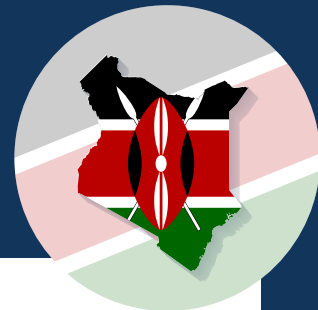


# ONLINE SEXUAL EXPLOITATION AND ABUSE IN KENYA



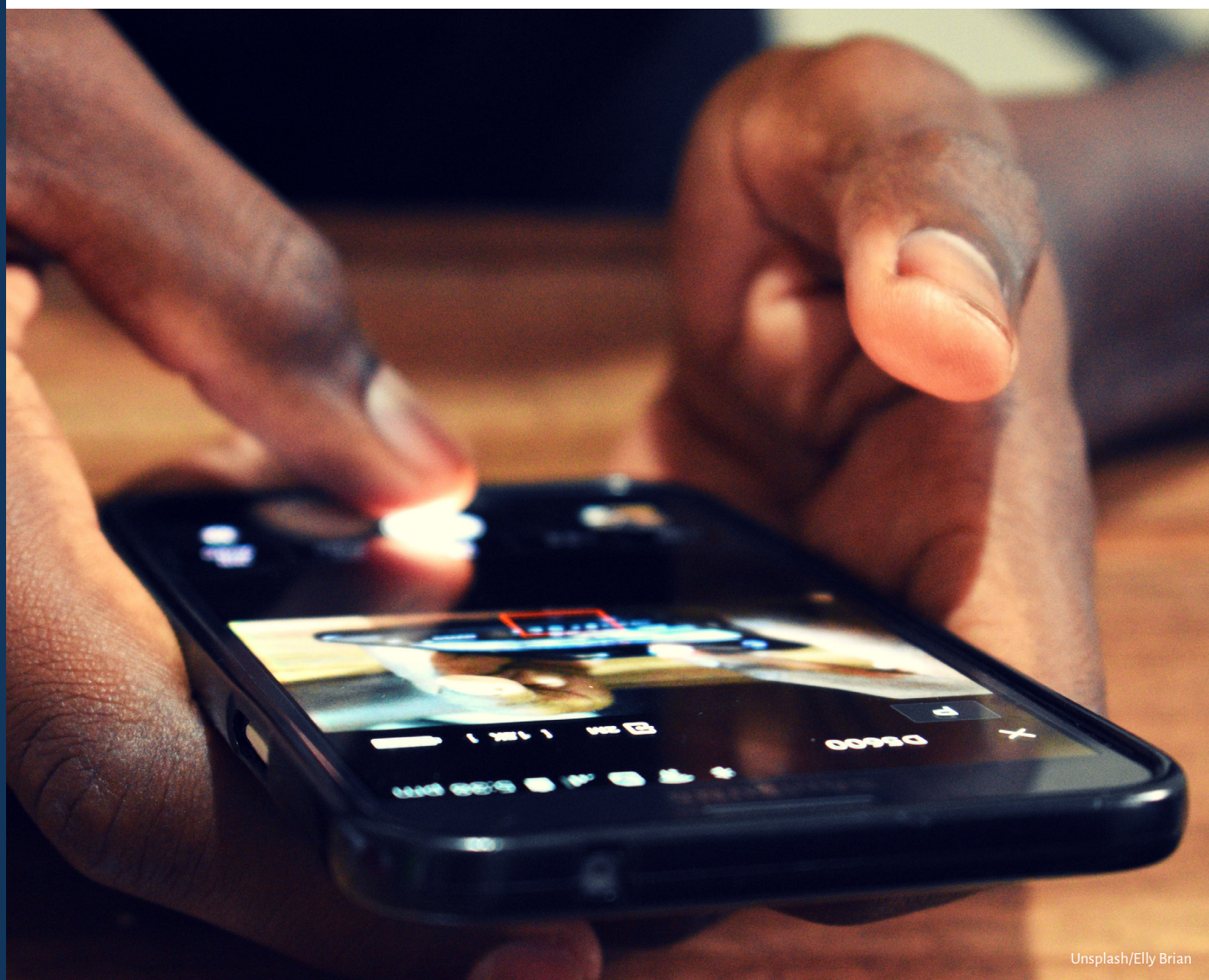
As one of Africa's leaders on internet uptake, recording the highest internet penetration rate in Africa in 2020, Kenya's laws are particularly important in protecting users against online sexual exploitation and abuse (OSEA).<sup>1</sup> Among a population of 47.6 million, there are approximately 41.5 internet subscribers, and those numbers continue to increase.<sup>2</sup> With ready access to the internet, Kenya has become a hub of human trafficking as ever-increasing internet and digital connectivity, camera-ready technology, and online anonymity are making it easier to groom, recruit, and sexually exploit with impunity. New forms of OSEA are emerging including online grooming, live streaming of OSEA, image-based sexual abuse and sexual extortion and coercion. Reporting of OSEA remains a challenge in Kenya, making it difficult to show a clear statistical picture of the occurrences of OSEA and to address and eradicate the behaviors.

While countries like Kenya have OSEA laws in place, a lack of consistent legislation and internationally adopted laws make obtaining legal recourse extremely challenging.

Note: The information in this factsheet is largely derived from the report titled *Ending Online Sexual Exploitation and Abuse: A Call for International Standards*, published during November 2021. Please refer to the report for further information on these laws as well as a full list of recommendations. <https://www.equalitynow.org/endosea>.

<sup>1</sup> <https://www.statista.com/statistics/1124283/internet-penetration-in-africa-by-country/>

<sup>2</sup> <https://www.ca.go.ke/wp-content/uploads/2020/12/Sector-Statistics-Report-Q1-2020-2021.pdf>



# LEGAL LANDSCAPE

## Overview of International and Regional Treaties

With respect to international protections, Kenya ratified:

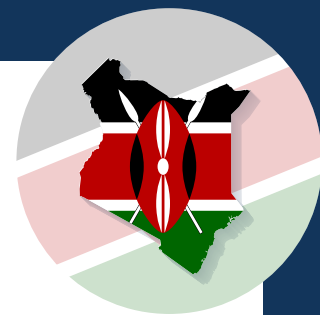
- The UN Convention on the Rights of the Child (CRC), including signing of the Optional Protocol to the CRC on the sale of children, child prostitution, and child pornography.
- The UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).
- The International Labour Organization Convention (ILO) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Worst Forms of Child Labour Convention).

In addition, Kenya acceded to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime (Palermo Protocol).

Regionally, in an attempt to provide protection from various forms of OSEA, Kenya:

- Became a party to the African Union (AU) Africa Charter on Human and People's Rights.
- Ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).
- Ratified the AU Convention on Cybercrimes and Electronic Transactions.

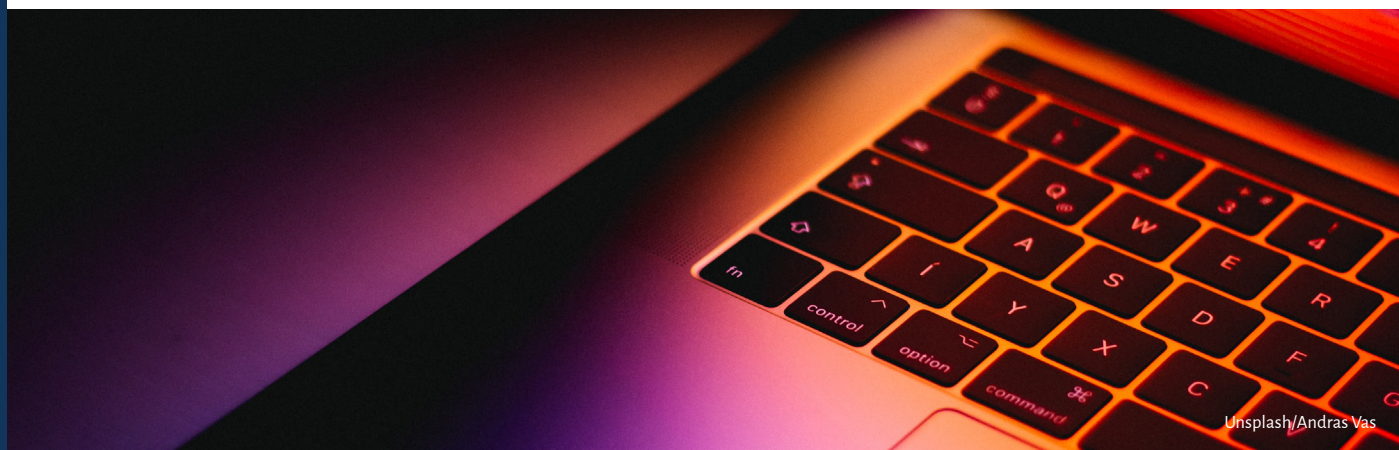
These instruments obligate governments to put in place measures to address sexual violence, sexual exploitation, and abuse.



## Overview of Existing Laws Covering OSEA

Kenya has put in place national laws to provide protection including:

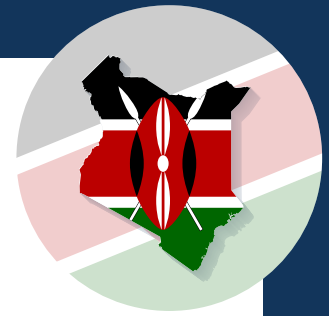
- The Sexual Offences Act, which provides for protection from sexual violence, with a primary purpose of ensuring survivors of sexual offenses get justice. It prohibits all manner of sexual offenses including sexual exploitation. Further, it criminalizes the production, distribution, profiteering, and advertising of CSAM and criminalizes displaying "obscene images, words, or sounds by means of print, audio-visual or any other media to a child" for the purposes of intending for the child to engage in a sexual act.
- The Children Act, which provides for the rights and welfare of children and guarantees them protection from physical and psychological abuse, neglect, and exploitation. The Act specifically prohibits sexual exploitation of children. It lists subjection to sexual exploitation via CSAM as one of the criteria for determining if a child needs protection.
- The Computer Misuse and Cybercrimes Act, which penalizes behavior that constitutes CSAM, prohibiting, producing, or possessing child sexual abuse material (CSAM), and it may apply in cases of live-streaming of sexual abuse and image-based sexual abuse.
- The Penal Code, which prohibits all acts of violence.
- The Data Protection Act, which protects the right to privacy of personal information, including in communications. When broadly applied, it can be used to address image-based sexual abuse.
- The Counter Trafficking in Person Act, which protects persons, including children, from being trafficked for whatever reason and prescribes appropriate penalties for such offenses.



Unsplash/Andras Vas

# GAPS IN LAW

Despite Kenya's efforts to act against OSEA, existing laws do not adequately address its different forms or impacts, leaving gaps in legal protection against this abuse. These laws are often plagued with definitions that are too narrow to always address the different crimes. In addition, there are gaps in the law where some aspects of offenses such as image-based sexual abuse and online grooming and solicitation for sexual exploitation and abuse are not yet criminalized.



## Online Grooming and Solicitation for Sexual Exploitation and Abuse

The Sexual Offences Act criminalizes displaying “obscene images, words, or sounds by means of print, audio-visual or any other media to a child” for the purposes of intending for the child to engage in a sexual act. Although this definition provides some protection from CSAM it is not entirely satisfactory, as it requires that the display be of something “obscene”. In reality, grooming may be done through “innocent” conversations. Another gap is the failure of laws to recognize and provide for protection of adults who may also be vulnerable to online grooming and solicitation for sexual exploitation and abuse.

## Online Sexual Coercion and Extortion

There is no specific law that provides protection from online sexual coercion and extortion. However, courts tend to prosecute cases involving the elements of sexual coercion and extortion under the Sexual Offences Act. Sections 23 and 24 of the Sexual Offences Act prohibits any person from making any persistent sexual advances or requests, that they know to be reasonably unwelcome and would be guilty of the offense of sexual harassment. One of the challenges in applying the Sexual Offences Act to cases of online sexual coercion and extortion is that victims would need to prove beyond a reasonable doubt that there was coercion to obtain their consent.

Laws that provide protection for the offense as it occurs online would ensure that victims are not straddled with burdensome requirements in law to meet so as to obtain protection.

## Child Sexual Abuse Material (CSAM)

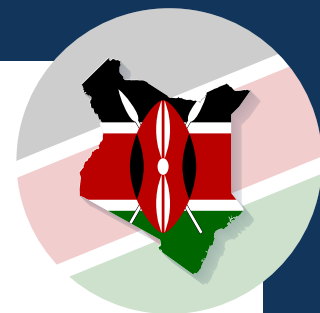
The Sexual Offences Act provides for the most comprehensive provisions on CSAM by criminalizing the production, distribution, profiteering, and advertising of CSAM. The Children Act, although it does not explicitly provide for CSAM, lists subjection to sexual exploitation via CSAM as one of the criteria for determining if a child needs protection. In addition, the Computer Misuse and Cybercrimes Act can be interpreted to penalize behavior that constitutes CSAM. In particular, producing or possessing CSAM on or through a computer system or computer data storage medium is prohibited. Other legislative provisions criminalize publicly exhibiting a visual, audio, or audio-visual media depicting a child.

Like other countries, one of the challenges that Kenya faces is addressing how to detect adolescent girls in CSAM on the internet. Automated tools that detect CSAM online and human reviewers cannot always be certain that images of girls who have reached puberty are not images of adults. The laws that address CSAM should include specific protections for adolescent girls.

## Live-Streaming of Sexual Exploitation and Abuse

There is no explicit offense addressing live-streaming of sexual exploitation and abuse in Kenya. Instead, other legislation tackling CSAM can be interpreted widely to penalize perpetrators. In particular, live-streaming of sexual exploitation and abuse would be provided for by the offense of producing or possessing CSAM on or through a computer system or computer data storage medium. Other legislative provisions provide protection for children from exposure to “obscene materials”.

A gap in Kenya's law is that it does not include specific protections for adults. Worryingly, it is women and girls who may be criminalized. In 2019, 10 women were arrested in Kenya and charged with trafficking obscene publications under Section 181 (1) (a) of the Penal Code.<sup>3</sup> In addition, abused adolescent girls are likely falling through the cracks because the tools used to detect images and videos are not always able to determine the age of survivors. There are also no specific provisions to address the use of deepfakes in live-streaming.



## Online Sex Trafficking

The Counter Trafficking in Person Act, protects people in Kenya from human trafficking, including trafficking for sexual exploitation, and prescribes appropriate penalties for such offenses. The Children Act also prohibits trafficking of children including for purposes of sexual exploitation. However, even though it may be interpreted that both laws can be used to prosecute trafficking facilitated by or taking place online, they do not make specific reference to the use of technology and the internet to traffic and exploit. Including such provisions would ensure adequate protection for victims.

## Image-Based Sexual Abuse

Kenya has decriminalized the offense of criminal defamation which was widely used to provide protection from image-based sexual abuse. There are, however, various remedies available to a victim under civil law where one may be able to make civil claims including torts involving privacy, copyright, and intentional infliction of emotional distress. It is important to note the limitations that come along with the use of these remedies: for instance under the Copyright Act, victims may have some recourse only if they can establish authorship of the image or video in question. Lack of a specific law addressing image-based sexual abuse means that there is not adequate protection for victims.

# KEY RECOMMENDATIONS

The Kenyan government should:

- Enact and implement laws that address the root causes of OSEA, in particular gender, sex-based discrimination and intersecting inequalities and the proliferation of misogyny and abuse of power online.
- Ensure that laws and policies that address all forms and aspects of OSEA are enacted and implemented. They should align with international standards, where they exist, including providing for protection of vulnerable people. Domestic laws should also consider the gendered, technological, and multi-jurisdictional nature and dimensions of OSEA.
- Provide legislative measures enabling law enforcement to investigate and prosecute perpetrators of OSEA including on collaboration between national law enforcement and regional and international agencies such as INTERPOL to enhance skills and capacity to investigate OSEA nationally and across jurisdictions.
- Mandate digital service providers and platforms to implement clear policies and procedures relating to posting, sharing and publication of OSEA material on their platforms, and mandate penalties when they fail to comply with the law.
- Strengthen national institutions through provision of adequate resources to investigate and prosecute OSEA cases.
- Support survivors' access to the legal system, including through providing adequate funding to key institutions including law enforcement, the judiciary, child protection services, and women's rights departments with a goal of supporting investigation and prosecution of cases and support of survivors of OSEA.
- Collaborate with civil society and the media to raise understanding of OSEA including information on how to identify violations and report to law enforcement and digital service providers and platforms.

3 <https://www.the-star.co.ke/counties/coast/2019-07-12-10-women-arrested-shooting-pornographic-film-dildos-recovered/>