and Another vs Minister of Justice and Constitutional Development and Another* (CCT 12/13) [2013] ZACC 35; 2013 (12) BCLR 1429 (CC); 2014 (2) SA 168 (CC); 2014 (1) SACR 327 (CC) (3 October 2013) leading to a moratorium in South Africa for certain cases involving adolescents.

LSK concluded the presentation by asking the following

key questions;

- Should there be provisions specific to situations where two minors are involved?
- Should we as a country continue criminalizing and penalizing consensual sexual conduct between adolescents or young persons?
- Should both participants in the alleged act be punished and if so what forms of penalties should be applicable?
- Does the definition of penetration, a key ingredient in the offence, discriminatory and unfair to males? Should the definition be expanded to other forms of sexual conduct particularly in light of increasing awareness in sexual orientation?
- Is the criminalization of consensual sexual conduct amongst adolescents a form of stigmatization?
- What is developmentally normative sexual conduct for adolescents or young persons? Should it be defined, and awareness raised alongside comprehensive sex education?

LSK urged the stakeholders to consider the following recommendations:

- The provision for clauses specific to where two minors are involved and consider less stiff penalties.
- Wider definition of defilement to capture all forms of sexual expression beyond penetration. Provision for close-in-age exemptions. These are commonly referred to as Romeo & Juliet Clauses that cater for minors aged 15 and above involved in sexual conduct with persons close in age with a 2-3-year difference.
- The differentiation of different age groups.

#### **Kenya Law Reform Commission (KLRC)**

The Kenya Law Reform Commission is mandated to keep under review all the law of Kenya to ensure its systematic development and reform, and generally its simplification and modernization. KLRC is mandated to recommend reform of the law to ensure respect for and observance of treaty obligations in relation to international instruments that constitute part of the law of Kenya by virtue of Article 2(5) and (6) of the Constitution, and to translate policy into legislation. While the Commission may provide advice and recommendations about the best way to proceed, enactment and implementation of legislation is always a matter for others.

The KLRC invited the participants to closely examine the statement in the judgment under discussion thus, '... that a candid national conversation on this sensitive yet important issue implicating the challenges of maturing, morality, autonomy, protection of children

and the need for proportionality is long overdue.... that prisons are teeming with young men serving lengthy sentences for having had sexual intercourse with adolescent girls whose consent has been held to be immaterial because they were under 18 years. The wisdom and justice of this unfolding tragedy calls for serious interrogation”.

Emphasizing that the discussion was about consent to sex for the purposes of the Sexual Offences Act, that is, whether a child should be sent to jail for engaging in sex with another child. KLRC focused on Section 8(5) of SOA which provides that it is a defense to a charge of defilement if -

- a. it is proved that such child, deceived the accused person into believing that he or she was over the age of 18 at the time of the alleged commission of the offence; and
- b. the accused reasonably believed that the child was over the age of 18

Clarifying that the Sexual Offences Act Sec 42, for the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice. KLRC urged the forum to keep in focus that the discussion is about sex between two people where there is an imbalance of power. In this situation, there can never be consent. Further clarifying that a person commits the offence termed rape if –

(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs; (b) the other person does not consent to the penetration; or (c) the consent is obtained by force or by means of threats or intimidation of any kind.

The courts are very well versed in interpreting this provision to determine whether a person who has engaged in sex has the freedom and the capacity to make the choice to engage. This can protect any person – including a child – who has not in fact consented.

KLRC noted with concern that sending minor boys to jail for engaging in consensual sex – which is the problem flagged by many children’s courts in this country- can be dealt with by changing the law to change the age of consent for sex only where the sex is between minors.

***Any decision that does not take into account the child’s views or does not give their views due weight according to their age and maturity, does not respect the possibility for the child or children to influence the determination of their best interests.***

Additionally, KLRC observed that in any matter of procedure affecting a child, the child shall be accorded an opportunity to express his/her opinion, and that opinion shall be taken into account as may be appropriate taking into account the child’s age and the degree of maturity. The purpose of assessing and determining the best interests of the child is to ensure the full and effective enjoyment of the rights recognized in the Convention and its Optional Protocols, and the holistic development of the child.

KLRC also noted that the right of the child to express his or her own views should be considered and an assessment of a child’s best interests must include respect for the child’s right to express his or her views freely, and due weight given to said views in all matters affecting the child. Similarly, as the child matures, his or her views shall have increasing weight in the assessment of his or her best interests. Any decision that does not take into account the child’s views or give their views due weight according to their age and maturity, does not respect the possibility for the child or children to influence the determination of their best interests.

She called for the use of the Child-Rights Impact Assessment (CRIA) on any legislation touching on children to enable ability to predict the impact of any proposed policy, legislation, regulation, budget or other administrative decision which affect children and the enjoyment of their rights. It should complement ongoing monitoring and evaluation of the impact of measures on children’s rights. CRIA needs to be built into Government processes at all levels and as early as possible in the development of policy and other general measures in order to ensure good governance for children’s rights.

There cannot be consent of sex between two children, because legally, children do not have a choice or capacity to give consent. Where both children are involved they should be referred to borstal institutions. When there are two minors, the law can be changed to have a provision for two minors while prohibiting adults having sex with children.

#### ***D. Religious and Social Actors***

Kenya is a highly religious nation, with strong cultural beliefs. This sector looked at the reduction of age of consent for sex from the faith and cultural perspectives.

#### ***Inter Religious Council of Kenya (IRCK)***

The Inter-Religious Council of Kenya (IRCK), is a body made up of all major faith communities in Kenya, namely the Kenya Conference of Catholic Bishops (KCCB), the National Council of Churches of Kenya

(NCCCK), the Evangelical Alliance of Kenya (EAK), the Organization of African Instituted Churches (OAIC), Seventh Day Adventist Church (SDA), the Supreme Council of Kenyan Muslims (SUPKEM), the National Muslim Leaders Forum (NAMLEF), Shia Ithnasharia, Muslim Association and the Hindu Council of Kenya (HCK).

IRCK submitted that sexuality permeates one’s individual being to its very depth; Sex conditions every facet of our life as human beings, because sex binds the two as sexual beings. It has long term outcomes which are completely out of consideration by majority of these young people.

IRCK submitted that studies have shown that both men and women who had sex before age 18 wish they should have waited longer before having sex. Before age 18, children are unable to make complex analysis, their brains have not developed enough to handle matters as complex as sex. Further evidence points that people who delay their first sexual experience until they are a little older are better equipped with social skills and are likely to make mature decisions regarding their careers, families, and health among other critical decisions.

IRCK submitted that person of age 16, are children in secondary and some in primary schools. They are children not ready to settle in marriage, and are still children in need of care, guidance and protection. IRCK referenced that the Holy Books teach young men and women to restrain from sexual passions for God/Allah is aware of what they do.

In conclusion, IRCK wondered about the motive behind lowering age limits for consent for sex; could the lowered age of consent for sex benefit older men and women interested in exploiting younger girls and boys who for a long time were protected by law? As a coalition of faith communities in Kenya, IRCK strongly objected to lowering the age of consent for sex, and in fact asked that it should be revised upwards. Cautioning that this is a disaster in waiting, a scheme by sex pests to take advantage of young girls and boys whose ability to make complex decision relating to sex is still immature.

The National Council for Churches of Kenya (NCCCK) submitted that teenage pregnancy is on the rise noting that one in every five adolescent girls of ages 15- 19 has either had a live birth or is pregnant with her first child. NCCCK submitted that there is need to offer life skills to children to build assertiveness. Like other participants, NCCCK argued that lowering the age of consent for sex will result in lower transition rates

to colleges and universities due to gender disparity in education. It is possible that lowering age of consent for sex could reverse recent gains of high transition rates for girls. The number of abortions procured by young girls could also rise.

NCCCK submitted that lowering the age of consent for sex will not reduce the number of boys convicted of sexual offences and a more comprehensive measure is required. Such a measure may involve reviewing the penal code to lower the threshold of punishment for teenagers.

#### ***SUPKEM***

SUPKEM, reinforced that premarital sex is prohibited in the Muslim community, and further said that for one to get married according to the Muslim faith, consent was required; and if one is unable to give consent, they are not allowed to get married. They however acknowledged that child marriage is an issue in the Muslim community and the Kenya law has been playing an important role in ensuring girls have a chance to grow.

## **E. DISABILITY SECTOR**

### ***The National Council for Persons with Disabilities (NCPWD)***

The National Council for Persons with Disabilities is a state corporation established by an Act of Parliament in 2003 with representation drawn from key government Ministries and organizations of/for persons with disabilities. Its mandate is to promote and protect equalization of opportunities and realization of human rights for PWDs in order to enable them to live decent livelihoods. NCPWD opposed the proposal of reducing age of consent for sex, citing that the judges in the Court of Appeal matter erred in their judgment. NCPWD noted that the age of a child is definite and well defined in the Constitution and should be respected as such. Further reduction of age for consent of sex is tantamount to reduction of the presumed age of adulthood. NCPWD noted “consent is to the mind not the physical structure of a person.” The Council is of the considered feeling that development of the mind to maturity may take longer for persons with disabilities. It is also important to note that persons with disabilities particularly those with multiple disabilities and intellectual disabilities are exposed to early sexual activities due to exploitation and therefore lowering the age of consent for sex has higher unintended consequences among them. The Council proposes that the age of consent for sex for persons with certain disabilities such as intellectual disabilities should be re-looked into with a view to raising it.

## F. CHILDREN AND YOUTH SECTOR

### *Children and Youth*

Children and Youth constitute 65% of Kenya's population, thus the discussion of lowering the age of consent for sex is all about them. They looked at the implication of lowering the age of consent for sex under perspectives of human development, employment, education and morality.

### *AKAD Education Group-Africa*

AKAD is a youth-focused organization in Kenya that offers career, education and leadership excellence training to youth. This is done through student mentoring that is intended to help students gain skills and confidence to be responsible for their own future. The group registered its disappointment with the decision seeking to lower the age of consent for sex. They noted that such a decision seeks to protect the perpetrators. They argued that sex is more than a physical act, it has an emotional connection. They called upon participants to begin a new narrative about the benefits of delayed sexual debut and corresponding positive outcomes. AKAD noted that such conversations could be more beneficial to youth and children who are interested in learning positive things.

### *National Youth Council (NYC)*

The Council argued that Kenya's legal framework defines a child as any person below the age of 18 and lowering the age of consent for sex is putting children in danger. NYC expressed fears that lowering age of consent for sex may result in increased number of child pregnancies and rise in school dropout rates for both boys and girls. An increase in unemployment and high crime rates may follow.

NYC observed that there are unfavorable and negative cultural practices that put girls at a disadvantage point and reducing the age of consent for sex will increase multiple risks to the girl child.

### *Kenya Girl Guides Association (KGGA)*

The Kenya Girl Guides Association started their submission by indicating that they promote abstinence and hence do not support lowering the age of consent for sex. The KGGA observed that girls and boys in the contemporary society are likely to suffer gender and child-based violence and negative influence from social media. The association feared that lowering the age of consent for sex may increase the burden of child pregnancies, child sexual exploitation, and higher incidences of child-based violence. KGGA observed that Kenya has several decades to achieve gender equality, and by lowering

the age we will lead to retraction of the gains made over the years and may lead to detrimental results. Enough evidence is required before rushing to make decisions about this matter.

### *Kenyatta University, Students of the Institute of Gender Development Studies*

The students observed that views about sex in any given society stem deeply from how people are socialized. In their view, the most important conversation should be how to ensure youth have access to sexual and reproductive health services as well as comprehensive sexual education.

The students cautioned that lowering the age of consent for sex will only open a window for sexual predators to abuse young boys and girls. This will eventually increase incidences of sexual gender-based violence. The students further observed that children at the age of 16 are still re-discovering themselves and trying to create an identity about themselves. Children's bodies are also at the peak of maturing and since the hormone levels are very high, they may tend to follow their bodily desires instead of making rational and informed sex decisions. Considering the generational gaps and differences, it is improper for the society to make a determination on a matter involving children without considering the views of children.

The students further invited the participants to consider making proper amendments to the Sexual Offences Act to ensure justice for the victims.

### *Children from Dagoretti Rehabilitation Centre (through Center Matron)*

The children in the center were concerned as to whether the pronouncement by the Court of Appeal Judges served to protect them, or give perpetrators a chance to exploit them further. Instead they requested for education and life skills targeting children of varying ages saying that reducing the age of consent for sex will result in increase in pregnancies, early child marriages, and worse still, unsafe abortions and increased incidences of child offender. They recommended that the age of consent for sex should be increased to 21 years.

### *Children from the Informal Settlement of Kibra (through Local Agency)*

The views of the children were secured through Polycom (a local organization) who undertook a survey to establish the perception of school going persons and the matter of age of consent for sex. The survey was conducted between 1st and 4th April 2019

in Kibra. During this period, 19 schools were surveyed, with a total of 1407 children disaggregated as 56% (790) girls and 44% (617) boys.

The study shows that 19% of the surveyed children had a lover a time of the assessment. Children aged 14 and above were asked if their age mates in the general population had lovers and 63% affirmed that indeed their age mates had lovers. When asked whether they thought it appropriate to have sex, a majority 85% said that it was appropriate to have sex when aged 18 compared to 8%, who said it is appropriate to have sex when 'you like it' and 8% said it's appropriate to have sex when their lover insists.

Participants were also asked if they have ever had sex. One tenth (15%) said that they have ever had sex. When asked to state what the minimum legal age for consent of sex is a majority 79% of those aged 14 and above said that the age should be 18 compared to 21% who said that it should be 16. A further analysis of the data by gender reveals that 54% of those who said that legal age should be 18 were female compared to 46% male. However, among those who said that the age should be 16, a majority 74% were male compared to 26% female.

The survey confirms that the school age boys and girls have lovers with more boys having sex earlier in life compared to girls. Despite this, the children say that it is appropriate to have sex after the age of 18 with more girls strongly expressing this. Majority of the children indicated strongly that the age of consent for sex should be 18.

### *Kenya Children Assembly*

The Kenya Children Assembly is an umbrella agency for children in Kenya. The outgoing 2018 children assembly submitted that often the matter of age of consent for sex had been discussed extensively in the past without involvement of the children. However, the assembly revealed that three years ago and out of their own motion, the children of Kenya through a forum facilitated by the Kenya Children Assembly examined the matter of age of consent for sex. The motion tabled by the national children's assembly was a complete success, as children agreed by a steady margin that the consensual age for sex remains at 18.

The KCA averred that premature exposure to sex interrupts proper access to quality education. The children will be occupied with matters of sex instead of learning and the relationship between learners and teachers will deteriorate. KCA also estimated that lowering age of consent for sex could lead to an increase in the number of school drop-outs, and interrupt

proper growth and development of the child's body, mind and soul, and affect their health. There is a very high likelihood that his/her reproductive system may be damaged if the child is exposed to sex at the age of 16.

If the proposal goes through it will lead to an unprecedented rise in number of abortion cases, increase the spread of HIV and AIDS and other Sexually Transmitted Infections and increase in overall government expenditure on health.

The proposal may also lead to moral decay and low regard for elders and parents since lowering the age of consent for sex shall enable children share a common social aspect (sex and adulthood) with their parents and significant others. This tension and social dispute will be more elaborately felt at the family level, by both parents and their children hence endangering the entire social structure.

## G. PLENARY DISCUSSIONS

Plenary discussions focused mainly on the fact that sexual violence happens everywhere and that sex education should be included in the school curriculum. The feeling was that boys and girls are to be treated equally and that reducing the age will not solve the problem. Instead, Kenya must embrace the reality and support children to understand matters of sex and value for delayed sexual debut. Sex education was identified as one strategy for reducing child pregnancy. Participants noted that in 2017-2018 about 350,000 learners were reported pregnant. Most of these children had sexual relationships with adults. The plenary agreed that the country should not consider lowering the age of consent for sex. A few advocated for raising this minimum age to 21.

### 3.5 Validation Workshop

The validation meeting was held at the Silver Springs Hotel, Nairobi on the 7th October, 2019 and attended by 69 agencies most of which participated in the April 2019 multi-stakeholders forum.

The Chairperson of the National Gender and Equality Commission, Dr. Joyce Mutinda, called on participants to finalize on the discussions to enable the Commission issue necessary advisories to the State on Kenya's age of consent for sex. In her address she reminded participants that the high prevalence of child pregnancy is due to defilement. During the workshop but detailed outputs from the adult's multi-stakeholder forum and from the children forum were presented and subjected to the audience for discussions and verification on accuracy, relevance and factualness. The meeting concluded that the content of the report was

acceptable and carried all necessary facts and information supporting minimum age of consent for sex.

In support of the contents of the report, Professor Ruth Nduati, of the University of Nairobi, elaborated the changes adolescents undergo, and the significance of understanding these changes coupled with brain development; as critical to providing the required assistance and guidance to adolescents. She submitted that area of the brain that weighs the long-term consequences of judgements develops last usually at around the age of 20. She therefore submitted that the consequences of lowering the age of consent for sex were immense and dire on the general development of the child.

Other views from the validation workshop worth noting and for consideration in future work on matter of justice to children includes:

- i. That Correctional Services section especially prisons have a role in ensuring children have access to timely and child friendly rehabilitation services.
- ii. That the religious sector should amplify their voice and support for family values as a single most important driver for promoting the well-being of children. Further care should be exercised to prevent pedophiles from rationalizing their actions even as discussions on the matter of age of consent for sex continue
- iii. That the voice of the vulnerable groups and communities especially those in

humanitarian and emergency settings be considered as well when determining whether or not to lower the age of consent for sex. The Commission noted that such views were captured during a mission undertaken by the Commission in Kakuma Refugee Operation Centre between 2nd and 4th October 2019. Related to this is the recognition that all children are not homogenous and that all voices of different categories of children be brought on board in the discussions including those with disability.

- iv. A re-emphasis that discussions and decisions particularly regarding lowering the age of consent for sex must be informed by the principle of best interest of the child as demanded in the international conventions, regional protocols as well as in Kenya's domestic laws, policies and regulations.
- v. There should a fast-tracking of the finalization of the Children Bill 2018 to enable address of emerging issues including those of age of consent for sex. This also includes the full implementation of the National Policy on Family Promotion and Protection (2018)
- vi. Emphasis should be placed on addressing cultural practices and beliefs that promote early sexual debut among children.
- vii. The country should not also confuse the twin issues of age of consent for sex and that of management of child offenders.

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## PART 4: CONCLUSIONS AND RECOMMENDATIONS

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## 4.1 Conclusion

Kenya's legal framework provides for the protection of children, stating that no child can give consent, because often children, are unable to understand the full scope of the decision put before them. It is important that a parent/legally authorized representative be the primary person to give consent in order to act in the child's best interests.

The Sexual Offences Act Section 42 provides that: "a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice." The Act also clarifies on the age of consent for sex that previously varied under different statutes and makes it clear that the minimum age of consent for sex is 18.

Discussions including those with children generally indicated that children are not well developed by all forms (physically, psychologically and socially) at the ages below 18. Further, children exposed to sexual activities before age 18 are more likely to suffer from long term mental, social and physical health challenges. However, it is also clear that there are multiple mechanisms that Kenya can explore to address the high number of boys convicted or in remand for committing sexual offences with girls of their age or slightly older or younger, but all aged below 18.

There lacks enough evidence though, of the benefits of lowering the age of consent for sex. As discussions on this matter proceed, it should not be lost to all that a reduction in the age of consent for sex may regress the gains made by the country on gender equality and children's' rights through a decision that is not very well thought out.

## 4.2 Recommendations

Based on the findings of this report, the following are the recommendations;

### 4.2.1 The State

1. The age of consent for sex in Kenya should remain 18. Children, state and non-state agencies working on children matters unanimously upheld this recommendation.

### 4.2.2 All agencies dealing with children matters including family

1. Children (0-18yrs) are incapable of making comprehensive independent decisions and judgements about their sexuality. The State, teachers, caregivers and family should therefore provide optimal protection and guidance to

children.

2. Children have a right to participate and contribute on matters that affect their life. Any further discussions on age of consent for sex should consult and consider views of all categories of children.

### 4.2.3 The Social and Justice Sector

1. Children must at all times be protected from punitive measures that are detrimental to their social, health and psychosocial status regardless of whether their acts are consensual or not.
2. In cases where children engage in sex, the girls and boys should be provided with care, protection and rehabilitation services. The children and justice sectors should identify feasible mechanisms for dealing with juveniles in conflict-with-law.

### 4.2.4 The Office of Attorney General and Department of Social Protection

1. The regulations required for the full operationalization of the Sexual Offences Act should be put in place to protect children from adults who exploit weaknesses of the prevailing laws to escape justice on offences related to sexual exploitation, defilement, incest among other crimes directed to children.
2. There is need for the full implementation of the National Children Policy 2010.

### 4.2.5 Parliament

1. Parliament should fast track the finalization of the Children Bill 2018 and the Early Childhood Education Bill 2018.
2. Parliament should scrutinize keenly any further amendments presented to the legislature on the Sexual Offences Act 2016 and the Children Act 2001 to protect and promote the rights of children particular in ensuring they are not sexually exploited by adults.

### 4.2.6 The Community

1. Children lack adequate information about sexuality. There is need for the community (with support from other actors) to continuously provide children with timely information about benefits of delaying sexual actions.
2. The community and all sectors must admit that children are more than ever before engaging in sexual activities. There is need for the actors lead by the community to prepare interventions (social, health, psychosocial, reproductive) directed to children who are sexually active.
3. The family must lay greater emphasis on value based parenting to ensure children are exposed to value system that respects self-image and dignity

and which provides children with correct information about their sexuality, reproductive life and how sexuality is connected to economic and social well-being of human kind. The family therefore must take a center stage in bringing up of children and in protecting the rights of children.

### 4.2.7 Issues That Need Further Discussions

1. Further amendments to the Sexual Offences Act, 2016 and the Children Act, 2001 to include such clauses as the close-in age exemptions (Romeo and Juliet clause) that will protect children in consensual sex and that give the judicial officers the discretion to apply the Children's Act fully in protection of children in conflict with the law.
2. There is need to re-evaluate the stand on comprehensive sexual education to ensure children have the correct information to make the right decisions regarding their sexuality as they transit adolescence to adulthood.

# ANNEXES

## 1. List of Participants during the Multi stakeholder's forum held at the Laico Regency Hotel Nairobi on 30th April 2019

S/NO	NAME	ORGANIZATION
1	Hon. Safina Kwekwe	State Department for Gender Affairs
2	Heidi Mumia	State Department for Gender Affairs
3	Rowland Tengai	State Department for Gender Affairs
4	Susan Njau	State Department for Youth Affairs
5	Christabel Adhiambo	State Department for Youth Affairs
6	Louisa Rautta	State Department for Youth Affairs
7	Joyce Ngugi	National Council for Children's Services
8	Abdinoor Sheikh	National Council for Children's Services
9	Truphena Cheminingwa	National Council for Children's Services
10	Hellen Mafumbo	Directorate of Children's Services
11	Kemunto Kenani	Ministry of Education
12	Dr. Jeanne Patrick	Ministry of Health
13	Dr. Mary Wangai	Ministry of Health
14	Sylvia Ngere	Teachers Service Commission
15	Virginia Nelder	Kenya Law Reforms Commission
16	Bryan Were	National Police Service Commission
17	Stephen Onchiri	National Police Service Commission
18	Roselyn Kabata	National Council of Administrative Justice
19	Juliet Gachanja	National Council on Administrative Justice
20	Caroline Karimi	Office of the Director Public Prosecutions
21	Ivy Nyandiko	Council of Governors
22	Andrew Levi Olando	KIPPRA
23	Getter Wasilwa	Kenyatta National Hospital
24	Vincent Akarah	National Council for Persons With Disabilities
25	Musila Muisyo	Kenyatta University
26	Rehema Abdulrazak	Kenyatta University
27	Jecinta Kagai	Kenyatta University
28	Aisha Said	Kenyatta University
29	Mwaluku Martha	National Youth Council
30	Hilary Busisa	National Youth Council
31	Asenath Mwithigah	National Youth Council
32	Walter Buleti	National Youth Council
33	Francis Ndirangu	Kenya Primary Schools Headteachers Association
34	Dan Nyanchoka	Kenya Secondary Schools Heads Association
35	Dr. Janet Mangera	Kenya Girl Guides Association
36	Lai Clare	Law Society of Kenya
37	Monika Sandrik	UNICEF
38	Florence Gachanja	UNFPA
39	Stephen Githinja	UN WOMEN
40	Josephine Njoroge	World Health Organization
41	Jacinta Makokha	Coffey International
42	Lonah Wanjama	Plan International
43	Nancy Okoth	Plan International

44	Marie Ramtu	NANHRI
45	Judy Gitau	Equality Now
46	Masheti Masinjila	Collaborative Centre for Gender and Development
47	Milka Kariuki	Collaborative Centre for Gender and Development
48	Ibrahim Muchelule	SUPKEM
49	Bonifes Adoyo	CITAM
50	Imelda Nyamani	National Council of Churches of Kenya
51	Rev. Dr. Nelson Makanda	National Council of Churches of Kenya
52	John Bulimo	National Council of Churches of Kenya
53	Rev. Fr. Joseph Mutie	Inter-Religious Council of Kenya
54	Bsh. Dr. John Warari	Inter-Religious Council of Kenya
55	Catherine Mutundu	Kenya Private Sector Alliance
56	Martin Omondi	AKAD Educational Group-Africa
57	Yuri Coret	AKAD Educational Group-Africa
58	Virginia Kimani	AKAD Educational Group-Africa
59	Fredrick Nyagah	Global Communities
60	John Mboya	Women Empowerment Link
61	Gloria Muturia	Women Empowerment Link
62	Catherine Githae	Men Engage Kenya
63	Annelyu Barbara	Cleanstart
64	Antonia Musunga	CREAW
65	Odhiambo Orlale	African Woman and Child Feature
66	Beth Waruguru	Girl Aid Foundation
67	Esther Waikuru	Buildher
68	Anastacia Njeri	Buildher
69	Linda Ngondu	Dial A Pad
70	Njoki Macharia	KBC
71	Anita Nkonge	NTV
72	Carolyn Bii	KTN NEWS
73	Aggrey Omboki	Nation Media
74	Albert Bwana	Urban Radio
75	Martin Masirere	Pwani FM
76	Njoki Macharia	KTN
77	Kevin Mabu	KTN
78	Charles Wene	Mt. Kenya Star
79	Njamiu Kiboi	KU TV
80	Nancy Mweu	Milele FM
81	Arah Labos	Ebru TV
82	Benjamin Mwaka	Ebru TV
83	Bonarem Samaha	Ebru TV
84	Nancy Mweu	Milele FM
85	Keit Silale	Ku TV
86	Dorcas Wangira	Citizen TV
87	Monicah Kamukwa	Truth FM
88	Mbugua Njeri	Radio Africa Group
89	Ronald Njoroge	K24 TV
90	Aggrey Ombuki	Nation Media
91	Jeremy Omondi	West TV

92	Marauni Bonface	West TV
93	Ogugi Samson	Live Nation Media
94	Anita Nkonge	NTV
95	Jackfone Lawi	Sunday Express
96	Malachi Motaro	Lolwe TV
97	Kimani Githuku	K24 TV
98	Naomi Gakenia	KBC
99	Betty Kiptum	KBC
100	Tabitha Rotich	Radio Citizen
101	Wanjiru Mwangi	Radio Africa
102	Zyena Nyakundi	NTV
103	Mercy Thuku Wakonyo	KBC
106	John Kibe	Realpix Media
107	Kelvin Mojangah	NTV
108	Brian Mutua	Mtoto News
109	Gloria Aradi	Standard Group
110	Clive Ayuko	Whistling African
111	Wangai Johnstone	Radio Pamoja
112	Joseph Kiplarus	NTV
113	Elmond Oyaro	Kenya News Agency
114	Yvonne Kadzo	Kenya News Agency
115	Nduta Waweru	Media Max
116	Tracey Wasunna	Mtoto News
117	Jennifer Kaberi	Mtoto News
118	Justus Irungu	Bunge La Mwananchi
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5	Betty Sungura Nyabuto, MBS	NGEC
6	Paul Kuria	NGEC
7	Desire Njamwea	NGEC
8	Winfred Wambua	NGEC
9	Josephine Kagucia	NGEC
10	Daniel Waitere	NGEC
11	George Kimani	NGEC
12	George Wanyonyi	NGEC
13	Lynette Kigotho	NGEC
14	Michael Gichimu	NGEC
15	Bernard Sompoika	NGEC
16	Betty Malamba	NGEC
17	Sylvia Nyabongi	NGEC
18	Dorah Mutogoh	NGEC
19	Margaret Kang'ethe	NGEC
20	Grace Wababu	NGEC

## 2. List of Institutions and agencies that made submissions on age of consent for sex

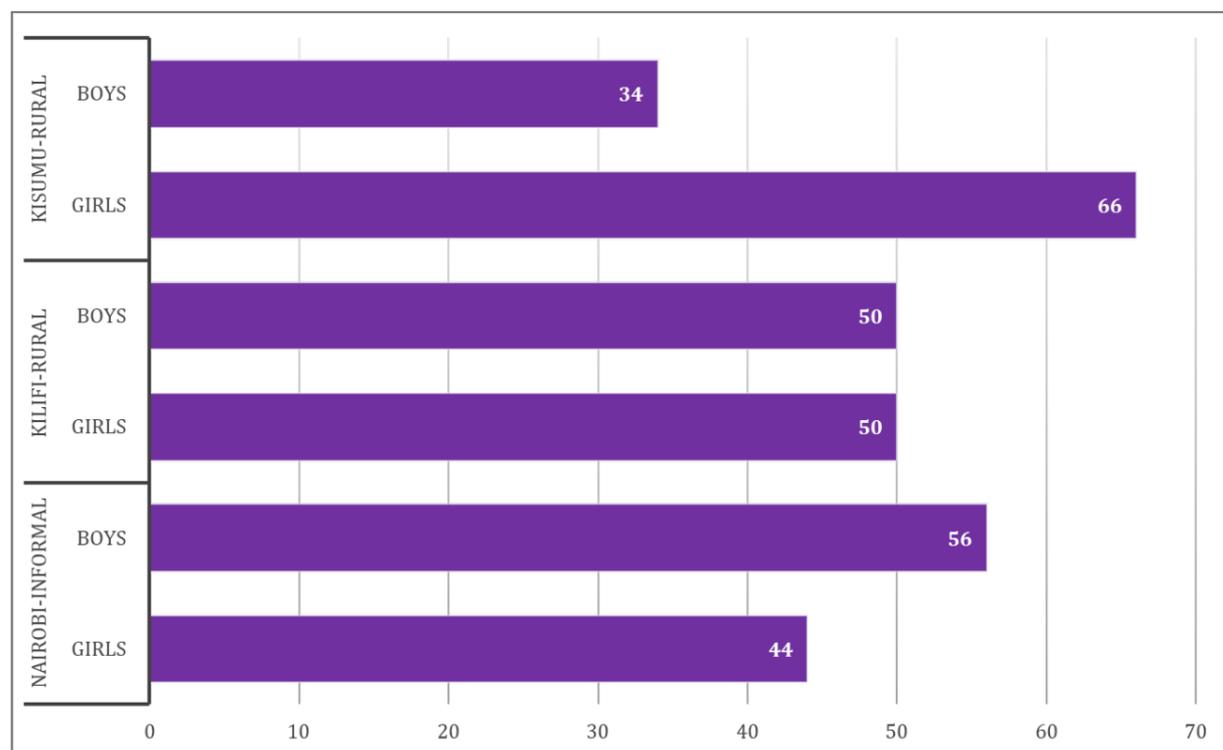
S/NO	INSTITUTION MAKING SUBMISSIONS
1	State Department for Gender Affairs
2	National Council for Children Services
3	National Council on Administrative Justice
4	National Council for Persons with Disabilities
5	Office of Director Of Public Prosecutions
6	Ministry of Education
7	Kenyatta National Hospital
8	Kenya Law Reforms Commission
9	National Police Service Commission
10	Teachers Service Commission
11	Law Society of Kenya
12	Kenya Primary Schools Heads Association
13	Kenya Secondary Schools Heads Association
14	Kenya Children Assembly
15	Kenya Girl Guides Association
16	National Youth Council
17	Kenyatta University
18	Collaborative Centre for Gender and Development
19	NANHRI
20	UNICEF, Kenya
21	KIPPRA
22	World Health Organization, Kenya
23	Plan International
24	National Council of Churches Kenya
25	AKAD Education Group
26	Clean Start
27	SUPKEM
28	Inter Religious Council of Kenya

## 3. List of schools for participating children in the forums during consultation on age of consent for sex

S/NO	NAIROBI COUNTY
1	Olympic Primary School
2	Raila Education Center
3	Ayany Primary School
4	Gifted Hands Educational Centre
5	Spurge Educational Center
6	New Life School
7	Global One Schools
8	Shine Educational Center
9	Prince of Peace Educational Center
10	Olympic High School
11	Prince John's High School

12	Langata Barracks Secondary School
13	Shunem Girls High School
14	Christian Family School
15	Toi Primary School
KISUMU COUNTY	
1	Miranga Primary School
2	Lunga Primary School
3	Ombo Primary School
4	Simba Gero Primary School
5	Langi Primary School
6	Ratta Primary School
7	Kuoyo Kaila Primary School
8	Siala Kaila Primary School
9	Namboyo Primary School
10	Diemo Primary School
11	St. Elizabeth Primary School
12	Asol Primary School
13	Onyinjo Primary School
14	Oluti Primary School
15	Miranga Secondary School
16	Asol Secondary School
17	Orando Secondary School
18	Ndiru Secondary School
KILIFI COUNTY	
1	Kimbule Primary School
2	Ganze Primary School
3	Baraka Primary School
4	Mwaeba Primary School

#### 4. Child participation in the Consultation Forums by County



#### 5. List of participants during the Validation workshop of the draft report on 'age of consent for sex' held at the Silver Springs Hotel Nairobi on 7th October 2019

No.	Name	Organization
1	Heidi Mimia	State Department for Gender Affairs
2	Peter Kabiru	State Department for Gender Affairs
3	Purity Jepchumba	State Department for Gender Affairs
4	Protus Onyango	State Department for Gender Affairs
5	Fatma Ahmed	State Department for Social Protection
6	Christabel Adhiambo	State Department for Youth Affairs
7	Waruinge Muli	Department of Children Services
8	Evalyn Omwega	Ministry of Education
9	Ezra Mwiti	Ministry of Education
10	Dr. Rose Wafula	Ministry of Health
11	Prof. Ruth Nduati	University of Nairobi (Pediatrics)
12	Dr. Florence Nyamu	Kenyatta University
13	Aisha Said	Kenyatta University
14	Jecinta Kagai	Kenyatta University
15	Samuel Muraya	Council of Governors
16	Roselyne Kabata	NCAJ
17	Vincent Akarah	National Councils for Persons With Disabilities
18	Victor Holi	National Police Service Commission
19	Elizabeth Juma	IWJAK-Judiciary
20	Jenipher Obetto	IAWS Kenya Chapter
21	Dinah Mwamba	Teachers Service Commission

22	Zipporah Musangi	Teachers Service Commission
23	Joseph Onyango	National Police Service Commission
24	Claris Kariuki	Office of AG and Department of Justice
25	Virginia Nelder	Kenya Law Reforms Commission
26	Mary Getonga	Law Society of Kenya
27	Ayan Shuku Ahmed	CAJ/Ombudsman
28	Sharon Munyali	Judiciary
29	Irene C. Ngetich	KESSHA
30	Dar Nyonchoka	KESSHA
31	Francis N. Ndirangu	KEPSHA
32	Ahmed M. Abdi	National Youth Council
33	Dr. Joyce Lavussa	World Health Organization
34	Milka Kariuki	CCGD
35	Masheti Masinyila	CCGD
36	Rebecca Theuri	Plan International Kenya
37	Nancy Okoth	Plan International Kenya
38	Beth Wairimu	Girl Aid Foundation
39	Nancy Kenyatta	FEMNET
40	Kathy Njuguna	GSDI
41	Odhiambo Oulele	AWC
42	Saoyo Tabitha	KELIN
43	Linda W. Kroegon	KELIN
44	John Mboya	WEL
45	Philip Otieno	Advocate for Social ChangeKenya (ADSCH)
46	Wangu Kanja	Wangu Kanja Foundation
47	Wawira Nyaga	EACSOFF
48	Ibrahim Muchelule	SUPKEM
49	Silvester Muthama	National Council of Churches of Kenya (NCCCK)
50	Pastor John Bulimo	Love in the Name of Christ-Ngong
51	Linda Ng'onde	DIAL- A-PAD
52	Philomena Nyambura	BUILDHER
53	Otieno Omboka	PeaceNet
54	Catherine Githae	Men Engage Kenya Network (MenKen)
55	Elsie Mulimu	CREAW
56	Faith Mutindi	DIAL A PAD
57	Joseph Mutie	OAIC/IRIK
58	Annelyn Barbara	Clean Start
59	Miriam Jomo	Mtoto News
60	Linus Nthigai	Inter-Religious Council of Kenya
61	Margaret Nyaga	Kenya Council of Catholic Bishops
62	Fr. Stephen Munguti	Kenya Council of Catholic Bishops
63	Dafalla Aisha	Msamaria Foundation
64	Martin Juma	Tunza Safeguarding
65	Eva Komba	PCF/Board Member
66	Ann Wambui	Mtoto News
67	Jane Anyango	Polycom Development

68	James Nyaigoti	Urban Radio
69	John Waithaka	Mediamax
70	Haron Hassan	RA Media
71	Julius Gacheru	Radio Waumini
72	Paul Kwanjira	KANCO
73	Hilda Akinyi	Polycom
74	Albert Bwana	Urban Radio
75	Simon Maina	BRITAM
76	Deric Ogola	Social Press
77	Peter Kimani	RTM T.V
78	Faith Chebet	Creative Media Concepts
79	Katunge Kiilu	Rapporteur
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5	Paul Kuria	NGEC
6	Bernard Sompoika	NGEC
7	Irene Bundi	NGEC
8	Josephine M. Mwatibo	NGEC
9	Lynette Kigotho	NGEC
10	Alice Njeri	NGEC
11	Muchiri Eric	NGEC
12	Rosebella Atieno	NGEC
13	Beatrice Owino	NGEC
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 Oginga Odinga Street,  
 Kisumu Town.

Nakuru Office  
 Tamoh Plaza, 1st Floor, Kijabe Street,  
 Nakuru Town.

Garissa Office  
 KRA Route off Lamu Road, Province,  
 Garissa Town.

Malindi Office  
 Malindi Complex, off Lamu-Malindi Road,  
 Malindi Town.

Kitui Office  
 Nzambani Park, off Kitui Referral Hospital Road,  
 Kitui Town.



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**NGEC**  
National Gender and  
Equality Commission

## **Minimum Age of Consent for Sex: Addressing the Dilemma**

A summary report of discussions and proposals  
from multi- sectoral stakeholders' fora, 2019

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