

VIEWPOINT

Balancing Protection and Autonomy: Adolescent Sexual Rights and the Limits of Criminal Law in Kenya

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A recent ruling by the High Court of Kenya in *HSO, AMO TA & Another v. Attorney General and 3 Others* on May 20, 2026, has exposed the tension between the duty to protect children from exploitation and the constitutional limits of such protection.¹ The court was faced with the question whether the prosecution of adolescents engaging in consensual, noncoercive, and non-exploitative sexual relations is constitutional. The petitioners argued that such prosecutions are discriminatory because they target boys as the perpetrators and girls as the victims. Their central argument, however, was that the impugned sections of the Sexual Offences Act (SOA) limited the rights of adolescents without meeting the proportionality and justification tests envisioned by the Kenyan Constitution.

Kenya's Constitution defines a child as any person under the age of 18, in line with the Convention on the Rights of the Child.² The SOA builds on this definition by providing that a child lacks the capacity to consent to sex.³ This statutory rule has informed the prosecution of defilement cases in Kenya, including cases involving adolescents whose sexual relations are alleged to be consensual, noncoercive, and non-exploitative.

Several considerations support strong legal protections against the sexual exploitation of children. First, children are more susceptible to manipulation and abuse. Second, there is evidence that exploitative sexual conduct causes significant harm to children in Kenya.⁴ Third, children in Kenya continue to face sexual abuse in the form of defilement and indecent acts, among others.⁵ A 2015 study of adolescents aged 13–17 found that 27% of respondents had experienced indecent touching by classmates, 21% by strangers, and 19% by neighbors.⁶ Against this backdrop, coercive, nonconsensual, and pressured sexual encounters may also occur between close-in-age adolescents, underscoring the need for legal protection within adolescent sexual relationships.

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Article 53(2) of the Constitution mandates the state to consider the best interest of the child in all its actions.⁷ The primary legal instrument for protecting children from sexual abuse and exploitation is the SOA, which criminalizes defilement and attempted defilement under sections 8 and 9, respectively. Section 11 prohibits any indecent act with a child, while section 43(4)(f) provides that children lack the capacity to consent to sexual conduct.⁸ These provisions establish a strict liability regime in which any sexual conduct with a person under the age of 18 in Kenya is a crime.

But what happens when one adolescent consents to sex with another adolescent in circumstances that are noncoercive and non-exploitative? The SOA does not distinguish between such situations and the coercive, exploitative, and nonconsensual conduct it is intended to guard against. The result is the blanket criminalization of adolescent sexual activity irrespective of the circumstances in which it occurs. The rationale for this can be found in section 43(4)(f) of the SOA, which provides that a child has no capacity to consent to sex. Without the necessary qualifications, this provision outlaws any sexual relations involving a child, even if such relations are between consenting adolescents in non-exploitative and noncoercive environments. As the *HSO* judgment recognized, however, the protection envisioned by this provision must be interpreted in full consideration of children's rights to dignity, privacy, and autonomy.⁹

The court's reasoning in *HSO*

While the SOA rightly protects children and punishes sexual abuse against them, applying it without regard to constitutional rights risks turning adolescents into perpetrators. In effect, the absence of a legislative mechanism distinguishing adult predation from consensual peer intimacy means that adolescents who engage in consensual sexual relationships may face the same criminal consequences as adults who prey on children. Such blanket criminalization is problematic, as the United Nations Committee on the Rights of the

Child has noted, particularly because adults who engage in consensual sexual conduct are not punished in the same way.¹⁰

Before the *HSO* judgment, Kenyan courts had considered this issue, albeit inconclusively. In *P.O.O. (A Minor) v. Director of Public Prosecutions*, the High Court observed that adolescents in consensual relationships should be counseled instead of criminally sanctioned.¹¹ Similarly, the Court of Appeal in *Wambui v. Republic* found fault in the incarceration of adolescents arising from consensual relationships.¹²

In *HSO*, the court interrogated whether sections 8, 9, 11, and 43(4)(f) of the SOA satisfied the proportionality test under article 24 of the Constitution—which outlines the test for the limitations of rights provided in the Bill of Rights—when applied to consensual peer relationships between adolescents. In essence, the court sought to determine whether limiting the rights of adolescents—including their rights to dignity, privacy, nondiscrimination, and reproductive health care—met the proportionality test. It found that blanket criminalization failed the minimal impairment requirement because it extended criminal sanction beyond conduct involving coercion, capturing consensual adolescent relationships. The court therefore ruled that sections 8, 9, 11, and 43(4)(f) of the SOA were unconstitutional insofar as they criminalized consensual, noncoercive, and non-exploitative sexual conduct between adolescents of similar ages.

The road ahead: Adolescent sexual and reproductive health and rights and the need for reform

While the judgment is timely, the court's failure to set a timeline for implementation creates uncertainty as to when the government should publish guidelines on handling cases of consensual, noncoercive, and non-exploitative sexual conduct between adolescents. Even more glaring is the court's failure to resolve the issue of "close in age proximity" in the context of peer sexual relations

among adolescents. Instead, it left that determination to Parliament.

It is important to note that nonconsensual, coercive, and exploitative sexual relations involving adolescents remain punishable under the SOA. The *HSO* judgment did not invalidate this. Rather, it recognized, first, that under the doctrine of evolving capacities, adolescents are entitled to exercise autonomy and should not be punished for doing so. Second, it highlighted the urgent need for Kenya to reconsider its approach toward adolescents' access to sexual and reproductive health services. As the court noted, adolescents in Kenya are sexually active and must be protected through access to sexual and reproductive health information and services free from discrimination. Essentially, this is a call for the removal of the parental consent requirements standing in the way of adolescents' access to health services.

Although Kenya has comprehensive guidelines and policies on adolescent health care, including the National Reproductive Health Policy 2022–2032, they still require parental consent before minors can receive reproductive health services.¹³ This requirement is informed by section 9, read in conjunction with section 8, of the Health Act, which requires consent from a minor's guardian before any health service is provided.¹⁴

In light of the *HSO* ruling, it is clear that adolescents in Kenya should be able to access sexual and reproductive health services and information free from structural and legal barriers. Such access is essential to protecting adolescents from the risks associated with sexual relations, including teenage pregnancy, sexually transmitted infections, and sexual and gender-based violence. Kenya should therefore consider lowering the age of consent to medical services, as was recently done in Rwanda.¹⁵

References

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