

**PROTECTING THE RIGHTS OF VICTIMS  
IN TRIALS FOR SEXUAL OFFENCES**

**A PAPER PRESENTED**

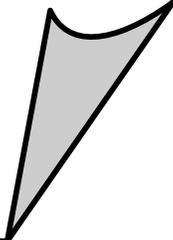
**BY**

**HON. JUSTICE. PETER AKHIMIE AKHIERO**

**AT THE WORKSHOP ORGANIZED BY  
GLOW (GLOBAL LEADERSHIP OF WOMEN),  
AN INITIATIVE OF THE INTERNATIONAL ASSOCIATION  
OF WOMEN JUDGES (IAWJ)**

**HELD ON THURSDAY, 30TH OF APRIL, 2015**

**AT BISHOP KELLY PASTORAL CENTRE,  
G.R.A, BENIN CITY.**



## 1.0 **INTRODUCTION:**

The theme of this Workshop is “**Changing Attitudes and Changing Behaviour towards Victims of Sexual Offences**”.

The aim of the Workshop is to break the custom of silence and continuous victimization of victims of sexual offences. Their position is that “justice is a two-way street to accommodate the accused and the victim”.

This paper intends to focus on the plight of the victims of sexual offences in the course of trials for such offences. Sexual allegations and offences constitute some of the most complex and sensitive aspects of criminal law and procedure. The trials can be highly emotive and sensitive for both the prosecution and the defence, with potentially life-changing outcomes.

The area of sexual offences which can prove to be most sensitive and complex is when it involves children. The criminal law recognizes the fact that the role of children in such trials must be governed by the most careful and exacting standards of conduct in terms of examination in-chief and cross-examination. We must be up to date with the modern approaches to safeguard the welfare of such children during trials.

There is a branch of criminology that is concerned with the welfare of the victims of crimes in general. It is called **Victimology**. Victimology is the study of victimization, including the relationship between victims and offenders, the interactions between victims and the criminal justice system – that is, the police and the courts<sup>1</sup>.

---

1. Andrew Karmen, (2003). *Crime Victims: An Introduction To Victimology*, Wadsworth Publishing, ISBN 978-0-534-61632-8.

In criminology and criminal law; a victim of a crime is an identifiable person who has been harmed individually and directly by the accused person. Under our criminal justice system, we regard a crime as a wrong against the State. Invariably, the trial is between the State and the offender. The actual victim of the offence is simply classified as a **prosecution witness**. The victim is not regarded as the **complainant** at the trial. The official complainant is **The State** or an agent of the State such as the Attorney-General, the Director of Public Prosecutions, or the Commissioner of Police. This type of arrangement appears to put the victim of the crime in an obscure position at the trial. This is quite a disadvantaged position.

There is no gain saying the fact that majority of the victims of crimes suffer some negative consequences as a result of the crime. The most common problems are usually psychological problems. These problems include: fear, anxiety, nervousness, self blame, anger, shame and sleeplessness<sup>2</sup>.

Coming to sexual offences, it is evident that the consequences on the victim are so severe that some special attention should be given to the victim during the trial. The injuries inflicted on the victim are more severe than those inflicted on victims of armed robbery, burglary and stealing. The actual scene of crime is the woman's body. Most victims of sexual offences suffer great emotional and psychological trauma. They feel devalued and dehumanized. They would rather blot out the ugly experiences from their memories. Invariably, they are most reluctant to come to court to testify. When they come to court, it is an ordeal for them to testify about all the sordid details.

---

2. Sebba, L., (1996). Third Parties Victims and the Criminal Justice System, Ohio State University Press, Columbus.

From the foregoing scenario, it is evident that such victims need the support of the key players in the criminal justice system. Their rights should be adequately protected by the court.

## 2.0 **SEXUAL OFFENCES:**

The term “**sexual offences**” is a generic term which covers a class of sexual conduct prohibited by the law<sup>3</sup>. The categories of sexual offences are not closed. The laws vary from State to State in Nigeria. We cannot exhaust the list of sexual offences in this presentation. We will identify some of them to enable us highlight the focal issues of the paper.

### 2.1 **RAPE:**

When a man has sexual intercourse with a woman or a girl without her consent, or if the consent is obtained by force, or threat or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act, or in the case of a married woman by impersonating her husband, he is guilty of the offence of rape and is liable to the punishment of imprisonment for life with or without whipping<sup>4</sup>.

To constitute rape, there must be evidence of unlawful carnal knowledge. Rape is established upon proof of penetration<sup>5</sup>. The slightest penetration will be sufficient; neither rupture of the hymen nor the emission of semen need be proved<sup>6</sup>.

A male person under the age of 12 years is presumed incapable of having carnal knowledge<sup>7</sup>. The presumption is irrebuttable. In other words, it is not permissible to lead evidence to show that an accused

---

3. [www.legal-dictionary.thefreedictionary.com](http://www.legal-dictionary.thefreedictionary.com)

4. See Sections 357 and 358 of the Criminal Code, L.F.N 2004

5. See Section 6 of the Criminal Code, L.F.N 2004

6. R. v. Marsden (1891) 2 Q.B. 149 at 150; Jegede v. The State (2001) 7 SCNJ 135, 141

7. See Section 30 of the Code.

though under the age of twelve years was actually capable of committing the offence<sup>8</sup>.

It has been a moot point whether a husband can be guilty of the rape of his wife. In some matrimonial cases, some women have made allegations of violent sexual behaviour on the part of their husbands. Some claim that they have been raped severally on their matrimonial beds. They even sometimes have medical evidence to prove their allegations. While such conduct may amount to cruelty and intolerable behaviour to prove the irretrievable collapse of the marriage, it is unlikely to establish the offence of rape. This is in view of the definition of unlawful carnal knowledge under Section 6 of the Criminal Code as “carnal connection which takes place otherwise than between husband and wife”. From this provision, it would appear that a husband cannot be guilty of rape of his wife. However, he can be guilty of other bodily assaults like wounding<sup>9</sup> or causing grievous harm<sup>10</sup>.

## 2.2 **DEFILEMENT:**

Any person who has unlawful carnal knowledge of a girl under the age of thirteen years is guilty of the offence of defilement and is liable to imprisonment for life, with or without whipping<sup>11</sup>.

The evidence to establish the offence of defilement is the same as in rape except that with defilement, it is immaterial whether the act was done with or without the consent of the victim. It is an absolute prohibition. The policy rationale is that a girl under the age of thirteen years is too young for any one to have carnal knowledge of her. Her consent becomes inconsequential and it is deemed to have been vitiated by her immaturity.

---

8. See R. v. Philips (1839) C & P. 736.

9. See Section 332 of the Criminal Code.

10. See Section 355 of the Code.

11. See Section 218 of the Code.

To sustain a conviction for defilement, there must be proof that the girl was under the age of thirteen at the time when the offence was committed. Proof may be by any legal means such as the certificate of birth or the **viva voce** testimony of her parents. Furthermore, a person cannot be convicted of the offence of defilement upon the uncorroborated testimony of one witness<sup>12</sup>.

Any person who – (1) has or attempts to have unlawful carnal knowledge of a girl being of or above thirteen years and under the age of sixteen years; or (2) knowing a woman or girl to be an idiot or imbecile, has or attempts to have unlawful carnal knowledge of her; is guilty of a misdemeanour, and is liable to imprisonment for two years, with or without whipping<sup>13</sup>.

Any person who unlawfully and indecently deals with a girl under the age of sixteen years is guilty of a misdemeanour and is liable to imprisonment for two years, with or without whipping. The term “deal with” includes doing any act which, if done without consent, would constitute an assault<sup>14</sup>.

### 3.0 **RIGHTS OF THE VICTIMS OF SEXUAL OFFENCES:**

I must reiterate at this stage that the rights which we seek to protect are not the rights of the victims outside the trials but their rights as they relate to the trial for such offences.

Over the years, the plight of the victims of sexual offences has assumed a topical dimension. When the matter comes up for trial, most of the time, the courts are more concerned with the rights of the accused who is standing trial. The current view is that the court must maintain a balance between two fundamental rights: the right of the

12. See Section 218 of the Criminal Code.

13. See 221 of the Code.

14. See 222 of the Code.

accused to a fair trial and the right of the victim not to be further traumatized by the trial. The court must be conscious of these two rights and balance the scales in the interest of justice to both sides. Our focus here is to identify some of the rights of the victims of sexual offences and the duty of the court to protect those rights during the trial.

Historically, in most jurisdictions of the world, the legal position was that the sexual history of the victim was very relevant to the trial. The view was that a chaste woman was an unlikely victim of any sexual offence. An unchaste woman was considered more likely to have consented to the sexual advances of the accused person. Consequently, any evidence of unchastity on the part of the victim was considered relevant and admissible at the trial. This attitude invariably opened up a flood gate of scandalous and offensive evidence to humiliate and further traumatize the victim in the course of the trial. The apprehension of such unwholesome developments discouraged many victims from coming to court to testify. This was a major setback in the trial for such offences.

### 3.1 **RAPE SHIELD LAWS:**

In the past half century, there was an evolution in the law in some foreign jurisdictions. The laws have evolved to prevent the accused in cases of sexual offences from leading evidence simply with the aim of smearing the reputations of the victims. They developed what is now known as **Rape Shield Laws**. These are laws designed to protect the victims of sex crimes during criminal proceedings. With very limited exceptions, they prevent the accused from introducing evidence of the victims' sexual behaviour, history or reputation.

The United States has been at the vanguard of the evolution of rape shield laws. As far back as the late 1970s and the early 1980s, almost all jurisdictions in the United States had enacted some form of rape shield statute. The laws in each State differ in the scope of sexual behaviour shielded and the time limits of the shield. Many States do not permit any evidence relating to the past sexual behaviour of the victim. The **Violence Against Women Act of 1994** created a federal rape shield law. In the recent American case of **THE PEOPLE V. DANNY ALFRED FONTANA SCT. 192597** decided on June 21, 2010, the California Supreme Court unanimously upheld and protected the State's rape shield law that would prevent specific instances of the victim's previous sexual conduct. The court was of the view that such evidence was not relevant to the present trial.

In Nigeria, we are yet to enact specific statutes to introduce the rape shield into trials for sexual offences. However, we have specific provisions in our **Evidence Act** which prohibits indecent and scandalous questions. Section 227 of the **Evidence Act 2011** provides that "The court may forbid any question or inquiry which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the court unless they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed".

Furthermore, Section 228 of the Act stipulates that "The court shall forbid any question which appears to it to be intended to insult or annoy or which though proper in itself, appears to the court needlessly offensive in form".

It is posited that in the absence of any statutory provisions on rape shield, Nigerian courts have the discretion to disallow evidence of the previous sexual behaviour, history or reputation of the victim using the provisions of Sections 227 and 228 of the Act. The court has a duty to protect the victim of the crime from the trauma of answering questions which are aimed at further humiliating her and denigrating her person.

Still on the issue of asking wrong questions, Keir Starmer, a British Barrister, speaking in a recent interview with the BBC observed that “in the past, many victims didn’t have the confidence to come forward because we were asking the wrong questions. If you go into a police station and report a burglary, the first question is not “are you telling the truth”? But if you are the victim of a sexual offence, very often in the past that has been the first question<sup>15</sup>”.

### 3.2 **RAPE VICTIMS PRIVACY:**

There is also the issue of the victim’s right to privacy. By the very nature of the offence which has to do with the violation of a woman’s body, it is evident that there are some very private details that will be revealed in the course of trial. Unlike robbery or homicide cases, prosecution for sexual offences may reveal some delicate facts such as whether the victim became infected with HIV or became pregnant or had an abortion. These are private details that are quite damaging to the reputation of the victim.

The disclosure of such private details has made some scholars to advocate the need for private trials in respect of sexual offences. They hinge it on the victim’s right to privacy as guaranteed by the constitution. For the avoidance of doubt, **Section 37 of the 1999**

15. Sexual Offences: Wrong questions asked of victims, says Keir Starmer [www.bbc.com/news/uk-24513004](http://www.bbc.com/news/uk-24513004).

**Nigerian Constitution** provides that “The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected”.

On the right to privacy during trials, the Criminal Procedure Act, LFN 2004 provides that “Subject to the provisions of Sections 204 and 223 and of any other written law specifically relating thereto, the room or place in which any trial is to take place under this Act shall be an open court to which the public generally may have access as far as it can conveniently contain them; provided that the judge or magistrate presiding over such trial may in his discretion and subject to the provisions of Section 205, exclude the public at any stage of the hearing on the grounds of public policy, decency or expedience”. Furthermore, Section 204 of the Act provides that the court may sit **in camera** while a child or young person is giving evidence in respect of offences against any conduct contrary to decency or morality.

I am of the view that the above mentioned provisions give the courts ample discretion to exclude the public from trials of sexual offences in some appropriate cases. A case may be appropriate where the victim makes a request that she would want to give her evidence **in camera**. The court ought to grant such request to protect the privacy of the victim. Even where the proof of evidence filed at the trial discloses some very delicate and disturbing facts about the victim, the court can **suo motu** order that the evidence of the victim will be taken **in camera**. According to Wendy Murphy, protecting the victims right to privacy is “...a small gesture that attempts to preserve what is left of the victims’ intimate self after the criminal justice process is over<sup>16</sup>”.

---

16. RAPE VICTIM'S PRIVACY IS MATTER OF LAW, NOT SHAME [www.womensnews.org/story/law](http://www.womensnews.org/story/law).

### 3.3 **COMPENSATION OF VICTIMS:**

In a recent publication, a Nigerian Legal Practitioner, Ayo Akintunde Esq. lamented that in Nigeria, “The victim of crime is the forgotten man in our criminal justice system. He sets the criminal law in motion but then goes into oblivion. Our present criminal laws do not recognize the right of the victim to take part in the prosecution of the case or his right to compensation. The victim is merely a witness of the State<sup>17</sup>”.

In most cases, the victims of sexual offences have suffered immeasurable losses. They have been traumatized by the offence. Sometimes, they have to undergo expensive medical examinations and treatments. When the matter is being investigated by the police, they are often made to fund the investigation expenses. They come to court to testify at their own expense. All these impose huge burdens on victims. The need for adequate compensation cannot be overemphasized.

The award of compensation by the courts in the exercise of their criminal jurisdiction is governed by statute. In the case of **TSOFOLI V. C.O.P**<sup>18</sup>, Ademola C.J.N, state thus:

*“...in every case, the matter of compensation is governed by statute and there is no inherent power in any court to award compensation”.*

The provisions of our statutes in respect of compensation in criminal trials are quite obsolete. Section 255(1) of the Criminal Procedure Act provides thus: “A court may order any person convicted before it of an offence to pay to the prosecutor in addition to any penalty

17. Ayo Akintunde: Making The Crime Victim Important Again; This Day Newspapers, 6th December, 2010.

18. (1971) N.S.C.C. 330 at 333.

imposed such reasonable costs as the court may seem fit". This provision seems to give the court some discretion to award some form of compensation to crime victims. The provision however, appears to be dormant. I could not find any decided case where the section was invoked to award compensation to any victim of crime.

Specifically, on the compensation of victims of sexual offences, there is no legislation which makes provisions in that regard. However, there appears to be some ray of hope from the National Assembly. Recently, the House of Representatives passed a Bill sponsored by Hon. Abike Dabiri-Erewa to enact an Act to eliminate all forms of violence against persons. The Bill prescribes life imprisonment for rape and a minimum of 20 years for any one involved as an accomplice. The bill also seeks compensation for victims of rape. We hope for a speedy passage of the bill by the Senate and a quick assent by the President.

#### 4.0 **CONCLUSION:**

It is evident that our current criminal laws fall short of the internationally recommended standards in respect to the protection of the rights of victims of sexual offences. The existing legislations are grossly inadequate. The statutes are in dire need of reform. The reform should not be left in the hands of the government. Non-governmental organizations can sponsor private bills to the National and State legislatures to standardize our legislations.

Before the legislative reforms are effected, the operators of the criminal justice system should be pragmatic and proactive to ensure that the rights of the victims are safeguarded. This calls for some forms of judicial activism on the part of the members of the Bench. In

the interpretation of statutes, where there is a gap, the courts should be pragmatic enough to fill up the gaps in the interest of justice. This was the approach which was consistently advocated by Lord Denning (Master of the Rolls). According to Lord Denning, it is the duty of the court to find out the intention of Parliament over a particular legislation. Having discovered that intention, they must proceed to fill in the gaps where there are any. In his words "...we sit here to find out the intention of Parliament and of Ministers and carry it out and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analyses<sup>19</sup>". In the case of **KAMMINS V. ZENITH INVESTMENTS LTD.**<sup>20</sup>, Lord Diplock drew a clear distinction between the "literal approach" and the "purposive approach". According to him, the "literal approach", would lead to a strict interpretation of the statute which might result in a miscarriage of justice. He advocated the "purposive approach" which is to find out the intention of Parliament.

I seriously commend the views of Lord Denning and Lord Diplock to our courts to rise up to the challenge of applying the purposive approach in the interpretation of our statutes to protect the rights of victims of sexual offences.

**HON. JUSTICE P. A. AKHIHIRO**  
LL.B (Hons) Ife; B.L; LL.M Lagos  
Judge, Edo State Customary Court of Appeal  
[www.nigerianlawguru.com](http://www.nigerianlawguru.com);  
[peterakhiero@yahoo.co.uk](mailto:peterakhiero@yahoo.co.uk)

---

19. Seaford Court Estates Ltd. v. Asher (1949) 2 K.B. 481  
20. (1971) AC 850 at 881.