

The role of medical evidence within the existing legal framework in Kenya

Dr. Emily Adhiambo Rogena

Dept. Of Human pathology

School of Medicine University of Nairobi

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Role of the medical examiner

- Definition and standards
- Sampling and preservation and start the chain of custody
- Challenges
- History
- The HCP as an expert
- Facts obtained vs the law
- Pitfall
- Negligence vs SOA 2006

history

- “ I write not to share my wisdom with you, but to share my ignorance” **PLO Lumumba-**
- The definition of rape in lay and medical context is not very clear
- History tells me that from Ghana to Botswana- rape has been considered historically as an offence against the male relatives and the family of the victim
- A south Nyanza DC once wrote- “their means to control VD is to smear the discharge from a venereal sore onto the private parts of a young girl so that the latter may become infected when the original sufferer becomes apparently treated. By some people a shilling is used to convey the infection to an unsuspecting person” (Brett LS 2008)

Medical experts and the law- evidence act CAP 80

- **Def:** when a court has to form an opinion upon a point of foreign law, or of science, or art , opinions upon that point are admissible if made by persons specially skilled in such foreign law, science, art.....
- Such persons are called experts
- Evidence act Cap 80- ss 48

Who is an expert ?

- Is it a medical officer? (stationed at 3-4 levels)
- Is it a nurse? (Stationed at 4 levels of health service provision)
- Is it a clinical officer? (stationed at 3-4 levels)
- There is no standard practice. Some magistrates allow clinical officers at least. Others will not

Facts in medical practice

- The medical evidence is deemed to be factual
- Unlike circumstantial
- The courts rely on this evidence with the trust put on the medical practitioners
- Garbage in garbage out- wrong convictions or acquittal

Role simplified

Roles

- What?
- By whom?
- Forcefully or no force?
- Intoxication by drugs or alcohol?
- Infection detection and control
- Prevention of pregnancy

Standard

- **What** – definition of the sexual offence
- Rape, sodomy, defilement
- **SOA-** Interpretation of penetration - means the partial or complete insertion of the genital organs of a person into the genital organs of another person;
- What is the anatomical landmark? Do we all understand the landmark?

Roles simplified

What

- The presence of spermatozoa
- Oral sex
- Rape
- Sodomy and rape of men

standard

- Contact as shown by the presence of spermatozoa or other tissue fluid or cells that have been transferred
- Not mentioned clearly in the SOA as a standard. It is presumed
- Prostatic specific antigen- detects semen
- Prostatic alkaline phosphatase- detects semen
- Protein 30- been tried- detects semen

Roles

what

- Infections – through examination and samples- urethritis, PID, HIV
- Emphasis put on HIVand any other life threatening STI

SOA

- 26. (1) Any person who, having actual knowledge that he or she is infected with HIV or any other life threatening sexually transmitted disease intentionally, knowingly and willfully does anything or permits the doing of anything which he or she knows or ought to reasonably know -

Roles simplified

What

- Detection of life threatening infections
- What is the sensitivity of the kit used, how many false positives, can one use the screening kits such as determine with high false positivity?
- Semiautomated/quantitative long ELISA

effects

- (a) will infect another person with HIV or any other life threatening sexually transmitted disease;
- (b) is likely to lead to another person being infected with HIV or any other life threatening sexually transmitted disease
- shall be guilty of an offence married or not

Medical Role

The pitfalls –What?

- Life threatening infections
- Hepatitis B
- Hepatitis C
- Chlamydiae species
- The last three not easily picked and yet have serious medical consequences

penalty

- shall be guilty of an offence, whether or not he or she is married to that other person, and shall be liable upon conviction to imprisonment for a term of not less fifteen years but which may be for life.

Medical role

Whom?

- The perpetrator

Minimum standard-screening

1. Blood group secretor factors
 - 85% of population will be a secretor of their blood group hence low evidential value (English case of group A and A)
2. Red cell iso-enzymes- numerous, tried
3. Fibre and hair- morphology

Role of medical evidence

whom

- DNA

Standard

- SOA- simply defined , not taken as the only means of diagnosis

Important but prohibited

history-DNA

- 34.(1) No evidence as to any previous sexual experience or conduct of any person..... shall be adduced, and no question regarding such sexual conduct shall be put to such person, the accused or any other witness at the proceedings pending before a court unless the court has, on application by any party to the proceedings, granted leave to adduce such evidence or to put such questions.
- For married women the information may be necessary in guiding the DNA -laboratory

Pitfall-Criteria for making a diagnosis/conclusion

- Not uniform- a retrospective study reviewing the medical evidence on patients files (2002-2003)
- Lack of uniformity
- Head injury
- Pregnancy
- Blunt force trauma
- Silent on the sexual violence

pitfalls

- Late presentation (Laikipia and Samburu women – review in 2003)
- Upto 42 years
- No physical evidence
- No trace evidence

Role of medics- means of “control”

- Force-Document features suggestive of force- mainly clothing and injuries
- Drugs- sample for drugs and alcohol screening where history suggests. Expensive

Legal standard for sampling

- (5) Where a court has given directions under subsection (4), any medical practitioner or **designated person** shall, if so requested in writing by a police officer above the rank of a constable, take an appropriate sample or samples from the accused person concerned;
- (6) An appropriate sample or samples taken in terms of subsection (5)

Legal Standard for sampling-negligence

- (7) Without prejudice to any other defence or limitation that may be available under any law, no claim shall lie and no set-off shall operate against - the State; any Minister; any medical practitioner or designated persons,
- in respect of any detention, injury or loss caused by or in connection with the taking of an appropriate sample in terms of subsection (5), unless the taking was unreasonable or done in bad faith or the person who took the sample was culpably ignorant and negligent.

Obstruction of justice

- (8) Any person who, without reasonable excuse, hinders or obstructs the taking of an appropriate sample in terms of subsection (5) shall be guilty of an offence of obstructing the cause of justice and shall on conviction be liable to imprisonment for a term of not less than five years or to a fine of not less fifty thousand shillings or to both.
- What is the option for the accused? Are we to seek consent from the accused?

Obstruction of justice

- Keeping scene of crime secure etc.
- 37.(1) Any person who intentionally interferes with a scene of crime or any evidence relating to the commission of an offence under this Act is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than three years or to a fine of one hundred thousand shillings or to both.
- (2) Interference referred to in subsection (1) includes but is not limited to -
 - (a) tampering with a scene of crime;
 - (b) interference or intimidation of witnesses; and
 - (c) any other act or omission that would hinder or obstruct investigations or materially misrepresent any evidence.

COST OF TREATMENT

- Medical treatment orders. 7 of 2007.
- (2) Notwithstanding the provisions of sub-section (1), a court shall, at any time at the request of a victim of sexual offence or an intermediary, grant an order for the treatment of a victim of sexual offence.
- (4) The expenses incurred for the treatment or professional counseling of any person convicted of an offence under this section or a victim of a sexual offence as the case may be, shall be borne by the State..... at a public hospital or institution or any other institution approved or gazetted by the Minister responsible for health.



COST OF DIAGNOSIS

- The law is silent on this