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DEPARTMENT OF SOCIOLOGY AND SOCIAL WORK

**ASSESSING THE PROBLEM OF NON-COOPERATION BY WITNESSES DURING
TRIAL OF CRIMINAL CASES IN KENYAN COURTS: A CASE STUDY OF KIAMBU
LAW COURTS**

BY:

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DECLARATION

This research project is my original work and has not been presented for an award of a degree in any other university:

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DEDICATION

This Project is dedicated to my family who made its completion possible.

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ABBREVIATIONS/ACRONYMS

PC	Penal Code
CPC	Criminal Procedure Code
WITSEC	Witness Security
SPM	Senior Principle Magistrate
PM	Principle Magistrate
SRM	Senior Resident Magistrate
RM	Resident Magistrate
ICC	International Criminal Court
WPA	Witness Protection Act
CJS	Criminal Justice System
WPP	Witness Protection Program
US	United States
LOK	Laws of Kenya
CJDP	Criminal Justice Delivery Process
KI	Key Informants

ABSTRACT

This study set out to assess the nature of non-cooperation by witnesses during trial of criminal cases, a case of Kiambu Law courts. The main objective of the study was to establish the nature of non-cooperation by witnesses during trial of criminal cases in Kenyan courts. The study was guided by the following specific objectives:- to establish the magnitude and typologies of criminal cases that were terminated due to non-cooperation by witnesses at the Kiambu Law Courts between the years 2008 and 2010; to establish personal and socio-economic characteristics of non-cooperative witnesses; to identify specific factors that account for non-cooperation by witnesses during the trial of criminal cases and to elicit remedial measures for ensuring cooperation by witnesses during the trial of criminal cases at the Kiambu Criminal Courts.

The units of observation were the court registers, court files, witnesses and the key informants. The unit of analysis was pertinently, the problem of non-cooperation by witnesses during trial of criminal cases at Kiambu Law Courts. The study was qualitative and purposive in nature, and adopted an exploratory study design. 30 witnesses (main respondents) and 10 Key informants that include; Magistrates, Advocates, Prosecutors, Police investigating officers and Court clerks were also interviewed.

The study found that, a total of 272 serious cases were terminated between the years 2008 and 2010 due to non-cooperation by witnesses during trial. Terminated cases cut across all typology of criminal cases. The magnitude of criminal cases terminated was thus very high.

The Study identified six major factors responsible for non-cooperation by witnesses during trial of criminal cases. These include; Intimidation, Lack of trust in Law enforcement, the adversarial nature of the trial process, lengthy trial process due to frequent adjournments and community ties. Other factors include personal and socio-economic characteristics of individual witnesses such as age, gender, social class and status.

The following major recommendations were suggested to planners, policy makers and administrators of Criminal Justice System;

There is an urgent need to fully operationalize the Witness Protection Act (2006) and establish Victim/Witness Agency and Programs that would factor in Emergency Relocation and Support of intimidated Witnesses. Where appropriate a specific contact person should be on call 24 hours to mitigate on victim or witness intimidation concerns.

To build trust in the Agencies of the Criminal Justice System, the government should criminalize the sharing of confidential court reports with criminals and weed out corrupt police investigating officers. The study suggested the establishment of cooperation between agencies of the Criminal Justice System and other State Corporations with related agencies e.g. Communication Commission of Kenya (C.C.K) and Safaricom Limited. Such cooperation should aim to monitor and recover all phones sneaked into prison unnoticed. The study also recommended that Kenya's adversarial model of trial be replaced.

To avert lengthy trial processes through frequent adjournments, the study recommended an increase of government experts so that processing of expert reports (such ballistic reports and government chemist reports) can be prompt in order to expedite trial processes.

CHAPTER ONE: INTRODUCTION

1.1 Background of the Study

The Criminal Justice System is the society's instrument of social control. It is a system of law enforcement, adjudication, and correction that is directly involved in the apprehension, prosecution, and control of those charged with criminal offences (Siegel, 2007). It is responsible for protecting the public, maintaining order, enforcing the law, identifying the transgressors, bringing the guilty to justice, rehabilitation and treating criminal behavior. The Criminal justice system comprise of three main parts or sub-systems, namely; Law Enforcement, Legal Sub-system and the Correctional Agencies.

The Law Enforcement sub-system is charged with investigation of crimes and apprehension of suspects, after which, it may prefer charges to suspects before channeling them to court for adjudication. The Legal sub-system is responsible for determining whether the criminal suspect is guilty as charged. It does this through a trial process conducted by a duly constituted court of law, presided over by a Magistrate or Judge. The trial process involves calling of witnesses, examination of witnesses by the Prosecutor and the defense, recording of evidence by the judges or magistrates and finally, a ruling by the presiding Magistrate/Judge. On its part, Correctional sub-system is charged with the rehabilitation of offenders.

The court process has four main actors, namely the Magistrate/Judge, Prosecutor, Defense Attorney, and the witness. The Magistrate/Judge leads the whole trial process; records evidence from witnesses; determines the guilt or innocence of the accused person and decides on what sentence to pass. He or she also makes the decision to either remand or bail the accused person. Technically, the court prosecutor is the people's attorney responsible for representing the public in criminal matters. He represents the state at criminal trials and also guides witnesses when adducing evidence in Court. On the other hand, the Defense Attorney helps the defense witnesses to give their testimony which is aimed at rebutting the evidence of the prosecution witnesses.

A witness is someone who has first hand information or knowledge about a crime or significant event through his/her senses, i.e. through his/her sight, hearing, perception or any other of his/her senses. This information helps to certify important considerations about a crime. What a witness

states in court amounts to what is normally referred to in legal jargon as evidence. Witnesses are often required to testify in trials so as to prove the guilt or innocence of the accused person. By so doing, they enable courts to administer justice to all the concerned parties. Delivery of justice is determined by the weight of evidence adduced by witnesses. Witnesses thus form a crucial link in the functioning of the agencies of the Criminal Justice Systems all over the world. Without this link, dispensation of Criminal Justice would be a nightmare.

Procedurally, due process demands that the purpose of any Criminal Justice System is to prove the guilt of a suspect beyond any reasonable doubt, in a fair trial, as a condition for imposition of a sentence by a judicial officer (Herbert Packer, 1968). Thus, in a Criminal trial, Witnesses may be called by the prosecution or the defense in order to testify. Conventionally, there are two main categories of witnesses in a criminal case namely: The prosecution and Defense witnesses. Defense witnesses are those witnesses who testify in favor of the suspect, where- as Prosecution witnesses are those who testify evidence in favor of the complainant or the state. Witnesses include the victim(s) of crime (i.e. the main witnesses), eye witness, expert witness and investigating police officers. Expert witnesses include medical doctors, document examiners and government chemist experts, among others. All these witnesses are sometimes required by the court to give evidence in order to prove the commission of an alleged offence. In most cases, witnesses go to court in response to a Police bond to attend Court. Sometimes, special witnesses, for example, expert witnesses attend court in response to Court summons served through police investigation officers. Court summons are issued to expert witnesses in time so that they can plan to excuse themselves from duty in order to attend Court. Witnesses are therefore expected to cooperate fully by adducing evidence in court.

In many countries, the Law is silent on those witnesses who refuse or fail to cooperate, but in the in the US, every citizen has a duty to testify whenever required to by a Court of Law. This is an essential element of civilized life (Edna, 1999). Even a death threat cannot be a sufficient legal excuse to abstain from testifying. As such, the United States Supreme Court has indicated clearly that not even the fear of death can obviate this obligation (Anthony 1999). It is therefore a serious crime punishable by law. Besides, to enhance cooperation by witnesses, US Congress passed the Organized Crime Control Act of 1970 and created Witness Security Programs to

provide protection and security to intimidated witnesses who testify against persons involved in organized crime or other serious offenses, by way of relocating and supporting them (Denzin, 1989). Here in Kenya, that is not the case. Non-cooperation for instance, by not attending court during trial even after the witness is duly bonded by the police is not a criminal offence. In most cases the state does not do much to pursue such witnesses. As far as refractory witnesses are concerned, the courts only react by putting them in remand for eight days and later terminate such cases, if the witnesses further refuses to co-operate (CAP 75, Section 152 L.O.K). The state has thus done very little to understand or address the problem of non-cooperation by witnesses during trial, despite its implication on the rise in crime rates caused by termination of such cases. It has now become a common trend by most witnesses, not to come forward to testify during trial. Sometimes, even key witnesses' such as victims of crime refuse to testify or even to appear in court during trial, hence impeding the delivery of criminal justice in Kenya. Although there are other obstacles that hamper the delivery of Criminal Justice in Kenya, this study has singled out non-cooperation by witnesses in the trial of criminal cases as a major impediment because of the many cases that get terminated. Sometimes criminal cases get terminated even before the trial starts because the witnesses do not appear in court. Sometimes cases get terminated in the middle of the trial because of conflicting evidence or because the exhibits were not produced in court. This has consequently led to a rise in crime trends in the country. This study therefore intends to explore the nature of non-cooperation by witnesses in Kenyan criminal courts, from the perspective of Kiambu Law Courts.

1.2 Statement of the Problem

The recent United Nations Crime Survey in Kenya indicates that criminal behavior is steadily increasing (UN-Habitat, 2002). This is despite having an operational Criminal Justice System charged with the delivery of Justice. On the other hand, the agencies of the Criminal Justice System namely: The Police, the Courts and the Corrections have increasingly become exasperated by their failure to investigate, prosecute cases and punish offenders successfully, since crucial witnesses do not come forward to give information owing to fear of retribution by individual suspects or criminal groups. Given the high prevalence of non-cooperation by witnesses, the Kenyan Criminal Justice System needs to explore intervention measures and instill

confidence in witnesses that their safety is assured by a credible witness program (Napoleon, 2004). The norm here in Kenya is that during trial of criminal cases, the witnesses often fails to appear before court, or may instead appear in court as required, but proceed to disown their original statements, thus becoming hostile witnesses. Besides, some other forms of non-cooperation by witnesses during trials e.g. giving of contradictory/conflicting evidence have also been documented.

It is within this context that this study aims at understanding the nature of the problem of non-cooperation by identifying its causal factors, so as to inform policy formulation. There is little information that explains non-cooperation by witnesses in the trial of criminal cases, a problem that has almost stifled the delivery of Criminal Justice in Kenya. It is against this back drop that this study has been deemed necessary since it explores a virgin area of study, whose understanding is long overdue. Besides, the study will generate information and add to the body of knowledge by providing critical information regarding non-cooperation by witness during trial of criminal cases. Key witnesses' refusal to testify renders a criminal case void in any court of law, thus leading to termination of such cases. Following termination of such cases the suspects will most likely return to the society to even commit more crimes. This has posed a significant challenge to the process of criminal justice delivery in Kenya. Besides, getting witnesses to testify in court is usually one of the biggest challenges prosecutors encounter in court cases especially where the defendant has an association with an organized criminal group. Thus, some criminal groups have effectively paralyzed the criminal justice system by informally, but effectively threatening retribution on anyone who attempts to testify against them.

Presently, non-cooperation by witnesses is so widespread in Kenya such that if there are no witnesses to a crime, it's likely that prosecutors will not pursue the respective cases. This state of affairs results in termination of many criminal cases, thus stifling the Criminal Justice Process. It is therefore against this backdrop that this study seeks to explore the nature of non-cooperation by witnesses during the trial of criminal cases in Kenya, with a view to eliciting remedial measures.

1.2.1 Key Research Questions

This study is guided by the following research questions;

1. To what extent does intimidation of witnesses by the accused persons or by members of a criminal gang contribute to non-cooperation by witnesses in the trial of criminal cases?
2. To what extent do frequent court adjournments contribute to the problem of non-cooperation by witnesses in the trial of criminal cases?
3. What other likely factors contribute to non-cooperation by witnesses during trials of criminal cases.

1.3. Study Objectives

1.3.1 General Study Objective

To assess the nature of the problem of non-cooperation by witnesses during the trial of criminal cases in Kenyan courts, with specific focus on Kiambu Law Courts.

1.3.2 Specific Study Objectives

1. To establish personal and socio-economic characteristics of non-cooperative witnesses
2. To establish the magnitude and typologies of criminal cases that were terminated due to non cooperation by witnesses at the Kiambu Law Courts between the years 2008 and 2010.
3. To identify specific factors that account for non-cooperation by witnesses during trial of criminal cases
4. To elicit remedial measures for ensuring the cooperation of witnesses during trial of criminal cases at the Kiambu Law Courts

1.4 Justification of the study

Concern has been raised by the public over the Criminal Justice System's inability to contain crime within reasonable limits in Kenya (Muhoro, 2000). Today, because of insecurity, many businesses in most Kenyan towns including Nairobi close very early due to crime. More over, operations of government ministries have also suffered as a result of death or injuries suffered by employees victimized in crime. Time lost from work by victims of crime when they are

hospitalized or by witnesses when they are required to attend court to give evidence have also had grave consequences such as impeding development (Safer world, 2004). Understanding the magnitude of non-cooperation by witnesses during trial of criminal cases is thus critical. Unfortunately, there is very little that has been done to date to establish the factors that account for the problem of non-cooperation by witnesses in the trial of criminal cases.

This study seeks to explore the nature of non-cooperation by witnesses during trial and its effects on the functioning of the criminal justice process. The study also seeks to establish the magnitude of the problem of non-cooperation by witnesses, the contributory factors and inform policy formulation process in order to ensure cooperation by witnesses. Findings will therefore be instrumental to inform Witness Protection Agencies and Programs that will provide Witness Services such as long term relocation in order to guarantee witness security.

The findings of the study may be used to fill knowledge gaps relating to the dispensation of Criminal Justice in Kenya, or to interrogate and review the Criminal Justice System's structures and processes vis-a-viz non-cooperation by witnesses and rise in crime trends.

From an academic perspective, this area of study has been ignored by researchers for a long time and is still a virgin area of study. The findings from the study may be used as a basis to carry out further research. Besides, the study will generate information and add to the body of knowledge by providing critical information regarding non-cooperation by witness during trial of criminal cases.

1.5 Scope and Limitations of the Study

The study focused on criminal cases that were tried at Kiambu Law Courts between 2008 and 2010. In particular, the study will establish the magnitude and typologies of the terminated criminal cases; personal and socio-economic characteristics of the non-cooperative witnesses, factors that account for non-cooperation by witnesses during trial of criminal cases and finally elicit remedial measures for improving on witness cooperation during the trial phase of justice delivery.

Due to geographical limitation and the limited sample size, the findings may not be generalized to the entire nation. However given that non-cooperation by witnesses is becoming a global phenomenon, knowledge generated through this study is likely to mirror the experience from other courts in the country. The study is limited to cases tried at Kiambu Law Courts between the years 2008-2010 only. Besides, the study is limited to Prosecution Witnesses only and not the Defense Witnesses.

The study faced several challenges that may have had impact on access to several respondents from whom data was expected.

First, the main respondents were to be located through cell phones. Their contacts were first to be obtained from lists of witnesses in court files and police files where their contacts were to be found. Court files and registers were to be located in dusty shelves, which exposed the researcher to a great deal of healthy risks. Records were also not computerized. Raw data had to be extracted from the dusty court files and court registers. After witnesses were reached on phone, arrangements were made to meet with them for interview sessions. This made the study a very expensive venture.

On the same note, data collection was at some point very sensitive in that, several respondents became emotive because their colleagues died as a result of what they feared to be, "associating with CJSA by giving evidence in court". Several respondents declined to give information completely because of what they cited as personal reasons.

1.6. Definition of Key Terms and Concepts

The following key terms have been used in this research and will bear the following meanings as defined below:

Criminal Trial: This term will be used to mean the process of adjudication.

Defense Attorney: This term will be used to mean the advocate of the suspect

Criminal Justice System: This term will be used to refer to the functionally related agencies charged with the delivery of justice i.e. The Police, The Legal system and The Corrections.

Felonies: The term will be used to mean serious offences which carry a penalty of three years imprisonment or more.

Adversarial System of Trial: Will be used to refer to a system of trial where each side, i.e. the Defense and the Prosecution hope to win at all costs.

Law Enforcement Agencies: Will be used in this study to refer to the police, courts and the Prisons.

Witness: This term will be used to mean, a person with crucial information about a commission of a crime.

Evidence: The term will be used to mean pivotal information given by witnesses about occurrences of crime(s), without which there can be no trial or justice process.

Intimidation of Witnesses: The term will be used to mean physical violence, explicit or implicit threats of physical violence, death threats and property damage.

CHAPTER TWO: LITERATURE REVIEW AND THEORETICAL FRAMEWORK

2.1 Introduction

This chapter examines the nature of the trial process in Kenya and also provides strong empirical information on factors that account for non-cooperation by witnesses during the trial of criminal cases. It further explains; the background of Witness Security Program, Review of Witness Protection Act (2006) of Kenya as well as an in-depth explanation of non-cooperative behavior, premised on relevant theories. These theories include: Theory of Reasoned Action, Theory of Planned Action and Social Ecology Theory.

2.2 The Trial Process in Kenya

Odegi (1993) observes that in law, the purpose of a court trial is to determine guilt or innocence of a party charged with the violation of the criminal law. Trial process involves; calling witnesses, hearing the case, hence locating the alleged crime in that continuum.

At independence, Kenya inherited an Adversarial System of Trial from the English Common Law. The nature of this trial process is that, from the very beginning it casts doubt over the veracity of the witness' testimony and is skewed in favor of the defendant. This process is premised on the traditional principle that, ten guilty persons escaping punishment is better than one innocent person being convicted (Katherine, 2001). Hence, a witness goes through three rigorous examinations during trial in court to ascertain the truth of his/her testimony, namely; Examination in Chief, Cross-Examination and Re-Examination. Examination in Chief is done by the Court Prosecutor, who leads the witness to give his/her testimony in court. During Examination in Chief the witnesses states all what they know about a case. Then the Defendant or his Attorney is given a chance to face the witness and examine him/her in what is referred to in legal jargon as, Cross-Examination of the witness (CAP 75 LOK). The reason given for Cross-Examination of witnesses is to undermine or impugn the credibility of the witness, so as to persuade the court, that the witness said nothing that can be relied upon. This moment is considered by witnesses to be very humiliating, embarrassing and degrading since defendants mostly confront the witness by not only asking personal but also annoying questions, some of which are not even relevant to the case. Moreover, in such a crude contest between the parties,

many witnesses complain of mistreatment in the hands of the Criminal Justice Agencies considering it unfair, especially if the witness was only acting voluntarily to further the public good of ensuring Justice. Cross-examination aspect has thus been widely blamed for hampering the Justice Process by intimidating witnesses, hence the high levels of non-cooperation by witnesses. Re-examination of witnesses is done by the Court Prosecutor to the witnesses to re-align their evidence considered swayed off the track by the defense side during Cross-Examination.

The adversarial nature of the trial process in Kenya thus scares most witnesses from coming forward to testify and as such also contributes to non-cooperation by witnesses in the trial of criminal cases. This, in the long run, affects the dispensation of Criminal Justice in Kenya. Anthony, (2009) it is argues that "Giving live testimony in an oral trial is intimidating and embarrassing while the expectation of a confrontation with the defendants creates considerable anxieties". Besides, it is also feared that members of the criminal gang may also attend court purposely to intimidate witnesses within the court precincts even before trial begins, especially when a member of the said gang is a defendant in a case. Sometimes members of the gang are said to wear black clothes in Court informally intimidating or communicating death threats to witnesses. Judicial intervention, in cushioning witnesses from such intimidation and also from inappropriate, overly aggressive and embarrassing questioning caused by the excesses of the trial process will thus be useful.

2.3 Factors Responsible for Non-cooperation by Witnesses.

2.3.1 Witness Intimidation

Witness intimidation includes threats against a witness and victims of crimes (Vonz, 2005). This problem strikes at the root of the criminal justice system since it denies critical evidence to police investigators and prosecutors, thus undermining the confidence of whole communities and the government's ability to protect and represent them. Intimidation is known to occur in areas more typically associated with high rates of crime, such as inner cities, high-density population areas and those where co-operation between the community and police has traditionally been poor. Offenders can create a general atmosphere of fear and non-cooperation with the Criminal Justice

System such that while victims and witnesses of crime in the community may not be threatened directly, their fear of reprisals is such that they are discouraged from reporting crime and/or from giving evidence (Schiff, 2007).

Gang and drug-related intimidation may be case-specific or community-wide. Widespread intimidation of entire neighborhoods can be as detrimental to witness cooperation as an explicit threat made against an individual (Bhabha, 1994). Each case-specific act of violence against victims or witnesses promotes community-wide perception that any cooperation with the Criminal Justice System is dangerous. Witnesses facing a threat to their personal safety are often either incarcerated or placed under government protection. In several countries, for example in the US, the problem of witness intimidation is beginning to impact on the investigation and prosecution of crime. However there appears to be few and therefore inadequate comprehensive, coordinated programs that address the issue. In Maryland, for instance, prosecutors, police officers, judges, and victim advocates concur that witness intimidation is widespread, increasing, and has serious impact on the prosecution of crime (Voruz, 2005). The need to provide the safety of witnesses was then emphasized, and constitutionalized. The Sixth Amendment of the U.S. Constitution provides, in part, that "in all criminal proceedings, the accused shall enjoy the right to confront the witness against him." Such protections were extended by the U.S. Supreme Court to witnesses in state proceedings through the "Due Process Clause" of the Fourteenth Amendment (Escobar, 1995). Here in Kenya, though the witness Protection Act (2006) was established, its effects is yet to be realized since the Act has not yet been operationalized. This seems to be one of the measures state should adopt if the criminal justice process is to be salvaged.

Another critical issue concerns intimidation of victims and witnesses in and around the courtroom. This common form of intimidation occurs when friends, relatives, and/or associates of a defendant meet victims and/or witnesses along the court corridors, thus providing them an opportunity to issue death threats against them. It has also been said that even in the courtroom sometimes intimidation continues through gestures, especially when the victims and witnesses are on the dock giving evidence, and is purposely intended to disrupt and frighten victims and or witnesses so that they don't give their testimony in detail. Intimidation of this nature is often

very subtle, and as a result, can easily be missed by judges (Voruz, 2005). Whenever victims and witnesses are intimidated, the justice system cannot be successful in prosecuting criminals; fairly important cases may be dismissed due to lack of testimony and evidence, and consequently, guilty criminals are set free. As more and more cases are lost due to issues of witness intimidation or frightened citizens, communities are strengthened in the belief that legal system is unable to protect them.

Here in Kenya, the situation is not different. Intimidation within the Court precincts is possible since majority of courts have no designated rooms that serve as waiting bays for court witnesses. This study therefore intends to find out whether intimidation of witnesses and also absence of witness waiting bays in court is related to the rampant non-cooperation by witnesses during trial of criminal cases.

2.3.2 Mistrust of the Law Enforcement Agencies.

Investigating agencies in many countries, especially in the third world, do not have well qualified officers in sufficient numbers (Murray, C. 1997). Often they have excessive work loads which end up impacting on the quality of investigation adversely. Efficient investigation necessitates qualified personnel commensurate with the work load. Besides, lack of resources such as transportation, communication and office equipment affect the quality of investigations. In several countries, investigating agencies suffer from one or more of these constraints, affecting the quality of evidence adduced in court. Here in Kenya the situation is not different. There are instances where cases are terminated, with blame being apportioned to the police for shoddy investigations or for failing to bond witnesses due to lack of transport. Such a failure, on the part of the Police is likely to cause disillusionment and mistrust of law enforcement and may promote non-cooperation by witnesses, especially if it is happens repeatedly. No victim or witness is likely to cooperate with the police, if for instance, he or she gets to know that the police will not bond them or inform them about the date they are supposed to attend court to give evidence.

According to Morris and Maxwell (2001), the fact that judges are recruited with limited or no legal experience affects the role that they are expected to play in the administration of justice, with a serious ripple effect in the management of cases. Von Hirsch (2005) identifies the need to

develop trial rules and procedures, the capacity to admit scientific and expert witness evidence; the doctrine of precedent; an independent Judicial Services Commission; as well as, graded sentencing guidelines to correlate the severity of sentencing better with the seriousness of the offence. On the other hand, Walgrave (2001), argued that getting justice especially in all Common Wealth Countries is difficult and the quality of Justice is poor, since the procedure of trial in itself (adversarial system of trial) discourages witnesses from giving evidence to detail, (due to its confrontational nature) resulting to a profound lack of trust by the population in the judicial system. Here in Kenya, the history of the Judicial System is the same; - It is often accused by the public of corruption, subservient to Political interference and Patronage and incompetence. All these allegations are likely to affect the level of trust by witnesses hence, non-cooperation during trials. This study therefore intends to find out whether the effect of trust in the Judicial System affects the level of cooperation by witnesses during trials at Kiambu Law Courts.

2.3.3 Community Ties

The communities in which gangs operate from are often worlds unto themselves, i.e. are places where people live, attend school, and work, all within a radius of only a few blocks-from which they rarely venture out. More importantly, victims and witnesses usually know the gang members and defendants against whom they are asked to testify against. Typically, victims and witnesses are the children of the gang member's friend's, relatives, religious grouping, classmates or neighbors (Sigel, 2007). These strong community ties are said to deter witnesses from stepping forward to give evidence in court. It is likely that when such relations exist, people become passionate and develop a feeling that coming forward to testify would be injurious to entrenched relationships. This study therefore intends to test the effects of this factor on non-cooperation by witnesses in Kenya during trial, with specific focus on Kiambu Law Courts.

2.3.4 Adversarial Process of Trial

The adversarial Process is a legal system that assumes truth to result from an open context or competition between the prosecution and the defense, with the two parties acting as adversaries

to each other (Louise, 1998). The two parties present the image of a court room as a battleground, or playing field, where contestants vie for victory. The emphasis of each side is "winning at all costs" including among other things, undermining each other without concern for truth. Each side, acting in its self-interest, is expected to present facts and interpretations of the law in a way most favorable to its interests. Through counter-argument and cross-examination, each side is expected to test the truthfulness, relevance, and sufficiency of the opponent's evidence. Moreover, in establishing a crude contest between the parties, there is a heightened emphasis on character that frequently leads to degrading questioning in court. For example, the defense side uses all manner of devices such as high tone of voice, facial expressions and sophisticated language to unsettle a witness or even keep asking one question repeatedly so as to annoy a witness. The adversarial system thus aims to constructively impugn the credibility of the witness, so as to persuade the court that it is unsafe to rely on anything the witness said. This is likely to result to what witnesses regard as degradation through unduly intrusive questioning on apparently irrelevant matters that end up abusing them. For instance, witnesses complain that asking victims of rape questions on their sexual history ends up abusing them even more.

Adversarial System of trial therefore, pits the prosecution against the defense, intimidates and degrades witnesses thus scaring them away from coming forward to testify. That is why many witnesses do not ordinarily come forward to testify in court during trial. This implies that the adversarial process of trial is itself a big problem that impedes the process of Criminal Justice delivery. This system is generally adopted in very many countries especially Common Law Countries. Witness complaints about their treatment in court at the hands of judges and lawyers are intrinsically harder to address as they flow from the logic of the adversarial model (Louise 1998). Though applied in many countries, adversarial model of trial is a threat to Criminal Justice Systems since it denies evidence to courts through non-cooperation by witnesses. This study therefore intends to test the effect of this system of trial on non-cooperation by witnesses during trial at Kiambu Law Courts.

2.3.5 Personal Characteristics

Morris (1974) and Ntarangwi (2003) argue that Witnesses differ depending on personal characteristics such as age and gender. For example, older witnesses display behavior that is dependable, organized, careful and thoughtful, with great attention to detail than younger witnesses, hence their level of cooperation is higher during trial of criminal cases. The two personal characteristics, they said affect the level of self efficacy as explained below:

2.3.5.1 Age

Napoleon, (2004) observes that younger witnesses are less likely to participate during trial due to language barrier which has been identified as a primary manipulative tool at the disposal of lawyers in court, especially in the context of cross examination. For example, the use of sophisticated language to children such as complex grammatical constructions in court, or use of interrogative technique that makes little reference to their linguistic capacity, combine to intimidate or bully younger witnesses leading to non-cooperation by such witnesses. This scenario badly affects the dispensation of criminal justice by denying the courts, crucial evidence that is needed in the process of justice delivery. Though there is little evidence here in Kenya that explains the impact of age on non-cooperation by witnesses, this study is set out to test the effect of age on non-cooperation by witnesses during trial.

2.3.5.2 Gender

Ntarangwi (2003) postulates that though both male and female witnesses equally volunteered to give information to the police, their degree of cooperation with the Criminal Justice System (CJS) differs especially during the trial phase. The confrontational nature of the adversarial trial process and intimidation of witnesses by defendants scares away most female witnesses than men. According to Muncie (2005) men elicit more respect than women at the time of witnessing, irrespective of age, years of experience, method of practice, and field of practice. This perception discouraged witnesses who were just acting voluntarily to further the public good by ensuring justice is done. This study intends to test the effect of gender on non-cooperation by witnesses during trial at the Kiambu Law Courts.

2.3.5.3 Socio-economic characteristics

Although there is no information on socio-economic characteristic of non-cooperative witnesses, this study intends to test the effect of class, religion, level of education and status on non-cooperation by witnesses during trial of criminal cases in Kenya.

2.3.6 Lengthy Trial Process

Duggan, and Civile (1976) observed that in US, several cases took months prior to commencement of the trial, and several months before it was concluded, due to several factors, e.g. frequent court adjournments, the defense lawyer or the accused person reported sick, among other reasons. This was said to affect the witnesses' cooperation especially those who had attended court more than once, bouncing the trial process.

Here in Kenya, the situation is not different at all. Members of the public often complain that the length of the Trial Process is long and chequered, with some cases often taking months before the trial. Delays are usually attributed to frequent adjournments, because: the trial Magistrate is sick, the defendant is not produced in court by prison authorities, the expert reports (e.g. the ballistic expert report) is not ready among other reasons. There has also been a complaint from the public that trial of some cases take too long, even up to two years, with so many frequent adjournments in between. This is likely to affect the cooperation of witnesses during trial of criminal cases. Thus, this study is set out to test the effect of this factor on non-cooperation by witnesses during trial of criminal cases at Kiambu Law Courts.

2.4 Background of the Witness Security Program (WITSEC)

Witness Protection Programs (WPP) started in the US, in 1963, when the first witness in the US was offered protection to, in exchange for his testimony prior to the creation of a formal WPP (Escobar, 1995). Immediately after the witness' testimony in 1963, before a congress committee about the structure of the Mafia criminal group and its activities throughout the country, it was feared that he could be killed by the said group, after it was widely rumored that a price tag of \$100,000 was placed on his assassination. About 200 US marshals guarded him until his death in 1971. The Congress passed the Organized Crime Control Act of 1970 and created the Witness Security Program (WITSEC) to "provide protection and security by means of relocation" for

witnesses who testify against "persons involved in organized crime activity or other serious offenses" (Denzin, 1989). Thus, WITSEC empowered the United States Attorney General to guarantee the protection of witnesses who had consented to testify against members and activities of the organized crime groups. Later the concept of WPP was borrowed and is being domesticated in other countries of the world; where non-cooperation by witnesses as a result of witness insecurity has threatened to stifle CJS of such states e.g. Pakistan and the Philippines. Here in Kenya, the concept of WPP and WITSEC was launched after the promulgation of Witness Protection Act (2006).

In the US, WPP and WITSEC have been very effective but also faced by several structural challenges such as; lack of formal implementation structure and a concrete witness selection process, in selecting witnesses who are fit for that program. There is also a challenge of determining the exact limits of the protection obligation. The government is also unable to provide for each benefit offered by the program (London: CJS, 2004). Most of the protected witnesses have had a criminal background, and have started to perpetrate new crimes after being admitted to WITSEC.

Though faced with several challenges, WPP and WITSEC have indeed worked in the US to avert non-cooperation by witnesses during trial and in the long run helped to dismantle the organized Mafia criminal gang. This research has singled out non-cooperation by witnesses during trial as a real threat to the success of the CJS here in Kenya since witnesses are not coming forward to testify during trial, hence denying courts, evidence required in order to dispense justice fully. Intervention by coming up with Witness Protection Programs and Services in Kenya will help to improve witnesses cooperation by assuring their security, hence avert the tragedy of termination of cases due to lack of evidence experienced in Kenyan Criminal courts today.

2.5 Witness Protection Act (2006)

Provision of witness protection is a crucial component of Criminal Justice reform. Witness protection underpins the success of the Criminal Justice Process through cooperation of witnesses during trial. For witnesses especially of sensitive crimes to testify, they must have

confidence in the states' ability to protect them. The Kenyan government's failure to fully implement Witness Protection Act (WPA) indicates lack of political will at the expense of justice delivery. However, Kenya is one of the few countries in the world that have established the framework for a comprehensive witness protection program.

Here in Kenya, Witness Protection Act was promulgated in 2006 and became operational in September, 2008. The regulations that facilitate the implementation of the Act were adopted in January, 2009. The Attorney-Generals office set up a multi-sectoral team to operationalize the Act. An office was thus opened within the judiciary for the witness protection unit. In addition, procedural and policy documents were developed. The witness protection unit is now an independent and autonomous Witness Protection Agency (WPA) that is in charge of its own staffing and able to mobilize and disburse its funding independently. This is an impressive account of government commitment to efforts towards establishing an efficient and robust Criminal Justice framework. However, challenges remain. In September 2010, the Witness Protection Advisory Board agreed that the Agency should begin protecting applicants. It recommended that a competitive process of staff recruitment begin and indicated that funding should be sought to protect at least 20 witnesses. It suggested that staff from other departments be seconded to proceed with the work of the Agency whilst the Agency awaits full enforcement.

In a statement on 22 September 2010, whilst pointing out the efficacy of the new constitution in the fight against graft, the Attorney General highlighted the importance of taking witness protection seriously in order to attract witnesses for corruption crimes. In reassuring prospective witnesses and a querying civil society, he announced that the WPA "would be commissioned soon". Unfortunately, "soon" is yet to materialize.

Of the KSh1.2 billion (about US\$11.8 million) budget requested by the Attorney General for implementing the Agency for the period 2010/2011, only allocated KSh35 million (about US\$ 413 000) were allocated by the treasury. This is hardly enough to meet the running costs of the Agency, to enable the appointment of permanent Agency staff and also for the agency to be able to implement its programs and activities on behalf of the witnesses and victims. In the greater scheme of things, government cannot argue that it does not have a sufficient pool of funds to commit to witness protection. Donors have been waiting keenly to support the program on

condition that, the government first displays the will to make it a success by providing a sizeable portion of the funding requested by the Agency.

The challenge is not the unavailability of funds, but most probably political will at the highest level - cabinet. The antithesis to the desire to create a robust National witness protection program and to establish an efficient, effective and functional WPA is treasury's reluctance to commit the necessary funds to make it happen. It no surprising that the Ministry of Finance headed by a minister, who was recently summoned by the International Criminal Court (ICC), a suspect in the post-election violence of 2007/08 should be the WPA's Achilles heel.

The Kenyan government's failure to fully operationalize the WPA for example, doesn't auger well for even the Key witnesses supposed to give evidence against the post election violence suspects. These witnesses are in dire need of protection services. It's not surprising that some witnesses are already reported dead, under circumstances that raise reasonable suspicion that they were murdered. The ICC had to intervene by way of providing protection to witnesses through long-term relocation to foreign countries. Generally, the absence of the WPA pose a significant challenge to witness cooperation since the witnesses are not assured of their safety, as they come forward to volunteer information and evidence to the agencies of the Criminal Justice System. It thus remains a fatalistic blow to the state that it is not doing enough to protect witnesses. The state must then move with speed to operationalize the witness protection Act, if the process of Justice Delivery is to be salvaged.

2.6 Theoretical Framework

2.6.1 Theory of Planned Behavior

This theory focuses on behavior as a product of cognitive processing of attitudes, perceptions and beliefs, hence very relevant to explain non-cooperative behavior by witnesses. The basic tenet of this theory is that, human behavior is guided by three kinds of basic considerations: "behavioral beliefs," "normative beliefs," and "control beliefs." In their respective aggregates, "behavioral beliefs" produce a favorable or unfavorable "attitude toward the behavior";

"normative beliefs" result in "subjective norm"; and "control beliefs" gives rise to "perceived behavioral control" (Icek Ajzen, 1991, 2002).

In combination, "attitude toward the behavior," "subjective norm," and "perceived behavioral control" lead to the formation of a "behavioral intention" (Ajzen, 2002b). In particular, "perceived behavioral control" is presumed to not only affect actual behavior directly, but also affect it indirectly through behavioral intention (Zimmerman et al., 2005). Normative beliefs:-are individual's positive or negative evaluations of self-performance of the particular behavior. The concept is the degree to which performance of the behavior is positively or negatively valued. It is determined by the total set of accessible behavioral beliefs linking the behavior to various outcomes and other attributes. Control beliefs:-are individual's beliefs about the presence of factors that may facilitate or impede performance of the behavior (Ajzen, 2001). The concept of perceived behavioral control is conceptually related to self-efficacy.

The Theory of Planned Behavior has thus been widely used, successfully to explain attitudes and behavior (in this case non-cooperative behavior by witnesses), or even to predict such behavior (Friedman and Harvey, 1986). The theory suggests that a person's behavior is determined by his or her intentions to perform that behavior and that this intention is in turn a function of his or her perceptions, beliefs and subjective norms on that behavior (Ajzen, 1991). This theory is used to explain human behavior and or identifying how and where to target strategies for changing the behavior. Most importantly, this theory focuses on behavior as a product of cognitive processing of attitudes, perceptions and beliefs.

The Kenyan criminal justice process is bogged down by the problem of non-cooperation by witnesses during trials. Factors such as intimidation, or death of witnesses without any intervention by law enforcement Agencies, amongst other factors contribute immensely to development of attitudes, beliefs and perceptions among witnesses that the Criminal Justice System institutions have failed and cannot be trusted. These institutions of social control include the Police, the Courts, and the Corrections. According to this theory, therefore, Programs and Policies that aim to transform already developed attitudes, perceptions, perceived norms and control in making change will have better results. The theory of planned behavior is thus a very

powerful and predictive model for influencing policy formulation that will help avert non-cooperative behavior of witnesses during trial of criminal cases.

2.6.2 Theory of Reasoned Action

Theory of Reasoned Action is somewhat related to the Theory of Planned Action. The key application of this theory is prediction of behavioral intention, spanning prediction of attitude and prediction of behavior. The subsequent separation of behavioral intention from behavior allows for explanation of limiting factors on attitudinal influence (Ajzen, 1980). This theory suggests that, a person's behavioral intention depends on the person's attitude about the behavior and subjective norms; hence, a function of both attitudes towards behavior and subjective norm towards that behavior, which has been found to predict actual behavior.

The theory has two major basic tenets, namely:

1) That there are determinants of specific behavior intentions which result in specific behavior (in this case non-cooperation by witnesses), and that these determinants of behavior give guidelines for intervention, in order to transform that behavior. Determinants of non-cooperative behavior are likely to be the contributory factors that this study is out to unveil. Even when attitudinal and normative beliefs are favorable, there are other salient conditions which help or hinder the possible behavior. According to this theory, Behavioral intent is influenced by three primary factors:

- Attitude toward the behavior
- Perceived social pressure to perform or not to perform the behavior
- The perceived degree of personal prerogative regarding the behavior (perceived behavioral control).

2) The second basic tenet views human beings as being capable of deciding their own behavior (Fishbein and Middle Stadt, 1989). Reason such as intimidation of witnesses by members of the criminal gang in the absence of WPA to guarantee witness security is enough to make such witnesses not to cooperate. This theory further suggests that a specific behavior (in this case, non-cooperation by witnesses) can be predicted by

specific perceptions (such as mistrust of Law Enforcement and the Judicial System) to contribute to non-cooperative behavior (Werner, 2004).

The Theory of Reasoned Action hence, best explains the back ground forces that shape the actions of non-cooperative witnesses or the reason why the witnesses behave the way they do, as explained by the determinants of behavior.

2.6.3 Social Ecology Theory

Though this theory explains crime causation, this study adopts it to explain non-cooperative behavior because it sets the conditions and perceptions of behavior that resonate with the theories of Planned and Reasoned Actions.

The basic tenet of this theory is that, crime thrives in an environment of social disorganization such as; weak social controls, siege mentality, mistrust of social control institutions, weak neighborhood cohesiveness, neighborhood fear of crime and unemployment amongst others. Perception of crime and victimization produces neighborhood fear. When fear grips a neighborhood, business conditions begin to deteriorate, population mobility increases and a criminal element begins to drift into the area, while the residents of such neighborhoods become self conscious and get worried. Such is an ecology or environment in the victims of crime and witnesses find themselves in (Siegel, 2007).

This study therefore adopted Social Ecology Theory to explain the relationship between the environment of social disorganization, crime and victimization of witnesses that may result to non-cooperation by witnesses during trial of criminal cases. In such an ecology or environment where there is Mistrust of the institutions of social control, weak neighborhood cohesiveness, neighborhood fear and siege mentality no witness is likely to come forward to give evidence in support of any criminal justice process, hence non-cooperation by witnesses.

Social Ecology Theory therefore resonates with the Theories of Planned Behavior and Reasoned Action by setting specific conditions or perceptions of behavior (in this case non-cooperative behavior by witnesses). When, for instance a witness is lynched in public and the police take no action then the community will likely develop mistrust and have reasons to fear. Residents will

always tell others of their previous personal involvement with victimization, spreading word that neighborhood is getting dangerous. Victimization of witnesses and perceptions that the witnesses will not get any help or support from the agencies of Criminal Justice System is likely to trigger behavioral beliefs, attitudes and responses against any cooperation with such institutions. This theory will also be therefore very useful in influencing the nature of policies that must be formed to avert non-cooperation by witnesses.

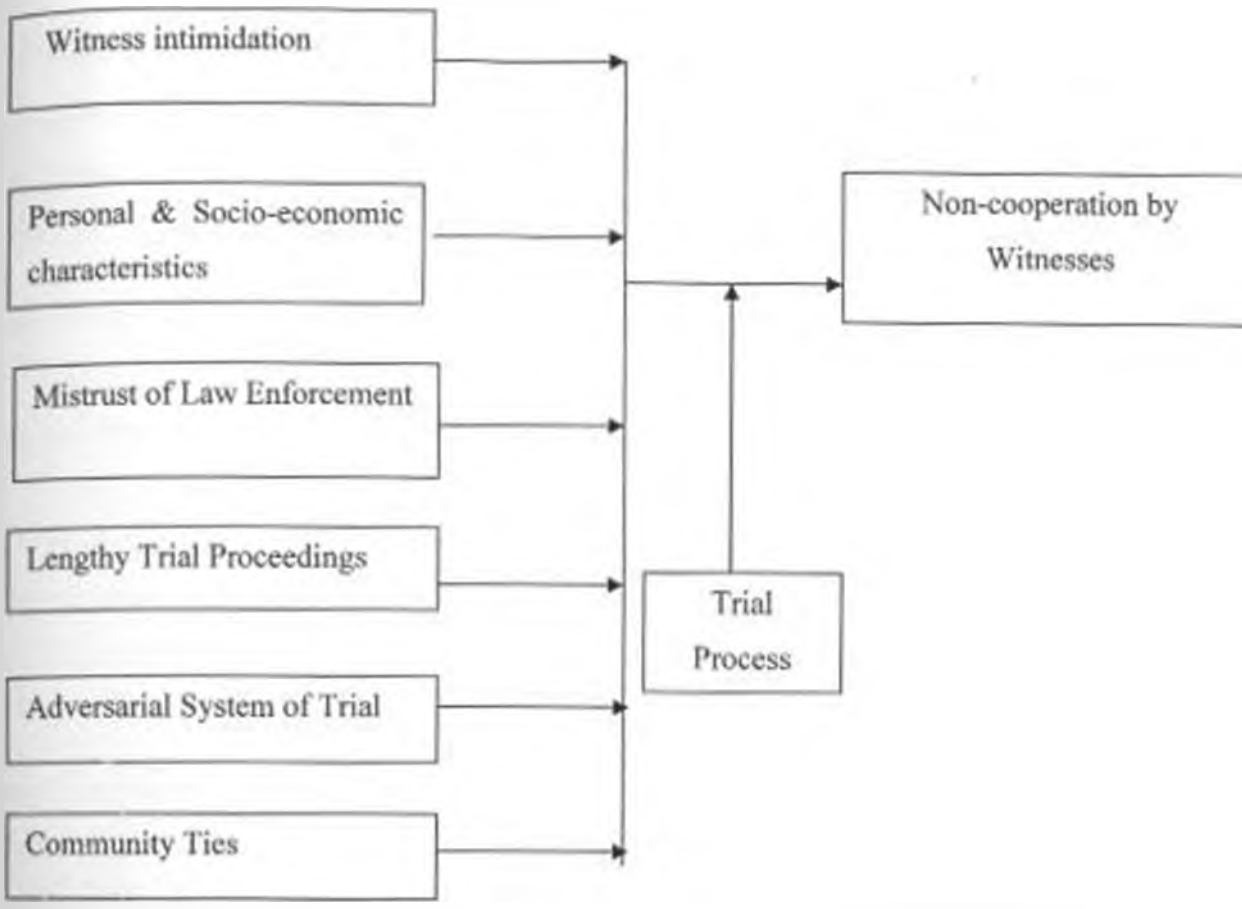
The three theories advanced above assert that behavior is a product of cognitive process of attitudes, perceptions, social beliefs/pressure and personal prerogative regarding behavior (behavioral control). The theories therefore provide some of the background factors/processes that relate/shape the causal factors in the conceptual framework below.

2.7 Conceptual Frame work

Conceptual Framework can be defined as a set of broad ideas and principles taken from relevant fields of inquiry and used to structure a subsequent presentation (Reichel and Ramey, 1987). It is also a research tool intended to assist a researcher to develop awareness and understanding of the situation under scrutiny and to communicate this.

A Conceptual Framework results in what a researcher conceptualizes as the relationship between variables in the study and shows the relationship graphically or diagrammatically (Mugenda & Mugenda 2003). A conceptual definition is an element of the scientific research process in which a specific concept is defined as a measurable occurrence and in measurable terms; basically gives one the meaning of the concept (Mugenda, 2008). Independent variables are those variables which are systematically varied by the researcher. On the other hand, dependent variables are those variables whose values are presumed to depend on the effects of the independent variables (Mugenda, 2008). The relationship between different variables in this research is presented graphically in the conceptual framework shown in figure 2.1 below.

Figure 2.1: Conceptual Framework of the Study



Independent variable

Dependent variable

As reflected in the conceptual frame work above, the Criminal Justice Delivery Process (CJDP) is under siege. Several factors work together to adversely affect witness cooperation during trial, hence impacting negatively to the process of Criminal Justice Delivery. For example Intimidated witnesses are unlikely to cooperate with the CJSA if their safety is not guaranteed. In addition, the entrenched mistrust in the CJSA due to factors such as incompetence and Corruption, have also contributed to non-cooperation by witnesses. The confrontational nature of the adversarial system of trial discourages witnesses from coming forward to testify. The offending nature of this system of trial conflicts with personal and socio-economic characteristics of individual witnesses such as age, gender and status amongst others. As articulated, all the above variables work together to affect the level of cooperation by witnesses during trial of criminal cases.

CHAPTER THREE: METHODOLOGY

3.1 Introduction

This chapter describes the chosen study site, the units of analysis and observation, and the sampling procedure. It also identifies the sources of data and how they were collected and analyzed.

3.2 Site Selection and Description

Kiambu Law Courts is situated at the Kiambu County in Central Province, bordering on Nairobi City to the North. The Courts are strategically located near Kiamumbi, Karuri, and Kiambu Police Stations. It also serves other police stations in Nairobi i.e. Kasarani, Muthaiga and Kabete. Due to pressure of cases from within the city of Nairobi and other parts of the country, the Nairobi law court also refers several criminal cases are referred to Kiambu Law Courts from Nairobi city in particular. The cases referred to these courts are of all types; that is Robbery cases, Rape cases, Assault cases, Theft, Child abuse, among others.

Kiambu Law Courts tries all types of criminal cases, i.e. felonies and misdemeanors. Examples of felonies tried at these courts include; Robbery, Manslaughter, House breaking and burglaries, offences against Morality, Offences against the person, Thefts, and other felonies. Example of misdemeanors tried at these courts includes Trespass, Common Assaults, Idle and Disorderly, amongst other offences.

For efficient administration of Justice, Kiambu Law Courts are classified into four, numbered hierarchical segments namely: the Senior Principal Magistrates Court (SPM) headed by a Senior Principle Magistrate. This is the highest court at Kiambu Law Courts. It has jurisdiction to try all criminal cases except murder and treason. Cases tried in this court include robberies, theft cases, and malicious damage to property, among other crimes.

The second tier comprises the Principle Magistrates Court (PM), Presided by a Principle Magistrate. This court has Jurisdiction to try all criminal cases except murder and reason. It also has jurisdiction to try robbery violence cases, simple robberies, assault cases, malicious damage to property etc. The difference between this court and Court One is that, court one has a higher

jurisdiction in awarding of sentences. For example, an offence like stealing has a maximum and a minimum punishment (3-7years of imprisonment). Where as the first tier of courts in a region can award a maximum punishment (7years), the second tier of courts can only award a lesser punishment than the first tier, for instance 5years of imprisonment

The third segment is the Senior Resident Magistrates Court (SRM), Presided by a Senior Resident Magistrate. Its jurisdiction includes trial of all felonies except Murder and Treason. These include robbery with violence cases, rape cases etc. It has a lesser jurisdiction in awarding of punishment.

The fourth is the Resident Magistrates Court (RM), Presided over by a Resident Magistrate. This court tries less serious felonies and misdemeanors e.g. theft cases, assaults, trespass, being in possession of traditional liquor among others.

In terms of Staffing, the Senior Principal Magistrate is administratively in charge of all Magistrates. All the Para-legal staff e.g. court clerks, messengers, telephone operators and cleaners are headed by the Executive Officer. There are four Court Prosecutors, one for each court namely; one chief inspector of Police and three inspectors. The chief inspector is in charge of the prosecution wing and is deployed in the highest court at Kiambu (SPM). The three inspectors serve in other courts.

3.3. Units of Observation

The present study units of observation were the witnesses, the court files, the court registers, and the KI.

3.4 Unit of Analysis

The unit of analysis is the Kiambu Law Courts, and more pertinently the problem of non-cooperation by witnesses during trial process.

3.5 Study Design

According to Cooper and Shindler (2000) and Schutt (1996), a research design is the blue print for collection, measurements and analysis of Data. It is the plan and structure of investigation conceived to obtain answers to research questions.

This study adopted the exploratory research design. This design was appropriate since it was intended to explore and pull out among other things, the "causal factors" that account for non-cooperation by witnesses during trial of criminal cases and also in exploring the nature of non-cooperation by witnesses during trial of criminal cases at Kiambu Law Courts.

3.6 Sample Selection

The target group for this study was the witnesses (who were the main respondents) of cases that had already been determined by the courts through termination. The study examined court registers for the period between 2008 and 2010, so as to construct a sample frame using purposive sampling technique. The sample frame comprised of cases terminated under Section 202 C.P.C (cases terminated for lack of evidence), under Section 210 C.P.C (cases terminated because of conflicting/contradictory evidence) and Section 215 C.P.C (cases terminated because of insufficient evidence). From that sample frame, files were selected purposively for study. From the court files and police case files, were lists of witnesses and their contacts. Through these contacts, witnesses were located and interviewed. 30 respondents who were available for study were located. Also included for study were Key informants (KI) such as: Magistrates, Advocates, Court Prosecutors, Police investigation officers and Court clerks.

The study adopted purposive sampling technique because; it focused only on data that was relevant to the study. The study focused on cases that had already been determined, and hence depended on witnesses that were available only.

3.6.1 Sample Size

The study interviewed a sample of 30 witnesses. In addition, 10 Key Informants were selected and interviewed. The Key Informants were represented as follows: Magistrates 2, Court Prosecutors 3, Lawyers 2, Court clerks 1, and Police Investigating officers 2.

3.7 Sources of Data

The study used both Secondary and Primary sources of data. Secondary data was collected from Court files and Court Registers for the years 2008, 2009 and 2010. Primary data was sourced from Witnesses and Key informants that include Magistrates, Advocates, Prosecutors, Police investigating officers, and Court Clerks.

3.8 Data Collection methods

Interviews and Questionnaires were used to collect primary data. The advantage of using the questionnaire is that it saves time, it is economical and it is easier to administer (Kothari, 2003). Structured interviews helped to gain useful insights during interview situations.

3.9 Data Collection Tools

Semi structured questionnaires were administered to the main respondents who were the witnesses. The questionnaire had a short introductory part with easy questions in order to put the respondents in a relaxed and less suspicious mood. This was followed by questions containing important variables which were put forward to the respondent. These were constructed in simple language in order to avoid ambiguities.

Interview schedule was developed to assist during interviews with the key informants namely Magistrates, Advocates, Court Prosecutors, Police investigation officers and Court clerks. It employed both structured and unstructured. Structured or close or close ended questions were those which gave the respondents a limited number of answers from which to choose. Unstructured or open ended questions gave the respondents the freedom to decide on the form, detail and length of their answers. These helped to gain more insight and knowledge some of which was not anticipated, from the respondents.

3.10 Data Analysis

Data analysis is the process of bringing order, structure and meaning to the mass of information collected. It involves examining what has been collected and making deductions and inferences Kombo and Tromp (2006).

This study employed descriptive statistics to analyze the data obtained. Descriptive statistics involves the collection, organization and analysis of all data relating to some population or sample under study. According to Breakwell (2006), descriptive research design is commonly represented by use of frequency charts, graphs, and pie charts to tabulate the information gathered appropriately. Statistical Package for Social Sciences (SPSS) was used to analyze the data. This package is known for its efficiency and ability to handle large amounts of data. Given its wide spectrum for statistical procedures purposefully designed for social science, it developed appropriate holding frame to come up with reliable results according to the responses in the questionnaires.

CHAPTER FOUR: DATA ANALYSIS AND INTERPRETATION

4.1 Introduction

This chapter discusses the research findings from qualitative data that was collected, to explain the problem of non-cooperation by witnesses during trial of criminal cases in Kenyan courts, with specific focus on Kiambu Criminal Courts. The findings are based on responses from a total of 30 witnesses who were the main respondents. These witnesses were purposively selected from the cases terminated under section 202 C.P.C, Section 210 CPC and Section 215 CPC in the years: 2008, 2009 and 2010, and to whom Questionnaires were administered. The study also targeted 10 key informants such as Magistrates, Lawyers, Court Prosecutors, Court Clerks and Police investigating officers. The Key Informants were represented as follows: Magistrates 2, Court Prosecutors 3, Lawyers 2, Court clerks 1, and Police Investigating officers 2.

The data was presented in explanations/prose form based on the important themes relevant in the study. Tables, bar graphs and pie chart were also used to present data. The chapter is organized into sections. The first section addresses personal and socio-economic characteristics of the respondents; the second section seek to establish the magnitude and typologies of criminal cases that were terminated due to non cooperation by witnesses during trial at the Kiambu Criminal Courts between the years 2008 and 2010. The third section deals with the contributing factors that are responsible for non-cooperation by witnesses during trials. The last section seeks to elicit remedial measures for ensuring the cooperation of witnesses during trial of criminal cases at the Kiambu Law Courts.

4.2 Personal and Socio-economic characteristics of Non-cooperative Witnesses.

As indicated earlier, the study utilized two major categories of respondents; Witnesses and Key Informants. A total of 30 respondents were interviewed while 10 KI comprised the respondents for the professional category. The personal and Socio-economic characteristics of the non-cooperative witnesses are profiled in this section. The presentation keys for personal characteristics are attributes such as gender, age and ethnicity. Socio-economic characteristics of the respondents are attributes such as marital status, level of formal education, occupation and income.

4.2.1 Age and Gender and Ethnicity of Respondents

Out of the 30 respondents interviewed, 75% of all the respondents were male while the rest were female. In addition, 70% were married, 20% were single while 10% were divorced. On the basis of age, 60% of the respondents were aged 31-35 years, 5% were aged between 18-30 years, while 25% were aged 36-40 years. The study established that all respondents were aged between 18-40 years.

A significant proportion (80%) of all the respondents was from the Kikuyu ethnic group, while the Luo and Kamba tribes contributed 5% each. The remaining respondents were from other tribes namely, the Luhya, Meru, Maasai, Kisii and Nubians. The result that most respondents are Kikuyu is likely because the Kikuyu are the majority ethnic group in Kiambu and even the surrounding districts or even in the city of Nairobi.

4.2.2 Religious Denomination of Respondents

Majority of respondents (85%) were of Christian affiliation, Protestants and Catholics. 10% were Muslim while 5% atheists. These results showed that the religious teachings the respondents may have received did not help to avert non-cooperation by witnesses during trial.

4.2.3 Occupation of Respondents

The study indicated that 25% of the respondents were in permanent employment either in the private sector or in the civil service. 35% of the respondents were in business, 20% of the respondents were in casual/ temporary employment while 20% of the respondents were farmers. When asked, most businessmen stated that they will only sacrifice a day but not two, to attend court during trial. The end result would be termination of such cases. Several unemployed witnesses conceded being culpable to any wealthy defendant who is ready to compromise them by paying a small fee so that they don't testify against them

4.2.4 Level of Education, Level of Monthly income and Residence.

As far as level of education is concerned, 50% of the respondents had college education, 20% had university education, and 20% had secondary school education. The rest, i.e. 10% had primary education as shown in table 4.1 below

Table 4.1 Level of Education of Respondents

Level of Education	Frequency	Percentage
None	0	0
Primary Education	3	10
Secondary	15	50
College	6	20
University	6	20
Other	0	0
Total	30	100

Source: Primary data, May 2011.

The respondents in permanent employment earned between 10,000 - 40,000 Kenya shillings. Respondents in business category earned between 20,000 - 90,000 Kenya shillings per month. Respondents in casual/temporary employment earned between 3,000- 9000 Kenya shillings per month. Respondents who were farmers earned between 4000 - 12000 Kenya shillings per month. Based on hard socio-economic situations in their lives, 50% of the respondents rated their income as inadequate.

Most respondents reside within Kiambu County in places such as Kiambu town, Karuri, Kawaida, Ndenyeru, Kinoo and Banana. These comprise 90% of all respondents. 10% of the respondents live in the city of Nairobi; in places such as Kasarani, Embakasi, Kabeto and Kahawa west.

4.3.1 Magnitude and Typologies of Criminal Cases

The study sought to establish the magnitude and typologies of criminal cases that were terminated due to non-cooperation by witnesses at the Kiambu Law Courts in the years, 2008, 2009 and 2010.

The tables below present an overview of the typology and the magnitude of cases that were terminated in the years 2007, 2008 and 2010 and the section of law. The cases terminated were classified into three categories: Under section 202 C.P.C (Non attendance of witnesses in court during trial) hence no evidence at all, 210 C.P.C (where the witnesses gave contradictory/conflicting evidence) and under section 215 C.P.C (where the evidence was insufficient and did not reach the threshold required to convict a suspect, thus leading to termination

Table 4.2. Cases terminated in the year 2008 and the section of Law

S/NO	TYPE OF OFFENCE	SECTION 210 C.P.C	SECTION 202 C.P.C	SECTION 215 C.P.C	TOTALS
1	Attempted rape	-	-	01	01
2	Malicious damage to property	02	02	04	08
3	Stealing by agent	04	01	03	08
4	Sexual exploitation	01	01	-	02
5	Creating disturbance in a manner likely to cause a breach of peace	02	02	01	05
6	Robbery with violence	06	03	03	12
7	Stealing by servant	01	01	01	03
8	Stealing from a person	01	05	05	11
9	Being a member of unlawful sect	01	01	-	02
10	House breaking and stealing	03	03	01	07
11	Assaults	06	06	01	13
12	Arson	01	-	-	01
13	Shop breaking	01	01	-	02
14	Being in possession of narcotics	-	02	03	05
15	Defilement	04	01	01	06
16	Theft of farm produce	03	-	01	04
17	Store breaking	01	-	02	03
18	Grievous harm	01	-	-	01
19	Burglary	01	-	-	01
20	Unnatural offence	01	-	-	01
21	Stealing	02	-	05	07
22	Office breaking	01	-	03	04
23	Giving false information	01	-	-	01
24	Bar breaking and committing a felony	02	-	01	03
25	Harboring aliens	-	-	01	01
	TOTALS	46	29	37	112

Source: Secondary data (Court files), May 2011.

The table above indicates that, assault cases were most terminated in the year 2008, with a frequency of 13, followed robbery with violence with a termination frequency of 12, stealing from a person followed closely with a frequency of 11. Malicious damage to property and stealing by agent had an equal termination frequency of 8. One case related to grievous harm, burglary, unnatural offence, attempted rape category, was terminated. The total number of cases terminated was 112.

Table 4.3 Criminal Cases Terminated in the year 2009 and the section of Law

SNO	TYPE OF OFFENCE	SECTION 210 C.P.C	SECTION 202 C.P.C	SECTION 215 C.P.C	TOTALS
1	Attempted defilement	01	01	-	02
2	Burglary	-	01	01	02
3	Door breaking and stealing	-	01	01	02
4	Assault	01	04	02	07
5	Being in possession of narcotics	01	02	10	13
6	Defilement	-	01	01	02
7	Robbery with violence	03	02	04	09
8	Attempted robbery	01	-	-	01
9	Stealing by servant	03	-	02	05
10	Stealing by agent	03	-	02	05
11	Grievous harm	02	-	-	02
12	Aiding a prisoner to escape	-	-	01	01
13	House breaking	02	-	01	03
14	Infringement of copy rights	01	-	-	01
15	Creating disturbance	02	03	03	08
16	Obtaining money	01	-	-	01
17	Breaking into a building and committing a felony	-	-	02	02
18	Perjury	01	-	-	01
19	Malicious damage	01	04	02	07
20	Issuing a bad cheque	-	-	01	01
21	Shop breaking	01	-	01	02
22	Attempted rape	01	-	-	01
23	Preparation to commit a felony	02	-	01	03
24	Handling stolen goods	-	-	01	01
25	Rape	02	-	01	03
26	Being in possession of imitation of a firearm	01	-	-	01
	TOTALS	30	19	37	86

Source: Secondary data (Court files) May, 2011

The table above indicates that, the number of cases terminated went down in the year 2009 to 86. 13 cases of being in possession of narcotics were terminated. 9 cases of robbery with violence and 8 cases of creating disturbance were terminated.

Table 4.4: Cases terminated in the year 2010 and the section of Law

S/NO	TYPE OF OFFENCE	SECTION 210 C.P.C	SECTION 202 C.P.C	SECTION 215 C.P.C	TOTALS
1	House breaking	01	-	02	03
2	Shop breaking	01	-	01	02
3	Robbery with violence	04	-	07	11
4	Being in possession of narcotics	03	01	02	06
5	Defilement	02	-	01	03
6	Assaults	03	01	01	05
7	Theft of motor vehicle parts	-	-	01	01
8	Malicious damage	-	02	-	02
9	Burglary	-	01	01	02
10	Abduction of a girl	01	-	01	02
11	Creating disturbance	02	06	01	09
12	Obstructing a public health officer	-	-	01	01
13	Injuring an animal	01	-	-	01
14	Stock theft	-	-	02	02
15	Bar breaking	01	-	-	01
16	Kiosk breaking	01	-	01	02
17	Grievous harm	01	-	-	01
18	Stealing	03	-	04	07
19	Breaking into a building	-	01	02	03
20	Obtaining money by false pretence	-	01	02	03
21	Theft of farm produce	03	-	01	04
22	Stealing of a motor vehicle	-	-	01	01
	TOTALS	27	13	34	74

Source: Secondary data (Court files) May 2011

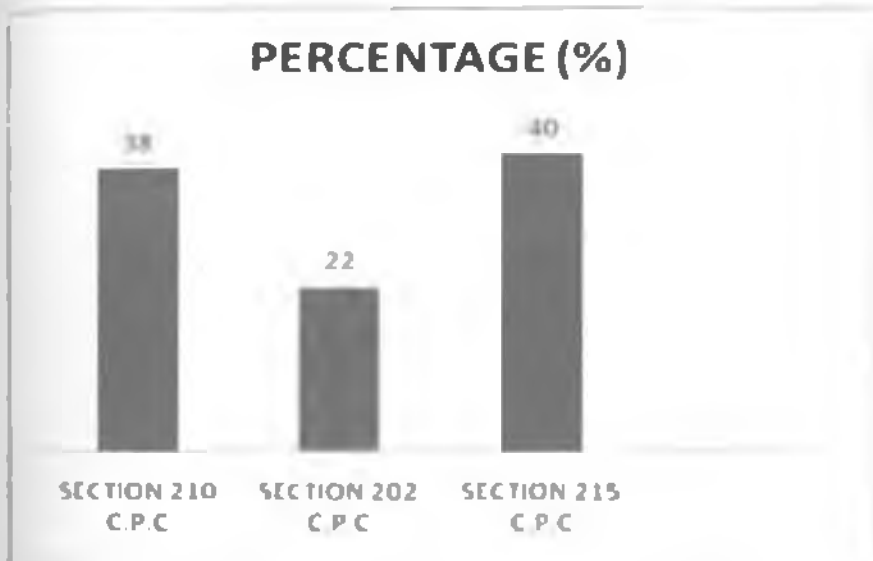
As indicated in the table above, in the year 2010, 11 robbery with violence cases were terminated, 9 creating disturbance cases, 7 stealing cases, 6 cases of being in possession of narcotics and 5 assaults cases were terminated. The total number of cases terminated in the year was 74.

Table 4.5 Comparative Summary of cases terminated during the Period 2008-2010.

YEAR	SECTION 210 C.P.C	SECTION 202 C.P.C	SECTION 215 C.P.C	TOTALS	PERCENTAGE (%)
2008	46	29	37	112	41
2009	30	19	37	86	32
2010	27	13	34	74	27
TOTALS	103	61	108	272	100
PERCENTAGE (%)	38	22	40	100	

Source: Secondary data (Court files) May 2011.

Figure 4.1 Cases Termination per section



Source: Secondary data, May 2011

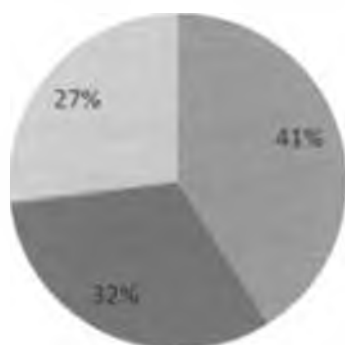
From table 4.2.5 and figure 4.2.6 above, 40% of all the cases were terminated under section 215 of the C.P.C because the evidence given was insufficient and did not reach the threshold required by law to convict suspects due to non-cooperation by witnesses. 38% of all the cases were terminated under section 210 C.P.C because the witnesses gave conflicting/contradictory evidence during trial. 22% of all the cases were terminated under section 202 C.P.C since the witnesses never attended court during trial.

The study found that a total of 272 cases were terminated in the years 2008, 2009, and 2010 due to non-cooperation by witnesses during trial. Non-cooperation by witnesses cut across all typology of crimes. Owing to the big number of cases terminated, the magnitude of non-cooperation by witnesses during trial is thus appalling.

Figure 4.2 Comparative Summary ((in percentages) of Cases terminated per Year (2008, 2009 and 2010)

Yearly percentage of cases terminated

■ year 2008 ■ year 2009 ■ year 2010



Source: Secondary data, May 2011

From the figure above, 41% of all the cases were terminated in the year 2008 while 32% and 27% of all the cases were terminated in the years 2009 and 2010 respectively. This indicates that most of the cases terminated due to non cooperation by witnesses at Kiambu Law courts occurred in the year 2008.

4.4. Factors Contributing to Non-Cooperation by Witnesses

The study also sought to identify factors that contribute to non-cooperation by witnesses during trial of criminal cases at Kiambu Law Courts. The respondents were first required to prioritize the factors starting from the highest to the lowest as shown in table 4.6 below.

Table 4.6: Ranking of Factors Responsible for Non-cooperation by witnesses during trial of Criminal Cases

Factors	Frequency	Percentage
Intimidation	9	30
Mistrust of Law Enforcement	6	20
Adversarial Process of Trial	6	20
Lengthy Trial Process	4	13
Community Ties.	3	10
Personal & Socio-economic characteristics	2	7
TOTALS	30	100

Source: Primary data, May 2011.

From the table above, the major contributing factors included, intimidation (30%), Mistrust of Law Enforcement (20%), Adversarial process of Trial (20%), Lengthy Trial Process (13%), Community Ties (10%), and Personal and Socio-economic Characteristics of individual witnesses (7%). It is therefore logical to regard intimidation of witnesses as playing a major role in contributing to non-cooperation by witnesses. The Key informants that include Magistrates, Lawyers, Prosecutors, Police Investigating Officers and Clerks confirmed the findings by saying that, these factors have contributed to undermine the functioning of the justice system by denying critical evidence to the courts. These factors were explained as follows,

4.4.1 Intimidation

The witnesses and the KI who were interviewed conceded that intimidation is a long-standing problem that also erodes confidence in the government's ability to protect citizens. According to the respondents, intimidation has usually been associated with organized crime and any violence related cases. Several respondents were concerned that sometimes intimidation was done in public, to terrify the whole community. A respondent cited a case where a witness's head was

found dumped at a matatu stage with the body missing. This according to them intended to discourage the whole community against cooperating with CJSA. No one was arrested by police.

Types of victim intimidation

The study also found that intimidation of an individual or a community may involve many of the same tactics, including physical violence, explicit or implicit threats of physical violence, property damage, and even death. Attempts by criminal gangs to promote community-wide non-cooperation include execution, assault, or public humiliation of victims or witnesses (or their families) suspected of cooperation with CJSA and also random public acts of extreme brutality intended to terrify potential witnesses.

Explicit threats of physical violence

From the study, Key Informants (K.I) reported a high incidence of threatened physical violence either against victims or witnesses or their families. These respondents stated that threats of violence were much more common than actual violence but were often just as effective in deterring cooperation because, in gang dominated communities, such threats are credible. Threats against the victim's or witness's mother, children, wife, or partner were particularly effective forms of intimidation.

Physical violence

While some incidents of physical violence were reported by respondents in all areas, physical violence was reported to be much more common in some areas than others. In addition, estimates of the frequency of physical violence varied even within the same area, depending on the responsibilities of the individual interviewed. According to K.I violent acts of intimidation-including, drive-by shootings, knee-capping, and beatings-occur on a daily or weekly basis.

Indirect intimidation

A third common form of intimidation, reported in almost every jurisdiction, involved indirect intimidation, such as gang members parked outside the victim's or witness's house, nuisance phone calls, or vague verbal warnings by the defendant or his or her associates.

Property damage

Property destruction was less common and involved shootings into a victim's or witness's house or car, burning their houses, or hurling bricks through the window of the victims or witnesses home.

Courtroom intimidation

From the study it was established that a common form of intimidation involved threatening looks or gestures directed by the defendant to the witness in the courtroom during trial. Gang members demonstrate solidarity with the defendant and make clear their readiness and ability to harm the witness by wearing black (symbolizing death) or using threatening hand signals. Because the judge and prosecutors may not understand the meaning of the gestures or other nonverbal threats, they may overlook these explicit attempts to intimidate the witness. In some cases, the Magistrate is aware of what the gang members are doing but feels that ejecting the individuals from the courtroom would violate the defendants' constitutional right to a public trial.

Characteristics of intimidation

The respondents were further requested to highlight the characteristics of intimidation, the main characteristic of intimidation that the respondents indicated were: Case-specific-threats or violence intended to dissuade a victim or witness from testifying in a specific case; Communitywide-acts by criminal gangs were intended to foster a general atmosphere of fear and non-cooperation within a neighborhood or community. The wholesale intimidation of neighborhoods by gangs is as harmful to witness cooperation as an explicit threat against an individual. Communitywide and case-specific intimidation were said to operate separately or in tandem. However, each case-specific act of violence against victims or by gangs promoted the communitywide perception that any cooperation with the criminal justice system is dangerous.

Most interview respondents and KI agreed that intimidation in domestic violence cases is different in nature from gang-related intimidation because of the close relationship between domestic partners and the near universality of intimidation in domestic violence cases. However, respondents agreed that intimidation associated with gang and violent crimes was escalating.

while intimidation linked to domestic violence was continuing at a steady rate. The respondents indicated that only unsuccessful intimidation attempts ever came to the attention of police.

From the study it was further noted that both case-specific and communitywide fear of retaliation are fed by the growth of powerful prison gangs whose members return quickly to the community because of brief sentences or are able from behind bars to arrange for friends or family members to threaten any potential witnesses. Due to the uninterrupted connections between incarcerated and neighborhood gang members, victims and witnesses no longer feel that imprisonment of the defendant pending trial or after conviction can ensure their safety in the community. The knowledge that gangs have easy access to members of the community deters many witnesses at once. KI conceded that the mere fact that a crime is gang-related is often sufficient to prevent an entire neighborhood from cooperating. Communitywide intimidation was the most frustrating type of intimidation because, even if no actionable threat is ever made, witnesses and victims are still deterred from testifying. Respondents and KI emphasized that the general atmosphere of intimidation and violence common to gang-dominated neighborhoods include frequent personal exposure to drive-by shootings and armed robberies.

In general, victims and witnesses who have no previous relationship and share no community ties with the defendant or suspect are better insulated from intimidation. Victims and witnesses who have been, and stay-relocated, and are able to keep their home and work addresses secret are also generally immune to intimidation. Respondents considered it extremely rare for a defendant or associate to leave his or her own community or socioeconomic milieu to intimidate a victim or witness in another jurisdiction

4.4.2 Mistrust in the Law Enforcement

As indicated in table 4.6, 20% of the respondents indicated that they do not have trust in Kenyan law enforcement. The respondents indicated that; investigating agencies do not have well qualified officers in sufficient numbers. Often they have excessive work load and the quality of investigation is adversely affected. Efficient investigation necessitates qualified personnel commensurate with the work load. Besides, lack of resources such as transportation, communication and office equipment affects the quality of investigations. Respondents further

indicated that access to justice is difficult because of corruption. The study found that, sometimes accused people corrupt investigating officers in order to hide police case files. This is intended to seek case adjournment through the back door or even provoke the presiding magistrate to terminate the case especially if it had several adjournments before. Corrupt court officials also give out witness information to defendants, including, in some instances, confidential court papers, which would otherwise be used to intimidate witnesses. The quality of justice is also poor because of political interference, for instance, a trial could just end prematurely just because the presiding court received stopping order from the Attorney general, also referred in legal jargon as Nolle Prosequere. In such so called stopping orders, there is always no good reason that is given to why the case is being stopped. This finding agrees with what scholars like Von Hirsch, (2005) found out implying that judicial independent is long overdue if the justice delivery process is to be trusted.

Respondents were also concerned that the prison institution has equally failed. Prisoners have unmonitored access to phones, and their correspondence is not screened, making it easy for even incarcerated offenders to arrange for intimidation. Due to the uninterrupted connections between the incarcerated prisoners and neighborhood gang members, victims and witnesses no longer feel that imprisonment of the defendant pending trial or after conviction can ensure their safety in the community. The knowledge that gangs have easy access to members of the community deters many witnesses at once. The prison institution is thus seen to have failed to protect the witnesses from such criminal gangs.

4.4.3 Lengthy Trial Process

The respondents were asked to state how the length of the trial affects the level of cooperation by the witnesses. 20% of the respondents indicated that length of trials is one of the major issues affecting cooperation by witnesses. The respondents indicated that majority of the cases in Kenya take unnecessary long period, before the trial commences and this affect the level of cooperation by witness. Some cases even take up to four to five months before trial begins. Frequent adjournments contribute to longevity of trial period. Reasons cited for frequent adjournment include the following: That the defense lawyer or the accused person was sick, the witnesses were not bonded, exhibits were not brought to court, the police file was missing, the

court prosecutor was not ready to prosecute, witness statements were not availed to the accused, experts report which include ballistic expert, medical report (P3) and document examiners report was not ready, or in some cases, the accused person was not produced in court during trial. Several respondents had appeared before court for three consecutive trials before they decided never to appear in court again. This finding resonates with what other scholars such as Duggan, and Civile (1976) observed in the US, that several cases take months prior to the commencement of the trial, and several months before such cases are concluded, due to the factors above.

4.4.4 Adversarial System of Trial

According to the study, 20% of all the respondents indicated that the adversarial process of trial contributed to non-cooperation by witnesses owing to its confrontational nature between the prosecution witnesses and the defense. Most respondents pointed out that the trial process is fearful because of the context between the defense and the prosecution. Frequently it results in what the respondents regarded as degradation through unduly intrusive questioning on apparently irrelevant matters that end up abusing them. A respondent even gave comments, that asking victims of rape questions on their sexual history ends up abusing them even more. The respondents argued that the adversarial process of trial deters witnesses from participating in a trial and that they will never come forward again to be court witnesses. This finding agrees with what Walgrave (2001) stated, that getting justice especially in all Common Wealth Countries is difficult, since the procedure of trial (adversarial system of trial) discourages witnesses from giving evidence to detail (due to its confrontational nature). This results to insufficient evidence which leads to termination of cases.

4.4.5 Community Ties

10% of all the respondents indicated that, victims and witnesses usually know the gang members and defendant against whom they are asked to testify. Typically, victims and witnesses are the children of the gang member's friend's, relatives, members of the same church, classmates, or neighbors. Coming forward to testify is thus deemed to threaten the collect conscience of the majority. Such community ties play a critical role to dissuade witnesses from coming forward to

testify. These findings agree with what Siegel, (2007) stated that, community ties deter witnesses from stepping forward to give evidence in court. It is likely that when such relations exist, people become passionate and develop a feeling that coming forward to testify would be injurious to entrenched relationships

4.4.6 Personal and Socio-economic characteristics of Non-cooperative witnesses

4.4.6.1 Age and Gender.

As shown in table 4.6, 7% of all the respondents indicated that personal and socio-economic characteristics of individual witness affect the level of cooperation by witnesses. According to both the respondents and KI, age was found to have some impact, affecting the understanding, clarity and authenticity of witnesses' testimony. It was pointed out that, the use of interrogative technique such as "rapid fire technique"-where a witness is bombarded with very many questions at the same time with little or no reference to witnesses' age, all contribute to intimidate or bully young witnesses leading to non-cooperation, particularly by standing mute in court. Gender was also said to affect the level of cooperation by the witnesses. The respondents stated that the confrontational nature of the trial process easily annoys and also sways most women witnesses pushing them off the balance, than men who remains stable through out the trial process.

4.4.6.2 Socio-economic characteristics of non-cooperative witness.

Several respondents from a high socio-economic class or status stated that they will only attend court once, before deciding never to attend court again. Most of them, especially businessmen were not willing to sacrifice another day to attend court during subsequent trial dates. The end result is termination of such cases. The study also found that a wealthy defendant always has a form of 'immunity' against any criminal charge, since he/she compromises most witnesses from a lower socio-economic class, who ends up failing to appear in court during trial. This prompts the presiding courts to terminate such cases due to lack of evidence.

Another Concern from some Respondents: In-adequate evidence due to Repealed Law on confession

70% of the respondents indicated that exclusion of evidence affects witness cooperation. Respondent's major concern on exclusion of evidence is that confessions made before police officers are not admissible in evidence, irrespective of rank of the officer. Due to this legal disability, valuable evidence against the defendant is lost during investigation. According to the respondents, after valuable evidence is thus precluded, going to court to testify becomes an act in futility and a waste of time.

Table 4.7: Samples of Selected Witness Concerns drawn from the Study on each Factor responsible for Non-cooperation by Witnesses during trial of criminal cases

Factors	Selected Witness Concerns
Intimidation	"A witness's head was found dumped at a Matatu stage with the body missing. This was intended to discourage the whole community against cooperating with CJSA. No one has been arrested despite the police having been being given proper leads. The government is doing very little to solve witness related issues".
Mistrust of Law Enforcement	"We will never have justice in Kenya, because the institutions of law enforcement are very corrupt".
Adversarial Process of Trial	"This process is very abusive because of its questioning nature. For example, asking victims of rape questions on their sexual history ends up abusing them even more. Its unduly intrusive questioning on apparently irrelevant matters is not only degrading but also very offending".
Lengthy Trial Process	"Some cases take up to five months before trial begins because of adjournments".
Community Ties	"Coming forward to testify will threaten the collect conscience of the majority".
Personal & Socio-economic characteristics	The Rich always have a form of 'immunity' against any criminal charge, since they compromises most poor witnesses.

4.5. Remedial measures for ensuring the cooperation of witnesses

The study sought to elicit remedial measures, for ensuring the cooperation by witnesses during the trial of criminal cases. The following are the main forms of remedies that the respondents suggested.

4.5.1 Enhanced legislation

The respondents emphasized the need of increasing penalties for obstructing justice as essential to better victim and witness security. The study considered: setting higher penalties for intimidation, requiring that penalties be served consecutively, and exacting higher bail and tighter bond restrictions as useful.

4.5.2 Community outreach and Awareness

Almost every respondent emphasized the need for public education on matters related to victim and witness security and assistance. Many respondents believed that, despite the seriousness of the victim and witnesses' intimidation problem, public perceptions on the dangers involved in testifying were exaggerated. For this reason, it was suggested that once a workable model for victim and witness protection was in place, it would be critical to take the program to gang-dominated communities and inform law-abiding residents of the services and safeguards available to them.

Community outreach is critical in establishing cooperative relationship with potential witnesses and preventing intimidation. The police need to find ways to build confidence in gang-dominated communities and ensure that victim/witness security is available. A number of outreach strategies were considered useful include; Community policing, assigning police units or opening police posts where gang intimidation is prevalent.

4.5.3 Trial and courtroom security measures

The respondents suggested several measures to decrease intimidation in and around the court precincts as follows:

Provision of a separate waiting area for victims and witnesses at Kiambu Law Courts, secure courts Precincts with security gate and introduce use of metal detectors on every one entering court precincts.

Another innovative courtroom approach that the respondents suggested is the formation of Community Support Groups; to encourage and give moral support to intimidated victims and witnesses who wished to testify. The support group members are supposed to cheer up witnesses during trial, when giving evidence in the midst of threatening looks and gestures in the audience. Despite the amount of work involved for the police and prosecutors, this approach was considered advantageous in providing increased security for victims/witnesses and also entire court staff at Kiambu Law Courts.

4.5.4 Witness Protection Act (2006)

Key informants and all other respondents recommended the full operationalization of the Witness Protection Act (2006) and establishment of Victim/Witness Agency and Programs that would factor in Emergency Relocation and Support for intimidated Witnesses. They recommended the establishment of Basic Victim/Witness Services such as; Short term and long term relocation, Emergency and longer-term counseling; Victim compensation where appropriate; providing information concerning the criminal justice system; notification of trial dates and the outcome of trials; a specific contact person who can assist the victim or witness with intimidation concerns throughout the trial and relocation; a 24-hour emergency contact number.

4.5.5 Make technology an ally.

Respondents recommended the introduction of gang-tracking software in Kenya that can locate and monitor their operations regularly. This gadget can be planted in the body of rogue gang members so that it can be used to locate and monitor gang activities at all times.

4.5.6 Protocols for Inter-Agency Cooperation

Respondents emphasized the establishment of cooperation between CJSA and other State Corporations and related agencies e.g. Communication Commission of Kenya (C.C.K) and

safaricom Limited. Such cooperation should aim at monitoring communication between incarcerated prisoners and members of the criminal gangs. Such cooperation can also aim to track and recover all phones sneaked into prison unnoticed and also intended to be used to intimidate victims and witnesses. By so doing, criminal gang networks and cartels will be cut at the nib.

4.5.7 Other recommendations

The respondents recommended a replacement of the present system of trial (adversarial) with another that is witness friendly.

The following were suggested to avert lengthy trial processes; Increase of government experts to quickly process expert reports in order to catch up with the timing of court trials. Prompt production of prisoners to court by prison authorities when required by courts to do so, failure to which, will constitute a serious punishment.

To build trust in the Criminal Justice Agencies, the government should do more to fight corruption in courts by for instance, criminalizing sharing of confidential court reports with criminals and weeding out corrupt police investigating officers. Indolence of prison authorities that leads to unmonitored access of phones to incarcerated prisoners should also be cut at the nib. The government must also allocate enough funds from the ex-checquer in order to support police operations and further training of police investigators. At the same time the number of police officers should be increased by employing more officers, so that they can match with the huge number of the Kenyan population. Political interference should also be shunned. The government should also stick to the principle of separation of powers where the Judiciary operates independently with out any interference from the Executive or Legislature. Such principle will minimize any attempts by those in political power to obstruct justice through Nolle Proseques

CHAPTER FIVE: SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

This chapter presents the summary of findings, conclusions, recommendations, and suggestions for further areas of research. The chapter summarizes the findings of the study in relation to the overall objective of the study; i.e. to establish the nature of non-cooperation by witnesses during trial of criminal cases in Kenyan courts with specific focus on Kiambu Criminal Courts.

5.2 Summary of Findings

272 serious cases were terminated between the years 2008 and 2010 due non-cooperation by witnesses. Terminated cases were categorized into three i.e. under section 202 C.P.C (termination due to non appearance of witnesses in Court during trial), under section 210 C.P.C (termination due to conflicting/contradictory evidence), and termination under section 215C.P.C (Termination due to insufficient evidence). The year 2008 had a total of 112 cases terminated. The year 2009 had 86 cases terminated while the year 2010 had a total of 74 criminal cases terminated. Terminated cases cut across all typology of criminal cases but most gang: violence related cases and cases that attract serious punishments were more affected. The magnitude of termination of criminal cases is thus appalling, and at this rate, threatens to stifle the criminal justice process. All these cases were terminated due to non-cooperation of witnesses.

The Study identified several major factors that contributed to non-cooperation by witnesses during trial of criminal cases. These include; Intimidation of victim and witnesses, Mistrust of law enforcement, Adversarial process of trial, Lengthy trial process, Community ties and finally Personal and socio-economic characteristic of individual witnesses. The reasons were explained in details in chapter four.

Several forms of non-cooperation by witnesses were identified. These include Non-appearance by witnesses before court during trial and giving of contradictory/conflicting statements during trial. In addition, several witnesses appeared before court during trial as required by law, but then turned hostile and disowned their statements. A few witnesses collaborated with criminals out of

fear for their lives and failed to produce exhibits in court during trial. As a result many cases were terminated, due to botched criminal prosecution process.

5.3 Conclusions

Given the overall study findings, the following conclusions have been made: Non-cooperation by witnesses during trial of criminal cases at Kiambu Criminal Courts is a real challenge, owing to the magnitude of the problem.

Based on the factors that contribute to non-cooperation by witnesses during trial, the Criminal Justice Delivery Process is at Limbo. On the other hand what is coming out clearly from the Study is institutional failure i.e. CJSA have failed to deliver Criminal Justice and cannot be trusted either. Though the government is doing its best to give the judiciary a new face through reforms, similar efforts should also target the Police, and the Prisons. Reforms should be all comprehensive, targeting legal impediments, personnel and integrity issues and impediments on processes amongst other areas.

Delivery of Criminal Justice is determined by the weight of evidence adduced by witnesses. Witnesses thus form a crucial link in the functioning of the agencies of the Criminal Justice Systems. Without this link, dispensation of Criminal Justice is a nightmare. Witness issues hence need to be addressed or else the Criminal Justice Process is under siege.

5.4 Recommendations

Based on the results of this study, the following recommendations are made in an attempt to address the problem of non-cooperation by witnesses during trial of criminal cases.

5.4.1 Policy Recommendation

1. Increased Government efforts to prevail on Prison cartels that have established networks with courts and the community at large to intimidate witnesses and the whole community against giving evidence in court. The study further recommends the establishment of cooperation between agencies of the Criminal Justice System and other state corporations with related agencies e.g. Communication Commission of Kenya (C.C.K) and Safaricom Limited. Such cooperation can aim at monitoring communication

- between incarcerated prisoners and members of the criminal gangs or to recover all phones sneaked into prison unnoticed, to be used to intimidate victims and witnesses.
2. To reduce victim and witness intimidation in and around the courtroom, the study recommends a provision of a separate waiting area for victims and witnesses at the Kiambu law courts. Plain clothes policemen should also be deployed in and around courts, in order to detect and arrest gang members who come to court purposely to intimidate victims and witnesses.
 3. On the use of technology, the government should introduce the use of gang-tracking software that can be used to locate and monitor gang members who have once been jailed and released. This software can be inserted into their bodies once they get jailed.
 4. Enhanced legislation and increased penalties for obstructing justice through witness intimidation. Besides, penalties should be served consecutively. The government should also consider higher bail and tight bond restrictions.
 5. The study recommended full operationalization of the Witness Protection Act (2006) and establishment of Victim/Witness Agency and Programs that would factor in Emergency Relocation and Support of intimidated Witnesses, Enhanced Basic Victim Services such as emergency and longer-term counseling; assistance with victim compensation, where appropriate and a specific contact person who can assist the victim or witness with intimidation concerns on a 24-hour basis.
 6. Police officers are better placed than officers of court to foresee and prevent intimidation at the street level. They should inform courts about repeat offenders and potential intimidators, or alert prosecutors on potential witnesses who are being intimidated. The police should also visit the families of potential intimidators and explain the laws concerning obstruction of justice. In addition, Police officers should reassure tenants in gang-dominated places by increasing patrols and putting up police posts in such areas, in order to decrease response time

7. To build trust in the Criminal Justice Agencies, the government should do more to fight corruption in courts by for instance, criminalizing sharing of confidential court reports with criminals and weeding out corrupt police investigating officers. Indolence of prison officers that leads to unmonitored access of phones to incarcerated prisoners should also be cut at the nib. The government should also allocate enough funds from the exchequer in order to support police operations and further training of police investigators. At the same time the number of police officers should be increased by employing more officers, so that they can match with the huge number of the Kenyan population. The repealed law on confession affects or weakens the quality of police investigations. Review of this section of law was found to be necessary. Political interference should also be shunned. The government should stick to the principle of "separation of powers", where the Judiciary operates independently with out any interference from the Executive or Legislature. Such principle will minimize any attempts by those in pulitical power to obstruct justice, by for instance, through Nolle Proseques. The government should also play a leading role in supporting CJSA in inculcating trust to the public through aggressive gang suppression measures. This is for instance, and in one day, by publicly executing all prisoners already sentenced to death by Kenyan Courts. This move will also be very supportive to CJSA.
8. With regard to Community ties, the study considers Community outreach as critical in establishing a working relationship between CJSA and the community. Through such cooperation, confidence building measures such as victim/witness security and support programs can be mooted. Community outreach will also be critical, in educating the public on the importance or benefits of coming out to testify in courts. One of the outreach strategies considered promising was: Community policing.
9. To avert lengthy trial processes through frequent adjournments, the study recommends prompt disposal of criminal cases by: Increase of government experts to quickly process expert reports in order to expedite court trials, Prompt production of prisoners to court by prison authorities when required by courts to do so, failure to which, will constitute a serious punishment. Courts should also introduce a system where by another magistrate

can be called upon to stand in on behalf of the Presiding Magistrate in case of sickness, so that the trials can proceed as planned.

10. The Kenyan trial process is adversarial in nature and was found to harass witnesses than being objective. Efforts should be made to introduce another model that is friendly towards all witnesses

5.4.2 Suggestions for further research

Given that this study has found Non-cooperation by witnesses during trial of criminal cases in Kenyan Courts to be a major challenge. Further Research can be done to examine the Role of the Government in handling Witness Related Issues. In addition, Further Research can also be done to examine the effect of the problem to the Country for example, in areas such as Policing.

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APPENDIX 1: INTERVIEW GUIDE

UNIVERSITY OF NAIROBI

FACULTY OF ARTS

DEPARTMENT OF SOCIOLOGY AND SOCIAL WORK

KEY INFORMANTS' INTERVIEW GUIDE FOR: MAGISTRATES, LAWYERS, COURT PROSECUTORS, COURT CLERKS AND POLICE INVESTIGATING OFFICERS.

My names are Paniel Mwangunde Mwaeke, a post graduate student of Sociology at the University of Nairobi. I am doing a study on delimiting the problem of non-cooperation by witnesses during trial of criminal Cases in Kenya: A case study of Kiambu Law Courts.

The information you will give will be treated in strict confidence and will only be used to advise policy makers on the appropriate measures to be taken in order to improve on cooperation. I would therefore appreciate if you could spare sometime for this interview.

We all know that the process of justice delivery here in Kenya has experienced several challenges in the recent past. Let us therefore talk about non-cooperation by witnesses during trial of criminal cases;

1. In what type of cases is non-cooperation by witnesses very common at the Kiambu Law Courts? How many cases have encountered in the last 3 years?

2. What factors contributes to non-cooperation by witnesses during trial of criminal cases?

3. Kindly explain how intimidation of witnesses affects non-cooperation by witnesses during the trial of criminal cases? -----

4. In what forms does non cooperation by witness manifest?-----

5. How often do you handle cases related to non-cooperation by witness, and how do you go about it?-----

6. How does mistrust of the law enforcement agencies contribute to non-cooperation by witnesses during the trial of criminal cases?-----

7. Do community ties between the offenders and the witnesses contribute to non-cooperation by witnesses during the trial of criminal cases? If yes, how exactly?-----

8. Does the adversarial trial contribute to non-cooperation by witnesses during the trial of criminal cases? If yes, explain how-----

9. How do personal and socio-economic characteristics like age, gender, status, class and religion contribute to non-cooperation by witnesses during the trial of criminal cases?-----

10. Does a lengthy trial process contribute to non-cooperation by witnesses during the trial of criminal cases? If yes, explain exactly how-----

.....
.....

11. What do you do to cope with non-cooperation by witnesses during trials?-----

.....
.....

12. How exactly does non-cooperation by witnesses affect the delivery of criminal justice in Kenya?-----

.....
.....

13. What do you think should be done to improve on non-cooperation by witnesses during trial of criminal cases?-----

.....
.....

14. Which are the main challenges facing witness protections and how can they be addressed?-----

.....
.....

15. (a) Explain how the following approaches can be used to enhance witness cooperation

a) Enhanced legislation-----

.....

b) Community empowerment.

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.....
.....

c) Community awareness.

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.....
.....

d) Community outreach.

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.....

APPENDIX 2: QUESTIONNAIRE

SECTION A: PERSONAL INFORMATION

1. Name of the Respondent.....

2. Indicate Your Gender

Male Female

3. Indicate your marital status

Married

Single

Divorced

4. What is your highest academic qualification?

Primary certificate Secondary school certificate

College certificate university degree post graduate

5. Which is your age bracket?

18-24 years 25-30 years 31-35 years

36-40 years above 40 years

6. Indicate your religion

Christian

Muslim

Hindu

Other (Specify).....

7. Are you currently employed?

Yes []

No []

8. Indicate your social-economic class

High class []

Middle class []

Low class []

SECTION B

Social-economic factors influencing non-cooperation for witnesses

9. In what forms does non-cooperation by witness manifest?

.....

.....

.....

.....

.....

10. Do you think age of the witness affect the level of cooperation of the witnesses?

Yes []

No []

If Yes or No explain how?

.....

.....

.....

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.....
.....
.....
.....

11. Do you think gender of the witness affect the level of cooperation of the witnesses?

Yes | |

No | |

If Yes/No explain how?

.....
.....
.....
.....
.....

12. Do you think political influence affect the level of cooperation by witnesses?

Yes | |

No | |

If Yes or No explain how?

.....
.....
.....
.....
.....

13. Does social status influence the level of cooperation by the witnesses?

Yes

No

If Yes/No explain how?

.....
.....
.....

14. Do you trust the judicial system?

Yes

No

If Yes/No explain your answer?

.....
.....
.....
.....

15. Does the length of trial affect the level of cooperation by the witnesses?

Yes

No

If Yes or No explain your answer?

SECTION C

Factors that account for non-cooperation by witnesses during the trial of criminal cases

16. What factors contribute to the non-cooperation by witnesses during trial of criminal cases?

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.....
.....

17. Does witness intimidation affect cooperation by witnesses during the trial of criminal cases?

A) yes b) No

If Yes/No explain your answer?

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.....

18. Highlight any forms of victim and witness intimidation you are aware of.

.....
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.....

19. To what extent does intimidation affect cooperation by witnesses during the trial of criminal cases?

.....
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Please explain your answer

20. To what extent does corruption of witnesses by the accused persons or their agents contribute to non-cooperation of witnesses in the trial of criminal cases?

.....
.....
.....

Please explain your answer

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.....
.....

21. Does mistrust of the law enforcement contribute to non-cooperation by witnesses during the trial of criminal cases? A) yes b) No

If Yes /No explain your answer?

.....
.....
.....

22. Do community ties between the offenders and the witnesses contribute to non-cooperation by witnesses during the trial of criminal cases? A) yes b) No

If Yes/No explain your answer?

.....
.....
.....

23. Does adversarial process of trial contribute to non-cooperation by witnesses during the trial of criminal cases? A) yes b) No

If yes /No kindly explain your answer?

.....
.....
.....

24. Do personal characteristics like age and gender contribute to non-cooperation by witnesses during the trial of criminal cases? A) yes b) No

If Yes/No explain your answer?

.....
.....
.....

25. Does lengthy trial process contribute to non-cooperation by witnesses during the trial of criminal cases? A) yes b) No

If Yes/No explain your answer?

.....
.....
.....

SECTION D Remedial measures for ensuring the cooperation of witnesses during the trial of criminal cases

26. Do you know of any victim/ witness programs and services administered by law enforcement agencies?

Yes []

No []

How effective are these programs and services

.....

.....

.....

.....

.....

27. What do you think should be done to improve on witness cooperation during trial

.....

.....

.....

.....

Thank you for your cooperation and time

APPENDIX 3

BUDGET

PROPOSAL DEVELOPMENT	Photocopying, Binding, Typesetting, Materials	15,000
DATA COLLECTION	Field work, Transport, Stationary, Telephone calls.	15,000
DATA PRESENTATION	Photocopying, Binding.	10,000
	TOTALS	40,000