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THE LAW ON WITNESS PROTECTION IN KENYA: A WHISTLEBLOWER'S REFUGE OR JUST A PIPE-DREAM?

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DECLARATION OF ORIGINALITY

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DEDICATION

This work is dedicated to my beloved parents, Silas and Josephine Saya, who brought me up and laid the foundation for my education. To my siblings too, Tridzar, Derrick and Henrick who have been encouraging me tirelessly through life and to whom I owe much.

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ABBREVIATIONS

AG- Attorney General

ANC- African National Congress

CIPEV- Commission of Inquiry into Post Election Violence

CPC- Criminal Procedure Code

ICC- International Criminal Court

ICTR- International Criminal Tribunal for Rwanda

ICTY- International Criminal Tribunal for the Former Yugoslavia

IEBC- Independent Electoral and Boundaries Commission

IMLU- Independent Medical-Legal Unit

IMO- International Military Tribunal

IPOA- Independent Police Oversight Authority

KNCHR- Kenya National Commission on Human Rights

NGO- Non-Governmental Organization

NPA- National Prosecuting Authority

OHCHR- Office of the United Nations High Commissioner for Human Rights

PEV- Post Election Violence

RCMP- Royal Canadian Mounted Police

SAPS- South African Police Service

SAWPU- South African Witness Protection Unit

UNICRI- United Nations Interregional Crime and Justice Research Institute

UNODC- United Nations Office on Drugs and Crime

UNTOC- United Nations Convention against Transnational Organized Crime

US- Unites States of America

WPA- Witness Protection Agency

WPPA- Witness Protection Programme Act

WPSBA- Witness Protection, Security and Benefit Act

WPU- Witness Protection Unit

AFP-Australian Federal Police

PJC- Parliamentary Joint Committee on the National Crime Authority

NWPP- National Witness Protection Program

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Republic v Titus Ngamau Musila Katitu [2018] eKLR.

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Sexual Offences Act NO.3 of 2006

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Canada's Witness Protection Programme Act, 1996

Centre for International Crime Prevention

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly Resolution 39/46, 10 December 1984.

Hague Convention of 1907

International Crimes Act no. 16 of 2008

International Criminal Court, Rules of Procedure and Evidence

International Criminal Tribunal of Yugoslavia Statute of 1993

Primary Legislation on Trafficking in Human Beings

Protected Disclosures Act 2000 (Act 26 of 2000),

Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa

South Africa's Criminal law (Sexual Offences and Related Matters) amendment Act, 2007

South Africa's Criminal Procedure Act, 1977

South Africa's Intimidation Act no. 72 of 1982

South Africa's Prevention and Combating of Corrupt Activities Act no. 12 of 2004

South Africa's Prevention of Organized crime Act, 1998

South Africa's Witness Protection Act no. 112 of 1998

Standing Committee on Public Safety and National Security 2008

The Geneva Convention of 1949

The Rome statute of 1998

The United Nations Convention against Transnational Organized Crime

UN Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

UN Convention against Corruption of 2003

United Nations Convention against Transnational Organized Crime

United Nations Drug Control Programme

Universal Declaration of Human Rights

Universal Declaration of Human Rights, adopted and proclaimed by the UN through resolution 217(111) in 1948

Victim Protection Act, 2014

Witness Protection Act 1998 (Act 112 of 1998),

ABSTRACT

Witness protection is a pillar of any successful criminal justice system. Concern for witness protection is amplified in mass atrocities and complex criminal trials where suspected perpetrators may endanger witnesses. In Kenya, these concerns were augmented after the 2007-2008 PEV, as reflected in the Waki Report that said failure to implement the witness protection law was one reason causing real and genuine difficulties in investigating violence of such magnitude.

Kenya enacted a witness protection law in 2006 when the country experienced mega corruption scandals. A law was necessary to protect witnesses or families of witnesses whose lives would be in danger owing to the seriousness of offences to which they would testify. Without witness protection some investigations are impossible to carry out, frustrating administration of justice. Kenya's witness protection regime is among the best. Perhaps devolution of the functions to the counties and more outreach is needed.

Even though there are various provisions under Kenyan legislations whose aim is to ensure witnesses in criminal matters are protected, the program has not really picked up in Kenya. Therefore, the research investigates reasons as to why this programme has failed to achieve its objectives in Kenya, bringing out comparisons with best practice regionally through the South African program pointing out on areas where improvements can be made on the Kenyan laws on the same.

Key words: Witness, protection, intimidation, testimony

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CHAPTER ONE: INTRODUCTION

THE LAW ON WITNESS PROTECTION IN KENYA: A WHISTLEBLOWER'S REFUGE OR A PIPE-DREAM?

1.0 Background of the study

In its strict legal sense, 'witness,' refers to a person who gives evidence in a case before a court. Generally, this includes all people who testify in any judicial proceeding including deponents and affiants as well as persons.[1]In a situation where the witness is required to give testimony in a matter that is likely to put his life at risk, such a witness would require protection. A witness in this case would therefore refer to someone who requires to be protected from a risk or threat which exists by the fact that he is a holder of crucial testimony as a witness.[2]

In that sense, witness protection program is defined as a state program whereby an individual who testifies against an accused person is relocated to a different part of the state and given a new identity in order to avoid any form of intimidation by anyone convicted because of that testimony.[3] It refers to the act of offering protection to a witness who feels threatened or is actually threatened either physically or otherwise or anyone involved in the justice system. This includes defendants and any other person involved, before, during and after a trial of a mostly criminal prosecutions.

Many countries have been faced with a legal conundrum when trying to ensure that justice as an important element in any functional legal system around the world is dully observed in adjudication of services to citizens. So whose duty is it to ensure that the administration of justice in the society is efficient?

[1]Black's Law Dictionary (8th ed. 2004), Pg.4946
[2] The Witness Protection Act, 2010, S.4(1)
[3] Ibid, Pg. 4950

For justice to be served efficiently, several things must come into play as a prerogative to having a functional justice system. Nationally, by virtue of the Kenyan Constitution, citizens are the source of power and only exercise their powers through their democratically elected representatives[4] and therefore the people's will has to be represented effectively by those elected to exercise this sovereign power. This translates to mean that political obligation is a salient feature when exercising the needs of a society, with the expensing of justice being one of them since it is through these political obligations that laws can be legislated to cover for the interests of the citizens. This is well emphasized by a great jurist, Thomas Hobbes in his assertion when trying to justify the importance of political obligation in society by stating that since men are naturally self-interested but still rational, they will choose to submit to the authority of a Sovereign so that they can be able to live in a civil society, which is conducive to their own interests.[5]

1.1 Statement of the problem

Kenya enacted a robust legal framework to provide guidelines on the witness protection cases through the Witness Protection Act, 2010 whose main aim was to provide for the protection of witnesses in criminal cases and other proceedings to establish a Witness Protection Agency and provide for its powers, functions, management and administration with a sole guidance of ensuring prosecution of such highlighted cases is achieved efficiently. Kenya comes second to South Africa in Africa in appreciating this kind of system in their judicial system after South Africa with this regional unfamiliarity in the system contributing to some of the issues that cog its incorporation in Kenya.

[4] Article 1(1) of The Constitution as read together with sub-article 2.
[5] Hampton, Jean. 1986. *Hobbes and the Social Contract Tradition*. Cambridge: Cambridge University Press.

The Witness Protection set up in Kenya has been among our legislations since 2006 even though shreds of its operations through criminal prosecutions can be traced through the period in Kenyan history when the country was marred by a spate of political assassinations. It is therefore of note that through various legislations, directly or otherwise, the program ought to have been well recognized and efficient in operation as at now. This is however not the case at the moment considering various factors including the most commonly identified enemy of the program's implementation, the financial liability that comes with running the program effectively. Since its inception, the program has always been heavily underfunded and thus almost crippling its operations. Part of the reason why this is the case is because of the provisions the Act gives as regards to funding the project. According to the Act, the Agency ought to source its funds out of the Consolidated Fund[6]with several prerogatives being presented before withdrawal of the said funds can be approved making the whole process of sourcing funds for the program rather tedious. In view of the fact that the country is currently riding on a dwindling economy, the program can prove to be rather uneconomical because its setup requires a lot of financial input to reach an efficacious realization.[7]

Under the WPA, there exists a provision for and the establishment of the Witness Protection Agency whose work is to provide protection to people who have information that is salient and run potential risk of endangering their life if they pass this information to necessary authorities with an aim of having the perpetrators convicted in a court of law. It is however in contention the manner and criterion within which leadership in the Agency is appointed. Under Section 3 of the WPA, powers and functions of the Agency is well outlined with the Act providing that the

[6] Article 206 of The Constitution of Kenya.
[7] Steve Mkawale, "Witness protection agency unveiled ahead of Hague hearing" Standard Digital (Nairobi, 12th August 2011) <https://www.standardmedia.co.ke/article/2000040678/n-a> accessed on 28th January 2019.

Director of the Agency is appointed by the Witness Protection Advisory Board. The composition of the Advisory Board is structured under Section 3P of the Act as consisting of the Solicitor General, Principal Secretary in charge of Foreign Affairs and his or her counterpart in Finance, Chief Registrar of the Judiciary among other persons with 90% of the Board consisting of officials drawn from Government institutions. With such a pool of composition, worries over the transparency in the board, which is solely in charge of appointing the Witness Protection Agency's Director, exists. Since the risk is developed out of witnesses' willingness to cooperate with the necessary authorities and the WPA offers the legal substructure and operational formulas for offering special protection to these witnesses, on the state's behalf,[8]the Agency's leadership does not give assurance on its transparency considering the criterion used in appointing the Director.

Further, the Act favours the provision that the Agency should fulfill its mandate independently. This however remains to be seen since the Agency still seeks its operational mandate from the Attorney General thereby tainting the independence of the Agency's operations. Even though the amended Act made some desirable changes that included, among others, the effective removal of the program from the AG's office, the former AG's appointee still holds office to date.

The above mentioned issues, when compared to a similar program that operates within Africa, South Africa, regional program, Kenya still does not have a mature economical ground to set up this program and with the issue of impartiality through government influence on appointments in the agency and general operation of the Agency, coupled up with blatant cases of corruption and state of impunity in the country, an implementation problem is unfolded.

[8] Ibid n.2, S.3B (1)

The main objective of the Witness Protection Program is to ensure justice dispensation is done on a fair and level ground so as to ensure that there is no miscarriage of the same. With such grey areas as raised above, clearly a lot more should be done to ensure that the implementation of the laid down procedures and improvements on the existing laws on the same is realized effectively.

1.2 Hypothesis

This paper will proceed on the following hypotheses;

1. That the Witness Protection Act is in existence in Kenya but its provisions are not clear enough and do not cover all the fundamental aspects of witness protection to the required standards.

2. That the Witness Protection Agency is not operating effectively and efficiently but the performance of this Agency can be improved tremendously with the adoption of measures used in other jurisdictions with successful witness protection programs.

3. That the salient objective of the Witness Protection Policies as highlighted by the Witness Protection Act, 2006 which is to foster justice has not been achieved despite the policies having been in existence in Kenya for a while.

1.3 Objectives of the Study

1.3.1 Main objective

The principal objective of this research is to establish the effectiveness and efficacy of the law on witness protection in Kenya and whether its implementation has been a success since its pioneer roll out or is it just a reverie. This will be guided by a comparative analysis of other states that have successful set ups of a similar program.

1.3.2 Specific Objectives

a. To examine and contextualize Kenya's laws on Witness Protection and its implementation since conception.

b. To examine and discuss how the Kenya's Witness Protection Act compares to near perfect models such as the policies in South Africa, Canada among others.

c. To accurately discern and discuss Kenya's stance against witness intimidation, identifying the key highlights of Kenya's Witness Protection Amendment Act that makes the application of laws against witness intimidation viable.

d. To critically discuss the viability of witness protection process from admittance criteria to protection measures and finally discharge from the program.

e. To draw accurate conclusions on the current guiding prototype on Kenya's legal and administrative framework on witness protection and make sound recommendations for reform.

1.4Research Questions

The following questions shall be answered at the end of this research:

a. Does Kenya's legislations on witness protection adequately deliver its mandate against the intimidation of witnesses for effective justice dispensation?

b. What legislative and administrative measures should Kenya borrow from other jurisdictions with similar programs to hers particularly the South African regime?

c. What is Kenya's position against witness intimidation and what are the improvements that have been meted in the Witness Protection Act that validates the application of laws against witness intimidation?

d. How viable is the witness protection process from the criteria used to admit witnesses, the protection measures employed and final discharge from the program?

e. What conclusions can be drawn from Kenya's current legal and administrative framework as far as witness protection is concerned and what recommendations can be derived?

1.5 Justification of the Study

For any criminal justice system to be deemed successful, the essentiality of witness protection should be made credible. The apprehension for witness protection is highlighted majorly in profuse atrocities and criminal trials where perpetrators can endanger the lives of witnesses. These issues were well augmented after the 2007-2008 PEV through the Waki Report that insinuated that one of the reasons that caused real and specific difficulties in investigating the nature of the kind of violence meted, was the failure by the country to implement the witness protection law.[9]

A witness protection law was enacted in Kenya in 2006 during a point in time when the country was experiencing lots of scandals associated with corruption. The need for laws to protect witnesses was necessitated bearing in mind the magnitude of the offences that they would be called upon to testify on and the risk it possessed on their lives and that of their loved ones. For some investigations to be conducted efficiently in Kenya, witness protection should be held a

[9] Ibid

salient ingredient to achieving an efficient and thorough effort in administering justice without which the wheel of justice would be adversely affected and frustrated. Most investigations are unfeasible to conduct without witness protection thereby frustrating the administration of justice. Judging by the hurdles existing in the implementation of this need in Kenya, maybe devolving this functions to the counties and more outreach would give the implementation exercise the impetus that has been missing.

This study intends to create fresh insight and contribute to a burgeoning area of academic reference with a focus on aiding government entities particularly the State Law office; legal practitioners; policy makers, law reform agencies and the citizenry who are directly or indirectly affected by Witness Protection program.

1.6 Theoretical Framework

Witness protection is premised on human rights, morality and acts done to promote good in the society with the sole aim of ensuring justice prevails in society. The good acts referred to in this situation include the giving of testimony by a witness in a court of law without fear of reprisals. This paper will therefore look at various theories in an attempt to explain this basis.

1.6.1 Social Contract Theory

The guiding principles of the this theory were best explained by John Rawls[10]The salient lead of these principles is converged on attaining justice, which is referred to as the family of moral concepts connected particularly with law and politics[11] within societies. Some of this theory's major proponents include Leon Duguit, Von Erhrlich, Roscoe Pound and Von Jhering.

[10] John Rawls (b. 1921, d. 2002) was an American political philosopher in the liberal tradition. His theory of *justice as fairness* describes a society of free citizens holding equal basic rights and cooperating within an egalitarian economic system.
[11] Brian H. Bix: *Jurisprudence: Theory and Context* (6th edn, Sweet & Maxwell 2012)

According to Rawls, the structural rules of society are premised on justice, within which people who, inevitably, have divergent sets of values and goals in life can coexist, cooperate and this theory tries to provide answers on how social goods in the society are to be distributed.[12]

Von Jhering understands that the study of law should scrutinize the social origins of the law and institutions. He argues that the purpose of the law is social control and hence an instrument of serving the society.[13]Pound further argues that the purpose of the law is social engineering and that the law has to serve a particular role in society and its ultimate function is social control. He further argues that law exists to maintain peace and to balance interests in a society.[14]

The main objective of the Witness Protection policies is to achieve justice to all in equal measure. The aim normally is always to help the prosecution or defense in their case with a goal of attaining societal justice and that is why this theory is an essential feed.

1.5.2 Legal Positivism

This theory is built on the belief that what law is should be kept separate from what the law should actually be[15]. The fact that law is in existence is enough for it to be followed to the latter without incorporating morality in its understanding, according to positivists. Positivism refers to the analysis of the law as it is without reference to the social, political and sociological background.[16]Some of the major features of positivism are that they consider law as a social fact

[12] Ibid
[13]Omony John Paul, *Key Issues in Jurisprudence: An in-depth Discourse on Jurisprudence Problems* (LawAfrica Publishing (K) Ltd 2014) 86
[14] Ibid
[15] Hans Kelsen, *The Pure theory of Law* (University of California Press, California (1971), p. 1
[16]Omony John Paul, *Key Issues in Jurisprudence: An in-depth Discourse on Jurisprudence Problems* (LawAfrica Publishing (K) Ltd 2014) 48

rather than a set of rules derived from natural law and believe in the separation of laws and morals, hence they hold the view that laws do not derive their legitimacy from morals.[17]

According to John Austin[18], a law which exists is a law despite the fact that people may dislike it.[19]The positivism theory applies to this paper as it recognizes the importance of laws in the society and the importance of having those laws obeyed and followed to the latter. Witness protection is mostly hinged on morality as it requires the rights of everyone to be respected. Morality is however not a known feature among positivists in their portrayal of law.

1.5.3 Natural Law Theory

The natural law theory as opposed to legal positivism addresses morality and often takes into consideration the interests of God. It addresses moral duties and natural rights[20]bringing forth the argument that law is supposed to be regulated by morality and that which is good for the society as a whole. According to John Finnis' school of thought, natural law is based in the concept of what is obviously good for humans rather than human nature.[21] He further reiterates that human rights are based majorly on centrality of duties arguing that a person is not supposed to present himself in a manner likely to scar the basic good even if the end result is beneficial.[22]

Natural law forms the root base of human rights which are viewed as those rights that are practiced universally and applicable worldwide. These rights include right to life, equality,

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[17] Brian Bix, *Jurisprudence: Theory and Context, Second Edition* (London Sweet & Maxwell 1999)31 and 32

[18]John Austin is considered by many to be the creator of the school of analytical jurisprudence, as well as, more specifically, the approach to law known as "legal positivism." Austin's particular command theory of law has been subject to pervasive criticism, but its simplicity gives it an evocative power that continues to attract adherents. Source: https://plato.stanford.edu/entries/austin-john/ accessed 23rd January 2019.

[19] Ibid

[20] William Sweet, *Philosophical Theory and the Universal Declaration of Human Rights* (2nd edn,University of Ottawa Press 2003) 19

[21] John Finnis, *Natural Law and Natural Rights*,(Reprint Clarendon Press 1980) 33

[22] Ibid

security, freedom in the eyes of the law and liberty to movement and habitation[23]. It is almost impossible to separate witness protection from human rights. If a situation presents itself where a witness feels the need to be protected, then it is implied that a specific human right to which the witness is entitled to is under threat. Most times the right being mutilated in these circumstances is always the right to life and freedom of movement. This study will therefore apply the natural law theory as the main theory since it contains the philosophy of human rights, which is a fundamentally important to witness protection.

1.7 Research Methodology

A mixed research design method will be suitable in this study whereby the doctrinal design, qualitative research and case study will be incorporated. The target population will be state counsels, members of the public involved in some criminal litigation matters, head of departments in the Witness Protection Agency and the citizenry in general.

The major means of collection of data will be mainly through library research, journals and newspaper articles available in the University of Nairobi Library. A bulk of this research however comes from the World Wide Web. The study will also analyze the already published documents and library materials including statutes, law reports and various research findings published and presented at conferences and workshops.

1.8 Literature Review

There are several scholarly materials and articles that have covered on Witness Protection. There is also a lot of literature on witness protection and enforcement that is geared to achieving a comprehensive witness protection program in Kenya especially since the dire need of the

[23]Universal Declaration of Human Rights (adopted 1o December 1948 UNGA Res 217 A(III) (UDHR) art 5

program came knocking on our doors after the floored 2007 general elections. All this is valuable information that warrants a review.

Peter Finn and Kerry Murphy Healey[24]examines the initiatives that law enforcement agencies and the prosecution offices across the country have taken in an effort to deter the intimidation of witnesses, describing how various states have rolled out these strategies. They also offer a framework for putting together these specific approaches into a detailed and properly structured program to protect witnesses and ensure their cooperation in the administration of justice. They go further as to discuss the nature and extent of witness intimidation, looking into the traditional approaches to security of witnesses, relocation of witnesses, ensuring that they are not intimidated in court and jails and minimizing community-wide intimidation.

Mary L. Boland[25] notes in her book that, a victim in a legal matter has the right to be protected throughout the criminal justice process. This may mean that he or she is entitled to a protective order that prohibits the accused from making any contact with the victim or victim's family; it includes consideration of victim safety in bail decisions. She further discusses that victims should be given information on the right to be free from intimidation while cooperating with law enforcement in the prosecution of their case. She highlights that secure or safe waiting areas are supposed to be provided to victims while attending court proceedings to minimize their contact with the defendant and the defendant's family and friends.

All these efforts are done so that the witnesses can be insulated from intimidation tactics that accused persons may employ in a direct ploy to avert justice. She further notes that ensuring the witness is protected is so salient that in some states in the USA, the prosecutor may specifically

[24]Finn P, Healey K.M, *Preventing Gang and Drug-Related Witness Intimidation* (Diane Publishing Co. New York.1996)
[25] Mary L. Boland, *Crime Victim's Guide to Justice* (3rdedn, Sphinx Publishing 2008) 9-12

request revocation of the defendant's bond for intimidating, threatening, or harming the victim or the victim's family. She further explains that witnesses have many of the same concerns about privacy and safety that victims have and in an effort to encourage witnesses to come forward and testify, the law ought to include witnesses in some of the protections given to crime victims.

Terry Thomas[26] also provides an insight in as far as how child witnesses should be treated with special emphasis on sex crimes because the stigma associated with sex crime to the victims and witnesses is of dire consequences in as far as achieving justice goes. In most cases, the child molested is the prime witness in the matter and if proper protection is not accorded to him or her, miscarriage of justice can easily be experienced. In her book she states that child witnesses ought to be protected at all costs and she goes further to list the legal provisions under UK laws that cover for this and the origin of these provisions.

She emphasizes that there is need to go at the child's pace when taking the testimony of a witness who is a child which is supposed to be recorded and to avoid leading questions and other interventions that might render the tape inadmissible as evidence.

Michael Bazyler[27], in his book on the Nuremburg Trials of 1945-1946[28] mentions on the relevance of witness protection and how a witness who feels safe can go ahead and give eyewitness accounts of events he witnessed without fear and which in turn leads to the efficient administration of justice in trials. One of the most effective witnesses in the trials was Marie

[26] Terry Thomas, *Sex Crime: Sex Offending and Society* (2nd edn, Willan Publishing 2005) 89

[27] Michael Bazyler, *Holocaust, Genocide and the Law: A Quest for Justice in a Post-Holocaust World* (1st edn, Oxford University Press 2016) 79.

[28] These trials were held before the International Military tribunal (IMO) between 20th November 1945 and 1st October 1946. They were held for the purpose of bringing Nazi war criminals to justice, the Nuremberg trials were a series of 13 trials carried out in Nuremberg, Germany, between 1945 and 1946. The defendants, who included Nazi Party officials and high-ranking military officers along with German industrialists, lawyers and doctors, were indicted on such charges as crimes against peace and crimes against humanity.

Claude Vaillant-Couturier[29], who when put on the stand by French prosecutors, provided powerful eyewitness testimony about what she saw at Auschwitz in 1942.

Harry Potter[30] in his work Law, Liberty and the Constitution, highlights the fact that parliament, being the representatives of the people in the societies, should pass legislations that upholds the basic principles of fairness, liberty, equality and justice. This responsibility, according to the author is sacrosanct and should parliament turn tyrant and exceed the unspoken bounds to its authority, for instance by passing legislation that undermines these basic principles, or denying the right to a fair trial, these enactments would be lawful in the sense that they would be enforceable in the courts because they are legislated by an authorized body, but there would be a constitutional crisis: judges would refuse to enforce such legislation, and the common law's assertion of right and justice would prevail.

This piece by the author speaks volumes about the importance of parliaments in legislating laws that are a reflection of the societal needs and the importance of making legislations that ensure that the course of justice is undeterred.

The importance of witnesses in any proper judicial system is also emphasized by **Jeremy Bentham** who reiterates that witnesses are a salient feature in ensuring the efficiency and quality of a trial process is not compromised.[31]

1.9 Limitations of the Study

During this research, the researcher anticipates facing several hurdles, which include:

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[29] A thirty-three-year-old non-Jewish woman arrested by the Germans in France and sent to Auschwitz as a political prisoner. https://avalon.law.yale.edu/imt/01-28-46.asp accessed on 17th June 2019.

[30] Harry Potter, *Law, Liberty and the Constitution: A Brief History of Common Law* (1st edn, Boydell Press 2015) 4-5.

[31] Jeremy Bentham, *A Treatise on Judicial Evidence - Scholar's Choice Edition* (M. Dumont ed.Bibliolife DBA of Bibilio Bazaar II LLC, 2015) 88

Inadequate data: The researcher marries the fact that there might exist situations where there will be fewer sources to source out data to analyse. To remedy against this, the researcher shall seek other alternative sources of information from secondary sources, and increasing the research population.

Lack of Sufficient Literature Review: Witness Protection in Kenya is relatively new although it dates back to the colonial era, it is only recently that various researchers have focused on this area intensively locally. The researcher shall cope with this challenge by visiting various libraries in the country so as to enrich the study.

1.10 Chapter Breakdown

This research work is divided into five chapters:

Chapter One: Generally introduces the whole work and it includes background information, statement of the problem, justification of the study, objectives of the study, research questions, , theoretical framework, research methodology, literature review, limitations of the study and the hypotheses.

Chapter Two: Will gives cognizance on the program's operation in Kenya. It will highlight the history and development of the program in Kenya, its legal and institutional framework. The regulations governing the program in Kenya will be brought out including the various institutions involved in running the program.

Chapter Three: Will analyze the reality of the situation of the program's operation on the ground as compared to what and how it is supposed to operate. The structure, composition, functions and powers of the Kenya Witness Protection Agency (WPA) will be discussed. This chapter will also uncover some situations that the operation failed when it was called upon.

Practices of the program in reality in the Kenyan society will be analyzed and identifying how successful the program has been in Kenya so far.

Chapter Four: Will look at the operation of the program in other jurisdictions with special reference to the Witness Protection Program of the Republic of South Africa. It will also look at various witness protection programs of other jurisdictions including but not limited to Canada, Philippines, Australia and Germany.

Chapter Five: This chapter will critically look at the challenges encountered by the WPA in Kenya that hampers full implementation of the WPA, cogging the attainment of its objectives. This chapter will also will give strong recommendations to ensure that the country has established a comprehensive Witness Protection Program.

CHAPTER TWO: WITNESS PROTECTION IN KENYA.

2.1 History and Development.

Majority of crimes that carry hefty sentences and vile consequences as corruption and human rights abuses are highly rate in criminal litigation and most a time, witnesses are the determinants of the efficacy of the administration of justice playing a salient role with law enforcement agencies relying almost fully on the testimonies of such witnesses to bring the perpetrators to justice.

With the gravity of such cases, witnesses are often threatened, harmed and intimidated with grim consequences all in an effort to deter them from testifying against the perpetrators. In the unfortunate event that measures aligned to ensuring that these witness are safe from intimidation of any kind are non-existent, then the perpetrators cannot be prosecuted successfully. In countries with successful witness protection programs in operation, the driving force is in most cases is always a well laid out and efficient criminal justice system operating with maximum support from all the stake holders.[32]

Historically, witness protection has demonstrated to be a salient feature in Kenya's prosecution of matters especially high profile matters that are usually marred with cases of witness intimidation, victimization and even deaths. The political assassinations that were experienced in the post-colonial period highlighted various instances where the need for witness protection was evident.

The assassination of Thomas Joseph Mboya in 1969 pioneered a dark chapter in the Kenya's history and heralding a series of murders and political assassinations. This kick started a string of

[32]Gerhard Van Rooyen, UNODC Witness Protection Adviser during the Regional Conference for Countries in Eastern Africa and other interested African countries on Witness Protection in Nairobi on 12 and 13 November 2009.

investigations and public inquests that did little in achieving the main objectives for which they were set up and that is delivering justice to the victims and their families. Even though this was a high profile case, the matter was not really resolved even with the formation of a commission of inquiry being set up owing mainly to deliberate frustrations in the prosecution of the matter and reported cases of key witness disappearances.[33]

In another case, the badly decomposed corpse of the then alluring cabinet minister J.M Kariuki was discovered in Ngong forest on 2nd March 1975. This discovery was received with consternation by all those who were familiar with him and how highly primed he had been in the country. He had led a fierce fight against corruption claiming that it was widespread also fighting for equitable distribution of land claiming that as it was then, the distribution was anything but fair since it favoured only the rich coining the phrase that Kenya had become a nation of 10 millionaires and 10 million beggars and he was also believed to have had his eyes on the presidency which also did not do him any favours.[34]

After being reported missing for a while, his murder was later confirmed through two gunshot wounds with the government subsequently setting up a commission of inquiry for the main purpose of finding those involved in his murder. Before this report was published, it is reported that the then President, Kenyatta demanded the removal of certain names close to him from the report before it was tabled in parliament.[35] This was a blatant case of intimidation in the effort of

[33] Dan Okoth 'High Profile Assassinations a stain in our Political History.' *Standard Newspaper* (Nairobi 13th December 2013) <https://www.standardmedia.co.ke/article/2000100033/high-profile-assassinations-a-stain-on-our-political-history>Accessed on 25th July 2019.
[34]Ellen Ortzen, 'Kenyan MP's murder unsolved 40 years on' *BBC World Service* (London, 11th March 2015) <https://www.bbc.com/news/world-africa-31817667 . An audio copy of this interview with the widow of the late J.M Kariuki , Mrs. Terry Kariuki can be accessed at https://www.bbc.co.uk/programmes/p02l69xc> accessed on 27th July 2019
[35] ibid

dispensing justice at the time and 44 years later, this murder has never really been solved nor have the contents of the commission of inquiry set up been made public.[36]

The assassination of Dr. Robert Ouko was one of Kenya's most high-profile murders and presented an interesting case with the details surrounding the assassination begetting more question than answers to date with a willful act of incompetence among the state agencies during the investigations of the murder. Commissions of inquiries into the murder were formed under the executive directions of the then President Moi who however dismissed and disbanded one commission for the sole reason that the witnesses interviewed by the commission were 'peddling lies' with the commission's efforts being continuously frustrated.[37]

In the above mentioned cases, and other cases like that of the late Pio Gama Pinto and the late Father john Anthony Kaiser it is mentioned that some of those involved in the investigations on the various murders complained of official interference in their work presenting a clear manuscript of witness intimidation in a matter that required all state organs to be in decorum in trying to reach the root cause of the matter.[38]

Previously, the operations that required for witnesses to be protected was heavily and directly reliant on national security agencies involvement to ensure that witnesses involved in high risk cases are protected from any form of intimidation before, during and even after prosecution in these cases in order to ensure justice dispensation is realized effectively. Such arrangements however elicited distrust in the judicial system as most of the security agencies involved in the perceived protection during the post-independence period were heavily compromised especially

[36] An audio copy of this interview with the widow of the late J.M Kariuki , Mrs. Terry Kariuki can be accessed at https://www.bbc.co.uk/programmes/p02l69xc
[37] ibid
[38] Ibid

in cases in which perpetrators were senior elements in the government or the police forces or even relations to people in high power within the society and state. The rot was too deep that even the Judiciary was compromised enough to turn a blind eye on wanton abuse of human rights during the prosecution phase like in the case of Koigi wa Wamwere who between 1975 and 1993, was arrested and detained without charge three times at the full glare of the Judiciary and state security agencies.[39]

The WPA of 2006 in Kenya was endorsed to counter the hurdles that the enforcing and prosecuting agencies had faced through the years in trying to bring the perpetrators of high-level corruption for instance the Goldenberg issue and the spate of PEV experienced in the country in2007-2008. These cases were marred by witnesses involved not being willing to testify against those involved and for what reason? For fear of victimization, intimidation and all other forms of reprisals leading to massive miscarriage of justice with failed and unsuccessful prosecutions. Widespread violence broke out in Kenya at the end of December 2007 following the announcement of the just concluded presidential elections.[40] The violence left around 1,200 Kenyans killed with thousands injured the displacement of over 300,000 and various activities of looting and destruction of businesses and homes with a significant number of cases of sexual violence also reported. [41] Additionally, defenders of human rights who had started asking for

[39] Wahome Thuku, 'Koigi awarded Kshs. 2.5 Million for Nyayo House torture' *The Standard Newspaper (*Nairobi, 9th April 2012) *https://www.standardmedia.co.ke/business/article/2000055864/koigi-awarded-sh2-5m-for-nyayo-house-torture accessed on 14th October 2020.*

[40]While most allege that violence was predominantly a spontaneous reaction to the election results, the OHCHR Mission observed that actual patterns of violence varied from one region to the next, greatly depending on region-specific dynamics.

[41] United Nations High Commissioner for Human Rights, "Report from OHCHR Fact-Finding Mission to Kenya", 6th-28thFebruary 2008

accountability from those individuals in the government believed to be involved in the chaos started receiving death threats.[42]

After both global and local indignation, the resolve and consequent intervention of the ICC trudged in with the sole resolve of bringing the perpetrators of these heinous crimes to justice. This led to the prosecution of six suspects who were summoned by the ICC for allegedly leading out the violence that led to the loss of lives and caused the destruction of properties, massive displacement of people and a gross violation of human rights.[43] Earlier on, a commission[44]had been established in an attempt to tackle the issue in the Kenyan Justice System. After the ICC found that the suspects had a case to answer, it brought about the complete initiation of the witness protection system in Kenya since most of the alleged perpetrators were high profile individuals and the need for protection of those witnesses who were or had to testify against the PEV suspects was dire.

The witness protection system was first brought about through the enactment of the Witness Protection Act Cap 79, in 2006 by the parliament which subsequently came into effect in 2008 and later amended in 2010. Despite this, the system was not actively referred upon until as recent as 2011 through the ICC process. This is mainly because the witnesses that testified in the PEV case in the ICC have so far been the most credible ones to be offered this program considering the high profile suspects that were involved.

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[42]Ibid

[43]The CNN Wire Staff, "6 Kenyans to appear at The Hague on 'crimes against humanity' charges *CNN Africa* (New York, 6th April 2011) <http://edition.cnn.com/2011/WORLD/africa/04/06/kenya.international.court/index.html> accessed on 28th January 2019.

[44] The Commission of Inquiry into Post-Election Violence (CIPEV), commonly referred to as the Waki Commission was set up by the Government of Kenya in February 2008 with the sole mandate of investigating the facts and circumstances surrounding the violence, the conduct of state security agencies in their handling of it and to make recommendations concerning these and other matters.

Witness protection law's main objective is to make sure that justice administration in cases of criminal nature and other relative proceedings do not suffer prejudice by the essence of witnesses failing to render their evidence without protection from violent criminal recrimination. Before amendments were made to the Witness Protection Act[45], several concerns were raised about the Act mainly by the Civil Society in Kenya.[46] Witnesses are the bedrock for any triumphant investigation and on extension, prosecuting a matter in the course of justice. A proper functioning and efficient witness protection unit is a salient tool for fighting crimes, especially crimes that are organized and also international crimes. This is an important tool for the police in clearing up investigations and the prosecutors in the framing of criminal charges when prosecuting suspected criminals with an aim of ensuring that the operations are successful.

Addressing witness protection at the national level is not enough and thus international hand in its operation is importantly needed to ensure that the efficiency of the program is met. Logically, a victorious prosecution of criminal matters is majorly dependent on viable witnesses who testify without fear of reparation and therefore this means that a strongly founded witness protection system is key to undeterred justice.

The impression of crime on the affected people by it can be pradical. Sufferers may suffer from financial harm, mental, physical and emotional which some may not recover from. Injuries may be threatened upon victims involved or their families, witnesses and they may also receive threats on their lives.[47] With these levels of uncertainties cogging the judicial system, as far as witnesses giving evidence is concerned, witnesses and victims may be quite apprehensive about

[45] No. 16 of 2006
[46] www.unodc.org/unodc/en/leegal-tools/Models.html
[47] 'Victim Assistance and Witness Protection' https://www.unodc.org/unodc/en/organized-crime/witness-protection.html accessed on 3/20/2019

giving out evidence or any kind of information due to the perceived intimidation or threats against them or their family members.

The very first Witness Protection Act, Number 16 of 2006, as drafted and presented, raised several concerns from various society factions with issues being highlighted in the manner in which the Act's operation and general provisions had been structured. The program under its pioneer statute had been established under the Attorney General's office and therefore raising issues as to the programme's independence since the AG's office manning and controlling the programme meant that witnesses required to testify against government officials were abit apprehensive about the way forward considering what was being taunted as a lack of statutory autonomy in operation and the independence of the programme's operation being called out.

The Act also empowered the AG to be the sole decider on whether a person can be admitted into the programme or not futhering the worries on the programme's transparency as set up in the pioneering legislation as the programme operated as part of the government process through the AG's office. The feeble definition of the term 'Witness' under this act also left a lot to be desired as the definition presented had been very limited and equivocal.

Another issue that posed a concern was the lack of structural integrity in the pioneering legislation. The Act provided for agencies and institutions to partner each other in the operations of the programme. This however spelled concerns regarding the integrity of some, if not most of the governmental institutions and agencies involved. For instance, the police force and the officials under the provincial administration wing had already been accused of having used excessive at will when required to actually offer protection in line with respect of constitutional rights. The civil society was abit skeptical about the same agencies being entirely tasked with offering protection to witnesses. In the same breathe, involving such a huge group of individuals

through the respective agencies also meant that there would be lapses in security and breach in confidentiality with information expected to be confidential being shared out widely and therefore compromising the witnesses.

Another issue that was presented was the sustainability of the programme given that the Act did not foresee the element of external funding as a means of raising funds to enable the programme run efficiently considering how expensive the programme is to run.

On 12th August 2011, the then AG of Kenya Honorable Amos Wako officially launched the Witness Protection Agency and its advisory board which had been established in 2009, hoping that it would grow to be effective and independent in making key contributions towards phasing out impunity in the country.[48]There was a Witness Protection Act already in place in 2006 the challenge being that it was conjoined to the State Law Office and therefore not efficacious and the major amendment that the 2010 amendment Act highlighted was an independent one.[49]The amendments in Number 2 of 2010 tried to cure the deficiencies that existed in the WPA Number 16 of 2006.The special nature with which the witness protection program operates, which include covert capability, operational autonomy, accountability and confidentiality, a need to amend the Witness Protection Act was yet again developed, with specific guidance to conform to the constitutional provisions, other legal provisions and some of the emerging best practices in witness protection globally.

Among the amendments introduced was expanding the definition of the term 'Witness' to include, *" a person who requires protection from a threat or risk that exists on account of being a crucial witness"* .This definition however still lacked some straightforwardness as it failed to

[48]Steven Mkawale, 'Witness Protection Agency Unveiled ahead of Hague hearing' (The Standard, 12th August 2011) www.standardmedia.co.ke/?articleID=2000040678&pageNo1accessed on 20th March 2019
[49] No. 2 of 2010

give clear guidelines on the protection of defence witnesses whose lives might be at risk. The amendment Act also introduced the Witness Protection Agency which is headed by the Director of the Witness Protection Agency who will head the programme taking it over from the AG's office. It is however an issue of concern that the Director has been empowered by the Act to unilaterally make decisions and it is a worry that this might give room for abuse of office.

The amended act also brought on board a more direct and conceivable source of funding for the programme in the Consolidated Fund which technically meant that the programme would get direct funding from the state's budget. With the legal privileges that comes with a body corporate as the Agency is, the Act also allows the Agency to receive donations, gifts and grants in a bid to bolster its finances and resources. There is also the introduction of the Victim Trust Fund that plays a major role in trying to restitute victims or families of those victims involved or at adverse length, to compensate for the victims' loss of life.

The Act also introduced the Witness Protection Advisory Board whose main function and objective as will be discussed in depth later on, is to advise the Agency generally on the exercise of its powers and the performance of its functions under the Act while also advising on the formulation of witness protection policies in accordance with the current law and international best practices. The Board has a general oversight obligation on the administration of the Agency where it helps approve the budgetary estimates of the Agency.

The Witness Protection (Amendment) Bill 2016 was therefore approved by the Witness Protection Advisory Board, Cabinet and the National Assembly before the presidential assent because it was imperative for these salient changes to be effected.

Under the amendments brought in was widening of the circumstances to be considered when assessing a witness for inclusion in the Witness Protection Program and this was taunted by the provisions of Section Six of the Witness Protection Act which, through amendments, included witnesses in matters that are of interest to the public and secondly, the ability of a witness to become attuned to the protection program. Before these amendments were effected, one had to prove that the seriousness of the offence is so dire and also the availability of the evidence to be tabled before one can be admitted into the program. The nature of the perceived danger to the witness is also to be considered.

With the amendments filtered through the Act, it now seeks to abhor harassment, intimidation, obstruction and threats of any kind hindering a witness in whichever way with the sole purpose intention frustrating the judicial process. It is now a criminal offence to intimidate witnesses and if found culpable one is punished in the terms of an imprisonment term not exceeding 5 years.[50]The Act was recently supplemented through the Statute Law Miscellaneous Act No. 18 of 2018 with further amendments and improvements mostly touching on the structures and operations of the Witness Protection Agency and improving the issues of accountability on the part of the Director as the authority head of the agency.

2.2 Legal and Institutional Framework of Witness Protection in Kenya.

For Witness Protection to be incorporated in the national system, it is salient that it derives its powers from the apposite legal provisions that exist within the state. It is only through these provisions that the program can be bequeathed powers to operate, thus creating the essentiality of legislative support. For instance, in Kenya, it is only Parliament that has been mandated to make provisions that would have the force of law in Kenya except under authority given by the

[50] Sec 30F of The Witness Protection Act, 2016.

Constitution of Kenya or through legislative mandate.[51]It is worthy to note that the Parliament, which is solely in charge of legislative duties by virtue of the Kenyan Constitution, is understood to derive its powers from the citizenry and therefore its exercises are supposed to be a representation of the citizenry's ideals.[52]

From the foregoing, it is therefore imperative to assert that for any program to operate with a legal backing in Kenya, it has to be enshrined in the legal provisions within the Country and this is no different from the Witness Protection program. With such assurances as above highlighted, the constitutional foundations of witness protection cannot be questioned. Witness protection's purpose is not only to protect the witnesses but to ensure due administration of justice to all which is a tenet of justice in a society governed by the rule of law. Notably, the restrictions that may be imposed by the need for protection of witnesses and victims fall within the provisions of article 50 of the Kenyan Constitution.[53]Accordingly, it is not defensible to state as a general proposition that witness protection is detraction from fair trial.

2.2.1 The Witness Protection Act Cap. 79

Witness Protection Act is the substantive statutory law on witness protection. On 30th December 2006 the Act was assented and subsequently started operation on 1st September 2008. Its main objective as stipulated in the Act is to offer protection of witnesses in criminal matters and other proceedings as well as establishing a Witness Protection Agency and providing for its administration, functions, powers and management, and for any other purposes intertwined with witness protection. This Act is given legislative force through the constitutional provision given

[51] Article 94 of The Constitution
[52] Ibid.
[53] Right to Fair Hearing

the parliament powers to make proper legislations to provide for the protection, welfare and rights of victims of offences.[54]

The Act came up with structural arms to help in its implementation. The Act first starts by explaining the program's targeted audience which includes witnesses in proceedings of a criminal nature, a witness needed to render evidence in a prosecution or an inquiry that is held before a commission, court or tribunal outside Kenya for the purposes of any agreement or treaty ratified by Kenya.[55]

Section 3A to 3V of part one of the Act provides for the establishment of the Witness Protection Agency, the Witness Protection Advisory Board and the Witness Protection Appeals Tribunal, setting out their objectives a, functions and compositions.

2.2.1.1 Witness Protection Agency

The Agency traces its powers from Section 3A of the act which establishes it as a body corporate with perpetual succession and goes on to lay down its objectives and purpose by virtue of Section 3B[56] of the Act. The agency is tasked with among other functions, establishing and nurturing a witness protection program, after which the agency determines the cardinal principles for admission to and removal from the witness protection program of witnesses. It also determines the type of protection measures to be applied and plays an advisory role to any agency, department or Government Ministry on the strategies and measures of adoption in matters witness protection.

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[54] Article 50(9) of The Constitution of Kenya.
[55] Section 3(1) of The Witness Protection Act
[56] (1) The object and purpose of the Agency is to provide the framework and procedures for giving special protection, on behalf of the State, to persons in possession of important information and who are facing potential risk or intimidation due to their co-operation with prosecution and other law enforcement agencies.
(2) The nature of the special protection referred to in subsection (1) shall entail the power of the Agency to acquire, store, maintain and control firearms and ammunition and electronic or other necessary equipment, despite the provisions of any other law.

The Agency is led by a Director, appointed by the Witness Advisory Board on terms and conditions approved by the Board, after consultations with the Salaries and Remuneration Commission. The functions of the Director and her objectives are laid down in detail under the Act in order to achieve the Agency's objectives.[57]The Act also tries as much as possible to ensure that the Agency enjoys independence from among other bodies, the Executive. This is aptly stated in the Act by empowering the Agency with the necessary authority to performance its functions as laid down in the Act with no impediment from any authority.[58] The Executive influence is however not really absolved in the agency since the Act goes further to authorize the Agency to report to the relevant Cabinet Secretary on the general fulfillment of its objectives and purpose and also how it has performed on its mandated functions under the Act for the purposes of accountability.[59]

As to where the Agency will get its funding, the Act states that the expenses incurred by the Agency in accordance with the Act should be charged and issued out of the Consolidated Fund and the appropriation for the expenses should be included in the Appropriation Bill introduced in the National Assembly to authorize the withdrawal from the Consolidated Fund. The Agency can also accept grants, gifts, donations or bequests made to it by well-wishers towards the achievement of the objectives of the Agency, provided that such donations are made in good faith and not in an effort to get favors from the Agency.

[57] Section 3E
[58] Section 3G (1)
[59] Ibid

The Agency is also required, as a matter of accountability, to develop a report detailing its operations and activities through the entire fiscal year and have the same deposited with the Witness Protection Advisory Board within four months after close of each financial year.[60]

2.2.1.2 Witness Protection Advisory Board

It is established under the Act and comprises of the Solicitor General as chairperson, the Principal Secretary in charge of foreign affairs, the Principal Secretary in charge of finance, the Chief Registrar of the Judiciary, the Director-General of the National Intelligence Service, the National Police Service Inspector-General, the Commissioner-General of Prisons, the Kenya National Commission on Human Rights' Chairperson and the Director of Public Prosecutions.[61] The Director of the Agency operates as the secretary in this Board.

The principal function of the Board is to advise the Agency generally on the exercise of its powers and the performance of its functions under the Act while also advising on the formulation of witness protection policies in accordance with the current law and international best practices. The Board has a general oversight obligation on the administration of the Agency where it helps approve the budgetary estimates of the Agency. On this oversight role, the Board receives a report from the Agency within four months after the close of each financial year as regards to the activities and operations of the Agency through the year report of which the Board is mandated to submit to the Attorney General who in turn submits it to the President within 14 days of receipt.[62]

[60] Ibid, 3L
[61] Ibid, 3P
[62] Ibid, 3L

2.2.1.3 Witness Protection Complaints Committee

The Committee is established under the Act and its composition stated to include; The Chairperson who should be an individual with qualifications of a judge of the High Court and four other members one being an advocate of the High Court of five years standing others being two members with relevant experience in handling complaints relating to human rights and intelligence respectively and one final member who should either be a retired senior witness protection officer or a person with experience in witness protection.

The eye catcher in this is that this committee is appointed solely by the Attorney General, who is an Executive member in the Government and therefore the issue of impartiality may arise in such appointments into a committee that is supposed to run on salient objective of impartiality. The committee's function is to basically to receive, consider and determine appeals from decisions of the Director under the Act and also receive and give determinations on complaints against staff of the Agency.

2.2.2 Other Relevant Legislations

2.2.2.1 The Constitution of Kenya

Witness protection is still a salient human right as clearly captured in the Constitution under Chapter Four that gives provisions on the Bill of Rights. Even though Article 48 guarantees the right to access to justice, discrimination, exclusion and inequality still remain stringent obstacles to universal societal development. Most marginalized groups and people living below the dollar are rarely aware of their legal rights and as a result, lack legal protection and easy reach to proper

mechanisms that could remedy their grievances, resulting in increased vulnerability.[63] The constitutional provision seeks to remedy such an occurrence and witness protection cannot be separated from this. Article 50(9) gives provision for the exigency to have necessary legislation that provides for the protection, welfare and rights of victims of offences and thus raising and obligation to the Kenyan Government to protect witnesses.

The Constitutional right to protection is specifically provided for under various articles of the Constitution including Article 29 providing for freedom and security of people from any psychological or physical harm. Article 48 guarantees the right of Access to Justice with Article 50(7) providing for the right to a fair hearing with the court allowing an intermediary to help an accused person or the complainant to present their case in court. Witnesses or vulnerable persons are protected under Article 50(8) of the Constitution. The Constitution also gives power to International Laws and Treaties ratified by Kenya, by virtue of Article 2 (5) and (6), to form part of the laws of Kenya.

2.2.2.2 The Sexual Offences Act No 3 of 2006 of Kenya

Section 31 and Section 32 of the Sexual Offences Act gives provisions on protection measures of witnesses who are vulnerable in cases of sexual violence and also gender based violence. On account of the sensitivity of these cases, they are to be conducted in camera. Publishing of information that would expose the witnesses' identity is abhorred by virtue of section 31(11) of the Act.

[63] United Nations Development Programme, 'Access to Justice' available at https://www.undp.org/content/undp/en/home/democratic-governance-and-peacebuilding/rule-of-law--justice--security-and-human-rights/access-to-justice.html Accessed on 4/27/2019

2.2.2.3 The Criminal Procedure Code (CPC) Chapter 75 Laws of Kenya

Section 77 (2) of the Criminal Procedure Code gives provisions for proceedings that relates to issues of defilement, incest, rape and abduction to be in camera since victims and witnesses of such cases are susceptible to victimization and intimidation of many forms.

2.2.2.4 The Children Act No 8 of 2001 of Kenya

Under section 77(4) of the Children Act, cases involving children are to be heard at the children's court at different times from other proceedings with unauthorized people not allowed to attend such proceedings. Section 75 (5) dictates that a child's identity, school, home or last known place the child resides should not be published in any proceedings as a way of protecting the children. The Witness Protection Agency came up with a special protection application form to provide for the needs of child witnesses in accordance with this Act.

CHAPTER 3: WITNESS PROTECTION: KENYA'S REALITY.

3.0 Introduction

The role witnesses play to ensure that justice has been dispensed effectively is so salient in any level-minded society that it is only prudent for its operations to be amplified. In its driving aim of achieving justice, courts will almost certainly rely on the cooperation of witnesses in matters before them with an expectation that witnesses will testify without fear or favour. Justice Panchal examined the role witnesses of criminal acts play in the criminal justice system by reasoning out that witnesses play a salient role in the administration of justice and that conducting a fair trial can be well achieved through protecting the witnesses involved via proper legislative measures.[64]

Jeremy Bentham also reiterates that witnesses are a salient feature in ensuring the efficiency and quality of a trial process is not compromised as discussed earlier on in this work.[65]It is therefore safe to note that it's the solemn duty of any witness who has information on a crime that has been committed, to aid the state in testifying and offering evidence.[66]

From the preceding discourse, the role witnesses play in any judicial system is in dispensible especially in matters of criminal justice majorly because the entire backbone of the decision that the court may give is heavily pegged on the witness' testimony in the case. This reasoning is not discriminative of the situation in Kenya with the need for witnesses' protection being felt as far back as post-independence.

Through history in Kenya, witnesses have been impeded from giving their testimonies through various forms of arm twisting techniques that have instilled fear in them occasioning their failure to show up in trials or withdrawing their testimonies altogether for fear of reprisals. In these

[64]Vikas Kumar Roorkewal vs State Of Uttarkh & Others (2011)SCC (Cri) No. 28 of 2008
[65] Ibid
[66]State Of Gujarat vs Anirudh Singh And Another (1997) 6 SCC 514.

intimidation schemes, the witnesses themselves have had threats being meted on their lives and those of their love ones if they dared testify against majorly powerful figures in the society. Other witnesses have even disappeared from the face of the earth with no trace until this day.[67] Some notable cases of political assassinations in the post-colonial period include the Tom Joseph Mboya's assassination[68], the assassination of Josiah Mwangi (J.M) Kariuki[69], the assassination of Pio Gama Pinto and Dr. Robert Ouko[70].

There are several structures incorporated into the Kenyan Judicial system in an effort to ensure that witnesses are protected and allowed to testify without being fearful of reprisals but have these efforts bred success and has the objectives thought over when these systems were being incorporated into the system been met? One of these efforts in the present day was through the provision for the protection of vulnerable people or witnesses in a society that is deemed democratic through the implementation of the Kenyan Constitution.[71]Instances exist where cases are rejected in court majorly due to lack of witnesses or by witnesses simply becoming reluctant and hesitant to come forward and give their testimonies and thus leading to miscarriage of justice.

Other notable assassinations that presented a picture of witness intimidation are the assassinations of Pio Gama Pinto[72], the assassination of Chris Msando[73] just days before the

[67] ibid
[68]Kamau Ngotho, 'The enduring mystery of Tom Mboya killer.' *Sunday Nation Newspaper*(Nairobi 7th July 2019) <https://www.nation.co.ke/news/mystery-of-Tom-Mboya-killer/1056-5186056-xrwr0m/index.html> accessed on 26th July 2019.
[69] ibid
[70] BBC Africa, 'Robert Ouko killed in Kenya State House' *BBC News*(London, 9th December 2010) <https://www.bbc.com/news/world-africa-11962534> accessed on 27th July 2019.
[71] Article 29 guarantees freedom and security of persons from physical or psychological harm.
[72]Durrani Shiraz, *Pio Gama Pinto: Kenya's Unsung Martyr. 1927 – 1965* (Vita Books Publishers 2018*).*
[73] One of the most senior officials at the Independent Election and Boundaries Commission (IEBC) was kidnapped, tortured and murdered, fuelling greater uncertainty and anxiety around the

2017 general elections in Kenya. The brutal murder of Chris Msando bred fear and uncertainty within the IEBC management leading to the resignation and subsequent fleeing of the then Commissioner in IEBC Dr. Roselyn Akombe. After fleeing to the USA, she held an interview with BBC where she revealed that she felt unsafe and was also worried about the safety of her immediate family because her involvement in the Commission.[74]

3.1 Practices of the Witness Protection Program in Kenya

The practices under the Kenyan Jurisdiction are majorly guided by the principles, provisions and regulations laid down in the Witness Protection Act (No. 16 of 2006) and the Witness Protection Rules, 2015.Other legal frameworks of the program as discussed earlier include The Constitution, International Laws and Treaties ratified by Kenya, the Children's Act, the Sexual Offences Act, the Prevention of Terrorism Act and the Criminal Procedure Code.

The Witness Protection Act has been revised severally since its conception, with a view of trying to accommodate the environmental and societal factors that are pegged to the Witnesses Protection Program. The practices as laid down in these provisions help guide the courts and state officers as well as people who might feel that they need protection under the program since it stipulates the conditions, requirements and the procedures required in order to be admitted into this program.

3.1.1 Protection Procedure in Kenya

Before a witness is admitted into the program, several issues have to be laid out bare before admittance of the witness into the program is okayed. The Director of the Witness Protection

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election. <https://www.aljazeera.com/indepth/opinion/2017/08/murder-shook-kenyan-elections-170801075934936.html> accessed on 27th July 2019.

[74]Dickens Olewe, 'Kenya election official flees to US' *BBC Africa News* (London, 18th October 2017) <https://www.bbc.com/news/world-africa-41660880>Accessed on 23rd August 2019.

Agency is the sole authority figure tasked with making the decision to whether admit a person into or exclude him from the program.[75]

A person cannot be forced into the program and the individual unfettered consent is salient in order for the person to be admitted with this being legitimized by the witness or a guardian, in a case where the witness is a minor or a person of unsound mind, signing a memorandum of understanding to enter into such an agreement. The Witness Protection Agency is required by law to ensure that processing the request of admittance into the program is done without delay.[76]A person admitted to the program is to be protected as long as the danger or risk to their safety exists and the inclusion of a witness into the program should not be treated as a reward or a means of persuading an individual to give testimony but rather to protect the witness wholly because of the nature of his or her involvement.

In arriving at a decision on the admission of a witness into the program, the Director of the Witness Protection Agency considers various issues in order to make a sound decision. First and foremost, the nature, importance and seriousness of the offence to which any relevant evidence or statements relates to is considered before one is fronted for admission. The basic nature of the adjudged danger to the witness is also considered before the decision is made. The Director would also try to unravel as to the existence of feasible alternative ways within which the witness can be protected before getting to the program. The public interest in the prosecution of the subject matter is also considered and also the ability of the witness to adapt to the program and its measures.[77]

[75] Section 5 Witness Protection Act No.16 of 2006
[76] Ibid
[77] Ibid, Section 6

A memorandum of understanding is then presented to the witness or guardian, depending on the circumstances, for signing after the Director has okayed the witness' admission into the program. This memorandum of understanding basically includes the basis on which the individual is selected for the program and details of the protection and the degree of assistance that is to be accorded to the individual. It also contains the obligations that are present to both parties and also instances, in writing, where the protection under the program may be terminated.[78]

It is therefore prudent that one is supposed to read and understand the provisions stipulated in the Memorandum of Understanding before appending his or her signature. This document is signed by the witness or his guardian, in the presence of the Director or an official designated by the Director for this particular purpose. The witness then becomes included in the program when the Director signs the Memorandum and subsequently informs the witness that the memorandum has been duly signed. A witness may also be included in the program on temporary basis if, in the Director's own wisdom, the individual is in urgent need of protection.

Termination or cessation from the program can be effected by the participant through a written notice to the Director requesting to be terminated from the program. The Director may also terminate the inclusion of an individual in the program if the participant deliberately breaches a term of the memorandum or if he does anything that in the Director's wisdom is likely to compromise the integrity of the program. If it is also established that the circumstances which gave rise to the need for protection and assistance for the participation have ceased to exist, then the participant can be terminated from the program.

[78] Ibid

3.2 Viability of the Witness Protection program in Kenya.

The program in Kenya has been in existence for a while now but its implementation has actually taken longer than most would have wished for. The documented success rate of the program in Kenya has been notably low because of many inadequacies that have cogged its efficient implementation into the Kenyan judicial system. This can be evidenced by the fact that despite the program being pioneered in 2006, we still have many instances where justice is eroded by the fact that witnesses fail to appear in court to give their testimonies for fear that the lives might not be guaranteed by their mere involvement in certain matters.

One perfect scenario that breeds the cogs that slows down the implementation of this program in the Kenyan society is the spate of extrajudicial killings that has been persistent to alarming rates in Kenya. Cases of police brutality intertwined with extrajudicial killings are so prevalent in Kenya, yet arrests of perpetrators leave alone prosecutions are ironically lacking. Most of these cases are marred by police cover ups, witness intimidation and in extreme cases, deaths of the witness. As per reports by Amnesty International and the Independent Medico-Legal Unit (IMLU) 122 and 152 deaths of civilians were reported at the hands of police in 2016 and 2017 respectively. Ironically, majority of these cases went unreported and of those that were reported, IPOA has only secured 4 convictions.[79]

Police officers in Kenya, who ideally and by statutory provisions[80] are supposed to serve and protect the citizens, have been used to maim and silence the citizens not aligned to the views of people in power especially the political class, in complete dishonor to their driving principle, **'…** *To promote, protect and respect the human rights of our customers.'* Many of the cases reported

[79] ibid
[80] Section 24 Part III of the National Police Service Act stipulating the functions of the Kenya Police.

of police brutality have followed up by reports of witness intimidation in order to silence the victims of such forms brutality.

3.2.1 The Case of Willie Kimani

The issue of extrajudicial killing in Kenya is so deep-rooted and has been a common occurrence since time in memorial. In Kenya, the security agencies are relied upon heavily when it comes to protecting witnesses considering the slim nature of expertise that exists when it comes to witness protection. With heavy reliance on these national security personnel in providing security to the vulnerable witnesses, who then protects the witnesses if their testimony is against security figures that are supposed to offer them the dire security needed? This presents a quagmire in the dispensation of justice and some rogue security officers have exploited this uncertainty to adverse abuse of human rights in an effort to stifle the voices of those who wish to speak against the atrocities perpetrated by these very security agencies.

National security agencies have been directly involved in cases of witness intimidation and blatant abuse of human rights both as macenaries for the high and mighty in the society or for their own benefit in cases where they, security personnel, are directly implicated and therefore seek to silence those who wish to testify against them. A few notable cases that hit the international spectrum are the cases of 3 Kenyans who were last seen alive in the police cells whereby even public defenders of human rights, like advocates, have not been spared in the intimidation. Such has been the level of impunity that the security personnel that are in charge of defending human rights have operated with, which essentially means the scourges have gone overboard with the intimidation tacts even targeting the advocates who are supposed to be the legal voice of the victims in the dispensation of justice and therefore the victims have little solace if any. An advocate, Willie Kimani, had been commissioned to a client who had made

accusations of being harassed by the police for over a year after he had duly reported that an officer had unlawfully shot him in the arm. On leaving the court premises where the matter had been filed, the advocate, his client and a taxi man they had hired were abducted. Days later, their tortured and mutilated bodies were found dumped in a dam.[81]

The advocate and his client had earlier on reported being intimidated by Police officers attached to the station against pursuing the matter with consequential threats being promised on them if they did not.[82]This was a clear case of witness intimidation that really required the attention of the Witnesses Protection Agency seeing that the matter was so delicate and intrinsically needed to be considered for the program.

3.2.2 The Case of Titus Ngamau Musila alias Katitu[83]

The other notable case is the concluded case in which a former cop, Titus Musila Ngamau with the street name of Katitu was charged with murder. It was alleged that he had murdered a youthful man called Kenneth Mwangi in March 2013 at the bus terminus of Githurai 45 in Nairobi. On his arrest and arraignment in court, his advocate made several application for bail pending trial on the basis that he had this right under the Constitution. The court however responded that the right was not absolute and that there was an honest concern that if release on bail, there was a probable chance that he would interfere with witnesses and thus foil the case. Witnesses had raised concerns and recorded fears of threats to their lives which according to them, had been issued by the then police officer, the court also noted that one of the Key witnesses Oscar Mwangi, who happened to be the deceased's brother was fatally shot by the

[81]Jeffrey Gettleman, '3 Kenyans Last Seen At Police Station Found Dead' *The New York Times* (Ney York, 1st July 2016). <https://www.nytimes.com/2016/07/02/world/africa/kenya-lawyer-missing-kimani-police.html>Accessed on 23rd August 2019.
[82] Ibid
[83]*Republic v Titus Ngamau Musila Katitu [2018] eKLR.*

police even as investigations were still ongoing. This forced the deceased's sister, his mother and the other remaining witnesses to relocate due to fear for their lives.

On conclusion of the trial, the officer was found guilty and subsequently convicted of murder after the court considering that the prosecution had proved that the accused had the *mens rea* to murder the deceased with court further ordering that the accused be detained awaiting sentencing. The learned Judge dismissed Katitu's several bail applications in this matter after considering the fact that he did in fact interfere with the witnesses, with the witnesses had being forced to relocate from out of fear. The fear of the witnesses was so dire after one key witness was murdered when investigations were still ongoing and attempts had been made to cover up his murder.[84]

According to the court, the evidence presented was able to point directly at the accused person who was very familiar with Githurai 45 residents for fighting crime in the area and that he was expected to protect the life of Kenneth by arresting him and letting law take its course rather that shooting him dead.[85]

Most recently, in The High Court of Kenya in Homabay, the prosecution made an application citing the witness protection rules, 2015 when applying for orders for witness protection for a witness who was supposed to give testimony in a murder trial.[86] When the murder trial came up for hearing before the court the prosecution informed the court of the difficulty police were having in getting witnesses to attend court since the witnesses were apprehensive about their security and in fact at the last session the prosecution had wanted to withdraw the case not for want of evidence, but due to reluctance of witnesses to attend court on account of their personal

[84] Ibid
[85] Ibid
[86] *Republic v Kevin Ouma Odhiambo& 4 others [2018] eKLR.*

security. It was due to this indication that the court advised the prosecution to explore the use of the Witness Protection Agency. The court felt that application was not just a breath of hot air but it arose from real concerns.

This is just one of many cases that present a situation whereby the witnesses are in complete doubt of the system's ability to protect them in instances where their statements and testimonies are crucial in the dispensation of justice. In an interview, Mrs. Alice Ondieki, the WPA's Chief Executive Officer said that the program has been effective and established that 150 cases had already been taken to court, with 14 of those having been concluded with 12 convictions by 2017. She went ahead to state that the agency, which has covered 328 witnesses and 800 dependents since its inception in 2011, also assists people facing threats for having crucial information in serious crimes including murder, corruption, and terror among other cases.[87]

[87] Joseph Muraya, " The role of Kenya's Witness Protection Agency explained" *Capital News* (Nairobi, 6th October 2016) <https://www.capitalfm.co.ke/news/2016/10/the-role-of-kenyas-witness-protection-agency-explained/> Accessed on 23rd August 2019.

CHAPTER FOUR: WITNESS PROTECTION IN OTHER JURISDICTIONS.

4.0 Introduction

The life of informants, whistleblowers, witnesses and their immediate families and friends is always at risk when fighting against serious crimes and therefore necessitating the need for their effective protection under the justice system. Fair and effective operations in the sphere of criminal justice is salient and a prerequisite of achieving the ultimate societal goal of maintaining natural justice in the society.

The major areas that really highlight the circumstances surrounding the involvements of criminal litigation are pegged majorly on response to terrorism, organized crimes and other serious crimes which are of interest to the government since a core function of the government is to ensure that peace and tranquility is maintained in the society. The government then is expected, to ensure justice prevails and thus it is required to handle the issue of informants and intimidation of witnesses and further come up with ways that would ensure that they are effectively protected against attacks, intimidation and reprisals.

Efficient and credible witness protection programs that can be relied upon have evinced their efficacy as salient tools in fighting serious crimes. In most states however, persistent concerns are still frisked out about some of the demerits and shortcomings of measures of protection that are still in existence, the ever elevated cost of the existing programs not forgetting the ethical and legal pitfalls.

Guidance, principles and standards governing effective witness protection programs and policies have been developed internationally through treaties that generally assert international laws to countries that ratify these treaties essentially giving these treaties a legal backing in the national laws. For instance, Good Practices forthe Protection of Witnesses in Criminal Proceedings

Involving Organized Crime and model Witness Protection Legal Provisions[88], which is a manual by the UNODC gives the objectives of good practices as being directed majorly at legislators, policy developers, those in legal practice and senior officials involved in the department of law enforcement and justice. The sole objective being to give these professionals with an extensive blueprint on the options available and the measures that would be salient and relevant to be infused into their legal systems and procedures of operation, bearing in mind the specific socio-economic and political situations in their countries and also the technological sphere existing in these jurisdictions since the need to develop technologically in the programme has been made salient with the ever changing systems of technology.

The report also states that "A state's decision to set up a witness protection program should be reached on the basisof a thorough analysis of factors relating to the level and types of criminality within its society, frequency of violence against participants in criminal proceedings, demonstrated abilityand will to prosecute high-profile crimes and availability of resources." For instance, we cannot wish away the fact that powerful criminal syndicates do exist with deep connections politically and financially. These kind of syndicates would be willing to tear through any living soul just to ensure that their criminal conglomerates and their rich lifestyles is protect and would not sweat at the possibility of doing away with witnesses that may present a hurdle for them and as such, the dire need for a witness protection program to help the prosecuting agencies is emphasized.

[88]Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime, A report by the United Nations Office on Drugs and Crime published in Vienna in 2008**.** At pgs.4 and 43

Article 24, paragraph 1 of the United Nations Convention against Transnational Organized Crime[89]gives guidelines on protecting witnesses stating that state members are required to take relevant measures that are in tandem with their means to provide efficient and reliable protection from intimidation for witnesses or potential retaliation in criminal prosecutions, to those witnesses who are required to give testimony pertaining offences covered under the Convention, their relatives and people that they are lose to and may be in danger as a result of the witnesses' actions close to them.

Article 23 gives a general on the principles of protection of such witnesses providing that their role regarding the evidence they are required to give in proceedings of a criminal nature is often critical in ensuring that offenders are convicted, especially in cases of organized crimes. This article gives key principles that should be considered with respect to witness protection.

In the near past, as a basis for furthering policy development, there has been a few reviews has been undertaken on some of the existing witness protections around the world that have success stories. The current review details out a comparative analysis of the operations and characteristics of witness protection programs in several selected countries, also noting the successes and issues they encounter to be discussed through this study.

4.1 Standard Characteristics of Witness Protection Programs

4.1.1 Purpose

Conventional witness protection programs have proper structures and policies in place to enable the safeguarding of the process of investigation, through the entire period of criminal trial and also try to ensure the security of witnesses is guaranteed. In practice, the main objective that

[89] The United Nations Convention against Transnational Organized Crime is a 2000 United Nations-sponsored multilateral treaty against transnational organized crime. The Convention was adopted by a resolution of the United Nations General Assembly on 15 November 2000 and came into effect on 29th September 2003.

these programs host is to ensure that the witnesses are safe and also those individuals seen as collaborators of justice together with those individuals close to them.

The programs in most of the developed jurisdictions include procedures for the physical protection of witnesses and those viewed as collaborators of justice to the extent such protection is perceived necessary and attainable. Physical protection in this case include, but not limited to relocating the witnesses and re-documenting them. It goes further to permit non-disclosure of information in those new settlements or regulating on the disclosure of information concerning the new identity and whereabouts of such persons.[90] Principally, witness protection programs are not necessarily meant to reward a witness for cooperating with the authorities as it is majorly expected for a witness to volunteer information deemed important to authorities in the expediting the process of achieving societal justice.

4.1.2 Structure

In most states, protection of witnesses is largely viewed as a police function.[91] In other jurisdictions however, various government departments and most importantly the judiciary play a key role in this very process. For instance, the practice in Canada is different in the sense that the federal witness protection program is seen primarily as a program under the Police Department. Internationally, there is a growing concurrence that it is preferable for witness protection to be kept separate from the agency conducting the investigation or prosecution.[92]

According to the Council of Europe study of best practices in witness protection, it is salient that one separates investigative and prosecutorial units from witness protection agencies, as far as

[90] *Witness Protection as a key tool in addressing serious and Organized Crime*, Karen Kramer
[91] Fyfe 2001, Fyfe and Sheptycki 2005: 333
[92] UNODC 2008, Council of Europe, 2004, 2006.

personnel and organization goes.[93] This is imperative in an effort to realize the order to ensure the objective that the witness protection intends to achieve and its intended measures with the sole objective being to protect the rights of witnesses.

With the existence of an independent agency, the responsibility for admission into the protection program, the protected witnesses' continued support as well as protective measures rests with it. Most a times, and due to its nature of practice and what its objectives are, investigative agencies are usually most erudite about the applicant's criminal background, the crime involved and the nature of the investigation. The agency often assists the protection service in the assessment of the threat to the applicant and his or her immediate relatives.[94]The Standing Committee[95] recommended the establishment of an independent witness protection office at the Department of Justice under guidance on the sensitivity of the nature of operations involved.

4.1.3 Enabling Legislation

The legal policies and regulations regulating the protection of witnesses and others who are involved or rather involve themselves in criminal proceedings can be said to be recent. Most programs are technically based on legislature with the exception being the program developed and in practice in the United Kingdom. In jurisdictions where the program does not run on a legislative basis, the program is solely treated as a police objective. In some jurisdictions, especially those that are guided by the civil law jurisprudence, the laws governing witness protection can also include agreements of immunity or leniency, as well as agreements touching on procedures to be employed in protecting the witness.

[93] Ibid
[94] Ibid, note 3
[95] Standing Committee on Public Safety and National Security 2008

There is always a danger of people trying to misuse the privileges that come with being admitted into this program and therefore as part of the legislations developed, mechanisms are created to ensure this danger is averted so that participants do not use the program to evade criminal or civil liability. Should a witness be admitted into the protection program as a reward for offering intelligence or rendering evidence? Some legislations touch upon this delicate concern.[96]

4.1.4 The Nature of the Protection and Services Offered

Protection programs that are already in operation and those that have been in operation for a while now are majorly identical in term of their objectives and the forms of protection covers that they provide. There is however some differences among the programs in these different jurisdictions mainly in terms of the criteria employed when trying to espouse on the eligibility and the manner in which the forms of protection offered is meted. Noteworthy distinctions in terms of who is responsible for their operation is also brought out when different jurisdictions are put into perspective.

The protection offered by these programs in most cases is normally furthered only to those witnesses that are entangled in the most serious criminal cases. The main reason for this is because the idea behind such programs, given how costly they are and the establishment priority based approach, is primarily pegged on the will to facilitate witness cooperation with a view of securing criminal convictions rather than on the guidance that the State is obligated to protect witnesses that have the right to be protected.

Most similar programs offer similar protection measures with a dependency being placed on the circumstances of the cases alongside the associated risks expected. Such measures include physical protection, relocation of the participants which in some cases may be internationally for

[96] https://www.unodc.org/documents/about-unodc/AR09_LORES.pdf

those jurisdictions with proper set ups being supported by legit financial muscles. Changing of identity can also be visited upon when the need gets dire with the participants being offered financial support and various other support services for instance access to medical services, counseling and other support services. In other programs, the individuals who require the protection offered are offered some financial support by the program in order for them to take their own precautions.

When the above mentioned standard characteristics of Witness Protection Progrmmes are discerned in comparison to what we have in Kenya, it is evident on which course the Kenyan system favours. The legislation that Kenya has in place stipulates the purpose that the programme seeks to play under Section 3 of the Act and goes further to provide the structure with which the progrmme is supposed to operate in the very same Section.

The nature of protection and services offered are also stipulated in the Act and from the provisions Kenya has, it is evident that its programme seeks to operate independently but with the help of state organs in very specific roles and not as other jurisdictions would have the programme operate under state organs and Departments for instance the Police Department in Canada and the Justice system in South Africa.

4.2 Regional Witness Protection Regimes

The importance of witness protection in addressing serious crimes has been recognized by most African countries with even more countries appreciating the fact that the need for this program has never been even direr. The African Union Model National Law on Universal Jurisdiction over International Crimes specifically lays it bare on the responsibility that falls on both the prosecution and the court in ensuring that witnesses are protected.

The need to prevent reprisal against witnesses is also emphasized and acknowledged by the Rules of Procedure of the African Commission on Human and Peoples' Rights. Other forums, such as the East African Association of Prosecutors, the Africa Prosecutors Association and the East African Magistrates and Judges Association, also insist on the crucial function of this protection program in fighting complex crimes. Even with these regional agreements and constituted bodies, not many African countries can really pride themselves on having legislated policies and legal provisions that specifically and adequately cover for witness protection at the national level.

The implementing witness protection in most African states is still at pioneering stages but these efforts are still appreciated. Draft legislations are in place in some countries with others having already legislated for this program. Some states are quite ahead in the process of implementing this program having and already formalized witness protection programs in their legislation. It is however of note that all these states have tried to design their legislation, policies and systems factoring in the circumstances surrounding them with a view of developing legislations that suit their specific needs and requirements. South Africa is regarded as the continent's pioneer in witness protection and, of all African countries, has the most developed national level mechanism for protecting witnesses.[97]

4.2.1 The Republic of South Africa

4.2.1.1 Introduction and Legal Framework

Earlier on in its pioneer stages of democracy, South Africa's security agencies focused mainly on reining on armed factions that were perceived to be hostile to the new government or those that were viewed not to be championing the government's agenda. A greater space for criminal

[97] UNODC 'Handbook on improving access to legal aid in Africa' (New York 2011) p. 86

activities and interests in South Africa is created as a result of a recoil from tyrannical forms of social and political control that had been in existence in the country for quite a while and the country was going through a transitioning period.[98]

During the Apartheid-era the security agencies were more concerned with prosecuting people who shared a different political ideology and guerrilla factions, with very minimal experience when it comes to matters of handling criminal syndicates that are organized.[99] These biases towards stifling political opposition was highlighted by the set ups of the witness protection program prior to 1996.

As a result of these acts of animosity and restlessness in South Africa at this point in time, human rights culture could not develop in an apartheid set up in South Africa.[100] The system, through the manner in which the then government chose to deal with the issue of post-independence revolutions bred a culture of violence, intolerance and a lack of respect for life and indeed, human rights in general. It has even been argued that these effects are still being felt to this day especially when we look at with scrutiny the way the country is highly volatile and also very much willing to plunge into vicious levels when xenophobic attacks are experienced.[101]

The system, through the manner in which the then government chose to deal with the issue of post-independence revolutions bred a culture of violence, intolerance and a lack of respect for life and indeed, human rights in general. It has even been argued that these effects are still being felt to this day especially when we look at with scrutiny the way the country is highly volatile

[98] Graeme Simpson and Janine Rauch, Political Violence: 1991, in N Boister and K Ferguson Brown, *South African Human Rights Yearbook 1992*, Vol. 3, Cape Town: Oxford University Press, 1993,212-239.
[99] Mark Shaw, Organised crime in post-apartheid South Africa, Occasional paper 28, Safety and Governance Programme, Institute for Security Studies, 1998.
[100] Jeremy Sarkin& Howard Varney; *Tradition Weapons, Cultural Expediency and the Political Conflict in South Africa: A Cultural of Violence,* 6 S.AFR. J. CRIM.JUST.2(1993)
[101] Jeremy Sarkin; *The Development of a Human Rights Culture in South Africa*, 20 Hum. Rts. Q. 628 (1998)

and also very much willing to plunge into vicious levels when xenophobic attacks are experienced.

After the fall of apartheid in 1994, there was an acute need to help create and foster a human rights culture with great demonstration of the value and the salient need of human rights that had been direly missing during the apartheid reign.[102] South Africa went through a rigorous transition resulting to a paradigm shift in the political sphere and also uncertainty became as imminent as it was prominent. To address the thorny issue of organized crimes that had been so prevalent that it had been considered a norm, blunt new methods that gave power to law enforcement without necessarily compromising the rights of people who were accused was needed and encouraged.

The South African witness protection program conspicuously highlights the paradigm shift in the political mustering of the country. A national program was rolled out in 1996 which was in tandem with other reform initiatives within the justice sector in South Africa, with a salient notion of having a strong and efficient program that ensured the safety of witnesses in the dispensation of justice. In 2000 the program was re-engineered and immortalized in law with the assentation of the Witness Protection Act 2000[103].

4.2.1.2 Legal and Institutional Framework

In 1996, guided by the strategy on preventing crime nationally, the South African Justice Department established the national witness protection program. The 1998WPA, which came into operation on 31 March 2000, gave provisions as far as the legal framework was concerned.[104] Its administrative and operational support was endorsed by the SAPS in all the nine provinces of South Africa. This is where the current WPU sought its foundation with many

[102] Ibid
[103] https://www.gov.za/documents/witness-protection-act Accessed on 6/6/2019
[104] Witness Protection Act 1998 (Act 112 of 1998), Cape Town: Government Gazette 19523.

personnel covering the operations of the program being sourced from the previous program that stemmed from 1996.[105]

The Act was enacted with the main interest of serving the citizenry efficiently and was relatively progressive in its nature of operation with its intentions pure. However, by operation, its initial objective and intention seemed to be bundled over by the State and prosecutions'. The Protected Disclosures Act 2000 is another salient legislative policy that was enacted by the South African parliament with the sole aim of facilitating and protecting the public and even private sector to enable employees to report on unlawful practices.[106]

This law, as enacted, offers an opportunity for divulgence of irregular or unlawful practice of employers, members of the executive arm of the government, legal practitioners, state council members and other appropriate institutions. Hat the Act offers whistleblowers in such circumstances where they disclose information, is protecting the parties from occupational detriment or victimization.[107]

It is however noteworthy that the law as is stipulated currently does not guarantee the protection against those receiving the information on disclosure to investigate neither does it protect a whistleblower identity. It does not also provide an authority that is independent to obtain complaints and does not require reports to be made to the parliament on the efficacy of the legislation. While the legislation abhors victimizing, penalizing or dismissing the whistleblowers from work, it is however silent on the possibility of limiting the whistleblower's career opportunities in terms of deserved promotions or pay rise.

[105] Ibid
[106] Protected Disclosures Act 2000 (Act 26 of 2000), Cape Town: Government Gazette 21453.
[107] Ibid, Ss 5-9.

The protection of witnesses and whistleblowers is often conflated. Only the Witness Protection Act grants protection for the Whistleblowers as a prerequisite for their cooperation as witnesses. Legislation on whistleblowers is developed with an intention of protecting those who report to the relevant authorities, inappropriate and illegal practices. Legislation on witness protection legislation on the other hand aims to protect only those witnesses involved in legal proceedings which in most cases are of criminal nature and is salient on protecting informants.

In the current legislation on witness protection, an Office for the Protection of Witnesses was created under the ambit of the justice and constitutional development ministry, with the Justice Director-General being the authority figure.[108] The office did not however begin operating independently majorly due to the financial implications that were associated with developing the office. The office was renamed the WPU in 2001 and subsequently moved to the National Prosecuting Authority (NPA) with the unit now required to be reporting to the NPA's national director through the deputy director's office. This new structure was deemed irregular under the WPA, which stipulated that the director was needed to report to the minister of justice and to operate under the direction of the minister.[109]

Issues with the location of the WPU are amplified by the fact that recently, the independence of NPA's was called into question with critics citing that its operation and general practice was more based on pleasing the political cadre than an objective approach of analyzing evidence when coming up with prosecutorial policies.[110]The view was that the unit's location within the

[108]Lala Camerer, *Protecting whistle blowers in South Africa: The Protected Disclosures Act*, no 26 of 2000, Occasional paper 47, Anti-Corruption Strategies, Institute for Security Studies, 2001, http://www.iss.co.za/Pubs/Papers/47/Paper47.html
[109] Witness Protection Act, 1998, section 3(2)
[110]Chandré Gould, *Challenges to the rule of law in South Africa*, Institute for Security Studies.

NPA basically undermined its expectation to operate objectively and by extension, the assertion by witnesses that political biases were deeply entrenched in the unit.

A witness's first interaction is, in most cases, always with the police since the first obvious report or complaint relating to threats is lodged with the police is made to the police. It is suggested that for protective services to be delivered more efficiently, the unit's location should be made more accessible to the SAPS.[111] The demobilizing of the Directorate of Special Operations of the NPA also known as the 'Scorpions', which had been given mandate to investigate organised and serious crimes independently, removed the specialised security function of the NPA reinforcing the assertion that the SAPS was the unit's most adequate location.[112] Ideally, the protection unit should be sovereign in tandem with both the Witness Protection Act and global best practices and here is where SAPS challenges with regard to objectivity is espoused.

Most personnel in charge with protection hold the opinion that the program's main objective would be realized if a unit is located at a neutral point under the direct authority of the Minister of Justice and Constitutional Development which would also ensure that there is independence in its operation and therefore make the program more efficient. This kind of independence and objectivity in operation would also mitigate any SAPS or NPA tendencies to use the WPU to strengthen the justice sector role of one department at the expense of another.

During the pioneering of this program, the government tried to cab cases of double standards in its operation by ensuring that no police from the former security branch from the apartheid era were absorbed into the 1996 national program. Most of management and administrative personnel in the current unit were on boarded from a civilian background, with few intelligence

[111] Ibid
[112] Ibid

and security sector staff. In the pioneering stages of the program, personnel in the security sector including the then Directorate of Scorpions were brought in. The shortfall of WPU leadership's is often mentioned in terms of its experience with intelligence and security in general. This is inspite of its prowess in policing operation and its military presence regionally which negatively affects relations with the SAPS. The unit is seen as likely to operate well from the greater knowledge of criminality and threats faced than what a more balanced leadership would provide.

In an effort to ensure personnel integrity was taken seriously by those involved in recruiting the unit's original staff, polygraph testing, expenditure disclosure and intelligence agency screening and asset were introduced to ascertain personnel integrity with the practice still being featured to this day, randomly approximately twice a year. All staffs in the unit are trained on issues of handling confidential information, counter-surveillance, advanced driving and medical and handling of firearms. The issue of confidentiality is so salient that the WPU director and all other staff members are required to take an oath of office to ensure that they maintain confidential such information that is deemed confidential.[113]

The integrity of personnel in the program is also intensified by operating in a manner that regulates the information of a particular witness to as fewer personnel as possible and also operating with a web of independent monitors being employed to ensure that personnel operations is well evaluated.

How does the program ensure that the career in witness protection as a personnel remain attractive bearing in mind the dangers involved? Better benefits both remuneration wise and allowances are furthered to personnel involved arguably even much better than the pacts favoured on SAPS. For observers however, it is a serious cause for concern that long-term

[113] Witness Protection Act 1998, section 17.

employment set ups are not yet placed and as such, personnel loyalty could be hinged on former colleagues who may be brought back in incase their contract dies out at WPU.

Financial sustainability in the long-term is salient in order to ensure the smooth running of the program and also help alleviate the sway of corrupt nature within the security agencies involved. Another worry would be professional tiredness and complacency that cannot be avoided due to the prolonged exposure to stealthy work which may prove a threat to long-term protection unit employment and in most particularly where psychological aid is not adequate.

4.2.1.3 Roles and Responsibilities of Personnel under the SAWPU

Among the main responsibly bequeathed upon the Director of Witness Protection is to determine the value of a witness, the societal threat that exists, how vulnerable the witness is to being intimidated and the ability of the witness to resettle.[114]It is also an ultimate decision and responsibility of the director to admit the witness into the program and also oversee the agreement between the witness and the state and also any arrangements with other state or commercial entities.[115] In practice however, it is the protection officers that negotiate these arrangements.

The coordination of regional protection officers is overseen by a deputy witness protection director from the head office where he also harmonizes management meetings jointly with the protection officers of the regions and their deputies. The finance officer, an operations officer and personnel staff are also based at the head office. The management of all assets is administered from the head office with one protection officer in every province acting as the provincial witness protection director.

[114] Ibid, Section 4.
[115] Ibid.

The on boarding process starts by the protection personnel making an application assessments of the witness for the same to be considered by the director. These personnel also give regional reports to the director on the operations of the program twice a year.[116] Protection officers are only mandated to give information relevant to their cause only to the head office unless under the discretion of the director, they are guided otherwise. This regulated manner on how they share the information guided by stealthiness within which the program is run. By practice therefore, only two files are developed for each case presented with one file being kept at the region where the issue originates from and the other file stored at the head office. The regional offices mostly operate independently where they manage their own resources and operations with only the aid of the deputy directors who assist to coordinate the provinces with the head office. Each provincial protection officer operates with two deputies one dealing with operations and the other handling the administration duties.

There has however been an expression of concern for lack of psychosocial personnel in the WPU. Being involved in such programs requires great psychosocial expertise round the clock to try to handle trauma and anxiety issues that relate to the threats, testimonies and the resettlement of the witnesses involved. Additionally, some of the personnel drafted into the program during its pioneer stages did not demonstrate adequate understanding of the pertinent criminal forces thus undermining WPU provision of psychosocially sensitive protective services. The appointment of 105 new staff in the 2007-08 financial year[117] implies the meteoric expansion of manpower and with such expansion in capacity, there's greater need for oversight over swelling staff numbers.

[116] Ibid, Section 5

[117]Mokotedi J Mpshe, Annual report of the National Prosecuting Authority 2007/08, Submitted to Parliament by Bridgitte Mabandla, MP, Minister of Justice and Constitutional Development, September 2008, 55, https://www.npa.gov.za/

The SAWPU however does not substantiate this operation independently but involves other organs of power in its quest to actualize its mandate. In its operation, it amalgamates with agencies in charge of intelligence on the assessment of threats and the decisions taken on measures of protection. Such relationships are also crucial when establishing witness and how authentic the evidences are before admission into the program. The police, intelligence services, NPA and Scorpions have commonly been cited as supportive of rival factions within the ruling African National Congress (ANC) party.[118] It is argued the questionable independence of the WPU by it operating under the NPA may give rise to discernments that outline political biases which might undermine concurrence in operation with agencies.

4.2.1.4 Funding of the SAWPU

The SAWPU is a rather complex program to run that requires massive funding in order to operate efficiently and gauging by the nature of its operation and of the sensitivity of the entire operation, the program needs adequate funding in order for it to be run. The Witness Protection Act authorizes monetary or material contributions that are to be approved by the Department of Justice's Director-General to ensure that it fulfills the WPU's legislated mandate before the contribution can be received.[119]

In practice however, this unit is majorly financed by the Justice Department. Even though the costs of operation vary depending on the cases involved, the average cost of services and goods has been deduced over time. This aids with budgetary planning with specific expenditure projections being developed and reporting on the same consequently letting the unit to enshroud

[118] Ibid
[119] Witness Protection Act, 1998, Section 20.

disclosing information that lets out witness location or identity. Probable identification or location through hacking of bank accounts or a paper trail is also cautiously avoided.

The South African judiciary has also helped mitigate costs of running the program by the mere fact of prioritization the WPU cases when cases are brought before it. This not only helps the program save on expenses as cases involving the WPU are heard on priority basis but the fact that the pre-testimony length for offering protection to witnesses who may turn hostile is also shortened. Most of these witnesses may turn hostile if they host a view that the judiciary process is stalling or the defense delay tactics are being tolerated at the expense of their safety.

The program is quite burdensome to run financially and therefore the importance of state support and cooperation is very salient in mitigating the costs. The fact that WPU meets its expenditure basically out of its own resources on logistical support or intelligence gathering raises its financial burden even further. The effectiveness and efficiency of other entities in the justice sector similarly affects the period involved in protective measures that are already costly.

Protecting all threatened witnesses fully presents a financial challenge and is rather inconceivable and as such, protected witnesses only appear in 0.033 per cent of cases.[120] The WPU therefore prioritizes certain types of criminality owing to the scarce resources available and thus try to use what is available to them to maximum effect.

The economic benefit of effective prosecution is seen as a justification of South Africa's witness protection expenditure. Whenever prosecution of high level crime is seen as not being feasible without employing the services of witness protection, there is normally a strong public interest in such dissipation. Witness admission should be well structured and properly appreciated

[120] David Bruce, *Danger, threats or just fear: Witness intimidation in three Gauteng courts.*

financially since it among the sole mandate of the program and expenditure experienced under this should not be surpassed by the costs of maintaining staff members since the increase in numbers of staff would suggest that financial caution should be observed while current expansion might be directed toward admission for diverse forms of criminality.[121]

When talking about oversighting of expenditure, one should consider how sensitive the work and operation of witness protection is. The reasons why intelligence assessments are conducted is basically to ensure that there is WPU financial discipline and overall oversight while also ensuring that an efficient security clearance is received by the auditors reviewing WPU records. WPU's regional and headquarters offices are audited both externally and internally without really being notified by the auditor-general on an extemporaneous basis. The auditing is done by examining the unit's normal expenditure and on how it contracts and also on its procurement procedures. These audit reports are submitted as classified documents omitting witness identities and very sensitive information about them.

The witness protection programme in South Africa and its setup has some procedures and guidelines that are quite different from that programme that exists in Kenya. For instance, The programme in South Africa is established under the Justice Department with the authority figure being the Justice Director-General while its administration and operation support is endorsed by the SAPS. In Kenya, as earlier discussed, the programme operates independently, as per the existing legislations, through the Witness Protection Agency which is a body corporate carrying all the the privileges and responsibilities of a legal person with the authority figure being the Director of the Agency as appointed by the Advisory Board.

[121]Mpshe, *Annual report of the National Prosecuting Authority 2007/08*, 35, 55, 72, 89.

Additionally, it is worth of note that the Witness Protection Act in South Africa only assures protection for the whistleblowers as a prerequisite for their cooperation as witnesses in these criminal proceedings. The Kenyan legislation covers for the protection of witnesses in criminal cases and other proceedings where the witnesses' vulnerability is established. The roles played by the directors of the programme in both jurisdictions are similar in nature with also a similiarity in the unilateralism of admission into the programme stemming from the decision of the Directors.

Similarly, the SAWPU also involves other organs of power in an effort to realize its mandate effectively which is also the case with the Kenyan system that incorporates security agencies and other relevant organs in an effort to actualize its mandate with the issue of confidentiality and stealthiness in the operation of the programme being insisted in both jurisdictions. In the case of funding, the SAWPU is majorly financed by the Justice Department with the South African judiciary also helping mitigate the costs of running the programme by prioritizing the WPU cases when brought before it. In this respect, the Kenyan programme is basically funded through the Consolidated Fund with provision being made for acceptance of grants, gifts, donations or bequests as a mode of supplementing the funds to run the programme.

4.3 Global Witness Protection Regimes

The importance of having a well-functioning judicial system with a salient aim of upholding the rule of law is a driving force to international bodies that seek to maintain a proper roll out on having a global society that ensures the provisions of a proper justice system are existent. An efficient and well elaborate criminal justice systems that functions properly is well founded on witnesses as their cooperation with judicial authorities and law enforcement agencies is indispensable to successful criminal prosecutions. Therefore, in upholding the rule of law, it is

critical that witnesses are protected from physical threats or any kind of intimidation from crime perpetrators so that the wheel of justice is not cogged up.

The United Nations Convention against Transnational Organized Crime calls upon countries to take appropriate measures to protect witnesses.[122] UNODC has over time played a major role in the fight against organized crimes through regimenting various regional meetings with experienced law enforcement agencies, judicial and prosecutorial agencies garnered from Member States with an intention of developing a set of internationally recognized good practices for use in the establishment and operation of witness protection programs.[123]

These consultations resulted to UNODC developing a set of guidelines giving provisions on protection procedures as well as offering guidelines on the establishment of furtive witness protection units. In its effort of shuttling the best practices in witness protection, UNODC conversed with more than sixty member states alongside international organizations such as Eurojust, Europol, the International Criminal Tribunals for former Yugoslavia and for Rwanda, the International Criminal Court, Interpol and the UNICRI.[124]

A model witness protection law for Latin America has been developed by UNODC going further in coming up with a model agreement guiding on international cooperation in the area of witness protection. The best practices that the manual developed identifies are, among others, identifying witnesses that are vulnerable and open to intimidation early, how witnesses are managed by the police, protecting the identity of witnesses during that salient period of testifying in court and in

[122] UNODC is a global leader in the fight against illicit drugs and international crime. Established in 1997 through a merger between the United Nations Drug Control Programme and the Centre for International Crime Prevention, UNODC operates in all regions of the world through an extensive network of field offices.
[123] https://www.unodc.org/unodc/en/frontpage/protecting-witnesses.html
[124] Ibid, n. 9

cases where its deemed necessary, giving the witnesses new identities and permanently relocating them.[125]

With UNODC, which represents the global regimes, is leading in the quest of social justice through ensuring that a well-functioning judicial system is in place, then the importance and need of having a proper witness protection regionally is emphasized. For instance, the reason most human trafficking cases fail to be prosecuted fully or at all is majorly due to lack of witnesses either in their cooperation or their elimination altogether . There therefore a need is create whereby the victims in these cases are turned into witnesses in order to assist law enforcement in the prosecution. The manual developed by UNODC can protect victims from being intimidated by criminal groups who try to frustrate the course of justice.[126]

It is worth noting that Kenya is a member of the UNODC and even hosts the East African Regional offices of UNODC. The manual developed by the UNODC sets out well thought and elaborate guidelines on matters witness protection going into details in helping member states develop the programs within their jurisdictions. It sets out the standard objectives of witness protection, the key elements that play a salient role in witness protection, best practices on the program globally and also offers guidance on how members states can meet the threat that exists to vulnerable witnesses. It goes even further in offering guidelines on how to set up the programmes with emphasis being riled up on two major basis namely, need versus want basis and the legislation versus policy basis. The guidelines also offers the elements required when recruiting personnel into the programme and the factors to consider while training these personnel.

[125] https://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf
[126] The then Executive Director of UNODC, Antonio Maria Costa, Speaking at the Vienna Forum to Fight Human Trafficking on 13th February 2008.

Essentially, the guidelines are well set out to offer adequate blueprints for member states and also other states that are not necessarily members but are interested in setting up the programme within their jurisdictions and therefore with Kenya ratifying the UNODC Treaty, it serves a good venture in helping the country through the journey of implementing and realizing witness protection.

There are several countries around the world that have proper functioning Witness Protection programs that have been in operation for a while. This chapter intends to highlight some of these countries in with a basis of trying to gain knowledge on how the program has been enabled to full implementation levels in some regions.

4.3.1 Canada

In Canada, the importance of having a proper functioning legal system is highly emphasized with direct relation coming from the legal provisions embedded in their legal system. For instance, the mother law of the land vehemently advocates for the right to a fair hearing[127] and thus giving nuance on the fact that there is the need to have a system where witnesses can give testimonies without fear in order to champion, among other things, the provisions of the Constitution of Canada.

The other legislations highlighting on the importance of witnesses in ensuring justice is meted include the Privacy Act[128] which recognizes the sensitive nature of the issues that the relevant witnesses have to deal with and gives provisions on strict disclosure rules protecting those in possession of sensitive information. The Canadian Criminal Code[129] also lays out provisions on dealing with witnesses tendering in evidence and testimonies that are deemed sensitive. The

[127] S.11(d) of the Charter, Constitution of Canada, 1867
[128] S. 8 (1) &(2) of the Canadian Privacy Act
[129] S. 539 of Criminal Code RSC 1985, c C-46 (amended)

main legislations however are the Witness Protection Program Act (WPPA) and the Royal Canadian Mounted Police Act (RCMPA).

The witness protection program is established under the WPPA. The WPPA was enacted in 1996 and was recently amended in 2014. The main purpose of the WPPA is to promote the enforcement of law, national defence, national security and the general safety of the public by expediting the protection of people who are directly or indirectly involved in assisting law enforcement authorities in relation to prosecuting matters.[130]

This responsibility is bequeathed on the Commissioner of the Royal Canadian Mounted Police (RCMP) who is required to help facilitate the protection of people who harbor a risk of suffering anguish because of their assistance in prosecuting criminal matters, or even the fact that they are related to someone providing such assistance.[131] The WPP in Canada is heavily relied upon as an efficient tool in fighting serious crimes whereby witnesses and their relations become confident in their protection and thus enabling them to offer evidence at trial fearlessly and without any worry of any kind of retribution.

The RCMP administers the WPP on behalf of the Government of Canada with the Program being made available to all security and law enforcement agencies in Canada as well as trusted international law enforcement agencies that have a formal agreement with the program. The program is funded from within the RCMP budget including wages and benefits for personnel involved in the program, requisite travel costs, administrative expenses and protectee[132] relocation expenses.

[130] Section 3 of the WPPA
[131] Section 20 of the RCMPA
[132] means a person who is receiving protection under the Program

As for the qualifications of admission into the program, the WPPA stipulates that it is the Commissioner who is tasked with determining whether a witness befits being admitted to the Program and the type of protection to be provided to any protectee in the Program.[133] The Commissioner is also mandated, in a case of emergency, and for a period of not more than 90 days, to provide protection to a person who has not entered into a protection agreement. The Commissioner may, if the emergency persists, provide protection for one additional period of not more than 90 days under guidance of the WPPA.[134]

As per the provisions provided under the WPPA[135], several issues have to be considered by the commissioner before one is admitted into the program. For instance, a recommendation for the admission has to be made by a law enforcement agency, a federal security, defence or safety organization or an international criminal court or tribunal as a first step before one is considered for admission into the program. In making this decision, the witness through himself or the agency making the application on his behalf, should furnish the commissioner with information that touches on the witness's personal history and any other relevant information so that the decision made by the commissioner is an informed one.

It is also worth noting that any information about the change of identity or location of a protectee or a former proctectee is to be treated confidentially and must not be disclosed by any person.[136] However, a protectee or former protectee under the Canadian legislation may disclose any information that does not put the safety of another protectee or former protectee in danger or compromise the program's integrity.[137] The Commissioner of Force may disclose information

[133] Section 5 of the WPPA
[134] Section 6(2) of the WPPA
[135] Ibid
[136] Section 11(1),
[137] Ibid, 11(2)

about the protectee however to a limited extend since this can only be done only under those circumstances that have been stipulated under the Act for instance; when he seeks the consent of the protectee to disclose such information.[138]

The Act also seeks to protect the protectee by essentially giving provision to allow the protectee lie about his or her true identity. The Act gives provisions stipulating that a person, whose as a consequence of being protected through the program changes his should not be held liable for affirming that his present identity has been his only identity disputing any information that would claim otherwise.[139] The Act empowers the Commissioner to enter into an agreement with the Attorney General of Province and even with a law enforcement agency[140] in an effort to enable a witness involved in activities that law enforcement agency or the administration of that specific province to be admitted for the Witness Protection Program.[141] The Commissioner can also enter into an agreement with any provincial authority in order to obtain documents and other information that may be required for the protection of a protectee.

The Act also empowers the Minister of Public Safety and Emergency Preparedness to enter into an agreement of a reciprocal nature with the Government of a foreign state, an International tribunal or court to enable a witness to be admitted to the Witness Protection Program if the witness is involved with the law enforcement agencies of a foreign country in matters that would necessitate the need for his protection under the program.[142] The essence of witness protection as

[138] Ibid, 11(3)
[139] Section 13
[140] One of the roles of the Attorney General of Province in Canada by virtue of **Section 5 of the *Ministry of the Attorney General Act*** is to conduct and regulate all litigation for and against the Crown or any ministry or agency of government in respect of any subject within the authority or jurisdiction of the Legislature.
[141] Section 14
[142] As per sub-sections (2) and (3) of the section 14,

enisaged under the WPPA, may be terminated by the Commissioner of Royal Canadian Mounted Police.

In the 2017-18 period, the annual report stated that the WPP in Canada assessed 49 cases for admission to the Program, based on the provisions of section 7 of the WPPA.[143] The WPP is administered by the RCMP on The Canadian government's behalf with the Program being made available to all security and law enforcement agencies in Canada together with other international law enforcement agencies that are trusted by the government and have a formal agreement in relation to the program, with the Canadian government. Out of the 49 cases referred to the WPP, the report intimates that 38 originated from the RCMP with one coming from an international partner agency and the remaining originating from other Canadian police agencies.[144]

It is reported by the WPP that there was no reported cases of individual protectees being injured or killed during that reporting period. Operationally, the Program continues to contribute to the overall mandate of a safe and secure Canada through the protection of key witnesses in cases that involve serious criminality.[145]From mentioned reports, Canada has success stories when discussing about witness protection globally.

Even though Canada as an economy is more advanced as compared to Kenya, there are some facets in its witness protection system that are quite comparable to wat operates in Kenya. For a start, legislations in Canada are streamlined to ensure protection of witnesses that are vulnerable for instance through its Constitution under Section 11(d) which is very precise on the right to a

[143] Public Service Canada, "Witness Protection Program - Annual report: 2017-2018 " on 5th October 2018. sourced at https://www.securitepublique.gc.ca/cnt/rsrcs/pblctns/wtnss-prtctn-rprt-2017-18/index-en.aspx on 23rd September 2019
[144] Ibid
[145] Ibid

fair hearing in any judicial setup. This is comparable to Kenya, who by virtue of Article 48 that gives provisions as regards to access of justice and Article 50 ensures that the right to fair hearing is protected legislatively.

The programme in Canada also insists on confidentiality in the way with which the programme should be handled through the Privacy Act which basically affirms to the sensitivity of theissues and the witnesses involved and as such assures through provisions, on the disclosure rules that intend to protect those in possession of very sensitive information. This is a similar case to the legislative nature of the programme in Kenya, which through the WPA and other relevant legislations, gives provisions as regards to the stealthness in operation of the programme.

As observed in the above discussion, the main objective and purpose of the WPPA is very specific and intrinsic to ensuring the programme is run smoothly and efficiently which is also similar in nature to that which the WPA intends to achieve as stipulated under Section 3 of the WPA. The difference that may arise between the two jurisdictions rests with the structure and administrative operation of the programmes whereby, authority rests with the RCMP in Canada with the authority figure being the Commissioner of the RCMP thereby essentially putting the programme under the country's security organ while in Kenya it is run through an independent body though with the government having direct tentacles into its management and administration. It is safe to note that the responsibilities of the the Commissioner of the RCMP under the programme is also similar to the responsibilities that rests with the Director of the Witness Protection Agency.

4.3.2 Philippines

Philippines is an Asian country with a population estimate of about 108.12 million people according to UN latest estimates.[146]In a country with such a big population, most a time issues that line up along insecurity are unavoidable. The rate of crime in the Philippines is high and the country's government keeps getting called into task to combat criminal activities with notoriety being seen in illicit drug trades, a spate of kidnappings and muggings and even assassination and murders.[147]With the kind of underworld dealings in such a society, the need for witness protection can be seen as dire.

In Philippines, there are legal provisions that provide for witness protection. The mother principle legislation is the Witness Protection, Security and Benefit Act [148](WPSBA) which is the guiding legal provision having come into force in early 1991. This Act legislates for the protection of the witness, the witness's general security and the benefit that he is entitled to under the protection program. The Department of Justice is mandated to formulate this program through its Secretary.

Admission into the program is not absolute and there are several conditions that the Act stipulates that should be considered before one is admitted into the program. The general provision however is that any person who has knowledge or is in possession of information in regard to the commission of a crime or has agreed and is willing to testify any judicial body or relevant body may be admitted into the program.

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[146] Philippine's Population 2019 sourced at <http://worldpopulationreview.com/countries/philippines-population/> Accessed on 23rd October 2019

[147] CNN Philippines Staff, "Number of Filipino families victimized by common crimes continues to rise – SWS" *CNN Philippines* (Manila, 22nd February 2019) <https://cnnphilippines.com/news/2019/02/22/sws-common-crimes-q4-2018.html> Accessed on 23rd October 2019.

[148] Republic Act NO. 6981

The Act however states that this is not the only consideration to be observed and that it should be well proven that the offence in which the person is to testify against should be a grave felony or an equivalent of it. Secondly, the witness should be able to substantiate the material points of the testimony. Thirdly, the witness should show that his life or that of any of his associates is in substantial danger as a result of him agreeing to take the stand on the subject case or the potential of him or his close associates and family being intimidated and threatened on that specific account ranks immeasurably high. The final requirement is that the person testifying should not be a law enforcement officer.

The examination of the applicant is conducted by the Department of Justice where after all issues relevant are taken into consideration and the examiner is convinced that the provisions of the Act have been complied with fully, the applicant shall be admitted into the program. After admission into the program, the witness is required to swear a statement to that effect and execute it fully. In case of legislative investigation in aid of legislation, a witness with his express consent may be admitted into the program upon the recommendations of the legislative committee. Before a person is provided protection under the Act, he should be required to execute a memorandum of agreement which should attribute his responsibilities including those referred to in the Act.[149]

Termination of the protection from the program can be effected upon proof that the memorandum of agreement has been substantially breached. Proceedings that involve application for admission into the program and any action taken post admission are to be handled stealthily. No information or documents given or submitted in support of the matter being prosecuted should be released except upon a written order from the Department or the appropriate court. Confidentiality aspect of the operation of the program is so important and

[149] Section 5 of the WPSBA,

highly regarded such that when violated by any person, consequences are passed on that person. The rights and benefits of a person who is admitted into the program are stipulated under the Act.[150]

Among the rights and benefits are that the witness under protection will be provided with a housing facility that is secure until the witness testifies or until such threats that exist on his life fizzle out or are mitigated to a level that can be managed or tolerated. At the expense of the program, the witness can also be relocated to a different location and have his personal identity changed when circumstances warrant for the same. This privilege may also be extended to the witness's family members or those close associates whose life may be in danger as a result of the witness's actions. The Justice Department is required by provision of the WPSBA to assist the witness in getting a means of livelihood wherever practicable. The relocated witness is entitled to get assistance from the program financially in order for him to support himself and his family.

The witness also enjoys immunity against being dismissed or demoted from work on account of his absence due to his attendance before the relevant investigating and judicial authority. In cases where prolonged transfer and permanent relocation is necessary, the employer is allowed to effect the mutual termination of the employee from the work without any necessary loss of benefits. In a case where the witness fails to report for duty at his place of employment because of his involvement as a witness in the specified cases, the Act forbids victimization of any kind on the witness and should be paid his normal salary and work benefits without fail.

Another privilege that the witness under the Program enjoys is that through the program, he gets reasonable allowances to cover for his travelling and subsistence expenses when he is called upon to attend court or any relevant office required when by the relevant authorities in

[150] Ibid, Section 8

discharging his duties as a witness in the matter. He also enjoys medical treatment and subsequent medical attention for any illness or injuries suffered because of his involvement in the program as a witness and all this at the full expense of the program.

In the unfortunate event that a witness is murdered, due to his involvement in the program, his heirs will be entitled to a burial benefit of not less than Ten thousand Pesos[151] from the program. In case of death or permanent incapacitation of the witness in the exercising of his duties under the program, his minors or dependent children will be entitled to free education from primary school to college level in any state, or private school, college or university. These cases are prioritized and therefore the relevant authorities are required to ensure that the prosecution is handle speedily, where the involved witness is under the program. It is recommended that the said proceedings take a maximum of three months from its filling for them to be completed.[152]

Any person, who has participated in the commission of a crime and desires to be a witness for the State, can also apply for admission into the program.[153] The admission of such a witness would however not be absolute as several factors will have to be considered before The Department of Justice admits him into the program. For instance, the offence in which his testimony is to be used should be proven to be a grave felony. Another condition is that there should be absolute necessity for his testimony. It should be proven that there is no direct evidence available for the proper prosecution of the offence committed before the person is considered for admission. His testimony should be able to be substantially corroborated on its material points and he must not appear to be most guilty. The final condition as per the Act is

[151] The official currency of the Philippines.
[152] Ibid, Section 9
[153] Ibid, Section 10

that the person should not have at any time been convicted of any crime involving moral turpitude.

Once admitted into the program as a prerequisite for testifying, the witness is legally obligated to testify and if he intentionally fails or rather refuses to testify, then he shall be prosecuted for contempt and prosecuted for perjury in a case whereby he becomes a hostile witness testifying evasively or gives a false testimony. Pleading the constitutional right against self-incrimination as a way of refusing to give testimony or provide evidence necessary for the prosecution is not viable for any witness admitted into the program.[154]The witness shall however be immuned from criminal prosecution and shall not be subjected to any penalty for any transaction or issue that concerns his compelled production of documents or testimony.

When comparing this jurisdiction's programme to Kenya's we cannot fail to notice that the programme derives its mandate from the Department of Justice through the Department's Secretary with the Secretary tasked with the onboarding process similar to the South African regime which is a little bit different from what the Kenyan regime operates on. The conditions that one has to fulfill before being admitted to the programme in Philippines are quite laborious if one makes a comparison to other jurisdictions with Kenya being among them. We can however observe that those admitted into the programme enjoy similar benefits and privileges during the period they are under witness protection as those in the Kenyan system.

[154] Ibid, Section 14

4.3.3 Australia

It is said that a civil society's function is to protect those who serve its institution from harm and this technically is inclusive of the witnesses in the court system.[155]In essence, the importance of there being measures and proper structures developed by societal administrative organs to ensure that those who serve these institutions are protected from harm in their service, is emphasized as a measure of a civilized society.

In the past two decades, Australia's organized criminal activity patterns has typically assumed the development patterns observed in North America and Europe. These activities oftently include, money laundering, illicit drugs, human trafficking, smuggling of people, terrorism, identity theft and high-tech crimes like activities of hacking into information.[156]

In Australia, witness protection operations were initially being conducted by the Australian Federal Police (AFP) from as early as 1981.[157]The stimulus for establishing witness protection programs in Australia was due to the depth within which serious and organized crime was entrenched in the country and its effect on police investigations, prosecutions and on the community.[158]Australia is a federation of states with a legal and parliamentary system of governance. It combines nine major jurisdictions including six separate states.

As per the Australian constitution, each state may make laws on almost any topic they wish. While the Commonwealth government can make laws on topics that fall within the powers

[155]Australian Parliamentary Joint Committee on the National Crime Authority, Parliament of Australia *'Witness Protection'* (1988) referring to the submission from the Hon. A. R. Moffitt.
[156] Nicholas Fyfe and James Sheptycki, 'International Trends in the Facilitation of Witness Co-operation in Organized Crime Cases' (2006) 3(3) *European Journal of Criminology* 319.
[157] G McGrath and D Hailes, 'Project Epsilon: Witness Protection - Interim Report' (National Police Research Unit, September 1984)
[158] Ibid

granted it under the constitution.[159] Where there is overlap between the powers of the individual States and the Commonwealth government, the States may still make laws, but those laws cannot contradict laws passed by the Commonwealth government. With this insight, we can understand that various jurisdictions can develop legislations that give provisions for protection of witnesses in various circumstances. The Commonwealth government, which is the supreme form of government in Australia, has a mother provision that gives provisions on witness protection.

Before the witness protection program was introduced in Australia, a range of protection arrangements which had little or no legislative support was provided by police in each jurisdiction provided except in Victoria Province.[160]Before the coming into force of the Federal Government's Witness Protection Act in 1994, the Australian Federal Police, AFP, and the state police provided protection of witness that included a twenty-four hour protection, routine police attention, relocation as well as identity changes for witnesses included in the program.[161]

The participants' identities are also protected during court proceedings whereby the court can hold parts of the proceedings in private or it can make suppression orders on the publication of the evidence.[162]In the absence of specific witness protection legislation, the AFP relied on the AFP Act[163] in performing functions relating to provision of witness protection services.

The statutory frameworks for the operation of witness protection programs in Australia came into being from 1994, following the work of the Parliamentary Joint Committee on the National Crime Authority (PJC).Its statutory purpose is ensure protection and assistance is provided to

[159]Lyndel Bates, Barry Watson, Mark King, 'Required of practice hours for learner drivers: A comparison among Australian jurisdictions' (2010) 41(2) CARRS-Q <https://doi.org/10.1016/j.jsr.2010.02.006> accessed on 27th September 2019.
[160] Ibid
[161] Ibid
[162] Section 5 of the Witness Protection Act 1994 (Commonwealth)
[163]Section 8 of the Australian Federal Police Act 1979

witnesses or relatives of witnesses who are assessed as being in danger because they have given or have agreed to give evidence or a statement on behalf of the Federal Government of Australia in criminal or certain other proceedings.

The Australian Witness Protection Act, 1994, established the National Witness Protection Program (NWPP) giving the Commissioner of the AFP sole responsibility for the maintenance of the program in coordination with the Federal Government.[164]

The Act provides the statutory regulations for protection arrangements for witnesses included in the NWPP while also ensuring that the complementary legislation in each Australian state and territory jurisdiction is introduced since it applies to those in the Crown and state and territory programs.[165]The AFP Commissioner is mandated to head the program under section 3 of the Act with his powers and responsibilities being laid out under the Act.

The AFP Commissioner administers the NWPP through the Witness Protection Committee and AFP Witness Protection. The Witness Protection Committee comprises the AFP Deputy Commissioner in charge of Capability, to whom a number of responsibilities are delegated, and the AFP's National Manager Support Capability and National Manager Organised Crime.[166]This Committee makes recommendations on how witnesses are included in the program and how they exit from it giving recommendations on the conditions to be observed during their inclusion and exit. The responsible for the daily operations of the NWPP is placed on the Officer in Charge of the Witness Protection.[167]

[164] Australian Federal Police, 'Witness Protection Annual Report 2005-2006' (2006).
[165] Beverley Schurr, 'Witness Protection' (1994) 19 *Criminal Law Journal* 157.
[166] Australian Federal Police, 'Witness Protection Annual Report 2017-2018' (2018).
[167] Ibid

Majority of those involved in the NWPP have been admitted into the program because of their involvement as witnesses in prosecutions relating to organized crime, dealings in illegal drugs or those involved in cases of corruption. Before admitting someone into the program, the NWPP must do due diligence and ensure that admitting one into the program comes in as a measure of last resort there being, in the NWPP's wisdom, no other viable means of protecting the witness. The Act also abhors witnesses from being admitted into the NWPP as a perquisite for them testifying thus operating as a reward.[168]

In Australia, this program is also available to those who are not Australian nationals albeit under specified prerequisites. The standard practice in such cases is that the relevant foreign agencies involved in enforcing the law and the International Criminal Court can make a formal request for foreign nationals or residents to be admitted into the NWPP but after the approval of the Home Affairs Minister.[169]

The Act defines who is considered a witness[170] under the program and also goes ahead to describe the matters the witness must disclose to the Commissioner in order to be considered for inclusion in the NWPP.[171]It also sets out the issues the Commissioner must take into consideration when deciding to include a witness into the program.[172]Under the Act, the Commissioner is authorized to create new identity documents and to liaise with state and territory registrars of births, deaths and marriages where the participant wishes to marry while under the program.[173]

[168] Witness Protection Act 1994 (Commonwealth) S 5
[169] Witness Protection Act 1994 (Commonwealth) S 10 & 10A
[170]Witness Protection Act 1994 (Commonwealth) S 3.
[171] Ibid S 7.
[172] Ibid S 8.
[173] Ibid S 13- 14.

Where then does the program sought out financial muscle to help in running the operations of the program? The AFP is the proper body mandated to administer and operate the NWPP. The cost of running and operating the administration and the remuneration of the AFP employees that get involved in the witness protection activities are handled under the AFP budget. Other agencies that have witnesses admitted into the NWPP are required to coordinate with the AFP in order to mitigate the costs incurred by their witnesses. These costs include, but not limited to those costs related to the operation, security of their witnesses and the subsistence expenses incurred by the NWPP meaning that the AFP is only responsible for the expenses of its witnesses admitted under the NWPP.

As an administrative organ and playing the role of the public watchdog, parliament requires that an annual report on the operations of the NWPP is tabled before it for scrutiny and interrogation, of course under the guiding lanes of the Act.[174]

What led to the recommendation to establish a structured and proper functioning witness protection regime in Australia by the Federal Government was the cog of organized crime that was progressively getting entrenched into the society. Intimidation of witnesses and the existing fear of reprisals was having dire effect on criminal investigations and organized crime was notoriously emerging as a normalcy in the intimidation of witnesses perpetuating and creating the issues that basically discouraged informants from coming forward to give relevant information to police.[175]

[174] Ibid S 22.
[175] Alfred W. McCoy, *Drug Traffic: Narcotics and Organized Crime in Australia* (Harper & Rowe, 1980); The Hon Justice J R T Wood, 'Royal Commission into the New South Wales Police Service Final Report Volume 1: Corruption' (May 1997).

Generally the program has been a success in Australia since its inception with a report documenting that for the year 2017 -2018 there were no reported avoidable incidents related to the NWPP including instances of direct physical attacks of any participant in the NWPP. The report went ahead and specified that in the year ending 30th June 2018, the NWPP managed 28 witness protection operations, providing protection and assistance of 54 people.[176]Even though Kenya cannot compete with Australia in most if not all facets of development, we can learn from Australia in an honest bid to improving our economy and also how run such programmes as the witness protection programme seeing that Australia's programme functions almost perfectly. Be that as it may, there are some comparisons that are healthy between the programmes in the two jurisdictions and if Kenya implements effectivelively on how the programme is to be administered, maybe we will have an efficiently functioning programme.As observed from the discussion above, Australian system of governance is different in the sense that it is a federation of states with a legal and parliamentary system that combines nine major jurisdictions and six separate states. These states are mandated by the Australian Constitution to make laws in as far as these laws are not inconsistent with the legislations of the Commonwealth Government. With this in mind, various states can prefer further legislations on witness protection that vary amongst them as long as the legislations are consistent with what exists with the Commonwealth Government on the same since it has the mother provisions on Witness Protection. The programme in Kenya is regulated purely through the National Government with the County Government that exist having no place in its administrative structure.

The element of confidentiality is highly emphasized as is the case with the programme's operation in Kenya. The programme's purpose and sole mandate is also similar to that which is

[176] Australian Federal Police, 'Witness Protection Annual Report 2017-2018' (2018).

bequeathed upon the WPA in Kenya with the difference coming in on the establishment of the programme. In Australia, the programme is established under the AFP with the Commissioner of the AFP being the authority figure in the setup which is similar to the Canadian system. With the programme being under the guardianship of the AFP, the programme's funding comes directly from the AFP budget as opposed to Kenya's system tht majorly gets its funding from the Consolidated Fund after various stages of approval.

Additionally, the programme's operations are audited annually by the Australian parliament who plays an oversight role in ensuring that checks and balances are not bypassed through the programme's operations. In Kenya, this role is played by the Witness Protection Advisory Board, which then submits a report to the Attorney General who is answerable to the President thereby raising issues as to the impartiality of the exercise when the Parliament is bypassed during the auditing and scrutiny of the report.

CHAPTER FIVE: GENERAL CONCLUSION AND RECCOMMENDATIONS

5.1 General Conclusion

As deciphered from the discussions in the previous chapters, witness protection programs are based either on administrative arrangements within the law enforcing agencies or on developed legislation. In cases here they are brought in through arrangements within the law enforcing agencies, they are developed as common practices within the police forces' activities in the discharging of their duties.

Witness protection programs are generally financially rigorous and yet most countries, especially those in the developing and underdeveloped phase, lack the resources necessary to sustain these financially draining programs. For countries with developing economies like Kenya, it is a hard task to relocate the involved witnesses within the country. A big stumbling block of some witness protection programs is the fact that most of these countries do not have ratified regional and international treaties or agreements with other countries and therefore presenting a difficult scenario for them in cases where it is laborious to relocate witnesses within the country and thus with the absence of regional and international treaties with other states, it is then impossible to have them relocated out of the country. With no existing agreements with other states both regionally and internationally, a difficulty is also developed in trying to resettle the witnesses causing a spiral effect in stifling the course of justice with the witnesses being apprehensive in testifying, refusing to cooperate with the relevant agencies in an effort f investigating the crimes and having the criminals brought to justice.

In the modern society, witness protection is presented with faces a new bother technologically in this era of the internet. In an honest effort to keep abreast with the evolving technology, witness protection programs are trying to get digital in terms of storing information n akin to the witness.

In the present world of free flowing and movement of data and into which the biometric systems are being introduced in an honest effort to modernize the program in order for operation to be made easier, susceptibility to hackers also exists.

Having all this information centralized runs a risk of compromising the sensitive information on the witnesses under protection and thus complicating the possibility of protecting and hiding those involved whose lives are in danger. Augmenting multilateral and bilateral cooperation in the protection, where the lives of the people under the protection is majorly dependent on measures and steps taken by all necessary involved agencies, requires the know-how of the agencies' applied measures, skills and technical abilities.

The witness protection program in Kenya has been in operation statutorily since 2006 with various amendments being made to it through the years. The practice has however been present even before the program was embedded into the country's legislation vide the Witness Protection Act of 2006. Prior to Kenya legislating its own guiding principle, heavy reliance as to the protection of witnesses was placed on the use of international treaties and agreements that had been ratified by Kenya and that articulated the importance of protecting witnesses in the course of upholding the rule of law and administering justice. These treaties found their legal force within the tenets of the Kenyan Constitution and their provisions applied to Kenya the moment the country ratified them.

Since its inception however, its success has drawn conflicting opinions with some arguing that, under the circumstances, the program has really tried to operate with an honest intention of achieving its set objectives while others are blatant that the program has not succeeded in achieving its objectives at all. For effective dispensation of justice to be achieved, we all agree that witnesses play a salient role in ensuring that and without their involvement, the course of

achieving justice is basically a lost one, especially in criminal cases. With this important highlight, protecting witnesses in proceedings of a criminal nature should be a priority of any society that seeks to champion for justice and upholding the rule of law.

As discussed in the study, a witness whose statement or rather testimony is required specifically to prosecute a criminal matter would be willing to put in his testimony if he is assured of unconditional protection especially if the matter in issue has involvements that would put his life and that of his family at risk and thus the need for witness protection established.

The main objective of the Witness Protection policies is to achieve justice to all in equal measures. The aim normally is always to help the prosecution or defense in their case with a goal of attaining societal justice. In an ideal society therefore, this program should be prioritized in order to prosecute cases that involves the 'Untouchables' in the society especially in a society like Kenya which recognizes that the Government derives its power from its citizens and not the other way round.

Seeing as this is of abject importance, support towards the program is expected to be highly encouraged and the state expected to be a front runner in ensuring that it takes appropriate measures aimed at providing effective and efficient protection of witnesses from any kind of intimidation when they are expected to testify in cases that may put them and their families in positions of harm.

In Kenya, witness protection can be said to be stagnant in operation, and the progress towards formalizing the services that the program is mandated to carry and its functioning has been rather slurred. The challenges include, among others, legal policies and developed statutory frameworks that are not properly legislated, the program being under-invested, this proving to be

the biggest challenge facing the program to date. There is also sparseness of necessary skills and knowledge among those developing the policies touching on the program and also law enforcement agencies on the issues touching witness protection. Awareness on the program is also persistently lacking among the citizenry and thus leads to many losing out on an opportunity into the program just because they have no idea of how the program works let alone the existence of the program in Kenya.

5.2 Research Findings

5.2.1 Findings on the nature of The Constitution of Kenya and administrative arrangement of the WPA.

Witness protection is an important human right ingredient as clearly captured under the Bill of Rights (Chapter Four) in the Constitution. **Article 48** guarantees the right to access to Justice. This clearly lays out emphasis on the importance of ensuring that justice is meted out effectively and in an efficient manner. With the constitutional provision of this Article, the Constitution seeks to remedy an occurrence whereby miscarriage of justice can occur at any point in the judicial system's operation. Witness protection cannot be separated from this right.

Article 50(9) highlights for the need to have legislation to provide for protection, rights and welfare of victims of offences and thus raising and obligation to the Government to protect witnesses in Kenya. These provisions clearly signifies the need for protection of witnesses in vulnerable positions both physically and psychologically with an end expectation that the course of justice is not compromised and the Constitution clearly anticipated this need as being dire.

Article 29 of the Constitution provides for freedom and security of person from any physical or psychological harm which can be seen to operate harmoniously with the requirements of Witness

Protection. **Article 50(8)** provides for the right to protection of witnesses or vulnerable persons which is a direct requirement that informed the establishment of the WPA through the Witness Protection Act. Even though witnesses deserve to be protected as a matter of right under guidance from the constitution, this right is subject to specific established procedures and criteria. The Witness Protection Act gives specific procedures for the process of applying into the program, stipulating that admission into the program is a decision of the Director of Witness Protection Agency as discussed early on in this study.

5.2.2 Findings on how Kenya's policies on Witness Protection conform to provisions under International Law and the extent to which it emulates the UNODC recommendations.

Under this finding, focus was placed on the UNODC recommendations on witness protection since it is these recommendations that were suggested for adoption globally by member states, of which Kenya is a member and the recommendations were made with experiences of the witness protection in different jurisdictions around the world in mind. From the document[177] prepared by the UNODC which informed these recommendations, origin and importance of the witness protection program was explained.

Through necessary experience, it has been deciphered that protection and assistance measures most often than not guarantee an affirmative outcome which encourages the witness giving him the confidence to come out and give his testimony. In most cases, the concerns about the security of a witness can be addressed well through aiding these witnesses before and in the pendency of the trial. This in return enables them to handle the aspect of the implication brought by the psychological and practical issues brought about by testifying with the relevant agencies. Police measures are employed to magnify physical security, which is the physical aspect of ensuring the

[177] ibid

witness' safety. Court procedures can then also step in to ensure the witness's safety during the giving of testimony as discussed in the study.

As standard practice, the recommendations provide that Witness assistance should be enhanced in prior to admission into the program. The focus here is supposed to be on the techniques employed during the interviewing phase, getting to familiarize with the procedures involved in the trial phase trial and discussions about court arrangements. In the event that the case proceeds, the witness would also require to be supported during the hearing of the matter in court and in the period that precedes the hearing. The intent of witness assistance is to ensure that there is efficiency in the prosecution and to avoid victimization of any kind to the witness before and after the trial process and not to merely protect the persons from the physical harm. Essentially, this means victimization that occurs through the response of individuals and institutions to the victim and not as a direct involvement of the criminal act.[178]

Kenya as a form of adhering to these recommendations has tried to ensure that provisions in its national laws regarding witness protection and witness assistance are laid down in tandem with the international provisions especially the UNODC Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime. These provisions have first been realized by virtue of **Article 2(5)** and **(6)** of the Constitution of Kenya that states that the general rules of international law any treaty or convention ratified by Kenya shall form part of the law of Kenya. More specifically under the Constitution, Article 50(9) was drafted in empowering the parliament to enact legislation to provide for the protection, rights and welfare of victims of offences. Other specific provisions through the Kenyan legislations have also factored in the provisions of the UNODC on witness protection for instance The Witness Protection Act, The

[178] ibid

Sexual Offences Act, The Children's Act, The Criminal Procedure Code and The Prevention of Terrorism Act Number 30 of 2012.

In 2016, the Government of Kenya with a sole intention of empowering the agency more passed a bill in the National Assembly amending the Witness Protection Act. The bill introduced more stringent consequences to those found culpable of intimidating, harassing, obstructing, threatening, hindering or preventing a witness with the intention of subverting the course of justice. The bill also gave provisions for reciprocal protection arrangements between Kenya and other foreign countries on relocating witnesses that fall within the provisions of the Act thus safeguarding Kenyan witnesses under the witness protection regime of foreign countries and vice versa.

The bill also introduced the provision on maintaining the witness on the program as long as the threat to the witness exists even after conclusion of the case. All these efforts were introduced with a view of having the Witness Protection Program in Kenya meet the international standards and practices on the same.

5.2.3 Findings on whether Kenya's Witness Protection Agency has adequately delivered on its mandate.

When the WPA was established with the commencement of the Witness Protection Act on 1st September 2008, it had an intrinsic mandate to provide the legal framework and operational procedures required for offering special protection, on the state's behalf, to people who are in possession of vital information and who are facing intimidation or potential risk to their lives and that of their associates because of their co-operation with law enforcement agencies and the prosecution.

Years later, the agency has not been able to fully exercise its mandate even though its efforts cannot be discredited under the circumstances that it has been operating in. There have been steps taken by the legislature in an effort to give the Agency an impetus in its operation as is discussed above. One of the biggest challenges has been the funding of the program seeing that the program is expensive to run.

For instance, during the 2016-2017 financial year, the WPA was only allocated Kshs 379 million against a proposed budget of Kshs 760 million according to the WPA's Chief Executive Officer Alice Ondieki. The issue of underfunding has also led to understaffing at the Agency which in turn leads to inefficiency in the Agency's operation. The Act was amended by the 2016 bill to try to mitigate this issue by stipulating that the WPA be funded out of the Consolidated Fund and also supplement its budget by receiving grants and donations from other lawful sources.

5.3 Recommendations

There exists a dire need to look into the deep-rooted socio-cultural affair influencing witness assistance, security and protection which has been orchestrated by ethnic driven influences, obvious absence of witnesses' security and outright nepotism. The program needs to enhance the measures of protection and even establish formidable bearings that are solely dedicated to protecting witnesses. Kenya can begin to gain relevant experience in this field by employing police and procedural protection measures efficiently. This can be ensured by establishing a branch within the police service, of trained personnel that have acquired requisite levels of training in handling witnesses of this kind. When these measures are applied appropriately and by personnel who are well trained, adequate protection can be ensured for the many witnesses that are in dire need of the same bearing in mind that these measures of protection are essentially just one of other important tools that must be applied effectively and collectively.

The legislative framework should also be amplified and built with a salient intention of strengthening the program by establishing an inter-agency task force that can conduct a self-audit on the agency's operations educating itself on the failures and the necessary improvements. This essentially embraces relevant law enforcement officials, judicial authorities and those people that are responsible for drafting legislations and developing policies among other stakeholders in order for them to understand and support any required changes.

This study goes further to suggest the salient need to prioritize cases that require this protection program to be employed as well as the need to use threat assessment techniques effectively. Kenya should also borrow a leaf from the practice in South Africa by the judiciary which insists on the prioritization of the WPU cases which has in turn also aided in the mitigation of costs of running the program. It also hastens on the time spent at the pre-testimony stage when protecting witnesses who may turn hostile in cases where the defence is playing delay tactics with the judicial system or where backlog of cases in the judiciary stalls proceedings.

With the world evolving technologically at a faster rate than earlier envisaged, the threat assessment measures should be updated with these new presentations that technology presents to the society being accommodated. All stakeholders involved in this process should be clear about what a witness protection program is intended to provide and why.

Underfunding of the program has proven to be among the biggest cog in the implementation of this program in Kenya. It is understandably difficult in the beginning to predict costs as there is a cumulative effect for each witness; moreover extended families will quickly drain resources. Similarly, the efficiency and effectiveness of other justice sector entities also affects the duration of costly protective measures.

The issue of the programme being very financially rigorous to run and the underfunding issue that has existed in the programme's administration since its conception, it is my recommendation that the financial burden be shared between the National Government and the County Governments. Just like how the programme operates in Australia, the programme can have a department within the county government structure whereby coordination can be embraced with the National Government in running the programme from the county level who can coordinate its admission process and also have some funds raised through the counties channeled towards running the county departments.

The Government of Kenya should therefore be encouraged to prioritize the program in order to channel funds in its support adequately when preparing the country's budget. At the same time, protection programs need to progressively build cooperation with other countries that share the same vision of achieving societal justice. This too takes time because cooperation in this area requires the trust and confidence of potential partners for the relocation of witnesses.

Finally, most of the citizenry are not aware of the program, its operations and its functions majorly due to lack of proper public awareness. The WPA should take the initiative of conducting community-based sessions where they team up with the government administrative agencies alongside judiciary agencies and other relevant stakeholders to educate the communities on their rights and expectations in the dispensation of justice with relevant linkage to the witness protection program. In most developing countries like the countries in Africa, the criminal justice system is mostly under pressure to perform effectively not forgetting that it is also limited of skilled personnel and also limited in resources and thus making it difficult to operate effectively. In order to ensure that witnesses are protected effectively in these countries, a more pragmatic

approach needs to be employed as the importance of finding local solutions for local issues is direr.

In conclusion, Kenya should look at the successes and failures of the South African witness protection program in an effort to improve its own witness program. This is because South Africa, regionally operate on a similar environment to Kenya and therefore it would be easier for Kenya to borrow a leaf from a country that operates its program from a similar societal influences as itself.

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