

Disrupting Harm

Evidence from 13 countries on the context, threats, and children's perspectives of online child sexual exploitation and abuse.

Legal Analysis of OCSEA related Provisions in Kenya

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This report is a summary of preliminary data collected for this research project. The perspectives contained herein represent the individuals interviewed and surveyed. Support from the Fund to End Violence Against Children does not constitute endorsement.

International, Regional and National Commitments and Legislation on Sexual Exploitation of Children

Status of ratification of relevant international and regional instruments, reporting to human rights bodies and engagement with the special procedures of the Human Rights Council		
International Instruments	Date of ratification/accession	
Convention on the Rights of the Child - 1989	30 July 1990	
Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography - 2000	8 September 2000 (signed, yet to ratify)	
Optional Protocol on a Communication Procedure - 2011	Neither signed nor ratified	
ILO Convention on the Worst Forms of Child Labour - 1999 (No. 182)	7 May 2001	
UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and children – 2000 (supplementing the UN Convention against Transnational Organised Crime)	5 January 2005	
Regional Instruments	Date of ratification/accession	
Charter on the Rights and Welfare of the Child in Africa (African Union, 1990)	25 July 2000	
Convention on Cyber Security and Personal Data Protection (African Union, 2014)	Neither signed nor ratified	
Human Rights Bodies	Date of latest submitted report	Comments
Committee on the Rights of the Child (OPSC review)	-	-

General Issues related to Children’s Rights

According to the Constitution of Kenya, a “**child** means an individual who has not attained the age of eighteen years”.¹ A similar definition is provided under the Children’s Act,² the Sexual Offences Act,³ the Marriage Act,⁴ the Employment Act,⁵ and the Computer Misuse and Cybercrimes Act.⁶ Therefore, the definition of a child is **consistent across major legislations** in Kenya. Notwithstanding, the Employment Act is an exception. The Employment act uses **alternative terminologies** to refer to persons below the age of 18. The Act uses the terms “young persons” for children who have attained the age of sixteen years but have not attained the age of eighteen years.⁷ In addition, the Act also uses the term juvenile, but the term has not been defined anywhere in the Act. However, the use of different terms in the Employment law to refer to children does not affect the application of its provisions relating to online sexual exploitation and abuse (OCSEA) offences.

Pursuant to the provisions of the Employment Act, the **legal working age** is 13 years.⁸ A child between 13-16 years is allowed to perform light work which is not likely to be harmful to their health or development and does not affect their attendance at school.⁹ In addition, juveniles cannot be employed in ‘worst forms of child labour’.¹⁰ The legal working age is the same for boys and girls. However, the Employment Act allows the Minister responsible for labour matters to treat juveniles of different ages and sexes differently while making any rules under the Act¹¹ which may allow for distinctions to be made in the future. It is noteworthy that the Employment Act is not applicable in the case of children working in the informal sector without an employment contract.¹²

Under the Sexual Offences Act, the **age of sexual consent** is 18 years.¹³ The age of age sexual consent is the same for boys and girls. The Sexual Offences Act uses the term ‘defilement’ for statutory rape. A person is liable to be punished for the offence of ‘defilement’ when such a person commits “an act which

¹ Republic of Kenya. (2010). [The Constitution of Kenya](#), Article 260.
² Republic of Kenya. (2001). [The Children Act No. 8 of 2001](#), Section 2.
³ Republic of Kenya. (2006). [The Sexual Offences Act No. 3 of 2006](#), Section 2(1).
⁴ Republic of Kenya. (2014). [The Marriage Act No. 4 of 2014](#), Section 2.
⁵ Republic of Kenya. (2007). [The Employment Act No. 11 of 2007](#), Section 2.
⁶ Republic of Kenya. (2018). [Computer Misuse and Cybercrimes Act No. 5 of 2018](#), Section 24(3).
⁷ Republic of Kenya. (2007). [The Employment Act No. 11 of 2007](#), Section 2.
⁸ Republic of Kenya. (2007). [The Employment Act No. 11 of 2007](#), Section 56(1).
⁹ Republic of Kenya. (2007). [The Employment Act No. 11 of 2007](#), Section 56(2).
¹⁰ Republic of Kenya. (2007). [The Employment Act No. 11 of 2007](#), Section 2.
¹¹ Republic of Kenya. (2007). [The Employment Act No. 11 of 2007](#), Section 91(3).
¹² Republic of Kenya. (2007). [The Employment Act No. 11 of 2007](#), Section 3(1).
¹³ Republic of Kenya. (2006). [The Sexual Offences Act No. 3 of 2006](#), Section 8.

causes penetration¹⁴ with a child”.¹⁵ A significant loophole with this provision is that it allows the accused to plead ignorance as to the age of the victim in defence.¹⁶ In addition, the law does not provide for a **close-in-age exception** nor any criteria to determine whether the consent for sexual activities between peers under the age of 18 is **voluntary, well-informed** and **mutual**. There have been cases where minor boys have been discriminated against based on their gender and have been wrongly prosecuted for having consensual sexual intercourse with minor girls.¹⁷ In *G.O v. Republic Siaya*, the High Court of Kenya at Siaya, hearing an appeal relating to a minor boy charged with the offence of defilement of another minor, held that both minors needed protection against harmful sexual activities and that none of them should have been sent to prison.¹⁸ In another case, the High Court of Kenya at Nyeri noted that the Sexual Offences Act has “overlooked that children would involve themselves in various forms of sexual activity at different developmental stages, and that there was a need to provide for that”.¹⁹

The **minimum age of criminal responsibility** in Kenya is 8 years of age.²⁰ However, a person under the age of 12 years is presumed not to be criminally responsible, unless it is proven that they possessed knowledge that they ought not to commit the act or make the omission at the time of doing the same.²¹ Boys under the age of 12 are presumed to be incapable of having carnal knowledge,²² and can therefore not be criminally liable for any offence related to sexual intercourse.

The Marriage Act sets the **minimum age of marriage** at 18 years.²³ However, it provides that “any provision of this Act which is inconsistent with Islamic law and practices shall not apply to persons who profess the Islamic faith”,²⁴ thereby potentially allowing child marriage.

¹⁴ Republic of Kenya. (2006). [The Sexual Offences Act No. 3 of 2006](#), Section 2(1): “penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person.

¹⁵ Republic of Kenya. (2006). [The Sexual Offences Act No. 3 of 2006](#), Section 8(1).

¹⁶ Republic of Kenya. (2006). [The Sexual Offences Act No. 3 of 2006](#), Section 8(5).

¹⁷ High Court of Kenya at Siaya. (2017). [G O v. Republic, Criminal Appeal No.155 of 2016](#), [2017 eKLR]; [High Court of Kenya at Nyeri. \(2019\). SNN v Republic, \[2019\] eKLR](#), Criminal Revision No. 104 Of 2018.

¹⁸ High Court of Kenya at Siaya. (2016). [G O v. Republic, Criminal Appeal No.155 of 2016, \[2017 eKLR\]](#), Paragraph 11.

¹⁹ [High Court of Kenya at Nyeri. \(2019\). SNN v Republic, \[2019\] eKLR](#), Paragraph 16.

²⁰ Republic of Kenya. (1930). [The Penal Code of Kenya \(Cap. 63\) \(as amended in 2012\)](#), Section 14(1).

²¹ Republic of Kenya. (1930). [The Penal Code of Kenya \(Cap. 63\) \(as amended in 2012\)](#), Section 14(2).

²² Republic of Kenya. (1930). [The Penal Code of Kenya \(Cap. 63\) \(as amended in 2012\)](#), Section 14(3).

²³ Republic of Kenya. (2014). [The Marriage Act No. 4 of 2014](#), Section 4.

²⁴ Republic of Kenya. (2014). [The Marriage Act No. 4 of 2014](#), Section 49(3).

Online Child Sexual Exploitation and Abuse

The Constitution of Kenya guarantees every child the right “to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour”.²⁵ Accordingly, the Government has enacted laws to protect children from sexual abuse including online child sexual exploitation and abuse (OCSEA).

The most authoritative piece of legislation on child sexual abuse material (CSAM)²⁶ is the Computer Misuse and Cybercrimes Act which explicitly criminalises CSAM and acts associated with it. The Computer Misuse and Cybercrimes Act **defines CSAM** as “data which, whether **visual** or **audio**, depicts a child engaged in sexually explicit conduct; a person who **appears to be a child** engaged in sexually explicit conduct; or **realistic images** representing a child engaged in sexually explicit conduct”.²⁷ The definition of CSAM contained in the Computer Misuse and Cybercrimes Act is partially in line with international standards as it includes **virtual CSAM** and audio and visual data but no other forms of CSAM.

Furthermore, the Computer Misuse and Cybercrimes Act criminalises the publishing,²⁸ **producing**, downloading, distributing, transmitting, circulating, delivering, **disseminating**, exchanging, **selling**, lending, offering for hire or offering in any way or making available in any way CSAM from a “telecommunications apparatus”.^{29,30} In addition, the **mere possession** of CSAM in a computer system or on a computer data storage device/medium has been criminalised.³¹ The Computer Misuse and Cybercrimes Act also penalises the **attempt** to commit any of the aforementioned offences.³²

The Sexual Offences Act prohibits conduct associated with CSAM. The Act prohibits selling, letting for hire, **distributing, publicly exhibiting** or **circulating (disseminating)** in any manner or **making, producing** or

²⁵ Republic of Kenya. (2010). [The Constitution of Kenya 2010](#), Article 53(1)(d).

²⁶ ECPAT prefers the term ‘child sexual exploitation material’ or ‘child sexual abuse material’ over the often in legal context still used ‘child pornography’ in line with the recently widely adopted Terminology Guidelines. ECPAT International. (2016). [Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse, adopted by the Interagency Working Group in Luxembourg, 28 January 2016](#). P. 39. Bangkok: ECPAT.

²⁷ Republic of Kenya. (2018). [Computer Misuse and Cybercrimes Act No. 5 of 2018](#), Section 24 (3).

²⁸ Republic of Kenya. (2018). [Computer Misuse and Cybercrimes Act No. 5 of 2018](#), Section 16(3): “publish includes to -(a) distribute, transmit, disseminate, circulate, deliver, exhibit, lend for gain, exchange, barter, sell or offer for sale, let on hire or offer to let on hire, offer in any other way, or make available in any way; (b) having in possession or custody, or under control, for the purpose of doing an act referred to in paragraph (a); or (c) print, photograph, copy or make in any other manner whether of the same or of a different kind or nature for the purpose of doing an act referred to in paragraph (a)”.

²⁹ Republic of Kenya. (2018). [Computer Misuse and Cybercrimes Act No. 5 of 2018](#), Section 2: “telecommunication apparatus” means an apparatus constructed or adapted for use in transmitting anything which is transmissible by a telecommunication system or in conveying anything which is transmitted through such a system

³⁰ Republic of Kenya. (2018). [Computer Misuse and Cybercrimes Act No. 5 of 2018](#), Section 24(1)(a)-(c).

³¹ Republic of Kenya. (2018). [Computer Misuse and Cybercrimes Act No. 5 of 2018](#), Section 24(1)(d).

³² Republic of Kenya. (2018). [Computer Misuse and Cybercrimes Act No. 5 of 2018](#), Section 42(2).

possessing for the purpose of selling, hiring, distributing, publicly exhibiting or circulating any obscene³³ book, paper, drawing, pamphlet, painting, art, figure, representation or any other obscene object which depicts the image of any child.³⁴ Further, the Act prohibits **importing** or **exporting** such obscene objects.³⁵ Exposing a child to such material with the intention of **encouraging** or **enabling** such a child to engage in sexual acts, has also been criminalised.³⁶ In addition, the **attempt** to commit any of the aforementioned acts has been criminalised.³⁷

To keep pace with the recent advancements in information and communication technologies (ICT), many countries with a well-developed ICT-infrastructure have identified access to CSAM as being of significant importance.³⁸ A major loophole in the Kenyan laws covering CSAM is that they do not explicitly criminalise **knowingly obtaining access to child sexual abuse material**. It is surprising that the recently passed Computer Misuse and Cybercrimes Act did not take note of recent developments in ICT.

Besides, the Employment Act prohibits persons from employing children in worst forms of labour including the “use, procuring or offering of a child for the production of pornography or for pornographic performances.”³⁹ The term ‘pornography’ has not been defined in the Act. It is noteworthy that the Employment Act allows **ignorance of the age of the victim** to be pleaded by the offender in excuse for his or her conduct. According to the Act, “It shall be a defence if the accused person proves that he genuinely had reason to believe that the child was above the age limit, which is the subject of the charge”.⁴⁰

Currently, the laws do not **criminalise knowingly attending pornographic performances** involving children and cases when such performances involving children are **live streamed online**.

The Kenyan legislation does not explicitly criminalise **bullying of a child through online sexual harassment**. Nevertheless, the Computer Misuse and Cybercrimes Act criminalises cyber harassment. Accordingly, “a person who, individually or with other persons, wilfully communicates, either directly or indirectly, with another person or anyone known to that person, commits an offence, if they know or ought to know that their conduct — (a) is likely to cause those persons apprehension or fear of violence to them or damage or loss on that persons' property; or (b) detrimentally affects that person; or (c) is in

³³ Republic of Kenya. (2006). [The Sexual Offences Act No. 3 of 2006](#), Section 16(3):“...a book, pamphlet, paper, drawing, painting, art, representation or figure or any other object shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or where it comprises two or more distinct items the effect of any one of its items, if taken as a whole, tends to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it”.

³⁴ Republic of Kenya. (2006). [The Sexual Offences Act No. 3 of 2006](#), Section 16(1)(aa).

³⁵ Republic of Kenya. (2006). [The Sexual Offences Act No. 3 of 2006](#), Section 16(1)(b).

³⁶ Republic of Kenya. (2006). [The Sexual Offences Act No. 3 of 2006](#), Section 16(1)(a).

³⁷ Republic of Kenya. (2006). [The Sexual Offences Act No. 3 of 2006](#), Section 16(1)(e).

³⁸ United Nations Office on Drugs and Crime, Regional Office for Southeast Asia, Bangkok, Thailand. (2015). [Working Paper Child Sex Offences Series 1: Child Pornography](#).

³⁹ Republic of Kenya. (2007). [The Employment Act No. 11 of 2007](#), Section 53 read with Sections 2.

⁴⁰ Republic of Kenya. (2007). [The Employment Act No. 11 of 2007](#), Section 64(3).

whole or part, of an indecent or grossly offensive nature and affects the person”.⁴¹ Hence, this provision could be used to prosecute offenders who sexually harass children in the online environment.

Finally, there is no law in Kenya that criminalises other manifestations of OCSEA such as **online sexual grooming, unwanted sexting, and sexual extortion**, committed in the online environment or through the use of ICTs.

The abovementioned provisions relating to OCSEA offences seem to apply to boys and girls equally as well as national and non-national victims. These provisions also apply to **all children below the age of 18 years**. However, as “unnatural intercourse” has been criminalised by the Penal Code in Kenya,⁴² this may affect the protection accorded to children aged 12-18 years who are sexually exploited by a perpetrator of the same gender. This may also hamper reporting of OCSEA offences due to the stigma associated with homosexuality as well as fear of prosecution, which could be exploited by offenders.⁴³ In addition, as discussed in the preceding section, minor boys face discrimination in cases involving minors engaging in consensual sexual intercourse. This bias may also exist in cases relating to OCSEA offences.

Finally, Kenyan laws do not impose legal duties on **Internet Service Providers (ISPs)** to filter and/or block and/or take down CSAM and report company and/or individuals disseminating, trader or distributing these materials. The Computer Misuse and Cybercrimes Act makes it clear that service providers shall be subjected to civil or criminal liability only if it is established that they had “actual notice, actual knowledge, or wilful and malicious intent and not merely through omission or failure to act, had thereby facilitated, aided or abetted the use by any person of any computer system controlled or managed by a service provider in connection with a contravention of this Act or any other written law”.⁴⁴ Here, the term “service providers” means “(a) a public or private entity that provides to users of its services the means to communicate by use of a computer system; and (b) any other entity that processes or stores computer data on behalf of that entity or its users”.⁴⁵ Therefore, ISPs should be covered within this definition.

Similarly, there are no regulations in place for **cybercafé owners** to report and prevent cases of OCSEA.

⁴¹ Republic of Kenya. (2018). [Computer Misuse and Cybercrimes Act No. 5 of 2018](#), Section 27.

⁴² Republic of Kenya. (1930). [The Penal Code of Kenya \(Cap. 63\) \(Rev. 2012\)](#), Section 162.

⁴³ Josenhans, V., Kavenagh, M., Smith, S., & Wekerle, C. (2019). [Gender, rights and responsibilities: The need for a global analysis of the sexual exploitation of boys](#). *Child Abuse & Neglect*, P. 6.

⁴⁴ Republic of Kenya. (2018). [Computer Misuse and Cybercrimes Act No. 5 of 2018](#), Section 56(1).

⁴⁵ Republic of Kenya. (2018). [Computer Misuse and Cybercrimes Act No. 5 of 2018](#), Section 2.

Extraterritoriality and Extradition

According to the Computer Misuse and Cybercrimes Act, conduct which constitutes an offence under this Act committed outside Kenya, will be punishable in Kenya as if the offence had been committed in Kenya. Further, the Act provides that for extraterritorial jurisdiction to apply, such an offence should be committed by a Kenyan citizen or resident against a citizen of Kenya or the offender should be present in Kenya after its commission.⁴⁶ The Sexual Offences Act has similar provisions.⁴⁷

Therefore, the Kenyan laws establish **active** as well as **passive extraterritorial jurisdiction** over OCSEA offences. Notwithstanding, the scope of passive extraterritorial jurisdiction is quite limited as there is no jurisdiction for offences committed outside Kenya by a foreign citizen against a Kenyan citizen or resident. The laws do not provide for **universal extraterritorial jurisdiction**.

In terms of extradition, the Extradition (Commonwealth Countries) Act states that an offence is **extraditable** if the law in the requesting country punishes the offence by a term of imprisonment of minimum twelve months, it falls within any description in an attached Schedule to the Extradition Act, and it would constitute an offence under the Kenyan law if it took place in Kenya.⁴⁸ The Schedule to the Extradition Act which describes extraditable offences does not refer to OCSEA offences. It vaguely mentions two offences in relation to children: “trafficking in young persons for immoral purposes” and “stealing, abandoning, exposing or unlawfully detaining a child”.⁴⁹ In the absence of any description of these offences, it is not clear whether OCSEA offences would be extraditable. Despite the lack of mention of OCSEA in the schedules of extraditable offences, the extradition for OCSEA-related cases has happened in Kenya. An example is the case of a Kenyan citizen accused of producing CSAM who was extradited to the United States in 2014.⁵⁰

Further, the Act provides general **restrictions** relating to surrender which include, *inter alia*, if it is found that the extradition request is for the purpose of prosecuting or punishing a perpetrator on account of their race, religion, nationality or political opinions, or if such a request would have the impact of prosecuting the person again for a crime for which they have already been convicted or acquitted (double jeopardy).⁵¹ A similar extradition procedure has been outlined in the Extradition (Contiguous and Foreign Countries) Act for extradition with non-Commonwealth countries.⁵²

⁴⁶ Republic of Kenya. (2018). [Computer Misuse and Cybercrimes Act No. 5 of 2018](#), Section 66.

⁴⁷ Republic of Kenya. (2006). [The Sexual Offences Act No. 3 of 2006](#), Section 41.

⁴⁸ Republic of Kenya. (1968). [Extradition \(Commonwealth Countries\) Act No. 65 of 1968](#), Section 4.

⁴⁹ Republic of Kenya. (1968). [Schedule to the Extradition \(Commonwealth Countries\) Act No. 65 of 1968](#).

⁵⁰ United States Department of Justice. (2015). [Kenyan child pornography producer sentenced to life in prison for participation in Dreamboard child sexual exploitation website](#).

⁵¹ Republic of Kenya. (1968). [Extradition \(Commonwealth Countries\) Act No. 65 of 1968](#), Section 6.

⁵² Republic of Kenya. (1966). [Extradition \(Contiguous and Foreign Countries\) Act No. 7 of 1966](#), Section 4.

Extradition, as defined in the Extradition (Commonwealth Countries) Act, includes the principle of **double criminality**. This implies that OCSEA offences would be extraditable in Kenya as long as they are criminalised both in Kenya and in the requesting State. An offender may escape prosecution for an OCSEA offence in the absence of the same.

In terms of international cooperation, the Computer Misuse and Cybercrimes Act enables the Office of the Attorney General and Department of Justice to request another State for assistance in any investigation related to a crime under the Act, and vice versa.⁵³ In addition, the Mutual Legal Assistance Act outlines procedures for cases when Kenya has to seek legal assistance from another State, and vice versa.⁵⁴

⁵³ Republic of Kenya. (2018). [The Computer Misuse and Cybercrimes Act No. 5 of 2018](#), Section 57(2).

⁵⁴ Republic of Kenya. (2011). [Mutual Legal Assistance Act No. 36 of 2011](#).

Other OCSEA-Related Provisions

The Computer Misuse and Cybercrimes Act prescribes stringent **penalties** for OCSEA offences. Offences relating to CSAM under this Act are punishable by a fine up to twenty million shilling (approx. US\$182,480 as of March 2021) or imprisonment up to twenty five years, or both.⁵⁵ The attempt to commit offences under the Act is punishable by imprisonment up to four years or a fine up to seven million shillings (approx. US\$63,868 as of March 2021) or both.⁵⁶ For the offence of cyber harassment, a person is liable to be punished with a fine up to twenty million shillings (approx. US\$182,480 as of March 2021) or imprisonment for a term up to ten years, or both.⁵⁷ Besides these penalties, the Court can also order the **forfeiture** of any proceeds, monies, properties, assets derived from the commission of an offence⁵⁸ or any device, thing or apparatus which is used for or in connection with the commission of the offence.⁵⁹

Pursuant to the provisions under the Sexual Offences Act, any person, including a **juristic person** who is guilty of the offence of CSAM and related acts, is punishable by imprisonment of minimum six years or a fine of at least five hundred thousand shillings (approx. US\$4,562 as of March 2021) or both and upon subsequent conviction, by imprisonment for a term of at least seven years.⁶⁰ It is pertinent to note that the Act sets mandatory minimum sentences. In *Evans Wanjala Wanyonyi v. Republic*, the Court of Appeal expressed disappointment over the mandatory minimum sentences for sexual offences under the Sexual Offences Act. The Court held that courts should have the liberty to decide about the appropriate sentence based on the nature and circumstances of the offence.⁶¹ It is important to note that the Sexual Offences Act criminalises **juristic persons** for offences relating to CSAM and the liability of juristic persons is the same as that of natural persons.⁶²

According to the provisions of the Employment Act, a person who uses a child in any activity constituting worst form of child labour, including CSAM, is liable to a fine not exceeding two hundred thousand shillings (approx. US\$1,824 as of March 2021) or to imprisonment up to twelve months, or both.⁶³

The Sexual Offences Act criminalises all forms of **advertising** or **promoting** CSAM. According to the Act, any person, including a juristic person, “who advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be produced from or through any person”.⁶⁴

⁵⁵ Republic of Kenya. (2018). [The Computer Misuse and Cybercrimes Act No. 5 of 2018](#), Section 24(1).

⁵⁶ Republic of Kenya. (2018). [The Computer Misuse and Cybercrimes Act No. 5 of 2018](#), Section 42(2).

⁵⁷ Republic of Kenya. (2018). [The Computer Misuse and Cybercrimes Act No. 5 of 2018](#), Section 27(2).

⁵⁸ Republic of Kenya. (2018). [The Computer Misuse and Cybercrimes Act No. 5 of 2018](#), Section 44(1).

⁵⁹ Republic of Kenya. (2018). [The Computer Misuse and Cybercrimes Act No. 5 of 2018](#), Section 67.

⁶⁰ Republic of Kenya. (2006). [The Sexual Offences Act No. 3 of 2006](#), Section 16(1).

⁶¹ Court of Appeal at Eldoret. (2019). [Evans Wanjala Wanyonyi v. Republic, \[2019\] eKLR](#), Paragraphs 24-25.

⁶² Republic of Kenya. (2006). [The Sexual Offences Act No. 3 of 2006](#), Section 16(1).

⁶³ Republic of Kenya. (2007). [The Employment Act No. 11 of 2007](#), Section 64(2).

⁶⁴ Republic of Kenya. (2006). [The Sexual Offences Act No. 3 of 2006](#), Section 16(1)(d).

In addition, the Sexual Offences Act provides for the establishment of a **national sex offender register**. According to the Act, such a register for convicted sexual offenders shall be maintained by the Registrar of the High Court and any person who has reasonable cause to do so may examine the register.⁶⁵ The Sexual Offences Regulations provide that the names and identities of the victims, complainants and other witnesses shall be protected in the Register, especially if such persons were declared vulnerable by a court of law during the criminal proceedings.⁶⁶ Pursuant to these provisions, the national sex offender register was launched in 2012.⁶⁷

The Sexual Offences Act also criminalises non-disclosure of conviction of sexual offenses.⁶⁸ According to the Act, “a person who has been convicted of a sexual offence and who fails to disclose such conviction when applying for employment which places him or her in a **position of authority or care of children** or any other vulnerable person or when offering or agreeing to take care of or supervise children or any other vulnerable person is guilty of an offence and liable upon conviction to imprisonment for a term of not less than three years or to a fine of not less than fifty thousand shillings (approx. US\$456 as of March 2021) or to both”.⁶⁹

Furthermore, the Sexual Offences Act has special provisions to deal with **dangerous recidivism**. Apart from imposing harsher penalties, the Act provides for the long-term supervision of dangerous sexual offenders.⁷⁰ A dangerous sexual offender is a person who has been convicted for a sexual offence more than once, been convicted of a sexual offence which involved violence or threats of violence; or has been convicted of a sexual offence against a child.⁷¹ In addition, the Sexual Offences (Dangerous Offenders DNA Data Bank) Regulations of 2008 provide for the establishment and maintenance of the Dangerous Offenders DNA Data Bank.⁷²

Pursuant to the provisions of the Data Protection Act, if a data controller or data processor is required to retain data for evidence, such a data controller or data processor shall restrict its processing and inform the person to whom the data belongs within a reasonable time.⁷³ In case the data relates to children, the Act provides that the data controller or data processor shall not process such information without the consent of the parents or guardian of the child and the processing should be carried in a manner which protects and advances the rights and **best interests of the child**.⁷⁴

⁶⁵ Republic of Kenya. (2006). [The Sexual Offences Act No. 3 of 2006](#), Section 30(13).

⁶⁶ Republic of Kenya. (2006). [The Sexual Offences Regulations 2008](#), Regulation 7(7).

⁶⁷ Physicians for Human Rights. (2012). [Finally... Kenya’s sex offenders register launched](#).

⁶⁸ Republic of Kenya. (2006). [The Sexual Offences Act No. 3 of 2006](#), Section 30.

⁶⁹ Republic of Kenya. (2006). [The Sexual Offences Act No. 3 of 2006](#), Section 30.

⁷⁰ Republic of Kenya. (2006). [The Sexual Offences Act No. 3 of 2006](#), Section 39(2)

⁷¹ Republic of Kenya. (2006). [The Sexual Offences Act No. 3 of 2006](#), Section 39(1).

⁷² Republic of Kenya. (2008). [Sexual Offences \(Dangerous Offenders DNA Data Bank\) Regulations 2008](#), Regulation 3.

⁷³ Republic of Kenya. (2019). [The Data Protection Act No. 24 of 2019](#), Section 40(3).

⁷⁴ Republic of Kenya. (2019). [The Data Protection Act No. 24 of 2019](#), Section 33(1).

In terms of **retention and preservation of digital evidence**, the Computer Misuse and Cybercrimes Act provides search and seizure powers to investigating agencies to investigate offences committed under the Act. A service provider can be compelled to collect or record Internet traffic data in real time, or to cooperate with the police or other authorised persons in carrying out the same.⁷⁵ As mentioned previously, **ISPs, mobile phone companies, and the technology industry** as a whole would be covered under the ambit of the definition of a “service provider” under the Computer Misuse and Cybercrime Act.

⁷⁵ Republic of Kenya. (2018). [The Computer Misuse and Cybercrimes Act No. 5 of 2018](#), Section 52(1)(b).

Access to Justice and Remedies

National complaint mechanisms and reporting

In Kenya, there is no mandatory obligation on the **professionals working with children** to report suspected cases of OCSEA.

Notwithstanding, there are some reporting duties for **private citizens** which could be applicable to OCSEA offences. The Children’s Act states that if a person has a ‘reasonable cause to believe’ that a child is in need of care and protection, he or she may **report** the matter to the nearest authorised officer.⁷⁶ It is not clarified in the Children’s Act the sense in which the term “nearest” has been used.⁷⁷ This is not a mandatory requirement.

Similarly, the Employment Act allows any person to make a complaint to a labour or police officer if they believe that a child is being employed for any activities that amount to the worst forms of child labour under the Act.⁷⁸

The domestic laws do not provide for the establishment of a **system for receiving and addressing reports** specifically for OCSEA offences. In the absence of any specialised mechanism, the provisions of the Criminal Procedure Code would be applicable to OCSEA cases.⁷⁹ In accordance with the Criminal Procedure Code, criminal proceedings can be instituted either by making a complaint or by bringing before the magistrate a person who has been arrested.⁸⁰ A complaint can be made by “any person who believes from a reasonable and probable cause that an offence has been committed by another person”.⁸¹ It appears that an **anonymous complaint** cannot form the basis of investigation as every complaint must be signed by the complainant.⁸²

It is not clear whether the Kenyan laws impose on the Public Prosecutors the duty to initiate investigations of OCSEA offences **ex officio** on the basis of information obtained by any sources (e.g. a police report).

Apart from the formal complaints mechanism established under the Criminal Procedure Code, there is also the National Computer Incidence Response Team (CIRT) under the Communications Authority of Kenya which deals with cybercrimes.⁸³

⁷⁶ Republic of Kenya. (2001). [Children Act No. 8 of 2001](#), Section 120(1).

⁷⁷ Since nearest is not defined- assumption is that this is geographical. In Kenya- authorised officers have clear geographical areas which they cover in terms of handling cases. If an incident involving a child happens in a certain geographical location- the children’s officer/ police officer/ chief in that location handles that incident. **(Information received via personal communication with the field researcher.)**

⁷⁸ Republic of Kenya. (2007). [The Employment Act No. 11 of 2007](#), Section 54(1).

⁷⁹ Republic of Kenya. (1930). [The Criminal Procedure Code \(Cap. 75\) \(as amended in 2012\)](#), Section 3.

⁸⁰ Republic of Kenya. (1930). [The Criminal Procedure Code \(Cap. 75\) \(as amended in 2012\)](#), Section 89(1).

⁸¹ Republic of Kenya. (1930). [The Criminal Procedure Code \(Cap. 75\) \(as amended in 2012\)](#), Section 89(2).

⁸² Republic of Kenya. (1930). [The Criminal Procedure Code \(Cap. 75\) \(as amended in 2012\)](#), Section 89(3).

⁸³ Nations KE-CIRT/CC. (n.d.). [Functions and services](#).

Additionally, in 2019, Kenya connected to the INTERPOL’s Child Sexual Exploitation (ICSE) database, a victim identification tool, which helps specialised investigators analyse and compare CSAM.⁸⁴

There are no **statutory limitations** for the prosecution of OCSEA offences. Indeed, the Criminal Procedure Code provides statutory limitations for all criminal offences in general however, only offences punishable by less than 6 months or a fine of one thousand shillings (approx. US\$9 as of March 2021) are subjected to a limitation period,⁸⁵ and no OCSEA offence (currently criminalised) fits into this category.

In 2019, the Status Report on Children in the Juvenile Justice System was published by the National Council of Administration of Justice (NCAJ) Special Task Force on Children Matters.⁸⁶ Although this report does not specifically mention child victims of OCSEA, it shows some general trends regarding the reporting and handling of complaints of sexual offences against children and the status of child victims’ access to justice. One of the gaps highlighted by the report is that not all complaints registered with the police get to the next level and many cases, mostly linked to sexual offences against children, are withdrawn, although it is not clear as to whether they are withdrawn irregularly or by the Director of Public Prosecutions.⁸⁷ Moreover, justice tends to be delayed, particularly in SEC-related cases.⁸⁸

Child-sensitive justice

In Kenya, the national legislation does not explicitly ensure child-sensitive justice for the child victims of OCSEA offences. Indeed, the Children’s Act provides for the establishment of Children’s courts which have the power to, *inter alia*, prosecute offences under the Act and other matters under this Act or any other written law.⁸⁹ However, the Children’s Act does not refer to OCSEA. It applies to children in need of care and protection, which include a child “who has been sexually abused or is likely to be exposed to sexual abuse and exploitation including prostitution and pornography”.⁹⁰ Therefore, the provisions of the Children’s Act could be applicable to the child victims of OCSEA offences.

The Children’s Act set forth that the Children’s Court shall sit in a separate building or room, or at separate times, from those in which sittings of other courts are held and only permitted persons would be present at any sitting of such Court.⁹¹

⁸⁴ INTERPOL. (2019). [Kenya first African country to connect to the international child sexual exploitation database.](#)

⁸⁵ Republic of Kenya. (1930). [The Criminal Procedure Code \(Cap. 75\) \(as amended in 2012\)](#), Section 219.

⁸⁶ National Council on the Administration of Justice. (2019). [Status Report on Children in the Justice System in Kenya](#), P. 20.

⁸⁷ National Council on the Administration of Justice. (2019). [Status Report on Children in the Justice System in Kenya](#), P. 17.

⁸⁸ National Council on the Administration of Justice. (2019). [Status Report on Children in the Justice System in Kenya](#), P. 27.

⁸⁹ Republic of Kenya. (2001). [Children Act No. 8 of 2001](#), Section 73.

⁹⁰ Republic of Kenya. (2001). [Children Act No. 8 of 2001](#), Section 119(1)(n).

⁹¹ Republic of Kenya. (2001). [Children Act No. 8 of 2001](#), Section 74.

It is noteworthy that the 2019 Status Report on Children in the Juvenile Justice System published by the NCAJ revealed that child-friendly infrastructure for children in the court is rare.⁹² This could imply that the provisions of the Children’s Act are yet to be implemented effectively, despite the fact that it has been almost 18 years since the Act came into effect.

Pursuant to the provisions of the Victim Protection Act, it is the duty of a person dealing with a victim to secure the victim from further harm before any other action is taken concerning the victim.⁹³ This includes providing urgent medical treatment, immediate psychosocial support and police protection wherever required.⁹⁴ Apart from these measures, the Victim Protection Board can take measures to provide services to the victims to help them deal with physical injury and emotional trauma, access and participate in the criminal justice process and cope with problems associated with victimisation.⁹⁵ Therefore, a child victim of OCSEA is entitled to receive **psychological support and assistance** during the legal proceedings.

The Constitution of Kenya provides children the right to bring cases when “a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened”.⁹⁶ Accordingly, the Children’s Act entitles every child to be provided with **legal representation** at the expense of the State.⁹⁷ In case a child is not represented by any advocate, the Court has the power to appoint a **guardian ad litem** to safeguard the interests of the child.⁹⁸ The Legal Aid Act provides for the creation of National Legal Aid Service to provide legal aid services in, *inter alia*, children matters.⁹⁹ The Act applies to persons who are indigent and who are **resident in Kenya**.¹⁰⁰

The national legislation does not ensure that **non-governmental organisations** can assist/support child victims at their request, during the investigation and judicial proceedings.

A child victim is entitled to the right to such information which is necessary to realise their rights under the Victim Protection Act.¹⁰¹ Further, a victim including a child victim has the right to be assisted by an interpreter provided by the State where they cannot understand the language in which the trial is conducted.¹⁰² However, these provisions are general and there is no explicit provision in the law that makes it mandatory for the authorities to provide a child victim with **information related to legal proceeding** in a child-friendly manner.

⁹² National Council on the Administration of Justice. (2019). [Status Report on Children in the Justice System in Kenya](#), p. 20.

⁹³ Republic of Kenya. (2014). [Victim Protection Act No. 17 of 2014](#), Section 11(1).

⁹⁴ Republic of Kenya. (2014). [Victim Protection Act No. 17 of 2014](#), Section 11(2).

⁹⁵ Republic of Kenya. (2014). [Victim Protection Act No. 17 of 2014](#), Section 14(2).

⁹⁶ Republic of Kenya. (2001). [The Constitution of Kenya 2010](#), Article 22(1).

⁹⁷ Republic of Kenya. (2001). [Children Act No. 8 of 2001](#), Section 77.

⁹⁸ Republic of Kenya. (2001). [Children Act No. 8 of 2001](#), Section 79.

⁹⁹ Republic of Kenya. (2016). [Legal Aid Act No. 6 of 2016](#), Section 35(1).

¹⁰⁰ Republic of Kenya. (2016). [Legal Aid Act No. 6 of 2016](#), Section 36(1).

¹⁰¹ Republic of Kenya. (2014). [Victim Protection Act No. 17 of 2014](#), Section 19(1)-(2).

¹⁰² Republic of Kenya. (2014). [Victim Protection Act No. 17 of 2014](#), Section 9(1)

The Children’s Act provides children protection against infringement of their right to **privacy** in any proceedings, whether conducted under the Children’s Act or any other written law. The Act prohibits **identification** of child victims by stating that “a child’s name, identity, home or last place of residence or school shall not, nor shall the particulars of the child’s parents or relatives, any photograph or any depiction or caricature of the child, be published or revealed, whether in any publication or report (including any law report) or otherwise”.¹⁰³ The Act penalises any person who contravenes these provisions with a fine of at least one hundred thousand shillings (approx. US\$912 as of March 2021) or to imprisonment for minimum one year or to both, and in the case of a body corporate, a fine of at least one million shillings (approx. US\$9,124 as of March 2021). The right to privacy of victims including the child victims of OCSEA offences is also ensured under in the Victim Protection Act.¹⁰⁴

With regard to the **protection** of child victims and their families, the Sexual Offences Act provides that a child victim in a legal proceeding relating to sexual offences committed under the Act, may be declared a vulnerable witness by the court in which such proceeding is being carried out.¹⁰⁵ Accordingly, the child victim would be protected with certain measures which include allowing him or her to give evidence in a witness protection box and give evidence through an intermediary.¹⁰⁶ The ‘intermediary’ can be a parent, relative, guardian, psychologist, counsellor, children’s officer or social worker.¹⁰⁷ Further, the court can direct that the proceedings may not take place in open court and can take any other measure which the court deems just and appropriate.¹⁰⁸ The prosecution has the duty to notify the child victims, their parents, guardians or any other person responsible for the child , of the protective measures.¹⁰⁹

Similarly, the Victim Protection Act contains provisions for vulnerable witnesses.¹¹⁰ Pursuant to these provisions, in the case of a vulnerable child witness, their best interest is of paramount consideration.¹¹¹ Further, the Act accords special protection to child witnesses by stating that “where it appears to any police officer or the Director of Public Prosecutions or any public officer presiding in a case where there is a vulnerable child victim, and it appears that it would not be prudent to place the victim with the parents, guardians, or care-givers, the child victim shall be committed to a place of **safety** until the court makes a decision in relation to the matter”.¹¹² A child witness who is kept in an institution is entitled to treatment in accordance with the provisions of the Children’s Act.¹¹³

Additionally, under the Victim Protection Act, a victim has the right to be protected from harassment, fear, abuse, intimidation, tampering, bribery and corruption.¹¹⁴ The Act further guarantees the victims to have their own safety and that of their family be taken into consideration in decisions relating to the

¹⁰³ Republic of Kenya. (2001). [Children Act No. 8 of 2001](#), Section 76(5).
¹⁰⁴ Republic of Kenya. (2014). [Victim Protection Act No. 17 of 2014](#), Section 8.
¹⁰⁵ Republic of Kenya. (2006). [The Sexual Offences Act No. 3 of 2006](#), Section 31(1).
¹⁰⁶ Republic of Kenya. (2006). [The Sexual Offences Act No. 3 of 2006](#), Section 31(4).
¹⁰⁷ Republic of Kenya. (2006). [The Sexual Offences Act No. 3 of 2006](#), Section 2(1).
¹⁰⁸ Republic of Kenya. (2006). [The Sexual Offences Act No. 3 of 2006](#), Section 31(4).
¹⁰⁹ Republic of Kenya. (2006). [The Sexual Offences Act No. 3 of 2006](#), Section 32(1).
¹¹⁰ Republic of Kenya. (2014). [Victim Protection Act No. 17 of 2014](#), Section 17.
¹¹¹ Republic of Kenya. (2014). [Victim Protection Act No. 17 of 2014](#), Section 17(5)(c).
¹¹² Republic of Kenya. (2014). [Victim Protection Act No. 17 of 2014](#), Section 18(1).
¹¹³ Republic of Kenya. (2014). [Victim Protection Act No. 17 of 2014](#), Section 18(2).
¹¹⁴ Republic of Kenya. (2014). [Victim Protection Act No. 17 of 2014](#), Section 10(1).

conditions of bail and release of the offender.¹¹⁵ This protection extends to child victims of OCSEA offences as well.

It is noteworthy that under the Victim Protection Act a victim is any natural person who suffers injury, loss or damage as a consequence of an offence.¹¹⁶ This implies that the provisions of this law are applicable to **boys and girls equally**. Further, this Act is applicable to a **non-national victim of OCSEA**, provided the offence is committed in Kenya.¹¹⁷

Access to recovery and reintegration

The national legislation does not provide for **specific programmes for support and reintegration for child victims of OCSEA**. Nevertheless, under the Children’s Act, a child who has been sexually abused or is prone to sexual abuse and exploitation including CSAM-related conduct, needs care and protection.¹¹⁸ In case such a child needs medical care, the same shall be provided to him by the officer concerned.¹¹⁹ The court before which such a child is brought, can commit such child to a **rehabilitation** school suitable to their needs and attainments.¹²⁰

The Victim Protection Act makes it the duty of courts, administrative authorities or persons performing functions under the Act to ensure that the dignity of a victim is preserved at each stage of the trial and also during the post-trial phase.¹²¹ The Victim Protection Act further provides that each victim should be dealt with in accordance with their age and intellectual development.¹²² According to the Victim Protection Act, every victim deserves protection from secondary victimisation in all types of proceedings relating to the victim.¹²³ Every vulnerable witness is entitled to legal and social services at the expense of the State.¹²⁴

Additionally, The Victim Protection Act outlines the role of the Victim Protection Board in advising the Cabinet Secretary on activities aimed at the implementation of rehabilitative programmes for victims of crimes.¹²⁵

The abovementioned provisions of the Victim Protection Act apply to **boys as well as girls** equally.

¹¹⁵ Republic of Kenya. (2014). [Victim Protection Act No. 17 of 2014](#), Section 10(2).

¹¹⁶ Republic of Kenya. (2014). [Victim Protection Act No. 17 of 2014](#), Section 2(1).

¹¹⁷ Republic of Kenya. (2014). [Victim Protection Act No. 17 of 2014](#), Section 5.

¹¹⁸ Republic of Kenya. (2001). [Children Act No. 8 of 2001](#), Section 119(1)(n).

¹¹⁹ Republic of Kenya. (2001). [Children Act No. 8 of 2001](#), Section 121(1).

¹²⁰ Republic of Kenya. (2001). [Children Act No. 8 of 2001](#), Section 125(2)(c).

¹²¹ Republic of Kenya. (2014). [Victim Protection Act No. 17 of 2014](#), Section 4(2)(c).

¹²² Republic of Kenya. (2014). [Victim Protection Act No. 17 of 2014](#), Section 4(2)(d).

¹²³ Republic of Kenya. (2014). [Victim Protection Act No. 17 of 2014](#), Section 4(2)(f).

¹²⁴ Republic of Kenya. (2014). [Victim Protection Act No. 17 of 2014](#), Section 4(2)(g)

¹²⁵ Republic of Kenya. (2014). [Victim Protection Act No. 17 of 2014](#), Section 32.

Further, this Act is applicable to a **non-national victim of OCSEA**, provided the offence is committed in Kenya.¹²⁶

Access to compensation

In Kenya, child victims of OCSEA have the possibility of seeking **compensation** in a civil or criminal proceeding from convicted perpetrators. They can be awarded compensation in the judgement of the **criminal proceedings**. The Computer Misuse and Cybercrimes Act allows the court to order the offender to pay compensation to any person who has suffered a loss caused due to the commission of an offence.¹²⁷ The amount of compensation is fixed by the court.¹²⁸ An order of compensation made under this provision is recoverable as a civil debt.¹²⁹ Such an order does not bar a victim from instituting an **independent civil suit** for the recovery of damages beyond the amount of compensation already paid by the offender.¹³⁰

According to the provisions of the Victim Protection Act, “a victim has a right to restitution or compensation from the offender and the enforcement thereof in accordance with this Act”.¹³¹ A victim can seek compensation for, *inter alia*, any economic loss resulting from the commission of the offence, loss of or damage to property, medical costs or costs of any psychological treatment.¹³²

In addition, child victims of OCSEA have the possibility of seeking compensation through a **country-managed fund**. The Victim Protection Act establishes a **Victim Protection Trust Fund**¹³³ which can be used to assist the victims of crimes.¹³⁴ **Non-national victims** of OCSEA are eligible to seek compensation through this fund, provided the offence is committed in Kenya.¹³⁵

¹²⁶ Republic of Kenya. (2014). [Victim Protection Act No. 17 of 2014](#), Section 5.

¹²⁷ Republic of Kenya. (2018). [The Computer Misuse and Cybercrimes Act No. 5 of 2018](#), Section 45(1).

¹²⁸ Republic of Kenya. (2018). [The Computer Misuse and Cybercrimes Act No. 5 of 2018](#), Section 45(1).

¹²⁹ Republic of Kenya. (2018). [The Computer Misuse and Cybercrimes Act No. 5 of 2018](#), Section 45(3).

¹³⁰ Republic of Kenya. (2018). [The Computer Misuse and Cybercrimes Act No. 5 of 2018](#), Section 45(2).

¹³¹ Republic of Kenya. (2014). [Victim Protection Act No. 17 of 2014](#), Section 23(1).

¹³² Republic of Kenya. (2014). [Victim Protection Act No. 17 of 2014](#), Section 23(2).

¹³³ Republic of Kenya. (2014). [Victim Protection Act No. 17 of 2014](#), Section 27.

¹³⁴ Republic of Kenya. (2014). [Victim Protection Act No. 17 of 2014](#), Section 28(2)(a).

¹³⁵ Republic of Kenya. (2014). [Victim Protection Act No. 17 of 2014](#), Section 5.