

## Sexual Offences in Kenya Courts, 1960S-2008<sup>1</sup>

Professor Brett Shadle<sup>2</sup>

2010.

In 2006, the Kenya parliament enacted into law the Sexual Offences Act, a major milestone in the histories of sexual violence and of the law. The law came in response to a perceived rise in cases of rape and defilement, to a penal system that defined sex crimes as offences against morality, to a criminal code that enjoined maximum but no minimum sentences for sexual offences, and to a judiciary that appeared not to treat sexual offences with sufficient gravity. Appointed MP Njoki Ndung'u, a longtime activist in women's affairs, sponsored the bill and received significant harassment and opposition from certain male colleagues. In the end, however, much of the public and a majority of MPs agreed that the courts had to take a tougher stance against sexual offenders.

Among the commonest arguments in support of the SOA was that magistrates and judges consistently imposed lenient sentences on sexual offenders. As the website established to guide implementation of the Act states, sexual offenders often received "a mere slap on the wrist."<sup>1</sup> In this paper, I do not wish necessarily to challenge that position: a different study would be necessary to compare sentences for sexual offenders with sentences for other criminals, and perhaps rates of recidivism, and so on. I also do not wish to suggest that the Kenya legal system has, on the whole, dealt fully and positively with sexual violence cases. Evidence abounds that cases go unreported or uninvestigated, are sloppily handled and not taken seriously.<sup>2</sup> The level of acquittals at the magistrate level is also apparently high. Others have argued that the courts have failed to rule in unbiased and consistent ways.<sup>3</sup>

These criticisms of the courts may well be accurate, yet I suggest that they overshadow significant historical changes in how the courts have handled sexual violence cases. In a publication by the Nairobi-based NGO Coalition on Violence against Women (COVAW), it is argued that the courts demonstrate "a lack of appreciation of the need to protect women and girls from sexual violence. These include gender insensitivity or indifference, leniency in sentencing, undue regard and emphasis on procedure and precedent etc."<sup>4</sup> The present study shows, however, that in certain ways magistrates and judges from the 1990s into the 2000s have taken sexual violence cases more seriously than was true from the 1960s through the 1980s. I argue that, since the 1960s and especially from the early 1990s, (1) magistrates and judges have been imposing increasingly harsh sentences on sexual offenders; (2) high court judges have been increasingly less likely to allow appeals by sexual offenders; and (3) members of the bench have become more sympathetic to women's complaints and less likely to assume that the complaint has been falsified. I suggest that these trends have to do with larger societal changes; the decline in use of corporal punishment and changes in the penal code are shown not

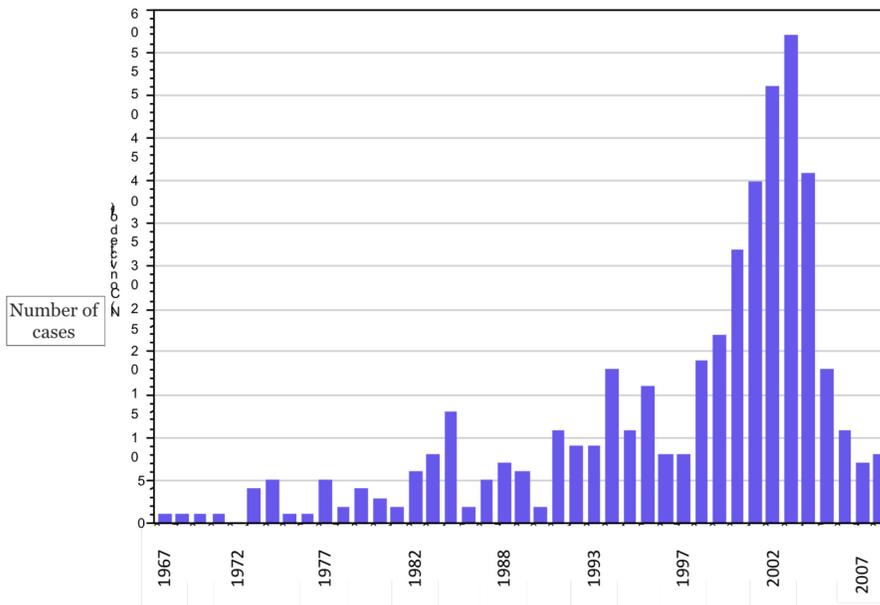
<sup>1</sup> Previous versions of this paper were presented at the VAD/German Association of African Studies annual conference, Mainz, April 10, 2010, and the European Social Science History Conference, Gent, Belgium, April 14, 2010. My thanks to Michael Murungi, Ann Asugah, Heather Switzer, and Amanda Clark who all assisted in collecting many of these files and entering the data. Thanks also to Eric Vance of LISA at Virginia Tech for advice on statistical programs. Funding for some of the research on which this paper is based was provided by the Department of History, Virginia Tech.

<sup>2</sup> Department of History, Virginia Tech University

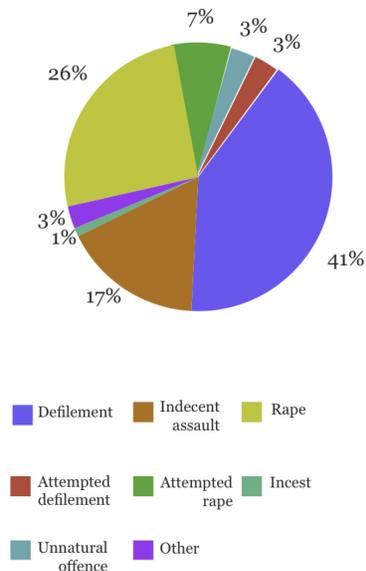
to have a causal relationship with rising custodial sentences.

This paper also evaluates the types of cases and of evidence that correlate with harshest punishment and unsuccessful appeals. In particular, members of the judiciary have imposed longer custodial sentences on those who abuse girls than those who assault women. While magistrates and judges vary in the types of evidence they find essential, medical evidence has relatively little correlation with sentencing, but greater significance in how appeals are adjudicated. The presence of physical evidence (torn clothing, etc.) correlates to stiffer punishments, as does the use or display of a weapon during commission of the offence. I suggest that while members of the bench have become less skeptical of women’s words, they tend to reserve harsher punishment for cases in which the question of consent can be emphatically ruled out.

My sources for this paper are 486 sexual offense cases from 1966 to 2008 (Figure 1). The cases include defilement (41% of the total), rape (26%), indecent assault (17%), attempted rape (7%), attempted defilement (3%), unnatural offences (3%), and small number of other cases such as incest (Figure 2). To the best of my knowledge, I have collected all appeals (published and unpublished) in sexual cases from the Court of Appeals and the High Court during this period; these appeals normally include details from prior hearings.<sup>5</sup> Magistrates’ courts records, unfortunately, are routinely destroyed: appeals cases are thus the only evidence we have from those courts. Of particular importance to this study is the use of unpublished cases. While published cases have a greater influence as precedents, these are a relatively small number of the sexual offences heard in the courts. To understand larger trends – in the high court and in the magistrates’ courts – unpublished cases must be used.



**Figure 1: Distribution of cases by year**



**Figure 2: Distribution of cases by crime**

This paper draws on a combination of qualitative and quantitative evidence. The amount of data in the judgments varies: some judgments include only the bare bones, others include details as to the place of the crime, the ages and relationship between the parties, if medical evidence was recovered, and so on. Using JMP software, I have completed some basic analysis focusing on several areas: levels of punishment, percentage of appeals allowed, dismissed, and revised, sex of magistrates and judges, types of evidence presented in court, and so on. This paper thus contributes to quantitative and historical studies of the law, a relatively unexplored aspect of African legal studies.

I should like to point out the limitations of my evidence and hence of this paper. First, as noted, I do not have all sexual crimes heard in magistrates' courts, only those which were appealed. I am seeking data on the number of sexual crimes heard by Kenya magistrates annually, to gauge the percentage for which I have data. My future research will include reviewing newspaper reports of rape cases to glean further information on cases for which the legal records no longer survive. Second, I need to compile similar data for other criminal cases – assault, theft, and so on – to determine if the changes I trace here are specific to sexual offences or were part of larger trends in the Kenya criminal justice system. Finally, I hope eventually to conduct interviews with magistrates and judges to gain a more detailed sense of their ideas about sexual violence and the law.

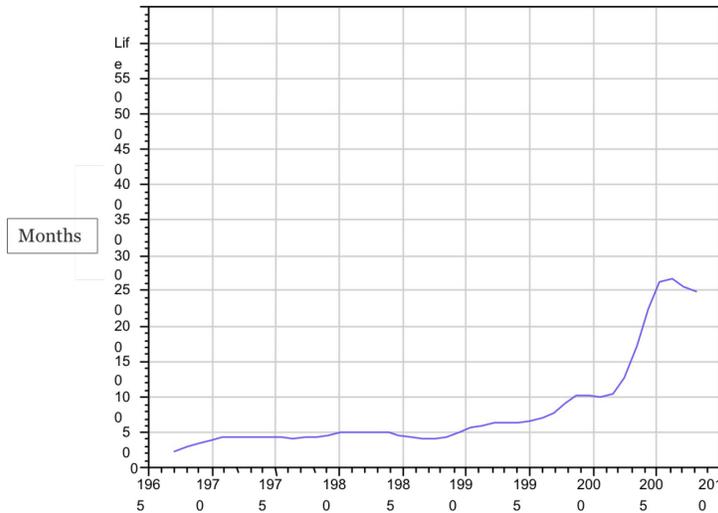
### **Trends In Sentencing And Appeals**

While no strict sentencing guidelines exist, several unwritten rules seem to be in the minds of magistrates and judges when determining punishment. Maximum sentences appear reserved for the most horrific cases – the use of physical violence, particularly on young children – and for repeat offenders. Mitigation tends to be reserved for first offenders and those who plead guilty (and thus, several judges note, save the court's valuable time). Otherwise, sentencing tends to reflect personal opinions of the judicial officials and larger social trends – changing ideas about women and children, impressions of upticks in sexual crimes, the spread of

HIV/AIDS.

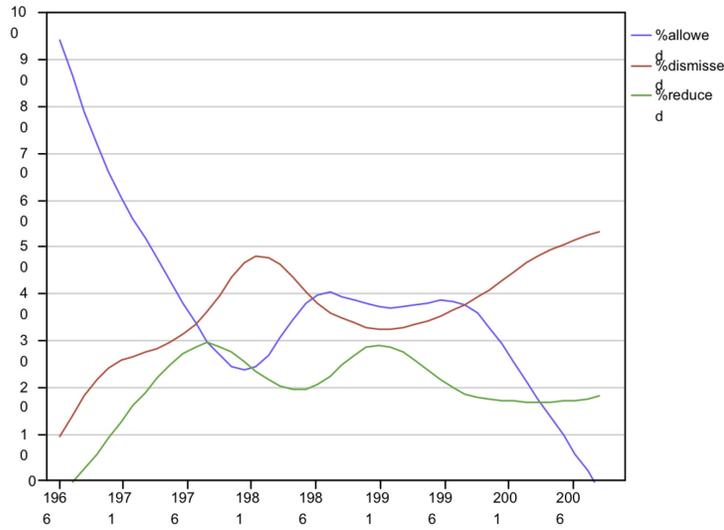
**Quantitative evidence**

Figure 3 shows the mean sentences in months for sexual crimes in magistrates' courts between 1967 and 2006 <sup>6</sup>. Sentences averaged around four years from the late-1960s through the end of the 1980s. Starting around 1990, however, average punishment began steadily to increase: from 50 months in 1990, to 100 months in 2000, to over 250 months in 2005. (Below I disaggregate changes in sentencing for various sexual offences.)



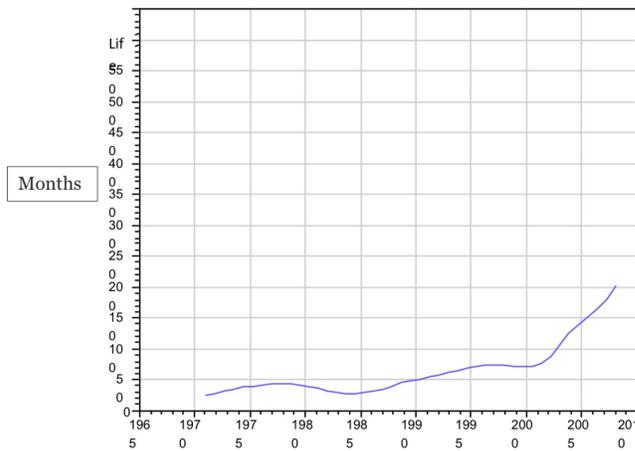
**Figure 3: Mean sentences in months, magistrates' courts**

Data from the high court show similar patterns. When hearing appeals, judges have essentially three options: allow the appeal (on factual grounds, on a point of law, or because of procedural failures by police or prosecution) and discharge the appellant, dismiss the appeal and confirm the judgment and sentence, or confirm the judgment but revise the sentence. As Figure 4 shows, high court judges have become increasingly likely to confirm judgment and sentence, and decreasingly likely to allow appeals and to reduce sentences. The percentage of all sexual crime appeals in which judges reduced sentence reached nearly 30% around 1991, then began to decline, reaching the mid-teens in 2004. In the late 1960s high court judges allowed around 90% of appeals, and the percentage of successful appeals held around 35% to 40% through much of the 1980s and 1990s. Since the late 1990s, however, this has dropped precipitously. (These numbers include only those allowed on factual grounds or a point of law, and does not include those quashed because of procedural irregularities.) Similarly, the percentage of appeals dismissed has risen from 10-20% in the 1960s to over 50% by the mid-2000s.

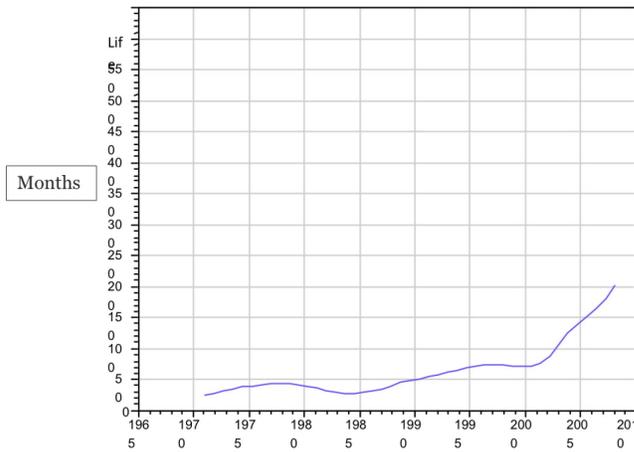


**Figure 4: Percent of appeals allowed, dismissed, and revised, high court**

Revised sentences in the high court have become lengthier ( Figure 5). Thus even when judges consider magistrates’ punishments excessive and reduce them, the level of these reduced sentences have increased over time: from around 50 months in the early 1990s to nearly 150 months in 2005 (Figure 5). High court judges have also recently showed a greater willingness to enhance sentences which they believed unconscionably low (Figure 6). High court judges enhanced sentences only three times before 2000, compared with eleven times in the subsequent six years.



**Figure 5: Mean sentence in months on revision by High Court**



**Figure 6: Mean sentences in months in cases in which the sentence was enhanced by the High Court**

**Qualitative evidence**

In addition to the quantitative evidence showing that the judiciary has over time treated sexual offenders more harshly, qualitative evidence demonstrates new ideas about sexual violence. From the 1960s into the 1980s, judges of the high court and court of appeal harbored strong suspicions of female complainants’ motives. From the 1990s, however, judges were much more likely to accept women’s accusations.

Much like justices in the colonial era and in English courts, Kenyan judges in the 1970s and 1980s remained highly skeptical of women’s accusations of rape. Hale’s dictum went unquestioned: “rape is an accusation easily to be made, hard to be proved, and harder yet to be defended by the party accused, tho’ never so innocent.” Thus in 1970, Judge Simpson allowed an appeal of a convicted rapist: “It is hardly conceivable that a married woman with experience of sexual intercourse could be forced to submit to rape five times without being able to escape or raise an alarm. Moreover one would expect some injuries – bruising at least. There is no evidence of such injuries.”<sup>77</sup> Two years later, Simpson and Wicks released an appellant upon concluding that the woman had, at least before having sex, consented. The basis for this conclusion: her knickers were not ripped, there was no evidence of injury to her, and she had spoken freely with the appellant earlier that night. They explained away her cries by this (unsubstantiated) reasoning: “she had been discovered having intercourse in the open and that she found intersourse [sic] painful during menstruation and that she changed her mind during the course of the act.”<sup>8</sup> (The implication: once consent has been given it cannot be revoked.)

Mitigating circumstances for an appellant could even be found in the actions of an 11 year old victim. Justices Madan, Law, and Miller heard the appeal of a man convicted of defilement. Although they declined to release him – he had in fact pleaded guilty – they reduced his sentence after being provided with new evidence:

Mr Gatonye for the appellant has produced to us a letter and an envelope written by the girl to the appellant before the commission of the offense. Both documents are amorous and they show the girl was friendly and she was encouraging the appellant. Although the envelope and letter were in the

possession of the prosecutor they were not produced to the first court, as they should have been, nor also to the High Court upon the first appeal. If that had been done the appellant may well not have received the severe sentence of four years imprisonment with hard labour and fifteen strokes. There were mitigating circumstances known to the prosecution which they failed to bring to the notice of the two courts below who may be said unknowingly to have involved themselves in an error of principle when the appellant was sentenced.

The justices reduced his sentence from 4 years imprisonment and 15 strokes to 1 year and 5 strokes.<sup>9</sup>

High Court judge Mbaya in 1982 heard an appeal of indecent assault, for which the appellant had been sentenced to 3 ½ years imprisonment. The woman explained how she had met the appellant to discuss purchasing land, and continued the conversation at his home. By evening, he had become combative, threatened to kill her, and raped her. Mbaya, however, believed that no rape had taken place: "In view of the casual conduct of the complainant in feeling comfortable and submitting to sexual intercourse with appellant in his house without protest I am of considered judgment that the appellant told the truth" about the sex being consensual. The appellant was released.<sup>10</sup> The next year, justices Madan, Potter and Chesoni insisted on the need for corroboration in sexual offences cases because "Women make accusations of sexual and indecent assaults for all sorts of reasons."<sup>11</sup> of particular note was Judge Patel, who into the early 1990s carried on these lines of reasoning. In his ruling in a 1991 rape case, he doubted the accusation. "It is common knowledge," he wrote, "that young girls who have been out for a night or so in the company of their male-friends when discovered turnaround and make allegations of rapes." Moreover, she had failed immediately to inform her neighbors that she had been raped, and waited until the next day to go to the police – that a woman might not wish to announce to her village that she had just been violated did not seem to occur to the judge.<sup>12</sup>

From the early 1990s magistrates and judges appear to have been less likely automatically to question women's motives. Prior relationships between accused and victim held less weight. As Judge Mbaluto explained in a 1992 appeal, "if there was no consent it did not matter a bit that the complainant was the appellant's girlfriend since the law of this land does not permit men to rape their girlfriends."<sup>13</sup> Echoing legal reasoning I have previously recovered from Gusii African courts, Khaminwa, J, disregarded an appellant's claim that his accuser had consented to sex (a claim he hoped to prove by arguing that they had been lovers). "If it is true as he says they did it regularly why should she now complain," Khaminwa wondered. "There is nothing to indicate that she had any reason to complain this time at all."<sup>14</sup> Similarly, Judge Lesiit rejected one appellant's attempt to raise doubts in his 13 year-old accuser. She had not reported their liaison to anyone, but three months later, upon discovering that she was pregnant, she ran away from home:

In fact running away from home was a natural reaction that was motivated by two factors, one a realization that the Appellant had rejected her after taking advantage of her naivety and innocence for a couple of days and secondly the realization that she was pregnant and especially at her age. A finger cannot be pointed at the Complainant. She was a child. The issue of her consent to the sexual intercourse is inconsequential.<sup>15</sup>

Unlike the 1981 case in which a letter from an 11 year old could be counted as mitigation, in this 2005 case the actions of the 13 year old complainant were immaterial.

In one 1994 case, the complainant admitted that she had gone with the appellant to exchange sex for money. He instead took her to a house where he and two others gang-raped her. Judge Mbaluto insisted that being a sex worker and agreeing to sex did not imply absolute consent, and that even in such an instance a woman could change her mind: "Even if he had paid some money to the complainant he was not entitled to force her into sexual intercourse."<sup>16</sup> Another man was released on appeal, having been convicted of raping his lover, already pregnant with his child. Judge Mwera made certain to note that the appeal succeeded only on evidentiary grounds: "But this should not be mistaken to mean that a man cannot be guilty of rape even in such circumstances."<sup>17</sup>

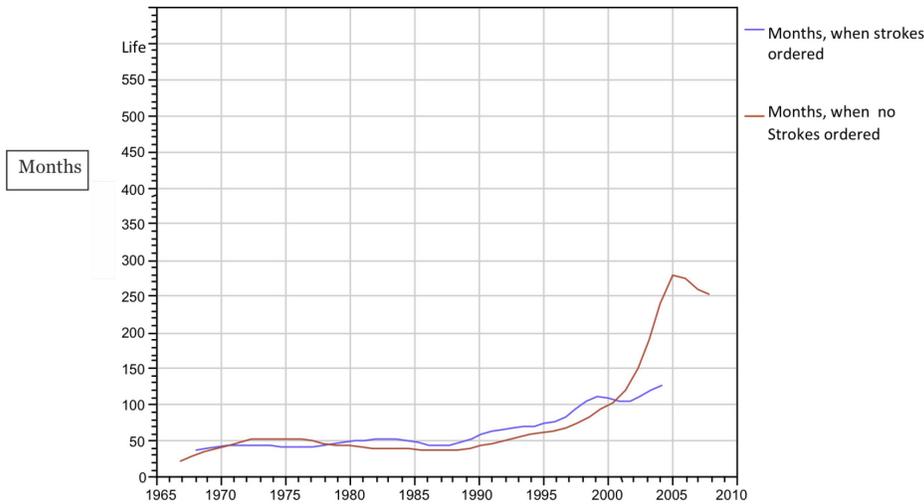
Some judges continued to doubt, in individual cases, the veracity of the complainants' story. Yet it was less common to make broad generalization about women and their willingness to lodge false rape claims. Magistrates and judges have also noted the deep, long-lasting psychological and emotional injuries defiled girls suffered. Judge Martha Koome pointed out "the irreparable psychological trauma of rape" that women faced.<sup>18</sup> In 2005 the Court of Appeal confirmed a thirty-year sentence, and noted that the appellant had "defiled a girl of only three years and has most probably ruined her whole life."<sup>19</sup> Judge Kimaru turned away an HIV+ appellant sentenced to life for defilement. "The dreams of the complainant," Kimaru wrote, "of having a bright future and may be [sic] having a family was shattered by the singularly beastly and brutal act of the appellant."<sup>20</sup> Thus it appears that magistrates and high court judges since 1990 have taken sexual violence cases more seriously and believe that sexual offenders deserve harsher punishment.

### *Explaining changes*

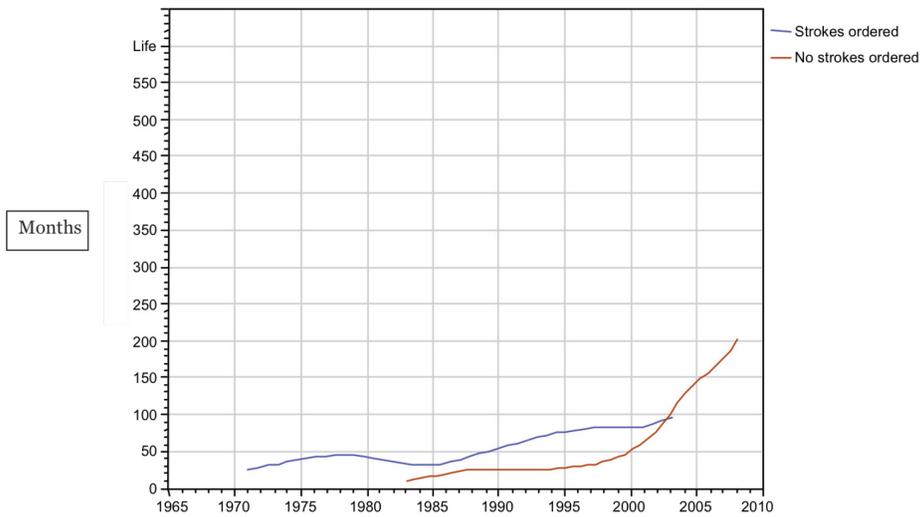
In this section I examine four factors that can only partly explain trends in sentencing: the decline in corporal punishment, changes in the penal code, the inclusion of more women on the bench, and the presence of HIV or other sexually transmitted infections (STIs).

### *Corporal punishment*

Until 2003, when the parliament eliminated corporal punishment, criminals could be sentenced to strokes with the cane – 24 for rape and defilement, 12 for indecent assault. Although (as noted in a 1995 judgment) the Penal Code "enjoin[ed] the court to include corporal punishment where the law so provide[d],"<sup>21</sup> not all magistrates did so: in about ¼ of the cases in which the law allowed strokes, magistrates imposed imprisonment only. The law did not provide any sentencing guidelines in terms of how many strokes should accompany a certain length of imprisonment, but left the matter to the discretion of the magistrate. Magistrates tended to impose strokes on the more egregious cases: the mean months imposed in cases in which strokes were also ordered was, during the 1980s and 1990s, several months higher than the average when no strokes were ordered (Figure 7). A similar pattern was followed in cases on appeal to the high court (Figure 8).

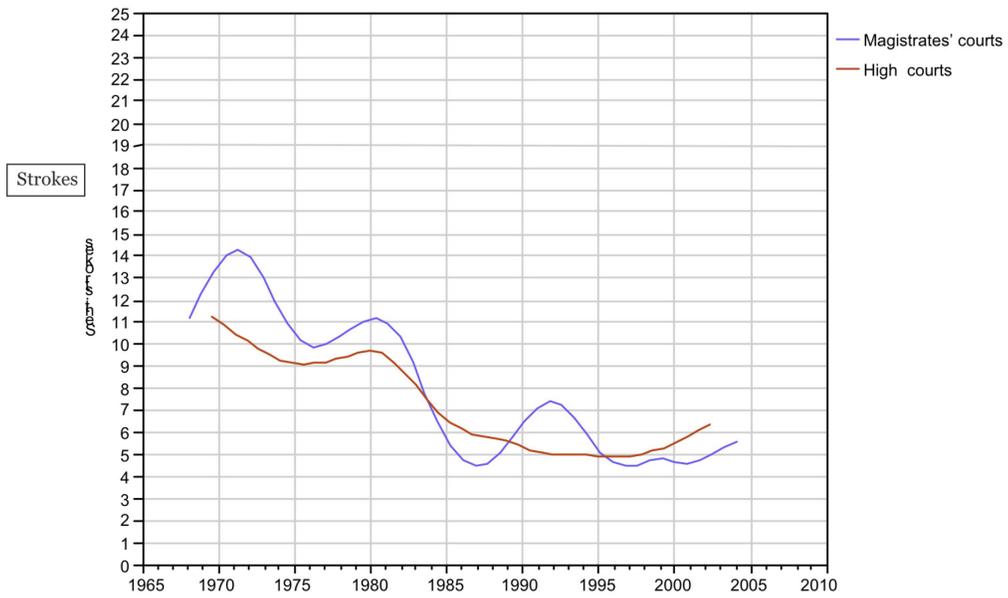


**Figure 7: Comparison of mean months punishment, cases in which strokes were ordered and not ordered, magistrates' courts**

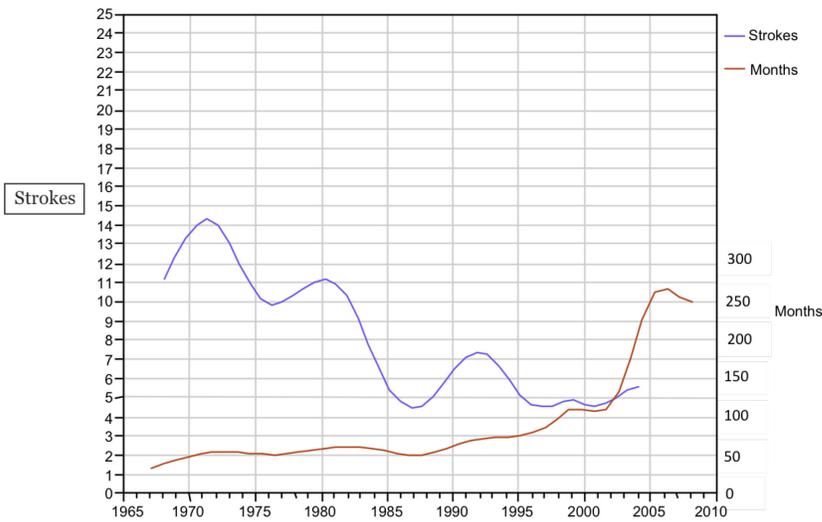


**Figure 8: Comparison of mean months punishment, cases in which strokes were ordered and not ordered, high courts on appeal**

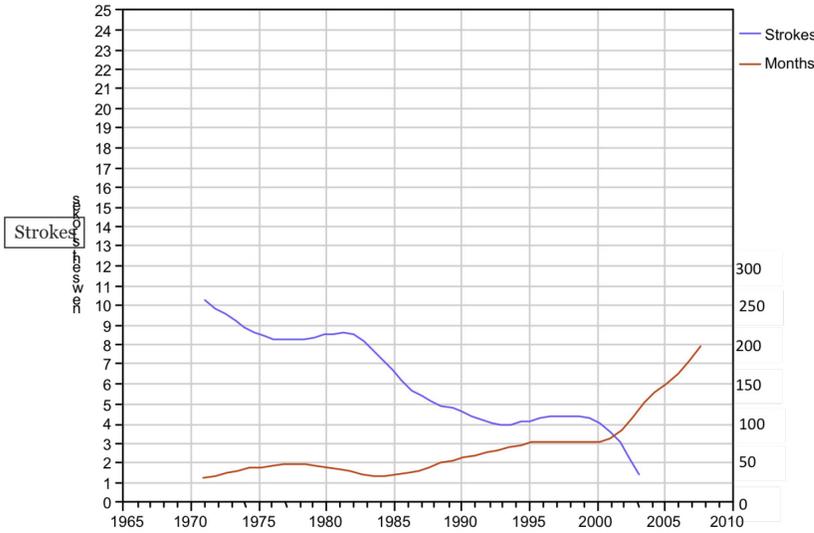
Although the pattern is not entirely clear, the basic trend was for magistrates to impose fewer strokes of the cane over time, with the mean settling to around 4 or 5 after 1995 (Figure 9); the main exception concerns an increase for men convicted of defilement between the late 1980s and early 1990s. One explanation for longer prison sentences might have been that magistrates and judges were shifting from physical punishment to incarceration: lowering the number of strokes while increasing the length of imprisonment. Overlaying the data does not show such a correlation, however (Figures 10 and 11). By the mid-1990s, when the length of prison sentences began a rapid increase, the number of strokes imposed leveled off. Further research is required to explain this decline in corporal punishment; this may be a trend across all crimes. But the increasing severity in sentences of imprisonment was not a strategy to offset declining severity in strokes.



**Figure 9: Mean number of strokes ordered, magistrates' courts and on revision by high courts**



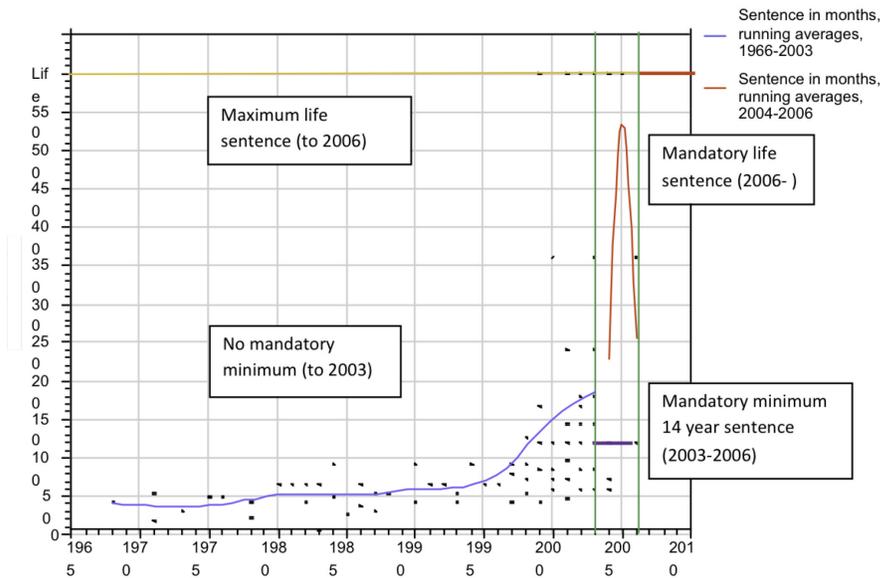
**Figure 10: Comparison of mean strokes and mean months ordered in magistrates' courts**



**Figure 11: Comparison of mean strokes and mean months ordered in high courts**

*Changes in the penal code*

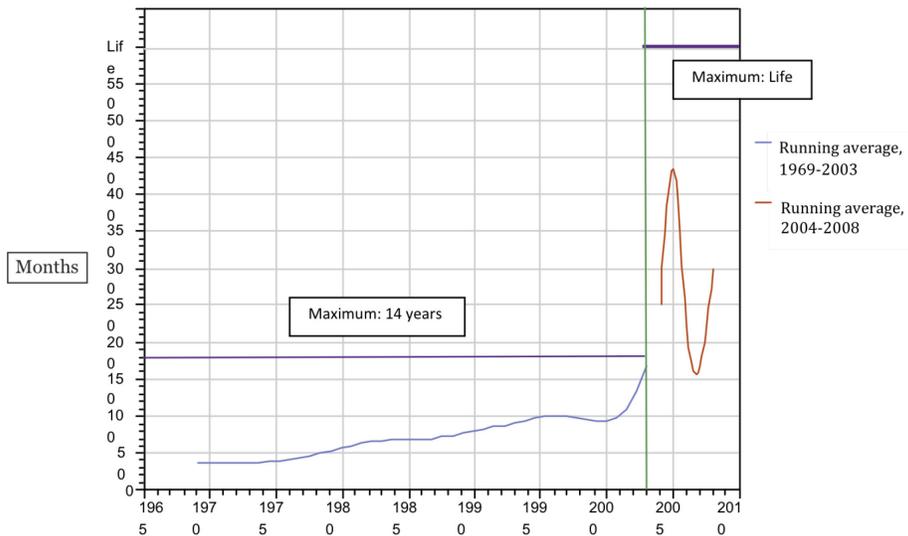
Changes in punishment rose throughout the period under consideration only partly in relation to changes in the penal code. Rape was a capital crime from 1926 into the 1950s, at which point the maximum penalty was reduced to life imprisonment with strokes; until 2006 the only subsequent change was the mandating of minimum punishment of 14 years in 2003. Figure 12 shows that sentencing in rape cases had begun to rise well before the enactment of mandatory minimums in 2003.



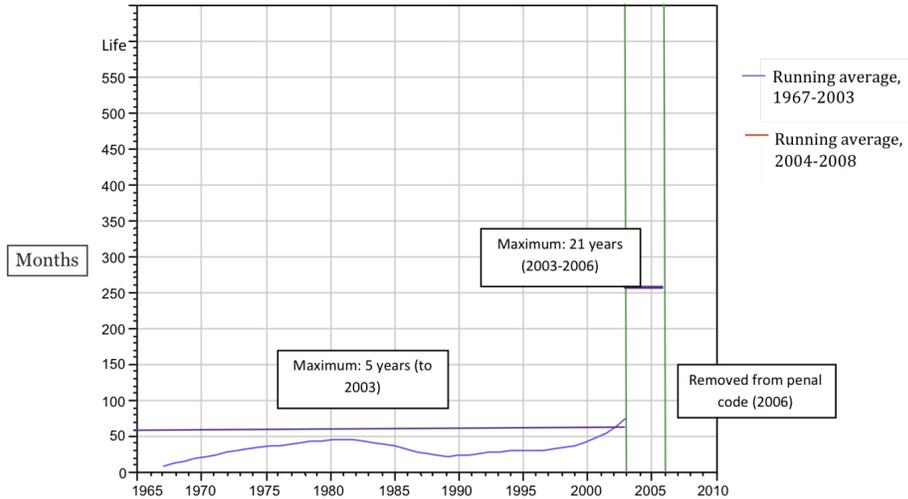
**Figure 12: Comparison of running average sentences for rape, 1969-2003 and 2004-2006**

Defilement, prior to 2003, could be punished by up to 14 years imprisonment with strokes; in 2003, the penalty was enhanced to life imprisonment. The Sexual Offences Act enacted mandatory minimum sentences of life imprisonment when the victim is under 11 years of age; a mandatory minimum of 20 years imprisonment when the victim is aged 13-15; and 15 years when the victim is aged 16-18. Those guilty of indecent assault prior to 2003 could be imprisoned for up to 5 years; this was increased to 21 years in 2003. In 2006 indecent assault was eliminated from the penal code. Also in 2003, the evidentiary requirements were loosened for sexual crimes involving children. As part of the Criminal Law (Amendment) Act (6 of 2003), so long as the court is convinced that the child’s evidence is truthful, that evidence need not be corroborated for the court to reach a guilty verdict.

Examining trends in defilement and indecent assault sentences demonstrate that magistrates had been imposing harsher sentences well before 2003. Once the law was changed in 2003, however, magistrates quickly took advantage of their new powers and began imposing yet harsher sentences. Figures 13 and 14 disaggregate running five year averages from before and after 2003. Figure 13 shows that prison sentences for indecent assault increased, albeit slowly, from the early 1990s until 2002. After the legal change in 2003, however, punishment increased rapidly: doubling from under 50 months to over 100 months. Similarly, Figure 14 demonstrate that punishment for defilement increased steadily from the late 1960s to 2002. Once the maximum sentence was raised to life, magistrates quickly extended prison sentences to beyond the old maximum of 14 years.



**Figure 13: Comparison of running average sentences for defilement, 1969-2003 and 2004-2008**

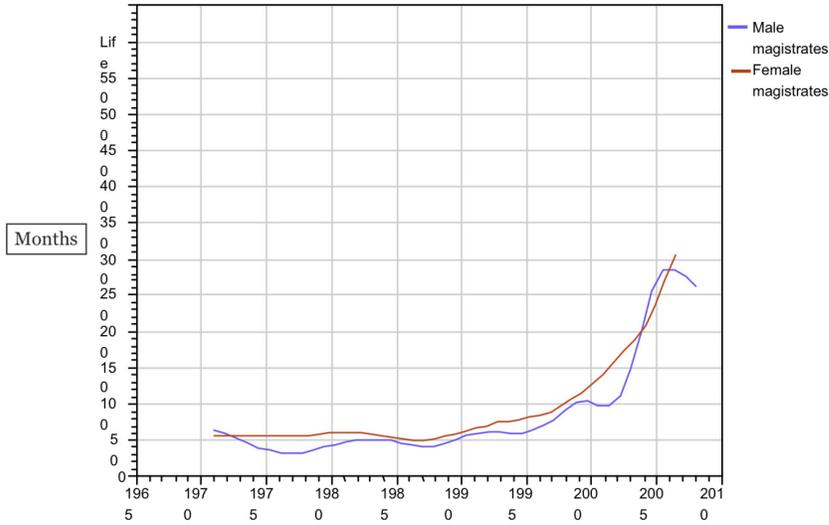


**Figure 14: Comparison of average sentences for indecent assault, 1967-2003 and 2004-2006**

Sentences that may previously have seemed harsh, relative to the old maximum, now seem acceptable or even lenient, relative to the new maximum.<sup>22</sup> For example, a magistrate convicted a man of defilement and sentenced him to the recently-enacted maximum punishment, life imprisonment: "Accused is treated as a first offender. Mitigation is considered. Offence is serious, complainant conceived at early age and definitely this will affect her and her studies for the rest of her life. Offence therefore calls for custodial sentence." On appeal, Judge Lesiit, although "mindful that the act of defilement of a child is an act of physical aggression and cannot be trivialized at all," also noted that the appellant was a first offender, he was young, and the offense was not aggravated. The maximum, he thought, was not warranted in such a case. Nonetheless, he ordered the appellant to remain in prison for 24 years – 10 years longer than the maximum only of only two years prior.<sup>24</sup>

#### *Gender and the judiciary*

The Kenya judiciary had for many years been an overwhelmingly male arena. By 1980 there were only two female magistrates, and at the inauguration of the Kenya Women Judges Association in 1993 only two women served as judges of the high court. Over the past fifteen years, however, these numbers have expanded dramatically: half the magistrates, 18 judges of the high court, and one judge of the Court of Appeal are women. While the introduction of female judicial officials may have indirectly led to the courts' treating sexual offenses more harshly, it was not the primary cause. As Figure 15 shows, average months imprisonment handed down in sexual cases by female magistrates was higher than that of male magistrates for virtually the entire period from the early 1970s through the early 2000s. Yet the sentences given by male magistrates, if relatively lower, still increased at about the same rate as did their female colleagues.



Male magistrates: n=275 Female magistrates: n=43

**Figure 15: Comparison of mean months punishments by male and female magistrates**

It is likely, however, that female magistrates and judges had an indirect effect on sentencing through their education of fellow legal officials. Joyce Aluoch, for example, has taken an active role in children's, gender, and human rights issues. After 19 years as a magistrate, she was elevated to the High Court in 1993. During her time on the Kenya High Court she established the Family Division, was elected to UN and African Union commissions on the rights of children, chaired the Kenya Women Judges' Association, helped train judicial officials in human rights issues, and chaired a task force dedicated to implementing the SOA.<sup>24</sup> Aluoch and Effie Owuor, then the only women sitting on the High Court, founded the KWJA. Among other issues, such as supporting the Family Division, the Association holds workshops for judges and magistrates on issues such as sexual violence.<sup>25</sup>

Without interviews, it is difficult to measure the impact of the presence and activities of women magistrates and judges. We can, however, get a sense of what it could mean to have a women's voice in the court. In a 1987 case the complainant was found not to have been a virgin at the time of the assault and did not suffer physical injuries. According to the magistrate, state counsel Mrs. Chana "stoutly protested that the Court must not turn the complainant, who was the victim, into an accused person."<sup>26</sup>

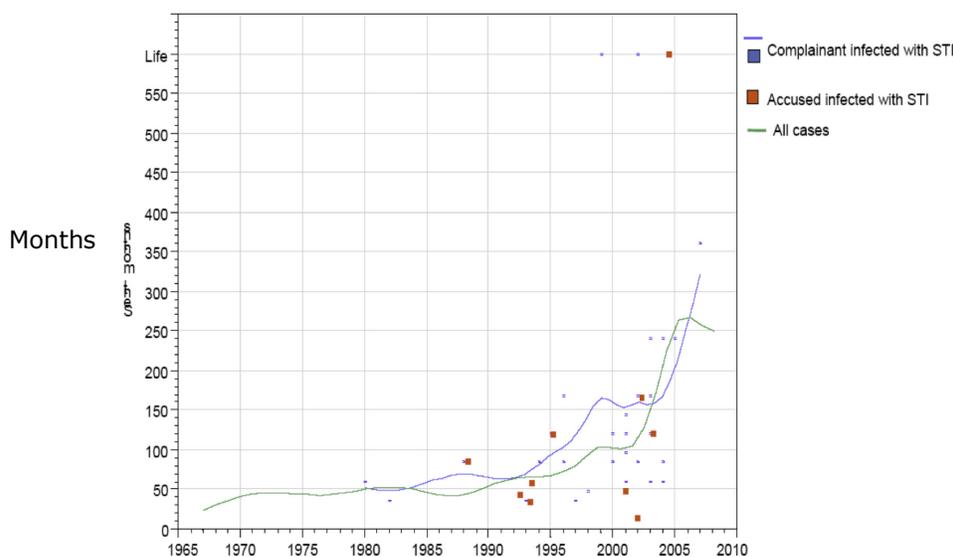
#### *Sexually-transmitted infections*

Changes in sentencing also reflect a heightened concern among the judiciary over the HIV/AIDS epidemic. The Kenya government was slow to admit the existence and extent of the virus.<sup>27</sup> President Moi himself did not address the epidemic until the late-1980s and for some years made conflicting comments about how to deal with it.<sup>28</sup> By 2001, it was estimated that 9% of the adult population (15-49) had been infected, equal to 1.5 million people.<sup>29</sup>

The possibility of contracting HIV(or another STI) via rape was clearly on the minds

of many members of the judiciary. In dismissing an appeal, Oguk, J, in 1995 noted that the sentence was on the higher side, "but in the present circumstances where we are living with the AIDS menace with us," it was not excessive.<sup>30</sup> Several noted that rape was now nearly equivalent to attempted murder. Judge Kimaru in 2004 remarked that "this court cannot ignore the fact that the appellant was armed with a lethal weapon [HIV/AIDS] which weapons he used to potentially inflict a fatal injury on an innocent girl child."<sup>31</sup> The threat that the virus posed not only to the victim but to society at large was of special concern to Judge L. Njagi. "In these days of HIV/aids," Njagi wrote, "would-be rapists ought to think twice, which clearly the appellant did not do. Contracting the HIV virus invites an early death to the individual, and spreading it spells disaster to family units as well as to a healthy, working nation."<sup>32</sup>

Curiously, however, punishments tended to be higher in cases in which the complainant was infected with an STI than those in which the accused was infected. As shown in Figure 16, from the mid-1980s punishment levels in cases in which the complainant had an STI was consistently higher than the overall levels (save the years 2003-06). This is true even when it was not proved, or even suggested, that the victim was infected because of the assault. Because medical testing of accused men has been relatively rare, there are not enough data to mark trends in sentencing for men with STIs. The punishment in those cases, however, tend to fall below the average punishment in cases in which the complainant has an STI.



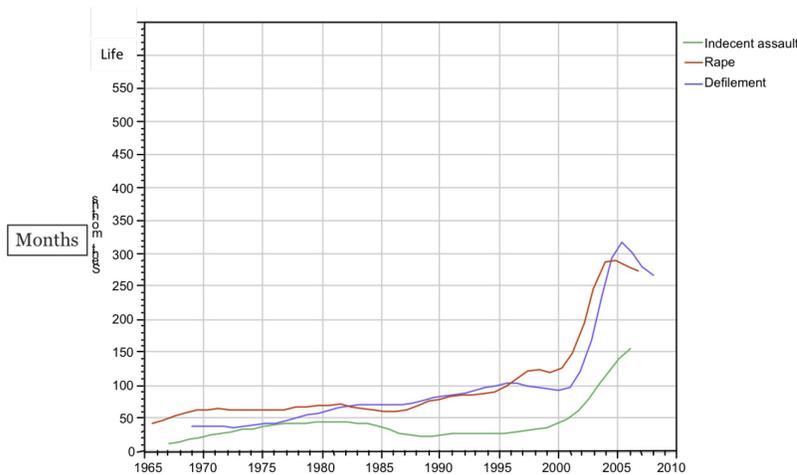
**Figure 16: Sentences in magistrates' courts in relation to presence or absence of STIs**

#### *Victim culpability*

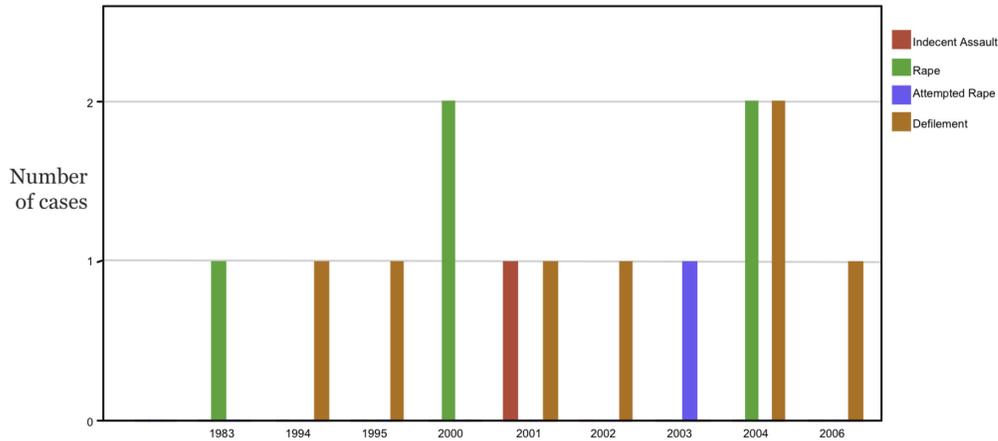
While the overall trend in offences against women was toward harsher punishment and higher rates of appeals dismissed, there remains a lingering tendency to assess more severe punishments in cases in which proof of forcible sex is overwhelming. Sentences of incarceration tend to be longer in defilement cases (in which a child cannot legally give consent), when physical or medical evidence is present, when eyewitness testimony is presented, and when a weapon was used in the commission of the offence.

Girls and women

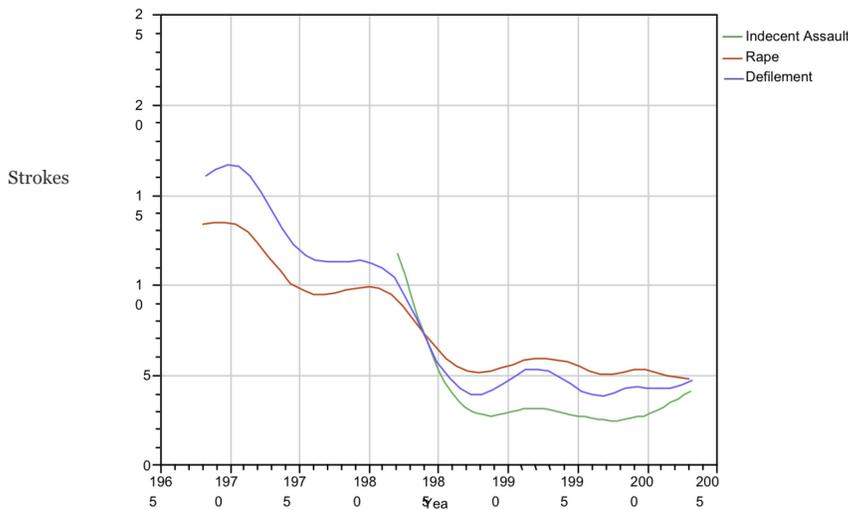
I examine here rape, defilement, and indecent assault, the only categories for which there were enough cases to make a statistically significant analysis. As Figure 17 shows, sentencing in rape cases follow a pattern of a slow increase until the mid-1990s, then a rapid increase. Sentences in indecent assault cases were consistently lower than in rape cases, dropped in the 1990s, but began a steep climb around 2000. Sentences in defilement cases rose steadily until 2000, then began a very rapid increase. In terms of custodial sentences, except for around 1998-2001 magistrates punished defilers more harshly than rapists, even though – judging by the statutory maximums – rape was the more serious crime. High court judges have also enhanced more sentences in defilement cases (seven) than in rape (five), indecent assault (one), and attempted rape (one) (Figure 18). Somewhat contrary to this trend, however, from the mid-1980s through the end of corporal punishment in 2003, magistrates handed down on average one more stroke for rapists than for defilers (Figure 19). Given the overall trend away from corporal punishment, however, magistrates may have considered corporal punishment of lesser importance than imprisonment – thus number of months may be a more accurate reflection of the seriousness of a crime (in magistrates’ eyes) than are the number of strokes.



**Figure 17: Mean sentence in months in magistrates’ courts for indecent assault, rape, and defilement**



**Figure 18: Number of cases in which the High Court enhanced sentence, by year and crime**



**Figure 19: Mean number of strokes for indecent assault, rape, and defilement in magistrates courts**

Part of the discrepancy between punishment for assaults on girls and on women, I argue, has to do with notions of victims’ culpability and innocence. Given judges’ suspicion of complainants’ motives and their willingness to consider mitigating circumstances, they have long tended to reserve stiff sentences for cases in which the victims’ actions were beyond reproach. In the colonial period, judicial and police official extended their suspicion of raped women to girls as well. They often wondered if sexually abused young girls – in one case, a six year old – might not have ‘led on’ their attackers. This was true even in several cases involving white children and African men.<sup>33</sup> In the first few decades of the independence era, some concern remained that a child might ‘lead on’ her abuser, and that that could constitute mitigation (recall the case of the 11 year old letter-writer).

Over time judges and magistrates came to understand girls to be a special category. In 1983 a man was convicted of indecent assault, for which he was sentenced to the maximum penalty of 5 years imprisonment and 12 strokes. His first appeal was summarily dismissed by the High Court at Nakuru, after which he went before the Court of Appeal. This appeal too was dismissed, by justices Kneller, Chesoni, and

Nyarangi. They concluded that he fully deserved his punishment for his "barbaric act on a female child of twelve years."<sup>34</sup> The same panel dismissed the appeal of a seventy year old man who had committed an act "which causes horror and revulsion" by defiling a 5 ½ year old girl.<sup>35</sup>

Later magistrates and judges continued this trend. Judge Muga Apondi in 1993 chastised a 40 year old man who had defiled a 6 year old girl, and who had received a 14 years sentence (the maximum allowed under the law) and 20 stokes (only four less than the maximum ). "The Appellant," he wrote, "took advantage of a tender and innocent young girl who could not defend herself. Having done so, the Appellant should not expect any mercy from this Court."<sup>36</sup>

It is perhaps in one judgment by Kimaru, J, where the emphasis on the victim's innocence is most pronounced:

This court cannot ignore the fact that the appellant was armed with a lethal weapon which weapon he used to potentially inflict a fatal injury on an innocent girl child.

The appellant is a danger to the children in the society and should therefore be put away so that he may not pose any more threat to the innocent children of this nation. [I will show no mercy to the appellant] who deliberately and without due regard to an innocent girl, sexually assaulted her and potentially infected her with the AIDS virus. The complainant did nothing to deserve the treatment that was meted out to her by the appellant. The appellant did not show mercy to the complainant. The dreams of the complainant of having a bright future and may be [sic] having a family was shattered by the singularly beastly and brutal act of the appellant. ...I think it would be a travesty of justice if this court were to release the appellant to the society so that he could prey on other innocent and vulnerable young girls.

Here, Kimaru emphasizes the girl's innocence in two ways. First, she had done nothing to encourage her attacker (she "did nothing to deserve" the attack). As Kimaru noted elsewhere in her judgment, consent cannot be considered in defilement cases. Nonetheless, she explicitly noted that the girl was blameless. Second, the victim and other girls were innocent in the sense of being naïve, sheltered, pre-sexual, and vulnerable. Other judges similarly noted that children deserve special protection from the ills of the world. Thus Judge Wendoh condemned one appellant who "used tricks to have carnal knowledge of these young girls and destroyed their innocence and violated them which is irreversible."<sup>37</sup> Men guilty of incest were similarly condemned not only for abusing the innocent, but innocent girls who they had been charged by society with protecting. Koome, J, condemned one man whom had committed a "very heinous offence" on his daughter. He was, Koome stated, "charged with the responsibility of protecting his own daughter but chose to attack her an inflicted upon her such injury and harm that might inflict and ruin her life forever."<sup>38</sup>

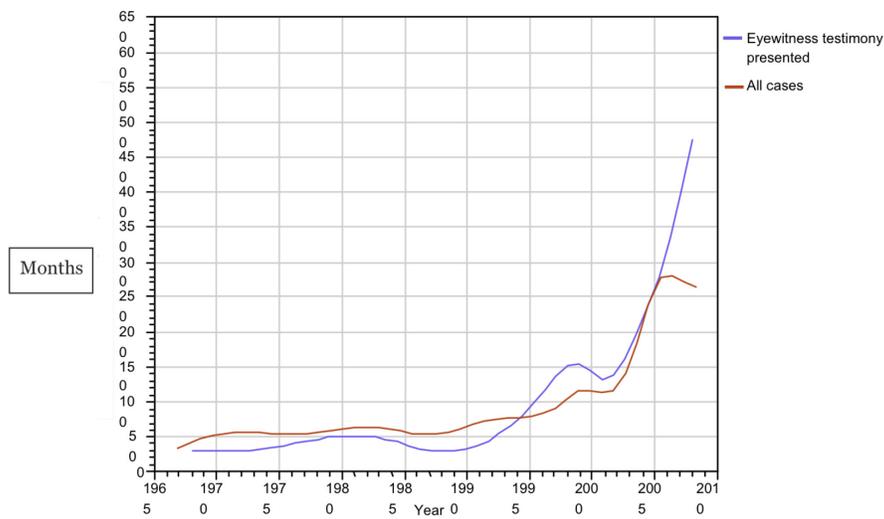
Also a factor in the disparity between rape and defilement penalties, I believe, was a rising discourse in Kenya (and amongst NGOs and the human rights/development community generally) about the rights of the 'girl child.' Numerous NGOs (such as CRADLE, the Child Rights Advisory Documentation and Legal Centre) focus on the special perils faced by girls in Kenya, including sexual abuse. Their work has shown that too often sexual abuse of girls is covered up, especially in cases of incest. In some areas, girls are forced to marry their abusers.<sup>39</sup> The legal system has rightly

been criticized for often failing to take such cases seriously or for tardiness in getting them to court.<sup>40</sup>

Despite the criticism of the judicial system, in numerous decisions magistrates and judges have decried assaults on girls in terms that suggested that they believed girls to have special rights. Thus the Chief Magistrate of Eldoret in 2004 sentenced a man to prison for defiling his own niece. Referring to the Criminal Law (Amendment) Act of 2003, he wrote that "Recently, Parliament enacted legislation with stiff penalties to protect female children from dangerous sex maniacs such as the accused person. Accused violated a child's fundamental right and destroyed a child's virginity without shame."<sup>41</sup> In another disturbing case in which a baby died after having been defiled, the justices wrote that "A clear deterrent message must be sent out to any aspiring paedophile anywhere that infants have their human rights too."<sup>42</sup> As justices O'Kubasu, Githinji, and Waki wrote in 2005, commenting on an appellant sentenced to 30 years for defilement, "Perhaps all we can say is that the sentence of 30 years might be an appropriate message to go out to all would be rapists and defilers of young children that the Courts will no longer be lenient in dealing with cases of this nature."<sup>43</sup>

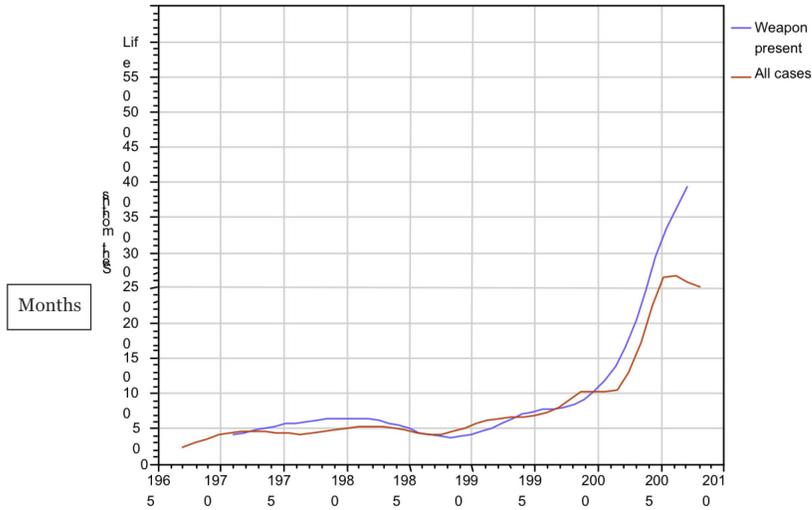
### *Evidence and sentencing*

Magistrates also hand down harsher punishments when evidence proves, beyond any question, that the victim gave no encouragement to her attacker. In cases in which the sexual offender was caught in the act or in which an eyewitness testifies to having seen the attack, magistrates have since the early 1990s consistently ordered longer prison sentences (Figure 21). Similarly, when a weapon was used in the commission of the crime sentences tend to be higher than average, as was the case when physical evidence (such as torn clothing) could be presented (Figures 22 and 23). (In both cases, however, this trend is significant only since the early 2000s). Somewhat surprisingly, this correlation does not appear relative to medical evidence until the early 2000s (Figure 24).



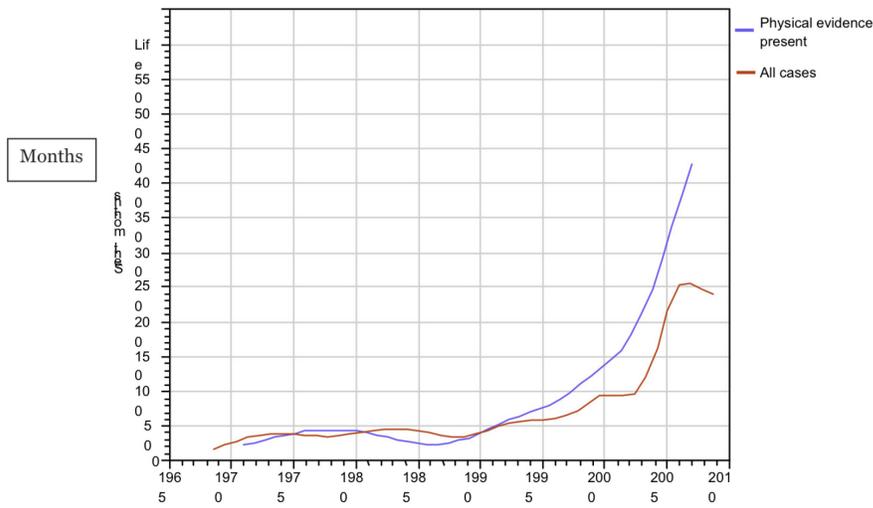
Cases in which eyewitness testimony was noted in the judgment: n=79

**Figure 21: Punishment in magistrates' courts, correlated with presence of eyewitness testimony**



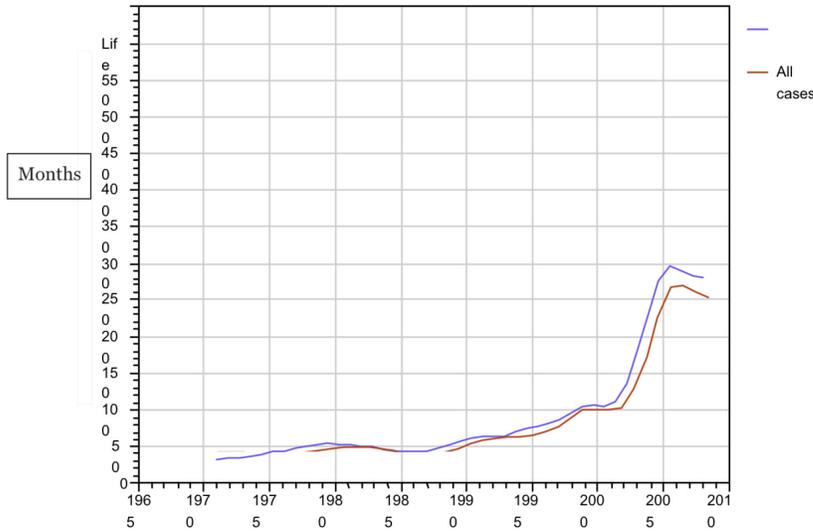
Cases in which presence of weapon was noted in the judgment: n=64

**Figure 22: Punishment in magistrates' courts, correlated with presence of weapon in commission of the crime**



Cases in which physical evidence was noted in the judgment: n=62

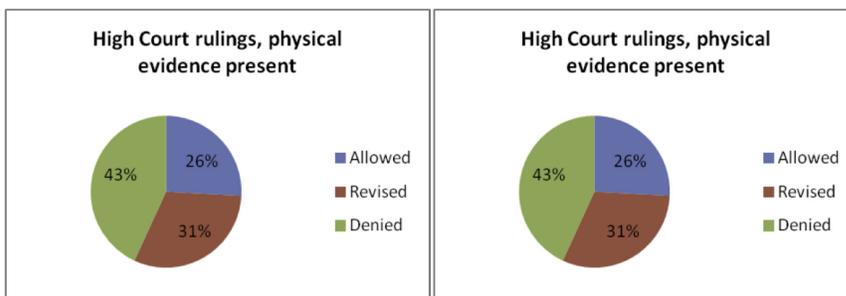
**Figure 24: Punishment in magistrates' courts, correlated with presence of physical evidence**



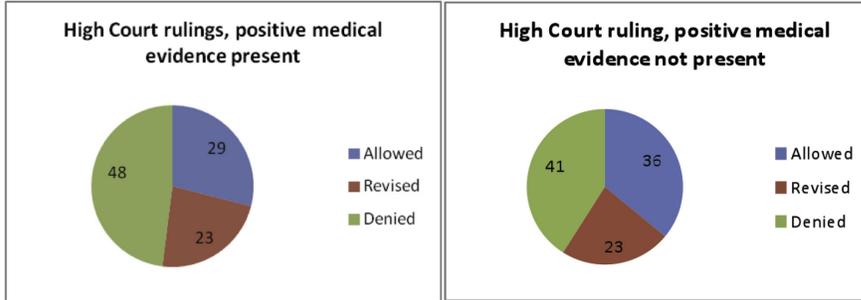
Cases in which medical evidence was noted in the judgment: n=168

**Figure 23: Punishment in magistrates’ courts, correlated with presence of medical evidence**

Similarly when prosecutors could offer physical evidence of the crime, high court judges were confident to sustain conviction, although they might lower sentences. Without such evidence, judges were more likely to reverse conviction. Whether or not physical evidence was presented, high court judges denied about the same percentage of appeals (43% when such evidence was presented, 44% when it was not), although the respective numbers for revisions was 31% and 22%. The percentage of appeals allowed when physical evidence was presented was significantly smaller than in cases in which such evidence was not available: 34% compared to 26% (Figure 25). Medical evidence seems to have carried more weight among high court judges than among magistrates. 48% of appeals were denied and 29% allowed when medical evidence was present, but only 41% were denied and 36% were allowed when no such evidence was provided (Figure 26).



**Figure 25: Comparison of high court rulings when physical evidence present or absent**



**Figure 26: Comparison of high court rulings when medical evidence present or absent**

### **Conclusion**

Through a statistical and qualitative review of sexual offence cases, this paper has revealed some perhaps unexpected trends in sentencing and resolution of appeals. Although victims of sexual violence continued to face significant obstacles to gaining justice, magistrates and judges have since the early 1990s come to understand the seriousness of such crime. Levels of punishment have increased, the ease of gaining a successful appeals has declined. Judicial officials sometimes still harbor some suspicions about women’s accusations, and when the actions of the complainant are beyond reproach sentences tend to be harsher. Nonetheless, at least one admitted sex worker saw her attacker convicted.

In the wake of the Sexual Offences Act, activists continue to work to increase judicial awareness of the law. For months, some magistrates continued to follow the old law and imposed sentences below the new mandated minimums. Vigilance is required to ensure that the police and the judiciary are well acquainted with the law and with appropriate methods of dealing with sexual violence cases. At the same time, I argue that it would behoove activists and legal scholars to pay close attention to trends in sentencing and in judicial attitudes. As this article has demonstrated, changes can be unexpected and can occur for multiple reasons, changes in the legal code not always being one of them. The passage of time and alterations in the legal, social, and political environments could induce yet new approaches to sexual crimes.

1. <http://www.thesequentialoffencesact.com/>, accessed 5 April, 2010.
2. Jane Kamangu, "Case Trends Monitor," *Juvenile Justice Quarterly* 1,2 (2004): 12-13; idem, "Kwale Culture Abuses Child Rights," *Juvenile Justice Quarterly* 1, 3 (2004): 3-5; Janice Ogonji, "Case Trends Monitor," *Juvenile Justice Quarterly* 1,3 (2004): 12-13; idem, "Case Trends Monitor," *Juvenile Justice Quarterly* 1,4 (2004): 14-15; T. Johnston, "Violence and the Abuse of Women and Girls in Kenya," Nairobi: Population Communication Africa, 2002.
3. COVAW, *Judicial Attitudes of the Kenyan Bench on Sexual Violence Cases: A Digest* (Nairobi: COVAW, 2005).
4. COVAW, *Judicial Attitudes*, 19.
5. At the base of the Kenya judiciary are magistrates’ courts. Cases can be appealed to the high court, and from there to the court of appeals, the latter only on points of law.
6. All charts in this paper showing averages use running five year averages, which better illustrate change over time.
7. High Court at Nairobi 394 of 1970.
8. High Court at Nairobi 34 of 1973. See also HC at Nairobi, 628 of 1976. In a 1985 case, the Court of Appeal dismissed the appeal against a rape charge, but returned it

to the High Court for resentencing. Yet two of the three justices, Hancox and Nyarangi, expressed hope that the high court judge "will bear in mind when considering sent the [rapist's] 13 years of professional life, his family circumstances and all that this conviction will mean to him and, moreover, that he has had this charged hanging over him for well over a year. CA 158 of 84.

9. Civil Appeal No 24 of 1981. But see also the judgment of the Court of Appeal in 36 of 1984, in which the justices dismissed a man's defense of "friendship" with the 12 year old he had abused: "friendship could not be a defence to the charge" and his sentence of five years "was merited for the appellant's barbaric act on a female child of twelve years."
10. High Court at Nakuru, Criminal Appeal No 163 of 1982.
11. Civil Appeal No 18 of 1983.
12. High Court at Kisii 179 of 1990. See also his judgment in HC at Kisii 178 of 1993, in which he reduced the appellants custodial sentence to one of probation, since the probation officer's report "shows that it may well be that the [complainant and appellant] were friends." See also his ruling in HC at Kisii 230 of 1993.
13. High Court at Mombasa Criminal Appeal No 741 of 1992.
14. High Court at Mombasa Civil Appeal No 84 of 2002.
15. High Court at Nairobi Criminal Appeal No 179 of 2005.
16. High Court at Kisii Criminal Appeal No 274 of 1994.
17. High Court at Nyeri, Miscellaneous Civil Application No 90 of 1997.
18. High Court at Nakuru Criminal Appeal No 568 of 2003.
19. Criminal Appeal No 90 of 2005.
20. High Court at Nakuru Criminal Appeal No 128 of 2004.
21. High Court at Mombasa 575 of 1995.
22. See for example Criminal Appeal No 305 of 2004.
23. High Court at Nairobi Criminal Appeal No 179 of 2005.
24. <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Chambers/The+Judges/The+Judges/Judge+Joyce+ALUOCH/Judge+Joyce+ALUOCH+Kenya.htm>. Accessed 18 June, 2010.
25. [www.kwja.org/aboutus/history.html](http://www.kwja.org/aboutus/history.html) . See also Resolutions and Recommendations of the Second Africa Regional Conference for Women Judges, Nairobi, 6-8 Aug., 2001.
26. High Court at Nairobi, Criminal Appeal No 26 of 1987.
27. Alfred J Fortin., 1987., "The Politics of AIDS in Kenya," *Third World Quarterly* Vol 9 para 906-19.
28. Samwel Ong'wen Okuo., 2009. "Daniel arap Moi and the politics of HIV and AIDS in Kenya, 1983-2002," *African Journal of AIDS Research* Vol 8 para 275-83.
29. WHO, "Kenya: Epidemiological Country Profile on HIV and AIDS," [http://apps.who.int/globalatlas/predefinedReports/EFS2008/short/EFSCountryProfiles2008\\_KE.pdf](http://apps.who.int/globalatlas/predefinedReports/EFS2008/short/EFSCountryProfiles2008_KE.pdf), accessed 11 March, 2010.
30. High Court at Mombasa, Criminal Appeal No 71 of 1995.
31. High Court at Nakuru Criminal Appeal No 128 of 04. On HIV/AIDS, see also: High Court at Mombasa, cases 298 of 2003, 182 of 2003, 94 of 2002, 94 of 2002, 282 of 2002, 84 of 2002; High Court at Kisii 141 of 2002. On other STI/VDs, see High Court at Mombasa, cases 75 of 2001, 373 of 1996; High Court at Kisii 147 of 96; Criminal Appeal No 25 of 2006; High Court at Nakuru 90 of 2001.
32. High Court at Mombasa Criminal Appeal No 122 of 2003.
33. See Brett L Shadle., 2008. "Rape in the Courts of Gusiiland, Kenya, 19Rape in the Courts of Gusiiland, Kenya, 1940s-1960s," *African Studies Review* Vol 51 pp 27-50.
34. Criminal Appeal No 36 of 1984.
35. Criminal Appeal No 52 of 1984.
36. High Court at Nakuru Criminal Appeal No 111 of 1993.
37. High Court at Machakos Criminal Appeal No 184 of 2002. But see also High Court at

Mombasa 67 of 2002. Here the state agreed that the sentence had been too stiff (10 years and two strokes) for a 58 year old man who defiled a 13 year old girl. Evidence suggested that the victim had not been a virgin. Otieno, J, wondered whether "the complainant was traumatised or not as if she was used to sex at the age 13 then she may not have been traumatised by what happened to her much." Although the defilement "was still cruel, beastly and brutal," his age and lack of criminal record were taken into consideration and his sentence was reduced to five years and two strokes.

38. High Court at Nakuru Criminal Appeal No 72 of 2004.
39. Kamangu, "Case Trends Monitor"; idem, "Kwale Culture."
40. Kamangu, "Case Trends Monitor."
41. Quoted in Criminal Appeal No 10 of 2005.
42. Criminal Appeal No 189 of 2004.
43. *Supra* note 19.