

11th July, 2014

LEGAL NOTICE No. 101

THE SEXUAL OFFENCES ACT
(No.3 of 2006)

IN EXERCISE of the powers conferred by section 47A of the Sexual Offences Act, 2006, the Chief Justice and President of the Supreme Court makes the following Rules:-

THE SEXUAL OFFENCES RULES OF COURT, 2014

Citation.

1. These Rules may be cited as the Sexual Offences Rules of Court, 2014.

Orders of the court.

2. (1) The court may make such orders or give such directions for the efficient disposal of cases and-

(a) ensure victims and vulnerable witness are treated in a manner that recognises their vulnerability;

(b) protect the privacy of victims; or

(c) protect the privacy of a child accused of an offence under the Act.

(2) The court may limit access of the press or the media or any other person to the court room or the court proceedings during the trial or any part of the trial to protect the privacy of a victim, a vulnerable witness or a child accused of committing an offence under the Act.

Expedited testimony of witness.

3. The court may permit the expedited testimony of a witness where it is necessary in the circumstances to meet the ends of justice.

Determination of age.

4. When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.

Sentence passed against minor. No 8 of 2001

5. Where a minor has convicted of an offence under the Act, the court shall take into account the provisions of section 191 of the Children Act when sentencing the minor.

Special arrangements for vulnerable witnesses.

6. (1) The court may permit a vulnerable witness to give evidence without the benefit of special arrangements if that vulnerable witness informs the court of the desire to do so.

(2) The court may not permit a vulnerable witness to testify using special arrangements if the use of such special arrangements will give rise to a significant risk of prejudice to the trial that significantly outweighs the risk of prejudice to the interests of the vulnerable witness.

(3) The court may seek the opinion of a vulnerable witness regarding any special arrangements that may be made for the witness when testifying and the court shall take into consideration the age and maturity of the witness when considering the opinion of the witness.

(4) Where a vulnerable witness is accompanied by a parent or an intermediary, and the parent or the intermediary does not agree with the opinion of the witness given under sub-Rule (3), the opinion of the vulnerable witness shall prevail.

Appointment of an intermediary.

7. (1) The court may, on the request of the prosecutor or if the court deems it fit to do so, direct that a vulnerable witness shall be accompanied by an intermediary when testifying in court.

(2) A vulnerable witness may refuse to be accompanied by an intermediary appointed by the court but the court may refuse to permit the witness to testify without being accompanied by an intermediary because of the age or the maturity of the witness.

(3) A vulnerable witness may request the court to appoint an intermediary of the witness's choice but the court may refuse to permit appoint the intermediary if such an appointment will not be in the interests of justice.

(4) When the court refuses to appoint an intermediary of a vulnerable witness's choice, the court shall do so in writing and shall state the reasons for refusing the appointment.

(5) Where a vulnerable witness has refused to be accompanied by an intermediary appointed by the court, and the court has agreed with the vulnerable witness's decision, and where the court has refused to appoint an intermediary of a vulnerable witness's choice, both the court and the witness may jointly choose an intermediary to accompany the witness during the testimony of the witness.

(6) An intermediary may accompany a vulnerable witness when that witness is-

(a) making a statement to any person in relation to the case;

(b) being interviewed in relation to the case; or

(c) testifying in court.

(7) When an intermediary accompanies a vulnerable witness when the witness is testifying in court, the intermediary shall remain visible to the court except when the court makes an order that prevents the intermediary from being visible to the court or any other person present before the court.

(8) An intermediary shall affirm to the court that the intermediary shall-

(a) assist the vulnerable witness to the best of the intermediary's ability; and

(b) not interfere with the vulnerable witness or the evidence of the vulnerable witness.

(9) In performing the functions of an intermediary, an intermediary may-

(a) accompany, stand or sit near the vulnerable witness;

(b) give the vulnerable witness the physical or psychological support that the witness might require;

(c) stand or sit in full view of the vulnerable witness; or

(d) draw the attention to the court if the vulnerable witness is in distress.

(10) An intermediary shall not instruct a vulnerable witness regarding the giving of evidence.

(11) In the interests of justice or for the protection of a vulnerable witness, the court may direct that an intermediary-

(a) shall not communicate with the vulnerable witness;

(b) shall not do any act in relation to a vulnerable witness; or

(c) to take such action in relation to a vulnerable witness as the court may require.

(12) When the court appoints an intermediary for a vulnerable witness, it shall inform in writing the accused person against who or form who the witness is going to testify of the appointment of the intermediary and shall give the accused person an opportunity to be heard regarding the appointment of the intermediary.

Factors to take into account when making special arrangements.

8. (1) Before a court gives directions under section 31(4), it may consider-

(a) whether the vulnerable witness is capable of giving a complete and undistorted testimony;

(b) the wellbeing and interests of the vulnerable witness; or

(c) the availability of facilities or locations for the protection of the vulnerable witness.

(2) The court may give directions under section 31(4) during the giving of all the testimony by the witness or during the giving of part of the testimony of the witness.

(3) The court may not give directions under section 31(4) if the effect of the direction would be-

(a) to prevent the vulnerable witness from giving a complete and undistorted testimony;

(b) to prevent the vulnerable witness from being cross-examined on the vulnerable witness's testimony;

(c) to prevent the court or the accused person from observing the demeanour of the vulnerable witness while the witness is testifying; or

(d) to prevent the accused person from enjoying the benefit of legal representation when the vulnerable witness is giving testimony.

9. Despite the power of the court to give directions for the protection of vulnerable witnesses -

(a) the person who has called the vulnerable witness to testify may apply to the court for special measures to protect the vulnerable witness:

(b) an application for the protection of a vulnerable witness may be made to the court at any time during the trial;

(c) an application for the protection of a special witness shall be notified to the accused person in writing by the person making the application;

(d) an application for the protection of a special witness shall specify the special measure sought and the reason for the application; and

(e) an application for the protection of a vulnerable witness may be made in accordance with the directions of the court.

When directions for special measures may not be made.

10. (1) The court may not give directions for the protection of a vulnerable witness if the court is satisfied that- may not be made,

(a) if it is not in the interests of justice; or

(b) it is not practicable.

(2) In making a decision whether or not it is in the interests of justice to give directions for the protection of a vulnerable witness, the court shall consider-

(a) the harm that the vulnerable witness may suffer if the witness is protected or not protected;

(b) whether or not the vulnerable witness is capable of testifying effectively; and

(c) whether or not the use of special measures for the protection of a vulnerable witness will give the testimony of that witness greater weight.

(3) Where the court refuses to give directions for the protection of a vulnerable witness it record its reasons for refusing.

(4) Where any person applies to the court to treat a witness as a vulnerable witness, that person shall be treated as a vulnerable witness until the court declares that person to be a vulnerable witness or not.

Samples may be collected from child.

11. Where a person has been accused of committing an offence under the Act, and it is alleged that a child has been born alive as a consequence of the commission of that offence, the court may order the collection of such samples in the form provided in the Schedule as may be required from the accused person and such samples may undergo such tests as the court may order to determine whether or not the child is the result of the commission of the alleged offence.

Application to discontinue investigation or prosecution.

12. Any application to discontinue an investigation into the commission of an offence under the Act or the prosecution of an offence under the Act shall be made to the court by a person specially authorised by the Director of Public Prosecutions.

Court to admit evidence taken in other proceedings.

13. A court may admit the evidence taken in other criminal proceedings, on the application of any person, if the court is satisfied that –

(a) the evidence is relevant to the proceedings before the court;

(b) the person who gave that evidence-

(i) is dead;

(ii) is too ill or infirm to give evidence; or

(iii) has not been found after a diligent search.

Examination of vulnerable witnesses.

14. The court may-

- (1) admit in evidence a recorded statement made by a vulnerable witness as the evidence-in-chief of the vulnerable witness or as part of the evidence-in-chief of the vulnerable witness;
- (2) hold a special sitting for the purpose of examining, in full or in part, the vulnerable witness;
- (3) make an audio-visual recording of the examination, in full or in part, of a vulnerable witness at a special sitting of the court held to examine the vulnerable witness; or
- (4) permit a vulnerable to be present in the courtroom when an audio-visual recording or part of an audio-visual recording of the examination of the witness made at a special sitting of the court to record the testimony is played back in court.

Taking evidence from a vulnerable witness.

15. (1) When a court holds a special sitting to examine a vulnerable witness, whether in full or in part-

- (a) the court may hold the sitting where it thinks it fit to do so but only if the sitting is held within the precincts of the court building;
 - (b) the court shall exclude the accused person from being present in the court but if the accused person wants to observe the examination of the vulnerable witness, the court shall make arrangements for-
 - (i) the proceedings to be transmitted so that the accused person can hear and observe the examination of the vulnerable witness; and
 - (ii) the accused person, whether or not represented by an advocate, to communicate with the court during the examination of the vulnerable witness;
 - (d) the court may limit access to the court where the vulnerable witness is being examined; and the court may give directions regarding any matter relevant to the examination of the vulnerable witness.
- (2) The court may defer the identification of evidence taken from a vulnerable witness by the witness until the witness has completed the giving of all other evidence if the court determines that there is good cause for the deferment.

Audio-visual recording of the evidence of a vulnerable witness.

16. (1) The court may direct the making an audio-visual record of the testimony of a vulnerable witness when the facilities for making an audio-visual record are available.

(2) An audio-visual record of the testimony of a vulnerable witness shall form part of the record of the court.

(3) If the court admits an audio-visual record of the testimony of a vulnerable witness, the court may excuse the witness, wholly or in part, from giving evidence in person in later proceedings.

Exception to hearsay rule.

17. The court may admit in evidence a statement of facts-in-issue made by a vulnerable witness to an intermediary if the statement is made in accordance with the provisions of the Evidence Act.

Evidence-in-chief in the form of a prior statement.

18. The court may excuse a vulnerable witness from testifying about a statement made by the vulnerable witness that has been admitted in accordance with these Rules and the court may treat the statement as the witness's evidence-in-chief or part of the witness's evidence-in-chief.

Report of identification parade.

19. (1) Where a prosecutor intends to rely on an identification report in which a vulnerable witness or another witness identifies an accused person as the person who committed an offence under the Act, the court shall presume that the person named in the identification report is the same person undergoing trial.

(2) Despite sub-Rule (1), the court may not presume that the person named in an identification report is the same person undergoing trial-

(a) unless the prosecutor has served the accused person with a copy of the identification report;

(b) the prosecutor notifies the accused person that prosecutor intends to rely on the identification report; and

(c) the accused person, within seven days or within such period that the court may direct, of receiving the copy of the identification report and notice of the intention of the prosecutor to rely on the identification report notifies the court that the accused person intends to challenge the facts stated in the identification report.

Victim impact statement.

20. (1) The court may rely on a victim impact statement during the sentencing of an accused person the court convicted of committing an offence under the Act.

(2) A victim impact statement may be given by-

(a) the victim;

(b) an expert witness; or

(c) a person giving the statement on behalf of the victim.

SEXUAL OFFENCES ACT, 2006

SEXUAL OFFENCES RULES OF COURT, 2014

ORDER FOR COLLECTION OF SAMPLES

CASE No. IN THE

MAGISTRATES' COURT AT

WHEREAS the prosecutor has applied to this court for an order under section 26 of the Sexual Offences Act, 2006, for the collection of samples from the accused person.

IT IS ORDERED that samples of the following be collected from the accused person-

- (a) _____
- (b) _____
- (c) _____
- (d) _____

Signed

Dated

WLLY MUTUNGA,
Chief Justice and President
of the Supreme Court.