

**IMPLICATIONS OF THE ADVERSARIAL LEGAL SYSTEM'S PROCEDURES
TO THE SPECIAL NEEDS OF CHILD VICTIMS OF SEXUAL ABUSE:
BALANCING THE RIGHTS OF ACCUSED PERSONS AND CHILD VICTIMS
OF SEXUAL ABUSE IN KENYA.**

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G80/80036/08

**A Thesis submitted in fulfillment of the requirements for the award of the degree of
Doctor of Philosophy of Law, University of Nairobi.**

September, 2013

Declaration

I hereby declare that the work contained in this thesis is my original work and has not previously in its entirety or in part been presented at any other University for a degree. All citations have been duly acknowledged.

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Dedication

To my parents, the late Mr. Thomas Ollando Agola and the late Mrs. Dorothy Aoko Ollando. Though not physically present, your inspiration and love for education have continued to be a powerful force towards the completion of this study. To both of you I shall forever remain grateful.

To all children who have been victims of sexual abuse, this study is a journey towards fair and friendly court procedures as a roadmap to your access to justice. It is my hope that Kenya will one day have court procedures that are child friendly, sensitive to their special needs and ensure justice to all victims of child abuse.

Acknowledgements

This research project would not have been undertaken and completed without the input of certain people. I take this opportunity to specially thank my supervisors; Dr. Winnie Kamau, Dr. Gidraph Wairire, Prof. Musili Wambua, Prof. Kiarie Mwaura and Prof. Edwin Abuya for their invaluable input and effort towards the successful completion of this thesis. I am grateful to Professor Migai Akech and Dr. Celestine Nyamu for their intellectual input. I wish to also appreciate the administrative support of the following who served as Deans of the School of Law during the period of the study: Prof. Kameri-Mbote, Justice Prof. Otieno Odek, Prof. Ben Sihanya and Mr. Okech Owiti. To the Board of Post Graduates Studies, University of Nairobi and the entire staff of the School of Law, thank you all for your support in various ways.

Special gratitude and appreciation to my family; my husband Paul and my children Petrine, Jerry, Jocelyn and Dorothy for their unwavering support and sacrifice throughout the study period. I appreciate your patience, encouragement and moral support throughout the study period. To my siblings, Bonaventure, Joseph, Christine, Ernest, Zacchaeus and Jackline, thank you all for your encouragement. To my nephew Cecil, thank you for your inspiration and encouragement.

To my research assistants: Yohana Gadaffi, Francis Kaburu, Dolphina Alego and Grace Nyang'or, thank you all for your dedication and sacrifice that you made by leaving the comfort of your families to collect data from the various courts countrywide. Special thank you to Yohana Gadaffi for your sacrifice in continued research assistance to the completion of the study.

I wish to extend my appreciation to the Honourable Judges of the Court of Appeal, the highest court of the land at the time of data collection (The Supreme Court had not been established as at the time of data collection). My sincere thanks to the High Court judges who gave their views during the interviews despite their daily busy cause lists. Special thanks to the judges of the Interim Independent Constitutional Dispute Resolution Court who also participated in the interviews. The study benefited greatly from all the judges' wealth of experience amassed over a period of over 20 years either as magistrates or advocates in private practice before their appointment as judges.

Special gratitude to all the magistrates and lawyers in the various selected children courts who participated in this research and took the testimony of the CVSA at the selected children court who participated in this research. The magistrates presided over child sexual abuse cases and therefore provided an opportunity for the research to observe the procedure as the CVSA testified.

This list would not be complete without mentioning the valuable participation by all the prosecutors, investigating officers, social workers and CVSA guardians involved in CSA cases. Despite your busy schedules, you still managed to find time to respond to the study requests.

A very special thank you to all the CVSA and their guardians who gave permission to interview the CVSA and participated in the study. Despite the sensitivity of the study, they volunteered to share their experiences and provide valuable information for the study. Without your input, this study would not have been possible.

There are many other people who contributed to this study in one way or the other and it is not possible to list all of them and thank them individually but their contributions form part of the success of the study. To you all thank you.

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List of Abbreviations

ACHPR	African Charter on Human and Peoples Rights (The Banjul)
ACRWC	African Charter on the Rights and Welfare of Children
AG	Attorney General
CA	Court of Appeal
CID	Criminal Investigation Department
CJS	Criminal Justice System
CLAN	Childs Legal Network
CLE	Continuous Legal Education
CNSCP	Children in Need of Special Care and Protection
CPO	Court Preparation Officers
CRADLE	Child Rights Advisory Documentation and Legal Centre
CSA	Child Sexual Abuse
CSAS	Child Sexual Abuse Syndrome
CVSA	Child Victim of Sexual Abuse
DBPJVCAP	Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985)
DNA	Deoxyribonucleic Acid
DPP	Director of Public Prosecutions
DSA	Daily Subsistence Allowance
EA	East Africa
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EHRR	European Court of Human Rights
FGD	Focused Group Discussion
FGM	Female Genital Mutilation
GoK	Government of Kenya
GVRC	Gender Violence and Recovery Centre
HIV/AIDS	Human Immunodeficiency Virus/Acquired Immuno-Deficiency
HRW	Human Rights Watch
IBEA	Imperial British East Africa
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	The International Criminal Tribunal for the Prosecution of Persons

	Responsible for Genocide and other Serious Violations of International Humanitarian Law committed in the Territory of Rwanda and Rwandese citizens responsible for Genocide and other Such Violations committed in the territory of neighbouring states, between 1 st January 1994 and 31 st December 1994 (ICTR)
ICTY	International Criminal Tribunal for the former Yugoslavia
IICDRC	Interim Independent Constitutional Disputed Resolution Court
JSC	Judicial Service Commission
KLR	Kenya Law Report
LSK	Law Society of Kenya
MOJNCCA	Ministry of Justice, National Cohesion and Constitutional Affairs
NGO	Non-Governmental Organizations
NPA	National Prosecuting Authority
P.S.S.P	Psycho- Social Support Providers
PSSC	Psychosocial Support Service Center
PTSD	Post Traumatic Stress Disorder
QB	Queens Bench
RPE	Rules of Procedure and Evidence
SPSS	Statistical Package for Social Sciences Syndrome
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UKHL	United Kingdom House of Lords
UNCRC/CRC	United Nations Convention on the Rights of the Child
UNGMCCVWC	United Nations Guidelines on Justice in Matters Concerning Child Victims and Witnesses of Crime (2005)
UNICEF	United Nations Children’s Fund
UNODC	United Nations Office on Drugs and Crime
USA	United States of America
WRAP	Women’s Rights Awareness Programme
YJCEA	Youth and Justice Criminal Evidence Act

Definition of Key Terms

Adversarial legal system - This refers to the conventional dispute resolution process applied by the courts where the parties to a case have a duty to collect and present their evidence before a passive judicial officer who makes the decision based on the parties' arguments before court. It assumes that both parties have the capacity and ability to contest the case on an equal footing.

Child- Anyone below age eighteen years. This includes both boys and girls.

Child abuse - Any action or inaction, directed at a child and whose consequences result into the injury (physical, emotional or both) of the child.

Child Sexual Abuse (CSA) - The contact or interaction between a child and an older or more knowledgeable child or adult (a stranger, sibling, family member, caretaker, parent or anyone in a position of authority in relation to the child) when the child is used as an object of gratification for the abuser's sexual needs. These contacts or interactions are carried out against the child using force, trickery, bribes, threats or pressure. Sexual abuse may in some cases be accompanied by physical, verbal, or emotional violation.

Child Victim of Sexual Abuse (CVSA) - The child who has been subjected to child sexual abuse.

Court procedures - The rules, practice, guidelines and conduct that govern the process of trials of cases of sexual abuse which the child victim must abide by while testifying about the abuse.

Criminal Justice System (CJS) -The legal process, institutions and players through which the accused and the CVSA are subjected to so as to determine the guilt or innocence of the accused person.

Criminal justice agencies - The different departments/entities that are involved in the process of determining the guilt or innocence of the accused.

Disempower -	To weaken a child's ability to testify by failing to provide measures that protect CVSA.
Due process of law -	The purposive measures or steps followed by a court of law or administrative institution to ensure fairness in their decision or outcome. The objective of any criminal trial, including those of child sexual abuse is to establish the guilt or innocence of the accused. In this study, due process refers to the various procedural steps that the CVSA are subjected to while testifying to assist the court establish the guilt or innocence of the accused. The study sets out to investigate the sensitivity or otherwise of the procedures to the special needs of CVSA.
Empower -	To enable CVSA testify in court by making provisions that recognize their special needs and vulnerability within the CJS.
Interventions -	Measures that make it possible for the CVSA to testify in court, taking into account their vulnerability and special needs.
Procedural law -	The body of laws that governs the ways in which the substantive laws are to be administered. It covers such subjects as the way suspects can legally be arrested, searched, interrogated, tried and punished.
Special needs -	The requirements that are specific to CVSA because they are children, sexually abused and have to testify in court about the abuse.
Substantive law -	The body of law that defines criminal offences and their penalties. Substantive laws which are found in the various penal statutes, govern what people legally may or may not do in their relationships with other people. Examples of substantive laws are those that prohibit and penalize murder, rape, robbery and other crimes.

Abstract

In accessing justice from the courts under the adversarial criminal procedure trial, Child Victims of Sexual Abuse (CVSA) need to testify in the presence of the accused person who has a right to cross examine them under the fair trial rights as internationally recognized and stipulated in the International Covenant on Civil and Political Rights (ICCPR) and many countries' constitutions. The adversarial criminal procedure rules of evidence may not have anticipated the participation of children in the court process hence their insensitivity to the physical, emotional and psychological needs of CVSA and a violation of their right to participation and protection in Child Sexual Abuse(CSA) trial process as stipulated by the United Nations Convention on the Rights of the Child (UNCRC), the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (DBPJVCAP, 1985) and the United Nations Guidelines on Justice in Matters Concerning Child Victims and Witnesses of Crime (UNGJMCCVWC, 2005).

The imbalance between the rights of accused persons and CVSA in CSA trial in some cases results into a miscarriage of justice in Kenya. Limited studies to this effect make it difficult to design an appropriate intervention to improve access to justice by CVSA. Using both quantitative and qualitative approaches of data collection, this study collected data in five purposively sampled children courts in Kenya, namely Nairobi, Kisumu, Nakuru, Mombasa and Eldoret Children's Courts. Fifty CVSA and key informants who included judges, magistrates, lawyers, and parents/guardians of CVSA, police officers (investigators and prosecutors), children officers and social workers were purposively sampled and data collected using interviews, focus group discussion, observation and records review methods. Statistical Package for Social Sciences (SPSS) and thematic analysis were used to analyze quantitative and qualitative data respectively. The adversarial and inquisitorial trial procedures from different jurisdictions were compared and a procedural justice framework for CSA trial identified trial. Using the procedural justice framework identified for CSA trial as the reference point, the study examined CSA trial procedure in Kenya and found the pre-trial, trial and post-trial procedures to be inadequate in addressing the special needs of CVSA therefore unsuitable for CSA trial. The study makes policy, administrative, research and legislative recommendations and provides a draft of a special hybrid model of child sexual abuse trial procedure that balances the rights of accused persons and those of CVSA to be known as the Child Sexual Abuse Procedure Act.

CHAPTER ONE

INTRODUCTION

1.1 Introduction

This chapter introduces the study by giving a brief background to the nature and extent of CSA. It also discusses the impact of child sexual abuse (CSA) on child victims of sexual abuse (CVSA). The chapter proceeds to discuss global concerns for the protection of children generally from abuse. This is followed by a statement of the problem, objectives of the study, justification and scope of the study, theoretical framework and the methodological approach applied to collect and analyze data. The chapter also presents ethical concerns for the study. In addition, the chapter provides a breakdown of chapters for the study.

1.1.1 The Nature and Extent of CSA and Its Impact on CVSA

CSA is a global phenomenon that, paradoxically,¹ often occurs within the context of the family, an institution that ideally should protect children.² It is a crime that occurs in private, away from the glare of the public. It violates the dignity of children as it invades the privacy of its victims, taking away their self-esteem and childhood.³ As will be discussed later, the private nature⁴ of committing CSA, and the possibility that the only witnesses to the crime may be the perpetrator and the victim, presents serious difficulties to the prosecution of the offence under the adversarial legal system.⁵ CSA robs girls of their virginity (a most cherished status that cannot be quantified).⁶ Likewise, CSA robs boys of their innocence which may be exhibited in adulthood as a form of relational problem.⁷ The abuse is often accompanied by other forms of abuse such as physical, emotional, psychological, mental and spiritual violence.⁸ CSA disrupts the normal healthy

¹ The paradox of child sexual abuse is that the home, institution or persons with the duty to protect children are the ones leading in committing sexual assaults on children under their care due to the private nature of any home. The abuse can thus take place over a long period of time without being detected by legal authorities.

² K Melville and G Bird, *Families in Intimate Relationships* (R R Donnelley & Sons 1994) 436.

³ J Temkin, *Rape and the Legal Process* (Oxford University Press 2002) 4.

⁴ Child sexual abuse, unlike other offences is committed in private, often an institution or home by people who have the duty to care for children and so are trusted by them. When the abuse occurs, the fear instilled in the child and many other factors hinder its detection and make it difficult to prosecute.

⁵ Abrams E D and Ramsey H S, *Children and the Law: Doctrine Policy and Practice* (Minn West Group 2000)541.

⁶ *Op. cit* n 3.

⁷ *Ibid.*

⁸ *Op. cit* n 3.

development of its victim and results into coping difficulties physically, intellectually or emotionally.⁹

It is estimated that more than 1.2 million children worldwide are subjected to various forms of sexual abuse while a child is sexually abused every two minutes.¹⁰ According to a report by UNICEF¹¹ released in 2010, India reports over 400,000 cases of CSA annually while in Taiwan, over 100,000 cases are reported every year. Thailand reports a minimum of 200,000 cases while Philippines records over 100,000 cases of CSA. The United States of America is not spared either and records a minimum of 325,000 cases yearly, while East and Central Europe, Brazil and West Africa receive a minimum of 175,000, 35,000 and 100,000 cases of CSA respectively in a year.¹²

The figures above refer to commercial sex trade involving children in a few selected parts of the world. However, commercial sex is only one form of CSA.¹³ amongst different forms such as pornography, sodomy, indecent assault. In Malaysia, 2,780 cases of CSA were reported to the police in 2010 and out of that number, 72% were cases of incest.¹⁴ In South Africa, more than 27,417 cases of child sexual abuse were reported to the police in 2008/2009 while there is a possibility that many more CSA cases remained unreported.¹⁵ From the foregoing, CSA affects many children worldwide as child sexual exploitation appears to be a lucrative and thriving venture, despite the existing laws against the offence.¹⁶ Further, there is a possibility that more children suffer sexual abuse but the cases are not reported or documented due to low reporting associated with the classical adversarial trial procedure.¹⁷

⁹ G Davies and E Noon, *Evaluation of the Live Link for Child Witness* (Home Office 1991) 3-6.

¹⁰ UNICEF, 'Fighting Child Sexual Abuse in the Caribbean'
<www.unicef.org/infobycountry/Jamaica_62479.html> accessed 29 May 2013.

¹¹ UNICEF, 'A Situational Analysis of Child Sexual Abuse' (2011) 3,5 <<http://unicef.org/protection/index-exploitation-html>> accessed 24 February 2012.

¹² UNICEF, 'Forlorn and Scared: A Situational Analysis of Child Sexual Abuse and Commercial Exploitation in the Pacific region' (2010) 12 <<http://unicef.org/protection/index-exploitation-html>> accessed 24 February 2012.

¹³ UNICEF, 'Child Maltreatment: Prevalence, Incidence and Consequences in East Asia and the Pacific' (2012) 8 <www.unicef.org/eapro/Child_Maltreatment.pdf> accessed 29 May 2013.

¹⁴ UNICEF, 'Child Sexual Abuse in Malaysia' (2011) 22 <<http://unicef.org/protection/index-exploitation-html>> accessed on 24 February 2012.

¹⁵ South African Police Statistics on Annual Crime Report (2011) 17 <[web.http://www-rape.co.za/index.php?option=com-content&task=views&id=875](http://www-rape.co.za/index.php?option=com-content&task=views&id=875)> accessed 24 February 2012.

¹⁶ Human Rights Internet, *The Canadian Component of the Protection Project: A Socio-legal Analysis of International Jurisprudence on the Commercial Sexual Exploitation of Women and Children* (Harvard University's John F. Kennedy School of Government 2005) 5.

¹⁷ *Op. cit* n 4.

At the time this study was undertaken, it was not possible to state with precision the number of children who are sexually abused due to lack of a systematized reporting of abuse cases.¹⁸ However, preliminary investigations carried out by the study revealed that different agencies dealing with child abuse received reports independently and did not necessarily inform their counterpart departments or agencies. For example, a case reported to the police may not be reported or forwarded to the Children Department, but may be settled at the police station, or passed on to court, without it being reflected in the records of the Children Department. Likewise, a case reported to the Children Department may be finalized at the department level, reported to the police or passed on to court for protection orders.

Limited data from the Children Department indicated that 1,718 cases of CSA were reported in the year 2010, while Kenyatta National Hospital recorded 152 CSA cases in the same year.¹⁹ The Kenya Police report for the year 2010 did not have a specific category for child sexual offences but such crimes were listed under offences against morality.²⁰ They included defilement, sodomy, incest, and indecent assault, totaling to 2554 in 2010.²¹ The discrepancy in figures on CSA from key government departments dealing with the same issue indicates that there could be more children abused, whose reports are not captured by the available statistics in Kenya. The Non-Governmental-Organizations (NGOs) handling CSA cases also had differing statistics. Child Welfare Society of Kenya received 125 cases of CSA in 2010, while CLAN recorded 522 in the same year.²² According to the Nairobi Women's Hospital (Gender Violence Recovery Centre), 1437 CSA cases were recorded in 2010.²³

CSA is therefore a big challenge in Kenya as is the case in other parts of the world. The implication is that more children are becoming participants in the justice system as witnesses/victims in CSA related cases, hence the need to accommodate their concerns

¹⁸ UNICEF and ANNPCAN Kenya, *A Situational Analysis of Sexual Exploitation of Children in Eastern and Southern Africa Region: The Vicious Circle of Sexual Exploitation, HIV/AIDS, Vulnerability of Children and Violation of Children's Human Rights, Nairobi* (2005) 15.

¹⁹ GoK and UNICEF, 'Violence Against Children in Kenya: Findings from a 2010 National Survey' (2010) <www.togetherforgirls.org/docs/Findings_from_a_2010_National_Survey.pdf> accessed 29 May 2013.

²⁰ Kenya Police Crime Report and Data (2010), <<http://www.kenyapolice.go.ke/resources/CRIME%20STATISTICS%202010.pdf>> accessed 30 June 2012.

²¹ Ibid.

²² *Op cit* n 19.

²³ Gender Violence Recovery Centre Report, (2010) Nairobi Women's Hospital page 5.

and ensure their effective participation in the court process.²⁴ The discussions in the next section trace the historical development of global concerns towards child protection generally and CSA in particular.

1.1.2 Global Concerns for the Protection of Children from Abuse Generally

Before the 19th century, world authorities and private organizations in Europe were least concerned about child protection and children were considered the property of their fathers or parents, who could do with them what they pleased.²⁵ Gradually, laws were introduced to protect children against heavy labour, neglect, mistreatment and withholding them from school.²⁶ Child protection became a public concern and states felt responsible towards children who were neglected, mistreated and exploited.²⁷ The global concerns culminated into the first Declaration on the Rights of Children by the fifth Assembly of the League of Nations in 1924.²⁸ The declaration emphasized the material needs of children such as food, nursing care and shelter.

In 1959, another Declaration on the Rights of the Child was passed to further enhance the status of children in the society, based on the premise that ‘mankind’ owes to children the best it can give them. This declaration emphasized the duties humankind owed to children, such as protecting them from abuse. The Declaration was however vague and did not state whose responsibility it was to protect children from abuse. The period that followed the 1959 Declaration was marked by a growing concern and appreciation that more action was needed to protect children by vesting in them rights and correlated duties.

The year 1979 was declared the International Year of the Child and further consultations led to the 1989 United Nations Convention on the Rights of the Child (UNCRC).²⁹ This

²⁴ E S Buzawa and C G Buzawa, *Domestic Violence: The Criminal Justice Response* (3rd Ed, Sage Publication 2003) 25.

²⁵ M Freeman and D A Veerman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell 2001) 54.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ The League of Nations became concerned about the massive abuse and need to protect children following the affliction and devastation of children by the Great War and its aftermath.

²⁹ Convention on the Rights of the Child, adopted 20th November 1989 (entered into force 2 September 1990) GA Res. 44/25 (1989), UN Doc. A/RES/44/25 (1989). Text also available in (1989) 28 *International Legal Materials* 1448 and (1990) 29 *International Legal Materials* 1340. CRC has been ratified by every state in the world except Somalia and the United States of America. See Office of the United Nations High Commissioner for Human Rights ‘Status of ratifications of the principal

was the first ever single international treaty to recognize the vulnerability of children and their need for special protection. The near universal ratification of the UNCRC showed the global recognition of child rights and the need to protect them, while appreciating that children have special needs that need to be addressed in a single document. The UNCRC obligates member states to take special measures to protect children against all forms of abuse, including CSA. There are five important provisions of the UNCRC that declare the rights of CVSA which should be protected, implemented and enforced in the court process. The rights have come to be known as the fundamental principles of child protection namely:

Best interest of the child

The first right is provided by Article 3 of the UNCRC and is referred to as children's right to have their best interest considered as paramount by any individual or institution in any matter concerning them. In CSA trials therefore, the courts must take into account the best interest of CVSA at all stages of the trial process.

Non-discrimination of children

The second right to CVSA is provided by Article 2 of the UNCRC and states that no child should be discriminated against on any ground. The right to non-discriminative treatment on any ground therefore does not preclude the trial process. In chapter six, the study discusses some evidentiary rules of procedure in the adversarial trial that discriminate against CVSA.

Children's right to participate and express their views in matters affecting them

The third right to CVSA is provided by Article 12 of the UNCRC and states that any child capable of forming his/her own views has the right to express those views freely in all matters affecting them. In addition, children have a right to be heard and their views shall be given due weight according to the age and maturity of the child. CVSA therefore have a right to express themselves freely while testifying in CSA trials. The enforcement of this right in the adversarial system may require accommodation of special needs of CVSA as they testify.

international human rights treaties' <<http://www.ohchr.org/english/countries/ratification/11.htm>>The UNCRC is the first single universal document that provides for children's rights.

Respect and Dignity

The fourth right of CVSA under the UNCRC is provided by Article 39 which states that children must be treated with respect and their dignity upheld. In testifying before courts in CSA cases, CVSA therefore have a right to be treated fairly under court procedures that respect, protect and uphold their dignity.

Right to protection

Article 32 of the UNCRC provides that children have a right to be protected from any activity that may be harmful to their child's physical, mental, spiritual, moral or social development. The court process must therefore protect CVSA from any of the above as a result of their testimony. The provisions of the UNCRC bind all member states. Kenya ratified the UNCRC on the 30th July 1990 and is therefore duty bound to enforce the protection of CVSA as they testify in court.³⁰ This calls for the incorporation of CVSA rights as identified under the UNCRC into the trial process of CSA. Subsequently, there is need to strike a balance between CVSA rights and the rights of accused persons to a fair trial.

At the regional level, the African Charter on the Rights and Welfare of Children (ACRWC)³¹ was passed by the African Union in 1990 to provide for peculiar African circumstances which were not deemed adequately addressed by the UNCRC in the interest of the African child. The conception of the ACRWC was premised on the view by African states that Africa's participation in the drafting of the UNCRC was minimal as it was dominated by participating 'western' countries.³² As such the conception of child rights as contained in the UNCRC was viewed by the then OAU as more reflective of western ideologies of human rights, while lacking in African cultural values and civilization.

³⁰ *Op. cit* n 14.

³¹ African Charter on the Rights and Welfare of the Child, adopted July 1990 (entered into force 29th November, 1999) OAU Doc.CAB/LEG/24.9/49 (1990). ACRWC was also passed to give effect to the provisions of the African Charter on Peoples and Human rights in respect to child welfare.

³² T Kaime, *The African Charter on the Rights and Welfare of Children: A Socio-Legal Perspective* (Pretoria University Law Press 2009) 16.

1.1.3 Regional Concern for Child Protection

The need to have an African framework at the regional level that reflects African virtues, values, cultural heritage and historical development therefore inspired the African countries, then under the umbrella Organization of Africa Union (OAU) – (later renamed Africa Union) (AU) to adopt a framework on child welfare that is sympathetic to the different cultures, historical background, social systems and economic organizations in Africa.³³ As a result, the African Charter on the Rights and Welfare of Children came into being in 1990 and was signed by Kenya in the same year. Amongst some of its provisions is the obligation by states to protect children from sexual abuse.³⁴

1.1.4 National Concern for Child Protection

At the national level, Kenya passed the Children Act 2001³⁵ to domesticate the provisions of both the UNCRC and the ACRWC. Further initiatives towards the protection of CVSA included the enactment of the Sexual Offences Act 2006³⁶ and the Witness Protection Act 2006.³⁷ The former provided substantive laws on sexual offences generally with some provisions for CSA cases. The latter attempted to provide protection to witnesses who may fear giving evidence in court generally including children. A further step was the amendment of the Evidence Act³⁸ to allow courts to convict an accused person on the evidence of a child alone,³⁹ thereby removing the requirement for corroboration. The Constitution⁴⁰ provides for the Bill of Rights⁴¹ which protects everyone including children.

Despite Kenya's achievements in substantive laws that protect children from abuse and CSA in particular,⁴² there is still concern that the classical adversarial court procedure

³³ Ibid.

³⁴ *Op. cit* n 22. Article xxvii obligates state parties to protect children from sexual abuse.

³⁵ The Children Act 2001.

³⁶ The Sexual Offences Act 2006.

³⁷ The Witness Protection Act 2006.

³⁸ The Evidence Act Cap 80 Laws of Kenya.

³⁹ The Criminal Law (Miscellaneous Amendment) Act No 5/2003.

⁴⁰ Kenya Gazette Supplement No 55(The Constitution of Kenya) Part 2-The Bill of Rights.

See also USA Constitution-Bill of Rights; Section 36 of the 1999 Constitution of Nigeria; Article 20 of the Indian Constitution; Section 11 of the Canadian Constitution's Charter of Rights; Commonwealth of Australia Constitution Act 1900 (UK).

⁴¹ Ibid (chapter four).

⁴² The achievements by Kenya in the area of Substantive laws include the ratification of the UNCRC and the ACRWC as well as the passing of the Children Act 2001, amendment of the Evidence Act to remove the corroboration requirement in the evidence of children, the passing of the Sexual Offences Act and the Witness Protection Act.

presents challenges in prosecuting CSA, thereby denying justice to CVSA. Minimal developments have taken place in the area of procedural laws, raising the concern that the court procedure protects the accused person to the disadvantage of CVSA.⁴³ This therefore calls for the need to strike a balance between the rights of accused persons and those of CVSA. At a conference held in Nairobi in 2004 by child rights protectionists from Africa,⁴⁴ the participants cited court procedure as one of the challenges faced in seeking justice for CVSA. In 2007, participants at a workshop⁴⁵ expressed concern that the procedural difficulties continue to hinder attempts to seek redress for CVSA from the courts. In the absence of developments in the procedural laws⁴⁶ that protect CVSA, the implementation of the substantive laws remains anchored in the adversarial legal system. This may expose CVSA to further victimization in violation of their rights.⁴⁷

The court procedure is technical, elaborate and centered on the guilt or innocence of the accused persons while exposing CVSA to re-victimization.⁴⁸ The procedure disempowers CVSA (a key prosecution witness) from coherently narrating the sensitive details of CSA in court.⁴⁹ The system assumes that CVSA are mature enough and have the same capacity as the accused persons to argue out their cases before an impartial judicial officer who makes decisions based on the arguments presented by both the defence and the prosecution.⁵⁰

Some challenges faced by CVSA while testifying in court include their immaturity with regard to physical, cognitive and emotional development which greatly affects their ability to comply with the expectations of the legal process.⁵¹ As an example, children

⁴³ UNICEF, 'Violence Against Kenyan Children Excessive, UNICEF Report Finds' (2012) <www.voanews.com/content/kenya-girls-at-risk-of-sexual-violence/1571132.html> accessed 29 May 2013.

⁴⁴ The conference was hosted by ANNPCAN-Regional office on the theme *CSA and the challenges of protecting the CVSA in Nairobi* in 2006.

⁴⁵ ANNPCAN, *Proceedings of a Workshop in Kenya on the Challenges of Implementing the Sexual Offences Act 2006* held in Nairobi in 2007.

⁴⁶ Procedural laws include statutes which regulate the conduct of the court process. They include the Constitution of Kenya, the Evidence Act Cap 80, the Criminal Procedure Code Cap 75, some aspects of the Sexual offences Act of 2006 and the Witness protection Act of 2006.

⁴⁷ L Hoyano and C Keenan, *Child Abuse: Law and Policy Across Boundaries*(Oxford University Press 2010) 598.

⁴⁸ *Op. cit* n 5.

⁴⁹ L C Brannon, 'The Trauma of Testifying in Court for Child Victims of Sexual Assault v The Accused's Right to Confrontation'(1994)18 Law & Psychology Review 439, 440.

⁵⁰ C Tapper, *Cross and Tapper on Evidence*(12th edn, Oxford University Press 2010) 176.

⁵¹ D Whitcomb, E R Shapiro and L D Stellwagen, *When the Victim Is a Child: Issues for Judges and Prosecutors* (National Institute of Justice 1985)17.

typically develop their own terms for body parts and are unlikely to respond adequately to questions about sexual organs.⁵² However, if allowed to use their own words or to describe the abuse using pictures or dolls, children's evidence may have a lot of crucial details.⁵³

Although Kenya has enacted laws that recognize the rights of children,⁵⁴ there is no specific statute that provides procedural mechanisms to implement substantive rights of CVSA in CSA cases.⁵⁵

Despite the gains made in passing substantive laws that declare the rights of children, the absence of a specific procedural law that addresses CVSA concerns when they testify in CSA cases makes it difficult to ensure the trial is fair to both CVSA and accused persons.

Whereas the Sexual Offences Act 2006⁵⁶ expanded the definition of sexual offences and enhanced penalties thereof, the Witness Protection Act⁵⁷ provides protection to witnesses who have vital information but fear for their life in case they testify in court. The witnesses envisaged under the Witness Protection Act 2006 appear to be in respect to high level crimes such as money laundering, drug trafficking, human trafficking and crimes against humanity. CVSA require special protective court procedure yet they are not provided for under the Witness Protection Act. This observation is based on the wording of the Act which does not focus on the special needs of children that make them require protective procedure. The Act focuses on those who have vital information but fear giving evidence on the basis of a threat to their life. Children may not even know that they are at risk when they testify yet the Act fails to make this clarification which is important in its operationalization to protect children.

According to Myers, the classical adversarial trial procedure subjects CVSA to secondary and institutionalized victimization leaving them more traumatized than before testifying

⁵²R J Spencer and R Flin, *The Evidence of Children, Law and Psychology* (Blackstone Press Ltd 1998)75.

⁵³Ibid.

⁵⁴*Op. cit* n 35, 36, 37, 40.

⁵⁵*Op cit* n 19.

⁵⁶*Op. cit* n 27.

⁵⁷*Op. cit* n 28.

in court.⁵⁸ Despite the efforts to protect children generally, there is still concern that the imbalance between the rights of accused persons to a fair trial and the rights of CVSA is an impediment in accessing justice for CVSA.⁵⁹

Although Kenya has succeeded in passing substantive laws that declare and provide for the protection of CVSA, there is still concern that the court procedure through which the rights of CVSA can be protected is not child friendly. The procedure subjects CVSA to trauma and re-victimization therefore resulting into the inability of CVSA to testify coherently and consistently. Studies have been carried out in the areas of child rights, causes of CSA, consequences of CSA and many related topics in Kenya.⁶⁰ However, no study has been undertaken in Kenya to examine the inadequacies of the court procedure through which CVSA testify in CSA cases. The lack of such a study therefore makes it difficult to design an appropriate intervention. This is the gap that this study seeks to fill.

1.2. Problem Statement

The study seeks to examine the classical adversarial trial procedure and its impact on the ability of CVSA to coherently testify in CSA cases in Kenya. While safeguarding the rights of accused persons in CSA cases, the classical adversarial trial procedure fails to take into account the rights of CVSA. The imbalance between the rights of accused persons and the rights of CVSA at times causes a miscarriage of justice in CSA cases in Kenya. The purpose of the study is to identify inadequacies of the trial procedure in CSA and develop appropriate interventions that balance the rights of CVSA and accused persons in Kenya.

1.3. Theoretical Framework

The study applies four theories namely: procedural justice theory, the psychoanalytic theory, the labeling theory and the rights theory. Procedural justice theory is relevant to the study in as far as it explains that fair procedures lead to fair outcomes/ treatment. Science and experience have demonstrated that CVSA require special procedures if they

⁵⁸ J Myers, 'The Child Witness: Techniques for Direct Examination, Cross-Examination and Impeachment' (1987)18 Pacific Law Journal 801, 804.

⁵⁹ *Op. cit* n 45.

⁶⁰ National Council for Children Services (NCCS), *Summary of the Outcome of Mapping and Assessing Kenya's Child Protection System: Strengths, Weaknesses and Recommendations* (National Council for Children Services 2010) 6-19.

are to be treated fairly/justly.⁶¹ The use of the scientific theory of psychoanalysis is therefore to show that children have special needs as victims of sexual abuse. The labeling theory drawn from the discipline of sociology explains the difficulties experienced by CVSA due to the labeling and stigma associated with being a child victim of sexual abuse. The rights theory explains the fact that all human beings are equal and entitled to human rights by virtue of being human beings. Competing human rights therefore have to be balanced to ensure the protection of the competing interests equally. The rights theory is relevant to this study to the extent that it argues for a balancing of competing rights. Accused persons rights to a fair trial therefore need to need to be balanced with concerns for CVSA protection if the trial procedure is to be seen as fair to both.

1.3.1 Psychoanalytic Theory

This classical theory is attributed to Sigmund Freud who is regarded as the founder of psychoanalysis.⁶² Psychoanalysis is a theory of personality that explains unconscious conflict, usually from childhood as a major factor in adulthood behaviour developed from a person's early psycho-sexual development, and the individual's efforts to deal with the resulting anxiety.⁶³ Freud also applied psychoanalysis as a therapy theory, by tracing incidences in ones' past life that cause conflict in adulthood, and addressing them to change the individual's behaviour. In order to understand better Freud's psychoanalytic theory, an understanding of personality concept is important at this stage. Dodge defines personality as: 'The unique and characteristic ways in which an individual reacts to his/her surrounding'.⁶⁴

Important elements in the structure of personality in the Freudian psychoanalytic theory are the *id*, *ego* and *super ego*, explains Kosslyn and Rosenberger.⁶⁵ Sigmund Freud was convinced that the three components of an individual's personality control one's behaviour.⁶⁶ The *id* is the most basic part of personality and is present at the birth of every

⁶¹ C McMahon, 'Due Process: Constitutional Rights and the Stigma of Sexual Abuse Allegations in Child Custody Proceedings' (1999) 39 Cath Law 153, 185.

⁶² F Dodge, *Psychology* (Prentice Hall1997) 489.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ M S Kosslyn and S R Rosenberg, *The Brain, the Person, the World* (Pearson Education Co 2001) 365.

⁶⁶ Ibid.

individual.⁶⁷ It functions on pleasure principle, and so is a little animalistic and can be irrational and illogical in the absence of the other two.⁶⁸ The *ego* functions to control and maintain the desires of the *id* by operating on reality.⁶⁹

As an illustration, when an individual sees a child and the *id* develops a desire for pleasure by engaging the child in a sexual act, if the person's *ego* is fully developed, it will inform the *id* it is not the right thing to do despite the pleasure that may be gained from it and the individual becomes rational, deals with the reality and decides not to go ahead with the thought aroused by the *id*'s desire for pleasure. However, in the absence of a fully developed *ego* in one's personality, the *id* component of the individual's personality becomes dominant and the individual is likely to sexually assault the child, hence the reference to such people as psychopaths, a term in psychology meaning a disorder in personality development.⁷⁰

The *super ego* is the conscience part of the personality.⁷¹ It contains the values and concerns of the society in which an individual has been socialized and operates on the ideal principle or idealism by inhibiting the desires of the *ego*. The *ego* urges the individual to work towards morally acceptable behaviour than realistic ones. In the illustration discussed in the previous paragraph, the *super ego*, if fully developed, delays the desire for sexual pleasure until when the individual is married as per the society's morals. In respect to CVSA, it is easier to sexually abuse children especially before the full development of the *super ego* as their personality is not likely to be fully developed. Therefore, they may not know about the society's disapproval of sexual acts of any kind, thus making them vulnerable and easily intimidated during CSA.

The psychoanalytic theory emphasizes five psychosexual stages of development of an individual.⁷² The first stage is known as the oral stage and it involves the first love relationship of an individual. This occurs at age zero to one and a half years of an

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ J W Santrock and S J Halonen, *Psychology* (McGraw Hill 1999) 603.

⁷⁰ Ibid.

⁷¹ *Op. cit* n 65.

⁷² *Op. cit* n 62.

individual's development. At this stage, the infant's most erogenous zone⁷³ is the mouth. The psychosexual development of the infant at this stage is completed by successful weaning when most infants stop sucking any object put in their mouth.

The *relevance* of the oral stage to the study is the infant's affinity for objects in their mouth which they appear to enjoy sucking. One form of CSA⁷⁴ is by placing a finger, the penis or any other object in the child's mouth to derive sexual pleasure.⁷⁵ The oral stage therefore predisposes a child to sexual abuse. However, at this stage since the child's mouth is the most erogenous zone, the child may be sexually abused over a period of time through the mouth. The involuntary sucking act by the child is viewed as a positive response to the abuser's sexual desire.⁷⁶ The oral stage therefore makes a child vulnerable to CSA through the mouth as the abuser takes advantage of the child's vulnerability.

The second stage is the anal stage that occurs from age one and a half to three years.⁷⁷ The most erogenous zone of the child's body is the anus. The psycho-sexual development of the child's personality is completed by successful toilet training.⁷⁸ Children at this stage are vulnerable to CSA through the anus as the zone involuntarily responds positively to any manipulation whether by hand, penis, fingers or any other object.⁷⁹

The third stage is the phallic stage which occurs from age three to six years.⁸⁰ The most erogenous zone of the child at this stage is the genitals (clitoris in case of girls and penis in the case of boys).⁸¹ Successful psycho-sexual personality development at this stage occurs when the child successfully identifies with same-sex parent following a period of unconscious pre-occupation with psycho-sexual feelings towards the parent of the

⁷³ Erogenous zones are those parts of the body that, at each stage of development, according to Freud's theory, have especially strong pleasure-giving qualities.

⁷⁴ *Op. cit* n 27. Section 5 of the Sexual Offences Act 2006 defines sexual assault to include any unlawful penetration or manipulation of any part of a person's body by another. The interpretation is that where anyone manipulates a child's body part with a view to sexual gratification, it would amount to sexual assault on the child who may only appear to respond positively due to the underdevelopment psychologically, especially at the oral, anal or phallic stages.

⁷⁵ D A Wolf, *Preventing Physical and Emotional Abuse of Children* (Guilford Press 1991) 123.

⁷⁶ *Op. cit* n 69.

⁷⁷ *Op. cit* n 75.

⁷⁸ *Op. cit* n 62.

⁷⁹ *Op. cit* n 75.

⁸⁰ *Op. cit* n 62.

⁸¹ *Ibid.*

opposite sex, sometimes referred to as the Oedipus/Electra complex.⁸² The phallic stage explains the vulnerability of children at this stage to CSA within the family as in the case of incest by fathers, uncles or by people known to and trusted by CVSA such as teachers and domestic workers.⁸³

The unconscious pre-occupation with psychosexual feelings by the child towards a close person of the opposite gender at the phallic stage, predisposes the child to CSA. The child may unconsciously respond positively to sexual advances from the opposite gender if their *superego* is not very well developed.⁸⁴ As will be discussed later in chapter four, CVSA find it difficult to testify against a close member of the family charged with CSA because of the possibility of the accused being jailed.⁸⁵ In this respect therefore, Freud's phallic psychosexual stages of an individual's personality development is relevant to this study.

The fourth stage is the latency period which occurs from six years to puberty.⁸⁶ The individual's sexual urge becomes fully developed. The child's psychosexual personality is successfully developed by the transformation of sexual urges into socially acceptable activities. The *super ego* begins to gain dominance over the *id* and the *ego*, depending on the social norms within which the child has been raised.⁸⁷ Where the *super ego* has been properly developed, the child is able to know that sexual relations are not approved of by the society, is reserved for adults and is referred to variously in adult language.⁸⁸

The relevance of the latency stage to the study is the reaction of CVSA when asked to testify in court about CSA. Knowing that sexual matters are secretive, reserved for adults,

⁸² The Oedipus/Electra complex, according to Freud is the physical attraction developed by a child towards the parent of the opposite sex during the phallic stage of psychosexual development, which is successfully completed when the child identifies with the parent of the same sex and ceases to be attracted to the opposite sex parent. Other psychologists like Herman confirm Freud's argument of a child's physical attraction to the opposite sex parent by stating that most father-daughter incest cases begin at around the same period referred to by Freud as the phallic stage of psychosexual development as they become vulnerable to incest.

⁸³ S A Omondi, 'Protecting Children from Abuse: Challenges Associated with the Implementation of the Children Act cap 586 of the Laws of Kenya'(Master's of Arts thesis, University of Nairobi 2007) 97.

⁸⁴ *Op. cit* n 65.

⁸⁵ *Op. cit* n 3.

⁸⁶ *Op cit* n 62.

⁸⁷ *Op. cit* n 75.

⁸⁸ *Op cit* n 65.

known as bad manners, and not openly discussed may be an obstacle to their ability to confidently testify in court as discussed later in chapter four.⁸⁹

The fifth and last stage of psychosexual development in an individual's personality is the genital stage.⁹⁰ This occurs from puberty to adulthood. The correct erogenous areas are the genitals (vagina/penis). The successful personality of an individual is completed at this stage by the formation of sexual love relationships and development of capacity for productive work. As an adult, an individual therefore ordinarily has the psychosexual capacity to make conscious decisions as to sexual matters. However, the psychosexual development of children is however incomplete making them vulnerable. This is the basis that necessitates special court procedures to protect CVSA during their testimony in CSA trials.

In one of his paper presentations⁹¹ in 1896, Freud argued that many of his patients seeking psychiatric services were indeed sexually assaulted as children. Freud concluded that sexual abuse is a cause of mental illness in later life if not addressed adequately. While supporting Freud's psychoanalytic theory, Dodge argues that during the five stages of psychosexual development, children are vulnerable to sexual abuse and are easily sexually aroused, predisposing them to sexual abuses.⁹² Early conflicts and frustrations which occur before adulthood may be repressed and later appear in symbolic form, often in a sexual or aggressive nature if not adequately dealt.⁹³ Both Dodge's and Herman's arguments can be interpreted to necessitate special court procedures that help CVSA overcome trauma caused by CSA as opposed to re-victimizing them through their testimony.

Critics of the Freudian psychoanalytic theory argue that it overemphasizes the psychosexual development of an individual's personality. One such critic is Carl Gustav Jung, a Swiss psychoanalyst, who rejected Freud's theory and postulated a collective consciousness which is universal among humans, containing human traits and cultural

⁸⁹ J L Herman and L Hirshman, *Father-Daughter Incest* (Harvard University Press 2000) 129.

⁹⁰ *Op. cit* n 62.

⁹¹ Freud Sigmund, *The Aetiology of Hysteria* at Vienna's Society for Psychiatry and Neurology <<http://www.pep-web.org/document.php?id=se.003.0187a>> accessed on 30 June 2012.

⁹² *Op. cit* n 62.

⁹³ *Op. cit* n 89.

characteristic inherited from ancestors and society.⁹⁴ He supported analytic psychology⁹⁵ as opposed to psychoanalysis.

While not totally rejecting the psychoanalytic theory, some psychologists have taken a Neo-Freudian approach, not disagreeing totally with Freud, but modified his psychoanalytic theory. One of them is Karen Horney who was more concerned with the anxiety in children that caused them helplessness and insecurity, predisposing them to sexual abuse.⁹⁶ She argued that when faced with anxious and helpless situations such as CSA, people cope in three different ways.

The first is by *moving towards people* to seek their love and approval through being compliant and submissive. The relevance of this argument to the study is that when children find themselves in the helpless situation as CVSA, they may seem to ‘co-operate’ unconsciously so as to seek the approval of the abuser. This is especially so in instances where the abuser already has some measure of responsibility over the CVSA, as in father-daughter or teacher pupil relationship. In chapter two, the study discusses what other scholars have said on this issue while chapter four analyzes the effect of such relationship on the CVSA’s ability to testify in court against the abuser.

The second coping skill in helpless situations, according to Horney is by *moving against people*. This action is contrary to compliance in the first coping skill. The relevance of this argument to the study is that CVSA who reject sexual advances of the abuser, attract disapproval and invites the need for use of force or other coercive means to obtain their compliance from the CVSA. This argument explains why CSA is in some cases accompanied by other forms of child abuse such as physical, psychological and emotional abuse. It also explains the consequences of CVSA giving evidence in incest cases without the approval of the family.⁹⁷

The third coping mechanism according to Horney is by *moving away from people* by withdrawing and establishing one’s self as an independent and separate entity from the rest of the people. This argument explains situations where CVSA go against the family

⁹⁴ C G Jung, H Reed, M Forthan, G Adler, *The Collected Works of C G Jung: Freud and Psychoanalysis* (2nd edn, Princeton University Press 1966)137 .

⁹⁵ Analytic psychology analyses all socio-cultural factors surrounding the development of an individual’s personality.

⁹⁶ K Horney, *Neurotic Personality of our Time* (Norton 1937) 213.

⁹⁷ *Op.cit* n 75.

wish, report and testify against the abuser. Horney argued for a balance of the three coping mechanisms as over reliance on one mechanism to explain personality would cause maladjustment of individual personality.

Both the Freudian and Neo-Freudian arguments complement each other. While the Freudian perspective of psychoanalysis explains the vital role of sexuality in a person's personality development and the general vulnerability of children to CSA, Horney's argument serves to explain the different reaction by CVSA to CSA. Horney's explanation also gives other factors that determine how CVSA behave in CSA situations. The psychoanalytic theory is therefore relevant in explaining CVSA vulnerability to CSA and subsequent reaction, hence the need for special protective court procedures when CVSA testify in court about the abuse.

1.3.2 Labeling Theory

The second theory underpinning the study is the sociological theory of labeling which deals with what happens to people (CVSA) after they have been singled out, identified and defined as deviants in society.⁹⁸ Labeling theorists are concerned about three related issues in respect to an individual's behaviour after being labeled as a social deviant.

The first concern of the labeling theorists is the forms of behaviour that the society defines as deviant. As discussed later in chapter four, one of the challenges faced by victims of sexual abuse generally is the tagging of sexual relations as 'bad manners', shrouded in secrecy and hardly discussed openly, especially with children. The society's labeling of the sexual relationship, the aggressor and victim as being engaged in 'bad manners' may have a negative impact on CVSA's ability and willingness to testify for fear of being stigmatized as a bad child engaging in bad manners.⁹⁹ The associated stigma may negatively impact on the confidence and self-esteem of the CVSA amongst their peers. In order to avoid the consequences of stigmatization, a CVSA may opt not to report the abuse at all, or if reported, deny that the abuse ever took place.

The second concern amongst labeling theorists is who amongst those who engage in deviant acts are labeled as deviants. The third concern is with the consequences of

⁹⁸ B C Little and S H Traub, *Theories of Deviance* (F E Peacock Publishers 1968) 289.

⁹⁹ *Op. cit* n 83 pg 79.

stigmatizing certain individuals and activities as deviant.¹⁰⁰ The relevance of the labeling theory to this study is in the tagging of sexual issues and those involved as bad manners and deviants respectively. Paradoxically, such labeling of CVSA as deviant and public condemnation may thrust CVSA into actual sexual relationship for fear of being rejected by the society.¹⁰¹ In an attempt to seek approval from a section of the same society, CVSA may identify with people who have similarly been labeled as sexual deviants. When this occurs, attempts to protect CVSA through the court system may not work as CVSA feel accepted by the sexual deviants' community.¹⁰² This argument explains why some CVSA retreat back to sexual activities labeled as deviant such as prostitution, despite efforts to rescue them from the abuse.¹⁰³

The resulting stigma of labeling CVSA as sexual deviants may further inhibit their ability to testify in court about the abuse, especially before family members from whom CVSA expect to be regarded highly.¹⁰⁴ The labeling theory is therefore relevant to the study in as far as it attempts to explain the difficulty in talking publicly about sexual matters.

The labeling theory therefore helps the study to understand the experiences of CVSA as they testify in court under the adversarial procedures about CSA in a society that has tagged not only the abuse, but the victim as well.¹⁰⁵ The theory helps the study to appreciate the reaction of CVSA after the abuse. In particular, it explains why some CVSA may testify while others refuse or fail to do so. In addition, it explains why some CVSA retract their earlier recorded statement by the police, especially in incest cases.

1.3.3 Procedural Justice Theory

The Greek philosopher Aristotle identified two major applications of justice as distributive justice and corrective/rectificatory justice.¹⁰⁶ John Rawls perceived justice as fairness to all by granting equal opportunities and liberties while distributing resources in

¹⁰⁰*Op. cit* n 98.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³*Op. cit* n 89.

¹⁰⁴*Op. cit* n 2.

¹⁰⁵*Op. cit* n 83.

¹⁰⁶ *Nichomachean Ethics* by Aristotle, Translated by D W Ross (350 B C) 741.
<<http://publish.uwo.ca/ndgault/phi/20/arpol.html>> accessed 4 March 2012.

such a way that benefits the least advantaged in society.¹⁰⁷ Rawls expounded Aristotle's notion of distributive justice and introduced two fundamental principles of distributive justice namely the equal liberty principle and the difference principle. Equal liberty according to Rawls implies that the society is just and fair when everyone has equal opportunities as to rights and liberties. Rawl argues that justice is fairness that results from equal distribution of rights and liberties to benefit everyone.

Rawls' perception of justice is relevant to this study as will be discussed under the imbalance between the accused person's rights and the rights of CVSA in chapter three.

Fair court procedures must ensure that there is a balance and equal opportunities and liberties of both CVSA and accused persons.

Rawls' second principle of justice, the difference principle states that social and economic differences that exist in the society must be distributed in such a way as to benefit the least advantaged people in society. CVSA, being children and vulnerable require child friendly procedures that balance the rights and liberties available to the accused while distributing the available resources, privileges, opportunities and protection to benefit the disadvantaged CVSA. This argument implies a limitation of the rights of accused persons in such a way as to benefit CVSA while ensuring equal protection of both accused persons and CVSA.

Another procedural justice proponent is Galligan¹⁰⁸ who argues that fair procedures made known to and accepted by parties to a transaction, lead to fair results, which are acceptable to all parties even if the result is not in favour of one party. Galligan's perception of procedural justice is relevant to the study since the court procedure in cases of CSA is not known or understood by CVSA, yet they are expected to follow them while testifying in court.¹⁰⁹ The lack of understanding of the court procedures by CVSA has been described as institutional re-victimization of victims of sexual abuse.¹¹⁰

Solum advances the argument on justice further and explains procedural justice as being concerned with the means by which social groups such as governments, private

¹⁰⁷ Rawls J, *A Theory of Justice*, pg 50 <<http://plato.stanford.edu/entries/original.position>> accessed 4 March 2012.

¹⁰⁸ J D Galligan, *Due Process and Fair Procedures* (Oxford University Press 1996) 12.

¹⁰⁹ J K Saywitz *et al*, *Children's Knowledge of Legal Terminology in Language and Human Behaviour* (American Psychological Association Press 1990) 14, 523-35.

¹¹⁰ *Op. cit* n 3.

institutions, and families institutionalize the application of requirements of corrective and distributive justice to particular cases.¹¹¹ According to Solum, procedural justice theory is characterized by three major antecedents that include participation (having a voice), dignity and trust that the authority is concerned with one's welfare.¹¹² Solum's argument on procedural fairness is supported by Lind and Tyler who explain that people want to be treated fairly by authorities, independent of the outcome of the interaction.¹¹³ Basing his arguments on the identified antecedents, Solum delineates three models of procedural justice theory namely; the accuracy model, balancing model, and the participatory model as explained below.

The accuracy model assumes that the aim of civil dispute resolution is the correct application of the law to facts. This model is however incapable of explaining a variety of doctrines which do not lend themselves to perfect procedural justice such as *res judicata* and other rules that protect the finality of the judicial decisions. In addition, the model suffers from crucial ambiguity between accuracy in particular cases and the system as a whole. The accuracy model alone is thus not suitable in studying the impact of the adversarial legal procedures on CVSA.

The balancing model assumes that the aim of civil procedure is to strike a fair balance between the costs and benefits of adjudication. It is based on imperfect procedural justice. The model has two broad variants; utilitarian or consequentiality and right based. The consequentiality variant focuses on the balance between accuracy and the cost of the due process. The rights based variant assumes that procedural justice requires attention to the fair distribution of the cost imposed by the system of procedure.

The balancing model appears to overstate the case of perfection since the law of diminishing returns makes the pursuit of perfection costly beyond a certain limit; hence perfection in the strict sense is not possible. In any case, the model does not provide conditions considered to be perfect as it fails to highlight the framework for distributing

¹¹¹B L Solum, 'Procedural Justice Theory' (2004) 240<<http://ian.bepres.com/sandiego/wps/pllt/art 2>> accessed 4 March 2012.

¹¹²Ibid.

¹¹³ A E Lind and S M Tyler, 'A Relational Model of Authority in Groups' in M Z Anna (ed), *Advances in Experimental Social Psychology* (Vol 25, Academic Press 1992) 115-191.

cost of procedural justice. This structural and conceptual difficulty renders the model inappropriate for CVSA under the adversarial legal procedures.

The participatory model assumes that the very idea of a correct outcome must be understood as a function of a process that guarantees fair and equal participation as argued by Rawls as well.¹¹⁴ This study therefore adopts the participatory model of procedural justice theory as it assumes that procedural justice best fits and justifies existing doctrines. The key notion is that it is the process itself and not the outcome that defines procedural justice.

The participatory model of procedural justice has two central concerns.¹¹⁵ The first concern is the prevention of unjustified or mistaken deprivations. The second concern is the promotion of participation and dialogues by affected individuals in the decision making process. This makes the model suitable for the analysis of the implications of the adversarial legal procedure on CVSA while testifying in courts. This study therefore applies the participatory model of procedural justice theory.

The participatory model of procedural justice as identified by Solum has four main interrelated applications. Although his discussion was based on civil litigation, there are a lot of similarities and application to the criminal justice procedures. All the four variants are based on pure procedural justice that fairness of procedure is a function not of some independent criteria, but instead of the intrinsic features of the procedure itself. The outcome of a procedure is fair, whatever it is, provided that the requirements of the procedures have been satisfied as per the interpretations discussed below.

The first application is the *game interpretation* which explores the notion that litigation should be considered as fair game or contest where the winner is entitled to prevail if the game is played by the rules.¹¹⁶ The winner is therefore entitled under the rules to win. The major weakness encountered in this application is that it overlooks the lawyers' skills, and assumes that there exists a level playground. Nonetheless, this approach provides a framework for considerations of what is fair. The application is relevant to this study

¹¹⁴ *Op cit* n 107.

¹¹⁵ *Op. cit* n 111.

¹¹⁶ *Ibid.*

since it emphasizes the need to have fair rules of the game acceptable to all the actors. It explains the adversarial legal systems' procedures that assume the playground in court is level and the winner takes it all.

The second application is the *dignity interpretation* which emphasizes dignity and autonomy as a function of actual participation of litigants in procedures that affect them.¹¹⁷ It identifies the crucial role of equity, individuality, and autonomy in procedural justice. However, participation alone is not sufficient to make a just or fair procedure. Accuracy of the procedure is also important. The application overstates the place of dignity over other values such as underlying substantive rights. However, to the extent that the application focuses on dignity and equality, it is relevant to the study since CVSA need to have their dignity upheld and protected as they testify in court. Likewise, there is need to accord both CVSA and the abuser equal protection by the law if a trial is to be seen as fair. The current adversarial legal system appears to protect only the abuser and not the CVSA.¹¹⁸

The third application is the *satisfaction interpretation* which argues that participatory process is justified by the greatest level of satisfaction it provides to litigants.¹¹⁹ The application is relevant to the study since dissatisfaction of CVSA with the current adversarial legal procedures, as discussed in chapter four, is part of the justification for the research.¹²⁰ When parties are satisfied with the process of dispute resolution, they are more likely to accept the outcome even if it is not in their favour.¹²¹

Solum's measurement levels of satisfaction still remain a contested issue and the interpretation does not seem to recognize the role of cost and accuracy in procedural justice. Despite this inadequacy, the satisfaction interpretation is relevant to the study although it cannot be applied alone.

¹¹⁷ Ibid.

¹¹⁸ *Op. cit* n 19.

¹¹⁹ *Op cit* n 111.

¹²⁰ *Op cit* n 19.

¹²¹ *Op. cit* n 111.

The fourth application is the *discourse interpretation* which appeals to an ideal communication situation as the criterion of what constitutes a just or correct outcome.¹²² Fair procedures aim at promoting this ideal. This application forms the basis for the need to reform the current court procedures in cases of CSA so as to ensure effective participation of CVSA as they testify.

For procedures to be seen as fair, each party must have an equal opportunity to present their case, question the other party, and rebut any adverse evidence.¹²³ In this case, there is no separation of the criteria for truth from the criteria for the argumentative settlement of disputes. This variant has been accused of laying unwarranted emphasis on the courtroom as the sole source of the truth.¹²⁴ This interpretation may exclude crucial information and there may not be guarantees of accuracy. However, despite the criticisms, the study adopts this application, together with the previous three as they jointly complement each other and explain the relevance of procedural justice to the study.

This study adopts the procedural justice theoretical perspectives. Procedural justice theory was selected because it provides a framework for analyzing how parties in a dispute interact in the adversarial court procedures and how the court officers' behaviour affects the special needs of the CVSA.¹²⁵ Fair procedure is important in the prosecution of CSA cases since the process used in resolving a dispute may in part underlie emerging success or failure of conflict resolution.¹²⁶

1.3.4 The Rights Theory

The rights theory has its origin in the notion of natural rights according to the Greek philosopher Aristotle.¹²⁷ The concept of natural rights was developed further by Thomas Aquinas who argued that rights are entitlements due to people naturally because they are human beings and because God intended it to be so.¹²⁸ Aquinas viewed the concept of natural rights as entitlements to human beings from a moral perspective. John Locke advanced Aquinas argument further and defended natural rights as God given and sacred

¹²² Ibid.

¹²³ I H Dennis, *Law of Evidence* (Sweet & Maxwell 2007) 604.

¹²⁴ *Op. cit* n 109.

¹²⁵ E Gurnon and S Prather, *The Need for a Children's Bill of Courtroom Rights* (Pioneer Press 2007) 27.

¹²⁶ A C Watson and B Angell, *Applying Procedural Justice Theory to Law Enforcement's Response to Persons with Mental Illness in Psychiatry Service* (American Psychiatric Association 2007) 187.

and inalienable.¹²⁹ Locke's perception of natural rights influenced the discourse that informed the American Declaration of Independence and France's Declaration of the Rights of Man and Citizen which was passed in 1789.

The French Declaration proclaimed 17 rights as the natural, inalienable and sacred rights of man. Thomas Paine defines natural rights as those rights which appertain to man in light of his existence.¹³⁰ Another rights' theorist, Jean-Jacques Rousseau views the notion of rights from the social contract perspective which argues that the state has a responsibility to protect the rights of its citizens equally.¹³¹ Rousseau's argument is relevant to this study since it argues for equal protection of citizen's rights. The implication is that the state must protect the rights of CVSA the same way it protects the rights of accused persons in CSA. This argument makes the rights theory relevant to the study as it calls for equal protection of citizens.

The contemporary notion of human rights views rights as arising essentially from the nature of human kind itself. The idea that all humans possess human rights simply by existing and that these rights cannot be taken away from them are direct descendants of natural rights.¹³² The preamble of the UDHR provides that human beings are entitled to human rights which flow from the inherent dignity of the human person. The importance of the rights theory is that it views rights as basic and fundamental entitlements to human existence which must take precedence over any other consideration. Human rights are therefore paramount and override any other claims within a society.¹³³

Universality and Equal Protection of Human Rights

Human rights are universal because they belong to all human beings in every society.¹³⁴

Human rights are inalienable since they flow from and protect human existence.¹³⁵ To fail

¹²⁷ F D Miller, 'Aristotle and the Origin of Natural Rights' (1996) 49 *The Review of Metaphysics* 4, 873,880. <www.jstor.org/stable/20129946> accessed 31 May 2013.

¹²⁸ H Grotius, *On the Law of War and Peace* (Kessinger Publishing 2004) 22.

¹²⁹ J Powell, *John Locke: Natural Rights to Life, Liberty and Property* (1996) <www.fee.org/the_freeman/detail/john-locke-natural-rights-to-life-liberty-and-property#axzz2Us3gSwb9> accessed 31 May 2013.

¹³⁰ T Paine, *The Rights of Man* (Penguin Books 1965) 68.

¹³¹ Jean-Jacques Rousseau, *The Social Contract*, Maurice Cranston (trans) (Penguin 1968) 50.

¹³² K Marx *et al*, *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man*, Jeremy Waldron(ed) (Taylor & Francis 1987)185-208.

¹³³ R Dworkin, 'Rights as Trumps' in J Waldron(ed) *Theories of Rights* (Oxford University Press 1984)78.

¹³⁴ J Donnelly, 'Human Rights as Natural Rights' (1982) 4 *Human Rights Quarterly* 3, pg 391,396.

¹³⁵ J Finnis, *Natural Law and Natural Rights* (Oxford University Press 1980) 204.

to recognize the human rights of an individual or group of individuals is to endanger the value of existence of that individual or group of individuals.¹³⁶ Human rights are therefore natural rights that all human kind are entitled to. Recognition of human rights is important because they portray certain agreed standards of how human beings should be treated. In addition, recognition of human rights standards prevents the unwanted consequences of having no limits in the way human beings relate to each other. Whereas not everybody may agree and accept what is termed as human rights, proclamation and acceptance of human rights involves the majority.¹³⁷ Human rights therefore exist because majority of human beings accept and recognize them as necessary for their protection.¹³⁸

Implication of Rights

Hohfeld assigns four meanings to the term rights.¹³⁹ The general understanding is that when one says that A has a right to X then there is somebody else, B who has a correlative duty to provide A with X. Within this context, A is the right holder, X is the right and B is the one who has the duty to ensure that the right is implemented. According to Hohfeld, a right may mean immunity, power, liberty and claim.

Within the context of this study, it is Hohfeld's meaning of a right as a claim that is relevant and applicable to this study. A claim in this regard implies that the state has a correlative duty to ensure the protection of CVSA rights. Therefore, to say that CVSA have a right to protection during CSA trial implies that CVSA have a claim against a correlative duty of the state. The state therefore has a duty to protect CVSA in CSA trials. The duty of the state in protecting CVSA is positive. This means that the state is required to take certain action to allow CVSA enjoy the right to protection during CSA trial.

Since CVSA have a right to protection, the state therefore has a duty to provide it. As concerns the accused person/counsel, there is a negative duty to refrain from activities that invade the privacy and dignity of CVSA. The court has a positive duty to take deliberate steps that ensure the protection of CVSA during the trial process. In this sense therefore, the essential characteristic of a right as a claim is the inherent relationship

¹³⁶ R McInerney, 'Natural Law and Human Rights' (1991) 36 *American Journal of Jurisprudence* <www.thomasinternational.org/ralphmc/readings/mcinerny000.htm> accessed 31 May 2013.

¹³⁷ J Blau, A Moncada, *Human Rights: Beyond the Liberal Vision* (Rowman & Littlefield 2005) 179.

¹³⁸ H Steiner, P Alston, R Goodman, *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (Oxford University Press 2008) 879.

¹³⁹ W N Hohfeld, *Fundamental Legal Concepts as Applied in Judicial Reasoning* (Yale University Press 1919) 200.

between CVSA's claim to protection and the state's, accused's and the court's duty. CVSA can therefore make a claim that the accused, the state and the court must perform. Likewise, to say that the accused person has a right to a fair trial implies that the accused person can make a claim for a fair trial against the state which has a responsibility to ensure that the fair trial rights of the accused are respected and implemented. This calls for the balancing of the rights of both accused persons and CVSA.

Conflicting Human Rights

Although human rights seek to protect all human kind equally, it is recognized that different groups or individuals in society are bound to have their own interest which may conflict with the interest of another group of individuals.¹⁴⁰ Conflict of interest is therefore inherent in any society of human kind. The concept of human rights is not static but is dynamic. Human rights evolve through various values, interests, goods, services, concerns as well as needs which are gradually accepted and incorporated as human rights.¹⁴¹

The concept of human rights has therefore been broadened beyond the traditional economic, social, cultural, civil and political rights. Today, human rights include concerns for the protection of special and vulnerable groups. They include women, children, the elderly, the disabled, the mentally-ill, minorities and indigenous people. In addition, human rights can either be individual or collective.¹⁴² In an attempt to protect all human beings of different groups and needs, there results a paradox of conflict between the human rights of different groups or individuals.¹⁴³ The resultant conflict creates a challenge in attaining the very goals of human rights which is to protect all human kind equally.¹⁴⁴

Balancing Conflicting Human Rights

When human rights compete, the resultant conflict results into a situation where some rights override the other.¹⁴⁵ The challenge therefore arises when competing human rights

¹⁴⁰ Y Dinstein, *Collective Human Rights of Peoples and Minorities* (British Institute of International and Comparative Law 1976) 10.

¹⁴¹ *Op. cit* n 138.

¹⁴² *Op. cit* n 134.

¹⁴³ *Op. cit* n 138.

¹⁴⁴ *Ibid*.

¹⁴⁵ C Lekhasriram, O Martin-Ortega, J Herman, *War, Conflict and Human Rights: Theory and Practice* (Routledge 2009)211.

of different groups of human kind conflict yet both seek the protection accorded by human rights.¹⁴⁶ This negates the intended goal of equal protection for all human kind. When this happens, then the principle of equality of human rights applies to balance the interests of competing groups of individuals so as to ensure just and fair treatment. This is consistent with the procedural justice theory as argued by Galligan and supported by Rawl that for procedural justice to be attained, parties who seek redress through a procedure must be treated equally if the process is to be regarded as fair.

Such competing human rights need to be balanced to the satisfaction of everyone. In this study, the competing fair trial rights of accused persons and concerns for the protection of CVSA during CSA trial calls for a balancing of the different interests. This needs to be resolved in a manner that protects the interests of both the accused and CVSA. It is the balancing act that makes the rights theory relevant to this study. The theme of balancing the rights of the accused persons to a fair trial and the need to protect CVSA therefore cuts across all the chapters that follow in this study.

1.3.5 The Linkage between the Psychoanalytic, Labeling, Procedural Justice and Rights Theories and Their Relevance to the Study

Whereas the psychoanalytic theory is derived from the discipline of psychology, it helps the study to understand the psycho-sexual developmental stages of an individual which predisposes children to CSA. It therefore explains CVSA vulnerability to CSA, the effect of the abuse on CVSA and the special need for their protection when required to testify before court in CSA trial. The psychoanalytic theory therefore sets the stage for the labeling theory, drawn from the discipline of sociology, and explains the behaviour of CVSA within the society.

The labeling theory helps the study to understand why some CVSA are able to report the abuse while others do not. The societal stigma attached to CSA and CVSA helps to understand the difficulty experienced by the already vulnerable and traumatized CVSA. It explains the difficulty experienced by CVSA in convincing the police, society and the court that they were sexually assaulted. Further, the labeling theory explains the action taken by family members of CVSA in some cases due to the need to protect and preserve

¹⁴⁶ J Amertus, J W Helsing, *Human Rights and Conflict: Exploring the Links Between Rights, Law and Peace Building* (US Institute of Peace Press 2006)419.

the family name, particularly in incest cases. The labeling theory explains the difficulties experienced by CVSA and their subsequent behaviour following the sexual abuse.

The procedural justice theory, drawn from the discipline of law explains what is a fair process of dispute resolution, which ensures the outcome is acceptable to both parties in a dispute. It emphasizes equality and fairness to both parties in the distribution of resources. The theory provides a standard of examining the current children court procedures whether or not the process is fair to both the accused and CVSA in the prosecution of CSA cases. Procedural justice theory provides a theoretical framework for analyzing whether or not CVSA enjoy equal protection by the law as the accused in CSA cases. The theory enables the study to examine whether or not CVSA have access to resources/liberties on an equal basis as the accused person according to Rawls' perception of justice already discussed. Procedural justice as a theoretical framework assists the study in assessing whether the court procedures are balanced in fairness to both CVSA and accused persons.

The rights theory explains the inherent need to protect all human kind. It also explains the resulting conflict in an attempt to protect different groups of individuals in society who have competing interests. It therefore puts into perspective the study's concerns about the imbalance between the rights of accused persons to a fair trial and concerns for CVSA protection. It lays the foundation for a justification in protecting the rights of both CVSA and accused persons through a trial system that ensures fairness to both. Whereas the psychoanalytic theory explains CVSA's vulnerability to CSA, the labeling theory explains the difficulty faced by CVSA in testifying in court. Procedural justice theory provides the basis for examining the CSA trial procedure while the rights theory justifies the study's argument for the need to balance the rights of accused persons and those of CVSA.

1.3.6. Conceptualization of the Study

Kenya has undertaken great steps in the area of substantive laws in keeping with the world trends on child protection generally. The reforms include the enactment of the Children Act 2001¹⁴⁷ to domesticate the UNCRC and ACRWC. Other measures include

¹⁴⁷*Op. cit* n 35.

the passing of the Sexual Offences Act 2006,¹⁴⁸ the Witness Protection Act 2006,¹⁴⁹ the amendment of the Evidence Act¹⁵⁰ and the promulgation of a new Constitution.¹⁵¹ However, as argued by procedural justice theorists such as Rawls, Galligan, Solum and others, the goals of substantive laws can only be realized through fair procedures which ensure equality of liberties, opportunities and resources to all parties in a dispute.

Procedural laws function as the engine for implementation of substantive laws. The absence of procedural laws therefore impedes the realization of the goals of substantive laws such as child rights. While assigning responsibilities to the CVSA as prosecution witnesses and privileges to the accused, the evidentiary rules of procedure under the adversarial system occasion inequality of resources and opportunities.

According to all procedural justice theorists, justice requires equal distribution of resources and liberties by balancing the rights of the accused persons and CVSA in CSA prosecution to benefit the disadvantaged (read CVSA). This is illustrated by Figure 1.

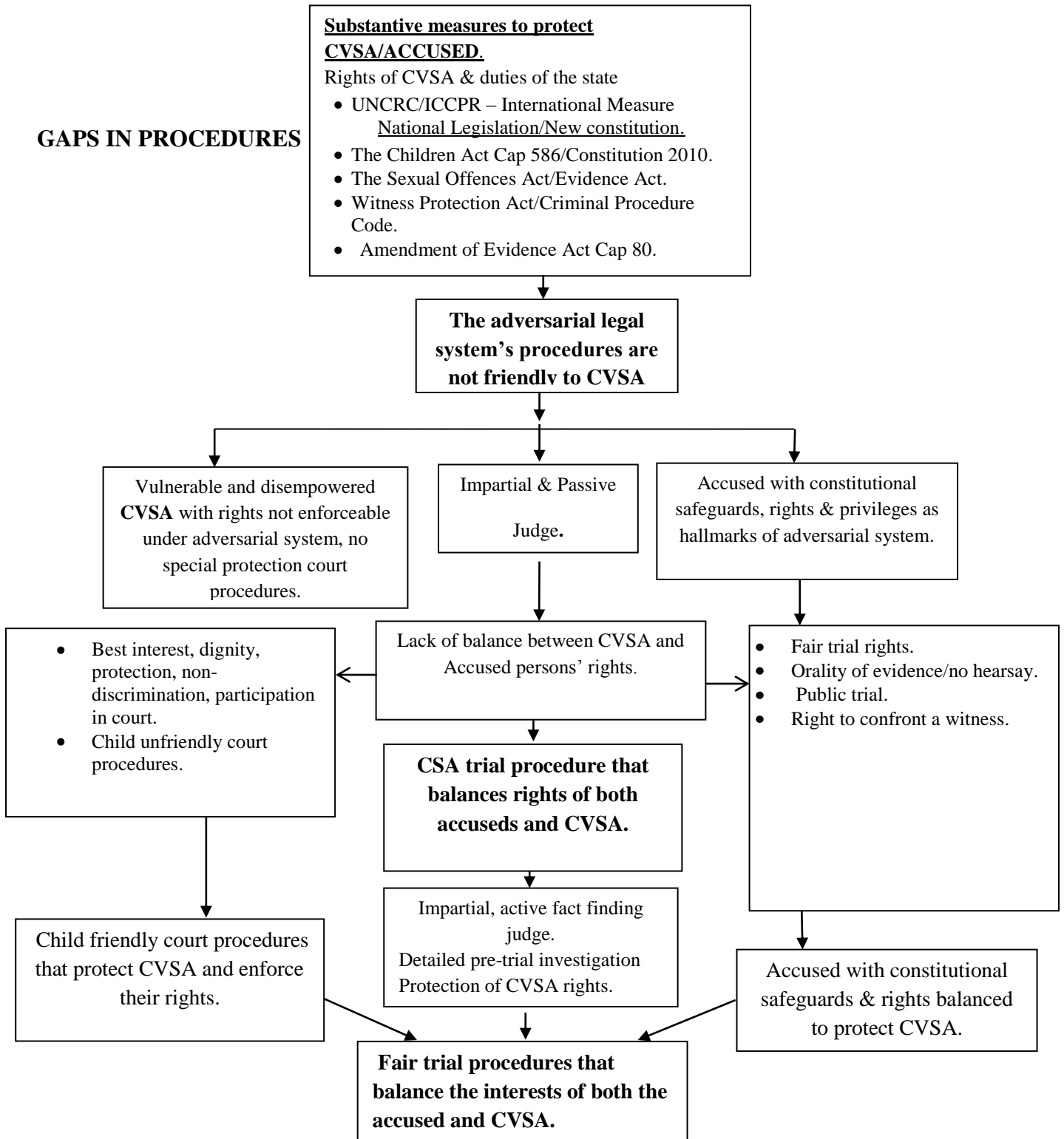
¹⁴⁸*Op. cit* n 36.

¹⁴⁹*Op. cit* n 37.

¹⁵⁰*Op. cit* n 38. The Criminal Law (Miscellaneous Amendment) Act 2003 which did away with the requirement of corroborating the evidence of a child.

¹⁵¹*Op. cit* n 40.

Figure 1: A Graphic Illustration by the Author of the Imbalance in the Protection of the Rights of the Accused and CVSA in a CSA Trial under the Adversarial Court Procedures



1.4. Research Objectives

The overall and specific objectives of the study are as follows;

1.4.1 Overall Objective

The study seeks to examine the use of the adversarial legal system's court procedures in CSA trials in Kenya, with a view to exploring how the rights/ interests of CVSA can be balanced with those of accused persons.

1.4.2 Specific Objectives

1. To investigate whether the adversarial trial procedure as applied by the children's courts balances the rights of accused persons to a fair trial with the rights and concerns to protect CVSA in CSA trials in Kenya.
2. To identify the inadequacies of the CSA trial process in Kenya.
3. To find out how other jurisdictions balance the rights of accused persons and CVSA in CSA trial.
4. To explore the extent to which the rights of accused persons may be limited to ensure a balance with the rights and concerns for the protection of CVSA in CSA trial in Kenya.

1.5. Argument

The study argues that, whereas the classical adversarial legal system's court procedure upholds the rights of accused persons to a fair trial, the prosecution of CSA presents unique challenges to CVSA when they testify. This is despite reforms in the substantive laws to protect them. The effect of the challenges experienced by CVSA while testifying in CSA at times result into re-victimization and a miscarriage of justice to CVSA. Whereas the classical adversarial legal system of criminal trial focuses on the guilt or innocence of the accused persons,¹⁵² the trial process occasions an imbalance between the rights of CVSA and accused persons. This is contrary to the principle of equal protection of the law to everyone, which is the basis of procedural justice theory.¹⁵³ When carried out in a manner that reflects the expectations, needs, concerns and rights of victims of crime, the trial process has the potential of playing a vital role in restoring the dignity of the victim. This can be achieved at the same time as delivering justice by arriving at the innocence or guilt of the accused. Unlike before the recognition of victims as participants

¹⁵² N Lacey, 'Legal Constructions of Crime' in M Maguire, R Morgan & R Reiner (eds), *The Oxford Handbook on Criminology* (Oxford University Press 2002) 275.

¹⁵³ Home Office, *Speaking Up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (1998) 37.

with stakes in the trial process, victims of crime today have rights in the trial process which are recognized globally. This calls for fairness in balancing the rights of accused persons with those of victims as argued by the rights theory.

1.6. Research Questions

- Q1. Does the adversarial trial procedure as applied by the children's courts balance the rights of accused persons to a fair trial with the rights and concerns for the protection of CVSA in Kenya?
- Q2. What are the inadequacies of the adversarial procedure in CSA trial in Kenya?
- Q3. How have other jurisdictions attained the balance between the rights of accused persons and concerns for the protection of CVSA in CSA trials?
- Q4. To what extent can the rights of accused persons be limited to accommodate the rights and concerns of CVSA protection in Kenya?

1.7. Research Hypothesis

CSA trial under the adversarial system causes an imbalance between the rights of accused persons and CVSA, at times resulting into a miscarriage of justice.

1.8. Assumptions

The study assumes that since the Children Act was enacted in 2001, it is being implemented in cases involving CSA.

1.9. Justification for the Study

The information generated by the study may contribute additional knowledge for academic, research and other institutions working on children issues as well as policy makers. Many NGOs, Faith Based Organizations, Governments and the public have shown concern about CSA. The research findings provide useful information and if implemented may encourage increased reporting of CSA to the police for prosecution.

Different courts apply the law differently in CSA cases resulting in procedures as varied as the number of court officers presiding over the cases.¹⁵⁴ The findings of this study may assist in the development of a child friendly court procedure. The findings may also assist in the development of policy on how to handle CVSA by the criminal justice officials. Such development may enhance efficiency and effectiveness in seeking justice for the CVSA.

¹⁵⁴*Op. cit* n 83.

The study objectives are in line with Kenya's new long-term national planning strategy, officially known as *Kenya Vision 2030*.¹⁵⁵ Under its social-economic and political pillars, Vision 2030 identifies adherence to the rule of law as the basis upon which it will “operationalize the policy, legal and institutional framework vital for promoting and sustaining fair, affordable and equitable access to justice.” In this respect, the study findings may assist Vision 2030 to achieve its objective of enhancing accessibility to justice for children. By recommending procedural reforms necessary in CSA trial, such reforms, when undertaken, have the effect of enhancing public confidence in the judicial system.

By identifying procedural barriers in the trial of CSA and recommending an appropriate framework for CSA trial, the study bridges knowledge and information gap in Kenya. In particular, the study contributes knowledge on how to strike a balance between safeguarding the rights of accused persons and protecting CVSA. The knowledge is important since the criminal justice system is about the balancing of the rights of all parties involved amidst the search for truth.

1.10. Scope and Limitation of the Study

Although the CJS comprises the Police, the Judiciary and the Prison Service as the main agencies, the study focuses only on the court procedure in selected children courts. There are several ways of dispute resolution mechanisms, both formal and informal. The informal systems vary from community to community and are at times preferred due to their simplicity and faster decision making process than the formal courts which appear to be prolonged and characterized by technicalities in procedures.¹⁵⁶ The court process is one way of dealing with CSA allegations. The study is limited to the formal court procedure of taking the evidence of CVSA in CSA cases.

The study is limited to CVSA who are 10 years and above but below 18 years. Although it would be important to consider CVSA of all ages, the age limit of 10 years is preferred because children of 10 years and above are able to form independent opinion, and express

¹⁵⁵ Government of the Republic of Kenya, *Vision 2030* (Government Printer's Press 2007) 176, <http://www.vision2030.go.ke/cms/vds/Popular_Version.pdf> accessed 4 June 2012.

¹⁵⁶ W Kamau, 'Indigenous and State Justice Systems in Kenya: Towards a Realization of Justice' in J D Whyte (ed), *Moving Towards Justice* (Purich Publishing Limited 2008) 227.

their views on issues better than those who are below that age.¹⁵⁷ The Children Act¹⁵⁸ puts more emphasis on the evidence of a child aged 10 years and above, than that of a child aged 9 years and below. However, in order to generalize the research findings for the entire country, secondary data is used to provide information in connection with children under the age of ten by perusing finalized court files.

There are other topics that have relevance to this study like legal representation, causes of child abuse, and public opinion about child sexual abuse, but they are not the focus of the study. The study is limited to views of selected respondents and observation of difficulties caused to CVSA by the adversarial court procedures.

The study is concerned about the implications of prosecuting CSA under the classical adversarial court procedure. The study focuses on the ability of CVSA to testify coherently and confidently in respect of the rights of accused persons to a fair trial. The study argues for a balance between the rights of accused persons and CVSA in the trial of CSA cases only and not in criminal offences.

The scope of the study is thus limited to CVSA rights of best interest, non-discrimination, right to participation in the justice process, right to dignified treatment and right to protection. The study examines how the CVSA rights are balanced with accused persons' right to fair trial with specific reference to the right to confront witnesses, receive oral direct evidence from the witness, adversarial cross-examination, public trial and trial by an impartial/ passive judge. The study therefore does not address all rights of CVSA under the UNCRC, or all fair trial rights of accused persons under the ICCPR, but is limited to the ones specified.

1.11. Methodology

This study involves both a desk review and field study. The desk work comprises the review of statutes, government reports, journals, periodicals, books and internet searches as secondary sources of data. This section presents the methodological approaches for the

¹⁵⁷*Op. cit* n 35, section 2 defines a child of tender years as one below ten years.

¹⁵⁸ Ibid section 4(4) provides for respect of views of a child who can form and give an opinion. Under the Penal Code Cap 63, the age limit for criminal liability is eight while for any child above eight but below twelve years, there is a rebuttable presumption of criminal liability. Age ten is thus a middle ground and the Children Act at section 3 defines a child of tender years as one who is under the age of ten. The Act appears to consider age ten as important for a child to make independent decisions.

study. It specifically presents the details on the study site, population, sample and sampling procedures, data collection methods, data management methods and ethical considerations. The study employs both quantitative and qualitative approaches of data collection and analysis.

1.11.1 Research Site

The study was conducted in five purposively selected children's courts located in Nairobi, Mombasa, Kisumu, Nakuru and Eldoret in Kenya. The courts are a creation of the Children's Act 2001 and have special jurisdiction on children matters. The study assumes that the children's courts, unlike other courts have procedures that take into consideration the basic need to protect children generally.

1.11.2 Population, Sample and Sampling Procedure

The main population of the study is CVSA whose cases had been filed at the selected children's courts by the time of data collection. The study sampled only cases of CVSA from both gender aged between 10 years and above but below 18 years. Ten CVSA were sampled from every station giving a total of 50 CVSA for the study. The selection of CVSA aged 10 years and above was based on their presumed ability to be articulate in expressing their experiences of sexual abuse better than those aged below 10 years. The study however did collect information about CVSA aged below 10 years through perusal of selected concluded court files.

The study also interviewed a number of key informants who were purposively selected. One prosecutor was purposively sampled from each of the courts giving a total of 5 prosecutors. The study purposively sampled 2 investigating officers from each court, giving a total of 10 investigating officers, hence a total of 15 police officers. One magistrate and 1 judge were interviewed from each of the 5 courts. Although the study intended to interview the Chief Justice as a key informant, a request which the Chief Justice accepted, he directed the researcher to interview the judge in charge of the Family Division of the High Court due to what the Chief Justice referred to as the 'special nature' of the research. The official view of the Judiciary was thus obtained through the judge and forms part of the data collected. The study also interviewed 2 lawyers representing the CVSA and 2 representing the accused persons per station, who were purposively sampled, giving a total of 20 lawyers.

A total of 5 social workers were purposively sampled and interviewed, representing 1 social worker per court station. The study conveniently sampled and interviewed 2 parents/ guardians per station, giving a total of 10 parents/guardians of CVSA. Six children’s officers were purposively sampled and interviewed, representing 1 officer per court station and 1 officer managing the child helpline in Nairobi. The study managed to interview the target number of 50 CVSA. The category and number of respondents interviewed is illustrated by table 1 below;

Table 1: Sample and Sample Size by Category of Respondents

Category	Number per station	Total
CVSA	10	50
Prosecutor	1	5
Investigating Officers	2	10
Magistrate	1	5
Judge	1	5
Lawyers	4	20
Social workers from NGOs	1	5
Parents/guardians	2	10
Children’s officers	1	5
Helpline Officer	1	1
Chief Justice(represented by judge in charge of family division of the High Court Nairobi)	1	1

1.11.3 The Respondents

The study interviewed four different groups of respondents namely; CVSA, legal practitioners, police officers and psycho-social support providers.

CVSA

The study interviewed the target total of 50 CVSA, majority (92%) comprising of girls while the boys accounted for only 8%.This could mean that either more girls than boys fall victims of sexual abuse or that more girls than boys report CSA to the police. All CVSA interviewed were between the ages of 10 to 18 years. The study observed the CVSA immediately they arrived at the court compounds and continued to do so until after they had testified when they were interviewed. Not all CVSA interviewed were found at

the court compounds as some of them were traced to the children homes that housed them after the abuse. These included both government remand homes and institutions under the management of NGOs.

Legal Practitioners

The target total of 30 legal practitioners was interviewed. They comprised of 5 magistrates, 1 from each children's court (Nairobi Children's Court, Nakuru Law courts, Mombasa Law courts, Eldoret Law courts and Kisumu Law courts), 5 judges comprising of the head of the family division of the High Court representing the judiciary's official position on the issues raised by the study as directed by the Chief Justice, 1 Court of Appeal judge, the Principal Judge of the High Court Division, 1 judge of the Criminal Division of the High Court and one judge of the Interim Independent Constitutional Dispute Resolution Court(IICDRC).

The magistrates presided over the trials of the accused persons and therefore took the testimony of CVSA as they were in direct contact with them in court. Their roles included issuing summons to witnesses, listening to the evidence of both parties (the accused and the prosecution witnesses including CVSA) and ensuring that the laid down court procedures were followed. In respect of this, magistrates had a duty to ensure the defence lawyers do not cross-examine CVSA in an intimidating manner. Under the adversarial legal system, the magistrates are required to remain impartial, non-partisan and passive throughout the process.¹⁵⁹ At the end of the trial, they are expected to make a decision based only on the evidence adduced before them in court. It is the magistrate's evaluation of the evidence produced before them that determines the acquittal or conviction of the accused persons. Subsequently therefore, it is the magistrates who make a determination as to whether the child should be protected or assisted in any way including making orders as to medical, counseling and psycho-social support services.

All the judges had either practised as advocates before their appointments as judges or had served as magistrates for over 20 years before being elevated to the judges' position. Thus, the experience of the judges was a useful source of qualitative data. Unlike the magistrates who had the opportunity to see, talk to and observe the reaction of CVSA, the judges only handled the CSA cases at the appellate/ review level thereby only dealing

¹⁵⁹ Criminal Procedure Code, section 125.

with the files/records from the magistrates courts without the benefit of CVSA appearing before them. However the High Court decisions bind the Magistrates' Courts and the Court of Appeal was the final court. (The Supreme Court became the final court after the promulgation of the new constitution on the 27th of August 2010. As at the time of the study the court had not been operationalized. Thus no interviews were possible with judges in this court).

The study also interviewed 20 lawyers in private practice comprising of 10 defence lawyers and 10 advocates representing CVSA. Two lawyers were selected from each of the 5 children court stations. The lawyers came into contact with CVSA either as defence lawyers or as CVSA's lawyers. Although regarded as officers of the court, the defence lawyers have the core function of protecting the interests of their clients (accused persons). They do this by subjecting the prosecution witnesses who include CVSA to rigorous cross-examination. This is aimed at creating doubt in their evidence, so as to have their clients/accused set free by the court.

The CVSA' lawyers on the other hand have the primary duty of protecting the interests of CVSA and ensuring they are not unduly intimidated. They ensure that the right/laid down court procedures are observed by the defence counsel. CVSA's counsel played a passive but key role in court as they neither lead CVSA in evidence like the prosecutor nor cross-examined the accused or the defence witnesses. They were mute observers who advised the prosecutors on the interests of CVSA. All the victims' lawyers happened to be employees or were engaged by NGOs working in CSA matters. Such NGOs included CLAN, CRADLE, WRAP and Kituo cha Sheria.

Police Officers

The study interviewed a total of 15 police officers comprising of 1 prosecutor and 2 investigating officers per court station. The analysis of police officers is more detailed than the rest of the respondents due to their crucial role in investigation and prosecution of CSA cases. Sixty two percent of the officers interviewed were female while 38% were male suggesting that more female than male police officers are assigned CSA cases. Eighty four percent of the police officers interviewed had attained high school education level, 8% had diploma in criminology and social order while a further 8% were university graduates. Although majority of the police officers had high school level of education, the

percentage of the officers who had university degrees was notably low. Of importance to this study was the fact that only a dismal 8% had specialized training (i.e. diploma in criminology and social order) in skills necessary to enable them handle CVSA and CSA matters. According to the police department, the various ranks for police officers range from the Commissioner of Police (changed to Inspector General of the National Police Service by the Constitution of Kenya) to a Constable.¹⁶⁰

Considering the police ranking system, the study found that 38% of the police officers interviewed comprised of police investigating officers and child desk officers of the ranks of constables and corporals. These are the lowest and second lowest ranks respectively in the police force. This is an indication that the important, serious, sensitive task of investigating CSA matters and handling CVSA that requires skills and experience is assigned to officers of the lowest and second lowest ranks.

The prosecutors were of the rank of inspector and accounted for 31% of the police officers interviewed. Only 24% of the respondents interviewed were of the ranks of chief inspector (8%), superintendent (8%) and senior superintendent (8%), being the middle ranks in the police ranking systems. It was noted that police officers from the higher ranks namely, assistant commissioner, senior assistant commissioner, deputy commissioner, senior deputy commissioner II, senior deputy commissioner I and the commissioner were not directly involved in either the investigation or prosecution of CSA cases.

The handling of CVSA by the police at the investigation or prosecution levels appears to be left entirely at the hands of officers of the lower ranks with little experience and skills in handling CVSA. There was almost no involvement of the most senior officers in the police force. This fact corroborates the response from CVSA and judicial officers that some police officers were insensitive to their needs. The insensitivity may have contributed to the difficulties experienced by CVSA while testifying in court. Twenty three percent of the police officers interviewed had experience of 1 year or less in

¹⁶⁰Commissioner of police (highest), Senior deputy commissioner 1, Senior deputy commissioner 2, Deputy Commissioner, Senior assistant commissioner, Assistant commissioner, Senior superintendent, Superintendent, Acting superintendent, Chief inspector, Inspector, Senior sergeant, Sergeant, Corporal, Constable (lowest) Source: Kenya Police Website <www.kenyapolice.go.ke> accessed 7 July 2011.

investigation and prosecution of crime generally. This tally's with the study finding that 38% of the officers assigned to investigate CSA cases are at the level of constable and corporal as the lowest and second lowest ranks in the police ranking systems respectively.

Fewer officers with experience of over one year handled CVSA than their counterparts with less than one year experience. The most experienced officer in crime/investigation generally amongst the police officers interviewed had a 15 to 20 years' experience in prosecution/ investigation of crime generally. This represents a paltry 7% of the officers assigned to handle CVSA. Another 7% of the officers had 13 to 15 years of experience in crime investigation/ prosecution generally. Eight percent of the officers had between 8 to 13 years of experience of crime investigation/ prosecution generally. Another 8% had between 7 to 8 years of experience of crime investigation/ prosecution. Similarly a further 8% had between 5 to 7 years' experience of crime investigation/ prosecution generally. Fifteen percent of the officers had between 3 to 4 years' experience of crime investigation/prosecution, 8% had 2 to 3 years' experience while 23% had experience of 1 year or below in crime investigation/ prosecution generally.

Figure 2: Years of Experience of the Officers of Different Ranks Handling CVSA



Apart from experience in prosecution/ investigation of crime generally, the study sought to find out the experience of the police officers in investigating/ prosecuting CSA cases specifically. An overwhelming majority of 77% of the police officers had 1 years' experience or less in prosecution/investigating of CSA cases. This supports the study finding that CSA cases are mostly assigned to officers of the lower ranks and less experience such as constables and corporals. Eight percent of the officers interviewed had between 1 to 2 years' experience in prosecution/investigating of CSA cases while another 8% had between 2 to 3 years' experience in prosecution/investigating CSA cases. Seven percent of the officers had between 3 to 7 years' experience in prosecution/ investigation of CSA cases.

The roles played by the police officers according to the study findings include; the arrest of suspects, investigation of cases, decisions on which offence to charge the accused with and the drafting of the same, serving summons to witnesses to attend court and leading witnesses to give evidence in chief.

Psycho-social Support Providers

The study interviewed 5 social workers from NGOs, 1 from each children court station, 10 parents/ guardians, 2 from each station and 5 children officers, 1 from each children court station and one officer in charge of child helpline desk.¹⁶¹ For ease of reference, this group will be referred to by the study as Psycho-Social Service Providers (PSSPs). The PSSPs comprised of 43% male and 57% female, an indication that men play a big role in offering psycho-social support to CVSA. Forty six percent of the PSSPs interviewed were between the ages of 35 to 45 years while 36% were in the age bracket of 26 to 45 years. Nine percent of the PSSPs interviewed were between ages 46 to 55 years while 5% were in the age bracket of 25 years and below. Another 5% were aged above 55 years. From the above statistics, it appears that majority of the PSSPs fall within the age bracket of between 26 to 45 years which reflects the seriousness with which the society views the need for psycho-social support services to CVSA. The majority of the PSSPs were neither too young nor too old.

¹⁶¹ This is a mechanism by department of children services in the Ministry of Gender and Social Services that encourages the public to report any forms of child abuse to the ministry by telephone.

Most of the PSSPs had attained secondary school education as the highest level of education representing 36% of the PSSP respondents. Thirty two percent of the PSSPs had attained university education while 14% possessed post graduate degrees. Tertiary level of education accounted for 14% of the PSSPs while only 5 % of the PSSPs had below secondary level of education probably representing the parents/ guardians of CVSA since the rest of the PSSPs were either employees of either the government or NGO sector with minimum requirement of secondary school education.

1.11.4 Data Collection Instruments and Procedures

The study collected both quantitative and qualitative data using four different techniques according to Mugenda and Mugenda¹⁶² namely direct observation, records review, Focus Group Discussion and Interviews.

The first technique involved direct observation of selected CVSA as they testified in each of the 5 children courts. This technique enabled the observation of the interaction between CVSA and court officers. The technique offers an opportunity for the interaction between CVSA and court officers to be captured first hand as a primary source of data.¹⁶³ The study observed and recorded the appearance, demeanor, reaction and interaction of CVSA and individual court actors i.e. the magistrates, prosecutors, the children officers, lawyers and court clerks. The interaction between CVSA and parents/ guardians, social workers, and the accused was also noted. The study also observed the court layout and its effect on CVSA ability to testify.

The second data collection technique involved the review of 17 randomly selected completed CSA cases in each of the selected children's court registries. The perusal of court records enabled the author to understand the basis for the courts' acquittal or conviction of accused persons in CSA cases. Through this technique, the study was able to analyze the court procedures and CVSA testimony as recorded in the files. Of special importance were the court's recordings of the appearance and demeanor and other marginal notes on the court's observation of the CVSA during testimony. Perusal of

¹⁶² O Mugenda and A Mugenda, *Research Methods: Quantitative and Qualitative* (ACTS Press 1999) 209.

¹⁶³ Ibid.

records compliments the observation method and enables the capture of information which may not have been observed directly by the researcher.¹⁶⁴

The third technique of data collection was the Focus Group Discussion involving the magistrates, lawyers, prosecutors, investigating officers, children officers, social workers/psycho-social service providers and CVSA in each of the five court stations. This technique was employed after the interviews, observation and court reviews were completed. It gave the participants an opportunity to interrogate themselves on their responses and preliminary findings of the study. It therefore served as a validation exercise for the data collected in each court station.¹⁶⁵

The fourth technique involved face to face interviews with all the respondents selected from different children courts. Different sets of questionnaires (Appendices B, C, D and E) were administered to different categories of respondents during the interviews. The advantage of face to face interviews is the opportunity for the researcher to obtain in-depth information from the respondent.¹⁶⁶

Interviews

The study conducted interviews based on an interview guide consisting of a list of open - ended questions which were flexible enough to accommodate further probing. The questions were designed to include the specific procedures at different stages of the court process. The purpose of the study was explained to each respondent before seeking their consent. Only those who voluntarily accepted to participate in the study were interviewed. Consent was sought from the parents or guardians of CVSA before the questionnaires were administered of questionnaires. The researcher enlisted the services of four research assistants, who had the requisite skills in communication and research with children. One of the research assistants had skills in traumatic counseling and this proved very important in cases where CVSA initially appeared withdrawn, apprehensive and uneasy.

The interviews were conducted at private locations where confidentiality and privacy was required by research ethics.¹⁶⁷ Recording of the data was done through note taking.

¹⁶⁴ D Silverman, *Doing Qualitative Research: A Practical Handbook*(Sage Publication 2004) 210.

¹⁶⁵ E Babbie, *The Practice of Social Research* (6th edn, Wadsworth 1992) 150.

¹⁶⁶ Isaac S & Michael W B, *Handbook in Research and Evaluation* (Edits Pub 1982) 131.

¹⁶⁷ M Mauthner, 'Methodological Aspects of Collecting Data from Children: Lessons from Three Research Projects' (1997) 11 *Children and Society* 25.

Where the parent/guardian or the CVSA declined to participate, such decision was respected, a replacement sought and the entire process repeated for any CVSA interviews.

Direct Observation

A participatory observation was preferred as this forges trust between the respondents and the researcher.¹⁶⁸ It gave further insight into the procedures that CVSA undergo while testifying in court. Throughout the observation, *field notes* (written accounts of what the researcher sees, hears, experiences and thinks about while collecting data) were taken comprehensively, covering as much aspects of the procedures as possible.

The field notes included portraits of participants, reconstruction of conversations, descriptions of the settings and accounts of particular events and activities. Particular CSA cases scheduled for hearing during the research period were purposively selected for observation. The observation captured the processes of the examination in chief, cross examination and re-examination of CVSA.

Focus Group Discussions (FGD)

FGD comprising of between 8 to 10 participants were conducted to obtain further information on the issues under consideration by the study. A total of two FGD were conducted with one session comprising of the parents/guardians of CVSA while the second FGD consisted of court officers who included a magistrate, prosecutor, investigating officers, children's officer, and lawyers for the defendant and CVSA. It was however not possible to have any judge participate in any of the FGD.

The discussions allowed the participants to freely express their opinion, attitude, feelings, beliefs and needs, reflecting on the tentative findings of the study after the completion of the interviews. The FGD had the advantage of revealing diversity in views and opinion on various issues under study.¹⁶⁹ FGD helped in providing in-depth understanding of the issues at hand.¹⁷⁰ In addition, the respondents had a chance to re-evaluate their previous positions or statements. FGD therefore served as a validation process of information collected through other means such as observation and interviews.¹⁷¹

¹⁶⁸ A Sense, 'Driving the Bus from the Rear Passenger Seat: Control Dilemmas of Participative Action Research' (2006) 9 International Journal of Social Research Methodology 1.

¹⁶⁹ *Op. cit* n 162.

¹⁷⁰ A Graziano and M Raulin, *Research Methods: A Process of Inquiry* (Harper and Row 1989) 140.

¹⁷¹ *Op. cit* n 164.

1.11.5 Secondary Data

The study reviewed two court records of finalized CSA cases per children court. The records provided insight into issues that influenced the court's decision to convict or acquit an accused in cases of CSA. The study also reviewed the evidence of CVSA under 10 years as recorded in the court files. Likewise a review of other secondary sources of data included books, journals and internet sources as well as government reports on relevant aspects of the study.

1.11.6 Validity and Reliability

Validity has been defined by Silverman as truth which is interpreted as the extent to which an account accurately represents the social phenomena to which it refers.¹⁷² The study ensured validity through *method and data triangulation*. This is the combination of different ways of obtaining data to arrive at the same findings.

Reliability refers to the degree of consistency with which instances are assigned to the same category by different observers or by the same observer on different occasions.¹⁷³ The study ensured reliability of the data collected through the use *low-inference descriptors*. This ensured that collected data was reported as near as possible in the words of the respondent. Although no act of observation can be free from the underlying assumptions that guide detailed data presentations, minimal inferences (low inferences) as opposed to (high-inference) was a preferred approach of summarizing data.

1.11.7 Data Analysis

Data analysis involved four processes namely; data reduction, data display, conclusion and verification.¹⁷⁴ Data reduction refers to the process of selecting, focusing, simplifying and transforming raw data to useful information for the study.¹⁷⁵ Data display refers to the organization of the data so as to permit conclusions to be drawn.¹⁷⁶ This involved the use of tables and charts which clarify the main direction of the data analysis. Conclusion drawing refers to deciding what things mean, noting irregularities, patterns explanations, possible configurations and propositions.¹⁷⁷ Verification refers to testing the provisional

¹⁷² Ibid.

¹⁷³ D Cook & S Reichardt, *Qualitative and Quantitative Methods in Evaluation Research* (Sage 1979) 47.

¹⁷⁴ *Op. cit* n 164.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

conclusions for their validity.¹⁷⁸ Quantitative data was analyzed using the Statistical Package for Social Sciences. The study employed the services of a data analyst in this respect. However, the interpretation of the data was done by the researcher. Quantitative data is presented using simple graphs and charts to illustrate the findings. Qualitative data was analyzed and presented in a narrative format by the researcher since this did not require any experts.

Qualitative data is presented in a narrative form. The use of low inference data is applied to ensure reliability of the data. The study sample size of respondents was representative enough as each respondent was as unique as the information they gave. Both the quantitative and qualitative data therefore supplemented and complemented each other.

1.11.8. Ethical Considerations

Being a social science research involving human interactions, the study observed utmost *objectivity* and *integrity* throughout the research period, managing any biases as far as was possible.¹⁷⁹ This was important for the credibility of the research findings. In order to achieve this, data collected through observation and interviews was supplemented with that from secondary sources such as law reports or the practice in other jurisdictions that apply the adversarial legal system. This offered an opportunity to compare and validate the research findings. However, the research relied heavily on the primary data collected from the field.

The research was carried out with openness without any secrets. Clearance was sought in advance from the Registrar of the High Court to enable the researcher collect the required data from the courts. In addition, consent was obtained from the individual respondents who voluntarily participated in the interviews as per research ethics.¹⁸⁰

The right to *full disclosure* of the nature and purpose of the research was observed so as to empower the respondents to make informed decision as to whether or not to take part in the research.¹⁸¹ All respondents therefore gave *informed consent* while the study

¹⁷⁸ Ibid.

¹⁷⁹ E Williamson *et al.*, 'Conducting Research with Children: The Limits of Confidentiality and Child Protection Protocols' (2005) *Children & Society* 1,5.

¹⁸⁰ W Bay, 'Doing Ethics: The Bearing of Ethical Theories on Fieldwork' (1980) 27 *Social Problems* 358.

¹⁸¹ Ibid.

respected the decisions of those who declined to take part in the study and treated such refusal as part of data. The research also observed and respected the *right to privacy* of all respondents by not revealing any of their identities.¹⁸²

Whereas it was necessary to obtain written consent from every respondent, the researcher ensured that details of the respondents that may lead to their identity were not recorded. This ensured *confidentiality and anonymity* requirement especially for CVSA. The researcher explained to the respondents that the information given by them was for purposes of the research only. The researcher took steps to ensure that the research process and information collected did not occasion any harm whatsoever (physical, emotional, psychological or moral) to the respondents. One such unfortunate event however occurred in Kisumu and the researcher, equipped with counseling skills applied the same appropriately to mitigate the effects immediately.

Since the study involved children as respondents, the researcher recognized their vulnerability. Therefore in addition to the ordinary ethical requirements, the study also observed ethical standards in research with children.¹⁸³ For example, the researcher discussed with CVSA and their parent /guardian the purpose of the research and the importance of their views, reassuring them of strict observation in respect to their confidentiality, privacy and anonymity. The decision taken by CVSA and guardian/parent as to whether or not to participate in the research was appreciated, understood and respected due to the sensitive nature of the study. Parents/guardians of children who opted to take part in the interview were required to give consent and the same was recorded by the researcher. Utmost good faith was observed, taking care to avoid any situation that could harm the feelings of CVSA in any way.

Where CVSA were unable to talk to the researcher for whatever reason, an attempt was made to seek the views of the child through the parent/guardian. All names and places were changed to conceal the identity and protect the privacy and dignity of CVSA. Considering the effects of CSA on children, the open ended questionnaire was used as a special tool of expression to allow CVSA write and draw their responses in some cases.¹⁸⁴

¹⁸² *Op. cit* n 179.

¹⁸³ *Ibid.*

¹⁸⁴ *Op. cit* n 167.

Structured questions enabled CVSA to give yes or no answers thereby reducing the interview time and maximizing on CVSA concentration during the first twenty minutes of the interview. This style enabled the collection of a lot of relevant information before CVSA lost concentration. The open ended questionnaires allowed CVSA to state their views of what was relevant to the study. Both methods were however combined in one document to avoid interviewing the child twice. This is in line with Article 12 of the UNCRC which provides for the child's right to express their views on all matters that affect them, including being facilitated to give informed consent. Article 54 provides for respect for and inclusion of children on matters that concern them.

The study employed the services of both male and female research assistants to ensure that CVSA were interviewed by a research assistant of their preferred gender. The importance of this measure is that some CVSA would not readily discuss the abuse with any person of the same gender as the accused person.¹⁸⁵

1.12 Chapter Breakdown

The study is divided into seven chapters as follows;

Chapter One: Introduction

The chapter introduces the study by giving a brief background information, problem statement, research questions, research objectives, specific objectives, justification for the study, scope and limitation of the study as well as the theoretical framework. The chapter provides a graphic illustration of the study concerns. The methodological approach employed by the study is also discussed in this chapter.

Chapter Two: Literature Review

The chapter reviews relevant literature on the adversarial system of trial and its implication for CSA trial from different parts of the world. The review is organized into three broad thematic areas namely pre-trial, trial and post -trial procedures of the classical adversarial trial. The thematic areas are further divided into sub themes reflecting the concerns of the study.

¹⁸⁵*Op. cit* n 109.

Under the pre-trial procedure, the subthemes are: The adversarial trial and implications for child victims of crime, the effect of CSA on CVSA's ability to testify, the investigation of CSA, the administration of the children court and its implication for CSA trial.

Under the trial procedure, literature is reviewed under the following sub themes: the burden of proof and the role of the prosecutor in CSA trial, impartiality of the trial judge and its implication on CSA trial, publicity of the trial, orality of evidence, cross examination, accused person's right to confront witnesses, re-examination the right to bail, imbalance between the rights of accused persons and CVSA in CSA trial, CSA trial procedure in Kenya.

Under the post-trial procedure, literature is reviewed under the following subthemes: post testimony effects of the trial on CVSA, concerns about CVSA safety and welfare after testimony, court orders protecting CVSA after their testimony.

The literature review reveals that the classical adversarial trial procedure is unsuitable for CSA trial. Some jurisdictions in other parts of the world have modified the adversarial trial procedure in CSA cases to accommodate the protection of CVSA. However, limited studies have been carried out in Kenya in the area of CSA and court procedures. No known study has been conducted to interrogate the implication of the classical adversarial trial procedure on CSA trial in Kenya. The knowledge gap in this area makes it difficult to develop appropriate interventions to protect CVSA in CSA trial in Kenya. This is the gap that the study identifies and seeks to fill.

Chapter Three: Conceptual Framework: Procedural Justice in CSA Trial

This chapter discusses the author's conceptualization of CSA trial within the theoretical framework of procedural justice and the rights theory. Drawing from the theoretical arguments, the author analyses what constitutes a fair trial in the context of procedural justice theory and the rights theory with respect to the rights of accused persons and rights of CVSA in a CSA trial. The chapter is presented in the following thematic areas; Definition of procedure, definition of justice, defining procedural justice, the relationship between substance and procedure, the objective of criminal procedure, procedural fairness

in criminal proceedings, limitation of accused persons' rights in criminal proceedings, CSA trial and procedural justice,

The chapter develops a procedural justice framework for CSA trial within the context of procedural justice that balances the rights of accused persons and concerns for the protection of CVSA. The framework becomes the reference point to evaluate CSA trial procedure in Kenya and therefore informs the discussions in chapters four, five, six and seven.

Chapter Four: Pre-Trial Procedure in CSA Cases in Kenya

Using the procedural justice framework for CSA trial identified in chapter three as the reference point, this chapter thematically analyzes data collected on the pre-trial procedure applicable in the five selected children courts in Kenya. The chapter presents an analysis of respondents' views and study observations on the adversarial legal system and implications for CVSA, the effect of CSA on CVSA's ability to testify, the investigation of CSA, the administration of the children court and its implication for CSA trial. The study examines whether the pre-trial procedure includes any measures to prepare CVSA for their testimony as stipulated by the UNGJMCCVWC (2005). The study finds that pre-trial procedures in CSA trial in Kenya are not in the best interest of CVSA. There are no pre-trial procedures to prepare CVSA for their traumatic experience associated with involvement in the legal process.

Chapter Five: Trial Procedure in CSA Cases in Kenya

This chapter evaluates CSA trial procedure in Kenya under the following thematic areas: the burden of proof, the role of the prosecutor in CSA trial, impartiality of the trial judge and its implication on CSA trial, publicity of the trial, orality of evidence, cross examination, accused person's right to confront witnesses, re-examination, the right to bail and the constitutionality of limiting accused person's right to a fair trial.

The study findings are examined in respect of the rights of accused persons to a fair trial and the rights of CVSA to protection. In particular, the study examines the balancing of accused persons' right to confront witnesses in a public trial and the requirement of witnesses to give oral evidence in the presence of the accused and how the courts protect CVSA from trauma associated with face to face confrontation.

This chapter also analyses the accused persons' right to cross examine witnesses with the need to protect CVSA from intimidatory cross-examination and the role of the trial judge in protecting CVSA while safeguarding the rights of accused persons to fair trial. The analysis includes measures taken by the court in protecting CVSA while safeguarding the rights of accused persons generally under the victim protection measures outlined in the UNGJMCCVWC (2005). In particular, the study analyzes the entire trial procedure in the context of human rights principles of non- discrimination, preservation of dignity, right to participation, right to be heard and the best interest of the child principle.

The study also analyses the court procedure in the context of the provisions of the Constitution of Kenya 2010 (promulgated on the 27th of August 2010), and relevant statutory provisions such as the Children Act of 2001, the Sexual Offences Act 2006, the Evidence Act, the Witness Protection Act 2006, and the Criminal Procedure. The discussion highlights the imbalance between the rights of accused persons and those of CVSA within the context of procedural justice and the rights theory. In addition, the study uses the psychoanalytic theory to explain why CVSA need special procedures while testifying in CSA cases, unlike other offences. Also discussed in this chapter is the effect of the difficulties on CVSA ability to testify and the consequences thereof.

The study finds that CSA trial in Kenya is to a large extent protective of the accused person while being insensitive to the concerns for CVSA protection. The trial procedure fails to balance the rights of CVSA and accused persons in CSA cases. This results into a miscarriage of justice to CVSA in some cases.

Chapter Six: Post-Trial Procedure in CSA Cases in Kenya

This chapter discusses the effects of the classical adversarial trial procedure on CVSA after they testify. The analysis is presented under the following thematic areas: post testimony effects of the trial on CVSA, court orders protecting CVSA after their testimony and concerns about CVSA safety and welfare after testimony. The study finds that there are no follow up procedures to ensure the safety and welfare of CVSA after they testify. No court orders are made to protect CVSA from intimidation, threat or harm by the accused person. There are no compensation orders in respect of expenses incurred by CVSA and their families following the abuse.

Chapter Seven: Conclusion and Recommendations

In this chapter, the study concludes that the classical adversarial legal system's court procedure applicable in the trial of CSA cases in Kenya fails to balance the rights of accused persons and CVSA. The pre-trial, trial and post-trial procedure is insensitive, causes trauma, re-victimization and violates the rights of CVSA as a result of the imbalance between the rights of accused persons and concerns for CVSA protection.

The children court procedure is not consistent with the procedural justice framework for CSA trial and the human rights' approach in justice matters concerning children as provided by the UNCRC and the UNGJMCCVWC (2005). The CSA trial procedure in Kenya is inconsistent with procedural justice and the rights theories. The trial procedure therefore violates the rights of CVSA to protection and participation in the judicial process.

The study makes policy, research, legislative and administrative recommendations. Specifically, the study recommends a special trial procedure for CSA cases, modeled along the procedural justice framework for CSA trial. In this respect, the study provides a model law for CSA trial to be cited as the 'Child Sexual Abuse Procedure Act.' The study therefore recommends the enactment of a child friendly children court procedure that balances the rights of both accused persons and CVSA along the proposed Act.

1.13. Conclusion to Chapter One

In conclusion, there is need to interrogate the court procedures applicable in CSA trial in Kenya. The absence of such a study makes it difficult to understand the implication of the adversarial court procedure on CSA trial in Kenya. Subsequently, it is difficult to develop appropriate intervention to protect CVSA in CSA trial. This is the gap that the study seeks to fill by generating new knowledge. In the next chapter, the study reviews relevant literature on the classical adversarial trial procedure and its implications for CSA trial.

CHAPTER TWO

LITERATURE REVIEW

2.1. Introduction

According to a study conducted in 2003 by the Office of the United Nations High Commissioner for Human Rights, although the UNCRC is a milestone in the universal protection of child rights, there are still many challenges which hinder the full realization of child protection in the administration of justice.¹⁸⁶ The study assessed the impact of international human rights law on domestic legal systems throughout the world. The study aimed at establishing the challenges faced by legal practitioners in applying international human rights law in various countries worldwide. The study found that procedural technicality is amongst several factors that hinder effective protection of children through the court system.¹⁸⁷ Whereas the United Nations High Commission for Human Rights' study was conducted worldwide, this study is carried out in Kenya. It is concerned about the effect of the adversarial court procedures on CVSA ability to coherently narrate the abuse in court. In addition, this study argues for the need to balance the rights of accused persons and those of CVSA in CSA trials.

This chapter therefore identifies and reviews relevant literature on CSA trial on the classical adversarial trial system and its implication for CSA trial from different parts of the world.¹⁸⁸ The classical adversarial trial procedure can be classified into three parts namely pre-trial, trial and post-trial procedure.¹⁸⁹ The study identifies thematic areas within the pre-trial, trial and post-trial procedures around which literature is reviewed, reflecting the concerns of this study.¹⁹⁰

Under the pre-trial procedure, the subthemes are: The adversarial trial and implications for child victims of crime, the effect of CSA on CVSA's ability to testify, the investigation of CSA, the administration of the children court and its implication for CSA trial. Under the trial procedure, literature is reviewed under the following sub themes: the

¹⁸⁶ Office of the High Commissioner for Human Rights, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (United Nations 2003) 47.

¹⁸⁷ Ibid.

¹⁸⁸ *Op. cit* n 165.

¹⁸⁹ J H Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press 2004) 109.

¹⁹⁰ B K Mutai, *How to Write Quality Research: A Complete and Simplified Recipe* (Thelley Publications 2000)88.

burden of proof, the role of the prosecutor in CSA trial, impartiality of the trial judge and its implication on CSA trial, publicity of the trial, orality of evidence, accused person's right to confront witnesses, cross examination and reexamination, imbalance between the rights of accused persons and CVSA in CSA trial and the right to bail. Under the post-trial procedure, literature is reviewed under the following subthemes: post testimony effects of the trial on CVSA, concerns about CVSA safety and welfare after testimony and court orders protecting CVSA after their testimony.

2.2 Pre-Trial Procedure

Pre-trial procedure refers to steps and circumstances that precede the prosecution of CSA trial under the adversarial criminal procedure. This covers what happens from the time CSA occurs and its detection. It also includes the reporting and investigation of CSA. In addition, this section reviews literature on the subsequent effect of CSA on CVSA's ability to narrate the details of the abuse within the adversarial court set up in the administration of children's courts.

2.2.1 The Adversarial Legal System and Its Implications for CSA Trial

Concerns have been raised about the focus of adversarial criminal trials on the establishment of the guilt or innocence of the accused persons, while ignoring the interests of victims of crime.

A study carried out by Zedner in England in 2002 revealed that the classical adversarial criminal trial does not recognize victims of crime (read CVSA) as key players in criminal proceedings, although they play an important role in reporting crime, furnishing evidence, identifying the offender and testifying in court.¹⁹¹ Zedner conducted victimization surveys in the criminal justice system in England from a victimologist's perspective and applied the lifestyle theory of victimization.¹⁹² The scope of the study was the impact of various crimes on victims and the need for compensation even in cases where the accused is not found guilty. Whereas Zedner's study aimed at creating public awareness in England on the causes and effects of crime on victims, from a victimologist's point of view, this study argues for the balancing of the rights of accused persons and CVSA in CSA cases in

¹⁹¹ L Zedner, 'Victims' in M Maguire and R Morgan and R Reiner R(eds), *The Oxford Handbook of Criminology* (Oxford University Press 2002) 419.

¹⁹² Ibid.

Kenya from a multi-disciplinary perspective by applying the psychoanalytic, labeling, procedural justice and human rights theories.

The adversarial criminal justice system has for a long time failed to recognize the burden it places on victims which hinders their accessibility to justice and sometimes causes them to withdraw from the criminal process, resulting into a limitation of its ability to pursue cases effectively.¹⁹³ In 1982, President Ronald Regan of the USA established the President's Task Force on Victims of Crime to look into the issue of protection of victims in the CJS.¹⁹⁴ The Taskforce report faulted the American adversarial trial procedure for failing to provide for victim's effective participation in the trial process. The taskforce observed that:

Victims, no less than defendants, are entitled to their day in court. Victims, no less than defendants, are entitled to have their own views considered. A judge cannot evaluate the seriousness of a defendant's conduct without knowing how the crime has burdened the victim. A judge cannot reach an informed determination of the danger posed by a defendant without hearing from the person he has victimized.¹⁹⁵

The Task Force report attracted varied views from different scholars in the American justice system. One such scholar is Lamborn who argues that the adversarial CJS has lost an essential balance and deprives innocent, honest and helpless victims of its protection by oppressively burdening instead of protecting them.¹⁹⁶ Lamborn emphasizes that the reliance of the adversarial criminal justice system on the victim is therefore a powerful bargaining twist in the recognition of their interest and concerns.¹⁹⁷ Lamborn was concerned about whether or not the US constitution could be amended to include basic rights for crime victims such as the right to information, to be present and be heard at all critical stages of the criminal process.

This study however argues that, CVSA need not be present in court for their evidence to be admissible since the accused person's presence disempowers them from coherently

¹⁹³ Lamborn L L, 'Victim Participation in the Criminal Justice Process: The Proposals for A Constitutional Amendment' (1988) 34 Wayne Law Review 125.

¹⁹⁴ Ibid.

¹⁹⁵ President's Ronald Regan's Taskforce Report on Victims of Crime (US Government 1982)76-77.

¹⁹⁶ *Op. cit* n 193.

¹⁹⁷ Ibid.

and effectively giving their best evidence. In addition, whereas Lamborn argued for the constitutional recognition of victims' rights to information, presence and participation in the criminal process, this study argues that although the right to a fair trial is a constitutional right in Kenya,¹⁹⁸ Article 53(2) of the Constitution of Kenya provides that a child's best interests are of paramount importance in every matter concerning them. This is a confirmation of the principle of the best interest of children as provided by Article 3 of the UNCRC. It also supports children's right to express their views and be heard on matters affecting them in any judicial or administrative process under Article 12 of the UNCRC. The protection of CVSA during CSA trial process is in their best interest and therefore a constitutional right. The two rights are however in competition in CSA trial processes hence the need for a balance.

A study conducted in Norway by Havik on how to handle CVSA concluded that the impact of the criminal justice process on the victim, in the absence of consideration of their needs, is tantamount to secondary victimization of the victims.¹⁹⁹ Havik analyzed the impact of the CJS on CVSA from a psychological and legal perspective, but only conducted desk review of available literature in this area. This study however focuses on the implication of the adversarial court procedure on CVSA testimony in CSA trial in Kenya. The study is carried out by way of both desk review and field data collection. The primary data is supplemented and complemented by secondary data from desk review.

Goodman *et al* identified challenges faced by CVSA in the criminal justice process to include inadequate provision of information, delays in the trial process, or unexplained decisions by police to drop a case without reference to victims contrary to the human rights approach to administration of justice.²⁰⁰ Whereas Goodman *et al* focused on emotional effects of the court process on CVSA, this study examines both emotional and psychological impact of the adversarial court procedure on CVSA ability to testify in court. In addition this study is concerned about fair procedure in the trial of CSA and argues for the balancing of the rights of accused persons and CVSA.

¹⁹⁸ *Op. cit* n 40 Article 25(c).

¹⁹⁹ T Havik, 'Official Ideals and Correct Practice in Work with Child Witnesses in Sexual Abuse Cases in Norway' in Losel *et al* (eds), *Psychology and Law: International Perspectives* (Walter de Gruyter 1992)21.

²⁰⁰ Goodman *et al*, *Testifying in Criminal Court: Emotional Effects on Child Victims of Sexual Assault* (Monograph of the Society for Research in Child Development 1992) 5, 57.

Herman and Hirschman examined the adversarial trial procedure in CSA cases and argue that CSA cases are difficult to prove since the accused persons have greater legal protection than CVSA in the form of constitutional safeguards.²⁰¹ They identified such safeguards to include the presumption of innocence, the right to confront CVSA and other witnesses in court under a public trial and the right to cross-examination. They however did not study the details of how the safeguards cause a miscarriage of justice in some cases, but were interested on the general difficulties encountered in prosecuting CSA case under the classical adversarial criminal process. The study by Herman and Hirschman interviewed only prosecutors in America while this study seeks the views of police investigators, prosecutors, judicial officers, social workers, children officers CVSA and their guardians.

According to Abrams and Ramsey, the insensitivity of the court proceedings to CVSA is enhanced by the fact that the rights of accused persons in a criminal trial were designed for the adversary proceedings between adults.²⁰² Abrams and Ramsey analyzed the law, policy and practice on child protection and in America. The study found gaps in policy and law and recommended measures to ensure effective protection of children in practice. This study does not focus on policy, but is concerned about the practice and the rules of evidence that regulate the testimony of CVSA in CSA cases in Kenya. The study seeks to find out if the evidentiary rules of the adversarial system of trial, takes into account the vulnerability and effect of CSA on the ability of CVSA to testify. In addition, since Kenya is a signatory to the UNCRC, the study seeks to find out if CSA trial procedure is consistent with the provisions of the UNCRC as regards children's participation in the justice process.

Temkin examined the effect of the English criminal justice system's response to concerns by rape victims in 2002 and concluded that the adversary proceedings result into a second 're-victimization of the victims.'²⁰³ Temkin's study involved two groups of sexual assault victims. The first group comprised of victims who testified in court about rape. The second group did not testify at all. The study found that rape victims who testified in court experienced more trauma as a result of their testimony than those who did not

²⁰¹ *Op. cit* n 89.

²⁰² *Op. cit* n 5.

²⁰³ *Op. cit* n 3.

testify. Temkin interviewed only the rape victims as the study respondents. This study however seeks to interview CVSA, and also seeks the views of legal practitioners on the suitability of the adversarial procedure, in balancing the competing rights of accused persons and CVSA.

The classical adversarial system of trial is characterized by the requirement that a person who alleges a fact against another must establish a *prima facie* case.²⁰⁴ The trial takes place in court before an umpire (judge/magistrate, taking the role of the impartial arbitrator). The evidence produced in court is subjected to scrutiny through cross examination by the accused person, before being subjected to any sanctions.²⁰⁵ The parties to the dispute are required to gather and present evidence to the judge/magistrate who remains passive, impartial and neutral to ensure that the parties abide by the set rules.²⁰⁶ According to Dennis, the classical adversarial legal system assumes that both parties have the capacity and resources to argue out their cases before the court.²⁰⁷ Spencer and Flin have argued that the principles of adversarial trial safeguard the rights of accused persons to a fair trial, but cause a miscarriage of justice to CVSA in some CSA cases.²⁰⁸ Eastwood and Patton single out the presumption of innocence, orality of evidence, adversarial cross examination of witnesses, publicity of the trial, impartiality of the trial judge and the principle of the burden of proof as causing difficulty in CSA trial.²⁰⁹ Whereas it is generally accepted that the adversarial trial procedure serves the ends of justice by insisting on the passive role of the umpire, this study seeks to find out the fairness of the procedure in CSA cases.

The presumption of innocence is recognized as a hallmark of the adversarial trial and gives rise to the right of accused persons to bail.²¹⁰ The suspect is treated as innocent until proven guilty, hence no justification to interfere with his/her liberties.²¹¹ Also derived

²⁰⁴ A *Prima facie* case was defined by the defunct Court of Appeal for East Africa in the case of *Ramanlal Bhatt v R* (1957) EA 332 (CA) as “... one which a reasonable tribunal properly directing its mind to the law and the evidence would convict if no explanation is offered by the defence.”

²⁰⁵ J Smith, ‘Evidence in Criminal Cases’ in M McConville M and G Wilson (eds), *The Handbook of The Criminal Justice Process* (Oxford University Press 2002) 183.

²⁰⁶ M Damaska, *Evidence Law Adrift* (Yale University Press 1997) 40.

²⁰⁷ *Op. cit* n 123.

²⁰⁸ *Op. cit* n 52.

²⁰⁹ C Eastwood and W Patton, ‘The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System’ (2002) <<http://www.aic.gov.au/reports/eastwood.html>> accessed 16 February 2012.

²¹⁰ *Op. cit* n 123.

²¹¹ R Dworkin, *Taking Rights Seriously* (Harvard University Press 2000)150.

from this principle is the protection from self-incrimination which shields the suspect from assisting the police in building the case against him/her.²¹² Whereas the presumption of innocence has achieved the desired goal of protecting accused persons from arbitrary use of state power, this study seeks to find out if the presumption of innocence in CSA cases in Kenya ensures justice for both CVSA and accused persons, since CSA is often committed in private, away from the public eye.²¹³

Keane, like many other scholars are in agreement that evidence must be produced in court orally by witnesses, so as to give the accused person an opportunity to test it.²¹⁴ The orality principle requires that evidence against an accused person must be presented by the accuser orally and directly in the presence of the accused person.²¹⁵ In addition, adversarial cross examination of witnesses requires that witnesses testify in the presence of the accused person, to give an opportunity to verify the reliability of the evidence and credibility of the witness.²¹⁶ This is the basis of cross-examination of witnesses by the accused persons/their counsel. Whereas the orality principle and cross examination are hailed as hallmarks of a fair trial, studies have shown that lack of their regulation results into a miscarriage of justice to victims of sexual abuse in some cases.²¹⁷ This study seeks to find out whether the Kenyan court procedure in CSA cases is regulated to ensure fairness to both CVSA and accused persons. Cross examination in Britain has been regulated as a result of studies in this area.²¹⁸ This study therefore seeks to find out if there are any measures that regulate cross examination and orality principle in CSA matters, with a view to developing interventions that ensure fairness to both CVSA and accused persons.

Like many other scholars, Smith argues that the publicity principle of adversarial trial requires that the process be conducted in a public place where the conduct of the trial judge is under scrutiny by members of the public.²¹⁹ Jackson further argues that cross-examination requires that the witnesses testify personally, orally and directly in the

²¹² M Damaska, 'Evidentiary Barriers to Conviction and the Two Models of Criminal Procedure: A Comparative Study' (1973) 15 University of Pennsylvania Law Review 507.

²¹³ *Op. cit* n 109.

²¹⁴ Keane A, *The Modern Law of Evidence* (7th edn, Oxford University Press 2008) 304.

²¹⁵ *Ibid.*

²¹⁶ *Op. cit* n 196.

²¹⁷ *Op. cit* n 3.

²¹⁸ *Ibid.*

²¹⁹ *Op. cit* n 205.

presence of the accused person so that the accused can ask them questions which they must answer, to test the veracity of their evidence.²²⁰ Dammer and Erika are also in agreement with the traditional principles of the adversarial trial and support the impartiality of the trial judge, which requires that the judge plays a passive, impartial detached role of a neutral umpire.²²¹ The role of the umpire is to ensure that the parties observe the rules of procedure in presenting their evidence in court.²²² Whereas the publicity principle, cross examination and impartiality of the umpire ensure fairness in the trial process and safeguards the rights of accused persons, studies indicate that in CSA trials, the strict application of the principles, in the absence of any regulations, at times occasions an imbalance between the rights of accused persons and victims of sexual assault.²²³ Many studies have been conducted to this effect in various parts of the world.²²⁴ However, no such study has been conducted in Kenya, making it difficult to regulate CSA trial. This study seeks to generate new knowledge in this area and provide recommendations on how to balance the rights of accused persons with those of CVSA in CSA trials.

Another fundamental principle of criminal trial is the burden of proof which requires the person who alleges an offence to prove it.²²⁵ When children become victims of sexual abuse, legal intervention to protect them is through criminal prosecution of the abuser which depends on the ability of CVSA to testify in court.²²⁶ However, a study by Hoyano and Keenan shows that the principle of the burden of proof, while protecting the rights of accused persons, in some cases leads to a miscarriage of justice in CSA trials.²²⁷ Hoyano and Keenan conducted their study in several parts of the world and analyzed the implementation of the UNCRC to protect children from abuse generally. Kenya is a signatory to the UNCRC and Article 2(6) of the Constitution of Kenya specifically provides that any treaty or convention ratified by Kenya forms part of the laws of Kenya.

²²⁰J Jackson, 'Adversarial Trial and the Trial by Judge Alone' in McConville and Wilson(eds) *The Handbook of the Criminal Justice Process* (Oxford University Press 2002) 335.

²²¹ Dammer and Fairchild Erika, *Comparative Criminal Justice Systems* (3rd edn, Wadsworth 2006)213

²²² Ibid.

²²³ *Op. cit* n 47.

²²⁴ *Op. cit* n 200.

²²⁵ *Op. cit* n 212.

²²⁶ D C Bross, 'Terminating the Parent-Child Relationship as a Response to Child Sexual Abuse' (1995) in D E Abrams and S H Ramsey (eds), *Children and the Law: Doctrine, Policy and Practice* (Minn: West Group 2000) 377.

²²⁷ *Op. cit* n 47.

This study therefore seeks to find out the extent of the implementation of the UNCRC provisions on the protection of CVSA subjected to the judicial process in Kenya.

Wolf studied abuse against children and concluded that the appearance of children as victims of crime in criminal proceedings generally causes special problems to them, due to their immaturity, sometimes resulting into traumatic experiences.²²⁸ According to Wolf, children develop in stages and acquire new functions at different stages and many are not emotionally and psychologically developed to handle the effects of CSA.²²⁹ Wolf's argument is consistent with Freud's psychoanalytic theory on the vulnerability of children to CSA as discussed in chapter one under the theoretical framework. According to Wynne, subjecting CVSA to the classical adversarial trial process results into a "re-victimization or a second rape" of CVSA.²³⁰ Wynne argued that children need special protection as they are vulnerable by virtue of their age, psychological, mental, and emotional under-development. Their inability to resist or defend themselves against sexual assault may amplify their vulnerability, resulting into trauma and fear of subsequent attacks.²³¹ No such study has been conducted in Kenya making it difficult to take into account the special needs of CVSA in CSA trial process. This study therefore seeks to generate information and contribute data towards judicial reforms in this respect.

Spencer and Flin, a lawyer and psychiatrist respectively, jointly studied the adversarial trial procedure in Britain and faulted the competence rule required of witnesses, the rule against hearsay evidence, examination in chief, cross examination and the technical court procedures as inhibitors of access to justice by CVSA.²³² The combination of psychiatric and legal knowledge has greatly aided the reform of the adversarial trial procedure in CSA cases in Britain. Although this is a legal study, it draws its respondents from social workers, prosecution and legal practitioners. In addition, the study complements the field data with desk review of observations made by experts from other disciplines such as psychiatry, paediatrics and sociology.²³³

McConville and Wilson examined the effectiveness of the CJS in Britain and concluded that the adversarial trial procedure does not address concerns of victims especially the

²²⁸ *Op. cit* 75.

²²⁹ *Ibid.*

²³⁰ *The Times* (London 17 April 1986) A British Daily Newspaper.

²³¹ *Ibid.*

²³² *Op. cit* n 52.

²³³ See Wolf, Freud and Traub & Little.

vulnerable ones such as CVSA.²³⁴ They both argue that although the rationale for the development of the evidentiary rules was justified to protect citizens against possible arbitrary abuse of state power, the same justification cannot be sustained in CSA trial due to the vulnerability and limitations of CVSA as they testify.²³⁵ McConville and Wilson were concerned about the entire CJS's response to victims of crime in general in Britain. This study is however limited to the adversarial court procedure in CSA trial in Kenya. Since Kenya inherited the judicial system from Britain as a former colony,²³⁶ the expectation is that once Britain reforms its trial procedure, then Kenya should follow suit. However, such reforms need to be based on empirical data generated by research. Concerns about victim protection in the CJS have since the 1970s been a focus of criminal justice reforms.²³⁷ This is the focus of the study.

A study by Eastwood and Patton described the experiences of CVSA in the Australian CJS as 'another level of child abuse, institutionalized by the adversarial legal system.'²³⁸ Eastwood and Patton concluded that cross-examination of CVSA left them more intimidated than before the trial. Some children reportedly said that they would never report further sexual abuse if they had to undergo the court experience again.²³⁹ Whereas the Australian study was conducted by way of quantitative research alone, this study adopts both qualitative and quantitative methods of data collection and analysis.

Bacik *et al*, conducted a study on the experiences of rape victims through the CJS in 15 member states of the European Union, and concluded that rape victims who participate in judicial proceedings suffer more serious effects and psychological harm, than those who opt out of the court process.²⁴⁰ Bacik *et al*'s study was conducted in Europe where human rights protection in the judicial system is more advanced than in Africa. However, the CJS was found to have adverse effects on rape victims.²⁴¹ This study is conducted in

²³⁴McConville, and G Wilson, *The Handbook of the Criminal Justice Process* (Oxford University Press 2002)1.

²³⁵ Ibid.

²³⁶B W Harvey, *Introduction to the Legal System in East Africa* (East Africa Literature Bureau, 1999) 429

²³⁷ L Zedner, 'Dimensions of Crime' in M Maguire, R Morgan and R Reiner(eds), *The Oxford Handbook of Criminology* (3rd edn, Oxford University Press 2012) 419.

²³⁸*Op. cit* n 209.

²³⁹ Ibid.

²⁴⁰I Bacik, C Maunsell & S Gogan, *The Legal Process and Victims of Rape: A Comparative Analysis of the Laws and Legal Procedures Relating to Rape, in Fifteen Member States of the European Union* (Cahill Printers Limited 1998)303.

²⁴¹ M Batra, *Protection of Human Rights in Criminal Justice Administration* (Devandra Printers 1989) 88.

Kenya, an African country in which social stigma affects children's ability to narrate details of sexual abuse.²⁴² The study is conducted through participant court observation by the researcher to observe the impact of the publicity requirement on CVSA's ability to testify.

While criticizing the lack of special court procedures for children in Britain before the reform of the court procedures, Lockton and Ward argued that children develop in stages, acquiring capacities for new functions and understanding with time.²⁴³ According to Lockton and Ward, when children become victims of sexual abuse, they are thrust into an adult system that classically does not differentiate between adults and children.²⁴⁴ Lockton and Ward point out that the court procedure seems indifferent to the legitimate special needs that arise from their participation in the court process. Whereas Lockton and Ward were concerned about the response of the CJS to victims of domestic violence and treated CVSA as witnesses while their mothers were the main victims and key witnesses, in this study CVSA are the main respondents whose testimony is therefore crucial for the success or failure of the prosecution case, hence the concern about fair procedures that enable them to tell their story.

Herman and Hirschman fault the technical court language due to its re-victimization of CVSA as they go through the pain of narrating details of the abuse to 'strangers' in court, in compliance with accused persons' right to public trial and confrontation of witnesses.²⁴⁵ Whereas Herman and Hirschman interviewed female victims of incest alone, this study includes both boys and girls who have been sexually assaulted irrespective of whether the assault was incest or committed by people outside the family. Prosecuting CSA under the classical adversarial trial system presents special challenges in incest cases.²⁴⁶ Incest victims are likely to be confronted by "feelings of a sense of guilt, hopelessness and reprisals" from the accused and their family members in CSA cases."²⁴⁷ CVSA in incest cases are confronted with the demand to testify in open court about the abuse in conformity with the publicity of trial principle already discussed. Such CVSA face the dilemma of keeping quiet and protecting the abuser who may be a close family

²⁴² *Op. cit* n 83.

²⁴³ D Lockton and R Ward, *Domestic Violence* (Cavendish Publishers 1997) 29.

²⁴⁴ *Ibid.*

²⁴⁵ *Op. cit* n 89.

²⁴⁶ *Op. cit* n 5.

²⁴⁷ *Ibid.*

member or known to CVSA and the need to testify against the abuser if justice is to be done.²⁴⁸ The difficulty in choosing whether to testify and have the accused person in incest cases convicted or to keep quiet and let the abuse continue therefore presents a special challenge in incest cases.²⁴⁹

Another scholar, Saywitz argues that many CSA cases fail to secure the conviction of the accused person due to the failure by the classical adversarial legal system to recognize the difficulties faced by CVSA.²⁵⁰ Saywitz concludes that CVSA lack the emotional strength to endure the ordeal of the trial process during their testimony and criticizes the classical adversarial legal system as lacking a balanced approach to the rights of accused persons and concerns for CVSA protection.²⁵¹ Whereas Saywitz was concerned with the need to provide for psycho-social support services to CVSA, this study explores interventions that ensure a fair CSA trial process by balancing the evidentiary rules of court procedure with the need for child friendly courts where CVSA can effectively narrate the abuse.

Hayes is another scholar concerned about the effect of the court testimony to incest child victims.²⁵² Hayes confirmed the observations by other scholars as already discussed and emphasized the particular challenges that the prosecution of CSA presents to CVSA. Hayes was concerned that although CSA appears to attract severe punishment in most jurisdictions, showing the society's concern to punish CSA offenders, in reality they are rarely punished because of the difficulties in proving the case by the prosecution against accused persons in an adversarial trial.²⁵³ Hayes argued that CVSA are often afraid to testify in court because they think that nobody may believe them, or that they may be punished by their families for 'bringing upon the family shame associated with CSA in the society.' Whereas the study by Hayes was conducted through desk reviews only, this study combines desk review with data collection from the field and incorporates the voices of CVSA on various aspects of their experience while testifying in court.

²⁴⁸ Ibid.

²⁴⁹ Ibid

²⁵⁰ J K Saywitz, 'Improving Children's Testimony: The Questions, the Answer and the Environment' in M S Zaragoza and others (eds), *Memory and Testimony in the Child Witness* (Sage 1995) 87.

²⁵¹ Ibid.

²⁵² M Hayes, 'Reconciling Protection of Children with Justice for Parents in Cases of Alleged Child Abuse' (1997) 17 *Legal Studies* 1, 5.

²⁵³ Ibid.

Makiwane, carried out a study in 2011 on the challenges of enforcing victims' rights according to the South African Service Charter for Victims of Crime 2004 in South Africa. The study found that the adversarial nature of the South African legal system does not provide for the status of a victim in the trial process, making it difficult to enforce victim's rights.²⁵⁴ Whereas Makiwane's study was conducted in South Africa and established that the South African Constitution does not provide for victim's rights, this study is conducted in Kenya and is concerned about the imbalance between the rights of CVSA and accused persons, both of which are constitutionally protected by Articles 50 and 53(2) of the Constitution of Kenya.

Due to their mental and cognitive under development, children sometimes confuse dates, times and frequencies of events.²⁵⁵ Where questions are not phrased in child-age-appropriate language; their answers may contradict their earlier recorded statements.²⁵⁶ This may result into inconsistencies in their testimony and in some instances, counsel for the accused persons urge the courts to interpret the inconsistencies to mean unreliability of CVSA as a prosecution witness.²⁵⁷ Whereas Keenan was concerned with the prevention of risk factors that pre-dispose children to sexual abuse and their inability to narrate the details of the abuse to doctors and social workers for purposes of treatment and therapy, this study is concerned about fair court procedure that enables CVSA to narrate the details of the abuse to an umpire in court under the strict adversarial set up that inhibits the child's ability to coherently testify.

2.2.2 CSA and its Effect on CVSA Ability to Testify

Studies in the medical field reveal that CSA has serious negative consequences which may hinder CVSA from testifying in court.²⁵⁸ According to Wolf, unlike most offences, victims of CSA experience far reaching emotional, psychological, physical and medical problems.²⁵⁹ These include both short and long term effects. The short term effects include sleep disorders, eating disturbances, fears, phobias, depression, guilt, shame and

²⁵⁴ P N Makiwane, 'Balancing Victims' Right Against Those of Accused Persons: Challenges Posed by the Adversarial Criminal Justice System (2011) 25 *Speculum Juris* 66, 76.

²⁵⁵ *Ibid.*

²⁵⁶ C Keenan, 'Finding that a Child is at Risk from Sexual Abuse' (1997) 60 *Modern Law Review* 857, 862.

²⁵⁷ *Op. cit* n 211.

²⁵⁸ See Wolf and Wynne.

²⁵⁹ *Op. cit* n 75.

anger which may result into serious problems requiring clinical intervention.²⁶⁰ The long term effects of CSA include self-destructive ideation and behaviour, increased anxiety, tension, nightmares and sleeplessness.²⁶¹ In very extreme situations, CVSA may suffer Post Traumatic Stress Disorder (PTSD), a medical condition described as the most severe effect of sexual abuse by psychiatrists.²⁶²

Many psychologists agree that while reactions to CSA are highly crime specific, psychological distress is the dominant reaction, most severe and has been formally recognized professionally as PTSD.²⁶³ It is a condition that alters CVSA ability in many ways, thereby reducing their capacity to testify coherently in the presence of the abuser.²⁶⁴ CVSA are thus disadvantaged and may not testify with ease or at all due to PTSD, unlike other victims of crime.²⁶⁵ The classical adversarial criminal procedure rules appear not to take into account cases where CVSA may have suffered post-traumatic stress disorder and fail to testify.²⁶⁶ In such circumstances, the failure by CVSA to testify is construed as lack of sufficient evidence resulting into the acquittal of the accused and a miscarriage of justice.²⁶⁷ Although medical practitioners recognize the effect of PTSD on a child's ability to testify, the court procedure fails to recognize the effect of PTSD on CVSA ability to testify.²⁶⁸ The failure by the courts to recognize the effect of PTSD on CVSA's ability to testify may be attributed to lack of empirical data in this area in Kenya. As a result, courts may not understand that CVSA's failure to testify may be as a result of the abuse and not lack of evidence. The resultant gap of information in this area necessitates a multi-disciplinary study. This is a gap that this study seeks to fill.

Lockton and Ward argue that criminal prosecution, if handled with sensitivity, can be therapeutic for CVSA.²⁶⁹ Although the classic adversarial procedure negatively affects CVSA, if reformed to accommodate the concerns of CVSA protection, it has the potential

²⁶⁰ Ibid.

²⁶¹ D R Kosovich, *Stress in Everyday Life: A Global Experience* (Viva Books 2006) 50.

²⁶² PTSD is a psychiatric condition in which the victim re-experiences trauma occasioned by the traumatic event. The intrusive recollection of the traumatic event persists in recurrent dreams and the victim feels and acts as if the event was actually happening. This is triggered by any recollection or association with any object or incident that reminds the victim of the traumatic experience.

²⁶³ Ibid.

²⁶⁴ *Op. cit* n 51.

²⁶⁵ E Woodcraft, 'Child Sexual Abuse and the Law' (1988) 28 *Feminist Review* 124.

²⁶⁶ Ibid.

²⁶⁷ *Op. cit* n 47.

²⁶⁸ *Op. cit* n 52.

²⁶⁹ *Op. cit* n 222.

of being satisfactory to both accused persons and CVSA. The court process may be viewed by CVSA as a sign that the society has taken the allegation seriously, and a conviction, if obtained, places the blame squarely on the perpetrator.²⁷⁰ It is however apparent from the review of literature so far that the classical adversarial trial procedure occasions more harm to CVSA than the protection they seek from the system. The inability of the court procedure to protect victims who seek its services is an area that needs detailed research. By establishing the specific details of the procedure that re-victimize CVSA, this study has the potential of providing the basis for reforming CSA trial procedure in Kenya. This study employs both observation and interview techniques to analyze the ability of CVSA to testify in court. In addition, the study includes social workers as key respondents on the importance of psycho-social support to CVSA before, during and after their testimony.

A study conducted in 2010 by Congressional Research Services cited the judicial system in African countries as one of the impediments in access to justice by victims of sexual violence in Africa.²⁷¹ The Congressional Research Services was concerned with factors that affect the prevention and protection of victims of sexual violence in African countries in conflict situations. The study found that although there existed programs that assist victims of sexual violence such as psycho-social support programs, victims of sexual violence found it very difficult to face their abusers and narrate the intimate details of the abuse in court. As a consequence, many victims of sexual violence opt not to report the abuse to law enforcement authorities. Whereas the Congressional Research Services study was conducted in many parts of Africa and interviewed victims of sexual offences generally, this study focuses on the classical adversarial court procedure as applied in the trial of CSA within Kenya.

2.2.3 The Investigation of CSA

Under the classical adversarial trial procedure, the state through the prosecution is tasked with the investigation, collection of evidence and prosecution of criminal offences.²⁷² The first bottleneck in the prosecution of CSA according to the study by Herman and Hirschman, is the difficulty in detecting CSA, because children may not know that they

²⁷⁰ *Op. cit* n 109.

²⁷¹ Congressional Research Services, 'Sexual Violence in African Conflict' (2010) <<http://www.fas.org/sgp/crs/row/40956>> accessed 3 July 2012.

²⁷² *Op. cit* n 212.

have been sexually abused due to their limited knowledge.²⁷³ They depend on someone else to detect the abuse. The second reason why it is difficult to detect CSA is the possibility of CVSA being punished and/or intimidated by the accused person for revealing the details of the abuse.²⁷⁴ Herman and Hirschman argue that CSA cases are difficult to investigate because CSA offenders are often aware that they are breaking the law and it is only CVSA who are likely to be at the scene of crime.²⁷⁵ The accused persons enjoin CVSA to keep secret the details of the abuse by either giving promises of reward or issuing threats of injury if they disclose the abuse to anyone.²⁷⁶ The conduct of the accused person may be followed by a constant reminder to CVSA to keep their part of the 'bargain', being intimidated into ensuring that they do not report the abuse or testify in court.²⁷⁷ The study by Herman and Hirschman revealed that CVSA's vulnerability and the private nature of committing CSA are a hindrance to the expectation that CVSA reveal the abuse to the CJS for prosecution. The gap identified by this study is that, whereas the CJS expects crime to be reported by victims who must narrate the details to enable prosecution, children are disadvantaged as victims of sexual abuse and may therefore not effectively participate in the judicial process. The lack of a study in this area in Kenya makes it difficult to design appropriate intervention. This is a gap that this study seeks to fill.

The circumstances surrounding CSA therefore make it difficult to investigate and collect sufficient evidence to sustain a trial. The only witnesses to the abuse may be the accused person and CVSA. However, it is a fundamental principle of criminal trial that the accused person is presumed innocent until proven guilty, has a right to remain silent and is privileged against giving self-incriminating evidence.²⁷⁸ Whereas the accused person is protected from giving any self-incriminating evidence and therefore revealing the details of the abuse, the possibility of the accused person intimidating CVSA so as not to testify negates the truth seeking goal of a criminal trial. It results into an imbalance between the protection of the rights of accused persons and the need to protect CVSA. There is therefore need to conduct a study on how the trial process in CSA cases, can maintain its truth seeking role while protecting both accused persons and CVSA.

²⁷³*Op. cit* n 89.

²⁷⁴*Op. cit* n 109.

²⁷⁵*Op. cit* n 89.

²⁷⁶*Ibid.*

²⁷⁷*Op. cit* n 47.

²⁷⁸*Op. cit* n 50.

A study by Saywitz reveals that CVSA may not report the abuse for fear of threats and intimidation by the accused.²⁷⁹ Even where the abuse is reported to the police, CVSA may fear to cooperate in narrating the details of the abuse which is crucial in deciding whether there is sufficient evidence collected to prosecute the case. In the classical adversarial system of trial, the prosecution depends on CVSA as a crucial witness to help in the investigation. The fact that the collection of evidence is left to the parties and there is no in-depth pre-trial investigation overseen by either an independent prosecutor or a trial judge may lead to loss of crucial evidence of probative value.²⁸⁰ A vulnerable and intimidated CVSA may not be effective as a key witness in assisting the prosecution to collect and present the evidence in court under the adversarial trial procedure leading to a miscarriage of justice in CSA cases. There is need to explore the possibility of ensuring that the prosecution conducts in-depth investigation that reveals and preserves sufficient evidence that can sustain CSA trial. This calls for a study that compares the pre-trial investigation under the inquisitorial and adversarial procedures so as to develop an intervention that protects the rights of accused persons against self-incrimination while ensuring that all evidence of probative value is collected. Since Kenya adopts the adversarial trial procedure, this study seeks to generate information in this area.

According to the study by Abrams and Ramsey, unlike other offences, CSA is not always supported by physical evidence or a non-participant eyewitness to the abuse.²⁸¹ The situation is worsened by the fact that CVSA are generally not forceful, convincing or consistent in their allegations and can easily be manipulated to change their story.²⁸² According to Fundudis, the investigation of CSA narrows down to a credibility contest between the accused person and CVSA necessitating expert psychological testimony as a determinant factor.²⁸³ Whereas Abrams and Ramsey's study contributed knowledge that assisted the USA to reform their CSA trial procedure, no such study has been conducted in Kenya making it difficult to devise interventions for effective judicial reforms. This is a gap that this study seeks to fill.

²⁷⁹*Op. cit* n 109.

²⁸⁰K Warner, 'Child Witnesses-Developments in New Zealand and Australia' in J Spencer and others (eds), *Children's Evidence in Legal Proceedings: An International Perspective* (Cambridge University Law Faculty 1990)111.

²⁸¹*Op. cit* n 5.

²⁸²*Op. cit* n 89.

²⁸³T Fundudis, 'Young Children's Memory: How Much do we Know About It?' (1997) 2 *Child Psychologies and Psychiatric Review* 150.

The investigation of CSA under the classical adversarial trial is further complicated in situations where CVSA are traumatized and the abuser is a respectable person in society or in incest cases, a family member.²⁸⁴ Abrams and Ramsey emphasized that because most CSA cases occur in private, the lack of independent eye witnesses weakens the investigation. Family members and the prosecution may thus decide not to investigate the case to shield CVSA and their families from associated trauma and social stigma.²⁸⁵ There is need for psycho-social support for CVSA and their families to enable them report and testify in CSA cases. However, no study has been carried out in Kenya to generate information that can assist in developing psycho-social interventions in CSA cases. This is a gap that the study sought to fill.

The investigation of CSA according to Abrams and Ramsey is complicated by the fact that children do not often readily report CSA out of fear of being blamed for the abuse or fear that no one will protect them from revenge by the accused person.²⁸⁶ CVSA who are abused by people they held in trust such as fathers or teachers do experience “feelings of anger, fear and confusion” and may retract their evidence due to family pressure or insensitivities in the legal process.²⁸⁷ This argument is consistent with the labeling theory which explains such behaviour by CVSA to avoid being labeled in the family and the social stigma associated with CSA. As a result, there is a possibility that many cases of CSA are not reported to the CJS.²⁸⁸ Studies such as those conducted by Abrams and Ramsey have improved the CJS’ response to CVSA needs in the USA. However, the lack of an empirical study in Kenya on the CJS’ response to CVSA’s concerns may be a contributory factor to the low reporting of CSA cases for prosecution. This study seeks to generate information on the CJS’ response to concerns of CVSA in Kenya so as to develop strategies for intervention towards reforming the system.

According to Cashmore and Haas, some types of CSA such as fondling may leave no lasting physical or medical evidence noticeable during the examination of CVSA upon

²⁸⁴ *Op. cit* n 89.

²⁸⁵ *Ibid.*

²⁸⁶ *Op. cit* n 5.

²⁸⁷ Davies G, ‘Children on Trial? Psychology, Video Technology and the Law’ (1991) 30

Howard Journal of Criminal Justice 177,191.

²⁸⁸ *Op. cit* n 19.

reporting of the abuse.²⁸⁹ Investigation of CSA under the classical adversarial system relies heavily on the ability of CVSA as the key witness to coherently testify to establish a *prima facie* case against the accused persons.²⁹⁰ The difficulty in relying on CVSA testimony to establish a *prima facie* case is complicated further by the accused persons' rights to confront and cross examine the vulnerable CVSA.²⁹¹ In order to enhance CVSA's ability to coherently testify in court under the adversarial trial system, there is need to conduct a study that examines the implication of upholding the accused person's rights in CSA cases.

2.2.4 The Administration of the Children Court and its Implication for CSA trial

Temkin argues that the adversarial courtroom set up appears intimidating to CVSA especially during their first appearance.²⁹² Saywitz, Temkin, Herman and Hirschman, Abrams and Ramsey all seem to suggest that the ordinary courtroom layout is so serious that it may frighten even the most confident person due to the serious nature of the court business.²⁹³ When CVSA who may not appreciate the nature of court business and language find themselves as witnesses in court, the intimidating environment sometimes impacts negatively on their ability to testify about the abuse.²⁹⁴

The usual court room-set up, argue Spencer and Flin, is quite often intimidating to children and the tense atmosphere quite frightening.²⁹⁵ CVSA may subsequently block out certain vital details while testifying due to the terrifying atmosphere.²⁹⁶ Other intimidating factors are the audience, the silence in court, the judge / magistrate, the defendants' promise to retaliate, fear of the unknown, being removed from home to unfamiliar court grounds, and being in the glare / focus of attention by everyone.²⁹⁷

The Kenyan court set up is typical of the adversarial trial procedure and has served the purpose of criminal trial to date. However, since studies have shown that in CSA cases

²⁸⁹ J Cashmore and N De Haas, *The Use of Closed Circuit Television for Child Witnesses in the ACT* (Research Paper 1 Australia Law Reform Commission, 1992) 12.

²⁹⁰ *Op. cit* n 265.

²⁹¹ *Op. cit* n 52.

²⁹² *Op. cit* n 3.

²⁹³ The courtroom arrangement with the judges' seat at a raised platform, the accused sitting opposite the witness stand from where witness testify, uniformed police officers, judges in robes, court clerks in dark suits and the general silence, all express the serious nature of the court environment.

²⁹⁴ *Op. cit* n 109.

²⁹⁵ *Op. cit* n 52.

²⁹⁶ *Ibid.*

²⁹⁷ *Op. cit* n 109.

such a court layout is not child friendly to CVSA, it might not be easy to convince judicial administrators to change it for purposes of CSA trials.²⁹⁸ An empirical study is needed to document the views of legal practitioners, social workers and CVSA on the impact of the court set up on CVSA's ability to testify. This study seeks to document the views of CVSA and other legal practitioners as well as make observation of the court layout and its impact on CVSA's ability to testify in CSA cases. This study observed selected children's courts proceedings to find out if the setup and the atmosphere within the Kenyan children courts is child friendly or the same as in ordinary courts.

Whitcomb *et al*²⁹⁹ identified factors that cause CVSA stress in the trial process to include; repeated interviews, time taken to dispose of the case, repeated schedule changes, removal of child from home, fear of retaliation by accused person, fear of the unknown and fear of subjecting their families to social stigma. Psychologists argue that long waiting periods beyond one month for children to testify about traumatic experiences cause more psychological harm to children.³⁰⁰ To overcome the trauma, they are encouraged to face up to the traumatic event by talking it through with a psychologist or counselor and then encouraged to forget about the event so that it no longer occupies their minds.³⁰¹ Yet if CVSA wait to give evidence about the sexual abuse, the details are the same ones he/she is encouraged to forget for him/her to heal psychologically. This therefore makes delayed hearings of CSA cases beyond one month a challenge in the prosecution of CSA.

If the child discusses the evidence too much with other people, the evidence may be contaminated and CVSA forgets the details of the abuse.³⁰² Under such circumstances, he/she has no evidence to give in court. For purposes of testifying in court, CVSA must therefore keep the details of the abuse fresh in their mind at the expense of psychiatric harm to themselves.³⁰³ There is a gap in balancing the need to protect CVSA from psychiatric harm as a result of delayed hearings and the necessity for CVSA to keep details of the abuse fresh in their minds so as to effectively testify about the abuse.

²⁹⁸ See Saywitz, Herman & Hirschman, Abrams & Ramsey.

²⁹⁹ *Op. cit* n 51.

³⁰⁰ *Op. cit* n 75.

³⁰¹ *Ibid*.

³⁰² S Moston S, 'Social Support and the Quality of Children's Eye Witness Testimony' in H Dent and R Flin (eds), *Children as Witnesses* (Chichester: Wiley 1992) 185.

³⁰³ *Ibid*.

Studies such as those carried out by Whitcomb, Temkin, Wolf contributed to intervention measures in Britain and the USA in this respect. In Kenya however, there is the possibility that the lack of such a balance is due to the absence of such a research. This study sought to amongst other things, document the experiences of CVSA as they wait to testify and the trauma that such waiting subjects them to. The generated information is meant to fill in knowledge gap in making the adversarial court procedure child friendly while protecting the rights of accused persons in CSA trials in Kenya.

2.3 Trial Procedure

It is generally accepted that the classical adversarial trial procedure is characterized by several principles of trial which give rise to the rights of accused persons as already discussed.³⁰⁴ Aimed at safeguarding the rights of accused persons from arbitrary use of power by the state, the principles have gained recognition over time and are today recognized as hallmarks of a fair criminal trial process.³⁰⁵ Although, the principles aim at ensuring fair trial in criminal cases, some of them cause a miscarriage of justice in CSA trials.³⁰⁶ This section identifies eight specific principles of the classical adversarial criminal trial procedure which reflect the study's concern about the implication of the procedure on CSA trial. They are: the burden of proof, the role of the prosecutor, the impartiality of the trial judge, the publicity of the trial, the orality of evidence, the accused person's right to confront witnesses, cross examination, re-examination and the right to bail. The section ends with a review of literature on CVSA trial in Kenya.

2.3.1 The Burden of Proof in CSA Cases

The burden of proof in criminal cases lies with the prosecution who must not only establish a *prima facie* case, but must prove the case beyond any reasonable doubt.³⁰⁷ However, the prosecution relies on the ability of witnesses to narrate the details of the abuse during investigation and prosecution so as to sustain a conviction.³⁰⁸ In CSA cases the reliability of the prosecution on CVSA, who suffer from the negative effects of CSA, and who may be the only eye witness to the abuse (since the accused person is protected from giving self-incriminating evidence) and the possibility of the accused person interfering with the investigation, presents special challenges. Whereas adult victims of

³⁰⁴ *Op. cit* n 123.

³⁰⁵ *Op. cit* n 50.

³⁰⁶ *Op. cit* n 52.

³⁰⁷ *Op. cit* n 50.

³⁰⁸ *Op. cit* n 212.

ordinary crimes (apart from CSA) may be able to effectively testify in the adversarial system, and are reliable prosecution witnesses, the same cannot be said of CVSA, due to the nature of the commission of CSA.³⁰⁹ Studies have shown that there is a gap in the legal requirement that prosecution proves the guilt of an accused person in CSA cases in the absence of measures that balance the rights of accused persons and CVSA in CSA prosecution.³¹⁰

Abrams and Ramsey, while criticizing the American trial procedure of CSA before procedural reforms were undertaken, criticized the system for burdening the already traumatized CVSA with the requirement to narrate the details of the abuse in court for the purpose of proving the innocence or guilt of the accused person.³¹¹ Arguing that the American CSA prosecution system at that time was insensitive to the limitations of children, they pointed out that the burden of proof, from which the accused person's safeguards emanates, presents difficulties in the prosecution of CSA. In India, the difficulties occasioned in CSA trial due to the burden of proof requirement has been recognized by parliament which passed a law that places the evidential burden of proof on the accused person in CSA prosecution, after a series of wide stakeholders' consultation (This is discussed further in chapter five).³¹² To attempt to propose any rebuttal of the onus of proof in cases where it is apparent that its strict observation causes a miscarriage of justice requires more than stakeholders' consultation and includes empirical data. In Kenya, no study has been carried out on the implication of the application of the principle of the burden of proof in CSA cases. Such a gap in knowledge makes it difficult to develop interventions that address concerns of miscarriage of justice in CSA cases due to the technical adversarial court procedure in Kenya.³¹³

An area of concern for the study is the prosecution's burden of proof which must be discharged beyond any reasonable doubt, if the court is to find the accused person guilty of CSA.³¹⁴ There are two related rules under the phrase 'burden of proof.' The first is about which party to a criminal proceeding should lead evidence in a case in order to

³⁰⁹*Op. cit* n 109.

³¹⁰*Op. cit* n 283.

³¹¹*Op. cit* n 5.

³¹²Protection of Children from Sexual Assault Act 2012, Act No 32 of 2012 (India).

³¹³*Op. cit* n 19.

³¹⁴Spencer G Nicholson, R Flin and R Bull (eds), *Children's Evidence in Legal Proceedings: An International Perspective* (Cambridge University Law Faculty 1990) 69.

convince the court to investigate it. The rule is that the person who makes the allegation must provide evidence about it, failure which he/she cannot complain if the court fails to consider it.³¹⁵ In CSA cases, it is for the prosecution, on behalf of the State, to provide evidence in court to prove that the accused person committed CSA against CVSA. The evidence tendered by the prosecution must show that the accused person committed the offence with any degree of fault required as an ingredient of the offence.³¹⁶ The prosecution bears the 'evidential burden' in CSA cases like other criminal offences and relies on witnesses, who include CVSA to give evidence to prove the offence.

The second set of rules determine which party in a criminal proceeding loses if there is a gap in the evidence produced in court.³¹⁷ The gap could be on an important point, or a severe conflict in evidence by the witnesses that the court is unable to decide whom to believe.³¹⁸ In such situations, a doubt is created in the evidence as to whether the accused person committed the offence.³¹⁹ Further, there would be a doubt as to whether the accused person meant to commit the offence and whether the circumstances surrounding the offence gave rise to some general defence.³²⁰ The benefit of the doubt is given to the accused person as the prosecution, bearing the 'burden of proof' loses the case.³²¹ The prosecution relies on CVSA as the key witness to prove CSA.³²² Inability of CVSA to coherently and confidently testify in some cases creates a doubt in the prosecution case, leading to an acquittal of the accused persons and injustice to CVSA.³²³

Closely linked to the burden of proof is the standard of proof required in criminal cases. The rule is that the guilt of the accused person must be proved 'beyond any reasonable doubt'.³²⁴ This rule means that the court should only find the accused person guilty of the offence if the court is very sure, based on the evidence provided in court that the accused

³¹⁵Nardini W and Gladwell G R, *Foundations of Law Enforcement and Criminal Justice* (Bobbs-Meril Educational Publishing 1977) 50.

³¹⁶ Ibid.

³¹⁷ *Op. cit* n 216.

³¹⁸ J McEwan, *Evidence and the Adversarial Process: The Modern Law* (Blackwell Publishers 1992) 128.

³¹⁹ Monir M, *Law of Evidence* Revised by H. S. Ursekar, (6th ed, The University of Book Agency 2004) 478.

³²⁰ Ibid.

³²¹ Ibid.

³²² Monir M, *Principles and Digest of the Law of Evidence*, Revised by Justice Deoki Nandan (Volume II, The University Book Agency 1997) 1041-1042.

³²³ R P Mosteller, 'Remaking Confrontation Clause and Hearsay Doctrine under the Challenge of Child Sexual Abuse Prosecutions in Abrams E D and Ramsey H S(eds), *Children and the Law: Doctrine Policy and Practice* (Minn West Group 2000) 215. .

³²⁴ J McEwan, *Evidence and the Adversarial Process: The Modern Law* (Blackwell Publishers 1992) 128.

committed the offence. The rationale for this rule, as already discussed is that the purpose of criminal proceeding is to punish the accused person if found guilty. According to Damaska, since the consequences of punishment by court are very serious, the society should not punish innocent people, but only those found guilty.³²⁵ Spencer and Flin emphasize that if a guilty man escapes punishment; the harm done to the society is less serious than when an innocent person is punished for what he/she did not do.³²⁶ High standard of proof makes it difficult to prove CSA cases due to the nature of CSA and CVSA's inability to narrate the details of the abuse in court.³²⁷ However, in the absence of a study in Kenya that documents the difficulty experienced by CVSA and the prosecution in meeting the requirements of the burden of proof, it may be difficult to address concerns of the injustice occasioned by the requirement of the burden of proof. This study seeks to generate information in this respect by examining the implication of the application of the concept of the burden of proof in CSA trial in Kenya. The study seeks the views of the prosecutors and the investigators involved in CSA trial in selected courts in Kenya. In addition, the study observed the interaction between the prosecutor, CVSA and lawyers representing accused persons on the requirement of discharging the standard of proof. It is only by documenting the experiences of key players in applying the burden of proof requirements that appropriate interventions can be developed to improve the trial process in CSA trial.

2.3.2 The Role of the Prosecutor and the Implication for CSA Trial

According to Worall, there is a conflict between the prosecution's role in protecting the interests of the public and protection of the interests of victims of crime.³²⁸ The role of the prosecutor presents special challenges in CSA cases due to the requirement that the prosecutor represents the interest of the public as an officer of the court, while at the same time, there is need to ensure concerns of CVSA are adequately addressed due to their inability as children which implies that the prosecutor has to act over and above a case in which an adult is a victim.³²⁹

In an adversarial system of trial, the accused/counsel collects the best evidence that strengthens their case while the prosecution is supposed to represent the public interest

³²⁵ *Op. cit* n 202.

³²⁶ *Op. cit* n 52.

³²⁷ *Op. cit* n 109.

³²⁸ J L Worall, M Elaine, *The Changing Role of The American Prosecutor* (Suny Press 2008) 110.

³²⁹ *Ibid.*

which extends beyond the victim while collecting evidence to support the victim's claim.³³⁰ The possible conflict where public interest appears to override the victim's interest often leads to non-prosecution.³³¹ In such situations, the victims' interests are not represented by the prosecution. The accused/counsel collects evidence for the defence while the prosecution collects evidence (depends on witnesses capacity to detect, report and record statements) and makes a decision to prosecute or not based on public interest considerations.³³² The victim's interest may in some cases such as CSA be overshadowed by the larger public interest leading to a miscarriage of justice.

In order to understand and address the conflict in the prosecutor's role of protecting both the victim and the public interest, a study by the Council of Europe Committee of Ministers found that prosecutors must remain impartial officers of the court who seek to assist the court in the search for the truth in a criminal trial.³³³ Subsequently, the Council of Europe Committee of Ministers recommended that victims of crime be provided with legal representation to take care of their interest just like the accused persons are provided with defence counsel. In Kenya however, victims of crime are not provided with legal representation since the prosecution is deemed to represent their interest. Lack of studies and information in this area make it difficult to argue for the provision of legal representation to CVSA since it is assumed that their interests are represented by the prosecutor. This study seeks the views of CVSA on how well the prosecution represented their interests in court.

Under the adversarial trial system, the prosecution is supposed to collect and present evidence about crime in court on behalf of the state.³³⁴ The prosecution depends on witnesses to report the crime, record statements, help with the investigation and to testify in court.³³⁵ CSA cases call for a delicate balance by the prosecution on the interest of CVSA to have the prosecution proceed and the larger public interest which may not

³³⁰ Ibid.

³³¹ *Op. cit* n 120.

³³² *Op. cit* n 317.

³³³ Council of Europe Committee of Ministers, *The Role of Public Prosecution in the Criminal Justice System: Recommendation* rec (2000)19 adopted by the committee of ministers of the council of Europe on 6th October 2000 and explanatory memorandum (Council of Europe Pub, 2001) 20.

³³⁴ American Prosecutors Research Institute, *Investigation and Prosecution of Child Abuse* (American Prosecutors Research Institute & National Centre for the Prosecution of Child Abuse, Sage Publication 2004) 300.

³³⁵ P Lewis, *Delayed Prosecution for Childhood Sexual Abuse* (Oxford University Press 2006) 189.

favour the prosecution of CSA.³³⁶ Since the prosecutor is an officer of the court, he/ she is supposed to be impartial in the investigation and prosecution.³³⁷ The prosecution is not supposed to appear to support either the victim or the accused but must remain impartial in the truth seeking process.³³⁸ The impartiality of the prosecutor assumes the ability of CVSA to participate in the investigation and prosecution with the same capacity as the accused.³³⁹ This is the special challenge that presents a hurdle in prosecuting CSA.

In criminal trials, the case is instituted by the state hence the use of the word Republic vs. another where Republic represents the state.³⁴⁰ The prosecution therefore prosecutes a criminal case on behalf of the state and not the victim.³⁴¹ The obligation of the state is to protect the citizens of the Republic by prosecuting those who breach laws that protect the public. Whereas the larger interest of the state is to protect the public, in a wider sense the public includes victims of crime, criminal suspects and uninvolved civilians who are not party to the proceedings.³⁴² The role of the prosecution therefore is to seek the truth by ensuring that the innocent are not punished while the guilty are convicted and punished. There is a gap in knowledge on how to ensure that CVSA's interests are protected in CSA trial while the prosecutor remains impartial and assists the court in the truth seeking process as an officer of the court in Kenya since no study has been conducted in this regard.

2.3.3 Impartiality of the Trial Judge and its Implication on CSA Trial

According to a study by Mosteller in the United States, the impartial role of the umpire under the classical adversarial trial makes it difficult to prosecute CSA cases as it exposes CVSA to unnecessary intimidation by the accused/counsel during the trial process.³⁴³ As already discussed, the adversarial trial subjects CVSA to re-victimization as they testify in court.³⁴⁴ Article 3 of the UNCRC which Kenya is a signatory to provides for the best interest of children as the paramount guiding principle in all matters concerning them

³³⁶ J Hill, *Prosecuting Child Sexual Abuse Offenders, A Case Study of Victim, Family, Offender, Incident and Evidentiary Characteristics* (ProQuest 2008) 212.

³³⁷ Hechler D, *The Battle and the Backlash: The CSA War* (Lexington Books 1989) 315.

³³⁸ *Op. cit* n 310.

³³⁹ *Op cit* n 292.

³⁴⁰ Council of Europe, *The Role of the Public Prosecution Office in a Democratic Society* (Council of Europe 1997)160.

³⁴¹ D Bethany, 'The Role of the Prosecuting Attorney', *Practice of International Law: Criminal Law* (JHU 2012) 1.

³⁴² *Ibid*

³⁴³ *Op. cit* n 323.

³⁴⁴ *Op. cit* n 3.

including the judicial process. The impartial role of the umpire hinders active involvement of the umpire in the conduct of the trial so as to protect CVSA and ensure that the trial is conducted in their best interest.

Several studies have been carried out in other parts of the world to improve the protection of CVSA in CSA trials by expanding the role of the umpire.³⁴⁵ However, in Kenya due to lack of knowledge on how to widen the role of the umpire in CSA trials, protection of CVSA in CSA cases remains a challenge due to lack of information in this area of study. This study sought to generate useful knowledge by analyzing the court procedure and interviewing umpires involved in CSA cases to establish the impact of their impartiality on the administration of justice in CSA cases in Kenya.

According to a study by Thaman, the inquisitorial system of trial provides for an expanded role of a judge so as to enhance the truth seeking process as opposed to the passive role of a judge in the adversarial system.³⁴⁶ There is need to interrogate aspects of the inquisitorial trial procedure which may be beneficial in protecting CVSA while balancing with the rights of accused persons in CSA cases in Kenya. The lack of a study in this area makes it difficult to merge the beneficial aspects of the inquisitorial trial procedure and the adversarial system as far as the role of the umpire is concerned in a fair trial.

In the inquisitorial system of trial, there is a difference between the roles of a pre-trial judge who supervises the pre-trial investigation of the case and compiles a *dossier* and the trial judge who conducts the hearing of the case. The pre-trial judge assumes the role of principal interrogator and examiner of witnesses including the suspect, to ensure that all evidence of probative value is collected and compiled into the *dossier* which forms the basis of the trial by the trial judge.³⁴⁷ Investigating judges in the inquisitorial system are specifically trained and equipped with investigative skills to enable them collect all probative evidence required for the trial.³⁴⁸ The pre-trial judges' role in summoning any witness, including the accused enhances the truth seeking process since they remain

³⁴⁵*Op. cit* n 336.

³⁴⁶S C Thaman, *Comparative Criminal Procedure: A Casebook Approach* (Carolina Academic Press 2008) 48.

³⁴⁷*Ibid.*

³⁴⁸*Op. cit* n 206.

impartial but actively involved in the investigation process. The detailed pre-trial process ensures that only cases with high chances of conviction are forwarded to the trial chamber. Where the evidence is weak, the case is closed at the pre-trial stage.³⁴⁹

The active participation of the pre-trial judge in the inquisitorial trial procedure however ensures no miscarriage of justice since all evidence of probative value is collected in the interest of the accused, victim and public interest.³⁵⁰ The trial judge in the adversarial system is a passive umpire whose role is to ensure that the adversarial parties collect and present evidence before court in accordance with the evidentiary rules of procedure.³⁵¹ The trial judge cannot therefore intervene on behalf of either the accused or the victim as they are conscious of any such intervention being interpreted as bias towards one party.³⁵² When this occurs, it may form a ground for an appeal.³⁵³

Although the impartial role of the trial judge in the adversarial procedure helps to maintain the judge's neutrality during the trial process, in CSA cases, this at times leads to a miscarriage of justice due to the secret nature of CSA, the difficulty in detecting, reporting and investigating the abuse.³⁵⁴ Further, due to CVSA vulnerability and possible interference by the accused in the investigation, the inquisitorial pre-trial procedure ensures fairness to both accused and CVSA while the adversarial pre-trial procedure causes injustice.³⁵⁵ Despite its supposed neutral function in the criminal process generally, the impartial role of the judge in pre-trial and trial stages in the adversarial process makes it unsuitable for CSA cases.³⁵⁶ Unregulated and inappropriate cross examination of CVSA by accused persons and their advocates traumatizes CVSA and disables them from testifying accurately and coherently, while the trial judge cannot intervene due to the impartiality requirement.³⁵⁷ In order to ensure fair procedures that are regulated by expanding the role of the umpire, there is need to generate information on how this can be achieved without interfering with the rights of the accused person. The lack of such information makes it difficult to intervene in protecting CVSA in CSA cases

³⁴⁹ Dammer R Harry & Albanese Jay, *Comparative Criminal Justice System* (4th edn, Wadsworth, 2011)62

³⁵⁰ *Op. cit* n 312.

³⁵¹ *Ibid.*

³⁵² J Doran, *The Judicial Role in Criminal Proceedings* (Hart Publishing 2000)145.

³⁵³ *Ibid.*

³⁵⁴ *Op. cit* n 312.

³⁵⁵ D Luban, *Lawyers and Justice: Ethical Study* (Princeton University Press 1988)50.

³⁵⁶ *Op. cit* n 243.

³⁵⁷ *Op. cit* n 3.

in Kenya. This study compares the beneficial aspects of both the inquisitorial and adversarial trial procedure as far as the role of the umpire is concerned. The aim is to generate information that forms the basis for arguments on a more participatory as opposed to a passive umpire in CSA cases in Kenya.

2.3.4 Publicity of the Trial

According to Vogler, a criminal trial must be conducted in public so as to keep the judge while trying under trial.³⁵⁸ Conducting trials in public ensures that the procedure is open to everyone so as to ensure that the rights of accused persons are safeguarded to protect them from arbitrary use of state power. A study by Hoyano and Keenan however reveals that in CSA trial, the publicity principle occasions a miscarriage of justice to CVSA who are required to narrate the embarrassing details of the abuse in a court full of people unknown to them.³⁵⁹ The gap that exists which this study seeks to address is the lack of a study in Kenya on the effect of a public trial on the ability of CVSA to coherently testify in CSA trials. The impact of such absence of information is that CVSA in Kenya continue to be subjected to a public trial while testifying, yet, Britain from where Kenya inherited its legal system has taken measures to protect CVSA while ensuring the accused person's right to a public trial.

In Britain, concern about the trauma that CVSA are subjected to by the court procedure led to several calls for the reform of the prosecution of CSA cases. In July 1983 the press covered the trial of television actor Peter Adamson (Le Fairclough to those who watched 'Coronation Street') for indecently assaulting two eight year old girls in a Lancashire swimming- bath. One of the CVSA was so traumatized by the thought of appearing in court to testify against the accused person in his presence that she attempted to commit suicide.³⁶⁰ The incident and the apparent distress the CVSA were subjected to as they testified was highlighted by the press and calls for the reform of court procedures in CSA cases gained momentum with scathing criticisms of the evidentiary rules of trial.

³⁵⁸R A Vogler (2005) *A Worldview of Criminal Justice* (2005). <<http://www.ashgate.com/default.asp?page=637&calc.Title=1&isbn+978075462677&lang=en>> accessed 3 April 2012.

³⁵⁹*Op. cit* n 47.

³⁶⁰*Op. cit* n 230.

The defence counsel, George Carman, a Queens Counsel who cross-examined the CVSA in the Adamson case, reportedly said:

It may be that a case such as this may require the law to look again and reappraise the problem of how children may give evidence more informally and more privately rather than in the presence of the public and the press.³⁶¹

According to Russel, the increased awareness and recognition of the negative impact of a public trial of CSA on CVSA's ability to testify led to a number of cross-disciplinary conferences which brought lawyers, sociologists, policemen, civil servants, psychiatrists, psychologists and paediatricians together to look into the need to reform the area of children and court evidence.³⁶² In Kenya however, such a cross-disciplinary conference is yet to take place hence the need for a study that creates awareness amongst different professionals on the impact of a public trial of CSA cases on CVSA. The gap in knowledge in this area makes it difficult to argue for the reform of a public trial of CSA under the adversarial trial in Kenya.

Jane Wynne, a paediatrician in Britain, while discussing incest cases pointed out that, the court appearance and requirement that CVSA give oral evidence in the presence of the abuser is child abuse in itself.³⁶³ Wynne was a medical practitioner and expressed her views about the British court procedures. It was an observation made in a different country with similar court procedures to the Kenyan system. Wynne's contribution to the legal reforms in Britain gives a multi-disciplinary approach to CSA and emphasizes concerns by other professionals on the continued abuse that CVSA are subjected to through insensitive court procedures that fail to balance the rights of accused persons and concerns about CVSA protection. Wynne was concerned that CSA trial procedures need to take into account the effects of the abuse on the CVSA and their ability or otherwise to narrate the details in stressful court environment such as the presence of the abuser during CVSA testimony. Whereas Wynne was concerned as a paediatrician that CVSA should not be required to give evidence in court due to the trauma associated with court

³⁶¹ Ibid.

³⁶² D Russell, *The Secret Trauma: Incest in the Lives of Girls and Women* (Basic Books 1986) 45.

³⁶³ *Op. cit* n 212.

procedure, this study seeks to explore the specific aspects of the court procedure that traumatize CVSA with a view to making the court procedure child sensitive or friendly.

2.3.5 Orality of Evidence

Scholars are generally agreed that witnesses must give oral evidence in the presence of the accused so that the evidence can be subjected to scrutiny in an adversarial trial.³⁶⁴ This is the basis of excluding hearsay evidence and the absence of any other procedure through which a witness can give evidence before the trial. Oral evidence is preferred by common law due to the following reasons; that it is free from errors of transmission, the court can observe the demeanour of the witnesses, see the non-verbal communication from the witness, the evidence is given on oath/solemn declaration which imposes a duty on witnesses to tell the truth, the honesty of witnesses can be tested by cross-examination, it gives the accused person opportunity to confront the allegation against him/her.³⁶⁵

Despite the advantages to an accused person of an oral testimony, scholars critical of the adversarial system of trial of CSA agree that it causes stress to CVSA.³⁶⁶ As a result, CVSA are not able to testify coherently and confidently in the presence of the accused person and other people in court who are not known to them who see them as 'strangers.'³⁶⁷ In some cases oral evidence takes place a long time after the event in question with the possibility of CVSA forgetting some important details of the abuse and this may create doubts in the prosecution case.³⁶⁸ Despite the revelations that the requirement of CVSA to give oral evidence in CSA cases subjects them to trauma while testifying, there is no known study that has been conducted in Kenya to generate information that can form the basis of reviewing the orality principle in CSA cases. CVSA therefore continue to testify orally in CSA cases in Kenya despite findings by various studies of the negative impact on their ability to narrate the details of the abuse. The lack of interventions that ensure the balancing of the accused person's right to oral

³⁶⁴ See for instance, Tapper & Dennis.

³⁶⁵ *Op. cit* n 349.

³⁶⁶ *Op. cit* n 362.

³⁶⁷ Saywitz K J, 'Children in Court: Principles of Child Development for Judicial Application' in J Bulkley & C Sandt (eds), *A Judicial Primer on Child Sexual Abuse* (American Bar Association 1994). <<https://www.ncjrs.gov/App/publications/Abstract.aspx?id=149722>> accessed 3 July 2012.

³⁶⁸ *Ibid.*

testimony and the need to protect CVSA at times leads to a miscarriage of justice in CSA cases in Kenya.³⁶⁹ This is the gap that this study seeks to fill.

Saywitz argues that during the presentation of oral evidence, CVSA's cognitive and verbal communication skills and understanding of the court language are put to test since the adversarial trial procedure was not developed with children in mind as participants in the justice process.³⁷⁰ Abrams and Ramsey agree concur with Saywitz that many CVSA are not able to give consistent, spontaneous and detailed accounts of their experience during the sexual abuse because of child insensitive court procedure.³⁷¹

Hoyano and Keenan add that delay in the taking of the evidence of CVSA from the time of the abuse complicates the situation further, since the longer the period, the more CVSA is likely to forget about the minute, but important details of the abuse.³⁷² Such delays according to Spencer and Flin provide an opportunity to the accused person/counsel to argue that there are doubts in CVSA evidence, the benefit of which serves to set the accused person free, based on the prosecution's 'failure' to prove the case beyond any reasonable doubt.³⁷³ Saywitz, Hoyano and Keenan, Spencer and Flin are therefore in agreement that protecting the rights of the accused persons in CSA cases under the adversarial trial without taking into account the concerns of CVSA, creates an imbalance in the trial procedure contrary to the rights theory. The above studies by Saywitz, Hoyano and Keenan, Spencer and Flin were conducted in different parts of the world and established the inadequacies of the adversarial trial in CSA cases. Subsequently, reforms were undertaken in CSA trial procedure in countries such as Britain, Australia and America. The lack of such a study on the inadequacies of CSA trial procedure in Kenya makes it difficult to reform CSA trial procedure by balancing the rights of accused persons and CVSA protection. This is the gap that this study seeks to fill.

2.3.6 Accused Person's Right to Confront Witnesses

A study carried out in England by Temkin in 2002 on the response of the CJS to concerns of victims of rape, the accused person's right to confront his/her accuser was found to be

³⁶⁹*Op. cit* n 19.

³⁷⁰*Op. cit* n 109.

³⁷¹*Op. cit* n 5.

³⁷²*Op. cit* n 47.

³⁷³*Op. cit* n 52.

the greatest source of trauma to victims of rape. Mosteller argues for the re-thinking of the right of accused persons to confront child witnesses and victims as well as a modification of the rule against the admissibility of hearsay evidence in CSA trials.³⁷⁴ Arguing that CSA is a major and growing concern for the society and that society must appreciate the fact that children are different from adults, Mosteller called for the rethinking of procedures and evidentiary rules regarding CSA trial in the USA. Mosteller's argument begins from the presumption that the ground rules for CSA trial should be different from other trials involving adults.

Further, Mosteller argues that the issue which needs to be addressed in the reform of laws relating to CSA trial, is not whether there is need to change the procedure and evidentiary rules, but rather, what needs to be changed and to what extent. In order for the trial of CSA to be fair to both CVSA and accused persons, Mosteller advances the argument that the rights of both accused persons and CVSA must be balanced. Whereas Mosteller and other scholars were able to advance arguments on what needs to be changed and to what extent due to the fact that several researches had already been carried out which showed the need to reform CSA trial procedure in the USA, there is inadequate research in Kenya on adversarial trial of CSA cases, making it difficult to advance arguments on what needs to be changed and to what extent. This study seeks to establish the inadequacies of adversarial CSA trial procedure in Kenya so that subsequent researches can advance arguments like Mosteller on what needs to be changed and to what extent.

2.3.7 Cross examination

One of the greatest sources of trauma to CVSA in incest cases is cross examination.³⁷⁵ According to Spencer and Flin, many lawyers describe cross-examination of witnesses as 'the greatest engine ever invented for the discovery of truth.'³⁷⁶ American writer, Wigmore adds that cross-examination is 'the greatest and permanent contribution of Anglo-American system of law to improved methods of trial procedure.'³⁷⁷ Legal practitioners have come to accept the role of cross examination of witnesses in the search for truth under the adversarial system of trial. Any proposals to amend the rule on cross-

³⁷⁴ *Op. cit* n 323.

³⁷⁵ *Op. cit* n 362.

³⁷⁶ *Op. cit* n 52.

³⁷⁷ H J Wigmore, *Evidence in Trials at Common Law* (revised by H J Chadbourn Little, Brown & Co 1979)151.

examination have met stringent opposition from lawyers.³⁷⁸ This is because cross-examination is an art that has been so perfected by lawyers that it is one single tool available to them to create doubts in the evidence of a witness and set the accused persons free.³⁷⁹ This is in line with the burden of proof and standard of proof requirement that any benefit of a doubt in the prosecution evidence is given to the accused persons.³⁸⁰

In the words of Scheneikert, cross-examination is the ‘best means of working upon witnesses and leading them astray.’³⁸¹ Scheneikert recognized the fact that any witness needs a calm and serene atmosphere to testify, but when subjected to cross-fire of interrogation and counter-interrogation, examination, cross-examination and re-examination which every witness must endure at the hands of two adversarial opponents, a child witness is not likely to testify confidently and coherently.³⁸² Cross-examination has been criticized on the ground that it distorts adult’s evidence and therefore unless specially regulated, cross-examination of CVSA can be a worse distortion of the child’s evidence.³⁸³

Despite the important role of cross examination in ensuring that only the guilty are convicted, it impacts negatively on the ability of CVSA to give their best evidence in CSA trials and at times leads to a miscarriage of justice.³⁸⁴ Whereas several researches have been conducted to show the need for the regulation of cross-examination in CSA cases in different parts of the world, no such study has been carried out in Kenya. As a result, CVSA continue to be subjected to unregulated cross examination in CSA trials in Kenya.

The absence of regulated cross examination has the potential of enhancing a miscarriage of justice in CSA trials.³⁸⁵ The lack of a study on the impact of cross examination on CVSA’s ability to testify in CSA cases in Kenya makes it difficult to develop measures that regulate cross examination. This study seeks to document empirical data by

³⁷⁸ *Op. cit* n 52.

³⁷⁹ *Ibid.*

³⁸⁰ *Op. cit* n 50.

³⁸¹ Hans Schneikert (Chief Prosecutor of Berlin, 1904).

³⁸² *Ibid.*

³⁸³ W Walter, W H Charles and D M Samuel, *Children in The Legal System: Cases and Materials* (Foundation Press 1983) 477.

³⁸⁴ I J Sagatun & L P Edwards, *Child Abuse and the Legal System* (Wadsworth Group 1995) 73.

³⁸⁵ M Stone, *Cross-Examination in Criminal Trials* (Butterworths 1988)170.

observing cross examination of CVSA in court and interviewing different actors in the trial process on the impact of cross examination on CVSA's ability to testify in court.

Some British lawyers question the value of cross-examining CVSA, noting that the trial of CSA is not an ideal forum in which the art of cross examination can flourish since the court atmosphere is unsympathetic to the vulnerability of CVSA.³⁸⁶ Obviously there can be no justice in a criminal trial unless the defence version of the events can be put to the witness by somebody at some time and some examination of the witness's intelligence, honesty and ability to tell the truth is tested.

In criticizing cross examination of CVSA, Spencer and Flin argue that:

...it is however not wise to pretend that a CVSA honesty, intelligence and ability to tell the truth can only be tested by the method of subjecting them to the classical live-cross-examination, in open court, on the trial day, or to even think that that is the best method of doing so.³⁸⁷

Like many other scholars, Stone confirms that cross examination of any victim of crime by the accused person or his advocate can be a very traumatizing experience.³⁸⁸

The study by Spencer and Flin interviewed a small group of child witnesses waiting to testify and found that most of them felt anxious and nervous. Some children were observed crying in the waiting room before testifying in sexual abuse cases while some described the court experience as 'terrifying, frightening and nerve-racking.'³⁸⁹ Whereas Spencer and Flin interviewed child witnesses waiting to testify in England, this study seeks to interview CVSA in Kenya after their testimony, while making observations about them, from the time they arrived at the court premises until they left the courtroom so as to document cross examination of CVSA immediately after observing them being cross examined in court.

³⁸⁶ Ibid.

³⁸⁷ *Op. cit* n 52.

³⁸⁸ *Op. cit* n 385.

³⁸⁹ Ibid.

Although the traditional legal systems have been slow to recognize the special needs of CVSA, an increasing number of lawyers have led the way in appreciating the difficulties occasioned by the adversarial legal system in CSA cases by pointing out the effects of the trial on CVSA. One such Scottish barrister, Archibald Crawford, representing an accused in a CSA trial said:

Not only counsel, but all concerned are harassed almost beyond endurance.
It is as if all in court were in conspiracy to rape the child again.³⁹⁰

A study conducted in New Zealand in 2008 confirmed Crawford's remarks and found that many defence lawyers admitted using aggressive misleading cross-examination and playing on the myth about child sexual abuse while taking advantage of the vulnerability of CVSA to ensure the accused persons are set free.³⁹¹ Despite the revelation that defence counsel too are harassed by CSA trials in which they participate, no study has been conducted in Kenya to document the views of defence counsel on their experience of cross examining CVSA in CSA trials. This study seeks to interview defence counsel as well as advocates representing CVSA on the impact of cross examination of CVSA in the search for truth.

Judges too have not been left behind in expressing their concern about the imbalance between the rights of accused persons and the need to protect CVSA. Some judges have therefore added their voice to the concern about apparent injustice caused to CVSA by the continual adherence to the traditional evidentiary rules of the classical adversarial court procedures. Judge Pickles of Scotland had this to say about the need to reform the Scottish court procedures in CSA cases:

The child may be so overcome as to be incapable of giving any evidence or any coherent evidence or may only come out with part of what he/she would like to say, and therefore, in that case, justice may well not be done.

³⁹⁰ A Crawford, *Guilty as Libelled* (A Marker Ltd 1938) 121.

³⁹¹ Emily Watt, 'Courts Fail Child Sexual Abuse Victims' *The Dominion Post* (31 March 2008) <<http://www.stuff.co.nz/dominion/post/44575296479.html>> accessed 10 March 2012.

A person may be acquitted because the child just cannot give the details required.³⁹²

Judge Pickles' sentiments were shared by Judge Piggot,³⁹³ an experienced English Judge who expressed concern that the fear by CVSA to give evidence in court had direct impact on low/non-reporting of CSA. In supporting the case for special procedures in CSA cases Judge Piggot said:

For various reasons many cases do not even reach the courts and when they do, they are often abruptly terminated by the inability or unwillingness of the witnesses to recall painful events. In our search for justice, it is often forgotten that when a guilty person is not charged or if charged, the court case does not reach its proper conclusion but is terminated abruptly because of the failure of the key witness to give evidence or come up to proof, that can be as much failure or miscarriage of justice as if an innocent person had been convicted.³⁹⁴

Judge Piggott's remarks directly call for the balancing of accused persons' right to fair trial with concerns about CVSA vulnerability in CSA trial to ensure justice, not only to the accused, but to CVSA as well. Whereas judges in Scotland, Britain and other parts of the world have recognized the injustice occasioned by cross examination in CSA trials and called for reform of the laws, no known study has been carried out in Kenya to document the experiences of judges while conducting CSA trials. The lack of such documentation makes it difficult to advance arguments to reform the adversarial trial procedure in CSA cases in Kenya. This study seeks to interview judges and magistrates so as to document their views on the suitability of cross examination in CSA trial in Kenya.

³⁹² Judge Pickles was talking to the British Broadcasting Cooperation (BBC) 'Panorama' on the 8th September 1986.

³⁹³ *Op. cit* n 52.

³⁹⁴ Pigot Judge T, 'Women and Children First' in J Spencer, G Nicholson, R Flin and R Bull (eds), *Children's Evidence in Legal Proceedings: An International Perspective* (Cambridge Law Faculty 1990) 210.

In yet another show of concern to address the court procedure in CSA trials, the Lord Chancellor of England, Lord Mackay, while giving an opening address at an international conference on children's evidence said:

Today there is growing recognition by all those involved that, where a child has suffered or is a witness to a serious, violent or sexual attack, to appear in court, seeing the perpetrator again, and facing cross-examination can cause anguish, may often be terrifying, and can sometimes have traumatic effects. Unnecessary stress in such a situation cannot be in the interest of the unfortunate children involved and it certainly does nothing to further the interests of justice.³⁹⁵

The Lord Chancellor's comments reflect a general change of attitude and acceptance by the legal profession that courts are unnecessarily stressful for child witnesses and victims. Such pronouncements by the judges in Scotland, England and other parts of the world fortify claims by other professionals that there is need to re-think court procedures in CSA trials. However, the lack of empirical study of the views of legal practitioners in Kenya on the effect of adversarial trial in CSA cases makes it difficult to achieve judicial reforms in the protection of children. This study seeks to document the official view of the Kenyan judiciary on the adversarial trial procedure of CSA cases in Kenya by including the Chief Justice as a key informant.

A study by the NGO group for the Convention on the Rights of the Child, prepared for the 1996 World Congress in Stockholm, Sweden, against the Commercial Sexual Exploitation of Children, reported that technical court procedures were a major hindrance to the protection of children from sexual abuse. The study found that the courts appeared to uphold the rights of the accused persons which were clearly stated by the constitutions of various countries to the disadvantage of women and CVSA. Whereas the NGO study focused on the commercial sexual exploitation of children and was conducted in several parts of the world, this study develops further the finding by the NGO study by interrogating the adversarial criminal trial procedure in CSA cases in Kenya to document

³⁹⁵ Lord Mackay of Clashfern in his opening speech at an international conference on children's evidence in J Spencer, G Nicholson, R Flin and R Bull (eds), *Children's Evidence in Legal Proceedings: An International Perspective* (Cambridge Law Faculty 1990)1.

specific aspects of the court procedure that hinder protection of CVSA while they testify in court. The study aims at establishing empirical foundation for the advancement of arguments on the balancing of the rights of accused persons and CVSA in CSA trials in Kenya.

From the discussions so far, most scholars are in agreement that cross-examination of CVSA is the most traumatizing part of the court procedure in CSA trial. Cross-examination of CVSA is variously described as ‘re-victimization, second rape of the victim, worse than the abuse itself’ by scholars such as Temkin, Abrams and Ramsey, Saywitz, Bulkley and many others.³⁹⁶

2.3.8 Re-examination

According to Dennis, re-examination of a witness clarifies areas that are not clear from his/her evidence in chief.³⁹⁷ However, in CSA cases it has been found to be confusing to CVSA who do not understand why they have to answer several questions in court.³⁹⁸ The effect of re-examining CVSA in CSA trials confuses them rather than clarify issues.³⁹⁹ Re-examination of CVSA is unnecessary and may lead to contradiction between CVSA’s evidence in chief, cross examination and what they say during re-examination.⁴⁰⁰ This only serves to highlight contradictions in CVSA evidence.⁴⁰¹ Such contradictions weaken the prosecution case while enhancing the possibility of the accused person being acquitted on the grounds of doubts raised in CVSA testimony.⁴⁰²

Despite studies showing that re-examination in CSA cases highlights contradictions in CSA evidence, no study has been carried out in Kenya to document the effect of cross examination on the truth seeking process in CSA cases. As a result, CVSA who testify in court continue to be subjected to re-examination due to lack of documented information that can assist in the regulation of re-examination to ensure a balance between the rights of CVSA and accused persons. This study seeks to interview and document views of

³⁹⁶See Temkin, Abrams and Ramsey, Saywitz, Bulkley.

³⁹⁷*Op. cit* n 123.

³⁹⁸ A Cossins, ‘Cross Examination in Child Sexual Assault Trials: Evidentiary Safeguard or An Opportunity to Confuse?’ (2009) 33 Melbourne University Law Review 68, 70.

³⁹⁹ T L Arcaro, ‘Child Victims of Sexual Abuse and the Law’ (2009) 12 Michigan Child Law Welfare Journal 3,10.

⁴⁰⁰*Op. cit* n 47.

⁴⁰¹*Op. cit* n 287.

⁴⁰²*Op. cit* n 283.

CVSA, magistrates, judges and prosecutors on the importance of cross examination in CSA trials in Kenya.

2.3.9 Right to Bail

According to this principle, anyone charged with an offence is presumed innocent until proven guilty by an impartial court.⁴⁰³ However, there are certain exceptions which include CSA where bail should be denied to the accused due to the possibility of the accused person interfering with the witnesses or tampering with evidence.⁴⁰⁴ Metiku argues that due to the private nature of the setting in which CSA takes place, the relationship of vulnerability between CSA and the accused person, Ethiopian cultural tolerance of some forms of sexual violence against children, inaccessibility of the formal legal system to CVSA and their families amongst many other factors, bail should be denied to accused persons charged with CSA.⁴⁰⁵ Whereas Metiku argued that bail should be denied to accused persons in CSA cases in Ethiopia due to the cultural tolerance of some forms of sexual abuse against children, this study advances the argument that courts should set conditions on bail that ensure non-interference with the prosecution process by the accused person.

Despite the findings of the above studies, there is no empirical study in Kenya to show that releasing accused persons on bail in CSA cases may enhance the possibility of interference with the prosecution process. It is therefore difficult to regulate the granting of bail which is a constitutional right in Kenya in CSA cases. This study seeks to document views of court practitioners and CVSA on the impact of granting bail to accused persons in CSA matters. The study findings may assist umpires in making decisions as to whether or not to grant bail in CSA cases in Kenya.

⁴⁰³ *Op. cit* n 123.

⁴⁰⁴ G Metiku, 'The Right To Bail In cases Involving Sexual Offences Against Children' (Human Rights, Public Policy and Law Blog, 5 May 2012) <[www. Abyssinianlaw.com/root/our-blog/entry/17-the-right-to-bail-in-cases-involving-sexual-offences-against-children](http://www.Abyssinianlaw.com/root/our-blog/entry/17-the-right-to-bail-in-cases-involving-sexual-offences-against-children)> accessed 8 June 2013.

⁴⁰⁵ *Ibid.*

2.4 Post Trial Procedure

This section discusses what happens to CVSA after they testify in court. The section reviews literature on the impact of the classical adversarial trial procedure on CVSA and CVSA protection after they testify in court.

2.4.1 Concerns about CVSA Welfare after They Testify

A study by Cluss *et al* revealed that the adversarial criminal trial procedure neglects concerns for the welfare of CVSA and does not protect them after they testify in court.⁴⁰⁶ Cohen and Roth confirm that CVSA like many other witnesses face challenges of their safety after their testimony.⁴⁰⁷ In addition, they have to incur medical expenses on account of physical, emotional and psychological injuries that result from CSA without any assistance from the CJS.⁴⁰⁸ Erez and Tontodonato argue that in the absence of court orders to follow up the welfare of CVSA, the adversarial trial procedure treats victims as mere suppliers of information for the wheels of justice to roll.⁴⁰⁹ After giving evidence to the court, CVSA therefore become the forgotten parties in the justice system while they bear the burden of giving evidence in court and its consequences.⁴¹⁰

Despite findings by the above studies on the need to protect CVSA after they testify in court, no study has been conducted in Kenya to document the concerns for CVSA post testimony protection. The lack of such a study makes it difficult to advance arguments for courts to issue orders that protect CVSA and ensure their welfare after they testify in court. This is a gap that this study seeks to fill in this area.

⁴⁰⁶ A P Cluss, J Boughton, E Frank, E B Stewart & D West, 'The Rape Victim: Psychological Correlates of Participation in the Legal Process' (1983) 10 *Criminal Justice and Behaviour* 342, 357.

⁴⁰⁷ J L Cohen and S Roth, 'The Psychological Aftermath of Rape: Long term Effects and Individual Differences in Recovery' (1987) 5 *Journal of Social and Clinical Psychology* 525, 534

⁴⁰⁸ E Erez, 'Victim Participation in Sentencing and the Debate Goes on' (1994) 3 *International Review of Victimology* 17

⁴⁰⁹ E Erez and P Tontodonato, 'Victim Participation in Sentencing and Satisfaction with Justice,' (1992) 9 *Justice Quarterly* 393, 427

⁴¹⁰ A P Frazier & B Haney, 'Sexual Assault Cases in the Legal System: Police, Prosecutor and Victim Perspectives,' (1996) 20 *Law and Human Behaviour* 607, 628

2.4.2 The Impact of the Classical Adversarial Trial Procedure on CVSA

A study by Chambers and Miller reveals that any victim of sexual abuse who goes through the judicial process feels re-victimized by the adversarial nature of trial.⁴¹¹ Many victims of sexual assault describe the adversarial trial process through which they testify as a “legally sanctioned second rape by all in court.”⁴¹² This shows that the trial process leaves many victims more traumatized than they were before they testified.⁴¹³ Court testimony in sexual assault cases therefore results into more trauma to the victims.⁴¹⁴ The criminal justice system however does not ordinarily concern itself with the effects of the court testimony on the victims who testify in court.⁴¹⁵ Subsequently, many victims leave the court subjected to additional trauma as a result of their testimony under the adversarial procedure trial.⁴¹⁶ CVSA are not spared the trauma experienced by victims generally, but instead suffer additional re-victimization when they testify under the adversarial system in CSA cases due to their vulnerability.⁴¹⁷ In order to effectively protect CVSA after they testify and to mitigate the associated trauma, there is need to understand the post-trial effects of testifying in court by CVSA in Kenya. The lack of knowledge in this area makes it difficult to develop measures such as psychosocial support and follow up procedures. This study seeks to establish concerns of CVSA for their protection and welfare after they testify in court in order to develop appropriate interventions in this respect.

2.4.3 CVSA Protection after they Testify in Court

According to Temkin,⁴¹⁸ because of the negative impact of the adversarial trial system, CVSA need protective court orders that ensure their welfare and safety after their testimony. Information in this area is lacking in Kenya due to lack of empirical studies. As a result of the lack of information, protection and welfare orders are often not applied for in court and therefore not issued. This is the gap that the study seeks to fill. However, the criminal justice systems fail to make follow up court orders to this effect.⁴¹⁹ Since the CJS has traditionally focused on the establishment of guilt or innocence of the accused

⁴¹¹ G A Chambers & R A Miller, “*Proving Sexual Assault-Prosecuting the Offender or Prosecuting the Victim?*” in C A Carlen & A Worall (eds), *Gender, Crime and Justice* (Open University Press 1987) 198.

⁴¹² *Op. cit* n 406.

⁴¹³ *Op. cit* n 407.

⁴¹⁴ *Op. cit* n 408.

⁴¹⁵ *Op. cit* n 409.

⁴¹⁶ *Op cit* n 410.

⁴¹⁷ *Op. cit* n 362.

person, it is not the practice of courts to issue orders protecting victims of crime.⁴²⁰ In addition to the re-victimization process which CVSA undergo while testifying, they are faced with the danger of being at the mercy of the accused person after their testimony in the absence of orders from the court to protect them.⁴²¹

2.5 The Adversarial Trial of CSA in Kenya

Kenya became a British colony on the 15th June 1895 when the British government bought the Imperial British East Africa Company (IBEAC), which was hitherto in charge of the administration of East Africa, and declared Kenya a British Protectorate, taking direct control over administrative matters.⁴²² Due to the need to extend to the British settlers in Kenya the same rights, protection and privileges that they enjoyed back in England, the British government introduced the English common law into Kenya through the East Africa Order in Council, 1897, which came into force on the 12th August 1897⁴²³ leading to the ‘reception clause’ that imported into Kenya the Substance of the English Common law, Doctrines of Equity and Statutes of General Application in force in England as at the 12th of August 1897.

Although Kenya gained independence from the British government in 1963, the reception clause found expression in the Judicature Act⁴²⁴ which established the Kenyan judiciary and provided that the Kenyan courts are to apply the substance of the English common law to the extent that local circumstances and its inhabitants permit. Therefore, the substantive criminal laws and procedures applicable in Kenyan courts today, have their origin in the English common law system which is characterized by the classical adversarial trial of criminal procedure as the process through which substantive penal laws are applied to achieve their intended goal.⁴²⁵

The review of literature so far shows that commonwealth countries that adopted the adversarial legal system’s procedures have found it unsuitable for the trial of CSA. Kenya inherited its criminal procedure law from Britain, one of the countries that have found the

⁴¹⁸ *Op. cit* n 3.

⁴¹⁹ *Op. cit* n 47.

⁴²⁰ *Op. cit* n 385.

⁴²¹ *Op. cit* n 323.

⁴²² *Op. cit* n 236.

⁴²³ C Sigh, ‘Some Notes on the Development of Law in East Africa’[1969]East Africa Law Journal, 5 149.

⁴²⁴ The Judicature Act, Chapter 8 Laws of Kenya.

⁴²⁵ O L P Lumumba, *A Handbook on Criminal Procedure in Kenya* (Business Trends Ltd 1998)43.

classical adversarial legal system in need of reform in the trial of CSA cases. However, few studies have been carried out in Kenya to ascertain the suitability of the classical adversarial court procedures in the trial of CSA.

The findings of a study carried out in Kenya on the challenges of protecting children from child abuse found the adversarial court procedure to be one of the challenges.⁴²⁶ The study took a sociological approach and was concerned about factors that affect the implementation of the Children Act 2001 in protecting children against child abuse generally. The study found the court procedure and its impact on the CVSA to be one of the factors which affect the protection of children from child abuse. This study examines the imbalance in the rights of accused persons and concerns for the protection of CVSA in the adversarial trial of CSA in Kenya.

A study by Adam examined the Sexual Offences Act 2006 in Kenya and focused on the definitions of sexual offences and the punishment provided.⁴²⁷ Adams' study concerns the expansion of the definition of sexual offences to include a wider scope. The study was however not concerned with the court procedure. This study concerns the trial of CSA and the need to balance the rights of accused persons' to a fair trial with the rights of CVSA. Muhui,⁴²⁸ another Kenyan scholar was concerned about the penalty for sexual offences in Kenya and the way forward in the face of increasing sexual offences. Both Adam and Muhui point out that the court procedure in sexual offences in Kenya is insensitive to the plight of sexual offence victims generally, but fail to document specific aspects of the procedures. This study seeks to fill this gap.

Another Kenyan study by Waichigo⁴²⁹ examined the rights of children in third world countries with a focus on the implementation and violation of the UNCRC and the ACRWC and recommended the development of effective institutions to implement the

⁴²⁶ *Op. cit* n 83.

⁴²⁷ A N Adam, 'A Critique of Sexual Offences and the Law in Kenya' (Unpublished Masters thesis, University of Nairobi 2006) 15.

⁴²⁸ M T Muhui, 'Sexual Offences Law in Kenya: The Penal Concerns and the Way Forward'(Unpublished Masters thesis, University of Nairobi 2006) 33.

⁴²⁹ W E Waichigo, 'The Right of The Child in Third World Countries: A Closer Look at the Implementation and Violation of the UNCRC and the ACRWC' (Unpublished Masters thesis, University of Nairobi 2002) 29.

rights of children generally. This study is specifically concerned about the rights of CVSA in the judicial process in Kenya.

A study by Onyango,⁴³⁰ focused on access to criminal justice in Kenya with special reference to Kibera in Nairobi. The study found the court procedure to be one of the factors hindering people's access to justice in Kibera. This study however develops the finding further and focuses on the adversarial court procedure in respect of CSA trial.

2.6 Conclusion

The study makes the following conclusions:

The review of literature reveals that there is universal consensus on the importance of accused person's rights in criminal proceedings and the need to safeguard them so as to ensure procedural fairness to accused persons. This is consistent with procedural justice theory discussed in chapter one.

There is consensus amongst various scholars that the classical adversarial court procedures cause trauma to CVSA and in some cases disables them from testifying coherently and confidently. Specific evidentiary rules that also protect the rights of accused persons which were identified as causing challenges in the prosecution of CSA are, the burden and standard of proof, the requirement that evidence should be adduced orally in examination –in- chief, the right to cross-examination by the accused person, the passive role of the trial judge, the requirement that criminal proceedings be held in public and the courtroom set up.

There is concern about the need to re-think the evidentiary rules of the classical adversarial court procedure in CSA trials. Britain from where Kenya inherited the classical adversarial legal system has reformed its CSA trial procedure, as have the USA and Australia amongst other countries. Limited study in Kenya shows that there is concern about the challenges caused by court procedures in CSA trials. However, there is no study specifically focused on examining the effects of the court procedures on CVSA ability to testify in CSA cases. In addition, there is lack of empirical data on how to strike a balance between the rights of accused persons and those of CVSA. As a result it is

⁴³⁰ O J Onyango, 'Access to Criminal Justice in Kenya: A Case Study of Kibera' (Unpublished Masters thesis, University of Nairobi 2008) 56.

difficult to ensure procedural justice and fairness to both the CVSA and the accused persons. This is the gap that this study seeks to fill. The next chapter discusses the concept of procedural fairness and its relevance in CSA trials.

CHAPTER THREE

CONCEPTUAL FRAMEWORK: PROCEDURAL JUSTICE IN CSA TRIAL

3.1 Introduction

In this chapter, the study discusses the concept of procedural justice and its application in criminal trials. The study examines how procedural justice can be achieved in CSA trial without violating the rights of accused persons to fair trial. The discussion identifies a procedural justice framework for CSA trials which serves as the reference point for analyzing Children's court procedures in Kenya in the subsequent chapters. The chapter is therefore presented in the following thematic areas: definition of procedure, definition of justice, defining procedural justice, the relationship between substance and procedure, the objective of criminal procedure, procedural fairness in criminal proceedings, safeguarding accused persons' rights in criminal trials, concerns about CVSA protection and participation in the judicial process, limitation of accused persons' rights in criminal proceedings, CSA trial and procedural justice and procedural justice framework for CSA trial.

3.2 Definition of Procedure

Procedures are simply steps leading to a decision, a means for reaching outcomes or legal decisions which have a goal to advance.⁴³¹ The substance of a decision refers to the outcome sought, while procedures are the steps leading to the outcome.⁴³² Such steps (procedures) must reflect and respect the society's values while fulfilling the expectations of a section of the society whose interests/rights are to be protected by them.⁴³³ The procedures must express the concerns of the society in ensuring fair treatment to all individuals who seek to be protected by the outcome. In respect of the study, certain societal values which need to be protected by the procedures are the rights of accused persons premised on the presumption of innocence to protect innocent people from being punished.

⁴³¹ *Op. cit* n 108.

⁴³² Bentham's works as found in M Bayles, *Procedural Justice: Allocating to individuals* (Kluwer Academic Publishers 1990)79.

⁴³³ *Op. cit* n 108.

The traditional goal advanced by legal decisions is the finding of guilt/innocence of the accused according to Damaska⁴³⁴ and other scholars such as McConville and Wilson,⁴³⁵ Dennis⁴³⁶ and McEwan.⁴³⁷ Human rights advocates as well as victimologists argue that another value to be recognized and respected by procedures is the need to uphold and protect victims' rights in the course of criminal trials. Such scholars include Batra⁴³⁸ and Zedner⁴³⁹ being human rights activists and victimologists respectively.

3.3 Definition of Justice

As already discussed under the theoretical framework, procedural justice theorists like Rawls, Solum and Galligan are all in agreement that justice is fairness and a process is fair only if it grants equal opportunities and liberties to the parties in a dispute. Rawls emphasizes that it is not enough to grant equal opportunities and liberties, but where there exists inequality or disadvantaged people in society; the distribution of available resources must be done in such a way as to benefit the least advantaged section of the society.⁴⁴⁰ This argument is consistent with the rights theory which argues for the equal protection of all human beings.⁴⁴¹ A fair procedure which leads to a just decision must therefore balance and protect rights of parties concerned. The concept of justice as discussed in detail under the theoretical framework applies in this section.

3.4 Defining Procedural Justice

As discussed under procedural justice theory in chapter one, procedural justice theory argues for fairness in the steps that are used to arrive at a decision if the outcome is to be viewed as just.⁴⁴² There are two important concepts in the procedural justice arguments that must be satisfied for a process to be viewed as just and fair. The first concept is that it must of necessity uphold the principle of equal distribution of resources to all involved in it.⁴⁴³ In this respect, the resources may be construed to mean rights and liberties. Therefore, a CSA trial would be viewed as a fair trial according to procedural justice

⁴³⁴ *Op. cit* n 206.

⁴³⁵ *Op. cit* n 205.

⁴³⁶ *Op. cit* n 123.

⁴³⁷ *Op. cit* n 318.

⁴³⁸ *Op. cit* n 241.

⁴³⁹ *Op. cit* n 191.

⁴⁴⁰ *Op. cit* n 107.

⁴⁴¹ *Op. cit* n 130.

⁴⁴² *Op. cit* n 107.

⁴⁴³ *Op. cit* n 108.

theory, if it safeguards the rights and liberties of accused persons and also ensures that CVSA have their rights equally protected during the trial.

The second principle of procedural justice is the difference principle which states that the distribution of resources must benefit the less advantaged members of society to bring them to an equal level with those more advantaged.⁴⁴⁴ In this respect, my argument is that in a CSA trial, the accused persons are already advantaged by the fact that they have procedural safeguards in the form of rights to fair trial which are constitutionally protected. On the contrary, the classical adversarial court procedure falls short of CVSA rights, making them less advantaged in CSA trial as discussed under literature review. According to procedural justice and rights theory therefore, for the trial to be just, it must be fair to both accused persons and CVSA. In ensuring such fairness, there is need to enforce the rights of accused persons in a manner that benefits the less advantaged CVSA by striking a balance between the rights of CVSA and those of accused persons in a CSA trial.

3.5 The Relationship between Substance and Procedure

Rawls attempted to distinguish between substance and procedure in his notion of justice which he analyzed in three levels.⁴⁴⁵ The first argument is that justice is based on a set of rules that establish basic rights and duties known to everyone in the society.⁴⁴⁶ Laws that declare basic rights are therefore substantive laws according to this notion of justice by Rawls. Examples of substantive laws therefore include the ICCPR, UNCRC, constitutions, and statutes that declare rights of individuals or groups of people.

Rawls' second argument is that justice is the property of the implementation of the substantive laws.⁴⁴⁷ He argues that it is not enough to declare rights, but there must be provided mechanisms to enforce them. The mechanisms are according to Rawl, referred to as rules to be followed in implementing the declared rights.⁴⁴⁸ An example of rules to implement rights may be given again as the Kenyan Criminal Procedure Code⁴⁴⁹ since it

⁴⁴⁴ Ibid.

⁴⁴⁵ Ibid.

⁴⁴⁶ Ibid.

⁴⁴⁷ Ibid.

⁴⁴⁸ Ibid.

⁴⁴⁹ Criminal Procedure Code Cap 75 Laws of Kenya.

provides for the procedure to be followed in ensuring that accused persons' rights in a fair trial are upheld.

The third argument according to Rawls posits that there is need to distinguish the rules (substantive laws) and the strategies of implementation. The effectiveness or otherwise of the implementation of the rights determines the overall functioning of the court and the country's judicial system.⁴⁵⁰ The procedures are the strategies for the implementation of the rules. The need to be fair if the outcome is to be seen as just whether or not it is accepted by the parties is of paramount concern as unfair procedures may lead to unjust results.⁴⁵¹

Rawls' third argument is shared by Zappala⁴⁵² who argues that criminal procedure is based on the idea that to punish the accused person, the charge must be proved in a fair process of discovering the truth through the accurate application and respect of rules of procedure. Galligan's perception of procedures as means, instruments or mechanisms for giving effect to values pertinent to each form of legal process confirms Rawls' third level of justice notion as strategies of implementing substantive laws. Substantive laws declare rights and liberties while procedural laws spell out the steps that are to be followed in realizing the rights. Procedural laws are therefore pertinent for the implementation of substantive laws.

The distinction between substance and procedure in law may not be very clear as there are areas of overlaps.⁴⁵³ Whereas some laws provide substance; others provide procedures while still others provide both. The distinction is however important in an analysis such as this study which looks into various descriptions by different scholars. The importance of the distinction is relevant to this study since CVSA have rights to protection through the UNCRC, the accused persons have rights under the ICCPR and constitutions, but the procedures for their implementation under the adversary system appear to be fair to the accused persons but not to CVSA, leading to miscarriage of justice in some cases.⁴⁵⁴ The

⁴⁵⁰ *Op. cit* n 432.

⁴⁵¹ *Op. cit* n 139.

⁴⁵² S Zappala, 'Balancing Rights of Accuseds and Rights of Victims; Human Rights in International Criminal Proceedings' [2010] 8 Journal of International Criminal Justice Issue 1,137. <jicj.oxfordjournal.org/content/8/1/137-64.full> accessed 15 March 2012.

⁴⁵³ *Op. cit* n 432.

⁴⁵⁴ *Op. cit* n 5.

ICCPR is therefore an example of a situation where substance and procedure are found in one legal standard making the distinction between the two almost obscure. Rawls attempt to differentiate substance and procedure in law has been advanced further by other procedural justice theorists such as Galligan and Solum as discussed in chapter 1 under the theoretical framework.

Unfair procedures according to all procedural justice theorists lead to unfair outcomes. The main argument is that the purpose of substantive law is directed towards ends and goals which are set by legal systems, but usually linked to important values within the society.⁴⁵⁵ Procedures must therefore ensure that such values in any society are respected if the procedure is to be seen as fair to all those who seek redress through it. Procedures have the objective of not only accurate application of substantive law to achieve its intended goal, but must respect and uphold societal basic values which influence the making of legal standards as the society's expression of its intention to protect all its members who seek redress through procedures.

Galligan recognized the fact that laws, procedures included, are not static, but dynamic, evolving over time and influenced by historical and prevailing conditions at any given time.⁴⁵⁶ Subsequently therefore, when they are found to be inadequate or unequal in their treatment of those who seek redress through them, then reforms become necessary so as to create equality in the process. In this respect, the study argues that as the perception about the objective of criminal trials change from the traditional focus of establishing the guilt or lack of guilt of the accused person to include victims' and international community's interests, so must procedures be reformed to reflect and accommodate the changes as prevailing societal basic values.

3.6 The Objective of Criminal Procedure

The purpose of criminal proceedings is to protect the citizen from wrongful treatment and wrongful conviction.⁴⁵⁷ The purpose of the criminal trial process is to establish the guilt or lack of guilt of the accused person, before those found guilty can be punished.⁴⁵⁸ An important feature of the adversarial system is that accused persons are not required to co-

⁴⁵⁵ *Op. cit* n 128.

⁴⁵⁶ *Op. cit* n 108.

⁴⁵⁷ C M Bradley, *Criminal Procedure; A Worldwide Study* (Carolina Academic Press 2007) 3.

⁴⁵⁸ *Ibid.*

operate with the investigators or prosecutors in the building up of the case against them. That is, investigating and prosecuting authorities, must prove, according to well-established rules of evidence before court, all the required components of the charge. The system is founded on the presumption of innocence and requirement of proof beyond reasonable doubt.⁴⁵⁹ Over the years however, the traditional purpose of the criminal process has been modified to include the need to balance the interests of victims of crime and the community with the liberties of accused persons, so that parties are treated fairly as per the rights theory.⁴⁶⁰

Many countries now require criminal trials to not only safeguard the rights of accused persons, but also the rights of victims as stipulated in international law.⁴⁶¹ In England, for example, the Human Rights Act 1998 which domesticates the European Convention on Human Rights requires the protection of victims' rights as human rights as well. The ICTY provides another example. Another example is the ICTY which held that in ensuring a fair trial, the court process needs not only to consider the rights of accused persons, but also interests of the victims and the international community.⁴⁶²

The above examples clearly demonstrate that the practice of many states and international law now require the balancing of the interests of accused persons on the one hand and victims of crime and the society on the other hand. The balancing is particularly required in the case of CVSA because of their vulnerability as children. The need for fairness and balancing implies that there is need for special procedures in CSA trials which take into consideration the special needs of CVSA while safeguarding the rights of accused persons. The question to be answered by this study therefore is; within the context of procedural justice theory and the rights theory what kind of procedure will guarantee fairness to both CVSA and accused persons in CSA trials? This is answered in the discussions that follow in this chapter.

⁴⁵⁹*Op. cit* n 50.

⁴⁶⁰ Senior, Crowther-Dowey and Long, *Understanding Modernization in Criminal Justice* (McGraw Hill, 2007) 142.

⁴⁶¹*Op. cit* n 241.

⁴⁶²*Prosecutor v Norman, Kallon and Gbao* ICTY Case No.SCSL-2003-09-PT.

3.7 Procedural Fairness in Criminal Proceedings

Procedural justice theorist, Solum argues that procedures must not only be fair, but must be known and accepted by both parties to a transaction, if the results of the process are to be acceptable to both as fair.⁴⁶³ The review of literature in chapter two showed that many CVSA do not understand the court procedures and why they have to narrate the intimate details of the abuse in court.⁴⁶⁴ The lack of understanding of the court procedures makes CVSA describe the court process, especially if it results into an acquittal of the accused person as ‘worse than the abuse itself.’⁴⁶⁵

Herman and Hirschman observed that some accused persons do commit the offence of CSA with full knowledge of the court process and the difficulty in proving the case against them since it is their word against the less knowledgeable CVSA.⁴⁶⁶ The lack of pre-trial procedures which can ensure CVSA have an orientation of the court and its procedures make the criminal process fall short of the requirements of procedural justice.⁴⁶⁷ Where the criminal process protects the rights of accused persons without balancing with the interests of CVSA, the result is inequality in the distribution of rights and liberties contrary to procedural justice and rights theories. It is the lack of a balance between the rights of accused persons and concerns for the protection of CVSA which results into unfairness in the procedures which in some cases may lead to injustice in CSA trials.

Concern about the position of victims in the administration of justice is a reflection of the prevailing international community’s basic values as concerns victims and the universal acceptance that their needs are legitimate.⁴⁶⁸

3.8 Judicial Pronouncements on Balancing the Rights of Accused Persons and Victims of Crime (CVSA)

Courts have appreciated the need to uphold the rights of accused persons in criminal proceedings while attempting to protect the interests/concerns of victims of crime,

⁴⁶³ *Op. cit* n 111.

⁴⁶⁴ *Op. cit* n 209.

⁴⁶⁵ *Ibid.*

⁴⁶⁶ *Op. cit* n 89.

⁴⁶⁷ One of the findings of the study from the Kenyan courts was that there is no pre-trial procedure to allow CVSA familiarize themselves with the court surroundings and learn the procedures they are expected to follow when testifying in CSA cases. This matter is discussed in details in chapter four.

⁴⁶⁸ *Op. cit* n 408.

including CVSA worldwide. In his speech at an international forum on International Justice, Judge Robinson⁴⁶⁹ pointed out that although the ICTY was obligated to comply with the international human rights instruments of fair trial, which the tribunal did, the circumstances of the trials, involving mass atrocities and crimes against humanity against a number of witnesses and victims who could not testify without protection, there was need to balance the rights of accused persons to fair trial with the concerns of witnesses to ensure fairness to both sides. According to Judge Robinson, what is important is that witnesses are protected to give evidence and the accused person has an opportunity to challenge the evidence produced.

Measures adopted by the ICTY to protect the witnesses/victims therefore had to pass the test of fairness for them to be legitimate. Fairness was thus the principal tool in construing the ICTY Statutes to ensure protection of witnesses /victims without compromising the rights of accused persons. If at the end of the balancing exercise the conclusion is that the protective measure is fair, then it is legitimate and meets the test of fairness.

In 2008 while addressing the question as to whether it is permissible to convict a defendant based solely or to a decisive extent on the testimony of one or more anonymous witnesses, Lord Bingham summed up the concept of fairness in criminal trials by stating that:

...if in order to do justice, some adaptation of ordinary procedure is called for, it should be made, so long as the overall fairness of the trial is not compromised.⁴⁷⁰

The contemporary perception by jurists of fairness in criminal trials has slowly grown to accommodate flexibility in procedural fairness as indicated by Lord Bingham of the House of Lords, Judge Robinson of the ICTY and Lord Diplock's celebrated *dictum* that:

... The respect and protection of fundamental human rights is not to a legal system that is infallible, but one that is fair, not necessarily perfect.⁴⁷¹

⁴⁶⁹ Robinson P, 'The Right to a Fair Trial in International Law with specific Reference to the work of the ICTY' (Colloquium on International Justice, Rome 16 October 2009) <www.isrcl.org/Papers/.../MacCarrick.pdf> accessed 20 Septemeber 2013.

⁴⁷⁰ *R v Davis* [2008] UKHL 36, (HL) {26(2)}.

⁴⁷¹ *Maharaj v Attorney-General of Trinidad and Tobago Privy Council* (1978) 2 WLR 902.

Lord Diplock's reference to a legal system that respects and protects fundamental human rights as one that is not infallible, but fair, is in conformity with the Concise dictionary's definition of fairness as being just and equitable, which is the essence of procedural justice as already discussed.⁴⁷² The concept of fairness in a criminal trial was again expressed when Judge Shahabudeen of the ICTY stated that:

...the fairness of a trial need not require perfection in every detail, but the essential question is whether the accused person has had a fair chance of dealing with the allegations against him/her.⁴⁷³

Despite the above liberal approach and interpretation of legal principles and constitutional provisions to accommodate emerging need for procedural fairness, there has also been a conservative approach aimed at maintaining the status quo of the rights of accused persons in criminal proceedings not being limited in any way. In 1981, the Superior Court of California state in the USA overturned a magistrate's conviction of an accused person on the basis that the magistrate allowed CVSA to testify in court with her chair turned away from the accused person in contravention of accused person's right to be confronted by his accuser under the Sixth Amendment of the Constitution.⁴⁷⁴ The Superior Court's interpretation of the right to confront witnesses was that the confrontation must be face to face.

The US Supreme Court equally took conservative approaches to any attempts to limit the rights of accused persons in order to protect CVSA, but gradually accommodated the need for procedural fairness in CSA prosecutions. In 1988, the US Supreme Court, by a majority of six to two judges, quashed a conviction of an accused person on the basis that the trial court allowed two thirteen year old CVSA to testify from behind a translucent screen which blocked out their view of the accused person, giving him a rather fuzzy view of them.⁴⁷⁵ The majority decision held that the accused person's right to confrontation meant face-to face, not obscured contact in which witnesses could see him as well as he saw them.

⁴⁷² Pearsall J (ed), *The Concise Oxford English Dictionary* (Oxford University Press 2002) 434.

⁴⁷³ *Prosecutor v Slobodan Milosevic*, (ICTY) Case NoIT-02-54-AR 73.4.

⁴⁷⁴ *Herbert v Superior Court* (1981)117 Cal App 3d 661.

⁴⁷⁵ *Coy v Iowa* (1988) 108 S Ct 2789.

The minority judges argued that the case raised procedural fairness issues and the need to protect CVSA. Some of the majority judges were however, willing to accept an exception to the rule of confrontation in CSA cases only if it could be shown that such confrontation caused undue distress that made CVSA unable to testify, while some majority judges could not at all accommodate such limitation of the rights of accused persons. The accused person was subsequently set free, but this decision, amongst many others led to the use of child psychologists in CSA cases to determine the impact of the abuse on the ability of CVSA to testify and the need for special protective court procedures.⁴⁷⁶

In 1990, the Supreme Court took a complete turnabout on the issue of procedural fairness to CVSA and the need to limit accused persons' rights in CSA prosecutions. The court held that it was constitutional to allow CVSA to testify through a live video link, if it could be shown that the presence of the accused person would upset the CVSA as to make her unable to testify.⁴⁷⁷ The decision attracted many legal commentaries, some applauding it while others criticized it as a violation of the accused persons' fundamental rights to fair trial.⁴⁷⁸

The US Supreme Court confirmed the need to ensure procedural fairness in CSA trials when it held that, despite the confrontation requirement, in a case where CVSA was unable to testify, the court could properly convict on the basis of a collection of hearsay statements, each of which was admissible under some exception to the hearsay rule.⁴⁷⁹ Courts slowly came to accept that CSA trials are challenging to prosecute under the classical adversarial legal system. Subsequently, the courts became flexible to limiting the rights of accused persons to fair trials such as right to confrontation, rule against hearsay evidence in order to ensure fairness in the trial to both CVSA and accused persons through a balancing act, without compromising accused persons rights, while protecting CVSA.

⁴⁷⁶ B E J Myers and others, 'Expert Testimony in Child Sexual Abuse Litigation' (1989) 68 Nebraska Law Review 1,59.

⁴⁷⁷ *Maryland v Craig* (1990)497 US 836.

⁴⁷⁸ K D Vaillancourt , 'State v Thomas. Face to Face with Coy and Craig. Constitutional Invocation of Wisconsin's Child-Witness Protection Statute'[1990] Wisconsin Law Review, 1613-53;
D G Cecchetini-Whaley, Children as Witnesses after *Maryland v Craig*(1992) 65Southern California Law Review, 1993, 2010.

⁴⁷⁹ *White v Illinois* (1992) 502 US 346.

The situation in Britain as far as limiting the rights of accused persons in fair trials to balance the concerns of victims was different and did not present unconstitutionality arguments due to the fact that Britain lacks a written constitution.⁴⁸⁰ Not only are the distinctive features of the adversarial system virtually without constitutional protection, but the courts are ready when circumstances necessitate, to allow significant departures from the adversarial system.

As an example, although parties call witnesses in court and examine them, special tribunals have at times deviated from the practice and sometimes adopted the inquisitorial approach in which the chairman of the tribunal conducts the interrogation of witnesses.⁴⁸¹ The British courts are so flexible to the reform of the adversarial system in pursuit of procedural justice that although it is the parties to call and examine witnesses, in England (not in Scotland), the judge in criminal proceedings has a right to call supplementary witnesses not called by the prosecution/defence and may ask supplementary questions to any witness in court.⁴⁸²

In theory therefore, any aspect of the adversarial system's procedures in Britain could be changed by Parliament if it is contained in a statute, or by a court decision if found in court precedents. In practice however, any such changes must conform to the European Convention on Human Rights (ECHR)⁴⁸³ which does not give similar unqualified support to the adversarial system's rights to fair trial as the Sixth Amendment to the US Constitution. The ECHR⁴⁸⁴ provides for several minimum guarantees to accused persons such as a public hearing, examination of witnesses, in a fair trial, but excludes the public and the press in the interest of morality, public order, national security, interest of juveniles, protection of private lives, or if in the court's opinion, it is necessary to do so in special circumstances in the interest of justice. The ECHR therefore expressly provides a human rights basis for the limitation of the rights of accused persons in criminal proceedings under various circumstances.

⁴⁸⁰*Op. cit* n 349.

⁴⁸¹*R v Commission for Racial Equality, ex parte Cottrell & Rothon* [1980]1WLR1580.

⁴⁸²*Op. cit* n 52.

⁴⁸³ The Convention for the Protection of Human Rights and Fundamental Freedoms, drafted in 1950, entered into force in 1953.

⁴⁸⁴ *Ibid.* Article 6.

While attempting to balance fundamental rights and freedoms of both accused persons and victims to ensure procedural fairness, the ECHR has ensured there is no compromise of the rights of accused persons to fair trial as provided by the ECHR under Article 6. In this respect the ECtHR condemned convictions based on witness statements obtained out of court which the accused persons had no opportunity to challenge.⁴⁸⁵ However the ECtHR emphasized that the accused person's right to cross-examine witnesses does not insist on the witness being brought to court to give live evidence, but that the prosecution can use written statements obtained from witnesses in pre-trial interrogations, provided the accused person had an adequate opportunity to challenge and question the witnesses either at the time of making the statement or at a later stage in the proceedings.⁴⁸⁶ The right to examine witnesses may be satisfied not only by allowing accused persons/counsel to put questions to the witnesses as in Britain, but also in the continental system such as France and Germany where the judge or some court official is appointed to put questions to witnesses at the request of the accused persons.⁴⁸⁷

In the next section, the study discusses views of contemporary scholars on the question of balancing accused persons' rights and protection of victims (CVSA included) in a fair trial. The discussion analyses arguments on whether or not the rights of accused persons to a fair trial can be limited to ensure a balance with the need to protect CVSA.

3.9 Limitation of Accused Persons' Rights in Criminal Proceedings

There is no consensus amongst scholars as to the extent to which the rights of accused persons may be limited to accommodate the protection of victims of crime, or indeed whether there should be any limitation at all. Some rights theorists agree that the rights of accused persons must be balanced with those of victims since both are human rights and indivisible.⁴⁸⁸ Others maintain that accused persons' rights are superior to those of victims and so any attempts to protect victims are secondary to the rights of accused persons and where any conflict occurs, the accused persons' rights prevail.⁴⁸⁹ This section analyzes views of various scholars on this vital aspect of this study. The first section

⁴⁸⁵ *Unterperinger v Austria* (Series A No 110) (1986); *Kostovski v The Netherland* (Series A No 166) (1989).

⁴⁸⁶ *Delta v France* (1990) Series A No 191.

⁴⁸⁷ *Op. cit* n 220.

⁴⁸⁸ *Op. cit* n 140, 241.

⁴⁸⁹ S Zappala, *Human Rights in International Criminal Proceedings* (Oxford University Press 2003)73.

analyses supportive views while the second section deals with opposing views on the debate of balancing accused persons' and victims' rights.

3.9.1 Arguments in support of the Limitation of the Rights of Accused Persons in Criminal Proceedings

Fairness to victims and witnesses of crime can be accomplished through procedural fairness without jeopardizing fairness to accused persons.⁴⁹⁰ The truth seeking purpose of the criminal trial can best be achieved by modifying the orthodox adversarial trial where its rigours impede that objective (as in cases of CSA).⁴⁹¹ Judge Jackson argues that protecting witnesses need not be at the expense of accused persons and there is no need for choosing either the accused persons' or victims' rights over the other as the two are not in competition.⁴⁹²

While appreciating that it is not possible to make the criminal proceedings entirely stress free for CVSA, it is however important to note that the very nature of CSA makes the experience of narrating the abuse to court agonizing. Procedural reforms to enable CVSA testify is the only way of ensuring justice for both accused persons and CVSA. The classical adversarial court procedures were not developed with the possibility of child victims' as participants in the process.⁴⁹³

While referring to the set of procedural rights of victim participation in the ICC process under the Rome Statute⁴⁹⁴ and Rules of Procedure and Evidence (RPE),⁴⁹⁵ Zappala supports the notion of victim interest protection and adds that there is nothing prejudicial *per se* to the rights of accused persons in allowing victims to participate in the international criminal process.⁴⁹⁶ Zappala however raises concern about apparent ambiguities in the ICC Statute and lack of clarity as to the procedural model adopted by

⁴⁹⁰ *Op. cit* n 47.

⁴⁹¹ *Ibid.*

⁴⁹² Judge Hal Jackson, 'Child Witnesses in the Western Australian Criminal Courts' (2003) 27 Criminal Law Journal 199.

⁴⁹³ Rayner Moira, a barrister and founder Director of the Office of Children's Rights Commissioner for London who argues that rules of advocacy of accused persons' rights demand that the defendant's version of events be put to the victims/witnesses, but that if the process is inevitably stressful, it need not be inevitably abusive in and of itself.

⁴⁹⁴ The Rome Statute- U.N.DOC A/CONF.183/9 of 17 July 1998.

⁴⁹⁵ *Ibid*, Article 51 which provides for the adoption of Rules of Procedure and Evidence by the ICC.

⁴⁹⁶ *Op. cit* n 489.

the court.⁴⁹⁷ Probably the expectation would have been to choose between the adversarial or the inquisitorial models of criminal procedure.⁴⁹⁸ However, both models have their own disadvantages⁴⁹⁹ and leaving the model open gives the judges an opportunity to draw from each model what is beneficial to the ICC in balancing the rights of accused persons and measures to protect victims. There is lack of clear provisions in the RPE as to how victims should present their evidence in court and the extent of their participation.⁵⁰⁰ In Zappala's opinion, this may lead to the violation of the rights of accused persons since judges are left with the sole responsibility of determining appropriate measures of victim participation that are consistent with the rights of accused persons.⁵⁰¹

Although Zappala's argument invalid, leaving judges to exercise their discretion in determining how and to what extent the measures to protect victims is a good practice in promoting development of jurisprudence.⁵⁰² This is important since it is the first time that victims' rights to participate in an international criminal process are recognized.⁵⁰³ Besides, it may not have been possible to envisage all ways in which victims may present their evidence considering the varied offences and types of victims that may appear before the court.⁵⁰⁴ In addition, the ICC has an appellate chamber where possible violations of the rights of accused persons can be challenged.⁵⁰⁵

Another argument by Zappala is that legal uncertainty about the exact nature and extent of victims' participation has in practice seen some judges of the ICC being reluctant to recognize the primacy of the procedural rights of victims' participation.⁵⁰⁶ In some cases this weakens victims' participation in the process.⁵⁰⁷ Zappala's concern is that the grey area of the status of a witness and that of a victim further complicates the notion of victim participation in situations where it is not clear if one is both a witness and a victim.⁵⁰⁸ This leads to double status which may present situations of possible conflict with the

⁴⁹⁷ Ibid.

⁴⁹⁸ Ibid.

⁴⁹⁹ *Op. cit* n 349.

⁵⁰⁰ Ibid.

⁵⁰¹ *Op. cit* n 489.

⁵⁰² *Op. cit* n 384.

⁵⁰³ Ibid.

⁵⁰⁴ Ibid.

⁵⁰⁵ C Stahn & G Sluiter, *The Emerging Practice of the International Criminal Court* (Brill 2009) 375.

⁵⁰⁶ *Op. cit* n 489.

⁵⁰⁷ Ibid.

⁵⁰⁸ Ibid.

rights of accused persons in an attempt to protect victims.⁵⁰⁹ The other concerns raised by Zappala are rights of victims in light of the principle of due process.⁵¹⁰ The primacy of the rights of accused persons, victim participation and the right to expeditious trial are yet other concerns in protecting victims.⁵¹¹ In addition, the presumption of innocence, the right to a fair trial and principle of equality and the right to be heard by an independent and impartial tribunal are areas of concern in protecting victims of crime.⁵¹²

In addressing each of the above concerns as possible areas of conflict, Zappala argues that what is needed is fair balancing of the rights of accused persons with the measures of protecting victims.⁵¹³ This can be achieved by recognizing that there is no competition amongst the two and by giving the accused person adequate opportunity to challenge evidence against him/her.⁵¹⁴ Zappala applauds the idea of victim protection as a step in the right direction.⁵¹⁵ This calls for the act of delicate balance in respect of the protection of accused persons' rights in the process.⁵¹⁶ In order to ensure no conflict occurs in protecting victims while safeguarding accused persons' rights, Zappala urges for clarity in the mode and boundaries of victim participation in light of the accused persons' rights.⁵¹⁷ Any potential conflict area must recognize the fact that the purpose of the criminal procedure is to establish the guilt/innocence of the accused person, while protecting his/her rights in the due process.⁵¹⁸ The criminal process, in protecting the rights of accused persons needs to ensure protection of victims' interests as provided by the Rome Statute.⁵¹⁹

As regards the primacy of the rights of accused persons, the argument is that accused persons' rights and victims' rights are both human rights which need to be treated equally in conformity with the rights theory.⁵²⁰ Both accused persons and victims are entitled to

⁵⁰⁹ *Op. cit* n 452.

⁵¹⁰ *Ibid.*

⁵¹¹ *Ibid.*

⁵¹² *Ibid.*

⁵¹³ *Op. cit* n 489.

⁵¹⁴ *Ibid.*

⁵¹⁵ *Op. cit* n 452.

⁵¹⁶ *Ibid.*

⁵¹⁷ *Ibid.*

⁵¹⁸ *Ibid.*

⁵¹⁹ *Op. cit* n 505.

⁵²⁰ *Op. cit* n 133.

equal treatment and protection of the law under the Constitution of Kenya.⁵²¹ The right of accused persons to a fair trial is recognized and protected by the same Constitution⁵²² and so is the fact that children are vulnerable and need special protection. Courts must give children an opportunity to be heard while children's best interests must be the guiding principle in decision making in matters affecting them.⁵²³ Both the accused persons' right to fair trial and need to protect CVSA are therefore constitutional rights under the Constitution of Kenya. The courts must ensure that neither is compromised in the interest of the other, for that is the essence of striking a delicate balance.⁵²⁴

As far as the accused persons' right to an expeditious trial is concerned, the possible conflict can be contained since the judges are deemed to be in control of the trial process.⁵²⁵ Any application or measure that may cause delay of the proceedings needs to be decided on a balance of the interests of both victims and the accused persons.⁵²⁶ One such balancing act, according to Zappala, is releasing the accused person on bail pending trial to mitigate the effects of the delay if the accused person is in custody.⁵²⁷ However, such a release of the accused person on bail should attach conditions that protect victims from intimidation or interference with the victim or the trial process.⁵²⁸ It is important that the court ensures the safety of victims as the accused person is released on bail.⁵²⁹

As regards the accused persons' right to be heard by an impartial tribunal, Zappala argues that when judges actively get involved in the truth seeking process like the one at the ICC, where they can question witnesses and make protective orders, they may at times be seen not to be impartial.⁵³⁰ The most important test for impartiality is fairness to both the accused persons and victims, while ensuring that the accused persons have every adequate opportunity to challenge any measure taken by the court in protecting witnesses.⁵³¹ As Lord Diplock,⁵³² Judge Robinson⁵³³ and Judge Shahabudeen⁵³⁴ all

⁵²¹ *Op. cit* n 40, Article 27.

⁵²² *Ibid* Article 50 provides for fair hearing to accused persons.

⁵²³ *Ibid*. Article 53.

⁵²⁴ *Op. cit* n 47.

⁵²⁵ *Op. cit* n 220.

⁵²⁶ *Ibid*.

⁵²⁷ *Op. cit* n 452.

⁵²⁸ *Op. cit* n 404.

⁵²⁹ *Op. cit* n 384.

⁵³⁰ *Op. cit* n 489.

⁵³¹ *Op. cit* n 220.

⁵³² *Op. cit* n 471.

observed, what is important in a fair trial is that the accused person has an opportunity to adequately challenge any evidence against him/her.

One last concern raised by Zappala is the principle of presumption of innocence in the light of victims' right to participate in criminal proceedings.⁵³⁵ Zappala clarifies that there is no conflict at all between the presumption of innocence and victims' procedural rights since the Rome Statute expressly states that the burden of proof is on the prosecution and no reversal of the burden is envisaged or allowed.⁵³⁶ Victims' participation or measures protecting victims cannot in any way alter such a fundamental principle of criminal proceeding which remains as a hallmark of justice.⁵³⁷ Zappala concludes by dispelling the notion that victims' rights can compromise the rights of accused persons in criminal proceedings.⁵³⁸ Instead Zappala argues for progressive development of procedural reforms to ensure justice for both victims and accused persons.⁵³⁹ Zappala's view since it gives room for development of jurisprudence that balances the rights of both CVSA and accused persons.

While Zappala supports the supremacy of the presumption of innocence as do many other scholars, not all scholars share the same view. Kamlasabayson,⁵⁴⁰ while not directly attacking the age old presumption of innocence argues that if not properly approached, the presumption of innocence could cause injustice to victims.⁵⁴¹ The presumption of innocence makes the criminal process focus on the guilt/innocence of the accused, while placing a heavy burden of proof beyond reasonable doubt on the prosecution.⁵⁴² The subject of inquiry, the accused person does not have a role in the discovery of the truth due to the right to remain silent.⁵⁴³ Kamlasabayson is however quick to point out that he

⁵³³ *Op. cit* n 469.

⁵³⁴ *Op. cit* n 473.

⁵³⁵ *Op. cit* n 452.

⁵³⁶ Article 66(2) of the Rome Statute.

⁵³⁷ *Op. cit* n 384.

⁵³⁸ *Op. cit* n 489.

⁵³⁹ *Ibid.*

⁵⁴⁰ C K Kamlasabayson, *Balancing Rights of Accuseds and Rights of Victims* (2003) <<http://www.alrc.net/doc/mainfile.php/documents/432/>> accessed 10 March 2012.

Kamlasabayson, Kandapper Chinniah P.C. served as an Attorney General of Sri Lanka and spoke during a human rights activists memorial lecture in the year 2003 on the topic at the Asian Legal Resource Centre.

⁵⁴¹ *Ibid.*

⁵⁴² *Ibid.*

⁵⁴³ *Op. cit* n 384.

does not criticize the presumption of innocence for the sake of it.⁵⁴⁴ Kamlasabayson's criticism is a demonstration that the presumption of innocence without a corresponding right of victims to seek effective justice for the wrong done to them, invariably leads to a miscarriage of justice in some cases.⁵⁴⁵

According to Kamlasabayson, the Sri Lanka CJS which is adversarial in nature is tilted in favour of the accused person who has constitutional safeguards as to fair trial rights.⁵⁴⁶ The victims of crime however have no sufficient and effective legal provisions to deal with their concerns and the lack of it in the constitution.⁵⁴⁷ He however argued that although the Sri Lanka constitution does not provide for victims' rights, the state has an inherent duty to protect all citizens and their property.⁵⁴⁸ Victims of crime (read CVSA) therefore have legitimate claim for a criminal process that enables them to express their experiences as victims.⁵⁴⁹ Likewise, witnesses of crime need to be protected in order for the state to carry out its protective role of punishing the guilty.⁵⁵⁰

Kamlasabayson was concerned that victims play two important roles in the CJS yet their concerns are not properly addressed.⁵⁵¹ The first is that the victim is the person injured by the crime committed and so suffers personal injury, but in exposing the crime, enables the state to carry out its function of maintaining law and order.⁵⁵² Victims are therefore in most instances also witnesses of crime and so the state must protect them.⁵⁵³ Kamlasabayson particularly singled out victims of sexual abuse, especially children as being in need of special consideration in the criminal process.⁵⁵⁴ When children testify under the adversarial trial procedure, they undergo secondary institutionalized re-victimization by the CJS.⁵⁵⁵ He concludes that the CJS is permeated by the notion of balance as to ensure that no innocent person is unfairly prosecuted or convicted.⁵⁵⁶

⁵⁴⁴ *Op. cit* n 540.

⁵⁴⁵ *Ibid.*

⁵⁴⁶ *Ibid.*

⁵⁴⁷ *Ibid.*

⁵⁴⁸ *Ibid.*

⁵⁴⁹ *Op. cit* n 384.

⁵⁵⁰ *Ibid.*

⁵⁵¹ *Op. cit* n 540.

⁵⁵² *Ibid.*

⁵⁵³ *Ibid.*

⁵⁵⁴ *Ibid.*

⁵⁵⁵ *Ibid.*

⁵⁵⁶ *Ibid.*

Kamlasabayson's argument is that the CJS should strike a balance between the interest of victims and accused persons.⁵⁵⁷

Another proponent of the balancing between the rights of accused persons and those of victims is O'Connell. This author recognizes the fundamental freedoms and liberties of the accused persons, but notes that victims have for a long time been the 'forgotten party' in criminal justice.⁵⁵⁸ He argues that the recognition of victims' rights is a new development aimed at making victims integral players in the criminal process.⁵⁵⁹ Since victims' rights are not readily seen as human rights, there is a disconnect in the debate about victims' rights and the belief that such rights may interfere with accused persons' rights.⁵⁶⁰

O'Connell traces accused persons' rights to the *Magna Carta*⁵⁶¹ and argues that the case set out two important principles of justice. The first principle is that no one should be denied justice, including victims.⁵⁶² The second principle is that if a presumed right is ignored or dispensed with, appropriate action should be taken to restore it.⁵⁶³ In this respect, O'Connell argues that crime is a violation of victims' human rights.⁵⁶⁴ Consequently, steps must be taken to ensure their access to justice which they are entitled to on an equal basis as the accused persons.⁵⁶⁵

O'Connell emphasizes that to allow supremacy of accused persons' rights over those of victims' is to perpetuate inequality in the administration of justice.⁵⁶⁶ This argument is consistent with the rights theory as argued by Miller.⁵⁶⁷ In recognizing the fact that the UNDBPJVCAP which declares the rights of victims is only a guideline on victim's rights, O'Connell argues it should be treated by courts in the same way as other international

⁵⁵⁷ Ibid.

⁵⁵⁸ Michael O'Connell is the Commissioner for Victims' Rights in South Australia and presented a paper towards the debate on Victims' Rights as Human Rights in Australia at Human Rights Construction, Parkinet House, and Canberra ACT in July 2009.

⁵⁵⁹ Ibid.

⁵⁶⁰ Ibid.

⁵⁶¹ *Magna Carta* is a Latin word meaning Great Charter. It is an important document signed in medieval England between King John and his subjects in 1215 promising good laws that respect everyone and treat everyone fairly.

⁵⁶² *Op. cit* n 558.

⁵⁶³ Ibid.

⁵⁶⁴ Ibid.

⁵⁶⁵ Ibid.

⁵⁶⁶ Ibid.

⁵⁶⁷ *Op. cit* n 127.

human rights instruments since it was adopted by the United Nations High Commission for Human Rights.⁵⁶⁸ This view is also expressed in other human rights instruments on fair treatment of victims.⁵⁶⁹ Indeed O'Connell argues that the international recognition of the need to provide justice to victims of crime is one of the objectives of setting up the ICC without prejudice to accused persons' rights to a fair trial.⁵⁷⁰ He concludes that balancing of victims' rights with those of accused persons is the beginning of transformation towards a fair system that recognizes the interests of both accused persons and victims.⁵⁷¹

Victims have also added their voice to the need for fair treatment in the administration of justice by balancing their interests with the rights of accused persons in accordance with the rights theory. According to research carried out by Young,⁵⁷² Wemmers,⁵⁷³ Erez and Roberts,⁵⁷⁴ victims want their rights recognized to the same extent as those of accused persons. They want a judicial process that treats them with respect and dignity.⁵⁷⁵ They want to be informed of the process and their role in it.⁵⁷⁶ They want to be enabled to effectively communicate their concerns.⁵⁷⁷

According to Samantha, the traditional adversarial system's trial procedures must be reformed to balance the rights of accused persons with the rights of CVSA, since children were not anticipated as actors in the administration of justice.⁵⁷⁸ A balancing act is therefore necessary to ensure fair procedures that can assist CVSA in the recovery process as opposed to re-victimizing them.⁵⁷⁹

⁵⁶⁸ *Op. cit* n 558.

⁵⁶⁹ The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988.

⁵⁷⁰ *Op. cit* n 558.

⁵⁷¹ *Ibid.*

⁵⁷² A Young, 'The Role of the Victim in the Criminal Process: A Literature Review' (Department of Justice 1989) <[http:// dsp-psd.pwqsc.gc.ca/collection j3-3-12001](http://dsp-psd.pwqsc.gc.ca/collection/j3-3-12001)> accessed 10 March 2012.

⁵⁷³ Joanne Wemmers, *The Meaning of Justice for Victims*, In the *International Handbook of Victimology* (Boca Raton: CRC Press 2010)37.

⁵⁷⁴ *Op. cit* n 408.

⁵⁷⁵ *Op. cit* n 573.

⁵⁷⁶ *Ibid.*

⁵⁷⁷ *Ibid.*

⁵⁷⁸ W Samantha, *The Impact of Changing Criminal Justice Response to Child Victims of Sexual Abuse* (Criminal Justice Initiative of Open Society Foundation for Africa, 2008)35.

⁵⁷⁹ *Ibid.*

3.9.2 Arguments Against the Limitation of the Rights of Accused Persons in Criminal Proceedings

The debate on balancing accused persons rights with those of victims is not complete without views of those who oppose any attempts to limit the rights of accused persons. One such critic is Berlins who argues that the criminal justice system has two sides in a trial.⁵⁸⁰ On the one hand is the state, represented by the prosecution and on the other hand is the accused person.⁵⁸¹ Berlins points out that the victim is not and should not be a separate entity with a separate say since their needs, whether cross-examination of witnesses or any other can be represented through the prosecution.⁵⁸²

Berlins emphasizes that the role of victims in a criminal process is that of a witness of crime on the side of the prosecution.⁵⁸³ To give victims a more central role, is in Berlins' view, an act of 'unbalancing the scales of justice against the accused person.'⁵⁸⁴ According to Berlins, this results into unfair contest with the prosecution and victim on one side and the accused persons on the other.⁵⁸⁵ Berlins' argument is that this may result into a possibility of more innocent accused persons being wrongly convicted.⁵⁸⁶ He concludes that any attempt to limit the rights of accused persons by involving victims in the criminal process other than as witnesses, amounts to a 'tripartite procedure' on a trial system meant for two parties only.⁵⁸⁷

Some measures taken in Britain to protect victims have been viewed as giving false hope to victims while eroding important protection for accused persons.⁵⁸⁸ The critics argue that such measures to accommodate victims which include allowing evidence of previous misconduct, changes in hearsay rule and the rule against double jeopardy⁵⁸⁹ have not enhanced victims' interests while pushing the accused persons away from the centre of the criminal proceedings. Lifting the restriction on allowing evidence of previous misconduct according to the critics, ignores the fact that judges may be unduly prejudiced

⁵⁸⁰ Berlins Mercel, 'Victims' *The Guardian* (London, 17 May 2005).

⁵⁸¹ Ibid.

⁵⁸² Ibid.

⁵⁸³ Ibid.

⁵⁸⁴ Ibid.

⁵⁸⁵ Ibid.

⁵⁸⁶ Ibid.

⁵⁸⁷ Ibid.

⁵⁸⁸ D E Cape, *Reconcilable Rights: Analyzing the Tension between Victims' and Defendants* (Legal Action Group 2006) 245.

⁵⁸⁹ The amendments are contained in the English Criminal Justice Act of 2003.

by such information.⁵⁹⁰ In addition, the evidence may be used to strengthen weak cases against accused persons by the prosecution and the police may unwisely arrest the usual ‘suspects.’⁵⁹¹

The relaxation of the rule against double jeopardy allows for a retrial where an appellate court finds that there is new compelling evidence.⁵⁹² This change is criticized on the ground that if the appellate court finds the new compelling evidence credible, then chances of a lower court acquitting the accused persons are limited. The hearsay rule, according to the critics, waters down the very essence of oral evidence and need to test its credibility, thereby making it easier to convict innocent people.⁵⁹³ They maintain that accused persons must remain at the centre of the criminal proceedings since the primary function of the criminal justice system is the conviction and appropriate punishment of the guilty and acquittal of the innocent, while the secondary aim is to ensure minimal pain caused to those involved.⁵⁹⁴ While the critics may have sound arguments about the need to ensure only guilty persons are convicted and punished, what is important in a fair trial is that whatever measures taken to protect the interests of victims, the accused persons must be given adequate opportunity to challenge evidence adduced against him/her.

The argument is that the accused person is the one whose conduct is being investigated and faces the possibility of a conviction with serious consequences. In their view, any measures that make it easier to convict innocent persons do not serve the interest of victims and must be avoided. The accused person must remain innocent until proven guilty and the prosecution must discharge the burden of proof beyond any reasonable doubt.⁵⁹⁵ Any other additional function of the criminal justice system must respect the rights and need to protect accused persons and ensure that the high standards and threshold of criminal trials are not undermined. This argument relegates the protection of the rights of victims as secondary to those of accused persons, whereas what is needed is a balance between the two to ensure fairness to both accused persons and victims according to the rights theory. The argument also ignores the fact that procedures should

⁵⁹⁰ *Op. cit* n 588.

⁵⁹¹ *Ibid.*

⁵⁹² *Op cit* n 140.

⁵⁹³ *Op. cit* n 52.

⁵⁹⁴ A Beijer & T Liefwaard, ‘A Bermuda Triangle? Balancing Protection, Participation and Proof in Criminal Procedures affecting Child Victims and Witnesses’ (2011) 7 *Utrecht Law Review* 3, 70.

⁵⁹⁵ *Op. cit* n 483, Article 6(2).

reflect societal values of protecting the vulnerable and respecting the rights of all who seek legal redress as argued by Galligan, Bentham and other procedural justice theorists in this chapter.

Evers, one of the strongest critics of erosion of accused persons' rights in sexual offence trials, argues that measures taken by the Australian government and courts to protect victims of sexual abuse have in fact overprotected them.⁵⁹⁶ The protection of victims has made the accused persons vulnerable to conviction hence the need for a rebalancing of the rights of accused persons and victims of sexual violence to ensure justice and fairness to both. Evers argument is based on reforms that prevented the admissibility of evidence of past sexual activities of victims.⁵⁹⁷ The argument is that the judicial and legislative enthusiasm, media publicity and public sympathy have resulted into undue erosion of the rights of sexual offence suspects.

3.10 CSA Trial and Procedural Justice

There are many arguments by different scholars on the balancing of accused persons rights with those of victims, but Beijer and Liefwaard are more specific on the balancing of the rights of CVSA and those of accused persons considering both the positive and negative implications of child witness protective measures.⁵⁹⁸ They argue that Article 12 of the UNCRC gives CVSA the right to be heard in matters affecting them which therefore implies that they must be heard under child friendly procedures in an environment that is not hostile or intimidating. The procedure should enable them to present their views articulately by being active participants in the criminal proceedings as elaborated by the 2005 UNGJMCVWC, as discussed in detail in the procedural justice framework for CSA trial at the end of this chapter.

Beijer and Liefwaard also argue that the General Comment No.12 of the UN Committee on the Rights of the Child⁵⁹⁹ further emphasizes the fact that member states are obligated to take appropriate measures to ensure that child victims and witnesses testify under child

⁵⁹⁶ Evers Tania, a lawyer based in Sydney presented a paper titled *Erosion of an Accuseds' Rights in Sexual Assault Cases* at the 9th International Criminal Law Congress in 2004.

⁵⁹⁷ Section 403 of the New South Wales Criminal Procedure Act 1986 (previously s 409B of the New South Wales Crime Act) introduced in 1981 to protect women who complained of sexual offences from being questioned on irrelevant sexual activity.

⁵⁹⁸ *Op. cit* n 594.

⁵⁹⁹ General Comment No.12 of the UN Committee on the Rights of the Child UN. Doc CRC/C/GC/12, 20 July 2009.

friendly procedures. The state obligation and CVSA right to be heard under the UNCRC therefore necessitate the balancing of accused persons' rights to fair trial with CVSA right to be heard and participate in criminal proceedings. They conclude that measures to protect CVSA while testifying such as video link should be viewed, not as competing against the rights of accused persons, but as measures to enhance the truth seeking process of establishing the guilt or innocence of the accused. This enables CVSA to tell their story of the abuse and give their views which can only be respected if the process treats them with dignity.

In CSA cases therefore, procedures must meet the test of whether they can effectively and efficiently lead to the implementation and enforcement of rights declared by substantive laws through accurate application of rules within society's social context of what constitutes basic values.⁶⁰⁰ Some basic societal values directly relevant to the trial of CSA include non-discrimination, fair distribution of resources, equality and respect for other peoples' rights.⁶⁰¹

The society values children and recognizes their vulnerability and need for special protection as expressed through the UNCRC,⁶⁰² ACRWC⁶⁰³ the Constitution of Kenya⁶⁰⁴ and the Children Act.⁶⁰⁵ CSA trial procedures need to recognize and respect, not only the need to protect innocent people accused of CSA, but must also reflect and respect the fact that CVSA are children, vulnerable and need special protection by the procedures when they testify in court.⁶⁰⁶

Both substantive and procedural laws are concerned about fair treatment of individuals who seek redress through them.⁶⁰⁷ Procedures are therefore fair if they ensure fair treatment of all those who stand to benefit from fair treatment or lose from unfair treatment.⁶⁰⁸ Both the accused persons and CVSA have claims in procedures and stand to

⁶⁰⁰ *Op. cit* n 211.

⁶⁰¹ *Op. cit* n 108.

⁶⁰² *Op. cit* n 29 Article 3 provides for the best interest of children as a paramount consideration in matters concerning them.

⁶⁰³ *Op. cit* n 31 Article 4.

⁶⁰⁴ *Op. cit* n 40 Article 53(2).

⁶⁰⁵ *Op. cit* n 35 Article 3.

⁶⁰⁶ *Op. cit* n 323.

⁶⁰⁷ *Op. cit* n 108.

⁶⁰⁸ *Ibid.*

benefit or lose depending on the applicable procedures.⁶⁰⁹ Both of them must as of necessity be treated fairly by fair procedures which give each equal opportunity to be heard.⁶¹⁰ Procedures must therefore guarantee the rights of both CVSA and accused persons in order to avoid a mistaken application of the law that may deny benefits to either party.⁶¹¹ Such a denial may be detrimental to the society, taking the form of what Galligan calls loss of confidence in the ability of the judicial process to treat everyone fairly.⁶¹²

All procedural justice theorists are in agreement that legal processes are about fair treatment and that procedures are fair to the extent that they ensure fair treatment to all affected by them. This consensus is best captured by Hart who observed: ‘...justice is concerned with how different classes of individuals in society are treated.’⁶¹³

As far as procedural fairness is concerned, the fact that legal standards declare rights of certain members of the society indeed confers to the same members procedural rights to enforce their entitlements under the recognized rights. Therefore, not only do accused persons have fair trial rights under the ICCPR and other international, regional and domestic human rights instruments, they have procedural rights as well to enforce the fair trial rights. In the same line of argument, CVSA not only have rights under legal standards such as UNCRC, ACRWC and domestic human rights instruments, they equally have entitlements to procedural rights without which they cannot enforce their substantive rights.

In order to ensure fair treatment of both accused persons and CVSA in a CSA trial, procedural justice dictates that there is need to balance the rights of accused persons and those of CVSA. The balancing action was endorsed by the Supreme Court of the United States when it ruled that ‘due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept.’⁶¹⁴ It is fairness with reference to particular conditions or particular results. This decision appeared to confirm that procedures must recognize and respect prevailing basic values of any society in which

⁶⁰⁹*Op. cit* n 411.

⁶¹⁰*Op. cit* n 108.

⁶¹¹ *Ibid.*

⁶¹² *Ibid.*

⁶¹³ A L H Hart, *The Concept of Law* (Clarendon Press 1961) 155.

⁶¹⁴ *Snyder v Massachusetts* (1934), 291 US 97 116-117.

they apply. This is also in conformity with the Vienna Convention on The Law of Treaties⁶¹⁵ which supports contextual interpretation of conventions and demands that all human rights be treated equally.⁶¹⁶ In the context of the study, accused persons' rights are human rights and so are CVSA rights in administration of justice. Both must therefore be accorded equal treatment and respect, by protecting and promoting them as required by the Vienna Convention and in conformity with the rights theory.

In order to ensure fairness to all parties in criminal proceedings, Solum's arguments on procedural justice as discussed in chapter one provide an avenue for ensuring a balance between the rights of accused persons and the need to protect CVSA. Solum identified three antecedents namely participation (having a voice), dignity and the trust that the judicial authority is concerned with one's welfare.⁶¹⁷ Whereas participation has to do with an opportunity given to the parties in a transaction to state their best case in a conducive environment, it reaffirms the right of CVSA to express themselves and be heard in matters involving them as stated by the UNCRC. The dignity antecedent conforms to a child's right to be treated with respect and dignity,⁶¹⁸ while the welfare antecedent directly expresses the best interest⁶¹⁹ of the child principle under the UNCRC.

Solum's four applications of the participatory model discussed in chapter one is relevant to this study. The first interpretation, the game interpretation is applicable in so far as it requires that a transaction must follow laid down rules, based on the assumption that 'the playground is even.' The shortcomings of prosecuting CSA under the classical adversarial system must therefore, according to the game interpretation be addressed before the game starts to ensure all parties have equal resources. In CSA trial therefore, the vulnerability⁶²⁰ of the CVSA needs to be taken into account if the trial process is to be seen as fair.

⁶¹⁵Vienna Convention on The Law of Treaties United Nations Treaty Series, Vol 1155 p.33. Done at Vienna on 23rd May 1969, entered into force on 27th Jan 1980.

⁶¹⁶ Article 1(5) of the Vienna Declaration and Programme of Action provides that all human rights are universal, indivisible and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis. States are obligated to protect and promote all human rights and fundamental freedoms.

⁶¹⁷*Op. cit* n 111.

⁶¹⁸*Op. cit* n 29 Article 39.

⁶¹⁹ *Ibid* Article 3.

⁶²⁰*Op. cit* n 153. The report on vulnerable witnesses proposed measures to protect vulnerable witnesses in court.

The second application, the dignity interpretation reiterates the dignity principle⁶²¹ as provided by the UNCRC. The third application is the satisfaction interpretation which states that a process is fair if it provides an opportunity for parties to participate with the greatest level of satisfaction, such that even the loser accepts the outcome as a result of a fair process.⁶²² The fourth application is the discourse interpretation which argues that an outcome of a process is fair and just only if it provides an ideal communication situation where parties can give their best evidence without intimidation or fear.⁶²³ The classical court procedure is, according to many scholars, not an ideal forum for CVSA to narrate their evidence confidently and coherently and as such may not be suitable for the trial of CSA.⁶²⁴

The conceptualization of procedural justice in the trial of CSA cases therefore is that the procedure adopted should not only ensure procedural fairness to accused persons (for that is the traditional essence of fair trial rights and procedures), but it must also incorporate principles that ensure fairness to CVSA as well. The principles of fairness in the context of procedural justice can be summarized as, equality of liberties and differential principles, the best interest of the child, dignity and participation principle which ensures that the rules of procedure are known and acceptable to all parties who participate in the proceedings to their best satisfaction in a conducive environment that enables them to give their best evidence devoid of fear or intimidation.

Procedural justice's differential principle which argues that less fortunate members of society should benefit from the distribution of resources (rights/liberties) is supported by the psychoanalytic theory which explains the vulnerability of CVSA to CSA.⁶²⁵ The theory explains why CVSA at times may not even know that they are sexually abused, especially at the stages referred to by Freud as oral, anal, phallic and latency.⁶²⁶ At these stages, CVSA do not have a properly developed *super ego* that alerts them that the actions by the accused persons amount to CSA.⁶²⁷

⁶²¹ *Op. cit* n 29.

⁶²² *Op. cit* n 111.

⁶²³ *Ibid.*

⁶²⁴ See for instance, Hoyano & Keen, Saywitz.

⁶²⁵ *Op. cit* n 96.

⁶²⁶ *Op. cit* n 91.

⁶²⁷ *Ibid.*

The explanation offered by the psychoanalytic theory is further supported by Marty⁶²⁸ who argues that the mode of trial should take into consideration the nature of the crime. Herman and Hirschman found that CSA is a crime mostly committed in secret away from the ‘public eye’ and so its prosecution may need to take into consideration the secret nature of its commission and subsequent difficulty in proving the same.⁶²⁹ Both psychoanalytic theory and procedural justice theory converge at the point of the need for procedures that leave the CVSA feeling relieved of the trauma caused by CSA. Whereas the psychoanalytic theory argues that procedural fairness in court is important as a therapy to the CVSA, procedural justice theorists see the fair procedures as a satisfactory forum for the CVSA to tell their story to the judicial authorities in the hope that they will be believed and their welfare will be taken into consideration.⁶³⁰

According to the labeling theory as discussed in chapter one, the society labels individuals or acts as deviants while the same may not inherently be so.⁶³¹ Labeling of CSA and CVSA as deviant behaviour and deviants respectively may in some cases invite social stigma on the CVSA and their families.⁶³² When this occurs, the CVSA may not be willing to testify, or in cases of incest, the family may impress upon the CVSA to withdraw the case to avoid family embarrassment.⁶³³ The labeling theory therefore explains the difficulties that CVSA encounter while testifying under the classical adversarial court system and the consequent challenge of prosecuting CSA under the same system.⁶³⁴

Arguing that labeling has a devastating effect on a person’s consequent action, Marty notes that the classical adversarial court procedures disable those already labeled as deviants from active participation in the process.⁶³⁵ The challenges in prosecuting CSA as explained by both the psychoanalytic and labeling theories therefore necessitate fair procedures in the context of procedural justice, to enable both accused persons and CVSA to participate in the process satisfactorily. In recognition of the challenges faced in

⁶²⁸ M D Marty D M, *The Criminal Process and Human Rights: Towards a European Consciousness* (Martinus Nijhoff Publishers 1995)34.

⁶²⁹ *Op. cit* n 89.

⁶³⁰ *Op. cit* n 108.

⁶³¹ *Op. cit* n 98.

⁶³² *Op. cit* n 89.

⁶³³ *Op. cit* n 5.

⁶³⁴ *Op. cit* n 98.

⁶³⁵ *Op. cit* n 628.

prosecuting CSA under the classical adversarial system, striking a balance between the rights of accused persons and CVSA according to the rights theory ensures fair procedures.⁶³⁶ However, fair procedure is not an end in itself, but a means towards the achievement of the goals of substantive laws.⁶³⁷

3.11 Human Rights Approach to Administration of Justice in CSA Cases

In recognizing this fact, the United Nations issued a guideline in 2005 on how child victims and witnesses should be treated by the CJS when they appear as victims or witnesses in the criminal trial process. Known as the United Nations Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime (UNGJMCCVWC), the guideline is not binding on member states of the United Nations since it is merely a guideline and not a convention. However, it provides persuasive basis of protecting CVSA. The UNGJMCCVWC provides six principles which must be observed in any trial process involving children either as witnesses or victims of crime namely: dignity, non-discrimination, best interest of the child, protection, harmonious development and the right to participation.

The dignity principle recognizes that children are unique and valuable human beings with their individual dignity, special needs, interest and privacy which should be respected and protected. The dignity principle is consistent with CVSA's right to dignity under the UNCRC⁶³⁸ and Solum's dignity interpretation⁶³⁹ of procedural justice theory.

Non-discrimination principle provides that children have a right to be treated fairly in the criminal process regardless of any factor that may attract discrimination towards them. The principle is consistent with procedural justice argument⁶⁴⁰ on fair treatment of parties as well as a child's right to non-discrimination⁶⁴¹ under the UNCRC.

According to the best interest of the child principle, every child has the right to have his/her own best interests given primary consideration in matters that affect them and that their welfare should be paramount in making any decision. This principle reflects a

⁶³⁶*Op. cit* n 127.

⁶³⁷*Op. cit* n 108.

⁶³⁸*Op. cit* n 29 Article 39.

⁶³⁹*Op. cit* n 111.

⁶⁴⁰*Ibid.*

⁶⁴¹*Op. cit* n 29 Article 3 .

child's best interest rights under the UNCRC⁶⁴² and procedural justice argument that fair procedures must benefit the less advantaged.⁶⁴³

The Protection principle provides that every child has a right to life and survival and to be shielded from any form of hardship or process that may result into their psychological, mental and emotional anguish. This principle reflects a child's right to protection⁶⁴⁴ in the judicial process and Solum's discourse interpretation⁶⁴⁵ of procedural justice.

According to the harmonious development principle, every child has a right to a chance for harmonious development and must be protected from any process that may interfere with their harmonious development. This principle is a reflection of a child's right to protection from any activity that may negatively affect their development and Solum's procedural justice game interpretation⁶⁴⁶ which requires that the rules of the game must be known and accepted by each party so as to ensure a level playing ground. It is also consistent with the satisfactory interpretation⁶⁴⁷ of Solum's procedural justice model.

The right to participation principle provides that every child has the right to express their views in any matter affecting them in the judicial process. Such views must be taken into account depending on the child's age, intellectual maturity and evolving capacity. This principle is consistent with a child's right to express their views which must be taken into consideration in making a decision in a judicial process.

The principles discussed above are in conformity with Solum's procedural justice participatory model which identified the game, dignity, satisfaction and discourse interpretations as being key to any fair and just process.⁶⁴⁸ The provisions of UNGJMCCVWC are therefore within procedural justice arguments on fair procedures in a trial process. From the study's conceptualization of justice, fairness and procedures under this chapter, the study develops a procedural justice framework for CSA trial within the context of procedural justice as discussed in the following section.

⁶⁴²*Op. cit* n 3.

⁶⁴³*Op. cit* n 111.

⁶⁴⁴*Op. cit* n 29 Article 32.

⁶⁴⁵*Op. cit* n 111.

⁶⁴⁶*Ibid.*

⁶⁴⁷*Ibid.*

⁶⁴⁸*Op.cit* n 111.

3.12 Procedural Justice Framework for CSA Trial

While attempting to protect the rights of CVSA, the protective measures undertaken by the courts should not infringe on accused persons' rights to fair trial and should ensure that the accused persons are given adequate and appropriate opportunity to challenge any evidence against them. This study envisages a procedural justice framework that balances the rights of accused persons with those of CVSA. Based on the discussions in this chapter so far, the study develops a procedural justice framework for CSA trial which should possess five characteristic features. These are: Protection of the rights of accused persons to a fair trial, detailed pre-trial investigation, an expanded role of the judge in the trial, human rights approach to administration of justice and procedural mechanisms for victim protection. The characteristic features are discussed in details as follows;

3.12.1 Protection of the Rights of Accused Persons to a Fair Trial

The right to a fair trial ensures that the accused person is protected against arbitrary use of power by the state in the prosecution process.⁶⁴⁹ It ensures that the trial process upholds the rule of law and the outcome of the process is fair.⁶⁵⁰ The fair trial rights are contained in the ICCPR,⁶⁵¹ ECHR,⁶⁵² ACHR,⁶⁵³ ACPHR⁶⁵⁴ and most countries' constitutions. The accused persons' rights in a criminal trial is synonymous with the trial process itself. It has over the centuries gained international recognition through codification in various international instruments, following several years of implementation and practice. As early as 1789, the French Declaration of the Rights of Man provided for the presumption of innocence and prohibited the arbitrary arrest and detention of citizens, unless as authorized by law.⁶⁵⁵ In 1791, the United States, through the 6th Amendment to the United States Constitution, provided that any person accused of any criminal conduct has a right to a speedy and public trial by an impartial jury. In addition, the person has a right to be informed of the nature and cause of the charges against him/her, to confront witnesses

⁶⁴⁹ *Op. cit* n 207.

⁶⁵⁰ *Ibid*.

⁶⁵¹ The International Covenant on Civil and Political Rights (ICCPR), adopted in 1996 *entered into force* 23 March 1976.

⁶⁵² *Op. cit* n 458.

⁶⁵³ The American Convention on Human Rights [Pact of San Jose", Costa Rica], *entered into force* July 18, 1978.

⁶⁵⁴ African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc.

CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

⁶⁵⁵ R M K Smith, *International Human Rights* (Oxford University Press 2007) 235.

and cross examine them. Further the person has a right to have a compulsory process of obtaining one's own witnesses and a right to assistance of a defence counsel.

Protection of the Right to a Fair Trial by the UDHR, ICCPR, ECHR

The right to a fair trial has a long history and has to a large extent retained its original form over the years.⁶⁵⁶ This is indicative of its universal character and status as an important rule of customary international law.⁶⁵⁷ Codified in the UDHR⁶⁵⁸ after the Second World War, the right to a fair trial is today clearly defined in the ICCPR.⁶⁵⁹ The ICCPR provides for the basic right to a fair trial, presumption of innocence, minimum fair trial rights in criminal proceedings, prohibition of double jeopardy and the right to review of sentence/conviction by a higher court.⁶⁶⁰ The right to a fair trial is a most extensive human right enshrined in more than one article by most human rights instruments.⁶⁶¹ It is one of the most litigated human rights and has attracted substantial case law on its interpretation as a fundamental right to accused persons in the criminal trial process.⁶⁶² The United States Supreme Court has emphasized that the right to a speedy trial is a due process right that must be upheld in all criminal trials.⁶⁶³

The central goal of the rights of accused persons to a fair trial is to ensure proper administration of justice.⁶⁶⁴ So important is the right of accused persons in a criminal trial that the judicial body/tribunal presiding over a case must be competent, independent and impartial in order to administer justice fairly.⁶⁶⁵ The fairness of such judicial bodies has been challenged by concerned human rights monitoring organs whenever there is reason to believe that the criminal process is not fair and the rights of accused persons have been violated.

⁶⁵⁶ D F J Curtis, *Introduction to International Human Rights Law* (CD Publishing 2006) 13.

⁶⁵⁷ *Ibid.*

⁶⁵⁸ Article 10 of the Universal Declaration on Human Rights.

⁶⁵⁹ *Op. cit* n 651 Articles 14 and 16.

⁶⁶⁰ *Ibid* Article 14.

⁶⁶¹ Articles 3,7 and 26 of African Charter on Human and Peoples' Rights, Articles 5,6,and 7 of the European Convention on Human Rights, Articles 3,8,9 and 10 of the American Convention on Human Rights.

⁶⁶² *Op. cit* n 656.

⁶⁶³ *Barker v Wingo*, United States Supreme Court (1972) 407 U S, 514-515.

⁶⁶⁴ *Op. cit* n 573.

⁶⁶⁵ *Ibid.*

As an example, the right to be heard in person is guaranteed by Article 6(1) of the European Convention on Human Rights (ECHR). In protecting the right to be heard, the ECtHR held that the Supreme Court of Norway violated an applicant's right to be heard in person when it gave a new judgment, convicting and sentencing the applicant, without summoning or hearing him in person, despite the fact that the Supreme Court proceedings showed a public hearing in which the applicant was represented by a counsel.⁶⁶⁶ According to the ECtHR, the Supreme Court of Norway was under a duty to take positive measures to summon the applicant and hear evidence from him directly in person before passing judgment. The case demonstrates the seriousness with which the accused persons' rights in a criminal trial are treated by judicial and human rights bodies.

Smith, writing on the importance of the evidentiary rules of the classical adversarial legal system, in protecting innocent people from the serious consequences of jail, points out seven fundamental principles of a fair trial in any criminal procedure.⁶⁶⁷ The principles, not listed in any order of priority are; the presumption of innocence, the right to silence, the passive role of the trial judge, oral evidence, the burden of proof, the standard of proof and the right to cross-examination by an accused person either in person or through a lawyer.⁶⁶⁸ The right to a fair trial as already discussed is amongst the principles pointed out by Smith and recognized not only in international instruments, but by many constitutions as well.⁶⁶⁹

In yet another example of the importance attached to fair trial rights, a report by Human Rights Watch (HRW)⁶⁷⁰ criticized the Bolivian government for gross human rights violations based on a law⁶⁷¹ passed by the Bolivian Parliament in March 2010, allowing retroactive prosecution of leaders for corruption cases allegedly committed before the passing of the law. This was contrary to the freedom from *ex post facto* laws and

⁶⁶⁶ *Botten v Norway*. Judgment of 19th February 1996 (50? 1994/497/579) <<http://www.norway-coe.org/general/hr/echr/Cases-against-Norway/ECHR---Cases-against-Norway/2-CASE-OF-BOTTEN-v-NORWAY/>> accessed 3 July 2012.

⁶⁶⁷ J Smith, 'Evidence in Criminal Cases' in M McConville M and G Wilson (eds), *The Handbook of The Criminal Justice Process* (Oxford University Press 2002) 183.

⁶⁶⁸ *Ibid.*

⁶⁶⁹ Article 50 of the Kenya Constitution, Section 28 of Uganda's Constitution, Section 119 of Tanzania's Constitution, Section 18 of Zimbabwe's Constitution.

⁶⁷⁰ Human Rights Watch, *World Report* <<http://www.hrw.org/world-report2011/Bolivia>> accessed 3 July 2012.

⁶⁷¹ 'Law Against Corruption, Illicit Enrichment and the Investigation of Assets' (in Spanish) <[www:business-anti-corruption.com/country_profiles/latin-america-the_Caribbean.bolivia/general-information/](http://www.business-anti-corruption.com/country_profiles/latin-america-the_Caribbean.bolivia/general-information/)> accessed 3 July 2012.

retroactive application of heavier penalties than those that could be imposed when the crime was committed.⁶⁷² The same law⁶⁷³ also allowed for the prosecution of suspects *in absentia* contrary to the right to a fair trial that accused persons must be present during their trial in order to defend themselves.

So concerned is the international community about the rights of accused persons that in October 2010, the Inter-American Court of Human Rights⁶⁷⁴ found Bolivia responsible for multi-violations of human rights of suspects who disappeared during the military dictatorship of Hugo Banzer in the early 1970s.⁶⁷⁵ The ECtHR, the top judicial body responsible for the protection of basic human rights and freedoms in Europe, also found Turkey responsible for gross violations of accused persons' right to fair trial in 126 out of 356 cases in the year 2009 which were too prolonged as to violate the right to a speedy trial.⁶⁷⁶ This amongst many other incidences highlights the importance of safeguarding the accused person's rights in the criminal process.

Protection of the Right to a Fair Trial by the ACHPR

The African Charter on Human and Peoples Rights (ACHPR), adopted by the Organization of African Union (as it was known) in 1981, also provides for fair trial rights under Article 7. However, unlike the ICCPR, UDHR and ECHR, Article 7 of the ACHPR does not expressly refer to the relevant components of a right to a fair trial. However, when Article 7 and Article 60 of ACHPR are read together, it is clear that the provisions are to be interpreted broadly to include other components of fair trial as contained in the UDHR, ICCPR and other international instruments.

Suffice it to say at this stage that accused persons' right to a fair trial is so well established as a cardinal rule of criminal procedure to which no derogation is permitted

⁶⁷² Retroactive and *ex post facto* legislation are contrary to fair trial rights under the international instruments.

⁶⁷³ *Op. cit* n 670.

⁶⁷⁴ The Inter-American Court of Human Rights is the highest tribunal on the Americas. It is an autonomous judicial institution based in the city of San Jose, Costa Rica. Together with the Inter-American Commission on Human Rights it forms the human rights protection system of the Organization of American States (OAS). It serves to protect and uphold basic human rights and freedoms in the Americas. The Organization of American States refers to the following; Argentina, Barbados, Chile, Bolivia, Brazil, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela.

⁶⁷⁵ *Op. cit* n 669.

⁶⁷⁶ European Court of Human Rights' Annual Report 2011 <<http://ecohr.wordpress.com/2011/01/11/>> accessed 3 July 2012).

except where derogation is provided by the constitutions of various countries in times of public emergency. A fair procedural justice trial in CSA must therefore safeguard the rights of accused persons. In chapter four, the study examines the constitutionality of limiting accused persons' rights in order to ensure a balance with CVSA rights.

3.12.2. Detailed Pre-Trial Investigation

The second important characteristic feature of the procedural justice framework for CSA trial is an elaborate pre-trial investigation procedure.⁶⁷⁷ Borrowed from the inquisitorial model of trial, it results into very thorough investigation that ensures cases with weak evidence against the suspect do not proceed to the trial stage.⁶⁷⁸ In addition, it ensures that those that make it for trial have a higher chance of conviction. Although the suspect in the inquisitorial system is also presumed innocent until proved guilty, the detailed investigative pre-trial process has led to the wrong perception of the inquisitorial system as one where the suspect is guilty until proven innocent.⁶⁷⁹

Whereas I do not support the distortion of the presumption of innocence based on the detailed pre-trial investigation of the inquisitorial system, the study finds such detailed investigation relevant and necessary in CSA as it enables the gathering of all probative evidence by the investigating authority. Of particular relevance to CSA cases is the power of the investigating judge/police under the supervision of a judge, to interrogate everyone with relevant information to the offence, including the suspect. This is carried out without violating the accused person's right to silence and privilege from self-incrimination while gathering as much probative information as possible to help in establishing the truth.⁶⁸⁰

The advantage of such an elaborate system of pre-trial investigation, if combined with the practice of plea bargaining, may save CVSA from the stress and trauma of narrating the abuse in court, while involving the suspect in the discovery of truth without violating his/her rights. Likewise, an elaborate pre-trial investigation may reveal such amount of information as to encourage the accused person, on the advice of a legal counsel to enter a plea of guilty instead of a full trial. On the other hand, the elaborate investigation may reveal that there is no sufficient evidence to put the accused on trial. The elaborate

⁶⁷⁷ *Op. cit* n 206.

⁶⁷⁸ *Ibid.*

⁶⁷⁹ *Op. cit* n 349.

⁶⁸⁰ *Ibid.*

investigation is therefore beneficial to both accused persons and CVSA if viewed objectively.

However, in order to ensure the impartiality of the trial court, it is important to inform the accused person every stage of the proceeding. In addition, the accused person should be provided with legal counsel. A further safeguard is to ensure that there is a distinction between the pre-trial judge who is to be an impartial finder of truth during investigation and the trial judge who conducts the hearing during the full trial. The practice is evidenced in the ICC procedure of the pre-trial chamber conducting the hearings for confirmation of charges and if the charges are confirmed a trial chamber proceeds with the actual trial.⁶⁸¹

The pre-trial and trial procedure of the ICC ensure fairness to both victims and accused persons by ensuring that accused persons against whom there is lack of sufficient evidence to sustain a trial is not prosecuted. In addition, it gives the court an opportunity to order for further investigations where crucial evidence is not collected by the prosecution. Unlike the trial process, the pre-trial is supposed to be a swift stage. Although the pre-trial proposal may be seen as prolonging the trial period, its advantage in determining whether there is a *prima facie* case against the accused person overrides the possible length of time taken to conclude it. In Argentina, pre-trial sessions are meant to last maximum four months and serve as a sieve/filter to cases without much chances of successful prosecution.⁶⁸² It is therefore crucial that procedural justice framework for CSA trial incorporates a detailed pre-trial process that ensures all evidence of probative value is gathered as happens at the ICC in order to ensure proper preparation for cases which proceed to full trial.⁶⁸³

3.12.3 An Expanded Role of the Judge in the Trial

The third significant feature of the hybrid model of CSA trial is an expanded role of the judge in the trial process to ensure fairness to both accused persons and CVSA. This is closely linked to the second feature already discussed. Under the adversarial system of trial, the trial judges' role is that of an impartial, passive umpire who ensures that the parties conduct their cases according to the rules of evidence, waiting to decide the case

⁶⁸¹ *Op. cit* n 494 Article 39.

⁶⁸² *Op. cit* n 352.

⁶⁸³ *Op. cit* n 594.

based on the evidence presented by the parties to court.⁶⁸⁴ Although this is one of the strengths of the adversarial system of trial, in CSA cases, there is need for the trial judge to actively intervene during the proceedings and protect CVSA from intimidatory cross-examination by the accused person/counsel where that occurs.⁶⁸⁵

An expanded role of the judge in the adversarial procedure is preferable in CSA trial in five distinct areas. The first advantage of the judge's role in an inquisitorial system that makes it beneficial to CSA trial is the trust and reliability on the pre-trial investigation process which is supervised by either a judge, an officer of the court appointed by a judge or an independent prosecutor different from the trial prosecutor.⁶⁸⁶ Whereas in the inquisitorial system of trial, pre-trial investigation is an important aspect of the truth seeking aim of a trial, there is no pre-trial procedure in a pure adversarial system which is characterized with mistrust in the reliability of the prosecution evidence.⁶⁸⁷ The importance of adversarial cross examination of witnesses has been described as the greatest engine ever invented to discover the truth.⁶⁸⁸ In the inquisitorial system of trial, the truth seeking process begins at the pre-trial stage and continues through the trial process whereas in the adversarial system, the trial is the exclusive truth seeking process.⁶⁸⁹

The second feature of the pre-trial investigation in the inquisitorial system that makes it beneficial to CSA trial is that it has faith in the integrity of the pre-trial process which is overseen by an independent prosecutor or a judge or a court officer appointed for that purpose.⁶⁹⁰ The purpose of the pre-trial investigation is to distinguish between reliable and unreliable evidence. This is achieved by detecting any flaws in the prosecution case, identifying evidence that is favourable to the prosecution and the defence and the preparation of a *dossier* for the trial court which outlines all aspects of the case.⁶⁹¹ This forms the basis for a trial. The pre-trial process is therefore an indispensable part of the

⁶⁸⁴ *Op. cit* n 52.

⁶⁸⁵ See for instance, Temkin, Hoyano & Keenan.

⁶⁸⁶ *Op. cit* n 352.

⁶⁸⁷ *Op. cit* n 349.

⁶⁸⁸ *Op. cit* n 377.

⁶⁸⁹ *Op. cit* n 212.

⁶⁹⁰ *Op. cit* n 221.

⁶⁹¹ *Op. cit* n 352.

truth seeking process hence the misconception that in an inquisitorial trial, there is greater presumption of guilt than in the adversarial system.⁶⁹²

The third feature that makes the inquisitorial system suitable for CSA trial is that whereas in the adversarial system, the prosecution has every discretion on whether or not to prosecute despite the existence of sufficient evidence to prove the case, in an inquisitorial system, once there is sufficient evidence compiled in the *dossier*, then the prosecutor's discretion is very limited and prosecution must take place.⁶⁹³ In some jurisdictions such as France, the 'legality principle' makes it mandatory to prosecute once there is sufficient evidence to establish guilt.⁶⁹⁴ The discretion of the prosecution is therefore limited and the prosecutor cannot fail to prosecute the case due to other considerations such as the accused person pleading guilty as happens in the adversarial system.⁶⁹⁵

It is therefore not possible for the prosecution to fail to prosecute based on accused person's interference with investigation or where the prosecution is compromised by the defence. The concept of plea bargaining is not recognized in the inquisitorial system and therefore unlike the adversarial system where one may plead guilty to a lesser charge.⁶⁹⁶ (e.g. in CSA cases, one may plead guilty to a lesser charge of indecent assault and get away with a lesser penalty). In the inquisitorial system, where there is sufficient evidence, the case must be proved and the accused sentenced appropriately.⁶⁹⁷

The fourth feature of the inquisitorial system that makes it suitable is the formal recognition of the role of the victim. The victim in an inquisitorial system plays a crucial role in the pre-trial investigation.⁶⁹⁸ The victim has a recognized right to request for a particular line of inquiry during pre-trial investigation and to participate in interviews at this stage.⁶⁹⁹ During the trial the victim has a recognized independent standing for the

⁶⁹² A Duff, L Farmer, S Marshall and V Tadros (eds), *Conceptions of the Trial in Inquisitorial and Adversarial Procedure* (Hart Publishing 2006) 22-42.

⁶⁹³ Ibid.

⁶⁹⁴ Ibid.

⁶⁹⁵ Ibid.

⁶⁹⁶ R S Frase, 'Comparative Criminal Procedure: A Guide to American Law Reform: How Do the French Do It? How Can We Find Out? And Why Should We Care?' (1988) 79 *California Law Review* 56, 64.

⁶⁹⁷ Ibid.

⁶⁹⁸ J Hemptinne and D Boyle, 'The Rights of Victims: Participation, Representation, Protection and Reparation' (2006) *Journal of International Criminal Justice* 307.

⁶⁹⁹ Ibid.

purpose of claiming compensation and is also permitted to ask witnesses questions.⁷⁰⁰ On the contrary, the victim has no recognized role in the classical adversarial system of trial since the presumption is that the prosecution represents the interests of the victim.⁷⁰¹ A careful analysis of the role of the prosecution in chapter two of this study revealed that the prosecutor is supposed to be impartial. The prosecutor is not expected to lean towards either the victim or the accused person being an officer of the court. Indeed, this is the argument advanced by this study that CVSA need to be recognized as parties in CSA trial with rights which must be protected and implemented in the trial process.

Another beneficial feature of the inquisitorial system to CSA trial is the fact that the duty to collect evidence which is compiled into a *dossier* rests with the investigating judge who determines what evidence needs to be investigated and which witness needs to testify. The trial judge determines what evidence is admissible including documentary evidence which carries more weight than oral evidence under the inquisitorial system.⁷⁰² The trial judge determines which witness to call and assumes the dominant role of questioning witnesses in search of the truth. The responsibility of marshaling and evaluating the evidence in the truth seeking process therefore rests with the investigative and trial judge respectively. In the adversarial system, that duty is left to the parties especially the prosecution.

The role of the trial judge in establishing the truth which includes asking questions to witnesses and accused persons at trial for purposes of clarity under the inquisitorial system has been adopted by the ICC and other international criminal. The expanded role of the judge is advantageous in CSA trial as it ensures the judges are in control of the court environment to avoid it degenerating into an uncomfortable situation that stresses/traumatizes CVSA. Judges must be actively involved in the truth seeking process and control the conduct of any party that is contrary to the dignity required of any court.⁷⁰³ Where there is need to protect CVSA from intimidating cross examination, the trial judge can play an effective role in asking the accused person/counsel to write down the questions on a piece of paper which is handed over to the judge who either reads it or appoints some court official to do so and the CVSA then responds to the questions.

⁷⁰⁰ *Op. cit* n 594.

⁷⁰¹ *Op. cit* n 349.

⁷⁰² *Op. cit* n 352.

⁷⁰³ *Op. cit* n 328.

In the absence of recognition and inclusion of an active but impartial participation of the trial judge in CSA trial, it may be difficult for a passive judge to ensure a conducive environment for CVSA to testify. The Supreme Court of Canada has held that in a purely classical adversarial system, the judge may be perceived to be biased against the prosecution if they intervene to protect CVSA from intimidating cross-examination.⁷⁰⁴ However, in a hybrid system of criminal trial like the one adopted by the ICC, the judge has a discretion and responsibility to protect witnesses. Such intervention in a hybrid trial model would not be construed as interference with witnesses. If the judge is well trained in court communication with children, such skills would benefit the accused person especially when the judge gives direction on the framing of questions by the accused person to enable CVSA answer them with ease. A hybrid system that provides for an expanded role of the judge beyond being a mere referee in the trial of CSA may therefore have the advantage of enhancing the truth seeking objective of the criminal justice system without the judge being seen as biased towards either party. A procedural justice framework for CSA trial should therefore incorporate an extended role of the judge that allows for the protection of CVSA while safeguarding the rights of accused persons.

3.12.4 Human Rights Approach to Administration of Justice

The fourth important feature of the procedural justice framework for CSA trial is a human right's perspective of recognizing that victim rights are human rights just like the rights of accused persons to a fair trial, hence the need to balance both rights in accordance with Rawls' theory of justice. According to Groenhuijsen,⁷⁰⁵ before the acceptance that victims' rights were human rights, the CJS was a contest between the accused person and the state, but that has since changed as victims now occupy a central place in the criminal process and they can no longer be ignored.⁷⁰⁶ They must be seen as human beings with rights and treated fairly with respect in order to restore an inequitable balance that has existed between the victims' and accused persons' rights.⁷⁰⁷

⁷⁰⁴*R v L (D O)* [1993]4 SCR 419.

⁷⁰⁵M Groenhuijsen, 'Conflicts of Victims' Interests and Offenders' Rights in the Criminal Justice System: A European Perspective' (1988) <http://www.aic.gov.au/en/publications/previous_publications/%20series/proceedings/1-27/~//media/publications/27/groenhijisen> accessed 10 March 2012.

⁷⁰⁶ *Ibid.*

⁷⁰⁷ *Ibid.*

Therefore, despite the universal consensus on the importance of upholding the rights of accused persons in criminal proceedings, there is appreciation and recognition of the need to take into consideration concerns and interests of victims of crime as well. The ICTY while observing the highest standard of fair trial held that the right to an expeditious trial is not just a right of accused persons only but also belongs to the victims of crime and the international community.⁷⁰⁸ The fact that the ICTY, recognized and ruled in favour of a balance between the accused persons rights and the rights of victims of crime was a major development in the jurisprudence of victims' concerns in the criminal proceedings.

It is not only the ICTY and ICC that have demonstrated a need to balance the rights of victims and accused persons in criminal trials. Such developments have taken place in different parts of the world demonstrating the need to reform the criminal justice procedure to incorporate concerns for victim protection.⁷⁰⁹ In Britain, the central organ of the victim movement, Victim Support, started as a local initiative in Bristol in 1974 and grew in the subsequent years.⁷¹⁰ Noting that accused persons had clear rights in the criminal justice system, while the victims had none, the movement sought legislative changes for the promotion of victims' rights enforceable under the law.⁷¹¹ They demanded that victims should have a right to be heard.⁷¹² They needed to be kept informed about the progress of their case and to be provided with information.⁷¹³ In addition, they be protected by law enforcement agencies and receive compensation.⁷¹⁴ In addition victims demanded be treated with respect, recognition and provided with necessary support.⁷¹⁵

Subsequently, provision of services to victims became a central part of the criminal justice system policy in Britain, culminating into the Victim's Charter in 1990 which signified the advancement in recognition of victims' interests. It has since been reinforced by the publication of several Standards of Service for Victims such as the Crown Prosecution Service Statement on the Treatment of Victims and Witnesses (1993), the

⁷⁰⁸ *Prosecutor v Norman, Kallon and Gbao* [2003] ICTY Case No.SCSL-2003-09-PT.

⁷⁰⁹ *Op. cit* n 594.

⁷¹⁰ *Op. cit* n 191.

⁷¹¹ *Ibid.*

⁷¹² *Op. cit* n 408.

⁷¹³ *Op. cit* n 573.

⁷¹⁴ *Op. cit* n 408.

⁷¹⁵ *Ibid.*

Court Users Charter (1994) and the Report on the Royal Commission on Criminal Justice (1993) whose recommendations sought to ensure that victims got better information about the progress of their case, that their views were obtained and considered and that they received proper facilities and assistance in court.

In 1996, a second Victim's Charter was developed in Britain, setting twenty seven standards which the various criminal justice agencies were to deliver to victims. Broadly, they are categorized into; provision of information to the victim, taking views of victim into account, treating the victim with respect and being sensitive to them in court as well as provision of support services. Concerns about victims' rights in Britain finally led to the enactment of the Youth Justice and Criminal Evidence Act of 1999.

In the USA, a report by the Attorney General's Task Force on Family Violence in USA,⁷¹⁶ urged parliament, judges and prosecutors to adopt new procedures for dealing with family violence which include some aspects of child sexual abuse such as incest. Amongst the findings was that the court procedure was insensitive to CVSA in the trial of CSA cases. The report recommended that the National Institute of Justice develops ways of reducing trauma of trial preparations and court appearance to CVSA. The report emphasized the need for approaches that maintain the right of the accused persons and the integrity of the justice system, while addressing the needs of victims.

It was not only in the USA and Britain that victims' issues in the criminal process gathered momentum, but the concerns became widespread globally, culminating into the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) (DBPJVCAP)⁷¹⁷ by the United Nations. The DBPJVCAP spelt out rules on access to justice and fair treatment of victims of crime and abuse of power. Recognizing the need to protect the rights of child victims and witnesses of crime, the UN Economic and Social Council, in 2005, adopted Guidelines on Justice Matters involving Child Victims and Witnesses of Crime (UNGJMCVWC).⁷¹⁸

⁷¹⁶ Attorney General's Taskforce Report, 'Family & Relationships' (1984)
<http://books.google.co.ke/books/about/Attorney-General-s-Task-Force-on-Family.html?id=BGRqAAAAMAAJ&redir_esc=y> accessed 3 July 2012.

⁷¹⁷ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, (1985) (DBPJVCAP). UN doc. A/CONF.144/20, Annex, Guide for Practitioners.

⁷¹⁸ Guidelines on Justice Matters involving Child Victims and Witnesses of Crime (GJMCVWC) UN Resolution N0.2005/20 of 22 July 2005.

One of the special considerations by the Council was the fact that much as the rights of accused persons have to be safeguarded in criminal proceedings, there is need to ensure the protection of the rights of child victims and witnesses of crime in appreciating their vulnerability and need to give effect to the provisions of UNCRC in this respect. Although not binding on state parties, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) DBPJVCAP and the UNGJMCVWC contain guidelines on fair treatment of child victims and witnesses of crime, an emphasis of the need to provide for child victims and witnesses of crime.

Compliance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (DBPJVCAP 1985)

Whereas there exist many universal conventions on the protection of the rights of accused persons as already discussed, there is no single universal convention that declares and protects the rights of victims of crime.⁷¹⁹ The absence of a universal convention that protects the rights of victims of crime is indicative of the lack of consensus on the need to protect victims of crime in the CJS.⁷²⁰ The DBPJVCAP is therefore a mere declaration of concerns of victims that need to be addressed in the CJS.⁷²¹ It lacks the binding status of universal conventions which are ratified by state parties of the UN body which ensure pursuit for compliance with universal and regional treaties.⁷²² However, the DBPJVCAP is a persuasive document that a country may refer to in protecting victims of crime at the domestic level. Countries that wish to incorporate rights of victims in their constitutions or statutes may find the DBPJVCAP a very useful document. Despite its lack of binding status on UN state parties, some of the rights contained in the DBPJVCAP mirror the provisions of some international conventions and regional instruments such as the UNCRC and CEDAW.⁷²³

Although there is no universal convention dealing with the rights of victims of conventional crimes such as sexual abuse, the United Nations General Assembly, in 1985,

⁷¹⁹ UNODC, *Handbook for Professionals and Policy Makers on Justice in Matters Involving Child Victims and Witnesses of Crime* (UN 2009)3.

⁷²⁰ Ibid.

⁷²¹ *Op. cit* n 558.

⁷²² Ibid.

⁷²³ The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) 1979.

adopted the DBPJVCAP⁷²⁴ which was approved by consensus by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders.⁷²⁵ This was followed by a Guide for Practitioners Regarding the Implementation of the Declaration.⁷²⁶

The DBPJVCAP defines the notion of a victim of crime to include victims of sexual violence, thereby recognizing CVSA as victims of crime who need protection and special measures. Specifically the measures should ensure rights of access to justice and fair treatment, restitution, compensation and assistance to ensure their participation in the criminal process. The DBPJVCAP places corresponding responsibility on governments to ensure victims' concerns are addressed. Although the DBPJVCAP is a mere declaration and therefore not binding on member states of the United Nations, it is a universal recognition that criminal justice systems need to take into account the plight of victims of crime and lessen the stress associated with the criminal process.

At the regional level, the member states of the Council of Europe had in 1983 concluded the European Convention on the Compensation of Victims of Crime.⁷²⁷ The Convention was in response to the increased awareness of the need for fair treatment to victims of crime in criminal proceedings. The Convention provided for measures to alleviate psychological distress and physical injuries. Recommendation No (85)11 on the Position of the Victim in the Framework of Criminal Law and Procedure is very specific on the need to protect victims of crime who may suffer physical, psychological, material and social harm and whose needs "should be taken into account to a greater degree, throughout all the stages of the criminal justice process."⁷²⁸

The preamble to the recommendation states that the operation of the criminal justice system 'has sometimes tended to add to, rather than diminish the problems of victims.' Today, 'it must be a fundamental function of the criminal justice system to meet the needs and to safeguard the interest of the victim.' It is also important to enhance the confidence

⁷²⁴*Op. cit* n 717.

⁷²⁵Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders UN doc. E/CN.15/1997/16.

⁷²⁶Guide for Practitioners Regarding the Implementation of the Declaration. UN doc.A/CONF.144/20.

⁷²⁷European Convention on the Compensation of Victims of Crime. The Convention entered into force on February 1988.

⁷²⁸Paragraphs 5 and 7 of the preamble.

of the victim in the criminal justice and to encourage his co-operation, especially in his capacity as a witness.⁷²⁹ The recommendation emphasizes that efforts to assist/protect victims need not necessarily conflict with other objectives of criminal law and procedure, but may assist in their achievement.⁷³⁰

The member states of the Council of Europe are encouraged to review their legislation and practice according to the guidelines in the Recommendation relating to victim treatment at different levels of the justice system. This includes the police, prosecution, questioning of witnesses, court proceedings, protection and privacy of victims. Other countries which have enacted legislation to protect victims include Canada, USA and Australia.⁷³¹ These countries have incorporated measures to protect crime victims including CVSA while retaining safeguards for the rights of accused persons.⁷³² The CJS in these countries can be said to be consistent with the demands of procedural justice and rights theory as argued by the study. A CJS that achieves a balance between CVSA rights and those of accused persons is measured by the level of inclusion of the rights of victims in the applicable legislation. Key amongst victim rights are: protection of one's dignity, non-discrimination, best interest of the child, protective measures and participation rights as provided by the DBPJVCWACP.

Compliance with the United Nations Guidelines on Justice Matters involving Child Victims and Witnesses of Crime (UNGMCCVWC, 2005)

The UNGJMCCVWC has the same status as DBPJVCWACP. It merely declares what rights child victims of crime have which countries can include in their domestic legislation to protect children in the justice system.⁷³³ Its provisions are not binding on any state. It however provides guidelines on how to enforce children's rights in the administration of justice under the UNCRC. The UNGJMCCVWC echoes the provisions of the UNCRC on children's rights to non-discrimination, protection, dignity, participation in the justice process and the best interest principle. The UNGJMCCVWC

⁷²⁹ Paragraphs 2, 3 and 4 of the preamble.

⁷³⁰ Paragraph 6 of the preamble.

⁷³¹ Domestic Violence Protection Act 2000(Canada), Victims of Trafficking and Violence Protection Act (USA), Family Violence Protection Act (Victoria, Australia)

⁷³² Groenhuijsen, *Concluding Observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland (CRC/C/15/Add.188 4 October 2002) [38(e).*

⁷³³ *Op. cit* n 719.

therefore provides a guide on how to implement the relevant rights of children in the administration of justice as provided by the UNCRC.

Despite the lack of a universal convention on victims' rights, child rights issues in the administration of justice under the UNCRC is monitored by the Committee on the Rights of the Child, an independent body of experts that reports to the UN General Assembly through the Economic and Social Council. In 2002, the Committee criticized the UK for inadequate procedures and mechanisms to amongst others investigate and prosecute child abuse and for neglect to ensure child victims are not victimized in the criminal process.⁷³⁴ In 2005, the United Nations considered that child victims of crime are particularly vulnerable in court and through the Economic and Social Council, adopted a specific guideline for the fair treatment of child victims of crime in the criminal process, building on foundation groundwork already laid down by the Canadian-based International Bureau of Children's Rights.⁷³⁵

Although not binding on states, the Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime, appreciates the fact that the rights of child victims of crime have not been adequately recognized and as a result they may suffer additional hardship in the criminal justice system. This is a confirmation that CVSA are vulnerable as per the psychoanalytic theory according to Horney.⁷³⁶ CVSA require special protection that is appropriate to their age, level of maturity and individual special needs. Further, the guidelines provide that while safeguarding the rights of accused persons, justice for CVSA must be assured in all countries.

The guideline reaffirms five fundamental cross-cutting principles which must be observed in accordance with the UNCRC,⁷³⁷ namely the dignity,⁷³⁸ non-discrimination,⁷³⁹ best interest of the child,⁷⁴⁰ protection⁷⁴¹ and right to participation principles.⁷⁴²

⁷³⁴ Ibid.

⁷³⁵ *Op. cit* n 47.

⁷³⁶ *Op. cit* n 96.

⁷³⁷ *Op. cit* n 29.

⁷³⁸ Ibid Article 39.

⁷³⁹ Ibid Article 2.

⁷⁴⁰ Ibid Article 3.

⁷⁴¹ Ibid Article 32.

⁷⁴² Ibid Article 12.

The European Convention of Human Rights

Apart from the UNCRC, the other influential human rights instrument for CVSA is the ECHR which provides for a fair trial.⁷⁴³ In interpreting the right to a fair trial as provided by the ECHR, the ECtHR held that fair trial rights encompass the interests of victims, which are a legitimate consideration in devising fair trial procedures.⁷⁴⁴ The decision of the ECtHR which binds the European Union countries is a step in the right direction in terms of legal recognition and protection of the rights of victims. The ECtHR's decision confirmed the resolution by the Council of Europe Committee of Ministers that victims' needs must be taken into account to a greater degree throughout the CJS so as to enhance the victims' confidence and encourage their participation and co-operation as witnesses.⁷⁴⁵

The council further recommended the taking of video-recorded evidence from vulnerable witnesses at the earliest opportunity in the criminal process to avoid repetition and loss of crucial evidence.⁷⁴⁶ Such recording, in order not to violate accused persons' rights is required to be conducted by or in the presence of a judicial authority, giving the accused person sufficient opportunity to challenge the testimony, but without face-to-face confrontation.⁷⁴⁷ The trial judge must closely supervise the cross-examination to avoid intimidating CVSA. The ECtHR has therefore been instrumental in giving effect to the legal protection of victim's rights at the regional level of European countries therefore despite the absence of a universal convention on victim's rights, regional bodies and specific countries can adopt legislative measures that recognize and protect the rights of victims.

The African Union and Kenya in particular can learn from the ECtHR and provide for the rights of victims. The constitutional framework for the protection of CVSA rights is Article 50(9) of the Constitution of Kenya, which mandates parliament to enact

⁷⁴³ Article 6 of the European Convention on Human Rights.

⁷⁴⁴ *Doorson v Netherlands* (1996) 22 EHRR 33(ECtHR); C L Hoyano, 'Striking a Balance Between the Rights of Defendants and Vulnerable Witnesses: Will Special Measures Directions Contravene Guarantees of a Fair Trial?'(2000) Crim LR 927, 935.

⁷⁴⁵ Council of Europe, *Recommendation No R(85)11 of the Committee of Ministers to Member States on the Position of the Victim in the Framework of Criminal Law and Procedure* (adopted 28 June 1985) guideline 8.

⁷⁴⁶ *Ibid.*

⁷⁴⁷ Council of Europe, *Recommendation No R(97)13 of the Committee of Ministers to Member States concerning Intimidation of Witnesses and the Rights of the Defence* (adopted 10 September 1997) guideline 13.

legislation for the protection, rights and welfare of victims of offences. CVSA therefore have a constitutional right to protection under this Article. However, the study established that to date parliament has not enacted any legislation in this respect. The absence of such legislation makes it difficult to argue for the protection of CVSA in CSA trials. Consequently, the adversarial court procedure applied by the children courts in CSA trial does not protect the specific rights of victims as provided in the UNGJMCCVWC and the DBPJVAWCP. If enacted, such legislation would provide procedural mechanisms for protecting such victim's rights in a manner that ensures their welfare.

The international human rights instruments, the guidelines and Article 50(9) of the Constitution of Kenya provide persuasive reasons and legal obligations, for initiatives in common law to mitigate against the rigours of the classical adversarial trial process in CSA cases.⁷⁴⁸ They recognize and acknowledge that CVSA are rights holders in their own right and not passive participants in the trial process and should not be perceived as such. Therefore, fair procedures in CSA trials must recognize and protect rights of CVSA while balancing them with those of accused persons.

Procedural Mechanisms for Victim Protection

The procedural justice framework for CSA trial should provide specific measures to protect CVSA during the criminal process. This is in conformity with procedural justice theorists such as Galligan's argument that the vulnerable, less advantaged members of the society need to benefit from equal distribution of liberties and resources.⁷⁴⁹ Procedural mechanisms that protect CVSA must be in line with CVSA rights to protection. Such mechanisms should include video conferencing, taking the evidence of CVSA in advance, use of intermediaries to take the evidence of CVSA, screening CVSA from face to face confrontation with the accused amongst many others.⁷⁵⁰ Such measures should however ensure that the accused person has adequate opportunity to test the evidence.⁷⁵¹

The ICCPR imposes obligations on the part of the child's family, society and state to give children such measures of protection as required by their status as minors.⁷⁵² The obligations have been reinforced and elaborated by the UNCRC which mandates state

⁷⁴⁸*Op. cit* n 47.

⁷⁴⁹*Op. cit* n 108.

⁷⁵⁰*Op. cit* n 52.

⁷⁵¹*Op. cit* n 492.

⁷⁵²*Op. cit* n 651, Article 24.

parties to protect children from all forms of physical, mental, emotional and any abuse including sexual abuse.⁷⁵³ In all actions concerning children undertaken by courts of law or administrative authorities, the best interests of the child is the primary consideration.⁷⁵⁴ Legal systems must respect children's rights to be heard in any judicial and administrative proceedings affecting them.⁷⁵⁵ Only Somalia and United States of America have not ratified the UNCRC. This is indicative of the universal acceptance of UNCRC.⁷⁵⁶

While the rights of accused persons to fair trial are human rights under the ICCPR, CVSA rights are under the UNCRC are also human rights. They include the right to be treated with dignity, not to be discriminated but accorded equal protection of the law, to be heard in matters affecting them and their best interests taken as paramount consideration by courts. Human rights are indivisible and need to be equally enforced as none is more superior than the other, hence the need to balance CVSA rights and those of accused persons.⁷⁵⁷

The rights of CVSA to be protected from a human rights perspective are: The right to be treated with dignity and compassion, the right to protected from any form of discrimination in the justice process, the right to be informed about the justice process at every stage, including their rights in the justice process, obligations and expectations, the right to effective assistance that ensures their participation in the justice process, the right to be protected from any hardships during the justice process, the right to safety during and after the court process, the right to compensation for injuries occasioned by the abuse and the right to special protective measures during their participation in the justice process.

⁷⁵³ *Op. cit* n 29, Articles 19, 34 and 39.

⁷⁵⁴ *Op. cit* n 29 Article 3(1).

⁷⁵⁵ *Op. cit* n 29 Article 12(2).

⁷⁵⁶ *Op. cit* n 47.

⁷⁵⁷ *Ibid.*

In concluding the discussion on procedural justice framework for CSA trial, the study argues that a CSA trial balances the rights of both CVSA and accused persons when it complies with the procedural justice framework identified and discussed in this section. In the next section, the study discusses the inadequacies of the classical adversarial system that make it unsuitable for CSA trial under procedural justice framework for CSA trial.

3.13 Inadequacy of the Classical Adversarial Trial Procedure that Makes it Unsuitable for CSA Trial under Procedural Justice Framework

The adversarial legal system's procedural approach in the trial of CSA has been found to cause more trauma to CVSA than victims of other crimes since children have very little, if any, understanding of legal processes.⁷⁵⁸ While acknowledging the adversarial court procedures in protecting the rights of accused persons, Saywitz argues that the court procedure does not provide a conducive environment for children generally to testify, due to the technicalities in the procedural rules which make them less meaningful to children than adults.⁷⁵⁹ The problem with the classical adversarial court procedure rules is the lack of appreciation and application by judicial officers, of the principles of child development in trials involving children.⁷⁶⁰ In order to incorporate the special needs of children as they testify in court, Saywitz argues for court procedures that enable child witnesses to testify with minimal difficulties.⁷⁶¹

According to Berliner and Stevens, common law rule that causes stress to CVSA is the emphasis on public trials of criminal offences which exposes CVSA to the public as they narrate the details of the sensitive CSA crime to court.⁷⁶² The classical adversarial court procedure is therefore viewed by some scholars as intimidating and unfair to CVSA who are compelled to answer questions on intimate details, often in the presence of the accused person.⁷⁶³

⁷⁵⁸ *Op. cit* n 109, pg 523-35.

⁷⁵⁹ J K Saywitz, 'Children's conception of the legal system: Court is a place to play basketball' in S J Ceci, D F Ross & M P Togli (eds), *Perspectives on Children's Testimony* (Springer-Verlag, 1986)79.

⁷⁶⁰ *Ibid.*

⁷⁶¹ *Ibid.*

⁷⁶² L Berliner and D Stevens, *Advocating for Sexually Abused Children in the Criminal Justice System* (Government Printing Office, 1980)78.

⁷⁶³ *Ibid.*

Experts in other disciplines apart from law have also expressed concern about the impact of the classical adversarial court procedures on CVSA. Wolf,⁷⁶⁴ a psychiatrist, argues that CVSA have the potential of becoming child sexual abusers as adults, if as abused children, they do not receive adequate assistance to deal with the resultant trauma of the abuse. This argument confirms Sigmund Freud's psychoanalytic theory⁷⁶⁵ on human behaviour as discussed in chapter one. The relevance of Wolf's argument to this study is that when CVSA testify under traumatic procedures, their ability to coherently narrate the abuse is reduced.

3.14 Conclusion

From the above discussion, the English common law adversarial system of trial procedure is unsuitable for the trial of CSA since it does not fit into the procedural justice framework for CSA trial proposed by the study. It lacks a detailed pre-trial procedure that involves judicial officers at the investigation stage. It fails to balance the rights of accused persons with the need to protect CVSA. The passive role of the trial judge is inadequate in protecting CVSA and ensuring a balance with the rights of accused persons. The adversarial procedure falls short of the required human rights approach to the administration of justice in matters affecting child victims and witnesses as provided by the UNGMCCVWC (2005). The classical adversarial procedure does not have mechanisms for protecting CVSA. However, the classical adversarial procedure best safeguards the interests of accused persons but lacks the required balance with the protection of CVSA. Using the identified procedural justice framework as the reference point, the study evaluates pre-trial procedure in CSA trial in Kenya in the next chapter.

⁷⁶⁴ *Op. cit* n 75.

⁷⁶⁵ This is a classical theory in the discipline of psychology that explains one's behaviour by analyzing past unresolved incidences in the person's life that are likely to influence current behaviour.

CHAPTER FOUR

PRE-TRIAL PROCEDURE IN CSA CASES IN KENYA

4.1 Introduction

This chapter presents the study findings on the evaluation of pre-trial procedure in CSA cases in Kenya. Using the procedural justice framework for CSA trial identified in chapter three, the study examined the pre-trial procedure under specific thematic areas which reflect the concerns by the study. The themes are the adversarial legal system and its implication for CVSA, the effect of CSA on CVSA's ability to testify, investigation of CSA and the administration of the children courts. The discussions in this chapter identify specific inadequacies of the pre-trial procedure and make recommendations towards child friendly pre-trial procedures that balance the rights of CVSA and accused persons.

4.2 The Adversarial Legal System and the Implication for CVSA

In order to understand the application of the adversarial trial procedure in Kenya, a brief background of the rationale for the development of the system in England is provided in this section.

The English adversarial legal system which Kenya inherited from the colonialists dates back to the Glorian Revolution in 1688.⁷⁶⁶ Although the state had a role to protect all its citizens, it was viewed with a lot of suspicion by the citizens who did not fully trust the state's goodwill in protecting them.⁷⁶⁷ This led to the development of liberal constitutionalism in the 18th century which called for political structures and legal rules designated to weaken the state's ability to interfere in the citizen's life.⁷⁶⁸

By the 19th century, there was a lot of focus on individual rights and liberties to protect citizens from possible abuse of power by the state. The trial of citizens accused of criminal conduct presented the best platform to protect citizens from state abuse of its powers, by regulating the conduct of the trial through laid down procedural rules.⁷⁶⁹ The rules were premised on the belief that the state had become more powerful and as a

⁷⁶⁶ *Op. cit* n 236.

⁷⁶⁷ *Ibid.*

⁷⁶⁸ *Ibid.*

⁷⁶⁹ *Op. cit* n 613.

consequence, the state had the potential of injuring an individual more than an individual could harm the society.⁷⁷⁰

The establishment of the innocence or guilt of the accused person was the preserve of the jury which had to be satisfied ‘beyond any reasonable doubt.’ The rationale was that mere suspicion did not entitle the state to interfere in the lives of the citizens, beyond subjecting them to the trial process.⁷⁷¹ Accused persons were therefore protected from any torture and had a right to remain silent upon interrogation by the state officials.⁷⁷² The rules were protective of the accused persons and operated on the basis that the accused person remained innocent until proven guilty under the due process of law, leading to the presumption of innocence.⁷⁷³

The rationale for the protection of the rights of an accused person was to ensure that the central focus of the trial procedure is to regulate potential, alleged and actual criminal activity within procedural limits. The aim was to protect citizens suspected of crime from wrongful treatment or conviction and possible excesses by the state.⁷⁷⁴ The adversarial legal system’s criminal procedure has served the intended purpose for many years, being accepted in the commonwealth jurisdictions as the hallmark of protecting citizen’s rights in trials of criminal offences generally.⁷⁷⁵ It is against this background that the study evaluated the adversarial trial procedure in CSA cases in Kenya.

Study Findings

This study established that the procedure applied in CSA trial in Kenya is characteristic of the pure adversarial criminal trial as described by Terril.⁷⁷⁶ The study found that in all the five selected children courts, the procedure applied in taking the evidence of CVSA in CSA cases is characteristically the adversarial legal system. The only departure is that some magistrates handled the cases in the privacy of their chambers while others did so in open courts. The magistrates, lawyers and judges interviewed confirmed the use of the adversarial legal system in CSA trial. They pointed out that there is no statute on special procedure in CSA trial hence the applicable procedural laws are the Criminal Procedure

⁷⁷⁰ Ibid.

⁷⁷¹ Richard J Terril, *World Criminal Justice Systems: A Survey* (7th edn, Lexis Nexis Group 2009)303.

⁷⁷² Ibid.

⁷⁷³ *Op. cit* n 613.

⁷⁷⁴ *Op. cit* n 236.

⁷⁷⁵ Ibid.

⁷⁷⁶ *Op. cit* n 771.

Code and the Evidence Act. A magistrate interviewed had this to say about the trial procedure in CSA cases in Kenya:

There is no separate or special procedure applicable in CSA cases. We apply the Criminal Procedure Code and the Evidence Act as the procedural laws in all criminal cases whether they involve children or not. The principles of trial and evidentiary rules of procedure applicable in adult cases are the same ones that apply in CSA cases. At times it causes a miscarriage of justice but what can we do? We have no other alternative.⁷⁷⁷

A review of both the Criminal Procedure Code and the Evidence Act revealed that statutes revealed that they have entrenched fundamental principles of adversarial trial which safeguard the rights of accused persons. However, they provide inadequate protection for CVSA as is discussed in subsequent sections of this and the next chapter.

The study established that due to the adversarial nature of court business, CVSA did not know what to expect in court or what was expected of them. Many were simply informed by their parents/guardians that they were to narrate the details of the abuse in court. They had inadequate information about what a court is and many did not understand the importance of testifying about CSA. According to a CSA interviewed while waiting to testify:

I was told that I come to court and say how I was sexually abused. I do not know why they want me to talk about it. Nobody has told me what to or not to do. I do not know what the court expects of me. I am afraid I might be jailed if I don't say the right thing.⁷⁷⁸

The public perception of a court is a battlefield where the winner takes it all. The study established that CVSA perceived the court as a place where they have to prove their innocence as if they, not the accused persons were on trial. This confirms Temkin's

⁷⁷⁷ Respondent no 44 in Appendix K.

⁷⁷⁸ *Op. cit* n 355.

argument that victims of sexual assault perceive the court experience as a re-victimization process.⁷⁷⁹

The study finds the adversarial trial procedure unsuitable for CVSA trial. It was developed without anticipating the participation of CVSA in the judicial process. Subsequently, the adversarial trial system remains protective of the rights of accused persons as envisaged during its development in England. Today, upholding the rights of accused persons in compliance with the adversarial system occasions injustice to CVSA in CSA cases as evidenced by the sentiments of one CVSA interviewed by the study who said:

Everybody in court seemed to believe the accused person and not me. I was asked many questions several times by the prosecutor and the accused person's advocate. I was however not allowed to ask any question to the accused person. He remained quiet throughout the proceedings while it is me who was asked to explain how I was abused. It is as if it was me and not the accused person on trial. The court process was unfair to me but protected the accused person.⁷⁸⁰

Recommendation

Kenya can learn from other jurisdictions which have reformed their adversarial trial procedure in cases of CSA to accommodate CVSA concerns. There is need for the children's court procedure to move away from the strict classical adversarial system to a hybrid system that retains features of the adversarial system which protect the accused persons, while borrowing features of the inquisitorial system that address the concerns of CVSA. This calls for a delicate balance between the rights of CVSA and accused persons in CSA trial, to conform to the procedural justice framework for CSA trial and the rights theory. Countries such as Britain, USA, Canada and Australia amongst many others have taken steps to reform their trial procedure by incorporating measures that protect CVSA while safeguarding the rights of accused persons.⁷⁸¹ The specific measures are discussed further in this chapter.

⁷⁷⁹ *Op. cit* n 3.

⁷⁸⁰ Respondent no 66 in Appendix K.

⁷⁸¹ *Op. cit* n 47.

4.3 The Effect of CSA on CVSA's Ability to Testify

The study found that the pre-trial procedure does not recognize the fact that CSA occurs in private. In addition, the procedure fails to take into account the negative effects of CSA on the ability of CVSA to report or narrate the abuse confidently and coherently. According to one of the defence lawyers interviewed:

Child Sexual Abuse cases are very easy to defend. In most cases, it is the word of the CVSA against that of the accused. Considering that CVSA are vulnerable and lack knowledge of the technical court process, it is easy to confuse them through cross examination and ensure that their evidence contradicts their recorded statement. Once such doubts are created, the law is clear, the benefit goes to the accused person.⁷⁸²

Although counseling of victims of sexual abuse is provided for by the Sexual Offences Act,⁷⁸³ there is no procedure to address the traumatic effects of CSA on CVSA to enable them give their best evidence during investigation and the trial. The study found that no government agencies provide psycho-social support to CVSA. A prosecutor interviewed reported that:

No probation officers, children officers or social workers from the government provide psycho-social support to CVSA as they testify. A few NGOs do accompany some CVSA to court but the majority of CVSA do not have access to psycho-social services.⁷⁸⁴

Most CVSA are therefore subjected to police investigation and court testimony without psycho-social support services that would deal with the emotional, psychological and mental trauma suffered by CVSA. This may build their confidence to narrate the details of the abuse effectively.

Ninety percent of CVSA interviewed responded that they did not receive any counseling services as there was none offered at the courts as a policy or requirement before CVSA

⁷⁸² Respondent no 54 in Appendix K.

⁷⁸³ *Op. cit* n 36 section 35.

⁷⁸⁴ Respondent no 14 in Appendix K.

testified. Only 10% of CVSA received psychosocial support before testifying. This accounts for the limited number of CVSA whose cases were handled by NGOs that specialize in this area. Such NGOs provided limited legal and psychosocial services to CVSA. The effect is that the already traumatized CVSA, lacking any counseling services, is thrust into the unfamiliar and tense court environment where they come face to face with the abuser. In addition, CVSA had to face people they had not known before, such as the magistrate, the prosecutor and the lawyer, all who interrogate CVSA about the abuse causing tension, nervousness and anxiety. Psycho-social services can alleviate the anxiety and fear experienced by CVSA due to lack of counseling.

The study found that CSA is not an ordinary offence against a child that should be treated as other crimes. It has serious short and long term effects which negatively affect the ability of CVSA to narrate the abuse in court. This is more pronounced in the presence of an accused person or their lawyers. The devastating effects of CSA on CVSA identified by the respondents during the interviews and FGD⁷⁸⁵ include trauma characterized by the following: physical injuries, psychological, emotional and spiritual turbulence, fear, anxiety, shame as well as guilt feelings and self-blame, lack of concentration and reduced academic performance.

According to a social worker interviewed by the study:

CSA has very serious negative impact on CVSA. In the absence of psycho-social support and therapy, it is cruel to ask CVSA to narrate the details of the abuse in front of the accused person and in the presence of many unfamiliar faces to the child.⁷⁸⁶

The respondents' views on effects of CSA on CVSA are consistent with the study observation of CVSA, some of whom appeared withdrawn. This was confirmed by social workers who emphasized that such withdrawal made it more difficult to get information from the affected CVSA. Withdrawal behaviour is consistent with the symptoms of PTSD⁷⁸⁷ discussed in chapter two. This is a psychiatric condition that results from

⁷⁸⁵ The FGD comprised of magistrates, lawyers, prosecutors, parents, social workers and children officers.

⁷⁸⁶ Respondent no 35 in Appendix K.

⁷⁸⁷ *Op. cit* n 262.

prolonged trauma that overwhelms CVSA as a result of the abuse.⁷⁸⁸ The social workers argued that CVSA who break down in court or remain silent upon seeing the accused person are likely to have suffered PTSD as a result of CSA. This situation is complicated in cases of CVSA below four years of age who cannot express themselves, making it difficult to get information from them.

A CVSA who remained silent at the witness box without testifying, responded during the interview that:

...to ask me to narrate what happened during the abuse was like putting me through the same experience again in front of more people. It was too much for me to handle.⁷⁸⁹

The review of Kisumu Criminal Case No 352/ 2008 revealed that a 14 year old girl reported the abuse to her parents but they were very harsh to her. This highlights the fact that some families still regard issues relating to sexual matters and especially CSA as matters which should not be discussed with children and that CSA would bring ridicule to the family. This is consistent with the labeling theory as discussed in chapter one. The case highlights the fact that some CVSA when defiled do not know what to do.

The above reactions by the CVSA confirm Temkin's argument that victims of sexual abuse experience trauma, fear and anxiety as they wait to testify under the classical adversarial system. This is further confirmed by the study observation of CVSA as they waited to testify looking dull and worried contrary to the playful nature of children generally.⁷⁹⁰ This finding is consistent with the traditional view of criminal justice system being focused on the accused person while ignoring concerns for victim protection as argued by McConville and Wilson.⁷⁹¹ Another effect of CSA according to social workers is that some CVSA develop problems relating to people of the same gender as the abuser. Where the police or magistrate belongs to the same gender as the abuser, some CVSA may refuse to talk in their presence as they psychologically equate the abuser to all those who belong to the same gender as the abuser. The overall effect of CSA on the CVSA is

⁷⁸⁸ Ibid.

⁷⁸⁹ Respondent no 98 in Appendix K.

⁷⁹⁰ *Op. cit* n 109.

⁷⁹¹ *Op. cit* n 234.

that it makes them more vulnerable to intimidation by the accused person and his/her lawyer under the current adversarial legal system in the absence of any special protective procedures.

The pre-trial procedure falls short of accommodating the interests and protection needs of victims (CVSA) according to human rights and victim advocates such as Batra⁷⁹² and Zedner.⁷⁹³ The study findings confirm the review of literature that CSA causes trauma to CVSA who react differently depending on their personality and available coping mechanisms.⁷⁹⁴ This is also consistent with Horney's explanation of the different reactions by children to CSA depending on different personality characteristics as discussed under the psychoanalytic theory in chapter one.⁷⁹⁵ The pre-trial procedure is inconsistent with the principle of human rights approach to the administration of justice and the procedural justice framework for CSA trial. It is widely accepted that some witnesses are vulnerable in the sense that their experiences as victims of crime, or their personality traits or their susceptibility to intimidation may make them suffer more than the normal amount of stress associated with being a witness. Subsequently, CVSA may not be able to give best evidence without certain protective measures.⁷⁹⁶

The study concludes that CSA pre-trial procedure in Kenya lacks recognition of the effects of CSA on CVSA. The abuse negatively impacts on their ability to participate fully in the judicial process. This is contrary to CVSA right to participate in judicial proceedings affecting them under the UNCRC. In addition pre-trial procedure lacks psycho-social support services to CVSA which violates their right to effective assistance under part ix of the UNGJMCCVWC.

Recommendation

The study recommends that pre-trial procedures be developed in CSA cases. Such procedure should ensure that all CVSA receive psychosocial support from children officers who are specially trained and designated to render such services. Such officers should be assigned to CVSA immediately upon reporting of the abuse. Subsequently, they

⁷⁹²*Op. cit* n 241.

⁷⁹³*Op. cit* n 191.

⁷⁹⁴*Op. cit* n 75.

⁷⁹⁵*Op. cit* n 96.

⁷⁹⁶A Karmen, *Crime Victims: An Introduction to Victimology* (Wadsworth 2010)144.

should accompany CVSA throughout the judicial process. Further, they should make a follow up after CVSA's testimony to ensure their welfare and psycho-social development.

In England, Wales and Scotland, the Judiciary has developed special procedures to prepare child witnesses and victims of crime for their court appearance.⁷⁹⁷ Such procedures include provision of psycho-social services to CVSA by specially trained psycho-social workers who ensure that the child is emotionally and psychologically prepared to testify.⁷⁹⁸ In addition, CVSA are informed about their rights and expectations in court. An orientation visit is organized to familiarize them with the court before the day of the testimony. The measures reduce anxiety and fear experienced by CVSA and enhances their capacity to testify coherently.⁷⁹⁹

4.4 Investigation of CSA

The study established that the first difficulty in detecting and investigating CSA is the secretive manner in which the abuse is committed.⁸⁰⁰ All the respondents were in agreement that CSA does not occur in public making it difficult to detect and prosecute since the only witnesses to the abuse may be the accused person and the CVSA, turning the trial into a contest between the words of the accused person and those of the CVSA. This finding is consistent with the argument advanced by Abrams and Ramsey⁸⁰¹ on the challenges of prosecuting CSA as discussed in chapter two.

The second difficulty is the lack of mandatory reporting laws in Kenya. There is no law in Kenya that makes it mandatory to report a suspected case of CSA. The study found that there is no statutory provision on mandatory reporting of CSA to the police by anyone who suspects a child has been abused. Neither the Children Act nor the Sexual Offences Act obligates parents, guardians or professionals handling children to report suspicions of CSA. Reporting of CSA thus depends on concerned adults or CVSA themselves who may not even know they have been abused or as reported by one CVSA, they may not be believed when they report the abuse.

⁷⁹⁷ *Op. cit* n 52.

⁷⁹⁸ V Ridgeway & A Matthews, 'Psychological Preparation for Surgery: A Comparison of Methods' (1982) 21 *British Journal of Clinical Psychology* 271, 275.

⁷⁹⁹ *Ibid.*

⁸⁰⁰ *Op. cit* n 89.

⁸⁰¹ *Op. cit* n 5.

Thirdly, due to social stigma attached to CSA, reporting the offence or talking about it presents special challenges during investigation. The records review of Kisumu Criminal Case No 352/ 2008 revealed that even when CVSA report the abuse to parents/guardians, some may not believe them or seek to protect the family name due to the social stigma attached to sexual abuse in the Kenyan society. This is consistent with the labeling theory discussed under the theoretical framework in chapter one. The stigma attached to sexual issues makes it difficult for CVSA to report the abuse and when they do so, they encounter challenges of not being believed or labeled as bad children who engage in ‘bad manners’. This confirms arguments by Abrams and Ramsey about the difficulty in investigating and prosecuting CSA cases under the adversarial system.⁸⁰²

All the respondents were in consensus that matters regarding sex are not openly discussed in the Kenyan society especially with children. This contributes to CVSA’s difficulty in narrating sexual abuse details to the police and court. The labeling of CVSA by their peers as children engaged ‘in bad manners’ was found to discourage some CVSA from reporting the abuse for prosecution. In the words of one CVSA:

...when I told my mother that the accused person did bad manners to me, she said that I should not talk about it as people would laugh at me. At school, other children refused to talk or play with me. They said that I was a bad girl because I did bad manners with big people.⁸⁰³

The above narrative by the CVSA is supported by one of the judges interviewed who concurred that it is difficult for CVSA to express themselves in matters concerning sex in the African society.⁸⁰⁴

To ask a CVSA to openly narrate to a police officer or judge how the sexual abuse occurred was in the judge’s view:

⁸⁰² *Op. cit* n 5.

⁸⁰³ Respondent no. 80 in Appendix K.

⁸⁰⁴ Respondent no. 39 in Appendix K.

...the height of the judicial system's insensitivity to African cultural values and inability of a child to describe what probably they have never been addressed on before, by their parents.⁸⁰⁵

Another CVSA expressed the stigma she suffered in the following words:

Some children say that I am a bad child engaging in bad manners with adults and they no longer want to play with me.⁸⁰⁶

The effect of social stigma on CVSA's ability to narrate the details of the abuse was confirmed by the FGD. The study finding in this respect is consistent with the psychoanalytic and labeling theories discussed in chapter one. The findings also confirm literature reviewed in chapter two on effects of CSA on the ability of CVSA to narrate the details effectively as argued by Wolf, Saywitz, Hoyano and Keenan amongst other scholars.⁸⁰⁷

A police investigator and a prosecutor interviewed by the study confirmed that social stigma hindered CVSA ability to effectively narrate the details during investigation.⁸⁰⁸ The implication is that inadequate evidence may be collected from CVSA during investigation. Relying on CVSA as the key prosecution witness in the absence of other supporting evidence therefore weakens the prosecution of CSA.

The study also established that CSA cases are investigated by police officers of the rank of inspector and below, many of whom did not possess specialized investigative skills in CSA cases. In an inquisitorial system of criminal trial such as France, a special prosecutor or a pre-trial judge supervises the collection of all evidence of probative value and interviews all those with relevant information including the accused person.⁸⁰⁹ The pre-trial investigation in the inquisitorial system is so detailed that where there is no sufficient evidence, the accused person is not tried but the charges are dropped. Where there is evidence, all information of probative value is collected and the chances of a conviction

⁸⁰⁵ Ibid.

⁸⁰⁶ Respondent No.71 in Appendix K.

⁸⁰⁷ See for instance, Hoyano & Keenan, Wolf, Herman & Hirschman.

⁸⁰⁸ Respondent nos 5 and 15, respectively, in Appendix K.

⁸⁰⁹ *Op. cit* n 220.

are higher than in an adversarial system.⁸¹⁰ So thorough is the pre-trial procedure of investigation that the trial process does not depend on CVSA as the key witness.

In Kenya however, investigation is left to the investigating officers. The prosecution has no control over the evidence collected, but merely receives a file for prosecution with a list of witnesses to testify. In France, Belgium and Holland which are non-commonwealth jurisdictions, witnesses and suspects are almost invariably interrogated ahead of the trial and the written minutes of the interviews known as *proce`s-verbaux* in French and *processen-verbaal* in Dutch are part of a *dossier* which forms part of the evidence in the case.⁸¹¹

The *proce`s-verbaux* often includes statements made to the police in the early stages of the investigation and in serious cases such as CSA, a further round of pre-trial questioning takes place before a judicial officer called a *juge d`instruction* in French and *richer-commissaris* in Dutch.⁸¹² This is a professional judge with discretionary powers to delegate the questioning to others.

In France, the judge may be a specialist in questioning children.⁸¹³ The judge sits in private, but with a clerk and lawyers who have a right to be present. The interrogation by the judge is recorded in writing. In cases of CVSA, the trial court reads the *proce`s-verbaux* instead of hearing live testimony from the child. The French system insulates CVSA from the need to appear in court because of the detailed pre-trial investigation that collects sufficient evidence to sustain a conviction. The pre-trial investigation process in the inquisitorial system is so detailed and thorough that there is a misconception that in the inquisitorial system, an accused person is innocent until proven guilty.⁸¹⁴

The study found that investigation in some cases was inadequate, leaving out very crucial evidence. In Nairobi Criminal Case No. 4740/2007, the accused person was never examined by a medical doctor to establish any forensic evidence linking him with the CVSA. The study found inadequate public awareness of collection and preservation of

⁸¹⁰*Op. cit* n 349.

⁸¹¹*Op. cit* n 52.

⁸¹² *Ibid.*

⁸¹³ *Ibid.*

⁸¹⁴*Op. cit* n 349.

CSA evidence. Most CVSA, parents and guardians, investigating officers and prosecutors responded that due to lack of knowledge, a lot of evidence is often destroyed at the crime scene as the CVSA takes a shower or wash the clothes or unknowingly tamper with the scene of the abuse before the matter is reported to the police.

According to one investigating officer:

Most of the crucial evidence in CSA cases is lost due to lack of public awareness on how to collect and preserve evidence. Majority of CSA cases are reported to the police after the CVSA has taken a bath and most evidence such as semen is therefore lost during the bath. In addition, the clothes that CVSA were wearing when CSA occurred are often not brought to the police station. When we ask for them, we are told that they were already washed. Consequently, by the time of reporting to the police, the material, circumstantial and forensic evidence which may be used in court to prove the abuse is lost. It is therefore difficult to prosecute CSA cases in the absence of such forensic evidence linking the accused person to the offence.⁸¹⁵

In the absence of the exhibits and medical examination of both the CVSA and the accused person(s), the prosecution finds it difficult to prove the offence as CVSA are put to task to prove the details of the abuse. The review of Kisumu Criminal Case No 352/ 2008, revealed that the CVSA did not know of the need to preserve the torn clothing which she had on while the abuse took place as exhibit. This was crucial evidence which could have helped the prosecution in proving the allegation. However the study found that there are no guidelines on how to investigate CSA cases. The lack of guidelines and inadequate public awareness on collection and preservation of evidence in some cases leads to a miscarriage of justice.

The adversarial investigation of CSA is therefore not in the best interest of CVSA. Unlike the inquisitorial system, the accused person cannot be questioned by a pre-trial judge. The responsibility of collecting and presenting evidence in court is the primary responsibility of the investigating and prosecuting agencies, which must do so in adherence to well

⁸¹⁵ Respondent no 8 in Appendix K.

established and strict rules of evidence, in what has come to be known as an observation of the due process and the rule of law.⁸¹⁶ However, the observance of the due process and the rule of law at times leads to a miscarriage of justice in CSA cases in Kenya.

The study therefore finds that the existing pre-trial investigation of CSA in Kenya lacks a detailed approach that ensures all evidence of probative value is collected. Further, the lack of participation of a special prosecutor or a judge trained in children matters to supervise the investigation of CSA cases at times leads to collection of insufficient evidence which weakens the prosecution case and causes a miscarriage of justice to CVSA.

The pre-trial investigation procedure is not in the best interest of CVSA. The pre-trial procedure fails to comply with the human rights approach to the administration of justice as far as children are concerned. There are no procedural mechanisms to protect CVSA or prepare them for the trial as stipulated under the (UNGMCCVWC, 2005). However, the pre-trial procedures safeguard the interest of accused persons who are presumed innocent until the contrary is proved, protected against self-incrimination and have a right to silence during the investigative phase of the trial. The CSA pre-trial investigation procedure in Kenya is therefore inadequate and fails to balance the rights of accused persons and the needs and interests of CVSA. It does not conform to the procedural justice framework for CSA trial and is inconsistent with the rights theory.

Recommendation

In view of the study findings on the inadequacy of the pre-trial investigation of CSA, the study makes the following recommendations;

There is need to conduct public awareness on the effect of CSA on CVSA and preservation of evidence in CSA cases. This can be achieved through public awareness programs by both print and electronic media. NGOs working on children matters can incorporate such awareness programs into their activities. Telecommunications companies such as Safaricom, Orange, Yu and Airtel can be of great help in this respect by disseminating the information through the short messaging system (SMS). The children department can develop brochures in English, Kiswahili and specific local languages at the county levels to reach as many people as possible.

⁸¹⁶*Op. cit* n 123.

Faith based organizations and the civil society can also play an important role in this respect. The Ministry of Education can incorporate such awareness programs in the school curriculum. Sports, drama and other school activities are good forum for creating public awareness. Britain and USA took deliberate steps to conduct public awareness in various forms by involving the media.⁸¹⁷ Such awareness programs enable the public to understand the nature of CSA and how it affects the prosecution case.⁸¹⁸ In addition, public awareness has the potential of encouraging more reporting of CSA and public corporation with the criminal justice agencies.

The study recommends the development of guidelines by the office of the Director of Public Prosecution, on how to conduct CSA investigation. In addition, there is need to train all criminal justice agencies on specific skills of CSA investigation and use of the guidelines. The National Centre for Child Abuse in the USA has developed special training programs for CJS officials, defence lawyers, judges, expert witnesses and child protection agencies to equip the personnel with special skills in handling CSA cases.⁸¹⁹ The state of California in the USA developed guidelines on child sexual abuse investigation.⁸²⁰ A special police unit has been trained on the most effective, but child sensitive ways of interviewing CVSA.⁸²¹ The state of Alabama in the USA established a centre known as Huntsville where all investigatory interviews in child abuse takes place.⁸²² The center offers many advantages to CVSA. They have specially trained staff to interview and support CVSA during the investigative process. Everybody with investigative duties in CSA cases meet at the center so that CVSA do not have to undergo several interviews.⁸²³ The interview format is such that all potential interviewers have the opportunity to gain the information they require in one interview.⁸²⁴ Two way mirrors and video tapes enable the interviewers to view the process without intimidating or intruding on CVSA.⁸²⁵ Medical specialists are available to perform medical examination and treatment which includes colposcopic examination (the use of a magnifying device to reveal injuries to the genitalia of children which are otherwise not visible to the unaided

⁸¹⁷ *Op. cit* n 52.

⁸¹⁸ *Ibid.*

⁸¹⁹ *Op. cit* n 384.

⁸²⁰ California Child Victim Witness Judicial Advisory Committee, Final Report (1988) at pg 25.

⁸²¹ *Ibid.*

⁸²² *Ibid.*

⁸²³ *Ibid.*

⁸²⁴ *Ibid.*

⁸²⁵ *Ibid.*

eye). In South Africa, there are ‘one stop care centers’ which are set up to address the special needs of both the child and adult victims of sexual assault in a holistic manner. These centers are known as *thuthuleza* (meaning to ‘be comforted’ in Zulu and Xhosa). The rationale underlying the centers is to introduce a victim centered approach in a manner that allows the reporting, investigation and intervention in sexual assault cases to be handled away from the police stations in a victim friendly atmosphere situated within a hospital. Kenya can learn a lesson from the South African experience.⁸²⁶

There is need to change the public attitude about the secrecy and stigma surrounding the topic of sex with children. This can be achieved by educating the members of public about the need to openly discuss with children matters regarding CSA so that when they become victims it is easy for them to report the abuse. This recommendation can be achieved during public awareness creation already discussed. In South Africa, such public education carried out by the civil society has led to increased reporting of CSA as people change their attitude from silence to cooperation with CJS in reporting, investigation and prosecution of CSA cases.⁸²⁷ This has the potential of encouraging the reporting and investigation of CSA.⁸²⁸

Fourthly, there is need to include a provision in the Sexual Offences Act on mandatory reporting of CSA by anyone who suspects that a child may have been sexually abused. Such a provision is useful in ensuring that medical practitioners, teachers, caregivers or anyone with information on reasonable suspicion of CSA to report to the police for investigation and prosecution. In addition, such persons are potential prosecution witnesses in CSA cases and can enhance the detection, investigation, prosecution and the truth seeking process in CSA cases. In Britain, USA and Australia, it is mandatory under the sexual offences statutes for anyone who suspects CSA to have occurred to report to the police for investigation to be carried out.⁸²⁹ The effect of mandatory reporting of CSA in those countries is that more cases of CSA have been reported, prosecuted and many CVSA protected by courts.⁸³⁰ Prior to the mandatory reporting requirement, child abuse at

⁸²⁶ Center for Child Law, *Justice for Child Victims and Witnesses of Crime* (Pretoria University Law Press 2008) 31.

⁸²⁷ South African Law Commission, ‘Sexual Offences Against Children’ Issue Paper 10, Project 108, (1997) 56-70.

⁸²⁸ *Ibid.*

⁸²⁹ Washington State Law, Revised Code of Washington Chapter 26.4.030 (Washington, USA), Australia State Statute, Family Law Act 1975 Section 67 ZA, Child Abuse Prevention and Treatment Act 1974 Sections 111(2) and 111(4), (Britain).

⁸³⁰ *Op. cit* n 384.

the family level was regarded largely as a private matter and many cases went unreported.⁸³¹ The introduction of mandatory reporting law led to a change in attitude towards child abuse which evolved into behavior that must be reported, investigated and potential criminal court intervention.⁸³² Accordingly, while cases of criminal child abuse were rare before the introduction of mandatory reporting law, today they form a substantial amount of criminal prosecutions.⁸³³

Lastly, the study recommends that Kenya borrows from the inquisitorial system's detailed pre-trial investigation that ensures collection of all evidence of probative value. Children are generally vulnerable and so when they become victims of sexual abuse, the presumption of innocence prejudices the investigation of the prosecution case. The study appreciates the procedural significance of the presumption of innocence as the foundation of the right to a fair trial. This has been emphasized by the ECtHR when it held that the presumption of innocence prevented the legislatures from stripping trial courts of their powers to assess the evidence of the defendant's guilt.⁸³⁴ The same reasoning was echoed by Lord Bingham when he said that, 'The overriding concern in a criminal trial is that it should be fair, and the presumption of innocence is a fundamental right directed to that end'.⁸³⁵

The presumption of innocence is that an accused person is presumed innocent until proven guilty by an impartial court in a fair trial and is privileged from giving self-incriminating evidence.⁸³⁶ Although the privilege against self-incrimination generally protects accused persons in other offences, in the trial of CVSA, the fact that the accused person, apart from the CVSA may be the only other person possessed of the facts of the abuse, gives undue advantage to the accused person. The adversarial trial system fails to appreciate the nature and impact of CSA on CVSA and the subsequent inability to testify especially in situations where CVSA may have been threatened by the accused against testifying.⁸³⁷

⁸³¹ Ibid.

⁸³² Ibid.

⁸³³ Ibid.

⁸³⁴ *Selabiaku v France* (App no 379) (1988) 13 EHRR 379.

⁸³⁵ *Sheldrake v DPP* (No 4 of 2002) Re [2004] UKHL 43.

⁸³⁶ *Op. cit* n 457.

⁸³⁷ *Op. cit* n 47.

Where CVSA may be the only prosecution eye-witness, proving case against the accused, person who is shielded from giving any information that may incriminate him/her presents a challenge in prosecuting CSA. This is the special difficulty under the adversarial system where the parties are solely responsible for the gathering and presentation of evidence in court.⁸³⁸ Although the prosecution may have all the resources to collect the evidence against the accused person, in CSA cases, this is hindered by the fact that the accused person may have the most crucial information needed to establish the truth, where the CVSA may be unable to testify or talk about the abuse.

The aim of the criminal justice system should not only be to safeguard the rights of accused persons, but also to ensure mechanisms that assist the court to arrive at the truth. The ends of justice cannot be said to be served where the accused person is acquitted simply because CVSA fail to testify if it can be proved that the accused person was at the scene of crime, yet protected from self-incrimination. There is a gap in this respect and the need to balance the truth seeking role of the court in protecting CVSA and the right of accused persons in CSA trial to be protected from self-incrimination and the fundamental presumption of innocence as the hallmark of an adversarial trial. Controversial as this matter may be, in CSA cases, there is need to re-think this principle.

Kenya needs to adopt the elaborate inquiry process of the inquisitorial system which is, according to Dammer and Albanese,⁸³⁹ its greatest advantage. It allows the vast resources of the government to be applied in the investigation process that is not one-sided. In the case of the adversarial system, the government resources are used by the investigators on the side of the prosecution since the accused is in charge of his/her own evidence gathering and presentation.⁸⁴⁰ This advantage makes the inquisitorial system suitable for the trial of CSA as it allows the investigation of any relevant information and the questioning of witnesses including the accused persons since CSA, as already discussed is sometimes committed away from the public eye with the possibility that the only witnesses may be the CVSA and the accused.⁸⁴¹

⁸³⁸ *Op. cit* n 5.

⁸³⁹ *Op. cit* n 349.

⁸⁴⁰ *Op. cit* n 315.

⁸⁴¹ *Op. cit* n 5.

Another advantage of the inquisitorial system is that the investigation is seen to be so thorough that only cases with high chances of successful conviction proceed to trial as those with slim chances of success are dropped at the end of the pre-trial stage.⁸⁴² This advantage serves the interest of the accused since the investigating judge only admits charges on cases with strong evidence, releasing suspects against whom evidence is weak.

The important distinction between the function of a trial and pre-trial judge is that whereas the pre-trial judge supervises the collection of information that forms the evidence, the trial judge is the one who hears the case and conducts the trial based on the *dossier* compiled by the pre-trial judge. However; the greatest advantage of the inquisitorial system is the non-adversarial nature of seeking the truth that accommodates the concerns of both victims and accused persons.

The greatest relevance of the inquisitorial system to CSA trial therefore is its non-adversarial nature of trial which allows for a conducive environment for CVSA to testify and present to the court the details of the abuse, unlike the adversarial trial which has been described by many scholars as a second rape, re-victimization and too cruel to CVSA.⁸⁴³ It is important to note that in both the adversarial and the inquisitorial systems, the accused person is presumed innocent until proven guilty and retains the privilege against self-incrimination as hallmarks of the criminal trial.⁸⁴⁴ An example of an inquisitorial system that ensures fairness to CSA is France.⁸⁴⁵ Kenya can therefore learn and borrow positive aspects of the French system in the investigation of CSA.

Relevance of the French Inquisitorial Pre-trial Procedure to CSA Trial

The characteristic feature of the French procedure is an elaborate and extensive pre-trial judicial investigation which may be requested for by the prosecutor, suspect, or any party. It involves investigative stages which appear useful to the manifestation of the truth. At this stage, the prosecution may request for the arrest and detention of any suspect as a security measure while suspects may question a particular witness or cross-examine

⁸⁴² F Pollock, *Essays in Law* (Macmillan 1922)179.

⁸⁴³ *Op. cit* n 52, 75.

⁸⁴⁴ *Op. cit* n 205.

⁸⁴⁵ *Op. cit* n 578.

another suspect, witness or visit the scene of crime and even request that another suspect be ordered to produce particular information.⁸⁴⁶

The elaborate pre-trial procedure therefore allows for the collection of all evidence of probative value and examination and cross-examination of witnesses at this stage by the prosecution and the suspect. This is in sharp contrast to the adversarial system which stipulates the order of presenting and testing evidence at trial stage where cross-examination occurs.⁸⁴⁷ In respect of CSA trial the elaborate French system is likely to help in seeking the truth as everyone likely to have any evidence is questioned. It is therefore more relevant to the trial of CSA so long as the accused person is given an adequate and appropriate opportunity to challenge the evidence at any stage.

The second feature of the French criminal trial is the discovery stage when both the accused persons and prosecutor may inspect the full (information) *dossier* gathered by the judicial pre-trial investigation. This gives an opportunity to narrow down issues for trial and has the effect of ensuring that each party is adequately prepared to argue their case as opposed to the adversarial system where each party guards their evidence waiting to surprise the opponent in court.⁸⁴⁸

Critics of the inquisitorial system of trial however argue that the role of the judge in its elaborate pre-trial investigative process in effect makes it difficult for the trial process to be impartial due to the extreme judicial powers of the judge at both stages which is likely to result into prejudice against the accused person.⁸⁴⁹ They further argue that the involvement of a judge at the pre-trial stage, takes away the court's impartiality.⁸⁵⁰ The trial develops into an affirmation or review of the pre-trial investigation. This raises concerns that an accused person under the system of trial is more likely to be convicted than acquitted.⁸⁵¹ This has given rise to the misconception that under the inquisitorial system of trial, an accused person is guilty until proven innocent.⁸⁵²

⁸⁴⁶ *Op. cit* n 123.

⁸⁴⁷ *Op. cit* n 220.

⁸⁴⁸ *Op. cit* n 349.

⁸⁴⁹ *Ibid.*

⁸⁵⁰ *Op. cit* n 580.

⁸⁵¹ *Op. cit* n 588.

⁸⁵² *Ibid.*

Van Kessel, however, views the involvement of the judge at the investigative pre-trial stage necessary to protect the interests of both the state and the accused person.⁸⁵³ According to Van Kessel's the judicial involvement at the pre-trial stage in the inquisitorial system results into a balanced investigation.⁸⁵⁴ This in the interest of both the victim and the accused person. This contrasts the adversarial system where the state's investigation is adversarial to the accused person and characterized by complex evidentiary rules of evidence which impede the search for the truth.⁸⁵⁵

Damaska, an expert in criminal procedure, agrees with Van Kessel. He argues that the judicial involvement at pre-trial stage of investigation in the inquisitorial system should be viewed as official state inquiry in the interest of both accused persons and victims.⁸⁵⁶ The judicial involvement in investigation under the inquisitorial system is in my view a feature that makes the trial procedure suitable for CSA trial. The process must however ensure that the judge remains impartial and protects the rights of accused persons throughout the investigation.

The ICTR adopted an elaborate inquisitorial trial procedure which Kenya can also borrow from. Under rule 43, the pre-trial procedure of the tribunal is in line with the inquisitorial nature of a detailed pre-trial investigation that ensures only those against whom there is sufficient evidence are indicted. Rules 67 and 68 ensure that the accused person prepares well for the defence, the prosecutor is obliged to disclose the evidence to be relied on and any exculpatory evidence, except for confidential information that may jeopardize the cause of justice and equally, the accused person has a duty on reciprocal disclosure of any *alibi* defence, diminished responsibility or mental incapacity. The disclosure provisions make the trial less adversarial and more inquisitorial in the search for truth.

4.5 The Administration of the Children Court and its Implication for CSA Trial

The study evaluated the administration of the children's courts under the following sub themes: location of the children courts, case management by the children courts, waiting rooms for CVSA, lack of provision of food to CVSA when they attend court, children's

⁸⁵³ Van Kessel G, 'European Trends towards styles in Criminal Procedure and Evidence' in M M Feelay and S Miyazawa (eds), *The Japanese Adversary System in Context: Controversies and Comparisons* (Palgrave MacMillan 2002) 225- 246 at 230.

⁸⁵⁴ Ibid.

⁸⁵⁵ Ibid.

⁸⁵⁶ *Op. cit* n 221.

court arrangement, administration of children courts, information to CVSA on various aspects of the court process, CVSA experience while waiting to testify, pre-trial court orientation for CVSA, lack of protective mechanisms to shield CVSA from face to face contact with the accused person, inadequate cooperation and coordination between the criminal justice agencies, inadequate training of officers, financial challenges to CVSA, lack of a CVSA protection unit and lack of a policy on CSA trials.

4.5.1 Location of the Children Courts

The study observed that all the selected children courts (Nairobi, Kisumu, Eldoret, Mombasa and Nakuru) are located at different buildings away from the main law courts building that houses all other courts in the respective stations. This is a notable administrative arrangement in keeping with the best interest of the child principle.⁸⁵⁷ The children courts are presided over by magistrates who are appointed through a gazette notice by the Chief Justice under the Children Act.⁸⁵⁸ The rationale for appointing specific magistrates appointed to handle children cases ensures that those with the interest in child cases are appointed and equipped with the relevant skills for the task.⁸⁵⁹ In one of the stations, the magistrate presiding over the children court was not gazzetted and had no prior training on handling CSA cases.⁸⁶⁰ According to the magistrate:

Handling children cases requires interest and special skills since they are different from ordinary criminal cases. It is therefore important that the office of the Chief Justice identifies those with interest in children matters for gazette to preside over children courts. In my case, I do not have the interest in children matters, I was not consulted and neither do I have special skills in children matters. I am however presiding over the court as part of my duty.⁸⁶¹

From the above narrative, the implication is that not all magistrates who preside over children courts are gazzetted, and specially trained to handle children cases. This defeats

⁸⁵⁷ *Op. cit* n 29 (UNCRC) Articles 3,9,18 and 40; n 57 Children Act Section 4.

⁸⁵⁸ *Op. cit* n 35, section provides for the creation of children courts to handle cases involving children.

Section 73(d) (ii) empowers the Chief Justice to appoint magistrates to preside over children courts.

⁸⁵⁹ *Op. cit* n 384.

⁸⁶⁰ The Resident Magistrate presiding over the Nairobi Children's Court was only two weeks old at the court, having been transferred from another station.

⁸⁶¹ Respondent no 44 in Appendix K.

the purpose of creating specialized courts for cases involving children under Section 73 of the Children Act. In addition, the study observed that some children cases were taken before magistrates who do not preside over children courts. It is important to emphasize that children cases should be handled by specially appointed magistrates who are trained on skills of handling children cases.⁸⁶²

4.5.2 Case Management by the Children Courts

The study found that children courts are classified as subordinate courts,⁸⁶³ and are not independent court stations but fall under the management of the Chief Magistrate's Courts, in whose jurisdiction they are located. Subsequently, the children's court magistrates also receive adult cases allocated by the respective Chief Magistrate's Courts. According to a magistrate interviewed by the study:

Although children courts are supposed to give priority to children matters, magistrates presiding over children cases are often under pressure from the Judiciary, the advocates and the litigants to finalize their cases in adult matters. They forget that this is a specialized court whose primary duty is cases involving children. Where adult case hearings are delayed, the excuse of having to handle children cases first is not entertained by either the Judiciary or the advocates. This is contrary to the rationale of setting up children courts to give priority to children cases. In order to deal with this problem, we often set aside specific days in a week when to handle children matters. However, adult matters are handled by the children courts on a daily basis. On the days when children cases are to be heard, we start with adult cases first and hear children cases afterwards. There is need to ensure that children courts give priority to children cases as envisaged by the Children Act when setting up the children courts.⁸⁶⁴

The magistrates presiding over children cases therefore handle not only children matters but adult cases too. All the children courts under the study set aside one or two specific days in a week when they handled children matters. Adult cases are however heard every

⁸⁶² *Op. cit* n 384.

⁸⁶³ *Op. cit* n 35 section 73(d) (i).

⁸⁶⁴ Respondent no 46 in Appendix K.

day of the week. The implication is that children cases are not heard on a daily basis by children courts, therefore, causing unnecessary delays in finalizing CSA cases.

The administrative arrangement, according to the FGD, is one of the factors that cause delays in the hearing of CSA cases which take between six to three years to finalize, as illustrated by the review of Mombasa Criminal Case no 3349/09. In this case, the accused faced a charge of attempted defilement of a fifteen year old girl who failed to testify in court after five adjournments, leading to an acquittal. Such adjournments discourage CVSA from going to court to testify especially where CVSA may have been intimidated by the accused person. An interview with the court prosecutor revealed that the CVSA could not be traced:

In this case, like many others where the CVSA is known to the accused person, intimidation of CVSA by the accused person at times makes it difficult for witnesses to testify in CSA cases. Other factors that make it difficult to prosecute CSA cases include delayed hearings since the children courts do not conduct trials on a daily basis but on specific days of the week. It would be better if children courts handled children matters exclusively to ensure speedy trial.⁸⁶⁵

The Mombasa Criminal Case no 3349/09 revealed that on the first hearing date, the prosecutor indicated that the CVSA and other witnesses were ready to testify but that particular day was for handling civil matters and not criminal matters. The case highlights the insensitivity of the court system to the special needs of CVSA and the frustration of witnesses who travel to court, but are turned away having been summoned to give evidence. The allocation of adult cases by the Chief Magistrates to the children courts, negates the rationale of having children courts located away from the main courts to protect their privacy, since CVSA end up being mixed with the adults. According to Temkin, such lack of sensitivity to concerns of sexual assault victims discourages them from testifying in court.⁸⁶⁶

⁸⁶⁵ Respondent no 13 in Appendix K.

⁸⁶⁶ *Op. cit* n 3.

4.5.3 Waiting Rooms for CVSA

None of the children courts under the study had any waiting room for CVSA who were spotted clinging to their parents/social workers. One CVSA guardian said that there was no special room for CVSA to sit as they waited for the trial:

We arrived at the court premises by 7.00 a.m. There was nobody to direct us on where to go and what to do. We had to wait outside the court where there are no sits. As we waited, the accused person came in. Upon seeing the accused person, the CVSA became terrified and came on me. I wish there were arrangements to ensure that CVSA have special waiting rooms which would protect them from any intimidation.⁸⁶⁷

Whereas Mombasa and Nakuru handled children matters on specified days in the morning hours, Nairobi, Kisumu and Eldoret children courts dealt with CSA cases in the afternoon. This caused some stress to some CVSA who were observed tired and complained of being kept waiting for long hours before testifying.

4.5.4 Lack of Provision of Food to CVSA When they Attend Court

Apart from the long waiting period, none of the children courts had any meal plans for CVSA who depended on those who accompanied them to court for something to eat. In the words of one parent:

We came to court in the morning before 8.00 a.m. as directed by the court summons. It is now 4.00 p.m. although the court summoned us to come and give evidence, they have not catered for our transport or anything to eat. If I knew that the courts do not provide any food for the children, I would have carried some for the child. We have waited the whole day until 3.00 pm when her evidence was taken. However, no court official even asked us if the child had eaten anything.⁸⁶⁸

In the absence of meal provisions, the ability of CVSA to testify coherently and confidently in the afternoon hours was negatively affected. This contributed to their

⁸⁶⁷ Respondent no 24 in Appendix K.

⁸⁶⁸ Respondent no 18 in Appendix K.

vulnerability during their testimony. There was no arrangement in any of the courts whatsoever to feed CVSA, some of whom arrived in the morning, but were finally asked to give evidence at about 4 p.m. They were observed hungry, yet they were expected to give evidence. According to the magistrates interviewed, neither the judiciary, nor the prosecution had financial allocation to feed the children. According to one magistrate interviewed by the study:

Yes it is true that the court does not provide any meals to CVSA or to any children who appear as witnesses. There is no budget to that effect from the Judiciary. Once in a while when I see a child who is very hungry but has to give evidence, I can only spend my own money to buy a soft drink. Since many of the CVSA give evidence in the afternoon, it would be appropriate for the court to provide at least lunch. However, in the absence of such budgetary allocation, it is difficult to feed the children.⁸⁶⁹

The decision by the courts to take CVSA's evidence in the afternoon is not in the best interest of children. It appears to be a concern about not keeping advocates and adult litigants waiting in a court meant for children issues. The administration of the children courts is therefore not sensitive to CVSA.

The study observed that most CVSA reported to court as early as 7 a.m. but waited between three to eight hours in court before being called to testify as all the courts started the day's proceedings by mentioning all cases for the day, then dealing with adult matters, leaving CSA cases to be heard last in all the selected children courts. One of the reasons given by the courts was that there was need to clear all cases involving adults in the open court before relocating to the private chambers for the hearing of CSA cases. According to a magistrate interviewed by the study:

I do prefer to hear adult cases first so that advocates are not kept waiting. This also ensures that I am not in a hurry to finish CSA cases since there would be no advocates waiting by the time I start the CSA cases. Because we get adult cases allocated from the Chief Magistrate's Court, I am not

⁸⁶⁹ Respondent no 45 in Appendix K.

able to tell the Chief Magistrate not to allocate me adult cases because of children cases. I am expected to handle both.⁸⁷⁰

From the above narrative, the hearing of CSA cases depends on what time the courts finalize adult cases allocated for hearing on the same day. The administrative procedure is insensitive to the long waiting period that it subjects CVSA to. Seventy four percent of CVSA described the waiting period before testifying as fearful, confusing, shocking, and tense. They felt bored, hungry, tired and found the waiting period too long. Only 26% of the CVSA felt confident during this period as they were accompanied by social workers and counselors, emphasizing the importance of psycho-social support to CVSA.

4.5.5 Children's Court Arrangement

The study found that there are inadequate administrative arrangements by the court to ensure a child-sensitive court environment where CVSA can express their views and give their best evidence about the abuse. Apart from the Nairobi Children's court, the other children courts visited had the same set up as ordinary courts. The magistrate's sitting position is raised above the rest and the air of seriousness intimidates even adults. The unusual quietness that characterizes the court room, officers in uniform, people handcuffed, others speaking in low tones and the gloomy faces all contribute to the tense atmosphere.⁸⁷¹ It was observed that adults testifying in court also appeared tense implying that court environment is generally intimidating.⁸⁷² Court officers wore official suits emphasizing the seriousness of the nature of court business. One CVSA described the court arrangement as:

The courtroom was a very strange place. Everybody was quiet. There was a police officer in uniform. I did not understand why he was there. I feared I would be arrested since I saw some adults in handcuffs. The magistrate sat in front on a seat that was big and there were policemen standing next to him. Everybody seemed afraid. I did not understand what was going on. I saw lawyers dressed in black suits. This was very intimidating.⁸⁷³

⁸⁷⁰ Respondent no 44 in Appendix K.

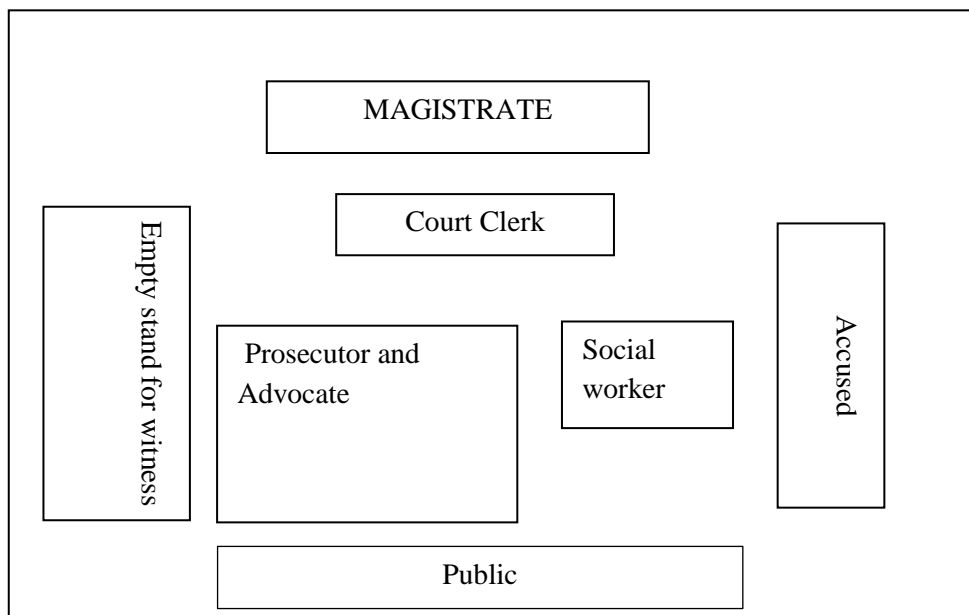
⁸⁷¹ *Op. cit* n 109.

⁸⁷² *Ibid.*

⁸⁷³ Respondent no 77 in Appendix K.

The court environment in all the selected children courts was generally not conducive for CVSA to express their views and opinion. The court environment was not child-sensitive and the administrative arrangements did not take into account the need to take the evidence of CVSA immediately after the abuse. The children court lay out in all the selected courts was similar in all respects to the arrangement in cases involving adults where the magistrate sits at the front raised platform. The accused person sits on one side and witnesses on the side opposite the accused person while the prosecution and advocates as well as the court clerk sit in the middle. The court layout was the same in both open court and magistrates private chambers as illustrated by Figure 3 below.

Figure 3: Children's Court Arrangement



The court arrangement shown above exposes CVSA to direct face to face contact with the accused person. This has the effect of disempowering CVSA from testifying. According to one CVSA:

The most difficult part of my testimony was facing the accused person in court and narrating how he abused me. Where I stood when giving evidence was directly opposite the accused person who looked at me directly in the face. This reminded me of his warning that I should not tell

anybody about the abuse or he will punish me. I wish there was a better arrangement where I do not have to see the accused person as I testify.⁸⁷⁴

In situations where CVSA are threatened by the accused person against revealing the abuse, this kind of court arrangement enhances CVSA's vulnerability upon seeing the accused person. The court arrangement is not in conformity with the best interest of CVSA under the UNCRC.

The study observed one CVSA seeking cover under a table in the courtroom on seeing the accused person. Upon being interviewed, the CVSA said:

I was scared when I saw the accused person in court. I wondered why he was allowed in court. I could not subsequently narrate how he abused me because I remembered his warning to me not to tell anybody about the abuse.⁸⁷⁵

It subsequently became difficult for the prosecution to convince the CVSA to testify. Although CSA cases were mentioned in open courts but heard in the magistrates' chambers, due to close proximity with the accused person, some CVSA were observed crying upon seeing the accused person while others kept unusually quiet. For those who managed to talk, it took a very long time and patience from the prosecution to convince them to narrate their story to the court.

This observation is consistent with the views of all the CVSA interviewed who said that they felt uncomfortable with the court arrangement due to the proximity (2 to 5 meters away)⁸⁷⁶ to the accused person in court which intimidated them. They preferred not to have any contact with the accused persons at all especially during their testimony. The court arrangement and layout in the selected children courts is therefore not sensitive to the needs of CVSA and does not provide a child friendly environment for CVSA to participate in the proceedings and express their views effectively as per the procedural justice framework for CSA trial.

⁸⁷⁴ Respondent no 78 in Appendix K.

⁸⁷⁵ Respondent no 63 in Appendix K.

⁸⁷⁶ The proximity between the accused and the CVSA in court was further reduced in cases where the trial was conducted in the privacy of the magistrates' chambers which are much smaller than the open courts.

4.5.6 Lack of a mechanism to ensure CVSA are informed of the court process and its outcome

The study found the pre-trial procedure lacking a mechanism of ensuring that CVSA receive relevant information about the trial contrary to child victims' right to information as provided by the UNGJMCCVWC.

My mother received court summons that I was expected to testify in court. Neither she nor I knew what was expected in court. When we reached the court, there was nobody to tell us what to do or what not to do. It was a long waiting period before a police officer in uniform called my name and told me to get inside the courtroom. There were many people. I did not know what to say and how people react to whatever I said.⁸⁷⁷

Although the CVSA are in the strict legal sense the complainants in a CSA trial, there was no procedure to ensure that they were kept informed of the developments in the cases, what was expected of them and what they should expect in the trial. They relied on their families to follow up the case as opposed to receiving information from the court. This is in violation of children's right to information on matters that affect them under the best interest principle. This led to CVSA missing court on the hearing and sentencing days, a fact that discouraged many of them from reporting sexual abuse to the police.

The study found that there was no procedure or practice of giving CVSA relevant information about the justice process, what to expect and what is expected of them. Subsequently, only 8% of CVSA learnt from the police that they needed to testify in court while 92% received the information from family members and social workers. The implication is that CVSA's access to information about the justice process is largely the concern of family members and social workers, with little input from the police whose responsibility includes ensuring that CVSA are informed about when and where the trial takes place according to the procedural justice framework for CSA trial. Failure by the police to ensure CVSA become familiar with them in advance of the trial, according to magistrates interviewed, contributes to the tension CVSA experience during their

⁸⁷⁷ Respondent no 62 in Appendix K.

testimony in court, further enhancing their vulnerability. In the words of one CVSA interviewed by the study:

My mother told me that the police required me to say in court how I was sexually abused. I did not know what to expect. I feared that they will punish me for being a bad child. In court, people were unfriendly, some of them were handcuffed. I did not know if I would be handcuffed too. I was too afraid. Nobody explained to me what the court process is like.⁸⁷⁸

Due to the failure to inform CVSA of the requirement to testify in court, the study found that majority (71%) of CVSA felt fearful, confused and shocked, tense, shy, nervous because they did not know what to expect in court. Only 29% of CVSA, most of whom had the support of social workers felt confident as they knew what to expect in court, confirming the importance of social support services to CVSA.

Whereas CVSA generally expected to find the police/ prosecutor, the accused person, the magistrate, their parents, social workers, lawyers, children officers, their teachers and family members in court, 95% of CVSA did not know what to expect of them and were anxious about their court appearance. Only 5% of CVSA (those represented by NGOs) had a rough idea of the court process. Majority of CVSA therefore lacked knowledge of the court process, enhancing their vulnerability. This increased the potential of intimidating them while testifying under the adversarial legal system procedures, due to the uncertainty of what to expect in court. According to a defence lawyer:

Children generally do not understand the court process. In addition, there is no mechanism to ensure that they are adequately prepared to testify in court. They hardly know what to expect or what is expected of them when they come to testify. Due to lack of information, it is very easy to intimidate CVSA and ensure that they contradict their earlier recorded evidence. Such contradiction creates a doubt, the benefit of which serves to set the accused person free.⁸⁷⁹

⁸⁷⁸ Respondent no.76 in Appendix K.

⁸⁷⁹ Respondent no 55 in Appendix K.

The court procedures therefore failed to comply with the right of CVSA to be provided with all relevant information regarding the trial as provided by Article 35 of the Constitution of Kenya.

4.5.7 Lack of Pre-Trial Court Orientation

The study found that there is no mechanism to ensure that CVSA visit the court before their testimony day so as to be orientated and familiarize themselves with the court business. The lack of a pre-trial court orientation for CVSA implied that CVSA found themselves in unfamiliar court grounds with many people, some in handcuffs on the day of their testimony. The resultant anxiety, nervousness and fear were evident on CVSA who stayed close to those who had accompanied them to court. Ordinarily, children play freely in any situation,⁸⁸⁰ but that was not the case in all the courts visited. Many CVSA knew they were to narrate the abuse in court, but had no idea about the procedure. In addition, they did not know what to expect or what was expected of them in court. This was a problem that was observed throughout in all the courts visited.

Many CVSA said that they had never been brought to court before the day of the testimony. It was the first time for many CVSA to appear in court. They did not understand the court procedure. They wondered what was the role of the different officers they encountered in court. The different stages of the trial process did not make any sense to them. In their own view, the court was a strange area where they were required to tell everyone how they were abused. In the words of one CVSA:

I was very afraid when I saw many people in court. They all looked so serious and used words which I have never heard before. I did not know how to address the magistrate or the prosecutor. I did not understand when to sit or stand or bend, but I saw people do that. I feared I could be punished if I made I mistake. I just wanted to finish and go home.⁸⁸¹

In one notable incident in Nakuru, the unfamiliar court environment that confines movement of people could not be understood by one CVSA who walked out and left the court proceedings going on.

⁸⁸⁰ *Op. cit* n 109.

⁸⁸¹ Respondent no.59 in Appendix K.

4.5.8 CVSA Experience while waiting to Testify

The study established that many CVSA found themselves in unfamiliar court environment as they waited to testify. Majority (81%) of CVSA described their experience using words such as fear, shock, nervousness, anxiousness, bad, unhappy, apprehensive, shame, and shy. This confirms the findings by Temkin in a study which observed CVSA looking anxious, apprehensive and some crying as they waited in court for their cases to be heard.⁸⁸² The study finding is consistent with the views of social workers who said that the waiting period is one of the sources of stress to CVSA. One CVSA described the waiting period as follows:

We arrived at the court as early as 7.30 a.m. and waited until 2.30 p.m. when I was called to testify. All this time, nobody told me what to do, what to expect or what not to do. I saw adults talking in low voices as if they feared something. I was terrified; I did not know how long the whole process would take. I just saw police officers call people and direct them inside the court. I had no idea what happened to them when they entered the court.⁸⁸³

Despite the anxiety associated with the waiting period, the study observed that there were no professional child counselors employed by the government to counsel the children and prepare them to testify in court as already discussed. The implication is that many CVSA approached the witness box while already under stress and without the benefit of psychosocial support.

Only 19% of CVSA (some of the CVSA accompanied by social workers) looked forward to the court appearance in anticipation of relief, healing, good outcome, happiness and excitement. They hoped that they would be believed by the court. They expected not to be blamed for the abuse but that the court would find the accused persons guilty and punish them. Their view of the court and confidence in testifying proves that psychosocial

⁸⁸²Temkin observed a group of child victims in a London court waiting to give evidence. She concluded that their fear was due to fear of not knowing what to expect in court, and seeing many unfamiliar faces.

⁸⁸³Respondent no 76 in Appendix K.

support enhances the confidence of CVSA to testify in CSA matters. This is supported by the sentiments of a social worker who said:

Most of the CVSA who testify in court lack psycho-social services because the courts do not seem to have any psycho-social support service providers attached to them. CVSA, having suffered the traumatic effects of CSA are therefore re-victimized by the court process. There is need to ensure that all CVSA undergo counseling and receive psycho-social support before they testify.⁸⁸⁴

The above narrative is consistent with the psychoanalytic theory as a therapy to sexual abuse victims.⁸⁸⁵

4.5.9 Lack of Protective Mechanisms to Shield CVSA from Face to Face Contact with the Accused Person

In all the children courts visited, the study found that there was no procedure of shielding CVSA from possible face to face contact with the accused person in court before they testified. Many CVSA were therefore able to see the accused persons within the court, setting in the fear of talking about the abuse. Some of them responded that they had been warned by the accused persons during the abuse not to talk about it to anyone. This was the case with respondent no 63:

I was scared when I saw the accused person in court. I wondered why he was allowed in court. I could not subsequently narrate how he abused me because I remembered his warning to me not to tell anybody about the abuse.⁸⁸⁶

At Nakuru Children's Court, the study observed one CVSA⁸⁸⁷ screaming upon seeing the accused person, while another CVSA refused to talk at all when asked to take the witness stand. The CVSA looked down at the floor, clinging on the social worker who had brought her to court, prompting the adjournment of the case as she was unable to give

⁸⁸⁴ Respondent no 33 in Appendix K.

⁸⁸⁵ *Op. cit* n 96.

⁸⁸⁶ Respondent no 63 in Appendix K.

⁸⁸⁷ Respondent no 72 in Appendix K.

evidence after seeing the accused person in court. When interviewed after the court session, the CVSA responded that:

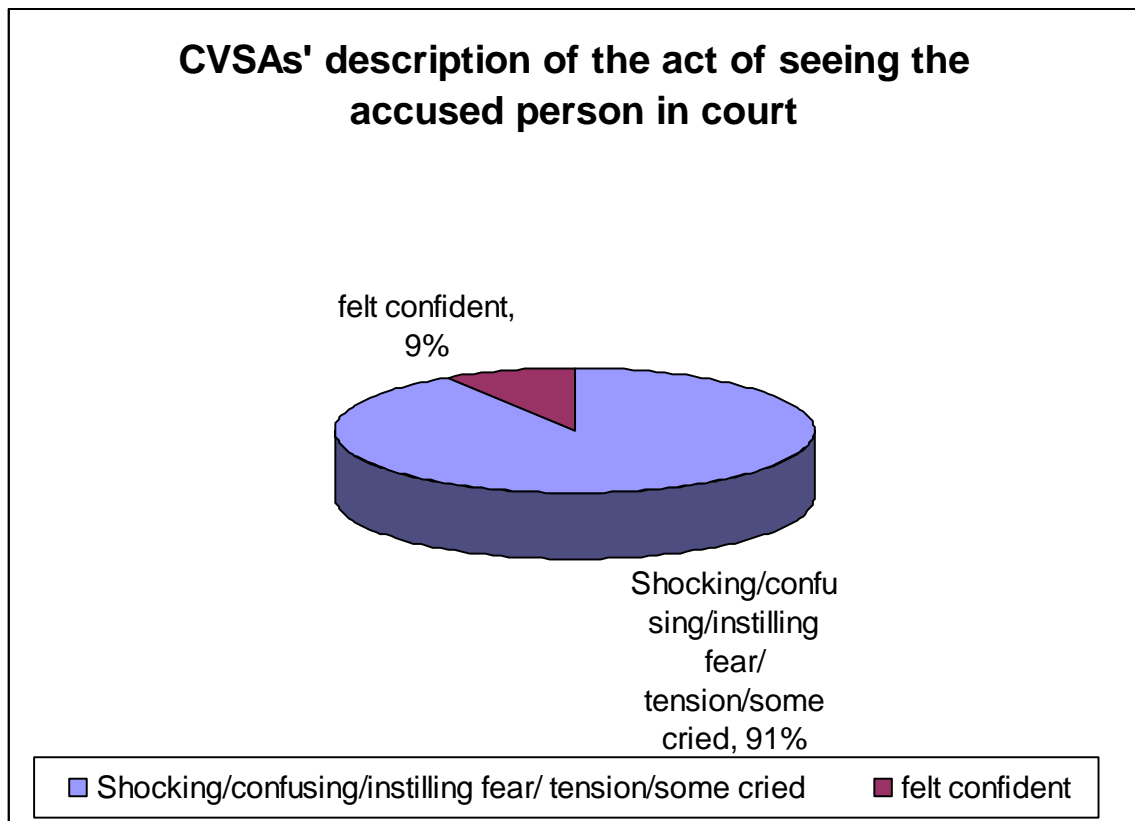
He (accused) warned me not to talk about the abuse to anyone or he will sexually abuse me again. I did not know that he would be present in court when I testify. There was nobody to ensure my safety. What would happen after I testify? I could not understand why he came to court.⁸⁸⁸

During the interviews, majority (91%) of CVSA described the act of seeing the accused person in court using words such as shocking, confusing, instilling fear, tension, nervous, anger, heart-ache as some cried. One CVSA, a 13 year old girl⁸⁸⁹ completely refused to give evidence in a Kisumu court, but during the interview revealed that she had been threatened with death by the accused person during the abuse and so she feared for her life. The study finding confirms the vulnerability of CVSA during and after the abuse, the consequence of the abuse on the CVSA and how CSA disempowers and incapacitates CVSA from testifying. Only 9% of CVSA felt confident enough to testify upon seeing the accused person in court as illustrated by figure 4 below.

⁸⁸⁸ Respondent no 70 in Appendix K.

⁸⁸⁹ Respondent no 91 in Appendix K.

Figure 4: CVSA's Description of the act of seeing the accused person in court



Majority of CVSA felt apprehensive about court appearance. They described their experience of seeing the accused person with words such as shock and tension. The already vulnerable CVSA had to face the accused person in court without special protection measures. This further enhanced their vulnerability and disempowered them from giving their best evidence contrary to the UNGJMCCVWC.

4.5.10 Inadequate Cooperation and Coordination between the Criminal Justice

Agencies

The criminal justice agencies involved in the trial of CSA namely the Office of the Attorney- General, Judiciary, Children Department, Probation Department and the Police did not seem to work together as a system, but rather independent of each other. The effect is that the court would not know in advance when a CSA case was to be filed so as to prepare and hear it at the earliest opportunity, hence unnecessary delays. Likewise, the children department did not get an opportunity in advance to arrange for the CVSA safety and care as required by the Children Act.

CVSA in incest matters continued to live with their families as they waited to testify. This caused difficulty to CVSA testifying against the accused persons in incest cases. Officers such as probation officers and other social workers skilled in social work who could offer psychosocial services to CVSA, were not involved in the trial of CSA as far as the support to CVSA was concerned. Ironically, the probation officers were involved in preparing pre-bail reports and pre-sentence reports to the magistrates for consideration of bail and sentencing of the accused persons respectively. This shows the disconnect amongst the various criminal justice agencies which should work together as a system within the CJS. According to one social worker:

The trial of cases involving children requires that all those involved work together as a team in order to ensure a speedy trial and justice to both the accused person and CVSA. However, the police work independently and the courts are not aware of when a CSA case is likely to be filed in court. The children department plays a minimal role in CSA trial cases. As social workers, we are not involved by the courts at all unless we are contracted by NGOs representing CVSA. The disconnect in the working of the agencies involved in CSA trial makes it difficult to protect the interest and rights of CVSA.⁸⁹⁰

4.5.11 Inadequate Training of Officers

The study found that magistrates handling children matters are not adequately trained on special relevant skills necessary in the administration of children courts. All of them referred to the Children Act and the Sexual Offences Act in handling CSA. However, they lacked knowledge on the secret nature of CSA, the effects of CSA on CVSA's ability to testify, effect of PTSD on CVSA upon seeing the accused person, communication skills with children and developmental stages of a child amongst many others. The gap in knowledge hindered the officer's ability to protect CVSA during their testimony.

⁸⁹⁰ Respondent no 34 in Appendix K.

A magistrate interviewed in Kisumu informed the study that trying CSA cases is traumatizing while he lacked any skills in handling CVSA and the trial itself left him traumatized.

Although I handle CSA cases, if I had an option, I would not preside over these cases. Every time I preside over CSA cases I get traumatized. I have never been interested in handling children matters. Even in my own house, issues to do with the children are handled by my wife. I am therefore not competent to handle CSA cases and I get frustrated every time I have to preside over them. This is an area that requires specialized training in skills for magistrates who have an interest in dealing with children.⁸⁹¹

The above sentiments highlight the fact that some judicial officers lack special skills to be able to understand the special needs of CVSA and how to handle them. The effect is that when CVSA appear before such magistrates, they are left in the hands of the prosecution and the accused persons/ their advocates due to the passive role magistrates are expected to play in the adversarial system.

According to magistrates, some prosecutors are incompetent, insensitive, and hostile and intimidate the CVSA while others are the exact opposite. All the police respondents were in agreement that investigating/ prosecuting CSA cases or handling CVSA required special skills over and above the training of a police officer and experience over and above prosecution/ investigation of general crimes. According to a prosecutor with over twenty years' experience:

In order to effectively prosecute CSA cases, the initial training that police officers receive at Kiganjo Police Training College upon recruitment is inadequate. There is need to enhance the skills of police officers involved in CSA cases in the following areas; counseling skills, child friendly language, sign language to handle deaf and dumb CVSA, child psychology, gender based violence, child rights and CSA investigation.⁸⁹²

⁸⁹¹ Respondent no 42 in Appendix K.

⁸⁹² Respondent no 15 in Appendix K.

Just over half (54 %) of the police respondents considered themselves to be adequately equipped to handle children cases since they had attended training on prosecution generally, counseling, and children rights under the Children's Act and had experience in general crime investigation. However, 46% did not consider themselves well equipped with the special skills to handle CVSA since they had no training at all apart from the general recruitment training at Kiganjo Police College where all police recruits pass through before being employed as police officers. Although the respondents rightly pointed out the specific courses/ skills which they require to equip them in handling CVSA, those who considered themselves well equipped had only basic skills in handling children generally, but not in handling CSA victims.

Police officers considered their work in handling CVSA as very formal, following strict functions of the police force. There was no mention of any assistance given to the CVSA such as counseling, psycho-social support, financial and material assistance or any advisory role whatsoever to the CVSA or their families. According to one police officer:

Our training as police officers is to deal with crime and criminals. Investigating and prosecuting CSA cases is a special area that requires special skills such as understanding children and being able to get information from them. Our training does not equip us with skills to handle these cases. We are used to handling adult criminals who are rough and violent. Dealing with CVSA is therefore not part of our training and so we find it very difficult to handle children cases.⁸⁹³

The above narrative explains and supports the sentiments expressed by the CVSA during the interviews that they viewed the police officers as insensitive, intimidating, harsh, serious and indifferent to their special needs. Seventy percent of the police respondents were of the view that prosecution/ investigating CSA cases is difficult and the success rate is low compared to other crimes hence the difficulties they experience in handling CVSA while testifying in court. Thirty percent of the police officers however thought that prosecuting CSA cases/ handling CVSA is manageable although with some difficulties.

⁸⁹³ Respondent no 8 in Appendix K.

4.5.12 Financial challenges to CVSA

All the respondents including CVSA were in agreement that lack of financial assistance from the courts hampered their ability to testify in court. Some CVSA were therefore not able to afford the services of a lawyer, psychosocial services, travelling, meals and medical attention.

Ever since my child was sexually abused, I have spent so much money. The entire process is very expensive. The expenses include travelling to the police station to report the abuse, medical expenses, travelling to court to testify on various occasions amongst many other expenses. My earnings are not much. I can barely afford to feed the family. I have had to borrow money at times to be able to meet the expenses. I am however unable to pay for the services of an advocate to represent my child.⁸⁹⁴

The financial inability of the CVSA parents/ guardians was therefore a weakness of the system despite the provision by Section 199(a) (ii) of the Children Act which allows the Minister in charge of children department to authorize expenditure on services rendered to children in need of care and protection which includes CVSA. Section 394 of the Criminal Procedure Code provides for witness reimbursement of travelling expenses to court once they testify. Lack of this information by CVSA guardians is attributed to the failure by the courts to ensure that CVSA are adequately informed of their rights according to the UNGJMCCVWC.

CVSA and their guardians said that they did not know that they are entitled to be reimbursed travelling expenses. The court records showed that prosecution did not apply to court for orders to reimburse witnesses their travelling expenses. The lack of knowledge by CVSA and their parents and the failure by the court to honour such reimbursements disabled many CVSA from testifying in court when cases were adjourned after the first date set for their testimony. Although Section 35 of the Sexual Offences Act provides for the treatment of sexual offence victims in public hospitals at the expense of the state, there is lack of public awareness in this regard. Many CVSA said

⁸⁹⁴ Respondent no 20 in Appendix K.

that they had difficulty with raising medical expenses. They preferred to go to private hospitals as opposed to public hospitals due to the social stigma associated with CSA.

The study found out that CVSA and their families were required to pay for the medical examination and filling of the police medical investigation forms. However, the required fee of Kenya shillings one thousand was beyond the ability of many CVSA and their families, majority of whom had to borrow, making their quest for justice an expensive exercise.

4.5.13 Lack of a CVSA Protection Unit

The study found that there is no system or mechanism in any of the selected courts for the protection of CVSA and provision of necessary support services such as counseling, psycho-social support, legal or other relevant services. Although section 35(2) of the Sexual Offences Act provides that the court may order the treatment of victims of sexual violence, including counseling, the study found that there is no mechanism specifically set up to implement such provisions in respect to CSA. According to one magistrate:

It is difficult to protect CVSA although we now have the Children Act and the Sexual Offences Act. These are only Acts that provide for rights and offences and punishment. They do not provide for the procedure that is to be applied in protecting victims of sexual assault. For example, section 31(4) of the Sexual Offences Act allows the court to use a witness protection box in the protection of victims of sexual offences, there is no procedure as to how this can be done. In addition, there are no witness protection boxes provided in the courts. This makes it very difficult to apply the Sexual Offences Act in protecting CVSA.⁸⁹⁵

The Witness Protection Agency, set up in 2011 under the Witness Protection Act, is now operational but does not have a special unit to deal with CVSA. Thus, despite the enactment and implementation of the Witness Protection Act, CVSA remain unprotected as they testify in court since their concerns are not captured by the provisions of the Act.

⁸⁹⁵ Respondent no 46 in Appendix K.

4.5.14 Lack of a Policy on CSA Trials

Despite the provisions of section 46 of the Sexual Offences Act that the Minister in charge of legal affairs and public prosecutions should prepare a national policy framework for the implementation and administration of the Sexual Offences Act in order to secure the care of victims of sexual offences, the study found that there is no specific policy on the prosecution of CSA which is the concern of the study. There is therefore a gap in policy as far as CSA trial is concerned.

The administration of the children courts lacks effective ways of administering justice according to the UNGJMCCVWC. The court administration has not created a conducive environment for CVSA to testify. In addition, the failure to put up mechanisms to assist CVSA testify effectively and coherently violates their right to participate in the judicial process according to the UNCRC. The administration of the children courts focuses more on the traditional goal of the CJS which is to establish the guilt or innocence of the accused.⁸⁹⁶ The court administration does not incorporate pre-trial measures that enable CVSA to tell their story of the abuse to court.

Recommendations

The study makes the following recommendations in order to address inadequacies of the pre-trial procedure in CSA cases in Kenya.

Location of the Children Courts

Since the study found that CVSA find the court atmosphere tensed, the study recommends that children courts be located away from the main court stations that house ordinary criminal matters. According to one CVSA:

The court was full with so many adults who appeared afraid. They spoke in very low voices. Some of them were handcuffed. I therefore feared that I would also be handcuffed.⁸⁹⁷

The above narrative confirms the study finding that children matters should not be handled in the same court where adults are tried. This is in conformity with the best interest of children and observation of their dignity and privacy. Children courts should

⁸⁹⁶ *Op. cit* n 191.

⁸⁹⁷ Respondent no 73 in Appendix K.

therefore be located in their own compound away from the adult criminal court. Children courts' priority should be to handle children cases on a daily basis so as to avoid unnecessary delay in the disposal of the cases. Children courts are specialized courts and should be given the priority that they deserve due to the sensitivity of children matters. Magistrates handling children matters should prioritize children cases. Where they must attend to adult matters, then this should be after they finish with the children cases and not the other way round.

In Wisconsin state of the United States, there is a special children court known as Wisconsin Juvenile court, located away from other ordinary courts that handle adult matters.⁸⁹⁸ The court has the mandate to adjudicate all matters regarding children in Wisconsin state and is managed by a chief judge who is in charge of 4 other judges.⁸⁹⁹ The judges are specially trained on developmental needs of child witnesses and are assisted by child experts from various fields such as social work, psychiatry, psychology, counseling and law.⁹⁰⁰ The Wisconsin Juvenile Court does not only house the children court, but has a medical assessment, recreational, boarding, catering and counseling facilities. Children cases are therefore given the deserved special attention and privacy in the best interest of children. Kenya can learn lessons from the Wisconsin Juvenile Court.

Case Management by the Children Courts

The study recommends that the Chief Justice issues practice direction on how children cases are to be managed. There is need to set a limit period within which children case must be finalized. Due to the traumatic effect of CSA, it is important that CVSA testify within four months of the abuse occurring so as to ensure that CVSA do not forget the details of the abuse during their testimony.⁹⁰¹ According to one magistrate:

Most CVSA testify between four and thirty six months after the abuse occurred. Subsequently, the delay in taking the testimony of CVSA results into a situation where most CVSA are not able to recollect and state the details of the abuse with precision. This often leads to several

⁸⁹⁸ P Platt, *Wisconsin Juvenile Court; A Guide to the Children's Code, Juvenile Justice Code, Related Statutes and Caselaw* (JURIS Press 1996) 311.

⁸⁹⁹ Ibid.

⁹⁰⁰ Ibid.

⁹⁰¹ *Op. cit* n 109.

contradictions on material facts between the CVSA testimony and their statements recorded with the police. Such contradiction creates doubts in the evidence of CVSA who is the key witness in a CSA trial. The benefit of the doubt results into an acquittal of the accused person. There is need to limit the period within which the evidence of a CVSA must be taken by court after the abuse occurs.⁹⁰²

Protracted CSA cases have negative effect on CVSA.⁹⁰³ Hearing of CSA cases should be conducted on continuous days from the beginning of the trial to the end, without unnecessary adjournments which extend beyond two weeks.⁹⁰⁴ Section 1080 of the California Penal Code gives priority to cases where children are victims by recognizing that children need to complete their testimony in a short period after the abuse.

In Scotland, the Lord Justice General occasionally directs judicial officers on specifics of justice administration concerning children.⁹⁰⁵ In 1990, the Lord Justice General of Scotland (the most senior judge) issued practice direction to judges giving guidance on the use of discretionary measures in cases where children were victims or witnesses.⁹⁰⁶ Trial judges therefore have considerable discretion regarding the manner in which a child's evidence should be presented in court.⁹⁰⁷ Where children are to give evidence in open court, there are a number of modifications to the standard trial procedure making the court appearance less stressful to children.⁹⁰⁸ Kenya can learn from California and Scotland on how to regulate the period within which the evidence of CVSA must be taken by courts.

Waiting Rooms for CVSA

The study recommends that every children court should have a special waiting room for CVSA designed to protect them from face to face contact with the accused person when they go to court to testify. There should be measures to ensure that when CVSA arrive in the court room, they proceed to the waiting room where the accused person will have no

⁹⁰² Respondent no 43 in Appendix K.

⁹⁰³ *Op. cit* n 47.

⁹⁰⁴ *Op. cit* n 384.

⁹⁰⁵ *Op. cit* n 52.

⁹⁰⁶ *Ibid.*

⁹⁰⁷ *Ibid.*

⁹⁰⁸ *Ibid.*

access to them. In addition, it is important that on the day of plea taking, the court issues an order that stops the accused person from interfering with CVSA or the investigation process in any way.

The constitution of the State of Mississippi in the United States provides for victim protection from further harm by the accused.⁹⁰⁹ In addition, the victim has a right to give his/her view during the bail hearing.⁹¹⁰ The judge must take into consideration concerns of victims of crime on matters concerning bail and impose conditions that ensure their safety.⁹¹¹ In England, the Child Liaison Officer is responsible for liaising with the Crown Prosecution Service on practical arrangements for CVSA to attend court.⁹¹² This includes ensuring that the person accompanying CVSA to court is informed about the location of the court, a separate entrance from that used by the general public and a separate waiting area that ensures CVSA do not see the accused person before their testimony.⁹¹³ Subsequently, CVSA are able to testify confidently without the stress associated with seeing the accused person prior to their testimony in the absence of special and separate waiting rooms for CVSA.⁹¹⁴ A model court building with special facilities for child witnesses is the Glasgow Sheriff court in Scotland.⁹¹⁵ Kenya can learn lessons on how to ensure that CVSA are comfortable in court as they wait to testify in CSA cases.

Lack of Provision of Food to CVSA When they Attend Court

The study recommends that in its budget, the Judiciary should set aside finances to provide children who participate in the judicial process either as witnesses or victims or accused persons with meals on the day they are required to appear in court. England, Australia, New Zealand, Canada, Germany, Israel and USA are examples of countries where children who participate in the judicial process are provided with meals.⁹¹⁶ This is consistent with the best interest of children principle and ensures that they are well fed and have the energy to withstand the stress of testifying in court.⁹¹⁷

⁹⁰⁹ Section 24 of the Mississippi Constitution of 1890.

⁹¹⁰ *Ibid.*

⁹¹¹ *Op. cit* n 909.

⁹¹² *Op. cit* n 52.

⁹¹³ *Ibid.*

⁹¹⁴ *Op. cit* n 47.

⁹¹⁵ *Ibid*

⁹¹⁶ *Ibid.*

⁹¹⁷ *Ibid.*

Children's Court Arrangement

The study recommends that children courts be modified into child friendly courtrooms to enable CVSA to testify with ease, coherently and consistently. This will ensure that children are comfortable when they have to testify in CSA cases. There is need for a complete departure from the adversarial court arrangement in adult cases. The courtroom should have a protective screen that ensures CVSA testify in the presence of the accused, but shielded from face- to-face contact with him/her.⁹¹⁸ Protective screens are used in CSA trial in many states in the USA and in England and have enabled CVSA to testify without being intimidated by the presence of the accused in face-to face contact situation.⁹¹⁹ Other measures include television links and use of intermediaries. These are discussed in detail in chapter five.

The study recommends that the children court arrangement be modified to a conference type scenario as opposed to the adversarial structure in which the judges' position is elevated and appears intimidating.⁹²⁰ The study found that apart from Nairobi Children's Court, all the other courts still used the ordinary court set up with the magistrates' position raised above the ground to form a platform, probably to emphasize the power and authority of the court. The Nairobi Children's Court had a conference table set up where the magistrate shared the same table with all actors in the case in a conference like set up. This arrangement had the effect of reducing the tension associated with court environment, therefore more children friendly. It was the only court which was near child friendliness in its set up while in the other courts the set up was more like the ordinary courts, very intimidating to CVSA. Nairobi Children's Court was also the only court that had a witness protection box⁹²¹ in compliance with section 31(4)(a) of the Sexual Offences Act⁹²² to shield CVSA from direct face to face contact with the accused person during their testimony. However, the witness box was not being used for its intended purpose, but as a storage area for court files and exhibits, negating the purpose for which it was set up.

⁹¹⁸*Op. cit* n 52.

⁹¹⁹ *Ibid.*

⁹²⁰ *Ibid.*

⁹²¹ The witness box was reportedly an innovation by a magistrate who presided over the court up to the year 2003 long before the Sexual Offences Act 2006 was passed. Section 31(4) (a) provides for a witness box to enable vulnerable witnesses testify in court.

⁹²²*Op. cit* n 36.

In England, the informal conference type of arrangement relaxes everyone in court including CVSA.⁹²³ This provides a friendly environment for all the parties involved in the trial process. However, as much as possible CVSA must be protected from direct face to face contact with the accused. The court set up should be informal and police officers, judges and magistrates should not wear their official court attire which has been found to intimidate CVSA.⁹²⁴ In Britain, judges and lawyers remove wigs and gowns when handling cases involving child witnesses. In order to reduce the formalities in court and relax the environment to enable CVSA testify, England,⁹²⁵ Australia and the USA did away with the formal court dressing by both counsel and the magistrate/judge. The various measures to make the courtroom informal for cases involving children were discretionary in most jurisdictions, but slowly came to be given statutory force as is the case in the USA where a child has a statutory right to a support person under the Victims of Child Abuse Act of 1990.

CVSA should not testify from the witness box which many of them view as isolating them and putting them on trial.⁹²⁶ The courts should be equipped with suitable chairs for children. The courtroom should be fitted with proper lighting system and voice amplifier so that CVSA who speak in low voice can be clearly heard.⁹²⁷ Every children court needs to be fitted with a live-video link which has the advantage of protecting CVSA from all the adverse effects of the courtroom layout.⁹²⁸

Lack of a mechanism to ensure CVSA are informed of the court process and its outcome

The study recommends that a mechanism be established by the Judiciary to ensure that CVSA receive information on every aspect of the trial. Simple brochures in Kiswahili and English should be developed and given to the guardian and CVSA. A social worker attached to the court is best placed to explain to the CVSA and guardian about the court process and what is expected of them. In addition, they need to explain to CVSA what to expect in court so as to remove the fear and anxiety associated with lack of information.

⁹²³ Ibid.

⁹²⁴ *Op. cit* n 109.

⁹²⁵ Section 26 of the YJCEA.

⁹²⁶ *Op. cit* n 52.

⁹²⁷ Ibid.

⁹²⁸ *Op. cit* n 109.

In England, as part of the process of preparing CVSA to testify, the Crown Prosecution Service and Child Liaison Officer ensure that CVSA and their guardians receive all information about the court process and where their view is important, that they have the opportunity to present it.⁹²⁹ In Scotland, all CVSA receive an explanatory leaflet ‘Going to Court’ to inform them about the court before the court orientation visit.⁹³⁰ This has led to an increased number of CVSA willing to testify in CSA cases in Scotland.⁹³¹

Lack of Pre-Trial Court Orientation

The study recommends the development and implementation of mechanisms that ensure CVSA visit the court before the day of their testimony. This makes CVSA familiarize themselves with the court surroundings and the court officers. When this occurs before the testimony day, CVSA are able to testify with ease in an environment already familiar to them. In England, this duty is shared between the Crown Prosecution Service and the Child Liaison Officer.⁹³²

Courts have shown an appreciation that preparing CVSA for their court appearance produces tangible benefits by reducing unnecessary anxiety and improving the quality of the evidence of CVSA.⁹³³ In England and Wales as well as in Scotland, CVSA preparation is taken seriously due to its potential benefits to the entire court process.⁹³⁴

Researches have also been undertaken to enhance specific cognitive training techniques to improve children’s memory and communication skills in the courtroom.⁹³⁵ Pre-trial preparation programs have been found to enhance CVSA participation in the court process in five key areas namely; recalling of information completely and accurately, understanding the lawyer’s questions and indications of non-compliance, resisting compliance with leading questions, coping with anxiety and understanding the trial process.⁹³⁶ The United Kingdom has greatly succeeded in preparing CVSA to go to court by organizing familiarization trips for CVSA to court before their testimony and

⁹²⁹*Op. cit* n 47.

⁹³⁰*Op. cit* n 52.

⁹³¹*Op. cit* n 9.

⁹³²*Op. cit* n 52.

⁹³³*Op. cit* n 47.

⁹³⁴*Op. cit* n 52.

⁹³⁵*Op. cit* n 75.

⁹³⁶*Op. cit* n 47.

explaining to them the court process using the court visits and booklets developed for such purposes.⁹³⁷ All children called to testify in Scotland are issued with an explanatory leaflet ‘Going to Court’ by the prosecutor while in England and Wales the responsibility rests with the court.⁹³⁸

In Canada, CVSA preparation programs include work with courtroom models and dolls, role plays and familiarization with the courtroom procedures.⁹³⁹ Stress reduction techniques which include breathing exercises, muscle relaxation and cognitive restructuring are taught to CVSA to help reduce the stress associated with testifying in court.⁹⁴⁰

The availability of support and comfort from other people is known to reduce stress in any situation.⁹⁴¹ Children provide more information in the company of a friendly person who is not involved in the trial as an interested party.⁹⁴² CVSA therefore derive emotional comfort from the presence of a support person and there is the added advantage of reduced anxiety by the CVSA which ultimately improves the quality of their evidence.⁹⁴³ Such support can be derived from family, friends, social workers or professionals in that discipline. In cases of incest, professional support service is required to enable the CVSA testify. In the USA, Britain, New Zealand, Canada and Australia, social support services are available to CVSA throughout the justice process beyond the testimony until the CVSA recovers fully from the effects of the abuse.⁹⁴⁴

Inadequate Cooperation and Coordination between the Criminal Justice Agencies

The study recommends that various criminal justice agencies namely the police, the courts, the children department need to come together under one forum. Working as a system enables them to address administrative challenges faced in CSA trial. In this regard, every children court can form a CSA trial stakeholders committee. This is in line

⁹³⁷ *Op. cit* n 52.

⁹³⁸ *Ibid.*

⁹³⁹ *Op. cit* n 52.

⁹⁴⁰ L Dezwirek-Sas, ‘Empowering Child Witnesses for Sexual Abuse Prosecution’ in H Dent and R Flin (eds), *Children as Witnesses* (Chichester Wiley 1992)167.

⁹⁴¹ T Cox, *Stress* (Macmillan 1978) 596.

⁹⁴² S Moston S, ‘Social Support and the Quality of Children’s Eye Witness Testimony’ in H Dent and R Flin (eds), *Children as Witnesses* (Chichester Wiley 1992) 185.

⁹⁴³ *Ibid.*

⁹⁴⁴ *Op. cit* n 47.

with the current practice with the courts under the court users committees.⁹⁴⁵ As already discussed in this chapter, a good example of cooperation between the stakeholders in CSA trial is found in the Huntsville project in Alabama, USA.⁹⁴⁶

Inadequate Training of Officers

The study recommends that the Judicial Service Commission, through the Judicial Training Institute, develops a course syllabus on special skills in handling CSA trial. This needs to take a multi-disciplinary approach to the trial. Experts from different areas such as sociology, child psychology, psychiatry, criminal law and research in children cases need to come together to build the capacity of the judicial officers and other criminal justice agencies in charge of CSA cases. The Judicial Studies Board in England has conducted several programs to build judges' and magistrates' capacity in resolving children cases.⁹⁴⁷ In California judges have a well-developed way of ensuring that all officers handling CSA cases undergo continuous training to improve their skills.⁹⁴⁸ The National Centre for Child Abuse in California offers a variety of training programs to various criminal justice agencies on CSA.⁹⁴⁹

The study recommends that before any magistrate is appointed to handle children matters, they should undergo the specialized training in this regard. In addition, because of the nature and sensitivity of children issues, the judiciary may consider gazetting magistrates with a special interest in children issues to preside over children courts so that not just any magistrate manages the children court. This recommendation is based on the fact that dealing with children requires patience and special skills to understand them especially when they are not able to communicate with the judicial officers.⁹⁵⁰ Judicial training should emphasize the need for judges and magistrates to be in control of the court proceedings to protect CVSA while safeguarding the rights of accused persons.

⁹⁴⁵ Kenyan Judiciary, *Judiciary Transformation Framework* (2012). This is a roadmap developed by the Judiciary in reforming the Judiciary in line with the provisions of the Constitution of Kenya 2010 specifically Article 259 which mandates courts to interpret the Constitution in a manner that promotes its purposes, values, principles and advances human rights amidst the development of law and contributes to good governance.

⁹⁴⁶ *Op. cit* n 384.

⁹⁴⁷ *Op. cit* n 52.

⁹⁴⁸ *Op. cit* n 384.

⁹⁴⁹ *Ibid*.

⁹⁵⁰ *Op. cit* n 52.

Financial challenges to CVSA

The study recommends that the Judiciary sets aside funds under the children court budget to facilitate CVSA's and their guardians/ parents who cannot afford to come to court on their own. This can be achieved through psychosocial support officers who should be attached to each children's court. In addition, courts need to make orders to ensure CVSA get treatment from the government hospitals following the filing of CSA.

Lack of a CVSA Protection Unit

The study recommends the creation of a CVSA protection unit charged with the responsibility of ensuring the protection and welfare of CVSA during pre-trial, trial and post-trial period. Jurisdictions such as England, France, Germany and Australia have established specialist units for dealing with CSA cases and some prosecutors' offices allocate the cases to officers with relevant experience.⁹⁵¹ This has led to increased rates of conviction in CSA cases.⁹⁵² In 1991, the Crown Office in Scotland issued procurators fiscal with guidance notes for the investigation and prosecution of cases involving children.⁹⁵³ Subsequently, a similar manual was prepared for the English Crown Prosecution Service. The issuance of such manual was in recognition of the fact that the conduct of investigation and trial has significant impact on any victim's ability to cope with the stress associated with testifying.⁹⁵⁴

4.6 Conclusion

The study found that the entire pre-trial procedures, from the reporting, investigation and court administration is focused on the guilt/innocence of the accused at the expense of CVSA special needs. The pre-trial procedure fails to protect CVSA rights. The study therefore finds that the pre-trial procedure applicable in CSA cases in Kenya is inconsistent with the procedural justice framework of CSA trial since it lacks a detailed pre-trial mechanism of collecting and preserving evidence, including CVSA evidence and fails to offer CVSA effective assistance in preparation for their testimony.

The study concludes that CSA pre-trial procedure in Kenya is not in the best interest of CVSA. The pre-trial procedure lacks a human rights approach to administration of justice.

⁹⁵¹ Ibid.

⁹⁵² Ibid.

⁹⁵³ J Morgan and L Zedner, *Child Victims: Crime, Impact and Criminal Justice* (Clarendon Press 1992)114.

⁹⁵⁴ Ibid.

It is inconsistent with the procedural justice and rights theories. The pre-trial procedure however, protects the rights of accused persons to remain silent and not give any self-incriminating evidence while being presumed innocent until proven guilty.

The pre-trial procedure is inconsistent with the UNGJMCCVWC and the inadequacies of pre-trial procedure expose CVSA to the trauma associated with court testimony in the absence of adequate measures to mitigate the stressful court environment. In the next chapter the study examines the trial procedure in CSA cases in Kenya.

CHAPTER FIVE

TRIAL PROCEDURE IN CSA CASES IN KENYA

5.1 Introduction

Using the procedural justice framework identified in chapter three, the study evaluated CSA trial procedure in Kenya. The concern was to find out the implication of specific evidentiary rules of procedure on CSA ability to testify in CSA cases. This chapter is therefore organized around the following thematic areas: the burden of proof, the role of the prosecutor in the CSA trial, impartiality of the trial judge and its implication on CSA trial, publicity of the trial, orality of evidence, cross examination, accused person's right to confront witnesses, re-examination and the right to bail.

5.2 The Burden of Proof

The concept of the burden of proof refers to the reconstruction of the facts of the past event that constitute the allegation made in court through evidence and arguments.⁹⁵⁵ This is the cornerstone of the adversarial system which provides that 'he who alleges must prove'.⁹⁵⁶ Since the prosecutor is the one who files a criminal case in court, the onus/burden to establish the facts through evidence and arguments that prove that the accused committed the offence lies with the prosecutor.⁹⁵⁷ This is what is known as the burden of proof which lies with the prosecution.⁹⁵⁸ One central and constant theme that cuts across the criminal adversarial trial system is that, the burden of proving the *actus reus* and the *mens rea*, beyond reasonable doubt, lies on the prosecution.⁹⁵⁹ In recognizing the importance of the burden of proof as a hallmark of the adversarial trial, the House of Lords held that:

Throughout the web of English criminal law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt...No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.⁹⁶⁰

⁹⁵⁵ *Op. cit* n 123.

⁹⁵⁶ *Ibid.*

⁹⁵⁷ *Op. cit* n 50.

⁹⁵⁸ *Ibid.*

⁹⁵⁹ *Op. cit* n 234.

⁹⁶⁰ *Woolmington vs. DPP* [1935] AC 462; at 481,482.

The adversarial trial procedure therefore places on the prosecution, as the initiator of the case, the burden of convincing the court that there is enough evidence on which a trial can go ahead, by establishing a *prima facie* case.⁹⁶¹ There are three types of burden of proof.⁹⁶² The first is the legal burden which refers to the prosecution's duty to convince the court of the guilt of the accused person, beyond any reasonable doubt.⁹⁶³ The legal burden is discharged, as a matter of law, at the end of the trial when the court decides on the guilt or innocence of the accused person.⁹⁶⁴ The legal burden is entirely on the prosecution, and is fixed at the beginning of the trial, when the prosecution files the charge.⁹⁶⁵ The legal burden remains on the prosecution and never shifts to the accused person at any stage of the trial.⁹⁶⁶

The accused person therefore has no legal burden of proof and once a 'not guilty plea' is entered in a case, every matter becomes a fact in issue, including the identity of the accused person.⁹⁶⁷ The facts in issue form the basis for adducing evidence to prove the offence.⁹⁶⁸ This gives rise to the second type of burden known as evidential burden, which refers to the onus of adducing evidence on an issue raised, as to the matter in question, for consideration by the court.⁹⁶⁹ The evidential burden requires the prosecution to prove facts sufficient to prevent the court from dismissing the charge on the ground of no case to answer.⁹⁷⁰

The third burden of proof is the onus of establishing the admissibility of evidence, and differentiates the types of burden of proof and the degree of burden on the party.⁹⁷¹ The reconstruction and proof of the facts by the prosecution must be dispensed to the satisfaction of the court beyond any reasonable doubt.⁹⁷² This is known as the standard of proof required in criminal cases.⁹⁷³ Since it is the prosecution to prove facts of the case,

⁹⁶¹ *Op. cit* n 234.

⁹⁶² Howard M N *et al*, *Phipson on Evidence: The Common Law Library No. 10* (14th edn, Sweet and Maxwell 1990) 51.

⁹⁶³ *Ibid*.

⁹⁶⁴ *Ibid*.

⁹⁶⁵ *Ibid*.

⁹⁶⁶ *Ibid*.

⁹⁶⁷ *Op. cit* n 123.

⁹⁶⁸ *Op. cit* n 50.

⁹⁶⁹ Monir M, *Law of Evidence* Revised by H. S. Ursekar, (6th edn, The University of Book Agency 2004) 478.

⁹⁷⁰ *Ibid*.

⁹⁷¹ *Op. cit* n 460.

⁹⁷² *Ibid*.

⁹⁷³ *Ibid*.

the result is a presumption of innocence of the accused person who is therefore presumed to be innocent until the allegations are proved in court beyond any reasonable doubt.⁹⁷⁴ In addition, if there is any doubt raised in the facts and arguments presented by the prosecution, the benefit of that doubt is given to the accused person who is set free for lack of sufficient evidence.⁹⁷⁵

If an issue of exoneration is properly raised by the accused person, it is for the prosecution to prove, beyond any reasonable doubt, that the ground of exoneration is not available to the accused person.⁹⁷⁶ The general rule is that the party which has the legal burden also has the evidential burden.⁹⁷⁷ Ordinarily therefore, both the legal and evidential burden lie on the prosecution.⁹⁷⁸ However, there are two common law exceptions in which the evidential burden can be reversed from the prosecution to the accused.⁹⁷⁹ The first exception is where the accused person raises any of the common law defences of self-defence, duress, insanity or provocation.⁹⁸⁰ The second exception is where a statute reverses the evidential burden from the prosecution to the accused person.⁹⁸¹ The effect of reversing the evidential burden is that the onus is placed on the accused person to provide evidence on the facts raised by him/her.⁹⁸²

The central argument for maintaining the burden of proof in the classical adversarial system of trial is that, the price of upholding the due process is the certainty that no innocent person is convicted, despite the danger of occasional acquittal of the guilty.⁹⁸³ In this respect, the presumption of innocence and standard of proof beyond reasonable doubt, have featured as the two most important pillars of the adversarial legal system.⁹⁸⁴ Criminal proceedings against accused persons are therefore instituted in the name of the state as the complainant.⁹⁸⁵ This is based on the state's duty to protect the society.⁹⁸⁶ The

⁹⁷⁴ *Op. cit* n 50.

⁹⁷⁵ *Op. cit* n 123.

⁹⁷⁶ *Ibid.*

⁹⁷⁷ *Ibid.*

⁹⁷⁸ *Ibid.*

⁹⁷⁹ *Op. cit* n 50.

⁹⁸⁰ *Ibid.*

⁹⁸¹ *Ibid.*

⁹⁸² *Op. cit* n 234.

⁹⁸³ S Zappala, 'The Rights of Victims v the Rights of the Accused' (2010) 8 *Journal of International Criminal Justice* Issue 1, 137.

⁹⁸⁴ *Op. cit* n 346.

⁹⁸⁵ *Ibid.*

⁹⁸⁶ *Ibid.*

state prosecutes the accused person on behalf of the victim of crime through the prosecution, which must discharge the burden of proof beyond any reasonable doubt.⁹⁸⁷

In order to protect the accused person in the trial process from arbitrary use of state power, several evidentiary rules of procedure developed out of the burden of proof to keep the state under check, while discharging the burden of proof.⁹⁸⁸ They include the impartial role of the prosecutor, the impartiality of the trial judge as a neutral umpire, the publicity of the trial, the orality of evidence, the accused person's right to confront witnesses, cross examination, re-examination and the right to bail amongst others.⁹⁸⁹

The evidentiary rules of the adversarial trial procedure are protected by the Constitution of Kenya and expressed in the Criminal Procedure Code and the Evidence Act, both of which provide the procedural framework in criminal trials in Kenya. The prosecution is therefore required to prove the guilt of the accused person beyond any reasonable doubt.⁹⁹⁰ If any doubt is raised in the prosecution case, the benefit of the doubt is given to the accused person who is subsequently set free.⁹⁹¹

As the adversarial system developed, the rationale for a high standard of proof aimed at protecting the accused person from arbitrary use of state power.⁹⁹² Secondly, the high standard of proof was to ensure that only the guilty suffer the consequences of imprisonment while the innocent are set free.⁹⁹³ The principle of the burden of proof and its high standard has achieved its intended goal in cases involving adults.⁹⁹⁴ However, the standard of proof required, beyond reasonable doubt, has been found to cause a miscarriage of justice in CSA trials.⁹⁹⁵ This is attributed to the challenges faced by the prosecution in discharging the burden of proof beyond reasonable doubt in CSA cases.⁹⁹⁶ Any doubts raised in CVSA evidence due to errors in minor details, are interpreted in

⁹⁸⁷J Stephen, *A History of the Criminal Law of England* (Macmillan 1883)39.

⁹⁸⁸*Op. cit* n 123.

⁹⁸⁹*Ibid.*

⁹⁹⁰*Op. cit* n 123.

⁹⁹¹*Op. cit* n 50.

⁹⁹²*Op. cit* n 123.

⁹⁹³*Ibid.*

⁹⁹⁴*Ibid.*

⁹⁹⁵*Op. cit* n 3.

⁹⁹⁶*Op. cit* n 578.

favour of accused persons.⁹⁹⁷ Saywitz argues that children at times cannot remember or confuse fine details such as time and sequences of events, making it easy to create doubts in their evidence during CSA trials.⁹⁹⁸

This study found that several cases of CSA cannot be successfully prosecuted due to the high standard of proof required in criminal cases. The study observed that the prosecution relies on CVSA as the key witnesses, to provide crucial information about the abuse. However, the circumstances surrounding the abuse which are already discussed in chapter four, such as the effect of CSA on CVSA, hinder them from enabling the prosecution to discharge the burden of proof. This finding is demonstrated by a review of Nairobi Criminal Case No. 4740/2007.

The case highlights peculiarities of prosecuting CSA cases. The accused person, a cook at a children's institution was charged with seven counts of indecently assaulting children (between the ages of five and fifteen) under his care at the institution in the year 2005. The accused person was prosecuted about two years after the offences were alleged to have occurred. He worked and lived at the institution for about eighteen years, cooking and serving the children. At times he did the children's laundry and distributed new clothes to them when the institution received any from donors. All the CVSA testified that they trusted him and would do what he asked them to. The accused person therefore took advantage of the CVSA's trust in him and their vulnerability, to sexually abuse them, warning them not to talk about the abuse or risk missing food and clothes, when he distributed them. To ensure the CVSA remained silent and cooperated with him, he rewarded his victims with sweets and jeans trousers while denying the same to those children who refused to be abused by him. The accused person allegedly used his fingers and assaulted the young CVSA as he 'played' with them at the stairs, lifting them to the sinks and inviting them to his house, located within the institution's compound. His victims included both boys and girls at the institution. He touched the breasts and buttocks of the girls and pulled the penis of the boys. The institutional set up and his relationship with the CVSA provided him with the opportunity to sexually abuse the CVSA, within the confines of the institution, and away from the 'public eye.'

⁹⁹⁷ *Op. cit* n 109.

⁹⁹⁸ *Ibid.*

The court record showed that CVSA made reports to the officer in charge of the institution, who admonished them and failed to take any action, so as to save the reputation of the institution. In addition, there was need to avoid the social stigma that such report would attract from the public. The failure by the officer in charge, to report the abuse to the police, is consistent with the labeling theory as discussed in chapter one. The matter was only reported to the police when the institution's donors insisted so, two years after the offences were committed. A 15 year old CVSA who recorded a statement with the police allegedly died while another 11 year old CVSA disappeared from the institution before testifying in court. The possibility of interference with investigation and intimidation of the potential witnesses could not be ruled out.

One CVSA feared to testify in court because of threats from the accused person not to do so, and because of the concern by the CVSA that if found guilty, the accused person could be jailed. This confirmed Herman's argument on the difficulty of prosecuting CSA when the CVSA is in a special relationship to the accused person, such as teacher-pupil, father daughter, and house help-child relationships.⁹⁹⁹ Some CVSA testified that the abuse went on for long and they got used to it, thinking it was a game, not knowing it was wrong, since nobody had talked to them about sexual matters prior to the abuse. According to the court records, seven CVSA testified how the accused person had repeatedly sexually abused them by touching their private parts. However, the study established from the court record that the prosecution failed to discharge the burden of proof as per section 107 of the Evidence Act. The accused person was found not guilty and acquitted on three grounds.

The first ground was that the evidence of CVSA contradicted each other and therefore created doubts, the benefit of which was given to the accused person as per Section 111(1) of the Evidence Act.¹⁰⁰⁰ Such contradictions included use of words by CVSA such as the 'accused slapped my buttocks' and 'he touched my buttocks.' This ground of acquittal highlights the difficulty in communicating sexual abuse by CVSA to court.¹⁰⁰¹ The court interpreted the words by the CVSA to mean that the CVSA was not sure as to the action of the accused person, slapping or touching.

⁹⁹⁹ *Op. cit* n 89.

¹⁰⁰⁰ Section 111(1) of the Evidence Act.

¹⁰⁰¹ *Op. cit* n 109.

The second ground for the accused person's acquittal according to the court records was that, when the CVSA's were taken for medical examination, no injury consistent with sexual abuse was noted. This supports the argument by Herman and Hirshman that medical evidence in CSA cases may be lost if the medical examination takes place several days after the abuse occurs.¹⁰⁰² Despite the amendment of the Evidence Act¹⁰⁰³ that did away with corroboration requirement, the court did not believe the evidence of the seven CVSA, and looked for corroboration in the medical report, failure which the accused person was acquitted.

The accused person had been prosecuted two years after the abuse. In case there were injuries, they would have healed by the time of the reporting of the abuse.¹⁰⁰⁴ Besides, the offence was not one of penetrating the genitals of the CVSA, but indecent assault. One would therefore not expect injuries on the CVSA. All the CVSA were not represented while the accused person had legal representation, hence the procedure was not fairly balanced. One of the CVSA was blind, yet there was no communication aid at all to assist the witness to testify. All CVSA testified in the presence of the accused person without any protection measure, despite the provisions of the Sexual Offences Act.¹⁰⁰⁵

The review of the court record revealed that the third reason given by the court was that, nobody reported the alleged crime at the time it was alleged to have occurred. The reasoning by the court demonstrates the lack of understanding of the nature of commission of CSA and the inability of children to report directly to the police,¹⁰⁰⁶ being dependent upon adults who make the decision whether to report to the police or not and when. The court also failed to appreciate the social stigma that characterizes CSA which may have delayed the reporting of the case to the police.¹⁰⁰⁷

The above case highlights the difficulties faced by the prosecution in discharging the burden of proof in CSA cases under the adversarial trial procedure. It also confirms

¹⁰⁰² *Op. cit* n 89.

¹⁰⁰³ Criminal Law Amendment Act No.5 of 2003 which repealed section 124 of the Evidence Act on corroboration of children's evidence.

¹⁰⁰⁴ *Op. cit* n 89.

¹⁰⁰⁵ *Op. cit* n 36, section 31.

¹⁰⁰⁶ *Op. cit* n 384.

¹⁰⁰⁷ *Op. cit* n 98.

literature reviewed about the challenges of prosecuting CSA cases.¹⁰⁰⁸ The requirement that the prosecution discharges the burden of proof implies that CVSA, on whom the prosecution relies to narrate the details of the abuse, must do so coherently, consistently and effectively.¹⁰⁰⁹ However, due to the vulnerability of CVSA, the nature of CSA and resulting trauma, social stigma and the technical rules of procedure, CVSA are not able to effectively testify in most cases.¹⁰¹⁰ The burden of proof in CSA cases obscures the truth in some cases.¹⁰¹¹ CSA occurs mostly in private, without eye witnesses, apart from the accused person and CVSA.¹⁰¹² Discharging the burden of proof, which is the essence of the criminal trial, is therefore, to a great extent, a contest between the words of CVSA and the accused person in CSA cases.¹⁰¹³

The difficulty in discharging the burden of proof in CSA cases was proved by the study again, in the Mombasa Criminal Case No. 2900/09. A six year old boy who did not understand the nature of an oath was allowed to give unsworn evidence. He reported the abuse to the mother who did not give evidence in court. However, the father testified that when his son told him that he was experiencing pain in his anus, he informed his wife (CVSA's mother). The accused was acquitted on the ground that the father's evidence contradicted that of the six year old boy who said that he reported the abuse straight to his mother. The doubt which resulted from a minor contradiction between the father and the boy created a doubt, the benefit of which served to acquit the accused person. This is despite the fact that the court records showed that the boy's clothes had blood stains and that he had been taken to hospital two weeks after the abuse. The father of the CVSA was interviewed by the study and expressed his disbelief at the court decision in the following words:

I do not understand why the court set the accused person free despite the fact that my son and I testified about how he was abused. It is difficult to comprehend the court procedure and how to prove a case. I do not mean to

¹⁰⁰⁸ *Op. cit* n 109.

¹⁰⁰⁹ *Op. cit* n 89.

¹⁰¹⁰ *Ibid.*

¹⁰¹¹ Frances Rickford and Clare Dyer, 'The Burden of Proof', in the Guardian Newspaper, Monday 29 November 1999 <www.guardian.co.uk/word/1999/nov/29/law.the_guardian> accessed 31 July 2013.

¹⁰¹² *Ibid.*

¹⁰¹³ *Ibid.*

be rude, but as the saying goes, the law is really an ass and causes a miscarriage of justice in CSA cases.¹⁰¹⁴

In yet another case, Mombasa Criminal Case No 3235/09, an 8 year old CVSA was allegedly indecently assaulted by a neighbour who covered her mouth to stop her from screaming and attracting public attention. According to the CVSA, the abuse was defilement and not indecent assault as she said, ‘the accused person removed my underpants and inserted his *‘dudu’*¹⁰¹⁵ into mine.’ This infers penetration and thus an act beyond indecent assault amounting to Sexual Assault.¹⁰¹⁶ The court allowed the CVSA to give unsworn evidence as she did not appear to understand the nature of an oath. However, one ground for acquitting the accused person was that the CVSA could not be believed as she gave unsworn evidence, yet it was the court that decided the child would give unsworn evidence. Further, the CVSA told the court that she slept in the accused person’s house the whole night, while other witnesses testified that when the abuse was detected, she was taken back to the family house.

The CVSA may not have had the correct sense of time, yet this contradiction was material enough for the court to dismiss her evidence. Further, the court considered the fact that the CVSA did not scream during the abuse and questioned why nobody in the plot where the abuse occurred heard the CVSA scream. The court record showed that the CVSA had indicated in her evidence that the accused person covered her mouth as he abused her. The accused person’s manner of cross-examining the CVSA managed to bring out contradictions which created doubts in the testimony of the CVSA who was already terrified. The benefit of the doubt was given to the accused person, even though this was a case where the child testified exactly four months after the abuse and there was a possibility of some measure of memory loss.

The above cases confirm the difficulty in discharging the burden of proof in CSA cases. Child psychologists argue that children prefer not to keep in mind traumatic experiences.¹⁰¹⁷ Children therefore may not repeat the exact details of a traumatic

¹⁰¹⁴ Respondent no 20 in Appendix K.

¹⁰¹⁵ This is a Kiswahili word which literally means an insect used by children to refer to the male genital organ, the penis.

¹⁰¹⁶ Section 5 of the Sexual Offences Act.

¹⁰¹⁷ *Op. cit* n 199.

experience as they occurred, due to its negative impact on them.¹⁰¹⁸ The adversarial court procedure's demand on the prosecution to discharge the burden of proof beyond any reasonable doubt, clearly results into an injustice in some CSA cases.

The study observed that from the very onset of the trial process, the focus is on the accused person who is treated as innocent until proven guilty,¹⁰¹⁹ benefiting from the privileged constitutional right to remain silent.¹⁰²⁰ In none of the cases did the prosecution inform the court of the condition of CVSA or apply for any orders in regard to the CVSA, who did not appear to be a focus of the justice system. It is indeed at the plea taking stage that if necessary, the court may issue orders to restrain the accused person from any interference with the investigation or with CVSA and the family.¹⁰²¹ This observation was confirmed by 98% of CVSA who wished that the court would protect them from the accused persons and their families as they felt insecure. Only 2% of CVSA felt secure and experienced no intimidation from accused persons. The study finding shows that many CVSA experience intimidation and interference from accused persons. To expect CVSA therefore to testify effectively in order for the prosecution to discharge the burden of proof, shows that the burden of proof favours the accused person, but occasions a miscarriage of justice in some CSA cases.

All CVSA interviewed said that they needed to be re-assured that all would be well, emphasizing the need for psycho-social support for CVSA, right from the discovery of the abuse, through to the trial and post-trial phase. The study observed that no psycho-social support service orders were issued by any of the courts to assist CVSA deal with the trauma of CSA. This was also confirmed by the perusal of court records of finalized cases, which indicated no issuance of psycho-social support service orders to CVSA at all. This finding shows a lack of appreciation by the adversarial trial procedure of the effect of CSA on CVSA, and their consequent vulnerability. CVSA are therefore treated like any other victims of crime, ignoring the possible effects of CSA on their ability to testify and assuming that they would be able to testify when called upon. This study finding proves that the court procedure enhances CVSA's inability to effectively testify, so as to enable the prosecution prove the case beyond reasonable doubt.

¹⁰¹⁸ Ibid.

¹⁰¹⁹ *Op. cit* n 40 Article 50(2) (b).

¹⁰²⁰ Ibid Article 49(1) (a) (ii) and b.

¹⁰²¹ *Op. cit* n 384.

The study observed that in all the pleas taken in CSA cases, none of the accused persons pleaded guilty, therefore setting the stage for the trial process to prove every fact alleged in CSA. Discharging the burden of proof in such cases is not easy, since every single fact alleged, including the identity of the accused person, must be proved beyond reasonable doubt.¹⁰²² While CVSA waiting to testify were observed looking anxious, fearful and timid, the accused persons appeared calm, composed and confident, confirming the argument that accused persons in CSA cases are often confident of winning the trial, since they are aware that it is their word against that of CVSA.¹⁰²³ One CVSA had this to say about the burden of proof:

I was the one abused by the accused, but it appeared that I was on trial to prove my innocence. The accused person remained silent in court throughout, as the prosecutor and defence counsel asked me many repeated questions. The magistrate did not stop them, even when it appeared that I was intimidated and harassed by them. When I attempted to ask the accused person why he denied sexually abusing me, the prosecutor told me that I was not allowed to ask him any question. The entire process of testifying in court was hostile to me. It is a very unfair system.¹⁰²⁴

The above sentiments by the CVSA were further confirmed by a magistrate who said that:

CSA trial procedure in Kenya is very insensitive to the plight of CVSA. The procedure applies the same standard of proof beyond reasonable doubt as it happens in cases where adults are witnesses. In most cases, it is difficult to sustain a conviction in CSA cases, since it is the word of the accused person against that of CVSA. There is need to re-think the burden of proof in CSA cases. In the absence of legal reforms in this area, many children are subjected to adult oriented trial procedure, which in some cases leads to a miscarriage of justice.¹⁰²⁵

¹⁰²² *Op. cit* n 123.

¹⁰²³ *Op. cit* n 47.

¹⁰²⁴ Respondent no 85 in Appendix K.

¹⁰²⁵ Respondent no 46 in Appendix K.

The view of the magistrate raises issues about the suitability of the application of the concept of the burden of proof in CSA cases. In particular, it raises the concern as to whether the standard of proof beyond reasonable doubt should be retained or lowered to a balance of probability as in civil cases.¹⁰²⁶ Lowering of the standard of proof cannot work. Indeed, the standard must remain beyond reasonable doubt in discharging the legal burden of proof by the prosecution. Section 109 of the Evidence Act in Kenya provides an exception to the general rule on the burden of proof. Such exception is where any law provides that the proof of a particular fact shall lie on any particular person. Section 109 of the Evidence Act in Kenya refers to the onus to adduce evidence in discharging the evidential burden, which according to Khatiwada is very “unstable” and may shift constantly, [throughout the trial] from the prosecution to the accused person and back.¹⁰²⁷

This study argues that CSA cases provide a reasonable ground where the law should provide that the burden of providing evidence that the accused person did not sexually abuse the CVSA should be placed on him/her. This therefore calls for a statutory exception provided by law in amending the Evidence Act or providing for such an exception under a procedural law in CSA trials. The study therefore recommends that the accused person should bear the burden in the context of evidence that he/she intends to marshal.

Based on the study observation, the burden of proof and its high standard in CSA cases favours the accused persons, upholds their rights, but disregards the concerns for CVSA protection. The burden of proof therefore results into an imbalance of accused person’s rights and CVSA’s concerns for protection. This study argues that the distinction between the legal burden and the evidential burden forms the basis of balancing the rights of accused persons and protection of CVSA in CSA trials. It is recognized that the legal burden lies on the prosecution to prove the case beyond any reasonable doubt and does not shift to the accused person at any point of the trial as held in Woolmington.¹⁰²⁸ However, although the evidential burden which refers to the onus of adducing evidence also lies with the prosecution, it can lie on the accused person if so provided by a statute or if the accused person raises any of the common law defences of self defence, duress,

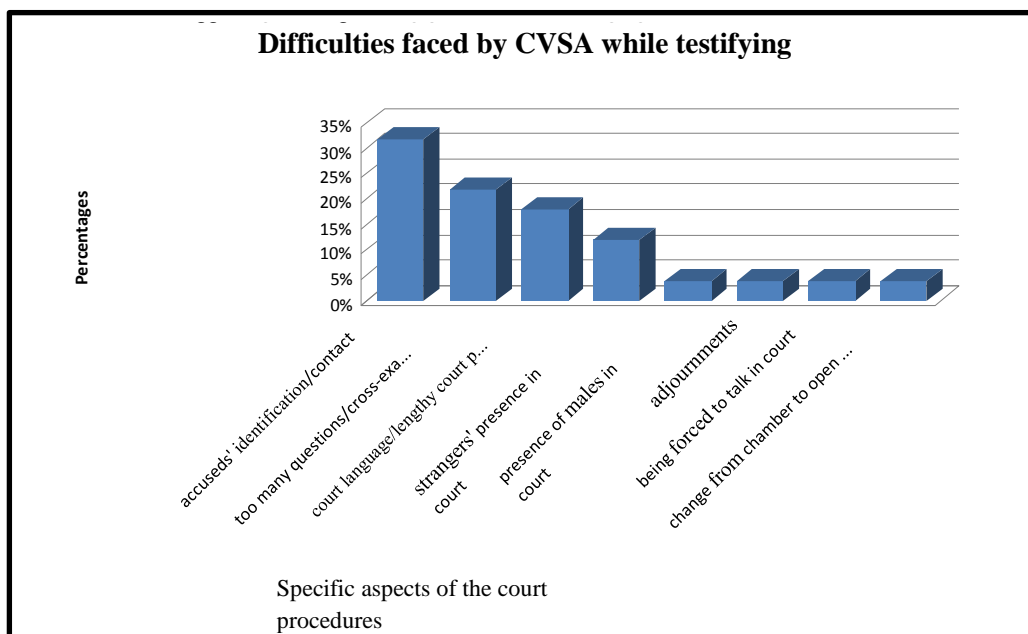
¹⁰²⁶ *Op. cit* n 384.

¹⁰²⁷ Khatiwada A, *Shifting of Burden in Criminal Cases*, Social Science Research Network (2007) at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=987493> (accessed 18 April 2013).

¹⁰²⁸ *Op. cit* n 960.

intoxication and insanity.¹⁰²⁹ This is what Khatiwada means by evidential burden being ‘unstable’ and can shift from one party to the other in a criminal trial.¹⁰³⁰ This study therefore argues that in striking a balance in CSA trial between accused persons rights and CVSA protection, there is need to rethink the concept of the burden of proof and provide a statutory exception that the accused person should bear the evidential burden, to the standard of the balance of probabilities as opposed to beyond reasonable doubt, in the context of evidence that he/she intends to marshal. This argument is based on the study findings which reveal that due to the secrecy surrounding the nature of CSA and the vulnerability of CVSA, the burden of proof turns a CSA trial, into a contest between the words of the CVSA and those of the accused person. However, due to their vulnerability, the study found that CVSA face many challenges in the adversarial trial as they testify in CSA cases as demonstrated by figure 5 below.

Figure 5: Difficulties faced by CVSA while testifying



The figure above shows the views of CVSA on the challenges they encountered while testifying in CSA cases so as to ensure that the prosecution discharges the burden of proof. The figure shows that confrontation and cross examination present the most difficulties to CVSA as they testify. This is supported by police officers who said that 53% of the difficulties faced by CVSA are as a result of face to face encounter with the accused person. This was followed by harassment by lawyers during cross-examination,

¹⁰²⁹ *Op. cit* n 319; See also section 109 of the Evidence Act, Cap 80 Laws of Kenya.

¹⁰³⁰ *Op. cit* n 1027.

resulting into CVSA being traumatized and accounting for 20% of the difficulties. Lack of understanding by CVSA as to why they have to go through the court process was in the opinion of the police officers, a contributor to the difficulties the CVSA face and accounted for 14%. Interference with CVSA and their families while the case was pending before court took the form of threats and intimidation of the CVSA, making it difficult for them to testify in court. This accounted for 13% of the challenges.

The study finds that burden of proof requirement protects the accused person while discriminating against CVSA in CSA cases due to the following reasons: First, the burden of proof requirement safeguards the rights of accused persons to a fair trial under Article 50 of the Constitution of Kenya but fails to protect CVSA as required by Article 53(2) of the same constitution. The study attributes this imbalance in the protection of the rights of accused persons and CVSA to lack of a special procedural protective mechanism and the passive role of the trial magistrate despite the provision of substantive laws. Secondly, the burden of proof requirement in CSA cases in Kenya violates CVSA's rights to be treated with dignity under Article 28 of the Constitution since it requires CVSA to testify orally and be cross examined in open court by the accused person. Thirdly, the burden of proof requirement discriminates against CVSA by exposing them to hardships in the trial process while safeguarding the rights of accused persons. The discriminatory treatment of CVSA violates Article 27 of the Constitution of Kenya which provides that everyone has a right to equal treatment and protection by the law. Despite the constitutional provision, the adversarial trial in Kenya is guided by the burden of proof principle and the prosecution must prove a criminal case beyond any reasonable doubt if a criminal case is to succeed.¹⁰³¹

Sections 107 and 108 of the Evidence Act in Kenya restate the ruling in *Woolmington*¹⁰³² and provide that she/he who alleges must prove the alleged facts. The burden of proof lies on the party who would fail if no evidence at all were given on either side. Accordingly, the prosecution in Kenya therefore, bears both the legal and evidential burden in CSA trial. Despite the apparent injustice caused by the burden of proof requirement in CSA cases, section 109 of the Evidence Act provides that, the burden of proof lies with the

¹⁰³¹ *Op. cit* n 425.

¹⁰³² *Op. cit* n 960.

prosecution, unless it is stated by any other law that the proof of any particular fact lies on any particular person.

Whereas section 107 of the Evidence Act confirms that the onus of discharging the legal burden always lies on the prosecution and does not at any point, lie on the accused person, section 109 of the Evidence Act confirms that in some situations, the law may place the onus of discharging the evidential burden on the accused person. This does not in any way go against the principle stated in the Woolmington case¹⁰³³ which appears to refer to the legal burden. Indeed section 109 of the Evidence Act simply recognizes that a statute may place the onus of discharging the evidential burden on the accused person. This is consistent with the common law exception of insanity, recognized by Woolmington¹⁰³⁴ and required the accused to prove the absence of *mens rea*. It called on the accused to adduce evidence showing that at the time of the alleged offence, he lacked the requisite *mens rea* to commit the offence.

The question as to whether or not, requiring an accused person to adduce evidence under such common law or statutory exceptions contravene the rule in the Woolmington case¹⁰³⁵ was decided by the European Court of Human Rights when it held that, the exceptions do not breach Article 6(2) of the European Convention on Human Rights on the right to be presumed innocent.¹⁰³⁶ The common law approach to the burden of proof continued after Woolmington¹⁰³⁷ and in 1974, the Court of Appeal in England held that:

Under the common law, where a statute prohibited an act, save in specified circumstances, the court could construe the statute such that the burden of proving the circumstances lies on the defendant.¹⁰³⁸

Although the decision of the Court of Appeal in the above case may form the basis for an argument to place the evidential burden in CSA cases from the prosecution to the accused person, the decision is of historical importance and was overtaken by the enactment of the Human Rights Act (1998), which has greatly affected the allocation of the burden of

¹⁰³³Ibid.

¹⁰³⁴Ibid.

¹⁰³⁵Ibid.

¹⁰³⁶*H v United Kingdom* Application No 15023/89 (1990).

¹⁰³⁷*Op. cit* n 960.

¹⁰³⁸*R v Edwards* [1975]QB 27.

proof in criminal cases. Although Article 6(2) of the Act recognizes the presumption of innocence, the ECtHR has not taken it as an absolute principle. The controversial nature of the burden of proof indicates the fluid nature of the law in this area. However, the House of Lords has upheld the presumption of strict liability in CSA.¹⁰³⁹ It is recognized that a statute can place the onus of discharging the evidential burden on the accused person, as evidenced by the Terrorism Act (2000) of England. In this respect, the House of Lords held that:

Notwithstanding that Parliament intended to impose a legal burden on the defendant, he should only bear the evidential burden. The justifiability and fairness of provisions which impose a burden of proof on a defendant in a criminal trial are to be judged in the particular context of each case, and the court's task is to decide whether Parliament had unjustifiably infringed the presumption of innocence, that the overriding concern is that the trial should be fair, and the presumption of innocence is a fundamental right directed to that end.¹⁰⁴⁰

From the discussions in this section so far, the study argues that, although both the legal and evidential burden lie on the prosecution, there are instances where the evidential burden lies on the accused person. For CSA trials in Kenya to be fair to both accused persons and CVSA, there is need to re-think the evidential burden of proof. This argument is based on the difficulties experienced by CVSA in testifying in CSA cases as illustrated in Figure 5.

As already discussed in this study, the major challenge in prosecuting CSA is the fact that the offence is mostly committed in private, where it is hardly witnessed by members of the public.¹⁰⁴¹ The possible eye witnesses may be only CVSA and the accused in most cases. The prosecution will therefore rely on the CVSA's account of evidence to prove the prosecution case. This becomes more challenging where CVSA may have been intimidated by the accused during or after the abuse so as not to testify.¹⁰⁴² In addition, due to the CVSA's vulnerability, CVSA's evidence may not be coherent, creating doubts

¹⁰³⁹ *R v G (Secretary of State for Home Department)* [2008] UKHL 37; [2009]1 AC.

¹⁰⁴⁰ *Op. cit* n 835.

¹⁰⁴¹ *Op. cit* n 108.

¹⁰⁴² *Op. cit* n 89.

in the prosecution case, the benefit of which is given to the accused person.¹⁰⁴³ Ironically, the search for truth in seeking justice for CVSA in the adversarial system of trial is about discharging the burden of proof by the prosecution.¹⁰⁴⁴ However, the study established that the burden of proof is a major impediment in the search for the same truth it seeks in CSA cases.

Although it is generally accepted as a cardinal rule and hallmark of adversarial criminal trial that the burden of proof lies with the prosecution, and not the defendant to prove his/her innocence, there are instances when the burden of proof may lie on the accused person.¹⁰⁴⁵ Where the accused person pleads certain defences prescribed by law, then the onus of proving the grounds of such defence lies with him/her.¹⁰⁴⁶ In other words, the burden of proof lies on the accused person to prove the defence raised.

Such situations include affirmative defences such as *alibi*, self-defence and insanity.¹⁰⁴⁷ *Alibi* defence refers to a situation where the accused person alleges that he was elsewhere and not at the scene of crime as at the time when the crime was alleged to have occurred.¹⁰⁴⁸ The burden therefore shifts to the accused to prove the allegation that he/she was not present at the place where the crime is alleged to have occurred.¹⁰⁴⁹ Self defence refers to a situation where the accused person submits that he/she committed the offence in self-defence.¹⁰⁵⁰ The burden therefore shifts to the accused person to prove that he/she committed the offence in the process of defending him/herself and not for any other reason. The defence of insanity refers to a situation where the accused person submits that as at the time when he/she was alleged to have committed the offence, he or she was legally insane.¹⁰⁵¹ The onus is, therefore, on the accused person to prove the insanity when the offence was committed. In all these cases, if the accused person successfully manages to establish facts that prove the defence raised, then the burden of proof lies on the prosecution to prove otherwise.

¹⁰⁴³ *Op. cit* n 52.

¹⁰⁴⁴ *Op. cit* n 384.

¹⁰⁴⁵ M Damaska, 'Structures of Authority and Comparative Criminal Procedures' (1975) 84 Yale Law Journal 480

¹⁰⁴⁶ *Ibid.*

¹⁰⁴⁷ Thayer J B, 'The Burden of Proof' (1890) 4 Harvard Law Review 45, 50.

¹⁰⁴⁸ *Op. cit* n 123.

¹⁰⁴⁹ *Op. cit* n 50.

¹⁰⁵⁰ *Ibid.*

¹⁰⁵¹ *Ibid.*

Lord Denning observed that:

Whilst the ultimate burden rests on the Crown of proving every element essential in the crime, nevertheless in order to prove that the act was a voluntary act, the crown is entitled to rely on the presumption that every man has sufficient mental capacity to be responsible for his crimes; and that if the defence wish to displace the prosecution they must give some evidence from which the contrary may be reasonably inferred.¹⁰⁵²

The dicta above confirms that, whereas both the legal and evidential burden of proof ordinarily lie on the prosecution, there are circumstances in which the evidential burden lies on the accused person to prove that he/she did not have sufficient mental capacity as at the time of the offence. It is only in situations recognized and provided for by law that the evidential burden of proof lies on the accused person.

Like the Evidence Act in Kenya, the Nepalese Evidence Act provides that the burden of proof in criminal cases lies on the prosecution and any accused person, who pleads on the basis of any existing law for the justifiability of his act, bears the burden to prove so.¹⁰⁵³ In addition, the Nepalese Prevention of Corruption Act 2054, Abuse and Drugs Prevention Act 2033 and Human Trafficking Prevention Act 2033 specifically place the evidential burden on the accused persons. The court in Nepal has upheld the provisions of the Nepalese Prevention of Corruption Act and Abuse and Drugs Prevention Act 2033 by recognizing that there are situations where the law places the onus to adduce evidential burden on the accused person. In *Kul Bahadur Kchteri v. HMG and Ram Chandra Devkota v. HMG*,¹⁰⁵⁴ the court held that the accused persons bore the onus to adduce evidence that they were not culpable since the Prevention of Corruption Act 2054 placed this onus on them. The prosecution presented evidence that they were the supervisors of the store where the goods went missing, but they failed to adduce evidence that they were not the ones who stole the goods. The Prevention of Corruption Act 2054 provided that the evidential burden lies on anyone charged with an offence under the Act. Subsequently, the accused persons were convicted for failing to discharge their evidential burden.

¹⁰⁵² *Bratty v Attorney General for Northern Ireland* (1963) AC 386 HL.

¹⁰⁵³ Section 31 of the Nepal Evidence Act, 2031, Act No 24 of 2031.

¹⁰⁵⁴ NKP 1(2057).

Despite the arguments advanced by the study so far, jurists differ on when the burden of proof can lie on the accused person. In the United Kingdom, Lord Bingham has stated the provisions of the United Kingdom Prevention of Terrorism Act 1989 violated Article 6(2) of the Human Rights Act 1998 and blatantly undermined the presumption of innocence.¹⁰⁵⁵

In *R v Lambert, Ali and Jordan*, the House of Lords, in a majority decision held that:

It is not justifiable to use a statutory provision to transfer the legal burden on the accused.¹⁰⁵⁶

In the above decision, Lord Hutton dissented and stated that:

It is not unprincipled to have regard to the practical reality where the issue related to knowledge of facts in the possession of an accused person.¹⁰⁵⁷

Lord Hutton argued that in cases where the accused is possessed of the knowledge that is crucial to prove facts in dispute, the onus to adduce evidence may be placed on him. He argued that where the accused person is possessed of knowledge of facts which are material to a case then the onus of adducing the evidence to prove the facts may be placed on him/ her. This argument is consistent with the nature of CSA cases since the accused person, apart from the CVSA is possessed of the knowledge of the facts that need to be proved by the prosecution. The same controversy therefore applies in CSA cases as to whether the legal burden can lie on the accused person. This study argues that only the evidential, not the legal burden, may lie on the accused person in CSA cases.

Arguments have been advanced that due to the secrecy surrounding the commission of CSA, the burden of proof in CSA trials should lie on the accused person.¹⁰⁵⁸ In CSA cases, once the prosecution proves that the abuse took place, but the child is unable to identify the perpetrator, the burden of proof regarding the identity of the perpetrator

¹⁰⁵⁵*R v DPP, ex p Kebilene and Others* [1999] 3 WLR 972, 976.

¹⁰⁵⁶*R v Lambert, Ali and Jordan* [2001] UKHL 37, 44.

¹⁰⁵⁷*Ibid*, para 194.

¹⁰⁵⁸K M Staller & K C Faller, *Seeking Justice in Child Sexual Abuse* (Columbia University Press 2009) 8, 357.

should require that the suspect(s) prove that he/she (they) are not the perpetrators.¹⁰⁵⁹ This argument may occasion injustice to suspects, unless there exists other evidence such as forensic material, linking the alleged perpetrators to the CSA.

The approach was employed by the appellate division of the New Jersey superior court in a case where there was medical evidence that a four months' old child was sexually abused.¹⁰⁶⁰ Unfortunately, there was insufficient evidence to identify the perpetrator. The New Jersey court turned to the Law of Torts and stated:

Were this a tort suit brought against a limited number of persons, each having access of custody of the baby during the time frame when the sexual abuse occurred, no one else having such contact and the baby being helpless to identify her abuser, would we not recognize an occasion for invocation of the doctrine requiring multiple defendants to exculpate themselves from liability? The burden would then be shifted and the defendant would be required to come forward and give their evidence to establish their non-culpability...¹⁰⁶¹

In a partial dissent, Judge Shebell argued against shifting the burden of proof, arguing that the court's solution might unjustly serve to place guilt upon a defendant for the heinous offence of sexual abuse, merely because of the defendant's inability to prove innocence.

Although it is generally accepted as a cardinal principle of criminal procedure and practice, that the onus is always on the prosecution to prove a case against an accused, in CSA cases, the requirement at times results in a miscarriage of justice.¹⁰⁶² It is now recognized that there are difficulties faced in prosecuting CSA cases.¹⁰⁶³ The challenges include vulnerability of CVSA, the fact that in most cases the only witnesses in CSA cases are CVSA and the accused, the secret nature of CSA and the high standard of proof required, due to the burden of proof being on the prosecution.

¹⁰⁵⁹ John E B Myers, *Myers on Evidence in Child, Domestic and Elder Abuse* (Vol I, Aspen Publishers 2005) 309.

¹⁰⁶⁰ *re D.T* (22) N.J. Super. 509.552 A . 2D 1988.

¹⁰⁶¹ *Ibid.*

¹⁰⁶² *Op. cit* n 109.

¹⁰⁶³ *Op. cit* n 47.

In recognizing that the prosecution bears both the legal and evidential burden in criminal prosecution, Section 102 of the Indian Evidence Act (1872) provides that the burden of proof lies on the prosecution. However, due to the difficulties faced in CSA trial in India, the Indian Parliament enacted the Protection of Children from Sexual Assault Act, 2012. Section 29 of the Act provides that an accused person prosecuted for CSA shall be presumed by the court to have committed the offence unless the contrary is proved. The implication of section 29 of the Act is that, whereas the legal and evidential burden of proof in CSA trial in India lie with the prosecution, once the prosecution establishes a *prima facie* case, the accused person is presumed to have committed the offence and subsequently bears the evidential burden in the context of evidence that he/she intends to marshal. Whereas the legal burden remains with the prosecution, the evidential burden shifts to the accused person who is presumed to have committed the offence and must therefore discharge the burden of adducing evidence to the contrary. The implication therefore is that, if the accused person discharges the evidential burden on a balance of probabilities, then the evidential burden shifts back to the prosecution as argued by Khatiwada.¹⁰⁶⁴

The provision of section 29 of the Protection of Children from Sexual Assault Act, 2012 is an attempt to balance the rights of accused persons and protection of CVSA and falls within statutory exceptions to the burden of proof. The Protection of Children from Sexual Assault Act does not shift the legal burden of proof from the prosecution to the accused person, but only presumes that the accused person committed the offence if the prosecution establishes a *prima facie* case. The presumption therefore only places the onus on the accused person to adduce evidence to the contrary. This does not in any way contradict the presumption of innocence since presumptions only hold ground until the contrary is proved.¹⁰⁶⁵ Once the accused person adduces evidence to the contrary, he/she remains presumed innocent until the prosecution provides sufficient evidence to find the accused person guilty.

Prior to the enactment of the Act, the Indian Parliamentary Standing Committee on Human Resource Development, held wide consultations with several stakeholders such

¹⁰⁶⁴ *Op. cit* n 1027.

¹⁰⁶⁵ *Op. cit* n 1047; See also section 4 of the Evidence Act, Cap 80 Laws of Kenya.

as the Ministry of Law and Justice, the Office of the Attorney General, civil society, human rights organizations, relevant ministries, National Commission for Protection of Child Rights and the Law Reform Commission.¹⁰⁶⁶ In its two hundred fortieth report on the Protection of Children from Sexual Offences Bill 2011, the committee discussed several issues raised by stakeholders. They included, amongst others, the constitutionality of shifting the burden of proof from the prosecution to the accused to prove his/her innocence in CSA cases.

The committee recognized the fact that the onus is always on the prosecution to discharge the burden of proof in criminal cases as provided by article 20(3) of the Constitution of India (1949) under the right to silence.¹⁰⁶⁷ In addition, the committee argued that Article 21 of the Constitution of India (1949) provides for a fair, just and equitable procedure in criminal cases.¹⁰⁶⁸ In the preamble of its report, the committee recognized that Article 15 of the Indian Constitution obligates the state to make special provision for the protection of children.¹⁰⁶⁹ In addition, Article 39 further obligates the state to protect children against sexual exploitation and ensure their dignity is upheld.¹⁰⁷⁰

After wide consultations, the committee came to the conclusion that the adversarial trial procedure in India, as provided by the existing laws which included the Indian Procedure Code, Juvenile Justice (Care and Protection of Children) Act 2000 and the Indian Evidence Act were inadequate in protecting CVSA.¹⁰⁷¹ There was need for a special comprehensive legislation that safeguards the interest and well-being of CVSA at every stage of the judicial process.¹⁰⁷² Such statute must include child friendly procedures for reporting, recording of evidence, investigation and trial of CSA in such a manner as to enforce the provisions of the UNCRC.¹⁰⁷³

¹⁰⁶⁶ The Two Hundred Fortieth Report on the Protection of Children from Sexual Offences Bill, 2011, by the Department Related Parliamentary Standing Committee on Human Resource Development, presented to the Parliament of India Rajya Sabha. <www.prindia.org/.../> accessed 15 May 2012.

¹⁰⁶⁷ Constitution of India.

¹⁰⁶⁸ Ibid.

¹⁰⁶⁹ *Op. cit* n 1065.

¹⁰⁷⁰ *Op. cit* n 1064.

¹⁰⁷¹ Ibid.

¹⁰⁷² Ibid.

¹⁰⁷³ Ibid.

The committee argued that since Article 21 of the Constitution of India 1949 provides for fair, just and equitable procedure in criminal cases, the procedure must be fair, just and equitable not only to the accused, but to CVSA too who have rights to protection in the judicial proceedings under the UNCRC, which India is a signatory too.¹⁰⁷⁴ The Indian Parliament therefore had an obligation to enact procedural law that addresses the concerns of CVSA protection as stipulated by Article 15 of the Constitution of India 1949.¹⁰⁷⁵ This could be achieved by ensuring that a specialized trained police force investigates CSA cases. As a result of the detailed investigation, if anyone was charged with CSA the onus shifted on him or her to prove his/her innocence.¹⁰⁷⁶ This was seen as a deterrent way of preventing increasing CSA in India by requiring the accused persons to prove their innocence as opposed to the prosecution proving their guilt.¹⁰⁷⁷

The committee argued that such a law would help in the development of child jurisprudence in the country.¹⁰⁷⁸ The recommendations of the committee were discussed in parliament and the Protection of Children from Sexual Assault Act 2012 was passed. Sections 29 and 30 of the Act provide that where a person is prosecuted for CSA, the court shall presume that the person committed the offence unless the contrary is proved.¹⁰⁷⁹ This move by the Indian Parliament recognizes the need to make the criminal trial process sensitive to concerns of CVSA.

Recommendation

Kenya can learn from India, which is a commonwealth state, and has taken a bold step in balancing the rights of accused persons and CVSA in CSA. This can be done through a statutory provision that places the onus of discharging the evidential burden on the accused person. This study appreciates the important role played by the burden of proof in protecting accused persons from arbitrary use of power by the state. However, the burden of proof occasions injustice to CVSA as demonstrated by the various cases cited in this chapter, particularly in Nairobi Criminal Case No 4740/2007.

¹⁰⁷⁴ Ibid.

¹⁰⁷⁵ *Op. cit* n 1065.

¹⁰⁷⁶ *Op. cit* n 1064.

¹⁰⁷⁷ Ibid.

¹⁰⁷⁸ Ibid.

¹⁰⁷⁹ *Op. cit* n 312.

This study recommends that section 109 of the Evidence Act in Kenya needs to be amended to specifically provide that in CSA cases, the onus is on the accused person to discharge the evidential burden, prove his/her non culpability. The constitutionality of this recommendation may be questioned in the light of Article 50(1) (2) of the Constitution of Kenya which protects the presumption of innocence. In the following section, the study attempts to address this concern.

The Constitutionality of the recommendation that the evidential burden in CSA cases lie on the accused person

The recommendation that the evidential burden lies on the accused person in CSA cases, does not in any way violate Article 50(1) (2) of the Constitution of Kenya on the right to be presumed innocent until the contrary is proved. The recommendation does not imply that the accused person is guilty and so needs to prove his/her innocence, for that would amount to placing the legal burden on the accused. In effect therefore, the prosecution must still establish a *prima facie* case. Subsequently, the evidential burden lies on the accused. If however, the accused person successfully discharges the evidential burden, then the onus is on the prosecution to prove that the evidence he/she adduced does not exonerate him/her. The legal burden therefore remains on the prosecution.

In addition, Article 20(4) of the Constitution of Kenya provides that in interpreting the Bill of Rights, a court, tribunal or any other authority shall promote (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and (b) the spirit, purport and objects of the Bill of Rights. The purpose and object of the Bill of Rights of the Constitution of Kenya is to provide equal protection of the law to every person. The Article emphasizes human dignity, equality and equity principles which are consistent with the rights theory and procedural justice theory already discussed in chapter 1.

The interpretation of the constitutional provisions must therefore ensure a balance between the constitutional right to a fair trial of accused persons and the concerns for the protection of CVSA. The provision of Article 20(4) (a) of the Constitution of Kenya is consistent with the democratic/normative reinforcement interpretation of the Constitution. The democratic/normative reinforcement interpretation argues that in interpreting a

constitution, modern society's current morals and feelings must be taken into consideration.¹⁰⁸⁰

This study argues that there is a general concern in the modern Kenyan society that CVSA should be protected during the CSA trial.¹⁰⁸¹ The democratic/normative reinforcement interpretation is also consistent with equitable/ethical principle of interpretation which argues that in interpreting the Constitution, the court decision should be based on an innate sense of justice, balancing the interests of the parties, and what is right and wrong, regardless of what the written law might provide.¹⁰⁸² In this respect therefore, the courts need to interpret the provisions of the Constitution of Kenya in a manner that balances the rights of CVSA and accused persons.

Article 21(3) of the Constitution of Kenya obligates all state organs and public officers to address the needs of vulnerable groups within the society, including children. This provision places a constitutional duty on the state to address the needs of CVSA in the trial process. The protection of CVSA in the CSA trial process is therefore a constitutional claim with a correlated constitutional duty on the state, according to Hohfeld's interpretation of a right as a claim.¹⁰⁸³ Further, the court should interpret the constitution in a manner that balances the rights of CVSA with accused persons according to the distributive justice principle as argued by Rawls.¹⁰⁸⁴ In doing so, the constitutional interpretation must benefit the vulnerable and less advantaged members of the society, in this case CVSA in CSA trials.

To enforce the rights of CVSA in CSA cases necessitates the limitation of the accused person's right to a fair trial. However, fair trial rights are non-derogable in Kenya.¹⁰⁸⁵ This implies that under no circumstance can any of the components of fair trial rights under Article 50 be suspended. The result is a conflict of the right to a fair trial and the need to protect CVSA in CSA cases. Despite the inclusion of the right to a fair trial under

¹⁰⁸⁰ C Sujit, 'Globalization in Search of Justification: Towards a Theory of Comparative Constitutional Interpretation,' (1999)74 Indiana Law Journal issue 3, 820, 845.

¹⁰⁸¹ *Op. cit* n 43.

¹⁰⁸² G Lawson, 'The Constitutional Case Against Precedent' (1994) 17 Harvard Journal of Law & Public Policy 23, 24.

¹⁰⁸³ *Op. cit* n 139.

¹⁰⁸⁴ *Op. cit* n 107.

¹⁰⁸⁵ Article 25(c) of the Constitution of Kenya.

non-derogable rights, the Constitution of Kenya provides that Parliament shall enact laws for the protection, rights and welfare of victims of crime.¹⁰⁸⁶ An analysis of Articles 25(c) and Article 50 (9) implies that the drafters of the constitution intended to protect the accused persons from arbitrary use of state power, while recognizing the need to protect victims of crime in the CJS. Since not everything can be put in a constitution, the drafters of the constitution mandated parliament to enact a law that protects victims of crime in a trial process.¹⁰⁸⁷ Victims of crime therefore have a constitutional right to be protected in the CJS as provided for under Article 50(9) of the Constitution of Kenya. It is the procedure of protection that the constitution mandates parliament to carry out. There is therefore no conflict in the constitution as regards the rights of accused persons and CVSA. What is needed is a developmental approach to interpreting the constitution in a manner that balances the rights of both accused persons and CVSA in CSA trials.

The protection of victims of crime in the criminal process implies some measure of limitation of the rights of accused persons to a fair trial which the Constitution of Kenya has protected from any derogation, unlike the provisions of the ICCPR. What is important in striking the balance of protecting CVSA and the rights of accused persons is a mechanism that does not infringe on the accused persons' right to fair trial, protects CVSA from stress and trauma associated with court testimony, while giving the accused person adequate opportunity to challenge evidence against him/her. Such a mechanism meets the Kenyan constitutional protection of the rights of an accused person to fair trial as well as the protection of vulnerable witnesses such as CVSA as envisaged by Article 50(9) read together with Article 53 that obligates courts to uphold the principle of the best interest of the child.¹⁰⁸⁸

Implication of the non-derogability of the fair trial right

The Constitution of Kenya, read as a whole and interpreted in the spirit of equality, protection of every citizen by law, non-discrimination and in particular the spirit of the constitution as per Article 20,¹⁰⁸⁹ protects all citizens equally and therefore CVSA have a

¹⁰⁸⁶ *Op. cit* n 40 Article 50(9).

¹⁰⁸⁷ Article 50 (9) of the Constitution of Kenya.

¹⁰⁸⁸ *Op. cit* n 40.

¹⁰⁸⁹ Article 20 of the Constitution 2010 under (3) mandates the courts to develop the law to the extent that it does not give effect to a right /fundamental freedom and adopt the interpretation that most favours the enforcement of a right or fundamental freedom. The right of CVSA to participate in the proceeding and have their best interests taken into consideration as paramount needs to be enforced by balancing them

right to protective court procedures as they testify. However, since the right to a fair trial is non-derogable, any limitation of the accused person's right to a fair trial in order to protect CVSA would be unconstitutional. Article 25(c) of the Constitution of Kenya needs to be amended to provide an exception that in CSA cases, the right to fair trial is not protected from derogation. This is the only way to ensure a balance between fair trial rights of accused persons and protection of CVSA in child sexual abuse trials.

It is only when both accused persons and victims of crime are able to give their best evidence in court that the trial judge can arrive at a just and fair conclusion, within the context of procedural justice, as discussed in chapter three. However, Article 25 of the Constitution of Kenya uses very explicit words to say that 'despite any other provision in the Constitution, the right to a fair trial amongst others shall not be limited.' Without faulting the drafters of the Constitution, my view is that they (the drafters) were mistaken when they included the right to a fair trial as an absolute right. Therefore there is a need for an amendment of the Constitution if CVSA are to get their deserved right to a fair trial.

Since both the rights to fair trial and best interest of CVSA as well as right to participate in the proceedings are protected under the constitution as already discussed in earlier chapters, the drafters of the constitution may not have conceived a situation where the criminal process discriminates against CVSA. Discrimination of all kinds is expressly unconstitutional under Article 27 of the Constitution of Kenya.

Controversial as this recommendation may seem, it is a bold step taken by the study after analyzing the impact of the burden of proof on the prosecution of CSA cases in Kenya. So long as the recommendation on detailed pre-trial procedure is implemented, then placing the evidential burden on the accused person in CSA cases will not violate the rights of accused persons. The move is aimed at ensuring justice and fairness in CSA trial. Laws are supposed to serve as tools for solving society's problems and not become bottlenecks to the administration of justice.

with those of accuseds to fair trial under the same constitution, for no right is superior to the other, both are human rights and indivisible.

In Bentham's view, the adversarial system's evidentiary rules such as the presumption of innocence that gives the accused persons a privilege against self-incrimination does not serve the objective of fairness.¹⁰⁹⁰ It is an obstruction to the discovery of truth as it shields accused persons from assisting in the search for truth. Khatiwada however argues that the requirement by the prosecution to discharge the burden of proof beyond any reasonable doubt is the hallmark of an adversarial system that ensures that the prosecution proves allegations against accused persons.¹⁰⁹¹ Any attempt to shift the burden to the defendant should be resisted as it has the potential of weakening the protection of accused persons in the trial process.¹⁰⁹² Whereas I agree with Bentham that the presumption of innocence in CSA cases obscures the search for the truth and the argument by Khatiwada that the burden of proof is the hallmark of the adversarial trial in CSA cases, the burden of proof obscures the search for the truth.¹⁰⁹³ This can only be addressed by placing the evidential burden, not the legal burden, on the accused person since in most cases only the accused person and CVSA are the eye witnesses.¹⁰⁹⁴ The accused person is therefore possessed of material facts which are important in the search for the truth in CSA trial.¹⁰⁹⁵

The study findings confirm Bentham's further argument that the adversarial system is characterized by relics of the past, which bear no relation to the objectives of the trial and should be reformed to ensure fairness to everyone.¹⁰⁹⁶ Bentham may have appeared to view the adversarial system negatively, but in respect of CSA trial, his argument is convincing, that the search for truth should involve everyone with the knowledge that assists the objective of justice. Bentham did not expressly advocate for the inquisitorial system of searching for the truth, but his view points towards a criminal trial that involves all with information relevant to the allegation in search of the truth.

Since the burden of proof epitomizes the adversarial trial procedure, the current trial procedure in CSA cases in Kenya is insensitive to the needs of CVSA. The subsequent sections of this chapter discuss the various aspects of the burden of proof which characterize the adversarial trial procedure and which occasions an imbalance between

¹⁰⁹⁰ *Op. cit* n 432.

¹⁰⁹¹ *Op. cit* n 1027.

¹⁰⁹² *Ibid.*

¹⁰⁹³ *Op. cit* n 5.

¹⁰⁹⁴ *Op. cit* n 384.

¹⁰⁹⁵ *Op. cit* n 493.

¹⁰⁹⁶ *Ibid.*

the rights of the accused persons and CVSA in CSA trials. In the next section, the study examines the role of the prosecutor in discharging the burden of proof in CSA cases.

5.3 The Role of the Prosecutor in CSA Trial

Concerns have been raised as to the unique challenges of prosecuting the offence of (CSA) under the adversarial legal system.¹⁰⁹⁷

This study found that many of the accused persons were represented as they could afford the services of lawyers while fewer CVSA had legal representation by advocates from NGOs dealing with children matters. In an ideal situation, the interests of CVSA are supposed to be protected by the prosecutor on behalf of the state.¹⁰⁹⁸ The advocates for accused persons are professional lawyers trained in legal matters. The study found that the prosecutors were all police officers of the rank of inspector and below. All of them had attained high school level of education as compared to advocates who are all university graduates in law. Only 8% of the prosecutors had additional qualification in diploma in criminology and social work. No state counsel from the office of the Director of Public Prosecutions was involved in the prosecution of CSA cases. Whereas the author does not fault the ability of the police prosecutors to effectively prosecute CSA cases, this situation resulted into an imbalance in the legal representation of the interests of accused persons and those of CVSA.

In Eldoret, the study observed a magistrate ask advocates to take up CSA cases *on pro bono* basis but they declined. The request by the magistrate confirms the need for legal representation of CVSA interests by lawyers (in a watching brief capacity) despite their representation by the police prosecutors. One of the advocates¹⁰⁹⁹ present in court when the request was made by the magistrate was interviewed and stated that he declined to take up the case because the court would not pay them and because CSA cases needed advocates with a passion for children. This finding highlights the difficulty faced by CVSA who cannot afford the services of a lawyer.

Whereas the defence counsel knew the rights of their clients and raised objection if those rights were threatened, the prosecutors generally appeared not so keen in protecting the

¹⁰⁹⁷ *Op. cit* n 328.

¹⁰⁹⁸ *Op. cit* n 89.

¹⁰⁹⁹ Respondent No 55 interviewed at Eldoret on the 18/10/2010.

rights of CVSA. As an example, in some cases, the prosecution failed to make necessary applications to court in cases where there was need to have CVSA testify through intermediaries,¹¹⁰⁰ or object to intimidatory cross examination. Some CVSA were of the opinion that prosecutors treated them harshly. In the words of one CVSA:

The prosecutor did not understand what I was going through. He insisted that I had to talk but failed to protect me from the cruel questions by the accused's counsel. Everyone seemed to protect the accused, but not me.¹¹⁰¹

The view of the CVSA above demonstrates the challenge faced by the prosecution in adequately representing the interests of CVSA.

Legal representation of victims has gained recognition to an extent that it is provided for by the UNGJMCCVWC (2005). Article 53(2) of the Constitution of Kenya protects children's right to their best interest as being of paramount importance in matters concerning them. Article 53(2) of the Constitution of Kenya therefore protects children's best interest principle as a constitutional right. In addition, Article 50 (7) of the Constitution of Kenya recognizes that victims of crime have rights, need protection and provision for their welfare. The Article mandates Parliament to enact legislation in this regard although such a law is yet to be enacted.

Victims' lawyers are today recognized as participants with status in the legal process as is the case in the ICC trial procedure.¹¹⁰² Article 48 of the Constitution of Kenya provides that the state shall ensure access to justice for all persons. The implication is a constitutional obligation on the state to ensure that factors that may hinder access to justice by anyone, including CVSA is addressed. Since the Kenyan court procedure in CSA case, does not provide legal representation to CVSA, it fails to comply with the constitutional right of CVSA to access justice and have their best interests regarded as paramount.

¹¹⁰⁰ *Op. cit* n 35, section 32 allows courts to direct that vulnerable witnesses be protected while testifying through the use of witness protection box, intermediary, hearings closed to the public, exclusion of press or any other appropriate measures.

¹¹⁰¹ Respondent no 57 in Appendix K.

¹¹⁰² P Devlin, *The Judge* (Oxford University Press 1979)121.

Based on the study findings, the concerns raised by the study are; what is the exact role of a prosecutor in the adversarial trial of CSA? Does the prosecutor effectively represent the interest of CVSA? As a court officer, can the prosecution represent the interest of CVSA without bias against the accused? What is the border between public interest, which the prosecutor is to represent, and the interest of CVSA? Is there a conflict between the two?

In the following section, the study attempts to answer these questions.

The United States Supreme Court explained the role of the state in prosecution in the case of as follows:

Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime. To this extent, our-so called adversary system is not adversary at all; nor should it be. But defence counsel has no comparable obligation to ascertain and present truth.¹¹⁰³

In yet another case, the court emphasized the role of the prosecutor as follows:

The (prosecutor) is the representative of not an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer. He may prosecute with earnestness and vigour. Indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.¹¹⁰⁴

¹¹⁰³*United States v Wade*, 388 U.S. 218,256 (1967).

¹¹⁰⁴*Berger v United States*, 295 US 78, 88-89(1935).

From the court decisions, it is apparent that public prosecution is an important aspect of the criminal justice system. The prosecution of an offender is therefore clearly the duty of the state which is carried out by the prosecutor. Whereas it is the responsibility of the prosecutor to ensure that a criminal trial results into a conviction so as to protect the larger community and serve as deterrence to potential offenders, the prosecutor does not need to be overwhelmingly concerned about the outcome of the trial process.¹¹⁰⁵ The prosecutor is an officer of the court and is therefore expected to provide a truthful picture of the circumstances surrounding the commission of an offence.

Although the prosecutor acts on behalf of the state, there is an obligation on the prosecution to ensure that the accused person does not suffer in an unfair and unethical manner. Being an officer of the court, the prosecutor therefore has a duty to assist the court in the truth seeking process of establishing the guilt or otherwise of the accused. Since the prosecution represents the state, the prosecutor cannot advance the interest of one party at the cost of another because the state is committed to the administration of justice to all its citizens (public). The prosecutor has to be truthful and impartial so that even accused persons as well as complainants/victims receive justice. The main function of the prosecutor is to protect public interest as opposed any partisan concerns. The Supreme Court of India further emphasized the role of the prosecutor as follows¹¹⁰⁶

- a) Prosecution of an offender.
- b) Withdrawal from prosecution.
- c) Being an officer of the court, the prosecutor is responsible to the court in assisting in the search for the truth.
- d) At the investigation stage, the prosecutor appears in court and obtains arrest warrants against the accused. The prosecutor also obtains search warrants from the court to facilitate the collection of evidence from specific premises. The prosecutor also obtains police custody remand for accused persons who need to be remanded in custody for purposes of interrogation.
- e) Once the investigation is complete and sufficient evidence is gathered against the accused, the prosecution makes a decision whether to

¹¹⁰⁵ Madan Lal Sharma, *The Role and Function of Prosecution in Criminal Justice*, (Central Bureau of Investigation, India 2007) 25.

¹¹⁰⁶ *Shiv Nandan Paswan v State of Bihar & others* (AIR 1983 SC 1994).

prosecute or not. If the decision is made to prosecute, then the prosecutor files a charge in court.

- f) To ensure the public interest is protected in making a decision as to whether to prosecute or not.

The prosecutor's main role is the prosecution of the accused person during the criminal trial. The prosecution therefore has to record the prosecution evidence by making sure that all relevant evidence and witnesses are presented before court. In carrying out all the above functions, the prosecutor's main duty is to protect the interest of the public (public interest).¹¹⁰⁷

Public interest is therefore a major consideration and an overriding factor in deciding whether or not to prosecute. It is also important in deciding whether to continue with a case or withdraw it.¹¹⁰⁸ Public interest refers to what is in the best interest of the entire society which includes the victim, the offender and the rest of the members of the public.¹¹⁰⁹ According to the code for crime prosecution, the public interest factors which must be considered in making a decision as to whether to prosecute a reported crime or not include; the existence of sufficient evidence to justify prosecution, whether the prosecution is in the best interest of the public, the nature and seriousness of the offence committed, the level of culpability of the suspect, the relationship between the suspect and the victim, the level of involvement of the suspect in the crime, the age and gender of the victim and the offender, the vulnerability of the victim, especially those in a position of trust or authority with the suspect and the motivation for committing the crime.¹¹¹⁰

It is important to note that while taking into account the public interest in the process of prosecution, prosecutors do not act for victims of crime or their families in the manner that advocates act for their clients.¹¹¹¹ The decision to prosecute a reported crime is therefore not based only on the protection of the victim of crime but on an overall view of public interest. From the above discussions, the study argues that, whereas the prosecution advances public interest, the aim is to protect all persons, who include the

¹¹⁰⁷ *Op. cit* n 193.

¹¹⁰⁸ The Crown Prosecution Service, *The Code for Crown Prosecution* (Government of the UK 2010).

¹¹⁰⁹ *Criminal Victim's Handbook of the State of California, Criminal and Civil Prosecution* <http://www.citruscollege.edu/stdntssrv/studentdean/ab_1088/pages/Cri> (accessed 18th April 2013).

¹¹¹⁰ *Op. cit* n 1106.

¹¹¹¹ *Op. cit* n 1091.

accused person, the victim of crime and none involved members of the public in the criminal trial.

Therefore, although the understanding is that the interests of a victim of crime are represented by the prosecution, in strict legal interpretation, the prosecution is non-partisan, impartial, an officer of the court whose duty is to assist the court in the truth seeking process. The prosecutor therefore does not argue out the case or prosecute in the interest of the victim. This is the basis upon which the study makes an argument for the protection of the rights and concerns of CVSA. The next section discusses the challenges faced in CSA trials due to the impartial role of the trial judge in the adversarial system.

The study establishes that the role of an adversarial prosecutor does not effectively represent the interest of CVSA, due to the fact that the prosecutor must remain impartial as an officer of the court and prosecute in the interest of the public which is larger than the victim's interest. The prosecution has no control over the investigation of CSA. The prosecutor merely receives the police file and a charge sheet which accompanies the accused person to court on the day of the plea taking. Subsequently, the prosecutor depends on the investigators to summon witnesses and bring evidence to court. The lack of control by the prosecutor on the investigation and summoning of witnesses to come to court was found by the study to be a major hindrance to effective prosecution of CSA.

Recommendation

The study recommends that Kenya adopts the inquisitorial type of prosecution where a special prosecutor is appointed to supervise the investigation of CSA so as to ensure that firstly, all evidence of probative value is collected. Secondly, the special prosecutor who works under the supervision of a pre-trial judge ensures that all witnesses who need to appear in court are summoned and attend court. In California and Wisconsin states in USA, a special prosecutor attends all CSA investigation to ensure that all probative evidence is collected during the investigation.¹¹¹² In King County, Washington (Seattle), and Orange County, California, CSA cases are prosecuted by specially trained prosecutors who form part of the investigative team and attend the interview of

¹¹¹² Section 1.3.4 of the Child Abuse and Neglect Reporting Act 2012 (California), Section 1191 of the Child Abuse Prevention and Treatment Act 1974 (Wisconsin).

CVSA.¹¹¹³ The early involvement of the prosecutor removes the unnecessary dependence of the prosecutor on investigating officers, while it ensures that the prosecutor has details of the case from the start.¹¹¹⁴ In the two counties, higher rates of filing charges have been observed due to the involvement of the prosecutor in the case from the start.¹¹¹⁵

This arrangement has ensured a higher conviction rate in CSA cases since the prosecutor is involved in the case at the reporting stage.¹¹¹⁶ In France and Germany, pre-trial investigation of CSA is overseen by a pre-trial judge or special prosecutor.¹¹¹⁷ As a result, all probative evidence is collected and recorded before the trial begins.¹¹¹⁸ In case CVSA is unable to testify, the *dossier* is admitted in court as evidence and the accused person is given an opportunity to examine it and ask questions which are presented to CVSA in a different forum by the trial judge.¹¹¹⁹ This measure ensures that CVSA interest is protected during the trial process and has encouraged more reporting of CSA for prosecution.¹¹²⁰ In India, special public prosecutors are appointed for CSA cases and must record the evidence of CVSA within 30 days of the report being made.¹¹²¹ In addition, the trial must be concluded within one year.¹¹²²

There is need for a specialized CSA protection unit of police who are specifically trained on CSA investigation and prosecution as is the case in England and Australia.¹¹²³ There is also need for guidelines to be developed by the office of the inspector general of police to guide the special police unit on how to handle CSA cases as is the case in Alabama State in USA, England, France Germany and Australia amongst others.¹¹²⁴ The development of the guidelines should indicate what happens when public interest and concerns for CVSA protection conflict, making the decision on whether or not to prosecute difficult. Kenya can learn lessons from section 33 of the Protection of Children from Sexual Offences Act, 2012, in India which grants special powers to Special Courts established under the Act to

¹¹¹³ Child Abuse and Prevention Treatment Act 1996.

¹¹¹⁴ *Op. cit* n 384.

¹¹¹⁵ *Ibid.*

¹¹¹⁶ *Ibid.*

¹¹¹⁷ *Op. cit* n 52.

¹¹¹⁸ *Ibid*

¹¹¹⁹ *Ibid.*

¹¹²⁰ *Ibid.*

¹¹²¹ *Op. cit* n 312.

¹¹²² *Ibid.*

¹¹²³ *Op. cit* n 47.

¹¹²⁴ *Op. cit* n 384.

try CSA cases. Such powers include taking cognizance of any CSA without the accused being committed to it for trial.

5.4 Impartiality of the Trial Judge/umpire and its Implication on CSA Trial

The constitutional basis for an impartial trial in Kenya is Article 50(1) of the Constitution. This is therefore a fair trial right that cannot be limited as provided by Article 25(c) of the Constitution. The study notes that any attempt to limit this fair trial right without the amendment of the constitution would be unconstitutional.

In the development of the adversarial trial system, the fear of the state's potential abuse of power led to the marginalization and passive role of the umpire, who was viewed as a representative of the state.¹¹²⁵ Subsequently, the judge had no control over the evidence to be adduced in court, or the conduct of the court proceedings by the prosecution or the defence.¹¹²⁶ The judge had two distinct roles.¹¹²⁷ The first role was confined to ensuring that both the prosecution and the accused persons conduct their cases according to the law.¹¹²⁸ The second role was to pronounce the sentence to the accused person in case of a conviction.¹¹²⁹ The role of the judge was that of a passive neutral umpire who did not actively get involved in the collection of evidence by the parties or its presentation in court.¹¹³⁰

The umpire's role in initiating or directing evidence is strictly limited and the main focus is on weighing the evidence presented by the parties, and making a decision, based on the concept of the burden of proof.¹¹³¹ In Kenya, the role of the umpire is provided in the Criminal Procedure Code. According to section 89 of the Criminal Procedure Code, the umpire takes plea, while sections 210 and 211 provide that the umpire rules on whether the accused person has a case to answer or not. Sections 215 and 216 of the Criminal Procedure Code, provide for the pronouncement of judgment and passing of sentence as the main functions of the umpire.

¹¹²⁵ *Op.cit* n 220.

¹¹²⁶ *Ibid.*

¹¹²⁷ *Ibid.*

¹¹²⁸ *Ibid.*

¹¹²⁹ *Op. cit* n 349.

¹¹³⁰ *Op. cit* n 227.

¹¹³¹ *Op. cit* n 234.

Whereas the rationale for the passive role of the umpire was to ensure impartiality and neutrality in the arbitration process, the study found that it leads to a miscarriage of justice in some CSA cases. This was shown by cases in which magistrates could not intervene to protect CVSA from intimidating harassment by the defence or their lawyers. The non-intervention of magistrates in CSA cases is inconsistent with the best interest of the child principle, and contrary to a human rights' approach to the administration of justice.¹¹³² This is illustrated by the following case.

In Eldoret Criminal Case No. 3614/2010, the court record showed that a 15 year old CVSA became shy upon cross-examination, when asked to state exactly what happened when she was defiled. She did not have an idea what a P3¹¹³³ form is. When asked details about it by the accused person's lawyer, she said she knew nothing about it. The record showed that the advocate asked her about her previous sexual relations with other parties apart from the accused person. The magistrate failed to protect her from such interrogation, contrary to the provision of section 34 of the Sexual Offences Act. She answered that she had actually had sex with somebody else two weeks before she was allegedly defiled by the accused person. The court record showed that the prosecution did not re-examine the CVSA so as to address issues which were inordinately brought out by the accused person's lawyer in cross examination. Likewise, the court did not intervene to protect CVSA from such cross examination. When interviewed after the court session, the magistrate stated that:

My role as an impartial arbitrator requires that I maintain neutrality. If I intervene to protect the CVSA, the defence counsel may raise an objection that I favour the prosecution. That may be a ground of appeal. My role is confined to that of a passive referee. The cross-examination by the defence counsel was intimidating to the CVSA, but my hands are tied by the impartiality requirement.¹¹³⁴

In the above case, the CVSA was left at the mercy of the accused person and his lawyer, since both the prosecution and magistrate remained impartial as demanded by the

¹¹³² *Op. cit* n 47.

¹¹³³ This is form filled by a medical officer employed by the police department upon examining a victim of crime. The form is produced in court as evidence.

¹¹³⁴ Respondent no 43 in Appendix K.

adversarial legal system.¹¹³⁵ In such circumstances, the court is literally turned into a battlefield where CVSA and the accused person are seen as adversaries.¹¹³⁶ The playground is assumed to be level, while the umpire watches the game and waits to make a decision based on the actions of the actors (CVSA and accused persons).¹¹³⁷ In this case however, the CVSA is at a disadvantaged position as illustrated in figure 1 in chapter one. The study found that due to lack of regulation or guidelines on how to cross-examine CVSA in CSA cases, it is not possible for umpires to apply the provision of section 34 of the Sexual Offences Act, without objection being raised by the defence counsel.

In Kisumu Children's Court, the study observed a defence lawyer interrogate a CVSA in so cruel a manner that the magistrate attempted to intervene, so as to protect the child from further harassment. The defence lawyer insisted that the CVSA had a duty to answer his questions. This confirmed that there are no guidelines on how CVSA are supposed to be cross-examined. This resulted into a heated argument between the magistrate and the defence lawyer, who insisted that the magistrate had a duty to remain impartial throughout the proceedings, and not appear to favor the CVSA. When interviewed after the court session, the defence lawyer confirmed that there were no guidelines on how CVSA are supposed to be cross-examined, leaving the process to be controlled by lawyers. In the words of the defence lawyer:

As a defence lawyer in CSA cases, I find it very easy to win the case for my client. It is not difficult to intimidate CVSA during their cross-examination. Once I succeed in confusing them, they are not able to testify coherently, but give contradicting evidence. The contradictions create doubts in the case. The law is clear on such contradictions. The benefit is given to the accused person who is subsequently acquitted. It may sound cruel to CVSA, but I have a duty to my client. Perhaps rules should be developed to regulate cross-examination of CVSA. An alternative is to provide CVSA with legal representation.¹¹³⁸

From the above discussion, the study argues that due to the vulnerability of CVSA, the privileges enjoyed by the accused persons, the passive role of the umpire, and lack of

¹¹³⁵ *Op. cit* n 1103.

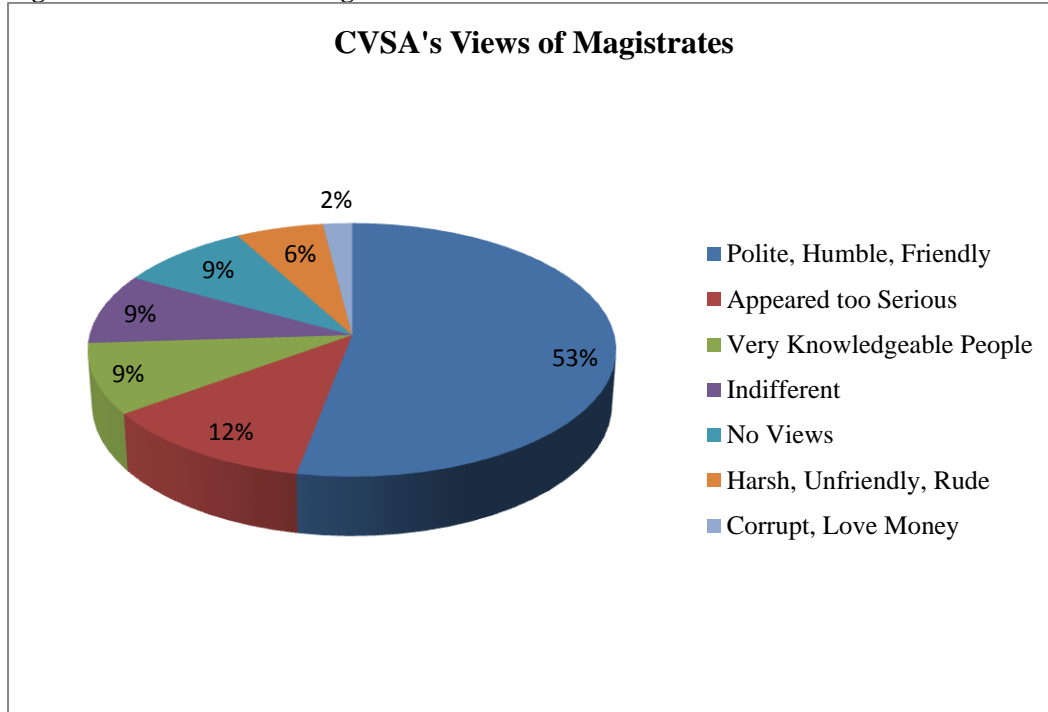
¹¹³⁶ *Op. cit* n 47.

¹¹³⁷ *Ibid.*

¹¹³⁸ Respondent no 53 in Appendix K.

regulation of CVSA cross-examination, CSA trial process sometimes leads to a miscarriage of justice as demonstrated above. The passive nature of the magistrates who presided over CSA trial was viewed in different ways by CVSA. The different views are illustrated by Figure 6 below.

Figure 6: CVSA Views of Magistrates



The views of CVSA about magistrates reflect the perception of the larger society about the justice system where the aggrieved go for redress.¹¹³⁹ Since majority of CVSA thought that the magistrates are polite and humble, if they played an active role in the procedure, CVSA would probably have more confidence in the courts. The views of the 13% of CVSA who felt that the magistrates were unconcerned and serious may be as a result of the adversarial legal system's requirement that the umpires remain impartial. The impartiality requirement contravenes the best interest of the child principle which is a constitutional right protected by Article 53(2) of the Constitution of Kenya. It results into failure by the umpire to protect CVSA from intimidation and harassment by the defence. As a consequence, CVSA are not able to effectively participate in the judicial process, contrary to the principle of a child's participation under the UNGJMCCVWC and Article 12 of the UNCRC.

¹¹³⁹*Op. cit* n 109.

The passive role of umpires negates the need for court protection of CVSA. This finding is inconsistent with the role of a judge in the inquisitorial trial procedure where courts have moved away from their passive role that contributes to the unfriendly court atmosphere.¹¹⁴⁰ The umpires in the inquisitorial trial play an active role in directing cross-examination as happens in France.¹¹⁴¹ Although the passive nature of the umpire's role in the adversarial system such as Kenya ensures that the courts remain neutral, in some cases, it may lead to miscarriage of justice due to the vulnerability of CVSA during cross-examination.

An active involvement of the umpire in an adversarial trial to control the examination of witnesses may enhance the quality of the truth seeking process.¹¹⁴² Likewise, increased participation of the umpire in the supervision of the trial process may improve the ability of CVSA to testify accurately and coherently.¹¹⁴³

Although the passive role of the judge in an adversarial trial offers the best protection for the rights of accused persons, it causes an imbalance with the rights of CVSA in some CSA cases.¹¹⁴⁴ The effectiveness of the passive role of the umpire in an adversarial trial in obtaining the truth and promoting values such as defending the rights of accused persons and vulnerable witnesses has been questioned.¹¹⁴⁵ Arguments have been advanced that the passive role of umpires in the classical adversarial system of trial contributes to injustice in some cases of vulnerable witnesses such as CVSA.¹¹⁴⁶

An active involvement of the umpire in examining witnesses or regulating the conduct of cross examination has been proved to enhance the ability of CVSA to testify accurately and coherently in countries such as France and Germany.¹¹⁴⁷ Under the inquisitorial legal system such as Argentina, the umpire endeavors to discover facts, while simultaneously

¹¹⁴⁰ *Op.cit* n 352.

¹¹⁴¹ *Ibid.*

¹¹⁴² *Op. cit* n 384.

¹¹⁴³ J Bulkley, *Innovations in the Prosecution of Child Sexual Abuse Cases* (American Bar Association 1981)72.

¹¹⁴⁴ *Op. cit* n 47.

¹¹⁴⁵ *Op. cit* n 52.

¹¹⁴⁶ *Op. cit* n 47.

¹¹⁴⁷ J Bulkley, *Innovations in the Prosecution of Child Sexual Abuse Cases* (American Bar Association 181)72.

representing the interests of the state in a trial.¹¹⁴⁸ The presiding judge is not a passive recipient of information, but is primarily responsible for supervising the gathering of the evidence necessary to resolve the case.¹¹⁴⁹ In France, the inquisitorial system allows the judge or some other official appointed for that purpose to collect evidence by interviewing witnesses, including the accused person, on the reported allegation and the judge uses the evidence and his/her knowledge of the law to decide on the matter.¹¹⁵⁰

Whereas the parties themselves control the collection and presentation of evidence in the adversarial system, in the inquisitorial model, that role is exercised by the judge who doubles as the investigator and the umpire.¹¹⁵¹ Although the pre-trial investigation is supervised by a judge and the trial is also presided over by a judge, the pre-trial and the trial judges remain separate individuals to ensure the impartiality of the process.¹¹⁵² This is similar to the International Criminal Court (ICC) trial process which has the pre-trial chamber whose judges are different from the trial chamber.¹¹⁵³

Unlike the adversarial legal system where the pre-trial investigation and evidence collection is undertaken by the parties to the case who subsequently present the evidence before the judge at the trial stage, the inquisitorial system makes no distinction between the pre-trial and the trial stages in as far as the role of the judge is concerned.¹¹⁵⁴ There is no such division between the pre-trial and trial process as a judge is involved in the process of discovering the truth right from the reporting of the dispute, and the parties and their advisors are pushed to the background.¹¹⁵⁵

The judge plays an active role in deciding what evidence needs to be collected, which witnesses to be interviewed and the issues to be addressed.¹¹⁵⁶ In this respect, the judge also interviews the suspect as part of the investigation process.¹¹⁵⁷ The investigating judge may carry out the investigative functions either directly or by supervising a team of

¹¹⁴⁸ *Op. cit* n 352.

¹¹⁴⁹ *Ibid.*

¹¹⁵⁰ *Op. cit* n 355.

¹¹⁵¹ *Op. cit* n 352.

¹¹⁵² *Ibid.*

¹¹⁵³ *Op. cit* n 494.

¹¹⁵⁴ *Op. cit* n 349.

¹¹⁵⁵ *Ibid.*

¹¹⁵⁶ *Op. cit* n 212.

¹¹⁵⁷ *Ibid.*

officers appointed for the task.¹¹⁵⁸ The investigation involves collecting any evidence of probative value and questioning anybody with information relevant to the case.¹¹⁵⁹

While the study does not advocate for such control of the trial process as making the umpire appear to take over the roles of the prosecutor and defence counsel, the study argues for the active participation of the umpire during pre-trial investigation and trial of CSA to ensure that CVSA are protected from intimidation by the defence counsel. Such an active umpire controls the truth seeking process by safeguarding the rights of the accused person, while protecting the rights of CVSA.¹¹⁶⁰

The CJS is about balancing of the rights of parties in a dispute.¹¹⁶¹ Umpires cannot therefore remain detached from the truth seeking process, but must effectively be seen to control the arbitration process without necessarily violating the rights of the accused persons.¹¹⁶² The study notes that in England, an adversarial system of trial where the parties examine the witnesses, the umpire has the right and duty to ask supplementary questions and summon witnesses whom the parties have failed to call.¹¹⁶³

In Germany, an inquisitorial system, witnesses are examined by the presiding umpire, although the defence can cross-examine witnesses too, but this rarely happens.¹¹⁶⁴ In France and other countries where the *juge d'instruction* umpires take an active role in gathering evidence at the pre-trial session, the trial process is conducted by a separate umpire.¹¹⁶⁵ In Scandinavia, it is the parties, not the judges, who ask witnesses questions, although the system of trial is considered as inquisitorial.¹¹⁶⁶

The study therefore argues that it is an over-simplification to discuss the adversarial and inquisitorial systems as if they are mutually exclusive. The reality is that each system has features borrowed from the other. The final outlook of the description of the system as

¹¹⁵⁸ *Op. cit* n 221.

¹¹⁵⁹ *Op. cit* n 352.

¹¹⁶⁰ *Op. cit* n 47.

¹¹⁶¹ *Op. cit* n 191.

¹¹⁶² *Ibid.*

¹¹⁶³ *Op. cit* n 52.

¹¹⁶⁴ *Ibid.*

¹¹⁶⁵ *Ibid.*

¹¹⁶⁶ *Ibid.*

either inquisitorial or adversarial depends on which features appear dominant over the other.

Recommendation

The study recommends that the Kenyan judicial system borrows from countries like France, Germany and Scandinavian countries which have fused certain features of both the inquisitorial and adversarial systems to ensure protection of victims of crime. In particular, the study recommends the procedure applied in France and Germany which gives the umpires a wide discretion in the control of the trial process in CSA cases.¹¹⁶⁷ Like the USA and Britain, the active role of the umpire in controlling the trial process has enhanced the public's confidence in the system's ability to protect CVSA while safeguarding the rights of accused persons.¹¹⁶⁸ Consequently, there has been an increase in the reporting of CSA to the CJS for prosecution.¹¹⁶⁹

Kenya can also learn from India which has provided for an active participation of the umpire in CSA cases under section 33 of the Protection of Children from Sexual Offences Act, 2012.¹¹⁷⁰ In recognizing the importance of the active involvement of the umpire, the Act provides for the procedure and powers of the umpire presiding over the Special Courts in CSA cases.¹¹⁷¹ The umpire is empowered to take cognizance of any sexual abuse of a child, upon receiving such complaint or a report being made to the police, without the suspect being committed to trial.¹¹⁷² This provision enables the umpire to take active measures such as issuing of orders for the protection, welfare and treatment of CVSA, even before a trial begins.

In addition, section 33 of the Act protects CVSA from harassment and intimidation, by providing that any examination-in-chief, cross-examination or re-examination by the defence counsel or prosecutor, as the case may be, shall be done through the umpire.¹¹⁷³ Questions are therefore formulated by the party (defence counsel or prosecutor), but instead of asking the CVSA directly, it is the umpire who communicates the question to CVSA. The umpire therefore assumes a more active role than being passive and decides

¹¹⁶⁷ *Op. cit* n 52.

¹¹⁶⁸ *Op. cit* n 384.

¹¹⁶⁹ *Op. cit* n 47.

¹¹⁷⁰ *Op. cit* n 312.

¹¹⁷¹ *Ibid* section 33.

¹¹⁷² *Ibid* section 33(1).

¹¹⁷³ *Ibid* section 33(2).

when it is necessary to take frequent breaks in the interest of CVSA.¹¹⁷⁴ This calls upon the umpire to actively participate in the protection of the best interest of CVSA, even without such an application being made by the prosecution.

The Act further obligates the umpire to create a child friendly atmosphere, by allowing a family member, guardian or relative in whom the CVSA has trust or confidence, to be present in court during the child's testimony.¹¹⁷⁵ This provision calls on the umpire to enquire into the suitability of such persons by actively engaging both the CVSA and family members. The umpire cannot achieve this goal by being passive. In addition, the umpire has a duty to protect CVSA from being asked to testify repeatedly.¹¹⁷⁶ The umpire is mandated to protect CVSA from aggressive questioning or character assassination and ensure that their dignity is maintained throughout the trial.¹¹⁷⁷ The Act also obligates the umpire to ensure the protection of the identity of CVSA at all times during investigation or trial period.¹¹⁷⁸ In addition, the Act also provides that the umpire enquires into and direct payment as to compensation for physical or mental trauma and rehabilitation of CVSA. The Protection of Children from Sexual Offences Act, 2012 widens the role of the umpire in CSA trial and makes a marked departure from the passive role of the umpire in the adversarial system. Although the Act is barely one year old in its implementation, it received a lot of support from different human rights' advocates, as well as lawyers in India.¹¹⁷⁹

An example of a jurisdiction where umpires actively participate in protecting both CVSA and accused persons is the ICTR. The judges actively controlled the trial process and were not as passive as in the adversarial system, but were involved in the questioning of accused persons and witnesses to clarify any point.¹¹⁸⁰ They were able to call for additional evidence, unlike in the adversarial system.¹¹⁸¹ Their firm control of the proceedings was particularly advantageous in ensuring a calm atmosphere for all to

¹¹⁷⁴ Ibid section 33(3).

¹¹⁷⁵ Ibid section 33(4).

¹¹⁷⁶ Ibid section 33(5).

¹¹⁷⁷ Ibid section 33(6).

¹¹⁷⁸ Ibid section 33(7).

¹¹⁷⁹ H Wadia, 'The Sounds of Silence: Child Sexual Abuse in India,

<<http://infochangeindia.org/children/analysis/the-sounds-of-silence-chil..>> accessed 2 August 2013.

¹¹⁸⁰ G Calvo, *The Trial Proceedings of the International Criminal Court* (Martinus Nijhoff Publishers 2006)

83.

¹¹⁸¹ Ibid.

present their cases.¹¹⁸² Judges have discretion to admit any evidence that according to them is of probative value.¹¹⁸³ The flexible rules of procedure and the discretionary power of the judges ensure that all evidence that may prove any fact is admitted towards seeking the truth. It has the advantage of enabling the tribunal to develop jurisprudence while treating every case under its own set of circumstances, especially those involving vulnerable witnesses such as CVSA.

Kenya can learn from the ICC how the judges manage to conduct and be actively involved in pre-trial and trial procedures without compromising the impartiality requirement.¹¹⁸⁴ The ICC procedure has created a hybrid system in which the judges actively participate in protecting both victims and accused persons' rights.¹¹⁸⁵

Kenya can also learn various lessons from the ICC trial process. The establishment of the ICC as a permanent court after the *ad hoc* ICTY and ICTR is a more advanced global recognition of the need to strike a balance between the rights of accused persons to a fair trial and the protection of victims through a procedural justice framework that gives judges discretionary powers to develop the law by active participation in the trial procedure.¹¹⁸⁶ Established by the Rome Statute¹¹⁸⁷ the court has complimentary jurisdiction to national courts in handling crimes against humanity.

The ICC Rules of Procedure and Evidence (RPE),¹¹⁸⁸ are drafted in a language that is not in the format of either the pure adversarial or inquisitorial system. The procedural law reflects a model of procedural justice framework that has not been in existence before. It is a unique compromise structure of procedure that gives judges wide discretionary powers to balance between the adversarial and inquisitorial models by playing an active role as opposed to being passive umpires.¹¹⁸⁹

¹¹⁸² *Ibid.*

¹¹⁸³ Rule 89 of the ICTR (RPE).

¹¹⁸⁴ C Kress, 'The Procedural Law of International Criminal Court in Outline: Anatomy of a Unique Compromise'(2003) 1 Journal of International Criminal Justice Issue 3, 603.

¹¹⁸⁵ *Ibid.*

¹¹⁸⁶ *Ibid.*

¹¹⁸⁷ *Op. cit* n 494.

¹¹⁸⁸ ICC Rules of Procedure and Evidence (RPE) ICC/ASP/1/3 Part II-A .Adoption and date of effect 9/9/2002.

¹¹⁸⁹ *Op. cit* n 1184.

The wide discretionary power of the judges enables the courts to develop jurisprudence in merging the positive aspects of both the adversarial and inquisitorial models towards a procedural justice framework that balances the rights of accused persons to fair trial and concerns of victims.¹¹⁹⁰

Indeed, courts have a traditional role as lawmakers through case law,¹¹⁹¹ a function they cannot effectively carry out without such wide discretion that enables them to treat each case as special within its set of circumstances.¹¹⁹² The increasing active involvement of judges in the trial process, away from the passive role of an umpire is recognized and appreciated as a major development in judicial reforms towards enhancing the truth seeking role of the trial process.¹¹⁹³

The wide discretionary powers and the active participation of the judges in developing the ICC procedure resulted into a shift away from the strict adversarial model to a hybrid procedural justice framework. The role played by the ICC judges in merging civil and common law elements into international procedure has resulted into less importance as to whether a rule is adversarial or inquisitorial. What is relevant is whether it can assist the court in accomplishing the task of providing justice and fairness to both accused persons and victims. The concern is whether it complies with the fundamental principles of fair trial to accused persons and rights and concerns of victims.¹¹⁹⁴ This would not have been achieved if the ICC judges remained passive as required by the adversarial system.

The perceived ambiguity and legal uncertainty resulting from the merger of civil and common law features, requires creative solutions, in the development of case law. This calls for the active participation and innovation by judges as opposed to being passive and living the parties to control the trial process.¹¹⁹⁵ There is increasing emergence of concepts and practice on international criminal law which stretch beyond mere adversarial or inquisitorial conceptualization of criminal trials.¹¹⁹⁶ Such doctrines include the difficult interplay between the prosecutor and pre-trial chamber during pre-trial

¹¹⁹⁰ *Ibid.*

¹¹⁹¹ *Op. cit* n 123.

¹¹⁹² *Ibid.*

¹¹⁹³ *Op. cit* n 469.

¹¹⁹⁴ *Op. cit* n 47.

¹¹⁹⁵ *Op. cit* n 1184.

¹¹⁹⁶ *Op. cit* n 221.

investigation phase, early participation of victims in the investigation and pre-trial stages, the question of efficient management of the trial at all stages and the balancing of accused persons' rights with concerns of victims.¹¹⁹⁷ Judges therefore need a system that supports their active involvement in the dispute resolution process so as to effectively contribute in the development of jurisprudence. This reflects the concerns and arguments advanced by this study.

As an example, the efficient management of the ICC trial depends on the court actors (judges, prosecutors, counsel) who must not only know the different adversarial and inquisitorial systems, but must be willing to look beyond both models to ensure justice for both victims and accused persons. The object of the ICC trial goes beyond the traditional CJS goal of establishing the guilt or lack of guilt of the accused person. It also ensures justice for victims as well in the context of procedural justice.¹¹⁹⁸ In such a situation, judges need discretionary powers to develop suitable mechanisms that balance the protection of victims with the rights of accused persons.

Under ICTY (RPE) rule 89 (A) and(C), Articles 64(9) and 69(4) of the Rome Statute and rule 63 (2) and (5) of the ICC (RPE), judges are not bound by national rules of evidence, but have a wide discretion in taking into account the spirit of the Rome Statute and general principles of law in making decisions on the admissibility of evidence. They may reject or admit any evidence depending on their view of its probative value and are not bound by strict exclusionary rules of evidence as in the adversarial system. This feature, borrowed from the inquisitorial system, gives the court its unique feature in the enhancement of discovery of truth. This is relevant in CSA trial due to its potential of unearthing evidence that would otherwise not be revealed by the adversarial system of parties being responsible for collecting and presenting evidence in court.¹¹⁹⁹

Likewise, the judges' wide discretion and active participation in the process, ensures that evidence that would have been excluded under the adversarial system's exclusionary evidentiary rules is nevertheless admissible if it is in the opinion of the judges, of

¹¹⁹⁷*Op. cit* n 1184.

¹¹⁹⁸*Op. cit* n 322.

¹¹⁹⁹*Op. cit* n 123.

probative value.¹²⁰⁰ The test that must be applied by the judges is whether the admission or rejection of the evidence promotes fairness and justice in the trial. The consideration is the need not to infringe upon the rights of accused persons to fair trial, while upholding the rights and concerns of victims.

Under Article 69(2) of the Rome Statute and rule 90 (F) of the ICTY (RPE), the judges of the trial chamber control the mode and order of interrogating witnesses and victims as in the inquisitorial system. This has the advantage of controlling possible intimidation and harassment of victims. This is unlike in the adversarial trial where such intervention by the judge may be construed as being partisan and partial as opposed to being impartial.¹²⁰¹

The International Criminal Court procedure therefore adopts a hybrid model with wide court discretion as to the evaluation of evidence hence the active participation and innovation of judges becomes a crucial part of the development of jurisprudence. The ICC trial procedure has been criticized for watering down the rights of accused persons in an attempt to protect victims of crime due to the wide discretionary powers and active participation of the judges in the process.¹²⁰² Kenya can learn and borrow from the ICC various aspects of active participation of umpires in the trial process without compromising the rights of accused persons while protecting CVSA.

Despite the criticism of the ICC procedure by Harovitz,¹²⁰³ the hybrid system of international trials has the advantage of taking what is good from each of the traditional models of trial. The procedure blends with the human rights approach to procedural fairness to both accused persons and victims in the context of the principle of equality of arms.¹²⁰⁴ Indeed, this is the argument advanced by this study in balancing the rights of CVSA and accused persons in CSA trials.

¹²⁰⁰ *Op. cit* n 1184.

¹²⁰¹ *Op. cit* n 352.

¹²⁰² Brett D Schaefer, *Overturing Clinton's Midnight Action on the International Criminal Court* (The Heritage Foundation 2001) <<http://www.heritage.org/organization/international-criminal-court>> accessed 8 April 2012.

¹²⁰³ Harovitz S, *Rwanda: International and National Responses to the Mass Atrocities and their Interrations* (2010) *DOMAC Reports* <<http://www.domac.b/media/veldu-flokk/DOMAC6---Rwanda>> accessed 10 May 2012 .

¹²⁰⁴ *Op. cit* n 241.

Since the right to an impartial trial is a fair trial right which the Constitution protects from any limitation by Article 25(c), the recommendations made in this section can only be constitutional if parliament amends Article 25(c) to allow such limitations of an accused person's fair trial right in CSA cases. The study therefore argues for the amendment of the constitution in this respect.

5.5 Publicity of the Trial

The constitutional basis for public trials in CSA cases in Kenya is Article 50(d) which provides that an accused person has a right to a public trial. Publicity of the trial is a distinctive feature of the classical adversarial trial procedure which makes it unsuitable for CSA.¹²⁰⁵ The rationale for the requirement is to preserve the quality of justice by keeping the umpire on trial as he/she conducts the trial.¹²⁰⁶ Criminal trials have traditionally been open to the public so as to enhance the quality and safeguard the integrity of the fact finding process to the benefit of the accused and the society.¹²⁰⁷ In addition, publicity of a criminal trial fosters an appearance of fairness which enhances public respect for the judicial process.¹²⁰⁸ In the real sense however, not the entire judicial process is conducted in public.¹²⁰⁹ Consultations between judges and prosecutors and defence counsel are conducted in the judge's private chamber.¹²¹⁰ The writing of the judgment also takes place in the chambers.¹²¹¹

Article 50 (8) of the Constitution of Kenya allows judges and magistrates in some cases to close parts of the proceedings from the public in the interest of public morals or safety concerns for the protection of vulnerable victims and witnesses. An accused person's right to a public trial is therefore not absolute since Article 50(8) gives power to a court to limit the extent of the publicity of a trial in certain situations. Vulnerable witnesses such as CVSA therefore have a constitutional right to have the public excluded from their testimony. This calls for a balancing act by the courts to ensure both CVSA and accused persons are equally protected by the courts.

¹²⁰⁵ J Bentham, 'Draught of a New Plan for the Organization of Judicial Establishment in France' (1790) Vol 4. < www.iep.utm.edu/bentham/ -> accessed 10 November 2013.

¹²⁰⁶ Ibid.

¹²⁰⁷ Ibid.

¹²⁰⁸ *Op. cit* n 193.

¹²⁰⁹ M Aronson *et al*, *Litigation: Evidence and Procedure* (3rd edn 1982) 745.

¹²¹⁰ Ibid.

¹²¹¹ Ibid.

The study found the impact of a public trial in CSA cases is that children find it very embarrassing and off-putting to narrate, in front of a large crowd, the intimate details of sexual abuse. In the words of one CVSA:

I found it very difficult and uncomfortable to narrate in front of many people in court including the accused person how he sexually abused me. It was embarrassing to speak about the ordeal as everyone watched me. Maybe the session should have been conducted in private away from the crowded court.¹²¹²

Consequently, the publicity of a trial impacts negatively on CVSA's ability to participate in the judicial process. Subsequently, CVSA are in some cases unable to access justice from the courts. Article 48 of the Constitution of Kenya obligates the state to ensure access to justice for all persons. In complying with this provision, there is need to explore mechanisms that allow CVSA to testify without the negative impact of the publicity requirement.

Over half (51%) of CSA cases were heard in open courts as per the constitutional requirement of an open public trial.¹²¹³ Only 49% of the cases were heard in the magistrate's chambers excluding members of the public. This shows that despite the constitutional provision of Article 53(2) on the best interest of the child principle, the courts are still guided by the classical adversarial procedures in CSA cases. Much as such trials upheld the rights of accused persons, they failed to balance the same with CVSA right to have his/her best interest considered as paramount in matters affecting him/her under Article 53(2) of the Constitution of Kenya.

Unlike the adversarial system, the French inquisitorial system observes publicity of trial and presumption of innocence but is flexible and admits written evidence where it is not possible to obtain the presence of the witness to give evidence in public especially in CSA cases.¹²¹⁴

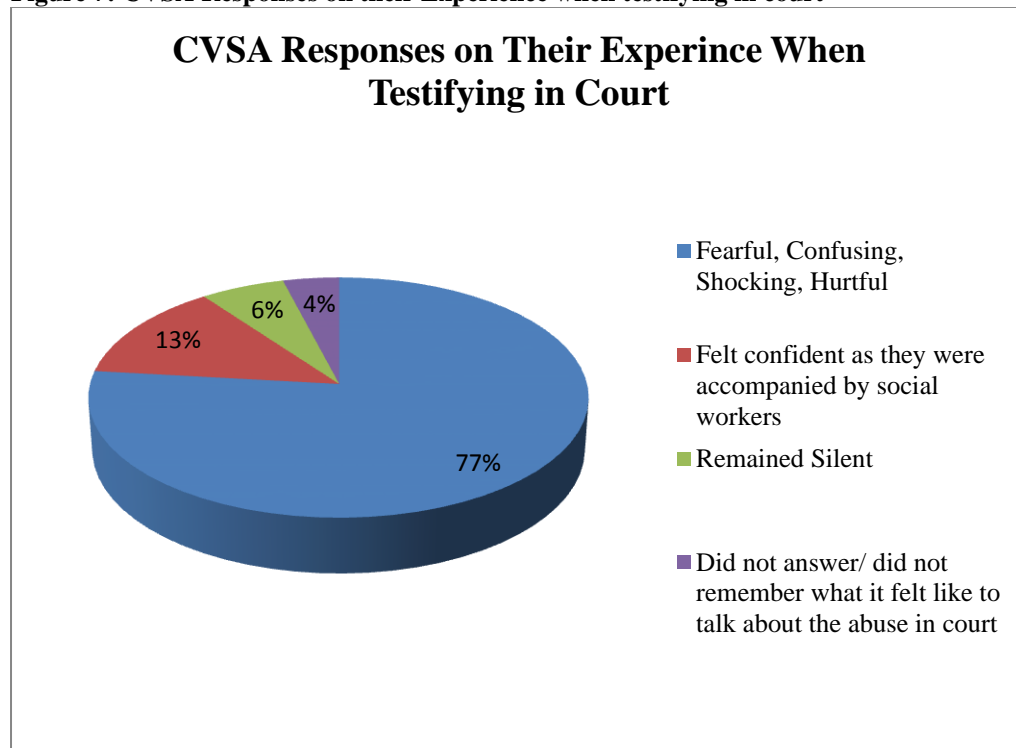
¹²¹² Respondent no 83 in Appendix K.

¹²¹³ *Op. cit* n 40 Article 50(1)-the right of an accused to a fair and public trial as a feature of an adversarial legal system.

¹²¹⁴ *Op. cit* n 349.

As already discussed, the study observed societal stigma hinders CVSA’s ability to narrate the details of the abuse in public.¹²¹⁵ This observation is consistent with the labeling theory discussed in chapter one. The study found that CVSA had difficulty narrating the details of the abuse in open court because of the tense atmosphere, presence of the accused person and lack of mechanisms to protect CVSA as illustrated by figure 7 below.

Figure 7: CVSA Responses on their Experience when testifying in court



Seventy six percent of CVSA described their experience of narrating the sexual abuse in court as fearful, confusing, shocking, tense, shy, nervous, angry, and hurtful as some were observed crying during their testimony. Four percent of CVSA did not answer/did not remember what it felt like to talk about the abuse in court, while 13% of CVSA who were accompanied by social workers felt confident as 6% of CVSA remained silent when asked to describe their experience when narrating the sexual abuse in court. This could probably mean that the experience was so traumatizing to them that they were unable to speak in an open court, filled with many unfamiliar people as a coping mechanism of dealing with the trauma hence their silence. This is consistent with PTSD reaction as discussed in chapter two.¹²¹⁶

¹²¹⁵ *Op. cit* n 109.

¹²¹⁶ *Op. cit* n 75.

In Nakuru, a 14 year old CVSA abused by a neighbour was unable to talk and remained silent. She did not answer any question at all from the magistrate or the prosecutor. This was an example of a case of CVSA suffering from PTSD as discussed in chapter two due to the abuse. The study observed that the court did not appear to understand that the behaviour of CVSA could be as a result of the sexual abuse itself. Instead, the case was adjourned, and the CVSA warned by the prosecutor that she had made a commitment in her statement and was under an obligation to co-operate with the court and testify. When interviewed by the study, the CVSA responded that:

Asking me to tell the court how I was abused by the accused in the presence of everyone including the accused is like going through the abuse again. Nobody seemed to care what I have gone through. Instead, the prosecutor was harsh to me. This process is not fair at all.¹²¹⁷

The incident illustrates failure by the prosecutor to understand that the CVSA's silence in court, in the presence of the accused person, could be as a result of PTSD and the publicity of the trial. The process lacked privacy that would enable CVSA to testify. The CVSA did not refuse to co-operate as interpreted by the prosecutor. The CVSA did not therefore deserve a warning and a further threat from the prosecutor. This amounts to re-victimization (institutional re-victimization of CVSA through the court procedure) instead, the CVSA needed psycho-social support, a private atmosphere and understanding by the prosecutor as a victim of PTSD. This finding supports Temkin's, Saywitz' and Whitcomb *et al*'s arguments that the adversarial trial procedure re-victimizes CVSA.¹²¹⁸

The study found that the apprehension about court appearance by CVSA is partly due to the uncertainty of the procedure and the publicity of the trial. The overall picture by the CVSA is that the court process needs to be child friendly to enable them testify in order to get justice from the courts. Majority (92%) of the legal practitioners interviewed by the study were of the view that publicity of the trial is not in the best interest of CVSA. Although some magistrates conducted CSA trial in the privacy of their chambers to accord CVSA the privacy, this measure was still inadequate because of the face-to-face contact between the accused and CVSA. In addition, CVSA were still required to testify

¹²¹⁷ Respondent no 73 in Appendix K.

¹²¹⁸ See Temkin, Whitcomb et al, Saywitz.

orally in the presence of the accused person. Only 8% of the legal practitioners were of the opinion that some CVSA appeared confident during their testimony and had good memory of the facts relating to the abuse.

A High Court judge who had risen from the ranks of a magistrate and had handled CSA matters for over thirty years described the experience of CVSA in open court during examination in chief as ‘...painful, bitter and makes the CVSA feel revengeful’.¹²¹⁹

The requirement for publicity contravenes CVSA’s right to dignity, privacy and their best interest according to Articles 28, 31 and 53(2) of the Constitution of Kenya. The study therefore finds that the application of the publicity principle is in need of reform in CSA cases in Kenya.

Recommendation

The study recommends that Kenya adopts measures that have been applied by several jurisdictions in an attempt to protect CVSA from the negative impact of a public trial.

In Britain, the YJCEA¹²²⁰ provides for the evidence of intimidated witnesses to be taken in private by excluding all persons from the proceedings except the accused person, legal counsel, interpreter and court officers or those appointed to assist the CVSA. The exclusion power of the court is an exception to the fundamental principle of public trial/justice as stipulated by the European Commission on Human Rights.¹²²¹ The study noted that 49% of magistrates conducted CSA trials in the privacy of their chambers while 51% did so in open court. All CSA cases need to be conducted in private so as to ensure the privacy and dignity of CVSA.

In Australia, instead of subjecting CVSA to a public trial, the court admits video recordings of interviews with CVSA as evidence.¹²²² The rationale for admitting video recordings of interviews with CVSA is that subjecting CVSA to testify orally in a public court is not in the children’s best interest and is likely to result into further trauma.¹²²³ not

¹²¹⁹ A judge of the High Court, in charge of the Family Division of the High Court at the time of data collection.

¹²²⁰ Section 25.

¹²²¹ Article 6(1) excludes the press and public in trials where children are involved, or in sexual offence trials.

¹²²² South Australian Task Force on Child Sexual Abuse, *Final Report of the SA Government Task Force on Child Sexual Abuse*, (SA Taskforce on Child Sexual Abuse 1986) 29.

¹²²³ Ibid.

Under the ICC trial, sexual assault victims have a right under rule 68 of the Rules of Procedure and Evidence to testify in ‘camera’ as an exception to the principle of public hearing. In this respect, the court may receive victim/witness evidence through electronic presentation or any other special means. Likewise, in India, section 37 of the Protection of Children from Sexual Offences Act provides for the testimony of CVSA to be taken in ‘camera’. This is consistent with Solum’s discourse interpretation¹²²⁴ that argues for opportunity for parties to present their views and be listened to, not being locked out of the discourse by technical procedures.

In Japan, identity of CVSA is concealed throughout the trial in order to maintain their privacy and dignity.¹²²⁵ In addition, the courts use video linkage during the victim’s testimony to enable them to testify in a different court room and transmit the video to the courtroom where the accused person, judge and the public is.¹²²⁶ This measure has enabled many CVSA in Japan to testify without the negative impact of a public trial.¹²²⁷

In Kenya, although section 31(4)(a), (b), (c) and (e) of the Sexual Offences Act 2006 provide for mechanisms of protecting sexual assault victims during their testimony (the use of a witness protection box, intermediary, avoiding the open court and any other measure that the court deems just and appropriate), the study found that more than half of CSA trials are conducted in disregard of the protective measures due to lack of guidelines on how to implement the measures. The study therefore recommends the development of guidelines on how to protect CVSA while testifying in court. In Mexico, a practical legal guide exists on how to protect sexual abuse victims within the justice system.¹²²⁸

In view of Article 50(d) of the Constitution, an accused person’s right to a public trial is a fair trial right which is protected from any derogation by Article 25(c). The implication of this provision is that the above recommendations made by the study can only be constitutional if Article 25(c) of the Constitution of Kenya is amended to provide an exception that in CSA trials the accused person’s fair trial rights are not protected from

¹²²⁴ *Op. cit* n 111.

¹²²⁵ S Matsui, ‘Justice for the Accused or Justice for Victims?: The Protection of Victim’s Rights in Japan (2011) 13 Asian-Pacific Law & Policy Journal 55, 76.

¹²²⁶ *Ibid.*

¹²²⁷ *Ibid.*

¹²²⁸ C Harwell, *A Practical Legal Guide on Sexual Assault and Sexual Assault for Health Care Professionals* (New Mexico Coalition of Sexual Assault Programs 2011).

derogation and may therefore be limited. The study therefore recommends that parliament undertakes this proposed constitutional amendment.

5.6 Orality of Evidence

An analysis of Article 50 of the Constitution of Kenya which lists the various fair trial rights reveals that, it does not expressly provide for an accused person's right to have evidence adduced orally in his/her criminal trial. By implication therefore, evidence can be presented in a criminal trial either orally or through other legally recognized means. If the drafters of the constitution intended that evidence in a criminal trial must be produced orally, nothing would have stopped them from stating so in the constitution under the fair trial rights in Article 50. However, sections 62 and 63 of the Evidence Act read together form the basis for the court's insistence on oral evidence in Kenya.

However, section 62 of the Evidence Act uses the word may and not shall in reference to how facts are to be proved by oral evidence. The interpretation of this section implies that it is not in all cases that evidence must be adduced orally. It allows for situations where evidence may be produced in any other legally recognized ways.

Section 63 of the Evidence Act however provides that where oral evidence is adduced in court, it must in all cases be direct evidence. The section defines direct evidence as the testimony given by a witness who saw a fact that could be seen, or heard a fact that could be heard or perceived a fact that could be perceived by any sense or in the case of an opinion, the evidence of the person who holds that opinion. In this section, the study argues that the requirement that CVSA testify orally hinders them from effectively participating in the judicial process and as a result, violates their right to accessing justice under Article 48 of the Constitution of Kenya which mandates the state to ensure access to justice for all persons.

The adversarial legal system generally requires evidence admissible in court to be given orally by the author of the statement.¹²²⁹ The trial consists of a 'day in court', when all the evidence which must be collected by the parties themselves is presented in court orally.¹²³⁰ The insistence on live oral evidence at trial, according to Herman and

¹²²⁹ *Op. cit* n 123.

¹²³⁰ *Op. cit* n 52.

Hirschman, implies direct face to face contact between the accused person and CVSA with a likely result of disempowering CVSA from giving the best evidence as a result of possible fear or intimidation by the accused person against the revelation of the abuse.¹²³¹ Further, the preparations towards live oral testimony by CVSA may lead to a waiting period between four to twenty-six months and an average of ten months in England.¹²³²

The waiting period may be characterized by anxiety and confusion to CVSA which according to psychiatrists is contrary to the healing of victims from trauma.¹²³³ As a healing mechanism trauma victims are encouraged to talk about the abuse as soon as possible, then encouraged to try and forget about the abuse and move on with life without the abuse occupying their minds.¹²³⁴ However, as CVSA wait to give oral evidence, they are not encouraged to talk about the abuse to anyone, except court officials.¹²³⁵ The rationale for discouraging witnesses from speaking to anyone is the fear is that the more they discuss it, the more the evidence gets contaminated, while forgetting the incidence of abuse before testifying means no evidence to support the prosecution case.¹²³⁶ It is also proved that children's memory fades faster than that of adults and so keeping them for over four months may lead to loss of crucial details of their oral evidence.¹²³⁷

Section 194 of the Criminal Procedure Code and section 62 of the Evidence Act require that all evidence in a trial must be oral, direct and taken in the presence of the accused person or his advocate. This is the basis upon which CVSA must give oral evidence in court in the presence of the accused person and identify him/her as the one who committed the offence under trial. The identification implies direct face to face contact between CVSA and the accused during oral evidence.

In compliance with the requirement of Section 194 of the Criminal Procedure Code and Section 62 of the Evidence Act, the study found that CVSA testify orally in children courts in Kenya. Section 150(1) of the Evidence Act prohibits the prosecution from

¹²³¹ *Op. cit* n 89.

¹²³² *Op. cit* n 9.

¹²³³ *Op. cit* n 75.

¹²³⁴ Bentovim *et al*, *Child Sexual Abuse within the Family: Assessment and Treatment* (John Wright 1988)119.

¹²³⁵ Section 165 of the Evidence Act.

¹²³⁶ *Op. cit* n 47.

¹²³⁷ J Plotnikoff, 'Support and Preparation of the Child Witness: Whose Responsibility?' (1990) 1 *Journal of Law and Practice*, 21-31.

asking any leading questions to CVSA. However, section 150(2) of the Evidence Act permits leading questions on matters which are introductory or undisputed or which in the opinion of the court have already been sufficiently proved. Testifying orally about the details of the abuse on all facts which need to be proved may be a challenge to CVSA's memory recall.¹²³⁸ According to a prosecutor interviewed by the study:

One of the most difficult challenges in prosecuting CSA is the reliance on CVSA to state orally in court, in the presence of the accused person, every detail of the abuse. Many CVSA are unable to recollect with precision the events of the abuse as they occurred and narrate them in sequence. As a result, several inconsistencies emerge from CVSA's oral testimony and the statement they recorded with the police. Such inconsistencies are often used by the defence counsel to argue that the CVSA are telling lies and their evidence is not credible. In many such cases, the accused persons are acquitted due to the law's insistence on oral evidence presentation by CVSA in CSA cases.¹²³⁹

The views of the prosecutor above were supported by a social worker:

The court procedure is very cruel to CVSA. The fact that a child has been sexually abused takes away their self-esteem and confidence. To expect them to narrate the details of the abuse orally in court is an underestimation of the impact of the abuse on them. Sexual abuse causes such trauma that many victims are unable to express the details of the abuse orally.¹²⁴⁰

All the respondents described CVSA's experience in giving direct oral evidence as traumatizing. Eighty percent of police officers interviewed were of the view that as witnesses, CVSA are afraid, timid and have difficulty in giving oral evidence. Only 20% of them were of the opinion that not all CVSA find difficulties in testifying as some manage to give their evidence fluently and with confidence. This probably accounts for

¹²³⁸ *Op. cit* n 109.

¹²³⁹ Respondent no 15 in Appendix K.

¹²⁴⁰ Respondent no 33 in Appendix K.

those children who had a strong family support or who were accompanied to court by the social workers from NGOs.

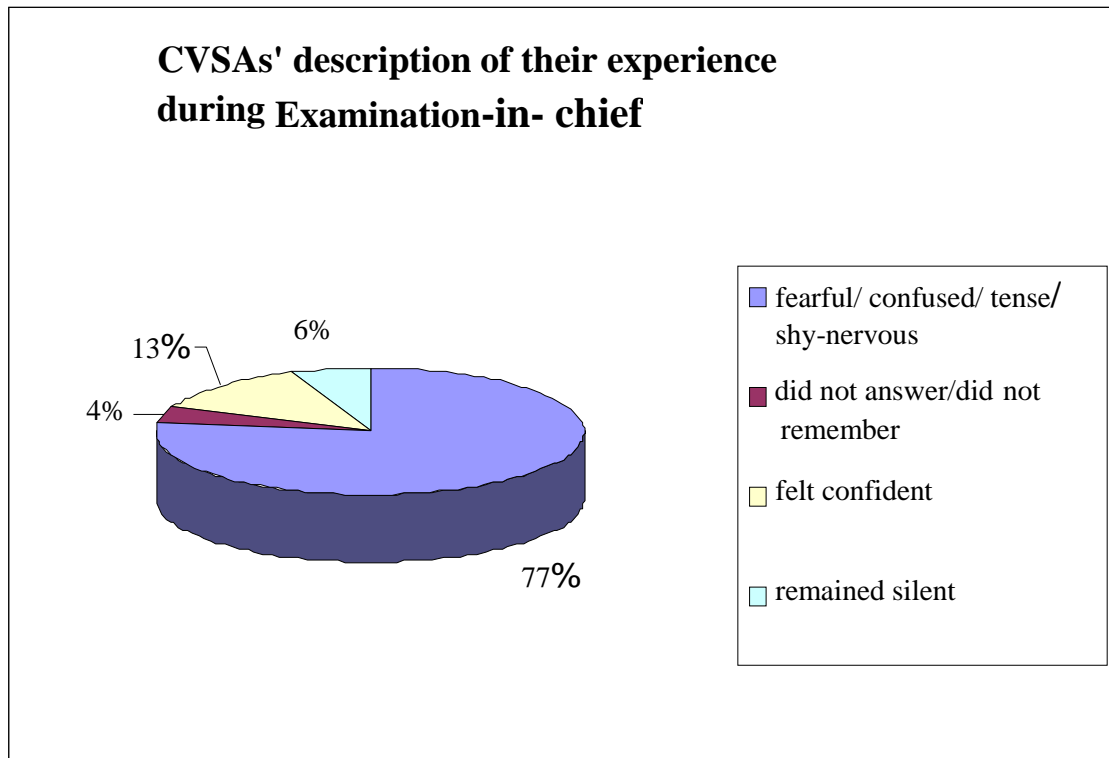
A High Court judge interviewed by the study said that CVSA are often not able to recount what happened during the abuse. The judge described the procedure as a cruel system that exposes the delicate and vulnerable CVSA to the rigours of a cruel trial in order to extract information from the already vulnerable CVSA on a topic that is not ordinarily discussed with children in the African society.¹²⁴¹ The judge described the requirement that CVSA testify orally in CSA matters in the following words:

Whereas it is alright to require adult witnesses to give oral evidence so that the accused person has firsthand information about the allegation and can confront the witness, it is in my opinion very unrealistic and unjustified to subject CVSA to the orality principle due to the traumatic effects of CSA. This provision of the law needs to be reformed.¹²⁴²

All the respondents confirmed the study observation that the requirement of CVSA to give oral/ direct evidence is not child sensitive, but embarrassing to CVSA. The findings were supported by the perusal of finalized cases and the FGD. Some of the difficulties experienced by CVSA during examination in chief are illustrated by figure 8 below.

¹²⁴¹ Respondent no38 in Appendix K.
¹²⁴² Respondent no 37 in Appendix K.

Figure 8: CVSA's Description of their Experiences during Examination in Chief



Most CVSA were concerned that giving oral direct evidence in the presence of the accused person implied that it is them, not the accused persons on trial. They wondered why they were subjected to narrate the details in such a manner. Many of them asked why the court could not use the statements they recorded with the police or get the information from their parents/guardians whom they had already told their story. According to one CVSA:

I had already recorded my statement with the police. I also told my parents about it. Why was I still required to say the same things in front of many people? Was it not possible for them to use my statement to the police? Did I have to come here to tell the whole story again to different people who blamed me for lying? The system is not fair at all.¹²⁴³

Although most CVSA supported the idea of testifying in court so that they can tell their story and enable the court to punish the accused persons, 55% of the CVSA were of the opinion that narrating the abuse orally in court is not in their best interest and re-

¹²⁴³ Respondent no 101 in Appendix K.

victimized them. Fort five percent of CVSA did not think they needed to appear in court at all. In their opinion, once they recorded their statement with the police, it is up to the state to carry out detailed investigations and ask the accused persons to explain his/her side of the story. According to one CVSA:

I cannot understand the need for me to testify orally in court. I am the one who was abused but it appears like I am the one being accused and I have to defend myself. I do not understand why the accused person was allowed to remain silent throughout in court without saying anything yet I had recorded my statement that he sexually abused me. If the police did not believe my recorded statement, why did they call me to court if they cannot use my recorded statement?¹²⁴⁴

The above sentiments of the CVSA support the study's argument that there is need for a detailed pre-trial investigation similar to the inquisitorial system that ensures all evidence of probative value is collected. Further, it supports the study's argument that once an accused person is charged in court with CSA after an elaborate investigation, the onus should be on the accused person to discharge the evidential burden as already argued in this chapter under discussions on burden on proof.

Specific difficulties experienced by CVSA in giving direct oral evidence included, difficulty in remembering details of the abuse, shyness in front of many unfamiliar faces, difficulty explaining how the sexual abuse occurred, fear, trauma and inability to describe the sexual organs. The study observed that all CVSA gave oral direct evidence in the presence of the accused persons/counsel in compliance with the provisions of the Criminal Procedure Code and the Evidence Act although child witnesses and victims are classified by the Sexual Offences Act as vulnerable.¹²⁴⁵

Despite the provisions of section 31(4) of the Sexual Offences Act, on protective measures in taking the evidence of vulnerable victims such as CVSA, the study observed that the courts relied more on the adversarial procedure as set out by the Criminal Procedure Code and the Evidence Act. This is in disregard to the Sexual Offences Act, which provides, under the first schedule that, it supersedes any existing provisions of

¹²⁴⁴ Respondent no 81 in Appendix K.

¹²⁴⁵ *Op. cit* n 36 Sections 2 and 31.

other laws with respect to sexual offences. In matters of sexual offences therefore, if there is a conflict between the provisions of any other existing law and the Sexual Offences Act, the latter prevails.

The above provision of the Sexual Offences Act is generally a good provision, but in terms of this study, it does little to improve the court procedures, since most of the provisions of the Act address substantive as opposed to procedural issues that relate to sexual offences. The study found that only the Nairobi Children's Court had a witness protection box in compliance with section 31(4)(a) of the Sexual Offences Act. The rest of the children courts in Kenya did not have any such witness protection box. However, the witness protection box at the Nairobi Children's court was not used for its intended purpose. The study observed that CVSA did not testify from inside the witness protection box which was instead used to store court files therefore defeating the purpose for which it was set up. The study however observed that some courts allowed CVSA to testify through an intermediary in compliance with section 31(4) (b) of the Sexual Offences Act.

The study observed the use of an intermediary only in one case. One magistrate who was asked why the court does not make use of intermediaries responded that:

Although the Sexual Offences Act intended to protect victims of sexual abuse and provided various ways to do that, its operationalization is hampered by a lack of specific procedures, regulations or guidelines that we can use while applying the provisions. I have never been trained on the protective mechanisms. In reference to the intermediaries, there is no list of who can be appointed as an intermediary or what their qualifications are and their specific functions. Advocates are equally not trained on the role of an intermediary in sexual offences. This may result into conflict between the role of the advocate watching brief for CVSA, the prosecutor and the defence lawyer. There is need for guidelines and training for all court officers if the Sexual Offences Act is to be implemented effectively.¹²⁴⁶

¹²⁴⁶ Respondent no 26 in Appendix K.

The study observed that many of the CSA cases were conducted either in the private chambers of magistrates or in the open courts but closed to members of the public and the press. This therefore appeared to be the only protective measure applied by the courts, but was short of the fact that it retained direct face-to-face contact between the accused person and CVSA. Due to the smaller space in the magistrates' chambers, the distance between the accused person and CVSA was reduced as compared to the open court, making CVSA testify near the accused persons, which further enhanced their intimidation and vulnerability due to the close face to face to face contact with the accused. According to a prosecutor:

It is very difficult to apply the Sexual Offences Act provisions to protect CVSA as they testify. What we have done is to take the testimony of CVSA in the private chambers of the magistrate instead of the court. Although this has the advantage of excluding members of the public from the proceedings and therefore observe the privacy of CVSA, I have noticed that CVSA who testify in magistrate's chambers appear more intimidated since the chamber is relatively smaller compared to the court. As a result, CVSA stand very near the accused as they testify. The proximity between the CVSA and the accused person in most cases enhances CVSA's frustration as the accused persons look directly at them as they testify. The best way would be to use a witness protection box, but we do not have any.¹²⁴⁷

The study observed that the children courts did not exercise their wide discretionary power to protect CVSA in any other appropriate way as provided by the Sexual Offences Act. In response to why the courts are not being innovative as to device ways of protecting CVSA under their discretionary powers, a magistrate responded that:

CSA trials need to be handled by those with an interest in children matters and special skills to do so. If an officer has an interest in this special area then they would be able to read widely on the subject and be innovative in terms of protecting CVSA. The appointment of magistrates to decide children cases should in my opinion be advertised so as to attract interested and most

¹²⁴⁷ Respondent no 6 in Appendix K.

qualified applicants. Currently, magistrates presiding over children courts are randomly appointed and gazetted from those already in the service. Some of them find the cases very traumatizing and if given an opportunity would not preside over the children courts. Not much can be expected of such officers in the absence of specific procedures.¹²⁴⁸

The use of English and Kiswahili as the official languages of the court presented difficulties to some CVSA. The study found that CVSA who came from the rural areas and could not fluently speak English or Kiswahili were particularly disadvantaged. They found the court language too technical to understand, as it comprised of legal jargon and adult language unfamiliar to many of them. Lack of innovative communication aids such as use of dolls and diagrams¹²⁴⁹ to identify the various body parts, enhanced the communication problem for CVSA during their oral direct evidence. Consequently, CVSA's use of their own descriptions of sexual organs and sexual abuse subjected them to stressful cross-examination by the accused persons/ their advocates. One CVSA had difficulty describing the private parts of a human body and instead of the use of the term *anus*, the CVSA used the term "*nyuma yangu*."¹²⁵⁰ This attracted intimidating cross examination by the accused person who insisted that "*nyuma yangu*" does not refer to the sexual organs. In the words of the CVSA:

*"aliweka dudu yake nyuma yangu"*¹²⁵¹

The use of child language in reference to the body organs and sexual acts according to the prosecutors is one area where advocates have taken advantage of the trial process. They pin down CVSA to tell the court in adult language exactly what they mean. According to one prosecutor interviewed by the study:

CVSA find it very difficult and some break down when asked by the prosecutor to tell the court how they were sexually assaulted by using the known ordinary terms in reference to the sexual organs. Children have

¹²⁴⁸ Respondent no 42 in Appendix K.

¹²⁴⁹ A prosecutor in Mombasa was exceptionally innovative enough to draw a sketch diagram of a human body to aid a CVSA in pointing the anus where the accused was alleged to have inserted his penis.

¹²⁵⁰ These are Kiswahili words that children use to refer to sodomy by inserting the penis in the anus of the CVSA.

¹²⁵¹ Respondent no 5 in Appendix K.

developed their own language to refer to sexual acts and organs which in most cases are framed in the Kiswahili language. The use of such terms by CVSA in court during their testimony subjects them to intimidation and harassment when defence counsel insist that such terms are not known in law.¹²⁵²

In supporting the above view of the prosecutor, the study observed advocates dismissing children's language in reference to sexual organs and acts such as “*koko*,”¹²⁵³ “*dudu*,”¹²⁵⁴ “bad manners/*tabia mbaya*”¹²⁵⁵ as not being recognized by law in evidence.

Some CVSA said that the prosecutors and magistrates used terms that they could not comprehend and asked them to explain details of the abuse in a manner that was beyond their capacity. As an example, prosecutors and magistrates asked CVSA to use adult language in describing the sexual organs and activities. Advocates dismissed CVSA descriptions such as bad manners, *dudu*, *tabia mbaya* in reference to the same. Consequently CVSA felt angry, hurt, nervous, tense and confused while some remained silent and could not answer any question in this respect.

The court procedures and terminologies could not be understood by CVSA as observed during court proceedings. This was supported by the court officers during FGD. The implication is that although CVSA testify in court, they do so as a formality, but do not deeply understand and get involved as key actors in the court scenario. This is caused by the language limitation which hinders their active participation in the justice process contrary to Article 48 of the Constitution of Kenya that mandates the state to ensure access to justice by all persons. In addition, it violates CVSA's right to have their best interest taken into account as of paramount importance in matters affecting them under Article 50(3) of the Constitution. It is in the best interest of CVSA that courts develop procedures that are sensitive to CVSA special needs and limitations such as language barrier in court. In this respect, part III of the UNGJMCCVWC provides for children's participation in the judicial process and mandates courts to allow them to express

¹²⁵² Respondent no 7 in Appendix K.

¹²⁵³ This is a word in Luo-(a local language) that literally means a bad insect that bites children, but is used to refer to the male sexual organ when speaking to children to warn them that it is not a play object.

¹²⁵⁴ *Op. cit* n 1015.

¹²⁵⁵ *Tabia mbaya* is a Kiswahili word which means bad manners, emphasizing the fact that sexual activities are not good for children.

themselves in their own words and to have regard to their age, intellectual maturity and evolving capacity.

Technicality in court language intimidates and infuriates adults as much as it did to CVSA, especially words used to refer to the act of sexual abuse. In Mombasa Criminal Case No.1827/2010, for instance, the CVSA's mother who gave evidence on behalf of the CVSA who was five years old, found it difficult to mention the sexual organs and in reference to the sperms she found on her five year old daughter(CVSA), she called it '*maji ya wanaume*.'¹²⁵⁶ Upon cross examination by the accused person as to what she meant, the study observed that she appeared infuriated and irritated by the cross examination, yet she had to answer the accused person's question. The accused person asked several questions some of which appeared irrelevant and harsh, purposely meant to confuse the witness. This example supports the study's argument that terminologies referring to sexual organs or activities present difficulties to adults as it does to children. It emphasizes the challenges of oral direct evidence under the adversarial procedure without communication aids.

In Nairobi Criminal Case No. 2077/09, the accused was charged with the offence of defilement contrary to section 8(1) (2) of the Sexual Offences Act (3) (2006). The particulars of the charge were that the accused person caused his penis to penetrate the vagina of the CVSA (name withheld), a girl of seven years. The alternative charge was indecent assault contrary to section 11(1) of the Sexual Offences Act. The CVSA gave evidence 3 months after the offence. Her evidence was that 'the accused person urinated on her thighs using his *dudu*. The accused person was acquitted as the court reasoned that there was a variance between the CVSA's evidence and the particulars of the charge as it appeared in the charge sheet. Evidence was produced in court showing that the CVSA was examined two weeks after the abuse. However, the report by the medical officer who examined CVSA indicated that there was no injury to the CVSA's private parts. According to the magistrate, there was a doubt raised in the prosecution case. The charge was not proved and the accused person was acquitted.

¹²⁵⁶ The phrase literally means a man's water in Kiswahili language, but refers to the semen ejaculated by a man during a sexual encounter.

The above case emphasizes a situation where a seven year old girl who is alleged to have been defiled by the accused person while wielding a knife (as per the court records), was expected to give evidence in court three months after the abuse. The CVSA failed to remember the exact details of the abuse and lacked the adult words to describe the act of defilement. In her words, urinating on her meant penetration and subsequent ejaculation on her, but she used the word thigh and not vagina. This appears to have been the reason that the court acquitted the accused person. The case shows the difficulty CVSA encounter in narrating the abuse in words that are known to adults during oral presentation of evidence. As a result CSA cases are likely to be dismissed for lack of sufficient evidence.¹²⁵⁷ Sagatun, argues that in CSA cases apart from the accused and CVSA, there is not likely to be another witness.¹²⁵⁸ In addition, where the offence is reported after three weeks, the medical examination may not reveal any injuries on CVSA, due to the possibility that any injuries occasioned by the abuse depending on the extent of the injuries may have healed.¹²⁵⁹ Failure to observe injuries on CVSA by medical examination, argue Hoyano and Keenan, is not proof that the CVSA was not sexually assaulted.¹²⁶⁰ In such cases, it is difficult to link the accused person to the offence. The prosecution in such circumstances relies on the words of CVSA as presented during oral evidence. The difficulties faced by CVSA in presenting their evidence orally in court therefore impacts negatively on the ability of the prosecution to prove the case beyond reasonable doubt.

In Kisumu Criminal Case No. 923/2010, the CVSA was a twelve year old boy who was alleged to have been sexually assaulted by a close relative. The child seemed very uneasy narrating the abuse before court throughout his testimony. The study observed that he completely avoided eye contact with the accused person and only looked at him at the identification stage when he was asked to show the court who had sexually abused him. That was the only time he raised his head up, pointed at the accused person and continued to look down. Ironically, the CVSA gave evidence very confidently as he was accompanied by his father and a lawyer watching brief from Kituo Cha Sheria. The presence of both the father and the lawyer seemed to give confidence to the CVSA. The

¹²⁵⁷ *Op. cit* n 109.

¹²⁵⁸ *Op. cit* n 284.

¹²⁵⁹ *Ibid.*

¹²⁶⁰ *Op. cit* n 47.

phrase used by the child to refer to the sexual abuse was ‘*nyuma yangu*.’¹²⁶¹ This invoked rigorous cross examination by the accused person and the prosecutor had to step in aid of the CVSA by quickly drafting a sketch of a human body diagram for the boy’s use to show what he meant by ‘*nyuma yangu*.’ This case highlights the difficulty that CVSA experience in complying with orality principle during their testimony. It also shows how an innovative prosecutor can be effective in assisting CVSA to testify.

Many CVSA, interviewed did not understand why they had to appear in court and narrate the abuse to many unfamiliar faces. They argued that since they had recorded statements with the police, the same should be used in court instead of asking them to go through the experience again. The argument by CVSA is consistent with the need to protect them from the trauma resulting from oral direct testimony in court. A guardian of one of the CVSA said:

I watched my daughter go through the traumatic experience of giving evidence in court in the presence of the accused person. It was very difficult for her to narrate the experience. She had difficulty describing the abuse. The advocate insisted on adult language which she did not know. I wish the court could understand that children cannot easily talk about sexual matters in an African setting.¹²⁶²

During the court session in Eldoret, one CVSA just kept quiet and refused to talk at all upon seeing the accused person in the dock. The behaviour by the CVSA is consistent with that of a victim who is under PTSD according to the psychoanalytic theory.¹²⁶³ The failure to talk is a coping mechanism by the victim to avoid re-victimization.¹²⁶⁴ Unfortunately, the evidentiary rules do not recognize PTSD and such failure to testify amounts to lack of sufficient evidence in the prosecution case.¹²⁶⁵ The lack of recognition of PTSD and its negative impact on CVSA’s ability to testify amounts to discriminatory

¹²⁶¹ *Nyuma* is a Kiswahili word meaning behind, while *yangu* means mine, together referring to the CVSA’s anus in reference to sodomy.

¹²⁶² Respondent no 18 in Appendix K.

¹²⁶³ *Op. cit* n 75.

¹²⁶⁴ H Hamon, ‘The Testimony of the Child Victim of Intra-Familial Sex Abuse’ in J Spencer and others (eds), *Children’s Evidence in Legal Proceedings: An International Perspective* (Cambridge Law Faculty 1990)346.

¹²⁶⁵ Section 210 of the Criminal Procedure Code.

treatment of CVSA who are expected to testify orally just like victims of other crimes. The resultant discriminatory treatment of CVSA is inconsistent with the principle of non-discrimination of children under part III of the UNGJMCCVWC and Article 27 of the Constitution of Kenya.

The study findings confirm Damaska's argument that the adversarial system protects the rights of accused persons by allowing the parties themselves to collect and present evidence in their respective best ability to win the case, while placing the evidential burden on the prosecution due to the fact that the state has vast resources at its disposal.¹²⁶⁶ The study findings on orality of evidence in CSA cases support Pollock¹²⁶⁷ and who criticized the adversarial system for assuming that the parties have the same capacity and knowledge or advice to carry out the challenging task of adducing evidence before court. As illustrated by cases in this section, CVSA do not possess the capacity to effectively give oral evidence in the absence of measures to protect them from the rigours of the process. While Pollock maintains that the assumed equality of parties' ability in the process of adversarial system is the ideal position, he argues that in reality, there exists inequality at times.¹²⁶⁸ This is supported by the arguments so far advanced by the study.

The study findings further confirm the argument by Hoyano and Keenan that proving CSA under the adversarial system can be a difficult exercise since the prosecution relies largely on the CVSA as the key witness.¹²⁶⁹ In such situation, where the only witnesses to the abuse are the CVSA and the accused, the oral evidence, testimony turns out to be a contest between CVSA and the accused. The prosecution therefore relies on CVSA to give their best evidence if a conviction is to be achieved.

Common law regards oral evidence as superior to any other type of evidence.¹²⁷⁰ Several rules of evidence flow from the orality requirement, which include the general rule against the admissibility of hearsay evidence.¹²⁷¹ The absence of any regular procedure by which a witness may give evidence in advance of the trial, and the court's unwillingness to consider such evidence further makes it difficult for the prosecution to discharge the

¹²⁶⁶ M Damaska, *Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press 1986) 83.

¹²⁶⁷ *Op. cit* n 842.

¹²⁶⁸ *Ibid.*

¹²⁶⁹ *Op. cit* n 47.

¹²⁷⁰ *Op. cit* n 52.

¹²⁷¹ *Op. cit* n 123.

burden of proof in CSA cases.¹²⁷² The orality of evidence at common law means that even if a witness gives oral evidence, his/her previously recorded statement is not admissible in court, except for the purpose of showing that the evidence in court is untrustworthy, if it differs with what was earlier recorded.¹²⁷³

The stress that CVSA undergo while testifying in CSA is attributed to the requirement that they give oral evidence.¹²⁷⁴ Although oral evidence enables the accused person to confront his/her accusers, it has two disadvantages, unlike the French-based inquisitorial system which prefers documentary evidence and makes it mandatory for certain types of cases while rating oral evidence as second-best, to be accepted with caution.¹²⁷⁵

Advantages and Disadvantages of Oral Evidence

The first disadvantage of oral evidence in court is that it is often given a long time after the event in question.¹²⁷⁶ Secondly, witnesses giving live evidence in court are often under stress and due to the psychological makeup of human beings, memory of an event fades gradually with time.¹²⁷⁷ Stress beyond a certain level can impair the power of memory recall.¹²⁷⁸ This may result into a situation where a witness gives an accurate account of the events immediately after it occurs, but after sometime, when subjected to the stress associated with the court process, the same witness fails to remember crucial details of the same event while in the witness-box.¹²⁷⁹

In extreme situations, some witnesses may be under such intense fear or stress that they fail to testify coherently or at all especially if under PTSD.¹²⁸⁰ Children are often more frightened in court than adults and so may be more affected by the orality of evidence requirement.¹²⁸¹ Despite its disadvantages, the orality of evidence has more advantages than disadvantages. The first advantage of oral evidence is that it is free from errors of

¹²⁷² *Op. cit* n 284.

¹²⁷³ *Op. cit* n 123.

¹²⁷⁴ *Op. cit* n 109.

¹²⁷⁵ *Op. cit* n 52.

¹²⁷⁶ *Op. cit* n 384.

¹²⁷⁷ *Op. cit* n 75.

¹²⁷⁸ *Ibid.*

¹²⁷⁹ *Op. cit* n 287.

¹²⁸⁰ *Op. cit* n 62.

¹²⁸¹ *Op. cit* n 89.

transmission.¹²⁸² When a witness testifies live in court, there can be no doubt about what the witness said or what his/her response is about an issue.¹²⁸³ Secondly, the court has the advantage of observing the demeanour of witnesses.¹²⁸⁴ The court has the opportunity to hear, listen and observe the witness as he/she testifies.¹²⁸⁵ The non-verbal communication by the witness is an important aspect of court testimony.¹²⁸⁶ Thirdly, oral evidence is given under oath/solemn declaration which places the duty on witnesses to tell the truth.¹²⁸⁷ Fourthly, the honesty of the witness can be tested through cross-examination, which many scholars, including Wigmore,¹²⁸⁸ believe is the ‘greatest engine ever invented for the discovery of truth.’ The fifth advantage of oral evidence is that any allegation by the witness against the accused person must be made in the presence of the accused person.¹²⁸⁹ This has the advantage of confronting the witness to test the truth of the allegation.¹²⁹⁰ The last advantage of oral evidence is the presence of the witness at the trial, which enables the accused person and the court to question the witness on any aspects of his/her evidence.¹²⁹¹

While appreciating various authors’ arguments on the advantages and disadvantages of oral evidence, my view is that the presence of the witness at the trial is the only exclusive advantage in oral evidence since the first, second, third, fourth and fifth advantages, may or not be lacking in evidence not given orally at trial. A written document admitted in court may lack freedom from transmission errors and demeanour of the witness. The third, fourth and fifth advantages may still be available because a written statement can be made on oath with great solemnity. The maker can be cross-examined at a later date in the presence of the accused person. Video-taped evidence has the first two advantages too. This is because all doubts can be resolved about what the witness said and the demeanour can also be observed.

¹²⁸² *Op. cit* n 52.

¹²⁸³ *Ibid.*

¹²⁸⁴ *Op. cit* n 123.

¹²⁸⁵ *Ibid.*

¹²⁸⁶ *Ibid.*

¹²⁸⁷ *Op. cit* n 50.

¹²⁸⁸ *Op. cit* n 358.

¹²⁸⁹ *Op. cit* n 214.

¹²⁹⁰ *Ibid.*

¹²⁹¹ *Op. cit* n 133.

Due to the disadvantages of oral evidence in CSA cases, there is need to rethink the principle in order to ensure a balance between the rights of accused persons and protection of CVSA.

The study finds that the current court procedure under which CVSA give oral direct evidence in chief is not child friendly but disempowers them from confidently and coherently testifying in CSA cases. It is contrary to procedural justice and rights theories. It contravenes the human rights approach to administration of justice in children matters. In particular, it is a contravention of CVSA's right to have their best interest regarded as paramount in matters affecting them as provided by Article 53(2) of the Constitution of Kenya and Article 3 of the UNCRC as well part III of the UNGJMCCVWC.

Recommendation

The study makes the following recommendations in order to enable the evidence of CVSA to be admitted in court without the negative impact associated with oral evidence in cases where it affects their ability to testify.

Use of Pre-Trial Video-Recorded Interviews of CVSA

Kenya can learn from Australia which uses video recordings of interviews with CVSA in cases where CVSA are unable to testify in court.¹²⁹² Tasmania has used video recording of interviews with CVSA as evidence in chief in both criminal and civil proceedings in accordance with the documentary hearsay exception provided for in section 81(b) of the Evidence Act (Tasmania) (1910). Lawyers and child rights advocates in Tasmania supported the move and there have not been any legal impediments in this respect.¹²⁹³ In Texas USA, Article 38.071 of the Texas Code of Criminal Procedure provides that video recorded evidence of a CVSA's oral statement or interview is admissible in court as evidence in chief.¹²⁹⁴

There are however conditions which must be adhered to in recording the evidence of CVSA.¹²⁹⁵ The first condition is that the equipment used for recording must be satisfactory and the process must be overseen by a court official. The recording of the

¹²⁹² *Op. cit* n 1222.

¹²⁹³ *Op. cit* n 47.

¹²⁹⁴ *Op. cit* n 384.

¹²⁹⁵ *Op. cit* n 47.

statement must not be in response to any questions calculated to lead the child to make particular statements. All voices in the recording must be identified. The interviewer must testify in court as to the circumstances under which the interview was carried out and be cross examined by the defence. The defence must be accorded an opportunity to view the recording before it is offered in evidence in court. Lastly, the CVSA must be available for cross examination (without necessarily having face to face confrontation).¹²⁹⁶ The desirability to admit the evidence must not cause any prejudice to the accused person, hence the need to balance the interests of both the accused person and the CVSA.¹²⁹⁷ Of importance in determining the admissibility of the video recorded evidence is the way the interview of the child is conducted. It must not contain leading questions and clues to CVSA as to what to say in response to questions.

In Scandinavian countries, specially trained policewomen carry out interviews with CVSA which are recorded and produced in court instead of requiring CVSA to appear in court and give oral testimony.¹²⁹⁸

Israel was the first to legislate on advance examination of CVSA in 1955 through the Law of Evidence Revision (Protection of Children) Law which set up the procedure of examining child witnesses by specialists. Sweden and Norway also have schemes for taking the evidence of CVSA ahead of the trial, and the defence can challenge the evidence at a later stage after watching the pre-recorded video tape or reading the pre-recorded statement. In Sweden,¹²⁹⁹ children below 15 years are not called to testify and the court can admit evidence of statements from potential witnesses recorded by police.

In England, the 1993 Children and Young Persons Act¹³⁰⁰ allowed a court to take the evidence of a child/young person anywhere else apart from the courtroom in the absence of the accused person and admit it in evidence against an accused person in criminal proceedings so long as the accused persons/counsel are given adequate opportunity to challenge the evidence by cross-examining the child witness/victim. The provisions of the Act were however limited to written depositions and did not allow for video-recorded

¹²⁹⁶ Ibid.

¹²⁹⁷ *Op. cit* n 123.

¹²⁹⁸ *Op. cit* n 47.

¹²⁹⁹ *Op. cit* n 1058.

¹³⁰⁰ Sections 42 and 43 of the Children and Young Persons Act of 1933.

evidence. In 1963, part of the Act was consolidated into the Magistrates' Courts Act of 1980. Under section 102, it allowed the replacement of live evidence of a child with a written statement if the accused person did not object. In 1991, the Criminal Justice Act removed the requirement of no-objection by the accused person under the Magistrates' Courts Act of 1980. It allowed the prosecution to produce the written statement of CVSA instead of producing the child to give evidence without the approval of the accused person.

In 1999, the Youth Justice Criminal Evidence Act (YJCEA) was enacted to provide for amongst other measures the admission in evidence of video recordings of interviews with CVSA admitted, the video recorded evidence takes the place of CVSA's evidence-in-chief as the recording is treated as the equivalent of direct oral testimony. The CVSA would therefore not need to appear in court, unless the court is satisfied as to the necessity of such appearance if any matter raised by the defence was not adequately covered by the video recording. In such circumstances, the options of a television link may be considered for purposes of the facts not adequately covered by the video recorded evidence.

Hoyano and Keenan examined the effectiveness of video recorded evidence in Australia, New Zealand, Canada and USA and concluded that video recorded evidence of CVSA has several advantages which include the following.¹³⁰¹ Video recorded evidence offers the best evidence of a child in CSA. The recording ensures that the child's evidence and the demeanour as well as the manner of disclosure is obtained and preserved while the details are still fresh in the CVSA's mind.¹³⁰² The visual recording is particularly important for children below six years who are likely to show by action how the abuse occurred.¹³⁰³ The second advantage of pre-trial video recorded evidence is that it encourages accused persons to plead guilty if they know that a video exists containing the disclosure by the CVSA on how the abuse occurred.¹³⁰⁴ The third advantage of pre-trial video recording of CVSA's evidence is that it protects the CVSA from the ordeal of giving evidence in relation to the details of the offence. Where cross examination is not deemed necessary due to the comprehensiveness of the video recording, the protection of the child is greater and this encourages treatment and counseling of CVSA to forget about

¹³⁰¹ *Op. cit* n 47.

¹³⁰² *Ibid.*

¹³⁰³ *Op. cit* n 109.

¹³⁰⁴ *Op. cit* n 384.

the incident.¹³⁰⁵ The fourth advantage of pre-trial video recorded evidence of CVSA prevents situations where CVSA may retract on their earlier recorded statements as untrue especially where they are intimidated into not testifying.¹³⁰⁶ The last advantage of pre-trial recorded evidence of CVSA is that it is a perfect tool for the defence to adequately prepare their case having watched the video in advance of the trial.

Despite the above advantages, pre-trial video recorded evidence of CVSA has been criticized on the following grounds. The first criticism is that video recording of CVSA's evidence before trial is contrary to basic traditions of justice which give rise to the accused person's right to confront his accusers, the right to cross examine them and test their evidence and ensure that the court observes the demeanour of the witnesses as they testify.¹³⁰⁷ In the USA, video-taping of CVSA's evidence before the trial has been criticized for conflicting with the constitutional requirement of confrontation.¹³⁰⁸ In Australia, there is no constitutional right to confront witnesses but a common law right to do so is recognized by the court. Another criticism of pre-trial video recording of CVSA's evidence is that there is the danger of coaching CVSA before the recording and the risk that the interviewer may prompt the child by excessive use of leading questions.¹³⁰⁹ To this, the argument is that the risk of coaching a child is much less when the interview is conducted immediately upon the report of the abuse than when CVSA testify orally several days after the abuse. In any case, the pre-trial recording of the interview should be observed by the accused and their defence from a different room through a TV link and they must have an opportunity to ask any questions.

Despite the criticism of pre-trial video recorded evidence of CVSA, this study argues that where subjecting a child to testify orally in CSA matters would cause trauma then the courts should consider taking their evidence under video recording in advance but ensure, that the accused person has an opportunity to adequately interrogate the evidence at a later stage of the trial process.

¹³⁰⁵ *Op. cit* n 109.

¹³⁰⁶ *Op. cit* n 47.

¹³⁰⁷ *Op. cit* n 384.

¹³⁰⁸ R Vogl & N Bala, 'Initial Involvement: Reporting Abuse and Protecting Children' in N Bala, M K Zapf, R J Williams, R Vogl and JP Hornick (eds) *Canadian Child Welfare Law: Children, Families and the State* (2nd edn, Thomson Educational Publishing 2004) 143-170.

¹³⁰⁹ J Wangman, 'Liability for Institutional Child Sexual Assault: Where Does Lepore Leave Australia?' (2004) 28 Melbourne University Law Review 169.

Use of Television link in Taking CVSA Testimony

Video linked testimonies or teleconferences as they are variously known enable CVSA to narrate the abuse in a location other than the court room where the accused person, the prosecutor, the magistrate and the defence counsel have the opportunity to hear and watch the CVSA through a video linked to the courtroom.¹³¹⁰ They can ask questions to CVSA which are answered by CVSA from the different room or location.¹³¹¹

The television link protects CVSA from the direct face-to-face contact associated with testifying orally in court.¹³¹² Subsequently, the chances of the accused person intimidating CVSA are reduced and the atmosphere created enables CVSA to testify effectively.¹³¹³ The accused person has the advantage of seeing and listening to CVSA as well as asking questions through the transmission technique. The technique has been used in Italy and Portugal to ensure that the testimony of CVSA who would be greatly affected by the orality requirement is nevertheless admitted in court.¹³¹⁴ This technique is preferred by lawyers appearing for both accused persons and CVSA because of its ability to enable the parties interact through the transmission system.¹³¹⁵

Articles 8 and 9 of the Law of Protection of Witnesses Under Threat and Vulnerable Witnesses in Bosnia and Herzegovina provides that technical means may be used to examine vulnerable or witnesses under threat from a different room or location without requiring their physical presence in court. Article 10 of the Act allows for the removal of the accused from court where there is concern that the presence of the accused person will affect the ability of the witness to testify fully and correctly.¹³¹⁶

Under Article 247 of the German Code of Criminal Procedure, the exclusion of the defendant is provided for where it is feared that, in his or her presence, the witness may not tell the truth; that a considerable burden would be placed on witnesses under 16 years of age; or that there is an extreme danger of grave detriment to the health of witnesses. In

¹³¹⁰ *Op. cit* n 52.

¹³¹¹ *Op. cit* n 384.

¹³¹² *Op. cit* n 109.

¹³¹³ *Ibid.*

¹³¹⁴ *Op. cit* n 52.

¹³¹⁵ *Op. cit* n 384.

¹³¹⁶ Available at <www.anti-trafficking.gov.ba/faj/ovi/B/H_Law_on_Protection_of_Witnesses.doc-44.doc> accessed 3 August 2013.

such cases, the defendant is removed from the courtroom for the duration of the examination of the witness and readmitted thereafter, and informed of the essential substance of the examination by the presiding judge.

The study recommends that Kenya borrows lessons from what has worked in the various jurisdictions that have employed the television link in balancing the rights of CVSA and accused persons in CSA trial in this respect.

Examination of CVSA through an Intermediary

The study noted that in one case in Mombasa, in Mombasa Criminal Case no 1827/2010, the trial magistrate applied the provisions of the Sexual Offences Act¹³¹⁷ to enable the evidence of a five year old CVSA be adduced in court by the CVSA's mother. This measure enabled the court to admit the evidence as opposed to acquitting the accused person for lack of evidence. However the practice was not uniform in all courts as other magistrates did not apply this provision showing a lack of uniform approach in CSA trial which the magistrates attributed to lack of guidelines and a comprehensive law on CSA trial.

The study recommends that the children courts in Kenya make more use of intermediaries in cases where CVSA are unable to give oral evidence or where subjecting them to the oral requirement has the potential of endangering their health by causing more trauma. The use of intermediaries is constitutional under Article 50 (7) of the Constitution of Kenya, which provides that in the interest of justice, a court may allow the use of an intermediary to assist a complainant or accused person to communicate with the court. The use of an intermediary is thus, a fair trial right which is available to both complainants and accused persons. It is a fair trial right which is protected from derogation in Kenya by Article 25 (c) of the Constitution of Kenya.

The use of intermediaries is also catered for by section 31(4) (b) of the Sexual Offences Act and it is also consistent with Article 53(2) of the Constitution of Kenya on the best interest of the child. However, the study found that only one court attempted to use it. The

¹³¹⁷*Op. cit* n 36, section 31(4) (b).

study therefore recommends the development of guidelines and training of magistrates and judges on how to implement this measure.

The role of intermediaries in a CSA trial is to filter questions and explain answers for CVSA with communication problems due to learning difficulties or physical impairment.¹³¹⁸ The use of an intermediary in this limited capacity was approved at Common Law by the English Court of Appeal where only a social worker could understand a severely mentally handicapped adult's replies in the case of *R v Duffy*.¹³¹⁹ The social worker was regarded and treated as a translator and so was able to give admissible evidence as to his impressions and interpretation of what he understood the man to have said in his video-taped police interview. The social worker's 'transcript' of what the declarant said was treated as a translation of the video-taped police interview which itself was admitted as hearsay under the Criminal Justice Act 1999 section 23(2)(a) as the man had died before trial. Thus the problem of how to handle his testimony at trial did not arise.

Courts can use the services of intermediaries to protect CVSA from the associated oral testimony requirement. Issues have been raised about the role and effectiveness of the use of intermediaries.¹³²⁰ Concerns center on whether intermediaries should be used for all child witnesses including those with communication capabilities typical for their age group or whether intermediaries in such cases should merely act as amplifiers of inaudible answers or as explainers.¹³²¹ Another area of concern is whether all questions asked by the defence or the courts need to be put to the intermediary or whether they would intervene only on a needs basis. Section 29 of the YJCEA 1999 does not prescribe minimum conditions for use of an intermediary nor their qualifications. The use of intermediaries in England is available to all children under the age of seventeen. The experience of jurisdictions which have provided for the use of intermediaries in their legislation such as Israel and South Africa reveals that issues such as their qualifications,

¹³¹⁸ *Op. cit* n 47.

¹³¹⁹ *R v Duffy* [1999] QB 919.

¹³²⁰ C Cobley, ' "Working Together?" -Admissions of Abuse in Child Protection Proceedings and Criminal Prosecutions' (2004) 16 Child and Family LQ 175.

¹³²¹ *Ibid.*

the circumstances in which their services are needed and the definition of their roles are not easy to resolve.¹³²²

In Australia, Britain, New Zealand and the United States, although the courts at times use them in CSA cases, they have not become established features of the adversarial trials in such countries.¹³²³ In South Africa, courts may appoint intermediaries in cases of sexual assault of victims under the age of 18 if subjecting the victim to oral testimony may expose them to undue mental stress or suffering.¹³²⁴ In such cases, all questions to the victim are directed through the intermediary who communicates the general purport of the question to the witness. The child's answer is then interpreted from a child's development level to the legal jargon employed in court. This means that CVSA do not give direct oral evidence and are not directly cross examined by the prosecution or the defence.¹³²⁵

Critics have argued that the use of intermediaries in the South African system is not effective in practice since many courts do not have intermediaries while some courts do not allow children to use them.¹³²⁶ The intermediaries in South Africa lack accreditation and training and there is confusion as to their role in court leading to a conflict with defence lawyers.¹³²⁷

Despite the criticism of the use of intermediaries in South Africa, Child Rights Advocates in South Africa have strongly supported the intermediary system which is seen as effectively protecting CVSA.¹³²⁸ In 1996, the constitutional challenge to the use of intermediaries that it unduly undermines the effectiveness of the accused person's right to cross examination was rejected by the Supreme Court.¹³²⁹ In the USA, constitutional challenges on the use of intermediaries have failed but the judges have insisted that their roles be restricted to that of interpreters and amplifiers in cases where CVSA are

¹³²² Criminal Procedure Act 1977 (South Africa), Protection of Children Law of 1955 (Israel).

¹³²³ Section 106 F of the Evidence Act 1906 (Western Australia), Section 29 of the Youth Justice and Criminal Evidence Act 1999 (Britain), Section 3 of the Child Abuse and Neglect Reporting Act 2012 (California), Sections 79 and 105 of the Evidence Act 2006 (New Zealand).

¹³²⁴ *Op. cit* n 1322 Section 170A.

¹³²⁵ South African Law Commission, *Sexual Offences: Process and Procedure* (Discussion Paper 102, Project 107 Dec 2002) Vol 3.

¹³²⁶ *Op. cit* n 47.

¹³²⁷ *Ibid.*

¹³²⁸ *Op.cit* n 1324.

¹³²⁹ *Klink v Regional Court Magistrate* (1996) 3 LRC 666.

inaudible or where the child's mode of communication is incomprehensible due to pronunciation or gesture.¹³³⁰

The Office of the Chief Justice needs to issue practice directions on the use of intermediaries in CSA cases in Kenya. The Judicial Service Commission, which is mandated to develop guidelines and conduct training of judicial officers, needs to develop guidelines and conduct trainings of judicial officers at the Judicial Training Institute.¹³³¹ Likewise, the Law Society of Kenya should consider training lawyers on the importance and function of intermediaries so as to avoid possible conflict with defence counsel. In addition, the Director of Public Prosecution needs to ensure that prosecutors handling CSA are properly trained on the functions of an intermediary. Kenya has wide latitude of jurisdiction from which it can borrow what has worked in this area and leave out what has failed.

The use of an intermediary can also be combined with video recording interviews. All court officers must be able to hear and communicate with the intermediary who is identified from a list of properly trained and accredited individuals or from specific institutions.¹³³² The use of intermediaries is not unique to the adversarial system since in continental jurisdictions, defence questions may be asked through the investigating judge, a procedure that has been upheld by the European Commission of Human Rights.¹³³³

Providing for Exceptions to the Hearsay Rule of Evidence

The study recommends that Sections 62 and 63 of the Evidence Act should be amended so as to provide an exception in cases of CSA where subjecting CVSA to the orality requirement might impact negatively on their health.

In France, Belgium and Holland, all non-commonwealth jurisdictions, the hearsay rule does not exist at all in either civil or criminal proceedings as they follow closely an inquisitorial system that does not place much value on oral evidence.¹³³⁴ Witnesses and suspects are almost invariably interrogated ahead of the trial and the written minutes of

¹³³⁰*US v Romey* 32 MJ 180.

¹³³¹ Article 172 (1) (d) of the Constitution of Kenya.

¹³³² M Latham, *Evidentiary and Procedural Trends in Child Sexual Assault Litigation in USA* (Report to the New South Wales Law Foundation 1987)15.

¹³³³*Baegen v Netherlands* App no16696/90.

¹³³⁴*Op. cit* n 108.

the interviews known as *proce`s-verbaux* in French and *processen-verbaal* in Dutch are part of a *dossier* which forms part of the evidence in the case.¹³³⁵ If the witness testifies at the eventual trial, then the court has the *proce`s-verbaux* to supplement the oral evidence, but if the witness does not testify, it replaces the need for oral evidence and is admissible as evidence.¹³³⁶

The *proce`s-verbaux* often includes statements made to the police in the early stages of the investigation and in serious cases such as CSA, a further round of pre-trial questioning takes place before a judicial officer called a *juge d`instruction* in French and *richer-commissaris* in Dutch. This is a professional judge with discretionary powers to delegate the questioning to others. In France, the judge may be a specialist in questioning children. The judge sits in private, but with a clerk and lawyers who have a right to be present. The interrogation by the judge is recorded in writing. In cases of CVSA, the trial court reads the *proce`s-verbaux* instead of hearing live testimony from the child. The French system insulates CVSA from the need to appear in court such that there is concern about CVSA who wish to appear in court to testify but are not allowed,¹³³⁷ the exact opposite of what is happens in Kenya according to this study.

The Scandinavian countries, USA, Israel and Italy which all follow the adversarial system of trial insist on oral evidence, but due to the difficulties children face in testifying in sexual offences, they have all taken measures to reform the traditional adversarial system of criminal procedure to accommodate CVSA.¹³³⁸ The reforms take three types. The first type is the creation of an exception to the rule against hearsay so that adults can repeat to court what an absent CVSA told them about the abuse. The second type is change in rules of evidence so that CVSA evidence in court can be supplemented with the previously recorded evidence while the third type is the advance pre-trial examination of CVSA by the judge.

¹³³⁵ *Op. cit* n 52.

¹³³⁶ *Op. cit* n 322.

¹³³⁷ *Op. cit* n 818.

¹³³⁸ *Op. cit* n 52.

The Use of CVSA's Aids to Courtroom Communication

Kenya should develop aids to court room communication. In England, the YJCEA¹³³⁹ introduced for the use of communication aids that enable witnesses to express themselves. In this respect, CVSA have been allowed to use body diagrams and dolls to describe the genital organs. The study observed that there was inadequate use of courtroom communication aids in the Kenyan courts, except for one prosecutor who attempted to aid a CVSA in describing to the court the genitalia by drawing a rough sketch of a human body. Australia, USA, Canada, Switzerland and France use various communication aids including motion pictures to assist CVSA in communicating details of the abuse to court.¹³⁴⁰

5.7 Accused Person's Right to Cross Examine Witnesses

The constitutional basis for accused person's right to cross-examine CVSA in CSA trials in Kenya is Article 50 (2) (k) of the Constitution of Kenya, which provides for the right to challenge evidence adduced by prosecution witnesses. Being a fair trial right, cross-examination is protected by Article 25(c) of the Constitution of Kenya, from any limitation. Cross-examination is also provided for, by section 145(2) of the Evidence Act, while section 146(2) stipulates that cross-examination need not be confined to facts which the witness testified, in examination-in chief. Further, section 154(a) of the Evidence Act provides that witnesses may be cross-examined as to their accuracy, veracity and credibility. Section 154(c) of the Evidence Act, further provides that witnesses may be cross-examined to shake their credit, by injuring their character. The discussion in this section, demonstrates the negative impact of cross-examination on the ability of CVSA to testify, and the consequent effect, on the prosecution's ability to discharge the burden of proof in CSA cases in Kenya.

Described by lawyers as the greatest engine ever invented for the discovery of truth in a trial process, many scholars as discussed in chapter three, are of the opinion that in CSA cases, cross examination defeats the truth seeking process of a criminal trial.¹³⁴¹ It causes unnecessary trauma to CVSA.¹³⁴² All the respondents interviewed by the study were in agreement that, cross examination of CVSA is the most traumatizing, cruel, insensitive

¹³³⁹ Section 30.

¹³⁴⁰ *Op. cit* n 250.

¹³⁴¹ *Op. cit* n 52.

¹³⁴² *Op. cit* n 3.

and intimidating part of the court procedures. It often leads children to tears, as it makes them appear as the one on trial.¹³⁴³ The legal practitioners all concurred that cross examination, though necessary to test the truth of the evidence, sometimes causes unnecessary intimidation and re-victimization of CVSA. In the words of a one lawyer:

Although cross-examination helps in verifying the credibility of the evidence and the author, it causes undue trauma to CVSA and defeats the search for truth in some cases, resulting into a miscarriage of justice. It may be time to consider other options of testing CVSA's evidence.¹³⁴⁴

As already discussed under the orality principle, the study observed that CVSA had difficulty in describing sexual acts and body organs in adult/legal language, as demanded by the defence counsel or the accused persons during cross examination. According to one CVSA:

Being asked questions by the defence counsel was the most painful part of my testimony. He was so cruel to me. He said that I was a liar. He used some phrases which I could not understand, such as, 'I put it to you that my client is innocent.' He insisted that I answer 'yes' or 'no'. Since I did not understand what he meant, I said no to most of the answers. The questions were all framed in a confusing manner. It was like I was called to court to prove that the accused person did not sexually assault me. I did not understand why the he never said anything. I am the one who was asked to talk and answer all questions. I will not report any abuse again because I do not want to go through this experience ever again. I would rather keep the abuse to myself.¹³⁴⁵

The study found that the fear and trauma experienced by CVSA due to face to face confrontation by the accused persons confused them and enhanced their vulnerability. This is illustrated by figure 5 which shows that face to face confrontation with the accused person was ranked as the greatest difficulty they faced while testifying in court.

¹³⁴³ *Op. cit* n 109.

¹³⁴⁴ Respondent no 50 in Appendix K.

¹³⁴⁵ Respondent no 96 in Appendix K.

As a result of face to face confrontation, cross-examination ranked second as the second most cause of difficulty faced by CVSA as illustrated by figure 5. This at times resulted in some CVSA contradicting their evidence- in- chief, while some broke down, shed tears and were unable to coherently respond to questions by the defence.

A High Court judge had this to say of the CSA trial in Kenya:

Although the rules of evidence are meant to protect innocent people from the consequences of imprisonment, in CSA cases, cross-examination often traumatizes not only the CVSA, but even the trial judge/magistrate, who is otherwise required to remain passive throughout the trial.¹³⁴⁶

The judge's remarks support Saywitz's¹³⁴⁷ description of the effect of cross examination on CVSA in CSA trial in Britain as discussed in chapter two.

The study observed that cross-examination confused and intimidated even CVSA who were accompanied by social workers, and initially appeared confident during examination-in-chief. This could be attributed to the harassment of the CVSA by the accused person/ defence lawyer, resulting in the CVSA breaking down, crying or even refusing to talk, while at times contradicting what they had initially said in evidence- in-chief.

An overwhelming majority (89%) of CVSA described cross-examination by the accused person or his/her lawyer as very traumatizing, depressing, embarrassing and the most painful experience. One CVSA described her experience of cross examination as;

...being sexually abused by the accused person for the second time in the open glare of the court.¹³⁴⁸

Many CVSA could not understand why the accused person/ lawyer asked them questions which they were obliged to respond to. Only 9% felt confident answering questions

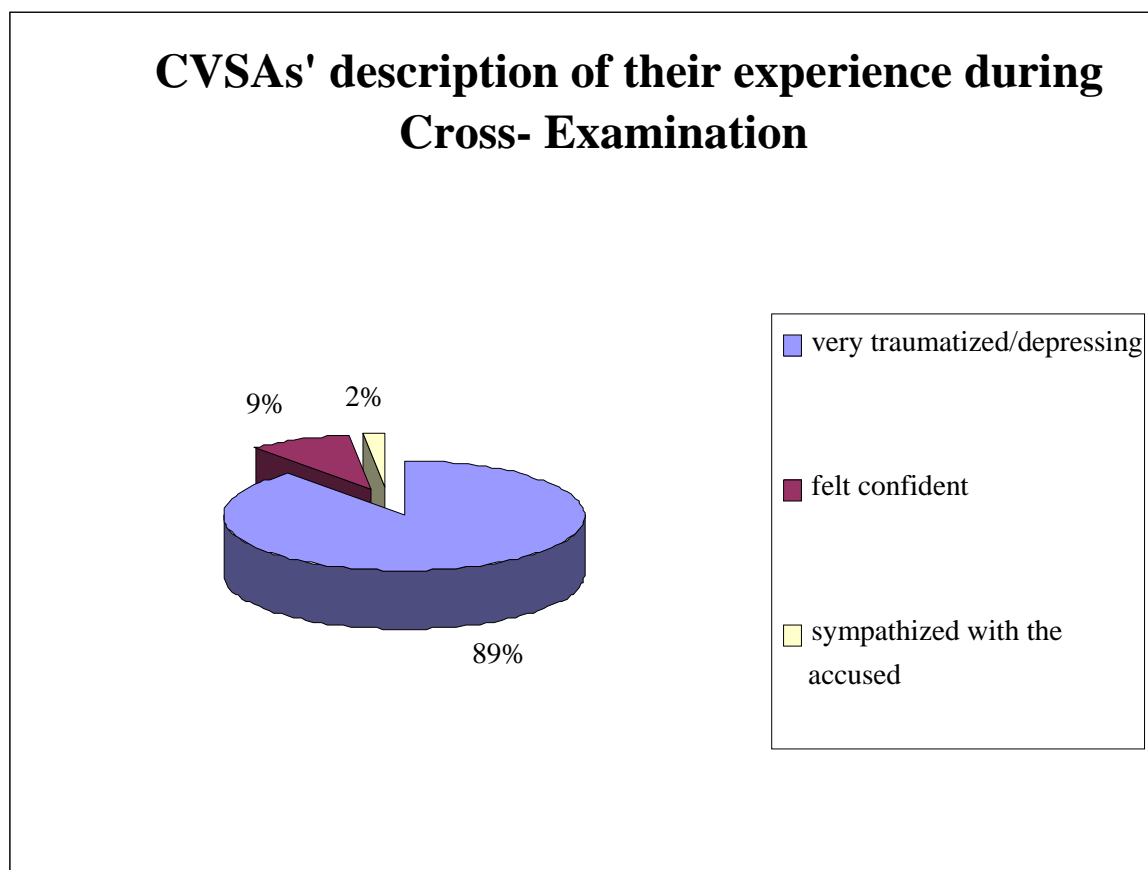
¹³⁴⁶ Respondent no 36 in Appendix K.

¹³⁴⁷ *Op. cit* n 109.

¹³⁴⁸ Respondent no 98 in Appendix K.

during cross-examination, while 2% sympathized with the accused person.¹³⁴⁹ The 2% who sympathized with the accused persons happened to be incest victims. They were confused as to whether to give evidence and have the accused person imprisoned, or fail to testify at the expense of the abuse continuing. This supports Herman and Hirschman's argument about the unsuitability of the adversarial procedure to prosecute incest cases. The various responses by CVSA, which describe their experience during cross-examination is illustrated by figure 9 below:

Figure 9: CVSA's Responses on their Experience during Cross-Examination



Upon interviewing the CVSA who sympathized with the accused persons, the study established that the accused persons had special relationships with the CVSA. In one incident, the accused person was the father of the CVSA. She feared that her testimony might lead to the imprisonment of the accused person. She did not want to be the cause of her father's imprisonment and subsequent suffering by the family, since he was the sole bread winner.

¹³⁴⁹ Respondent no 67 in Appendix K.

In another incident, a 14 year old girl sympathized with the accused person whom she claimed to be her boyfriend. In her view, she said that the accused person did not sexually abuse her since she ‘agreed’ to the alleged sexual activity.¹³⁵⁰ In this latter case, the law on CSA is unfair not only to CVSA, but to the accused person too. The accused person was only 17 years old when the offence occurred. Both CVSA and the accused person were therefore below 18 years and were children who believed that they were in a loving relationship. However, in such circumstances, the boy is treated as an accused person and faces up to life imprisonment, if found guilty. In this respect, the law (section 8 of the Sexual Offences Act which provides for mandatory sentence of 20 years imprisonment) is unfair to the accused person who should, together with the CVSA, be treated as children in need of care and protection under sections 119(n) and (q) of the Children Act. Although the Sexual Offences Act supersedes the Children Act in matters of sexual offences, the provision of the Sexual Offences Act in regard to punishment in cases where boys under 18 are found in sexual relations with girls about their age (where both believe to be in a loving relationship) need to be reviewed to ensure fairness to both accused persons and CVSA.

The two incidences above support Herman and Hirschman’s explanation as to why at times, CVSA are divided between their need for protection from abuse, and their wish that the accused persons should not be punished.¹³⁵¹ In addition, they highlight the subsequent difficulty faced by CVSA in testifying against accused persons in such cases. These were some of the incidences where CVSA gave evidence in chief, but on cross examination, they began to cry when they realized that their evidence may be used to jail the accused persons. According to one CVSA who was alleged to have been sexually abused by the father and who refused to testify in the presence of the accused person:

I do not want my father to be jailed. He is the one who pays our school fees and takes care of all expenses. My mother does not work. I just want the abuse to stop. I do not want him jailed. My grandmother told me not to say anything in court because if I do, the police will take daddy to jail.¹³⁵²

¹³⁵⁰ The details of the two cases such as names and criminal case numbers cannot be divulged for purposes of protecting the identity of the CVSA as per Section 3 of the Children Act and Section 19 which provide for the best interests of the child and right to privacy respectively.

¹³⁵¹ *Op. cit* n 89.

¹³⁵² Respondent no 104 in Appendix K.

Although all the judges, magistrates, lawyers and police were in agreement that cross examination of CVSA was traumatic to them, they argued that it is a fundamental right of the accused person that cannot be done away with.¹³⁵³ They expressed concern about the need to balance the right of accused persons to cross examination with concern for CVSA protection, in order for the process to be fair to both. According to a Court of Appeal judge:

Cross-examination of CVSA under the current evidentiary rules of the adversarial system is traumatizing, not only to CVSA, but to all court officers involved in the trial. In many cases, CVSA are not able to effectively narrate the abuse in court, due to their vulnerability. The current standard of cross-examination of CVSA is the same standard used, when cross-examining adults. Cross examination therefore causes more stress to CVSA than it does to adults. This is due to lack of a guideline on how to interrogate children generally, and CVSA in particular. Unless the law is changed, it is unfortunate that the law has to be applied as it is. In so doing, the process subjects CVSA to unnecessary trauma. The current style of cross-examining CVSA is not only traumatizing to the CVSA, but to the lawyers and the magistrates as well.¹³⁵⁴

A High Court judge supported the views of the Court of Appeal judge when he said:

I recall the cross examination of a 14 year old girl by myself (when in private practice) about thirty years ago, when I represented an accused person who had been charged with sexual assault. As I cross-examined the girl, she broke down and cried. I was equally traumatized. Several years after that incident, I cannot forget the scene of the cross-examination and the trauma that I subjected the CVSA to. All this was aimed at ensuring that her evidence was beyond any reasonable doubt, if the court was to find that my client (then) was guilty. I regret having to put the CVSA through such an interrogation, but I had a duty to my client. Up to now, I

¹³⁵³ *Op. cit* n 50.

¹³⁵⁴ Respondent no 41 in Appendix K.

still remember vividly the scene of the CVSA crying in court as I cross-examined her to set my client free. It was a cruel process that needs to be reformed. Today I would not do that again to any child.¹³⁵⁵

The study observed that lawyers appearing for the accused persons cross-examined CVSA with such zeal aimed at punching holes/discrediting CVSA's evidence. They did so meticulously as they managed to confuse CVSA over the answers they gave in response to the questions, while some ended up crying. Two of the advocates interviewed said that as defence lawyers, they were under a duty to act in the interest of their clients, and the prosecution must discharge the burden of proof. In the words of one of the advocates:

I have a duty to squeeze the truth from CVSA, by insisting that they answer my questions. They are prosecution witnesses and the law does not exempt them from cross-examination. I have done so severally. I know that to create doubts in the prosecution case, the most effective way is by interrogating CVSA in a harsh manner. This may be contrary to the best interest of children principle, but the law has not been changed.¹³⁵⁶

The lawyers admitted that the court procedures permitting such interrogation is cruel to the CVSA and needs reform. They however considered it their duty, to set their clients free, by confusing CVSA during interrogation in cross examination.

Some accused persons/ lawyers insisted on details which CVSA could not remember with ease, such as dates and the sequence of events. This particularly appeared very intimidating to CVSA, some of whom gave evidence several months, after the abuse had occurred. The study observed that lawyers representing the accused persons seemed to know exactly the weakest points of CVSA. They took advantage of such weakness to drive CVSA to tears. They concluded that the children were lying, could not be believed, had given conflicting testimony and asked the courts to acquit the accused persons. To most CVSA, this was a painful experience, as they had come to court to tell how the

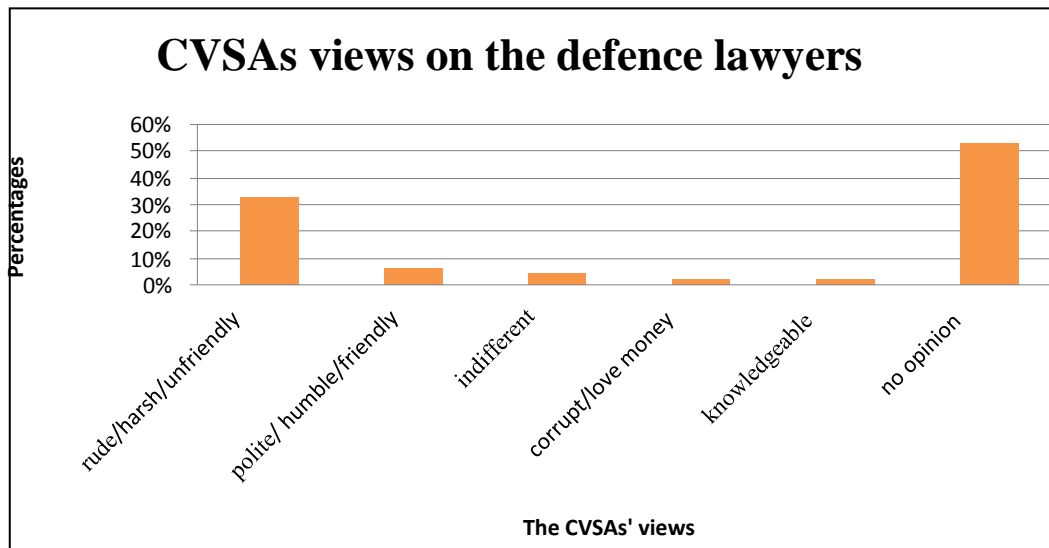
¹³⁵⁵ Respondent no 38 in Appendix K.

¹³⁵⁶ Respondent no 55 in Appendix K.

abuse happened, but the lawyers made them look like liars in court, who had to prove their innocence.

As concerns the accused person's lawyer, 32% of the CVSA described them as very rude, harsh and unfriendly, while 6% found them to be polite, humble, friendly and good. Four percent found them to be indifferent and quiet, as 2% described them as knowledgeable in their work. Two percent of CVSA said that the advocates are corrupt, love money and work together with the prosecutor, accused persons and the magistrates to release the accused persons and punish CVSA. Fifty three percent of CVSA were of the opinion that the lawyers are worse than the accused persons. They said that the defence counsels made them feel like the ones on the wrong. Figure 10 below, illustrates the views of CVSA about the defence counsels.

Figure 10: CVSA's Views on the Defence Lawyers



Review of court records also revealed that there were certain instances when the evidence of the CVSA and that of adult witnesses was inconsistent, but nonetheless revealed material facts to the case, as the inconsistencies were not on material facts. However, the defence counsel/ accused persons emphasized the inconsistencies as proof of the evidence of the witnesses not being credible. They asked the courts to disregard the evidence and give the accused person the benefit of doubt, due to such inconsistencies. Interestingly, the court records revealed that the magistrates, in majority of the cases, were in agreement with the accused persons/ defence counsel and found that the inconsistencies (though not of material importance) created a doubt in the prosecution case. This finding is supported

by the analysis of the court's reasons for acquitting the accused persons in Mombasa Criminal Case No. 1827/2010 and Nairobi Criminal Case No. 2077/2009, which have already been discussed under the orality principle in section 5.6 of this chapter. In both the cases, the accused persons were given the benefit of doubt and acquitted. The study finds that the standard of proof required, beyond any reasonable doubt, in some cases, causes miscarriage of justice, due to lack of guidelines on how to cross examine CVSA. This matter has already been discussed under the burden of proof (see section 5.2).

Although Article 50(2) (k) of the Constitution of Kenya recognizes accused persons' right to challenge evidence produced against him/her, the study found that cross-examination of CVSA was carried out in a manner that is insensitive to CVSA, and is contrary to their best interest, as stipulated by Article 53(2) of the same Constitution of Kenya. The intimidating cross-examination of CVSA is inconsistent with Article 3 of UNCRC, which provides for children's right to participate in judicial proceedings, in which they are involved. Kenya is a signatory to the UNCRC, and Article 2(6) of the Constitution of Kenya, provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya. The UNCRC therefore obligates Kenya to protect CVSA and ensure their participation in the judicial process.

Intimidating cross examination of CVSA contravenes the right to equality and equal treatment by the law under Article 27 of the Constitution of Kenya, since it safeguards the accused persons' right to challenge evidence, but disregards CVSA best interest, under Article 53(2). Consequently, some CVSA who are unable to testify coherently without court protection of their interests, are hindered from accessing justice, contrary to Article 48 of the Constitution. Cross examination of CVSA as shown by the study findings, results into a violation of CVSA's right to be treated with dignity, contrary to Article 28 of the Constitution of Kenya. This study argues that the cross-examination of CVSA is conducted without regard to their right to protection under the best interest principle, which should be the paramount consideration in matters involving children in the justice process.¹³⁵⁷ The intimidating nature of the cross examination, causes trauma to CVSA, as it is in most cases, devoid of any protection by the court, contrary to the powers of the court to protect CVSA under section 31 of the Sexual Offences Act.

¹³⁵⁷ C P Cohen and H A Davidson, 'Children's Rights in America: UN Convention on the Rights of the Child Compared with United States Law' (1990) American Bar Association 13.

All the respondents and the CVSA were in agreement that cross-examination of CVSA is cruel, intimidating and aimed at confusing the CVSA, as opposed to arriving at the truth. Many CVSA could not understand why they had to answer many questions repeatedly, to the police at the investigation stage, to the magistrate and prosecutor during examination - in-chief and to the accused/advocate during cross-examination. Advocates perfected the art of driving CVSA to tears, ensuring that they contradict their evidence- in- chief.

Described by many lawyers as the greatest legal engine ever invented for the discovery of truth,¹³⁵⁸ the right to cross examination of witnesses by the accused persons has, in the opinion of many scholars, amounted to a re-victimization of CVSA.¹³⁵⁹ This is contrary to the legitimate object of cross-examination, which is, to bring to light relevant matters of fact which would otherwise pass unnoticed.¹³⁶⁰

The study findings support the concerns by other scholars in this area that, although cross examination is the best way of establishing the truth of a witness's evidence, in CSA cases, it negates the whole process of establishing the truth.¹³⁶¹ Instead, it obstructs the search for the truth and leads to a miscarriage of justice.¹³⁶²

Recommendations

While appreciating the need to testify in court, CVSA interviewed gave different views on what needs to be done to enhance their participation in the justice process. Figure 11 below presents a summary of proposed measures by CVSA to improve their testimony in CSA trial in Kenya.

¹³⁵⁸ *Op. cit* n 52.

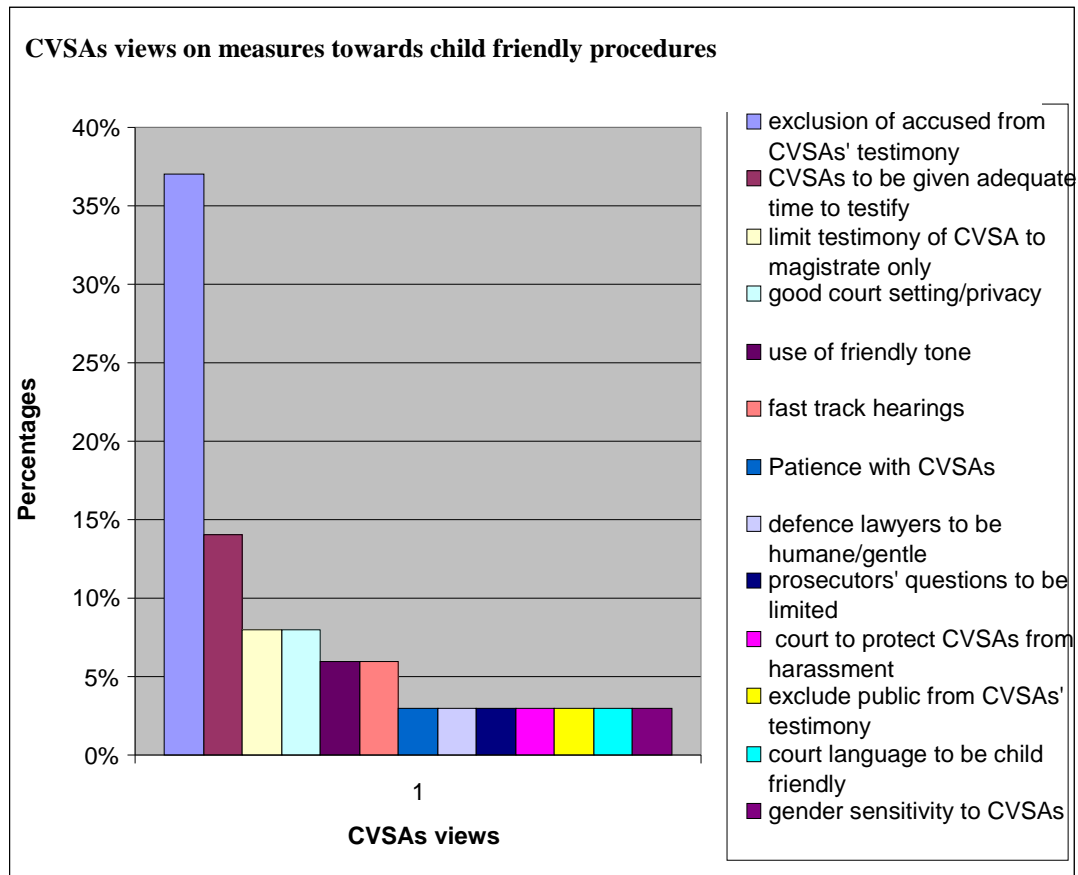
¹³⁵⁹ See Abrams & Ramsey, Hoyano & Keenan.

¹³⁶⁰ *Op. cit* n 52.

¹³⁶¹ See Spencer & Flin, Saywitz.

¹³⁶² *Op. cit* n 58.

Figure 11: CVSA Views on Measures towards Child Friendly Procedures



The concern about CVSA protection therefore centers on how they are to be cross-examined under the law of evidence in a manner that protects them, while safeguarding the rights of accused persons to challenge their evidence. The questioning of CVSA in particular, raises great professional and public concern worldwide.¹³⁶³ The concern raises the question as to how far the law of evidence, as regards the rights of accused persons to a fair trial, in examining witnesses, can be modified/ limited to accommodate, the vulnerability of CVSA. This concern recognizes the fact that CSA often occurs in the absence of any eye witness, apart from the accused person and the victim, hence the need to enhance CVSAs' ability to testify effectively.¹³⁶⁴

The testimony of CVSA is crucial in the ability of the prosecution to discharge the burden of proof, which depends on evidence adduced by victims of crime and eye

¹³⁶³ *Op. cit* n 47.
¹³⁶⁴ *Op. cit* n 384.

witnesses.¹³⁶⁵ This is a powerful argument for the development of special measures of taking the evidence of CVSA, while safeguarding accused persons' right to confront witnesses, in a fair trial.¹³⁶⁶ If successfully applied, special measures in taking the evidence of CVSA may assist in convicting dangerous CSA perpetrators, while protecting CVSA and the larger society.¹³⁶⁷

The study recommends a balancing of accused persons' right to cross examination with CVSA's right to protection while testifying in CSA cases. In the following section, the study suggests several ways of ensuring that the accused person has an opportunity to test CVSA's evidence, while protecting the rights of CVSA.

(i) Avoiding adversarial examination of CVSA

The main aim of cross-examination is to bring to the open all relevant evidence which would otherwise pass unnoticed by the court, and to assist in the process of discovering the truth.¹³⁶⁸ However, although described by lawyers as the best engine ever invented to discover the truth, the study established that, the process has been abused and turned into provocative, intimidatory and at times, embarrassing sessions to CVSA, who get confused and end up contradicting their earlier recorded statements.¹³⁶⁹

In England and Scotland, section 41 of the YJCEA obligates judges to intervene and stop the intimidation of witnesses. The section imposes statutory limits on the extent to which victims of sexual offences can be cross-examined. Protective measures towards sexual assault victims include the 'rape shield statutes' and video recorded cross examination which are explained below.

(a) Rape shield statutes

The rules regarding intrusive cross examination of sexual assault victims in general, were relaxed by the introduction of the so called 'rape shield statutes' in England.¹³⁷⁰ The first such statute in England and Scotland was the Sexual Offences (Amendment) Act of

¹³⁶⁵ *Op. cit* n 123.

¹³⁶⁶ *Op. cit* n 52.

¹³⁶⁷ A Hucklesby & A Wahidin, *Criminal Justice* (Oxford University Press 2009) 279.

¹³⁶⁸ *Op. cit* n 52.

¹³⁶⁹ *Ibid.*

¹³⁷⁰ *Op. cit* n 123.

1976,¹³⁷¹ which prohibited evidence and cross examination on the past sexual history of the victim with any person, other than the accused person, except with the leave of the court. This provision was however found to be inadequate and in 1999, YJCEA was passed, imposing a general ban on cross examination of the victim, by the accused person or his/her representative, except with the leave of the court.¹³⁷² The shield applied in cases of both child and adult victims of sexual assault.¹³⁷³

The rape shield statute has been criticized by some defence lawyers, for taking away the right to cross- examination of witnesses by an accused person.¹³⁷⁴ This matter was decided by the House of Lords which held that, it was possible to read section 41 of the Youth Justice Act (Rape Shield Statute) ('No evidence may be adduced and no question may be asked about any sexual behavior of the complainant') to mean that 'evidence and questioning that is necessary to ensure a fair trial should not be excluded.'¹³⁷⁵ Thus, the court was in favor of protecting the accused person's right to a fair trial by allowing cross-examination on sexual assault victims' past sexual history, if it related to the case at trial. The House of Lords took the position that the rape shield statute was not incompatible with the accused person's right to cross examine witnesses on their past sexual history, if that fact makes the trial fair.

The reasoning by the Lords was predicated on a stereotypical link between chastity and veracity which is now discredited.¹³⁷⁶ However, arguing for the protection of witnesses from intimidation, the House of Lords pointed out the 'twin myths' which permeated the common law's approach to such cross-examination, aimed at showing that by reason of such sexual behavior on other occasions, the victim (a) was more likely to have consented to the issue at trial, or (b) in any event was less worthy of belief.¹³⁷⁷ The House of Lords held that in passing the 'rape shield statutes', restricting such questioning is a legitimate aim for legislators, because the rule of law is impaired, if the CJS fails to protect

¹³⁷¹ Section 2.

¹³⁷² Section 41 of the YJCEA provided exceptions which include 1.if the refusal would render the jury's decision unsafe.2 where the evidence or question relates to a relevant issue.3.where the relevant issue is one of consent.

¹³⁷³ Ibid.

¹³⁷⁴ L Ellison, 'Cross-Examination in Rape Trials' (1998) Criminal Law Review 605.

¹³⁷⁵ *R v A* (No.2 2001) UKHL 25, (2001)2 Cr App R 21.

¹³⁷⁶ *Op. cit* n 47.

¹³⁷⁷ *Op. cit* 1372.

vulnerable witnesses from unnecessary humiliation or distress in cross-examination. Lord Steyn observed that:

...the concept of a fair trial requires the court to take into account the familiar triangulation of interests of the accused, the victim and the society, and in this context proportionality has a role to play.¹³⁷⁸

The decision by the House of Lords reflected the position taken by the Supreme Court of Canada in support of limiting accused persons' rights to protect victims of crime in sexual assault cases.¹³⁷⁹

Kenya can learn from the above court decisions that umpires have an obligation to protect CVSA so as to ensure that their access to justice, under Article 48 of the Constitution of Kenya is not violated. As held by Lord Edmund-Davies, judges and magistrates have a duty, as part of their inherent jurisdiction in controlling the court proceedings, to prevent cross-examination of an unduly offensive or oppressive nature.¹³⁸⁰

Defence counsel too, while testing the evidence of witnesses, have a corresponding ethical duty not to make statements or ask questions intended to intimidate or harass witnesses.¹³⁸¹ In this respect, the study suggests that the Law Society of Kenya takes initiative to provide for the ethical regulation of cross examination of CVSA. The Law Society of Kenya can learn from England and Wales which have regulated children's cross-examination by including such provision in rule 708(g) of their Code of Conduct of Rules of the Bar of England and Wales.

The rape shield statutes have increased the protection of sexual assault victims' from vulnerability and enabled them to testify more confidently in England, Wales, Australia, and Canada amongst other countries.¹³⁸² Kenya can therefore learn from them and borrow what works so as to enhance CVSA protection in accordance with Article 53(2) of the Constitution of Kenya.

¹³⁷⁸ Ibid.

¹³⁷⁹ *R v Seaboyer* [1991] 2 SCR 577.

¹³⁸⁰ *Wong-kam-Ming v R* [1980] AC 247.

¹³⁸¹ *Op. cit* n 47.

¹³⁸² Ibid.

(b) Video recorded cross-examination

Under the YJCEA,¹³⁸³ a video recorded interview of CVSA can be admitted as CVSA's evidence in cross-examination and re-examination. The recordings must however be made as per set rules by the court or under its direction.¹³⁸⁴ Similarly, the recordings of the interview must be done in the absence of the accused person, but in the presence of such persons as directed by the court.¹³⁸⁵

The court officers, magistrate, legal counsel, interpreter and any person assisting CVSA must be able to hear and see the conduct of the interview.¹³⁸⁶ Though not required to be present at the interview room, the accused person must nevertheless be able to hear and see CVSA being interviewed, and be able to communicate with his counsel as to what questions to ask.¹³⁸⁷ The cross examination is done under the control of the court, and the accused person's rights are respected, by ensuring his/her participation through the defence counsel.¹³⁸⁸ This procedure is therefore in compliance with the right to a fair trial without the physical confrontation of CVSA. The presence of CVSA can thus, be dispensed with, since the accused person has an opportunity to challenge the evidence through his/her counsel.¹³⁸⁹

The process of taking the evidence of CVSA in advance of the trial is illustrated by figure 12 below.

¹³⁸³ Section 28.

¹³⁸⁴ *Ibid.*

¹³⁸⁵ *Ibid.*

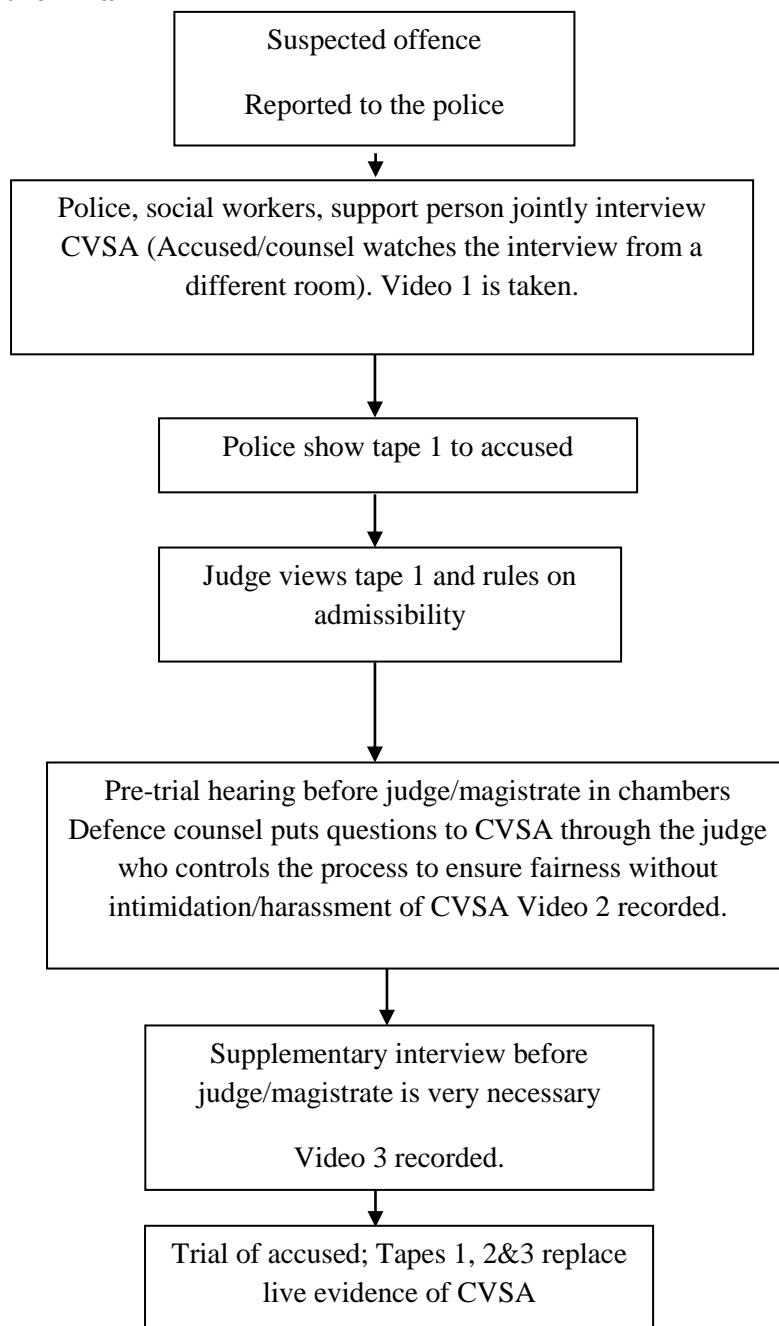
¹³⁸⁶ *Op. cit* n 384.

¹³⁸⁷ *Op. cit* n 109.

¹³⁸⁸ *Op. cit* n 47.

¹³⁸⁹ *Op. cit* n 52.

Figure 12: An Illustration of the Process of Taking the Testimony of CVSA in Advance of the Trial



Source: Adopted from the Piggot Committee's proposals to reform the child sexual abuse trial in Britain. (With some modification).

Countries that use video-recorded cross-examination in CSA cases include USA, England, Germany, France, Canada, Australia and New Zealand.¹³⁹⁰ Whereas studies conducted to examine the effectiveness of the use of video-recorded cross-examination

¹³⁹⁰*Op. cit* n 47.

show that it is a preferred measure by child rights advocates, some defence counsels have faulted the measure on the ground that, it denies the defence the advantages of a face-to-face confrontation of witnesses.¹³⁹¹

Critiques of the video-technology argue that when witnesses testify in the physical presence of the umpire and the accused person, the solemnity of the umpire emphasizes the serious nature of the process.¹³⁹² They argue that video technology lacks the immediacy and persuasive impact of a live testimony in court, making it difficult to assess the credibility of CVSA.¹³⁹³ The advantages of video technology include improving the quality of CVSA testimony due to the protection from face-to-face confrontation with the accused person, facilitation of pre-trial preparation of the case, facilitation of the conduct and scheduling of the trial and minimizing the trauma caused to CVSA.¹³⁹⁴

Kenya can adopt the use of video technology in CSA cases, where subjecting CVSA to cross-examination has the potential of re-victimizing them. This technology has the benefit of protecting CVSA as per Article 53(2) of the Constitution of Kenya, while at the same time, safeguarding the accused persons' right to challenge evidence as per Article 50(2) (k) of the same constitution. The result is a balancing of the rights of both CVSA and accused persons in a fair trial. Kenya can learn from the Supreme Court of Canada in this respect. The Supreme Court of Canada, in holding that the rights of an accused person to a fair trial in CSA cases can be limited, held that the admission of a videotaped statement of a 9 year old CVSA, did not infringe on the accused person's right to fair trial.¹³⁹⁵ The admission of the videotaped evidence without having the CVSA testify in the presence of the accused person, did not amount to hearsay evidence; neither did it deny the accused person the opportunity to cross-examine the CVSA.

The Court observed that by allowing the videotaped evidence, the trial court protected the CVSA and made participation in the procedure less stressful and traumatizing in the

¹³⁹¹ *Op. cit* n 226.

¹³⁹² *Op. cit* n 47.

¹³⁹³ *Op. cit* n 226.

¹³⁹⁴ *Op. cit* 384.

¹³⁹⁵ *R v L(D O)* [1993]4 SCR 419.

presence of the accused person, while enhancing the discovery of truth.¹³⁹⁶ The court added that cross-examination does not need to be contemporary with the evidence.¹³⁹⁷ The accused person can put questions to the CVSA either at the pre-trial stage, during the interrogation of the CVSA by the investigators, or watch the videotape and ask questions afterwards.¹³⁹⁸ The court added that the questioning of CVSA can be conducted through the court or an advocate or some child expert, appointed by the court, so as to avoid direct face-to-face confrontation between accused persons and CVSA.¹³⁹⁹ Whichever method is adopted by the court to protect CVSA in CSA cases, the aim must be, to balance the rights of accused persons, with the concerns of CVSA, while giving the accused person adequate and appropriate opportunity to challenge any evidence against him/her.¹⁴⁰⁰

The Supreme Court of Canada stressed that in seeking the truth in CSA trials, the law must provide a dignified, workable and decent environment for both accused persons and CVSA to tell their story.¹⁴⁰¹ The emphasis was that the trial must be conducted within the context of recognition of existing power imbalance between accused persons and CVSA, due to age and development stages.¹⁴⁰² This observation by the court is consistent with the psychoanalytic theory discussed in chapter one, which explains the vulnerability of CVSA to CSA.¹⁴⁰³ It is also consistent with Rawls' differential principle of procedural justice which stipulates that resources must be distributed in such a manner as to benefit the less advantaged in the society so as to ensure equal treatment to all.¹⁴⁰⁴ Admitting videotaped evidence in CSA trial, not only preserves the early account of CVSA's version of the abuse, but provides a procedure for the introduction of the evidence to court, enhancing the truth seeking objective of the criminal trial.¹⁴⁰⁵ This can help to achieve a balance of the rights of CVSA and that of the accused person to a fair trial according to the rights theory.¹⁴⁰⁶

¹³⁹⁶ Ibid p.420.

¹³⁹⁷ Ibid p 420.

¹³⁹⁸ Ibid p 420.

¹³⁹⁹ Ibid p 420.

¹⁴⁰⁰ Ibid p 420.

¹⁴⁰¹ Ibid p 421.

¹⁴⁰² Ibid p 421.

¹⁴⁰³ *Op. cit* n 96.

¹⁴⁰⁴ *Op. cit* n 107.

¹⁴⁰⁵ *Op. cit* n 109.

¹⁴⁰⁶ *Op. cit* n 138.

In advancing an argument for balancing a trial to protect both accused persons and victims of sexual offence, the Supreme Court of Canada stated:

Although the accused person's right to fair trial is protected under the Canadian constitution, the rules of evidence are not constitutionalized into unalterable principles of fundamental justice. These rules are not cast in stone and will evolve with time. They should not be interpreted in a restrictive manner which may essentially defeat their purpose of seeking the truth and justice. The modern trend in the field of child sexual abuse trial is to admit all relevant and probative evidence and allow the evaluation of facts to decide the weight to be given to that evidence in order to arrive at a just result.¹⁴⁰⁷

From the above court decision, it is arguable that, the Supreme Court of Canada supported the fact that where necessary in CSA cases, there is need to re-think rules of evidence, including those protecting the accused persons' right to fair trial. As already discussed in this chapter, the ICCPR does not include the right to a fair trial amongst the non-derogable rights, giving room for arguments on its limitation where necessary as in the cases of CSA. This is evident in jurisdictions that have limited the rights of accused persons to fair trial in order to protect CVSA during criminal proceedings.

In another example of limiting the accused person's right to a fair trial, the European Court of Justice (ECJ) ruled that national courts must enable CVSA to testify under procedures that guarantee them appropriate level of protection.¹⁴⁰⁸ To effect the required protection of CVSA while testifying, implies some measure of limitation of the rights of accused persons to a fair trial.¹⁴⁰⁹ The issue therefore remains the extent of the limitation of accused persons' rights that ensure protection for CVSA, while safeguarding the interests of the accused persons as well.

¹⁴⁰⁷ *Op. cit* n 1395.

¹⁴⁰⁸ *R v Maria Pupino* [2005] ECR I-5285. C-105/03.

¹⁴⁰⁹ *Op. cit* n 592.

Several years after the Supreme Court of Canada's decision,¹⁴¹⁰ the ECtHR confirmed that the admission of videotaped evidence in a CSA trial, where the CVSA is unable to testify, does not infringe the accused person's right to have witnesses testify in his presence, nor does it deny him the right to cross-examine the witness, since cross examination does not have to be contemporaneous with the testimony in court.¹⁴¹¹ Failure to avail an appropriate and adequate opportunity to the accused person to challenge the videotaped evidence however, amounts to a violation of the right of an accused person to a fair trial.¹⁴¹²

In recognizing the special needs of victims, the ECtHR recognized the need to reform criminal proceedings to balance the rights of accused persons and those of victims when it held that:

Principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called to testify.¹⁴¹³

The above statement highlights the inevitable conflict that arises between the rights of accused persons and need for special measures to ensure vulnerable victims such as CVSA testify. Protecting CVSA implies that the conduct of the defence, as far as the rights to fair trial are concerned, must be limited, hence the question, to what extent should the rights of the defence give way to CVSA protection?

Article 6 of the European Convention on Human Rights, requires that any difficulties that the accused person would face in protecting victims of crime, be adequately and appropriately counter-balanced, by giving the defence adequate opportunity to challenge the evidence. Subsequently, the enactment of the Human Rights Act of (1998) resulted into the English courts' attempts to balance the rights of victims and accused persons.

The difficulties that characterize the adversarial system in taking the testimony of CVSA, has led to its modification in several ways, in an attempt to make it more suitable to

¹⁴¹⁰*Op. cit* n 1395.

¹⁴¹¹*B v Finland* (App no 17122/02) (2007) ECtHR.

¹⁴¹²*W v Finland* (App no14151/02) (2007) ECtHR.

¹⁴¹³*Op. cit* n 616.

victims, including children, as it safeguards the rights of accused persons. In recognition of the various challenges and difficulties caused by the adversarial legal system to CVSA, many commonwealth jurisdictions have taken steps to reduce the trauma associated with court testimony. Such measures have been found to greatly enhance CVSA ability to testify more confidently and coherently about the sexual abuse.¹⁴¹⁴

Britain, from where Kenya inherited its current legal system has taken steps to reform its CSA trial procedure.¹⁴¹⁵ One such measure is through the introduction of ‘rape shield statutes’ as already discussed in this chapter. An example of such a statute is the Youth Justice and Criminal Evidence Act (1999) which limited the accused persons’ right to cross examine victims of sexual assault. Such limitation ordinarily denies an accused person the opportunity to test the truth of the evidence and credibility of the witness which is an important component of the trial process. However, the Youth Justice and Criminal Evidence Act (1999) allowed such limitation so as to ensure the protection of victims of sexual assault.

It is however worth noting that since Britain has an unwritten constitution, even the most sacred of English traditions and human rights can be abrogated by an Act of Parliament due to parliamentary supremacy principle.¹⁴¹⁶ It was therefore easy for England to limit the rights of accused persons to a fair trial by balancing them with the interests and concerns of CVSA through the enactment of statutes by Parliament.¹⁴¹⁷ However English common law traditions such as due process, rule of law, representative government, freedom of expression and judicial independence are immutable traditions equivalent to non-derogable rights that courts must uphold and protect despite parliamentary supremacy.¹⁴¹⁸ The right to fair trial is not listed amongst such immutable English traditions.¹⁴¹⁹ At the international level, the ICTY, ICTR and the ICC have shown that it is possible to balance fair trial rights with the need to protect victims in a criminal trial.¹⁴²⁰

¹⁴¹⁴*Op. cit* n 123.

¹⁴¹⁵*Op. cit* n 52.

¹⁴¹⁶*Op. cit* n 349.

¹⁴¹⁷*Op. cit* n 221.

¹⁴¹⁸*Ibid.*

¹⁴¹⁹*Ibid.*

¹⁴²⁰*Op. cit* n 1180.

(i) Cross examination conducted through the judge or magistrate

As illustrated by figure 5, the adversarial system of trial causes more trauma to CVSA compared to the German inquisitorial system.¹⁴²¹ Special features of the German inquisitorial system which make it less traumatizing to CVSA are: Firstly, CSA cases are tried in special children courts by specially trained judges who can communicate to children effectively.¹⁴²² Secondly, the judges, not accused persons or counsel ask CVSA questions, and if CVSA fear the accused persons, they can be excluded from the trial. Thirdly, although the German system depends on first hand oral evidence, it has mechanisms of taking evidence in advance of trial. Fourthly, where the court appearance would cause psychological injury to CVSA, the court reads the previously recorded evidence of CVSA to the accused person who is allowed to ask questions which the court records and later asks CVSA to respond to. Fifthly, CVSA have a right to refuse to give evidence and the parents have a right to refuse on behalf of the CVSA if it would result into harm to the child.¹⁴²³ Sixthly, legal representation of CVSA is a right in Germany as it is in Australia, USA and Scotland.¹⁴²⁴ The German CSA trial is regarded as one of the best practices in protecting CVSA and recognizing the role of the court in the search for the truth.¹⁴²⁵ However, scholars who criticize the inquisitorial system of trial argue that the German CSA trial procedure oversteps the fundamental principles of protecting the rights of an accused person in a fair trial.¹⁴²⁶ Despite its criticism, the German CSA trial procedure has achieved a balance in protecting CVSA while proving the accused person with an opportunity to adequately test the evidence in a fair trial and is therefore regarded as one of the fair trial procedures in cases involving children.¹⁴²⁷

In Japan, although children give oral evidence, Articles 158 and 227 of the Code of Criminal Procedure give the judge power to conduct witness examination out of court, and in advance of the trial, due to their age and vulnerability as witnesses. In addition, formal statements made to the police are sometimes admissible as documentary evidence. The courts combine all the above options to avoid traumatizing CVSA through the court

¹⁴²¹ Article 247 of StrafproceBordnung (Code of Criminal Procedure)..

¹⁴²² *Op. cit* 52.

¹⁴²³ *Ibid*.

¹⁴²⁴ Child Abuse Prevention and Treatment Act 2010 (USA), Children and Young Persons Act 1989 (Australia), Vulnerable Witnesses Act 2004 (Scotland).

¹⁴²⁵ See for instance Hoyano & Keenan.

¹⁴²⁶ J Fortin, 'The HRA's Impact on Litigation involving Children and their Families' (1999) 11(3) *Child and Family LQ* 237.

¹⁴²⁷ See for instance Spencer and Flin, Hoyano & Keenan.

process. The Japanese system of CSA trial is also regarded as protecting the rights of CVSA while achieving a balance with the fair trial rights of accused persons.¹⁴²⁸ Like the German system, the Japanese trial procedure has also been criticized for interfering with the rights of accused persons to a fair trial.¹⁴²⁹ Despite the criticisms however, the Japanese system of CSA trial is an example of how accused persons' right to a fair trial can be balanced with the protection of CVSA.

The study recommends the appointment of specially trained advocates in children matters as to ensure that, the best interest of the child, as the guiding principle in children matters, is followed by the court. The advocates representing the interest of CVSA should have party status in the entire trial process, including post-trial procedure. CVSA therefore should have legal representation just like it happens at the ICC.¹⁴³⁰ This will not only protect the interest of CVSA, but enhance their participation in the trial process. This is the practice in the USA as well.¹⁴³¹

5.8 Accused Person's Right to Confront Witnesses

The constitutional basis for confrontation of CVSA by accused persons in Kenya, is Article 50(f) and (k) of the Constitution of Kenya, which provide for an accused person to be present at his/her trial, and challenge the evidence adduced. The adversarial system of trial is so entrenched in the Kenyan trial procedures that, the Criminal Procedure Code¹⁴³² provides that evidence in a trial must be taken in the presence of the accused person or his advocate. The requirement of oral evidence is further reinforced by the Evidence Act which requires evidence to be adduced orally and directly by the witnesses.¹⁴³³ This leads to direct face-to-face contact between the accused person and the victim in court.¹⁴³⁴ The resulting fear of the accused person by the victim has been found to disempower the victim from giving evidence coherently and confidently.¹⁴³⁵ The confrontation requirement has no regard to situations where the CVSA is vulnerable and easily intimidated by the accused person.¹⁴³⁶ Narrating the painful experience of the abuse in

¹⁴²⁸ See for instance Hoyano & Keenan, Sagatun, Spencer & Flin.

¹⁴²⁹ *Op. cit* n 221.

¹⁴³⁰ Article 68 of the Rome Statute.

¹⁴³¹ Legal Representation of Infants Act 1997.

¹⁴³² *Op. cit* n 424 section 194.

¹⁴³³ *Op. cit* n 38, section 192.

¹⁴³⁴ *Op. cit* n 399.

¹⁴³⁵ *Op. cit* n 199.

¹⁴³⁶ *Op. cit* n 399.

the presence of the accused person has been found by several studies to be very traumatic to all victims of sexual abuse.¹⁴³⁷

The psychological trauma associated with seeing the accused person in court, according to psychologists, may in some cases remind the CVSA of the abuse.¹⁴³⁸ As a coping mechanism, such reminder may cause intense trauma that blocks the brain from remembering the details of the abuse.¹⁴³⁹ In such circumstances, the provision of direct evidence does not serve the interest of CVSA, who may fail to testify, leading to the acquittal of the accused person in CSA cases in Kenya.¹⁴⁴⁰ In this respect, the psychoanalytic and the labeling theories discussed in chapter one provide an explanation as to the challenges faced in prosecuting CSA under the adversarial system.¹⁴⁴¹ In order to ensure fairness in CSA trial, there is need to balance the rights of accused persons and those of CVSA in the context of procedural justice.

The study observed that CVSA were asked by the prosecutors to physically identify the accused person in court by pointing at him/ her. This aspect of the procedure is important as the identity of the accused person is a material fact, that must be proved by the prosecution, under sections 107 and 109 of the Evidence Act as part of the duty to discharge the burden of proof.¹⁴⁴² The study observed that CVSA experienced difficulties in cases where the child was too young to know who their abuser was. Likewise, where the CVSA was ambushed, blindfolded or threatened during the abuse, it was not possible in many cases for CVSA to identify the accused person. According to one prosecutor:

The identification of the accused person requirement presents the greatest trauma to CVSA. For identification to be correct, the witness must positively identify the accused person amongst those present in court, by looking at the people present and pointing at the accused. The witness must tell the court that the person who sexually assaulted him/her is the one he/she has pointed at. This implies a direct face-to face confrontation with the accused. There are

¹⁴³⁷ *Op. cit* n 108.

¹⁴³⁸ *Op. cit* n 75.

¹⁴³⁹ D Peters, 'The Impact of Naturally occurring Stress on Children's Memory' in S J Ceci, M P Toglia and D F Ross (eds), *Children's Eye Witness Memory* (Springer 1987)292.

¹⁴⁴⁰ *Op. cit* n 38, section 210.

¹⁴⁴¹ See Freud, Horney.

¹⁴⁴² Evidence Act, Cap 80 Laws of Kenya.

cases where witnesses testify about the abuse very well, but fail to link the abuse to the accused. In some cases, the CVSA may not know who the accused is, despite testifying that the abuse took place. Obviously in such cases, the prosecution fails to discharge the burden of proof, unless there is some other evidence or witness who can link the accused to the offence.¹⁴⁴³

Difficult as identification of an accused person by a CVSA may be, it is a crucial factor in determining the guilt or otherwise of the accused person.¹⁴⁴⁴ The stressful court environment and the lack of psycho-social support services to CVSA during their testimony, enhances their vulnerability when they have to confront accused persons and identify them as the perpetrators.¹⁴⁴⁵ The study findings support the argument that confrontation of CVSA by the accused person is the greatest source of trauma in CSA cases.¹⁴⁴⁶ It easily causes stress to CVSA, some of whom become unable to testify coherently or consistently.¹⁴⁴⁷ This results into gaps in their evidence which create doubts in the prosecution case, in some cases leading to the collapse of the cases.¹⁴⁴⁸ As one CVSA narrated:

I found it difficult telling people I have never seen before; how I was sexually abused. It was difficult to talk about it because nobody has ever talked to me about sex. It is bad to discuss such matters openly, but I managed. However, the most difficult aspect of my testimony was when the accused person stood up and asked if I had ever seen him. He looked very cruel and his voice was harsh. It reminded me of his warning to me, not to say anything about the abuse, or else, he will punish me. I therefore kept quiet, but he insisted that I answer his question. I could not. I wondered why everyone kept quiet as the accused intimidated me. I wish I could tell my story in court in the absence of the accused.¹⁴⁴⁹

¹⁴⁴³ Respondent no 8 in Appendix K.

¹⁴⁴⁴ *Op. cit* n 123.

¹⁴⁴⁵ *Op. cit* n 399.

¹⁴⁴⁶ *Ibid.*

¹⁴⁴⁷ *Op.cit* n 47.

¹⁴⁴⁸ *Ibid.*

¹⁴⁴⁹ Respondent no 81 in Appendix K.

The right to confrontation of witnesses is part of the fair trial rights under the Constitution of Kenya and is further found in the Evidence Act¹⁴⁵⁰ which not only provides for the prosecution's burden of proof beyond any reasonable doubt, but that the prosecution witnesses must be confronted by the accused person to challenge their evidence. Whereas confrontation is necessary to verify the truth of witnesses' evidence, in CSA cases where the CVSA is vulnerable and easily intimidated, confrontation of the CVSA becomes counter-productive to the truth seeking goal of a criminal trial.¹⁴⁵¹ Confrontation subjects CVSA to intimidating cross-examination to an extent that they cannot testify coherently and or consistently with confidence.¹⁴⁵²

The study found that the presence of the accused person in court was the biggest challenge to CVSA, many of whom, preferred to testify in the absence of the accused. In the words of one social worker:

It is better for the court to exclude the accused person from court when children testify in CSA cases. If the accused is present in court, the CVSA feel like being abused again, in front of everyone by the accused person. The accused's presence reminds them of the abuse as it occurred. Many CVSA find it difficult to testify under such circumstances.¹⁴⁵³

The argument above by the social worker, supports the study findings by the FGD that CVSA prefer to testify in the absence of accused persons, who have a non-derogable constitutional right, under Article 50(f) and (k) of the Constitution of Kenya, as read together with Article 25(c), to be present at their trial, listen to the evidence adduced and confront the witnesses. The implication is that CVSA must be confronted by the accused persons, despite the negative impact of their testimony. However, CVSA have a constitutional right to protection in their best interest as per Article 53(2) of the Constitution of Kenya. Both the accused persons and CVSA therefore have constitutional

¹⁴⁵⁰ *Op. cit* n 38 sections 107 and 146.

¹⁴⁵¹ *Op. cit* n 52.

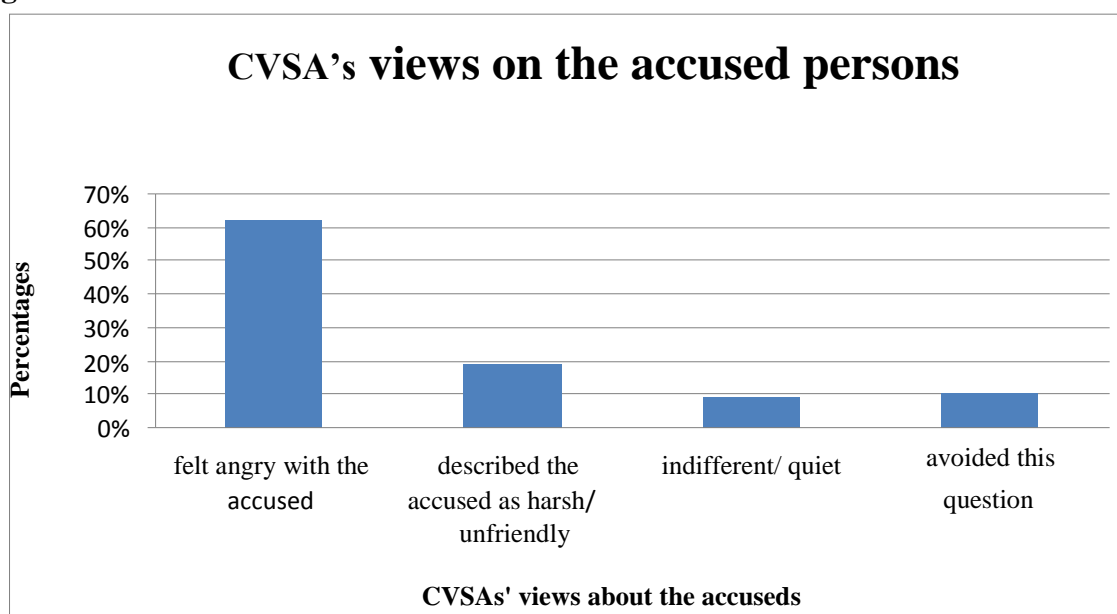
¹⁴⁵² *Ibid.*

¹⁴⁵³ Respondent no 33 in Appendix K.

rights which conflict during CSA trial.¹⁴⁵⁴ The courts must therefore balance the two rights if the trial is to be fair to both the accused persons and CVSA.¹⁴⁵⁵

The study found that due to the confrontation requirement, 62% of CVSA felt angry with the accused person. As argued by Temkin, the study found that CVSA felt threatened by the presence of the accused persons in court.¹⁴⁵⁶ Some CVSA responded that, the threat had continued since the abuse took place and that being confronted by the accused in court increased their vulnerability.¹⁴⁵⁷ They described the accused person as the most evil person they ever met. Nineteen percent of CVSA described the accused persons as rude, harsh, and unfriendly, while 9% found them indifferent and quiet. Eleven percent of CVSA did not give any description of the accused person and avoided this question. The strong views of CVSA are illustrated by figure 13 below.

Figure 13: CVSA's Views on the Accused Persons



¹⁴⁵⁴ K R Hornbeck, 'Washington's Closed- Circuit Testimony Statute: An Exception to the Confrontation Clause to Protect Victims in Child Abuse Prosecutions' (1992) 15 University of Puget Sound Law Review 913.

¹⁴⁵⁵ M Garvin, R S T Khali and S LeClair, 'Confronting the Confrontation Clause: Finding the Use of Closed Circuit Television to be "necessary" Under *Maryland v Craig*' (Child Victims' Rights Bulletin 2012) National Crime Victim Law Institute 3.

¹⁴⁵⁶ *Op. cit* n 3.

¹⁴⁵⁷ *Op. cit* n 47.

The above figure supports Temkin's argument about the intimidating presence of the accused persons during CVSA's testimony.¹⁴⁵⁸ The fact that majority of CVSA felt angry with the accused person means they were under stress.¹⁴⁵⁹ Subsequently, they could not coherently and confidently narrate the abuse in court.¹⁴⁶⁰ The situation was aggravated by the cruel cross-examination that CVSA underwent. Many CVSA felt intimidated and vulnerable in court in the presence of the accused person. They were unable to testify with ease due to fear, threat and intimidation which may have occurred at the time of the abuse or after the abuse.¹⁴⁶¹

All the respondents were in agreement that face-to-face contact between the CVSA and the accused person is a major impediment to CVSA's ability to testify about the abuse. The presence of the accused person reminded CVSA of the abuse itself. If any threat was used before, during or after the abuse by the accused person to the CVSA, the experience is re-lived by CVSA.¹⁴⁶² Subsequently, they become either hostile or silent for fear of the threat being carried out by the accused person.¹⁴⁶³ This position was supported by the court observations and interviews with CVSA. One CVSA said:

After the abuse, the accused warned me not to talk about the abuse to anyone. If I do he will kill me. So I was afraid to talk in court, and when I saw him, I recalled his threat. I could not say anything in front of him in court.¹⁴⁶⁴

Due to lack of any protection mechanism to shield CVSA from direct face-to-face contact with accused persons, all CVSA who testify in court go through the experience of re-victimization as they testify.¹⁴⁶⁵ The right to confrontation negatively impacts on CVSA's ability to testify coherently and confidently hindering their effective participation in the judicial proceedings.¹⁴⁶⁶ This is contrary to the right to have their best interest regarded as

¹⁴⁵⁸ *Op. cit* n 3.

¹⁴⁵⁹ *Op. cit* n 384.

¹⁴⁶⁰ *Op. cit* 1455.

¹⁴⁶¹ *Op. cit* n 52.

¹⁴⁶² M S Raeder, 'Enhancing the Legal Profession's Response to Victims of Child Abuse, (2000) 24 Criminal Justice 12, 14.

¹⁴⁶³ *Ibid.*

¹⁴⁶⁴ Respondent no 71 in Appendix K.

¹⁴⁶⁵ *Op. cit* n 47.

¹⁴⁶⁶ *Op. cit* n 1462.

of paramount importance under Article 53(2) of the Constitution of Kenya. Courts therefore need to adopt measures that enable the accused persons to challenge the evidence of CVSA without the presence of the accused person intimidating them. This calls for a balance between the accused persons' right to confrontation under Article 50 (f) and (k) and CVSA's right to protection under Article 53(2) of the Constitution of Kenya. The question that arises is whether the right to confrontation, being a fair trial right, can be limited, in view of Article 25(c) of the Constitution of Kenya, which protects fair trial rights from derogation. In the next section, the study recommends how the question can be addressed without violating the constitution as the supreme law of the land under Article 2 of the Constitution of Kenya

Recommendation

The study recommends that Article 25(c) of the Constitution of Kenya needs to be amended so as to provide an exception in CSA trials. Such an amendment will allow courts to limit the confrontation right so as to enable CVSA testify in CSA cases without being intimidated by the confrontation requirement. It is only by amending the constitution that any measures proposed to protect CVSA while safeguarding the rights of accused persons to confrontation can be constitutional. Without faulting the drafters of the Constitution, a reading of Article 50 (f) and (k) and Article 53(2) of the Constitution of Kenya reveals a conflict in the protection of both CVSA and accused person's rights. This may not have been envisaged by the drafters of the constitution whose intention appears to have been to ensure that all parties have access to justice as stipulated in Article 48 of the Constitution. In addition, the drafters of the constitution appear to have intended that everyone be treated equally according to the law and be provided equal protection of the law under Article 27 of the Constitution. Discrimination of any kind is out rightly outlawed by Article 27 of the Constitution of Kenya. Applying the confrontation clause as stipulated under Article 50 (f) and (k) without protecting CVSA as per Article 53(2) amounts to discriminative application of the constitutional provisions which the drafters of the constitution may not have envisaged or intended. This study therefore recommends that Article 25(c) be amended as already argued.

The study further recommends that the Judiciary can learn and borrow from various jurisdictions how they have managed to protect CVSA in CSA cases while at the same time safeguarding the accused person's right to confrontation. In this respect, the study

recommends the following specific measures to protect CVSA from the adverse effects of confrontation.

(i) Admission of Hearsay Evidence in CSA cases

The rule against hearsay evidence prevents the admission of a statement made by CVSA to a third party in situations where CVSA cannot or are unable to testify in court. This is the implication of Section 62 and 63(1) of the Evidence Act which provides that oral evidence must be direct. As already discussed in this study, the effect of oral direct evidence requirement at times disables CVSA from giving their best evidence.¹⁴⁶⁷ This study proposes that in balancing the interests of CVSA and accused persons, there is need to shield CVSA from confrontation by the accused person, by introducing an exception to the rule against hearsay evidence in situations where CVSA is already under trauma, cannot testify in court, but there exists evidence in statement/video of the CVSA or a narration to a third party by the CVSA which contains details of the abuse.¹⁴⁶⁸

The argument is that to admit hearsay evidence in such cases ensures the required details of the abuse are recorded by the court, while the accused person has a chance to ask any questions concerning the hearsay evidence through the court.¹⁴⁶⁹ In this respect, there is need to review the accused persons' rights under the Confrontation Clause as provided by Article 50 (f) and (k) of the Constitution of Kenya. In this respect, Kenya can learn from America which has reviewed the confrontation right in CSA cases.¹⁴⁷⁰ Scholars in America argued that the confrontation clause intimidated CVSA from testifying in CSA cases.¹⁴⁷¹ They argued for the reform of the hearsay rule in CSA cases to strike a balance between the rights of accused persons and concerns to protect CVSA. Subsequently, the American legal system has accommodated the evidence of CVSA by providing for exceptions to the hearsay rule in CSA cases.¹⁴⁷² The use of hearsay testimony in CSA cases in America represents the most dramatic shift in the American Legal System in the

¹⁴⁶⁷ *Op. cit* n 109.

¹⁴⁶⁸ *Op. cit* n 323.

¹⁴⁶⁹ *Ibid.*

¹⁴⁷⁰ The Sixth Amendment to the United States Constitution states inter alia: "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour..." The first of these rights is called the Confrontation Clause, and the second the Compulsory Process Clause. Both clauses express the accused persons' rights to fair trial.

¹⁴⁷¹ *Op. cit* n 323.

¹⁴⁷² *Op. cit* n 384.

past three hundred years.¹⁴⁷³ This has resulted into the admissibility of video-taped testimony of CVSA so as to protect child victims from the adverse effects of confrontation.¹⁴⁷⁴

Over thirty four American states have created special hearsay exceptions for CSA cases.¹⁴⁷⁵ An example is Alabama state which amended Section 15 to 25 and Section 31 to 33 of the Alabama code (1985) to provide for admissibility of hearsay evidence of CVSA under age twelve in CSA cases. Other examples include Florida, Pennsylvania, Alaska, Arizona, Colorado, Illinois, Maryland, Minnesota, Mississippi, New Jersey, Ohio, Oklahoma, Oregon and Washington amongst many others which have amended their statues to provide for hearsay evidence of CVSA in CSA cases.¹⁴⁷⁶

In New Zealand, the Evidence legislation was amended in 1980 to provide for hearsay evidence of CVSA in CSA cases.¹⁴⁷⁷ In Australia, the Evidence Act (1929) (South Australia) was amended to create an exception to the hearsay rule under section 34 in CSA cases.

Courts have in the past ruled in favour of admissibility of hearsay evidence in CSA cases. In *Ohio v Roberts*¹⁴⁷⁸ the United States Supreme Court developed a twin test to determine when hearsay statements are admissible in CSA cases. The court held that the prosecution must show that the author of the hearsay statement is “unavailable” to testify and that the content of the hearsay evidence has adequate reliable information that is relevant to the case. Hearsay evidence has been accepted in several jurisdictions in CSA trials as evidenced by the number of countries that have enacted legislation to this effect.¹⁴⁷⁹ Some of the advantages of admitting hearsay evidence in CSA cases include the fact that it gives the opportunity for the best evidence of CVSA to be obtained, in circumstances where subjecting the child to the court process may result into more trauma.¹⁴⁸⁰ Hearsay

¹⁴⁷³ D F Ross, A R Warren and L S McGough, ‘Foreword: Hearsay Testimony in Trials Involving Child Witnesses’ (1999) 5 Psychology, Public Policy and Law 251, 252.

¹⁴⁷⁴ *Op. cit* n 47.

¹⁴⁷⁵ *Ibid.*

¹⁴⁷⁶ *Ibid.*

¹⁴⁷⁷ Section 3(1) (a) of the New Zealand Evidence Act was amended by Evidence Amendment Act (No 2) 1980 (New Zealand).

¹⁴⁷⁸ 448 US 56, 63 (1980).

¹⁴⁷⁹ *Op. cit* n 47.

¹⁴⁸⁰ *Op. cit* n 384.

evidence therefore protects CVSA from the ordeal of being confronted by the accused person.¹⁴⁸¹ In addition, admitting hearsay evidence in CSA cases prevents CVSA from retracting what they had recorded in their initial statements at the time of their testimony in court especially in situations where they are intimidated to do so.¹⁴⁸² The use of a video-taped interview which is admitted in evidence preserves the initial statement by CVSA.¹⁴⁸³

Admission of video-taped evidence provides an opportunity for the accused person to view the evidence in advance and prepare for the defence case.¹⁴⁸⁴ Despite the advantages of admitting hearsay evidence in CSA cases, critics argue that admitting hearsay evidence is contrary to basic traditions of justice, the hearsay evidence may be contaminated and that the defence does not have the opportunity to physically confront the witness. This study advances the argument that the advantages of admitting hearsay evidence in CSA cases outweigh the disadvantages and assist in the truth seeking process, resulting into a fair trial to both CVSA and accused persons.

This study therefore recommends the amendment of sections 62 and 63 of the Kenyan Evidence Act to provide for the admissibility of hearsay evidence in CSA cases as an exception to the rule against hearsay.

(ii) **Suppressing the Presence of the Accused Person through the Use of a Screen**

The study recommends the use of screens to protect CVSA from trauma associated with face to face confrontation by the accused person in CSA cases. During CSA's testimony, a special screen is placed between the accused person and CVSA to enable CVSA testify without seeing the accused person.¹⁴⁸⁵ However, the accused person, the umpire, the interpreters, defence counsel and anybody else in court are able to see the CVSA and listen to the testimony.¹⁴⁸⁶ The accused person therefore has an opportunity to see the CVSA who testifies in the accused person's presence but is protected by the use of the

¹⁴⁸¹ *Op. cit* n 109.

¹⁴⁸² *Op. cit* n 52.

¹⁴⁸³ *Op. cit* n 47.

¹⁴⁸⁴ *Op. cit* n 109.

¹⁴⁸⁵ *Op. cit* n 399.

¹⁴⁸⁶ *Ibid.*

screen.¹⁴⁸⁷ In addition, the accused person can observe the demeanour of the witness and has the opportunity to ask questions which the witness responds to. In *Maryland v Craig*, the US Supreme court held that:

Important policy reasons exist that support the need to protect specific child victims from the trauma of in-court testimony during confrontation by the accused. However, before offering a child witness protective measures, the court must determine that the child needs to be protected from a particularized harm or trauma that may result from testifying in the defendant's presence outweighs the defendant's rights to face his accuser during trial.¹⁴⁸⁸

The Supreme Court of the USA in the Craig case developed a set of three conditions that must be satisfied in order to protect CVSA from direct face to face confrontation with the accused in CSA cases. The first condition is that the trial court must establish the fact that limiting an accused person's right to confrontation is necessary to protect the particular CVSA.¹⁴⁸⁹ The second condition is that failure to protect the CVSA by limiting the accused person's right to confrontation would result into increased trauma for the CVSA.¹⁴⁹⁰ As a result, the CVSA will not be able to testify in the presence of the accused person. The third condition is that the trauma experienced by the CVSA would be substantial as to impact negatively on the health of the child witness.¹⁴⁹¹

From the discussions on cross examination, publicity of the trial and confrontation in this chapter, the study has shown that most CVSA undergo trauma to an extent that some of them are unable to effectively testify therefore defeating the search for the truth in CSA cases in Kenya. This study finding is supported by various voices of respondents cited by the study.

The study therefore argues that the conditions under which CVSA testify in CSA cases in Kenya meets the three conditions set out in the Craig case which necessitate the limitation

¹⁴⁸⁷ Ibid.

¹⁴⁸⁸ *Op. cit* n 477.

¹⁴⁸⁹ Ibid.

¹⁴⁹⁰ Ibid.

¹⁴⁹¹ Ibid.

of accused person's right to confront CVSA. In England, the YJCEA¹⁴⁹² provides for the use of screens to shield the victim/witness from direct face to face contact with the accused person. The impact of the use of the screen has been a reduction in the impact of face to face confrontation between the victim and the accused person, enhancing CVSA's ability to testify effectively.¹⁴⁹³ The effect of the screen is to reduce the impact of face to face confrontation between the victim and the accused person. The European Commission on Human Rights approved the use of screens in Northern Ireland to protect intimidated witnesses from not only the accused person, but the public and the media.¹⁴⁹⁴

In England, the Court of Appeal approved the use of screen by child witnesses where the test of 'the balance of fairness' was satisfied as they took into account not only the interest of the accused person, but that of the child witness too.¹⁴⁹⁵ The main argument in the use of screens is the necessity of the vulnerable child to give evidence, which outweighs any possible prejudice to the accused person.¹⁴⁹⁶ It also confirms the judges' inherent common law power to vary the physical arrangement of the courtroom.¹⁴⁹⁷

The issue of identification of the accused person by the victim remains an integral part of any trial procedure which presents difficulty in trying to protect CVSA from direct face-to-face confrontation with the accused person. In England, the problem is avoided since the courts readily accept as evidence that the accused was the person involved, evidence of identification parade prior to the trial or any other form of identification conducted by the police.¹⁴⁹⁸ The Scots have for long insisted on identification of accused person by the victim, but now apply the English procedure in cases of sexual assault.¹⁴⁹⁹

The study therefore recommends that children courts in Kenya use screens in CSA trials to protect CVSA from the adverse effects of face to face confrontation by the accused persons. Screens have been used to protect CVSA in CSA trials in Scotland, Britain,

¹⁴⁹² Section 23.

¹⁴⁹³ A Cossins, 'Prosecuting Child Sexual Assault Cases: Are Vulnerable Witness Protections Enough?' <http://www.judcom.nsw.gov.au/publications/benchbks/sexual_assault/...> accessed 9 August 2013.

¹⁴⁹⁴ *X v United Kingdom* (1992)15 EHRR CD 113.

¹⁴⁹⁵ *X, Y, Z* (1990) 91 Cr App R 36.

¹⁴⁹⁶ *Op. cit* n 1401.

¹⁴⁹⁷ *Op. cit* n 123.

¹⁴⁹⁸ *Op. cit* n 52.

¹⁴⁹⁹ *Ibid.*

France, Australia and New Zealand.¹⁵⁰⁰ However, in order to ensure that the above proposed measures do not violate the constitution, it is important that parliament amends Article 25(c) of the Constitution of Kenya to allow for the limitation of accused person's right to confrontation in CSA cases. This is important because unlike the American Constitution which does not make the right to confrontation absolute (as indicated by the Supreme court decision in the Craig case), the Constitution of Kenya expressly protects fair trial rights which include confrontation from limitation under Article 25(c) of the Constitution of Kenya.

(iii) Use of Live Television Link

Television link, also referred to as closed circuit television (CCTV), is a technology that is used to enable CVSA testify in a CSA trial from a different room or location from the court.¹⁵⁰¹ While the CVSA is protected from face to face confrontation with the accused person, the CVSA can be seen and heard by the judge, the accused person, the defence counsel and all present in the courtroom via the CCTV.¹⁵⁰² There are however variations in various methods of CCTV as to whether the CVSA should be able to see and hear the defendant or not.¹⁵⁰³ In England, all CVSA under 14 years give evidence by video link as provided by the YJCEA.¹⁵⁰⁴

Where necessary, CVSA may be accompanied by a support person in the live link room to reduce the child's anxiety and enhance the quality of the evidence without influencing the child's evidence, but by offering psycho-social support services.¹⁵⁰⁵

First introduced in England in 1988, live link has gained wide use in both physical and sexual abuse cases involving children in Britain, USA, Canada and Australia.¹⁵⁰⁶ Early research conducted on the effect of the use of live link in England showed that it greatly reduced the stress suffered by CVSA while testifying in court.¹⁵⁰⁷

¹⁵⁰⁰ Vulnerable Witnesses Act 2004 (Scotland), Evidence (Protection of Children) Amendment Act 2003 (Queensland Australia), Evidence Act 1908 of New Zealand, Youth Justice Criminal Evidence Act 1999 (England), Child Abuse Prevention and Protection Act 1974 (France).

¹⁵⁰¹ *Op. cit* n 1222.

¹⁵⁰² *Op. cit* n 1432.

¹⁵⁰³ *Op. cit* n 1494.

¹⁵⁰⁴ Section 24.

¹⁵⁰⁵ *Op. cit* n 47.

¹⁵⁰⁶ *Ibid.*

¹⁵⁰⁷ *Op. cit* n 9.

The United Kingdom House of Lords observed that even though face-to-face confrontation with trial witnesses was important, such confrontation was not necessarily an indispensable element of the constitutional right of an accused person to face his accusers.¹⁵⁰⁸ It may be dispensed with where it is necessary for public policy and where the reliability of the testimony is otherwise assured.¹⁵⁰⁹ The House of Lords further observed that the use of one-way closed-circuit television procedure, where it was necessary to further an important state interest, ‘did not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause.’¹⁵¹⁰

In India, in what is arguably one of the leading judicial opinions in the Commonwealth, on the use of video conferencing in giving and receiving evidence, the Supreme Court observed that:

In video conferencing, both parties are in the presence of each other. As long as the accused person or his lawyer/attorney was present when the evidence was recorded by video conferencing that amounted to recording the evidence in the ‘presence’ of the accused person. Such a procedure of taking evidence was in accordance with the law.¹⁵¹¹

In the above case, the Supreme Court addressed itself to practical aspects of setting up the video conference and how to deal with certain concerns about the procedure that may be typically raised by parties opposed to it.

In Kenya the live link has been used by the Court of Appeal sitting in Nairobi to hear an appeal in Mombasa as a way of introducing information technology in the effective management of the judiciary.¹⁵¹² The High Court in Nairobi ruled that the absence of a specific legislation on the admissibility of video recorded evidence does not outlaw the admissibility of such evidence.¹⁵¹³

¹⁵⁰⁸ *Op. cit* n 470.

¹⁵⁰⁹ *Ibid.*

¹⁵¹⁰ *Ibid.*

¹⁵¹¹ *The State of Maharashtra v Praful* [2003] INSC 207.

¹⁵¹² *Alishabhai Ali v Maritime Freight Company Ltd.* Court of Appeal at Mombasa Civil Application No. Nairobi 136/2003.

¹⁵¹³ *R v Kipsigei Cosmas & Another* [2011] e KLR.

The High Court in Kenya has held that the use of video conferencing in taking evidence of witnesses who are unable to testify in court is within the law.¹⁵¹⁴ The court ruled that the trial magistrate erred in declining to take the evidence of two witnesses resident in the USA through video conferencing.¹⁵¹⁵ In such a situation, the accused person would have an opportunity to cross examine the witness through video conferencing.¹⁵¹⁶

The High Court reasoned that taking the evidence of witnesses by video conferencing does not prejudice the respondent's right to confront witnesses.¹⁵¹⁷ In addition, it is in the public interest that all evidence must be laid before court to arrive at a just decision.¹⁵¹⁸ Therefore taking witnesses' evidence through video conferencing where the witnesses are unable to come to court ensures that all evidence is presented in court while giving the defendant the opportunity to cross examine a witness.¹⁵¹⁹

The High Court decisions are binding authorities for the children courts to admit video recorded evidence of CVSA in CSA trials. However, the study did not observe the use of live television link in deserving cases of CSA at all. The study therefore recommends that the Children Courts adopt the use of television link in CSA trials in Kenya.

(iv) Removing the accused person from the courtroom

A fundamental requirement of the adversarial trial procedure is that the accused person should be present at his/her trial.¹⁵²⁰ This requirement is protected under Article 50 (f) of the Constitution of Kenya. However, the Article creates an exception in which the court may dispense with the requirement that the accused person be present at his/her trial where the conduct of the accused person makes it impossible for the trial to proceed. The study findings reveal that there are instances when CVSA are unable to testify because of the intimidating character or conduct of the accused persons towards the CVSA. An example is the concern by a CVSA who told the study that the accused person threatened

¹⁵¹⁴*Livingstone Maina Ngare v R.* High Court of Kenya Nairobi, Criminal Revision No 88 of 2011. [2011] eKLR.

¹⁵¹⁵ *Ibid.*

¹⁵¹⁶ *Ibid.*

¹⁵¹⁷ *Ibid.*

¹⁵¹⁸ *Ibid.*

¹⁵¹⁹ *Ibid.*

¹⁵²⁰ *Op. cit* n 123.

to kill her if she testified.¹⁵²¹ Such threats, if investigated by the court and found to be true, can be interpreted to mean that the conduct of the accused person and subsequent presence at the trial makes it impossible for the CVSA to testify. Based on this argument, the courts would be justified to exclude the accused person from the testimony of CVSA under Article 50 (f) of the Constitution of Kenya. In such circumstances, the use of a video link or admission of a video-taped testimony of CVSA would suffice.

In Britain, during wardship orders hearings in civil proceedings, the accused person is removed from the court as CVSA testify.¹⁵²² In criminal proceedings however, the accused person has a right to be present at the trial as part of the fair trial rights.¹⁵²³ To exclude an accused person from his/her criminal trial would amount to a violation of the fair trial right.¹⁵²⁴

Where the accused person is unrepresented, this results into unfair procedure as it prevents the accused person from hearing the evidence of the witness and therefore makes it impossible to challenge the evidence effectively.¹⁵²⁵ However, the argument is weak where the accused person is represented and the lawyer/counsel can listen to the evidence, cross-examine and look after the accused person's interests effectively in his absence.¹⁵²⁶

There are indeed legal systems in which accused persons are excluded from their trial in the taking of evidence of a witness who has expressed fear of the accused persons. Such systems include France, Holland, Denmark and Germany.¹⁵²⁷ In France and Holland, the judge has wide powers to do this and where necessary, the accused person is informed of the decision to exclude him/her from the witness testimony.¹⁵²⁸ After the witness testifies, the court informs the accused person of what the witness said in evidence in his absence immediately afterwards.¹⁵²⁹

¹⁵²¹ Respondent no 71 in Appendix K.

¹⁵²² Youth Justice Criminal Evidence Act.

¹⁵²³ *Op. cit* n 50.

¹⁵²⁴ *Op. cit* n 123.

¹⁵²⁵ *Op. cit* n 399.

¹⁵²⁶ *Op. cit* n 52.

¹⁵²⁷ Criminal Procedure Act 1977 (Germany), Section 210 of the Criminal Code (Denmark), Netherlands Criminal Code 1811(Netherlands), French Code of Criminal Procedure 1808 (France).

¹⁵²⁸ Netherlands Criminal Code 1811, French Code of Criminal Procedure 1808.

¹⁵²⁹ *Ibid.*

In Germany, Article 247 of the Code of Criminal Procedure allows the court to exclude the accused person from the testimony of a witness if the witness fears the accused person and if the witness is under 16 years of age.¹⁵³⁰ In Denmark, the protection of the welfare of children requires that the presence of the accused person in criminal proceedings be dispensed with.¹⁵³¹ In Australia, the rules of evidence in Queensland have been changed, giving powers to the courts to exclude the accused person from the taking of CVSA evidence if the child is under 12 years of age.¹⁵³² The proceedings must be relayed to the accused person through a television link under section 22 of the 1977 Evidence Act.¹⁵³³

In France and Holland, the judges have discretion to arrange for confrontation between accused persons and CVSA under a protective screen or television link.¹⁵³⁴ However in doing so, the courts safeguard the rights of accused persons in the following ways; the first safeguard is a number of procedural rules to regulate the pre-trial investigation.¹⁵³⁵ These include the presence of an official clerk at the interview, recording of the statement in writing, reading each page of the statement by the witness to confirm its contents, the signing of the statement by all parties present and provision of the statements to the accused person in advance of the trial.¹⁵³⁶

The second safeguard is the right by accused person and prosecutor to ask for any witness, even if he/she had recorded a statement to give live evidence at trial.¹⁵³⁷ This does not however add value to the accused person since the witnesses are traditionally examined, not by defence counsel, but by the judge.¹⁵³⁸ In case the witness fails to turn up, the case still proceeds on the basis of the *proce`s-verbaux*.¹⁵³⁹ This is unlike the adversarial system where the case collapses if witnesses fail to testify in court.¹⁵⁴⁰

¹⁵³⁰ Article 247 of the Germany Code of Criminal Procedure.

¹⁵³¹ Section 210 of the Criminal Code (Denmark).

¹⁵³² Section 22 of the Evidence Act (1977).

¹⁵³³ G Shannon, Report of the Special Rapporteur on Child Protection: A Report Submitted to the Oireachtas (2007).

¹⁵³⁴ Netherlands Criminal Code 1811(Netherlands), French Code of Criminal Procedure 1808 (France).

¹⁵³⁵ *Ibid.*

¹⁵³⁶ *Ibid.*

¹⁵³⁷ *Ibid.*

¹⁵³⁸ *Op. cit* n 47.

¹⁵³⁹ *Op. cit* n 52.

¹⁵⁴⁰ *Op. cit* n 123.

The third safeguard is the practice of confrontation which has been enhanced by several ECtHR decisions which have insisted on accused persons being given adequate opportunity to challenge evidence against him/her.¹⁵⁴¹

The study therefore recommends that Kenya adopts the measures discussed above namely, admission of hearsay evidence, use of the screen, use of television link and removal of the accused person from the courtroom, in balancing the rights of accused persons to confrontation with CVSA rights to protection. However, for the measures not to violate the constitution, the study recommends the amendment of Article 25(c) of the Constitution of Kenya to allow the limitation of the fair trial rights of an accused person in CSA cases.

5.9 Re-Examination

The statutory basis for re-examination of CVSA by the prosecution is section 145(3) of the Kenyan Evidence Act. The purpose of re-examination is for the witness being re-examined to explain matters that arise out of cross examination.¹⁵⁴² The effect is to explain any inconsistencies which may appear between the witnesses' statement recorded with the police and the testimony in court.¹⁵⁴³ The study therefore established that during re-examination, the prosecution asks CVSA to clarify issues raised in cross-examination that may conflict their evidence in chief.¹⁵⁴⁴ While 57% of CVSA felt confident during re-examination, and indicated that some of the prosecutors especially in Nakuru were fatherly, patient and gave them time to respond to their questions, 15% of CVSA remained silent during re-examination and when interviewed one of them stated that:

I had been asked many questions by different people. All of them were asking me to tell them about how I was abused. I did not see why I should answer any more questions after being intimidated by the accused person's lawyer. I did not know if the prosecutor too was going to be harsh to me like the accused person's lawyer. In any case, they already had my

¹⁵⁴¹ Ibid.

¹⁵⁴² Ibid.

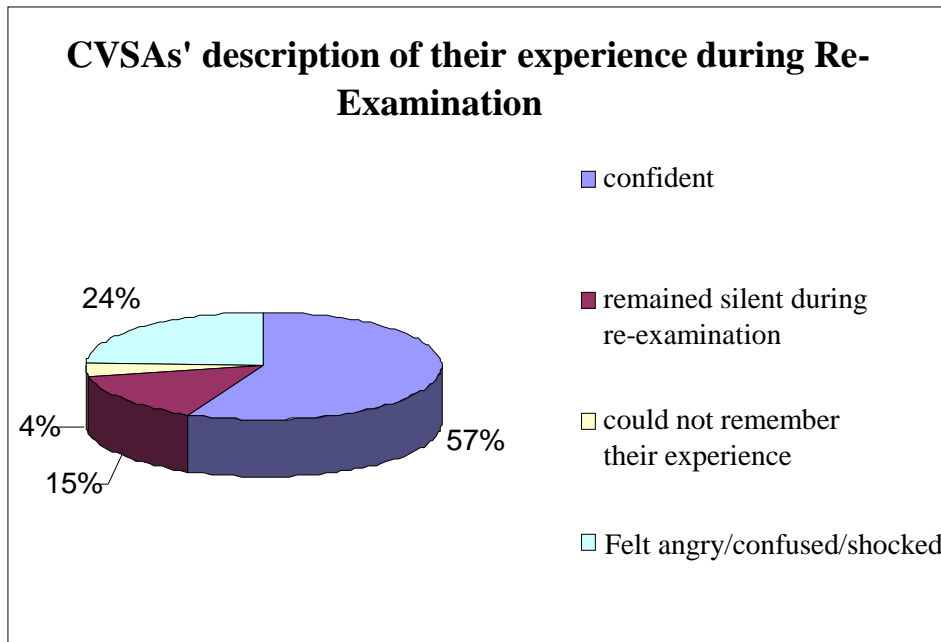
¹⁵⁴³ *Op. cit* n 50.

¹⁵⁴⁴ *Op. cit* n 216.

statement. I wish all the questioning would be done at once so that I tell my story once and for all in one forum.¹⁵⁴⁵

Four percent of the CVSA could not remember their experience during re-examination, while 24% said that they felt angry, hurt, confused, shocked, tense and nervous, during re-examination. Re-examination is therefore not as intimidating as cross examination, but nevertheless, unnecessary according to majority of CVSA as shown by figure 14 below.

Figure 14: CVSA Description of their Experience during Re-examination



The views of CVSA were supported by 68% of the legal practitioners. They were of the view that re-examination resulted into a further confusion of CVSA and was unnecessary since it involved asking the child to repeat details of the abuse to the prosecutor. The same details had been narrated to the magistrate during examination in chief. The details had also been told to the defence lawyers/ accused persons during cross examination. In the opinion of the legal practitioners, CVSA are fatigued at the stage of re-examination. The social workers were of the view that CVSA who kept quiet during re-examination did so as a coping mechanism, to avoid a repeat of the painful experience associated with cross-examination.

¹⁵⁴⁵ Respondent no 66 in Appendix K.

Many respondents felt that re-examination leads to further contradiction between what CVSA said in examination-in-chief and cross-examination. This only strengthens the case for the accused person and therefore in the opinion of 68% of the legal practitioners, the process is unnecessary. However, 32% of the legal practitioners found the process necessary in order to clarify any doubts raised during cross-examination, but added that it should be regulated.

Recommendation

The study recommends that re-examination of CVSA be done away with where it would amount to additional re-victimization of CVSA. The study recommends that Kenya adopts the method of interviewing CVSA where all questions are put to CVSA in one forum and one person with special skills in interviewing children is mandated to conduct the interview. All parties interested in interviewing the child must be present in such forum and must present all their questions to the person interviewing the child.

In the State of Alabama in USA, examination of CVSA has grown and become and become a more sophisticated operation.¹⁵⁴⁶ Law enforcement, prosecutors, defence counsel, judges, expert witnesses and any person interested in interviewing CVSA appear for a pre-trial interview of CVSA immediately upon the report of the abuse.¹⁵⁴⁷ The interview is conducted by a child expert appointed by the court who receives all questions from the various parties and communicates them to CVSA in a child friendly language and manner.¹⁵⁴⁸ The child's response is likewise communicated to the parties by the child expert.¹⁵⁴⁹ This technique has the advantage of limiting the number of times that CVSA have to be questioned by different people at different stages of the trial process.¹⁵⁵⁰ It has however been criticized for limiting the number of questions that can be put to CVSA due to time constraints.¹⁵⁵¹

Despite its criticism, the technique has been accepted and used in various states in the USA and has had the effect of ensuring that CVSA answer questions that are put to them

¹⁵⁴⁶ *Op. cit* n 384.

¹⁵⁴⁷ *Ibid.*

¹⁵⁴⁸ *Op. cit* n 47.

¹⁵⁴⁹ *Ibid.*

¹⁵⁵⁰ *Op. cit* n 1494.

¹⁵⁵¹ A Whittam, H Ehrat and Office of the DPP for South Australia 'Child Witnesses in the Criminal Justice System-the Issue of Vulnerability' (2003) Child Sexual Abuse: Justice Response or Alternative Resolution Conference (Australian Institute of Criminology)4,5.

without the undue stress associated with the order of examining witnesses as stipulated in sections 145 and 146 of the Evidence Act in Kenya namely examination in chief followed by cross examination and re-examination. In addition, the study recommends the development of guidelines which can assist in proper interviewing of CVSA. Such a guideline would contain issues such as who should conduct the interview, where the interview is to take place, what time the interview is to be conducted, how the questions are to be framed, what questions can be asked amongst many others. In this respect, the state of New Mexico in the USA has developed guidelines for interviewing CVSA which Kenya can learn from.¹⁵⁵²

5.10 The Right to Bail

Although bail is a constitutional right¹⁵⁵³ of accused persons, the study found that the courts did not take into consideration the need to balance accused person's right to bail with concerns for the best interest and protection of CVSA.¹⁵⁵⁴ The courts did not seek the views of CVSA on whether or not the accused persons should be granted bail. This is contrary to CVSA's right to effectively participate in the trial process in their best interest under Article 53 (2) of the Constitution of Kenya.

As recommended by President Regan's Taskforce, views of victims must be taken into account by courts on decisions such as bail and plea bargains.¹⁵⁵⁵ The study established that CVSA experienced intimidation, interference and threats from the accused persons so as not to testify in court as evidenced by one CVSA who said:

When the accused person was arrested and taken to court, he was set free on bail and has continued to intimidate me and my family. The court should not have set him free. He has told me not to give evidence against him or he will kill me.¹⁵⁵⁶

¹⁵⁵² C Harwell, *A Practical Guide on Sexual Assault and Sexual Abuse for Health Care Professionals* (New Mexico Coalition of Sexual Assault Programs, Inc 2011); National Crime Victims Research and Treatment Center, *Child Physical and Sexual Abuse: Guidelines for Treatment Final Report January 2003* (U. S Department of Justice 2003).

¹⁵⁵³ *Op. cit* n 40 Article 49 (1) (h).

¹⁵⁵⁴ *Ibid* Article 53(2).

¹⁵⁵⁵ *Op. cit* n 195.

¹⁵⁵⁶ Respondent no 77 in Appendix K.

In some cases, intimidation of CVSA by the accused persons hindered them from giving their best evidence in court. Despite this study finding, none of the court records perused showed any court order protecting CVSA from intimidation by the accused persons. In addition, the records did not show any conditions attached to the bail that the accused person should not get into contact/interfere with CVSA or their families. This study finding shows that the trial process safeguards the rights of accused persons without regard for the protection of CVSA contrary to their right to protection under Article 53(2) of the Constitution of Kenya.

The study found the trial procedure to be imbalanced as far as the right to bail for accused persons and protection of CVSA is concerned. Being a constitutional right of accused persons, bail can only be denied if there are compelling reasons to do so.¹⁵⁵⁷ All the accused persons in cases selected for the study were out on bail, even in cases where the records showed that CVSA expressed fear of intimidation by accused persons. In one such case a CVSA said that:

The accused person is known to me and my family. Ever since he abused me he has continued to instill fear in us. He tells us that if I give evidence against him, he will revenge. Now that I have given evidence, I do not know what will happen to me.¹⁵⁵⁸

In cases of incest, the accused, having been released on bond, went back to the same home environment with the CVSA. Such situations disempowered the CVSA from testifying in court and there were reported incidences of interference and attempts to withdraw the cases from court. The courts did not however consider such interference by accused persons as compelling reasons to deny or cancel bail. Whereas the author does not advocate for a complete denial of bail, such cases call for a balance between the right to bail and protection of CVSA in accordance with the best interest of the child principle under Article 53(2) of the Constitution of Kenya.

Since the promulgation of the Constitution of Kenya in 2010, the High Court in Kenya has ruled that since bail is a constitutional right, an accused person can only be denied

¹⁵⁵⁷ *Op. cit* n 40 Article 49(1) (h).

¹⁵⁵⁸ Respondent no 62 in Appendix K.

bail where the prosecution proves that the appropriateness and justification of the grounds to do so.¹⁵⁵⁹ The court however recognized that the constitutional right of the accused to be released on bail is not absolute since it has been limited by the Constitution itself in two respects; (a) the release on bond or bail is on reasonable conditions (b) the accused will not be released on bond or bail where there are compelling reasons.¹⁵⁶⁰

In the above case, the prosecution objected to the release of the fourth accused person on bail on the ground that he had already interfered with a witness in the case.¹⁵⁶¹ In addition, the accused had consequently absconded attending court and evaded arrest after the commission of the offence.¹⁵⁶² The court held that the phrase, “compelling reasons”, as used in Article 49 (1)(h) of the Constitution of Kenya, denotes reasons that are forceful and convincing as to make the court feel very strongly, that the accused person should not be released on bond.¹⁵⁶³ Bail should not therefore be denied on flimsy grounds, but on real and cogent grounds that meet the high standard set in the constitution.¹⁵⁶⁴ The court found that interfering with witnesses is a compelling reason as the prosecution gave evidence that the fourth accused had accosted a witness in the case.¹⁵⁶⁵ This was sufficient to prove interference with witnesses to dissuade them from giving evidence against the accused person. The court went on to add that:

Threats or improper approaches to witnesses, although not visibly manifest but aimed at influencing or compromising or terrifying witnesses not to give evidence or to give skewed evidence amounts to interference with witnesses. This is an impediment to or perversion of the course of justice.¹⁵⁶⁶

The court further observed that interference with witnesses may occur during the commission of the offence, immediately after the offence, during investigations, at the

¹⁵⁵⁹ *R v. Joktan Mayende and Four Others*, criminal case no.55 of 2009, High Court of Kenya at Bungoma, Ruling delivered in December 2012.

¹⁵⁶⁰ *Op. cit* n 40 Article 49 (1) (h).

¹⁵⁶¹ *Ibid.*

¹⁵⁶² *Ibid.*

¹⁵⁶³ *Ibid.*

¹⁵⁶⁴ *Ibid.*

¹⁵⁶⁵ *Ibid.*

¹⁵⁶⁶ *Ibid.*

inception of the criminal charge in court or during the trial.¹⁵⁶⁷ The court recognized that interference with witnesses may include threats and intimidation to members of the family of the witness or victim.¹⁵⁶⁸ The fourth accused was therefore denied bail by the court on the ground of interfering with witnesses. Although the Joktan Mayende case was filed in 2009, the ruling on the bail application was made in 2012 following an application by the defence for the release of the accused person on bail as a constitutional right within the Constitution of Kenya which was promulgated in 2010 making bail a constitutional right. Previously, bail was not a constitutional right. The bail application in the Joktan Mayende case was made under the current constitution and the court ruling considered the fact that although bail is a constitutional right under Article 49, it is limited by the same section.

This study argues that although bail is a constitutional right under Article 49 (1) (h) of the constitution, it is not listed under the fair trial rights in Article 50 of the Constitution. It is therefore not protected from limitation under Article 25(c) of the Constitution of Kenya. The study therefore supports the ruling in the Joktan Mayende case and recommends that the accused person's right to bail be limited in CSA cases where it can be proved that there are attempts to threaten or intimidate CVSA in CSA trials.

This study observed that the release of accused persons on bail was, in most cases not in the best interest of the CVSA and violated their constitutional right under Article 53(2) of the Constitution of Kenya. This is demonstrated by the case of a sixteen year old CVSA whose testimony was interrupted as she broke down while narrating the abuse. In her own words:

I was sexually abused by the accused person who attacked me on my way from school. He took me to an abandoned house, defiled me and later set dogs on me. However, when he was arrested and taken to court, he was not locked up but was set free on the same day. I continue to see him in the neighbourhood and he has threatened to kill me if I testify in court. I do not understand why the court cannot lock him up so that he stopped threatening me. I am afraid he might abuse me again.¹⁵⁶⁹

¹⁵⁶⁷ Ibid.

¹⁵⁶⁸ Ibid.

¹⁵⁶⁹ Respondent no 82 in Appendix K.

In yet another case, a CVSA who had been threatened by the accused person not to testify against him but the family took a firm position and supported her said:

It is difficult for me to tell the court my story as the accused person is here in court. He had threatened to repeat the abuse to me and harm my family if I do not drop the case. But we decided not to drop the case, now that I have told the court the truth, I do not know what he will do to us.¹⁵⁷⁰

This testimony highlights not only the need to balance the right of accused persons to bail with the concern for CVSA safety, but also the violence that accompanies CSA and the difficulty in testifying in court.¹⁵⁷¹ However, the study noted that in cases where the prosecution objected to the release of accused persons on bail, the argument was that investigations were not yet complete and the accused persons could interfere with the investigations. Much as this is a good ground for objecting to the accused persons' release on bail, the prosecution needs to apply for conditions attached to bail that protect the safety of CVSA as well.

According to all the judges and magistrates interviewed, bail is a constitutional right of accused persons which should be granted unless there is good reason to deny it. Whereas denying bail to the accused persons in CSA cases may not be appropriate in most cases, attaching conditions to bail such as 'no contact with CVSA or their family' serves the purpose of balancing the concerns of CVSA and those of accused persons to fair trial.

Articles 63 and 67 of the Ethiopian Criminal Procedure Code provide exceptions to the general rule of right to bail. The grounds for denying bail include, where

1. The accused person is unlikely to comply with bail conditions.
2. The likelihood of the accused committing other offences if granted bail.
3. The accused is likely to interfere with witnesses or tamper with evidence.¹⁵⁷²

¹⁵⁷⁰ Respondent no 58 in Appendix K.

¹⁵⁷¹ *Op. cit* n 399.

¹⁵⁷² Criminal Procedure Code of Ethiopia, Proclamation no. 185 of 1961.

Recommendation

Due to the nature of CSA and its effect on CVSA which enhances the vulnerability of CVSA during their testimony, the study recommends that Article 49(1)(h) of the Constitution be amended to specifically provide that in CSA cases bail shall not be granted. This bold recommendation is justifiable where a detailed pre-trial investigation supervised by a judicial officer or special prosecutor ensures that only cases with high chances of success are prosecuted. Denying accused persons bail in CSA cases will therefore enhance the truth seeking process since the accused person does not have an opportunity to interfere with the investigation of CVSA. In the event that the accused person must be granted bail, then the court must issue such conditions as to ensure the safety of CVSA and non-interference whatsoever with the investigative process.

Courts should give CVSA or their families an opportunity to present their views before making a decision on bail. This is because CVSA have an interest in their safety which should be considered by the court on bail matters.

In New South Wales, Australia, victims of crime have a right to participate in bail hearings and give their view as to whether or not the accused person should be granted bail.¹⁵⁷³ In New Zealand, Section 8(1) of the Victims of Offences Act (1987) allows victims to present their views to court on various matters including bail through the Victim Impact Statement. This is in line with victim's right to participate in the judicial process under the Part VIII of the UNGJMCCVWC in Appendix L.

The study has so far established that the CSA trial procedure in Kenya violates the constitutional rights of CVSA while it safeguards the fair trial rights of the accused person. In this respect, the study has made suggestions on how to protect CVSA when they testify. The study has also attempted to address the question of the constitutionality of limiting the fair trial rights. In the next section, the study concludes the discussions in this chapter, by examining the constitutionality of limiting fair trial rights under Article 25(c) of the Constitution of Kenya.

¹⁵⁷³ Sections 6.12 and 6.13 of the Victims Rights Act 1996 (New South Wales, Australia).

5.11 Constitutionality of Limiting Accused Person's Right to a Fair Trial

The Constitution of Kenya, which is the supreme law, provides for the fair trial rights of an accused person which must be safeguarded during the trial process.¹⁵⁷⁴ This study was concerned about the fair trial rights which cause a miscarriage of justice in CSA cases discussed in chapter two, three, four and five. They are the right to a public trial, the right to be present at one's trial, impartiality of the trial court, the right to challenge evidence in cross examination and protection against self-incrimination amongst others. In chapters four and five, the study has recommended several measures to limit the above rights of accused persons to fair trial so as to ensure a balance with CVSA rights to protection. The study recognizes that fair trial rights in Kenya are listed among the non-derogable rights under Article 25(c) of the Constitution of Kenya.¹⁵⁷⁵

Although the right to a fair trial has developed over time and almost attained the status of non-derogative rights, it is not listed among the non-derogable rights by the ICCPR¹⁵⁷⁶ which only lists the right to life, protection against slavery and torture as non-derogable. Robinson argues that the implication of excluding the right to fair trial from non-derogable rights by the ICCPR is that state parties can limit the right to fair trial in times of public emergency so long as the procedure put in place can ascertain some measure of fairness to accused persons.¹⁵⁷⁷

The question as to whether the right to a fair trial can be limited remains a controversial issue. There are however scholars who think like Robinson and argue for flexibility in certain situations to ensure procedural fairness to both accused persons and victims. Tham, Ronneling and Rytterbro are in agreement that crime victims have gained prominence in the criminal justice system and this has affected traditional legal principles.¹⁵⁷⁸ They give the example of the right to equal treatment of the law which in their view implies that upholding the rights of accused persons to a fair trial should not confer undue advantage to the accused person at the expense of the victim.¹⁵⁷⁹ Based on

¹⁵⁷⁴ *Op. cit* n 40 Article 50.

¹⁵⁷⁵ *Ibid* Article 25(c).

¹⁵⁷⁶ *Op. cit* n 651 Article 4(2).

¹⁵⁷⁷ *Op. cit* n 469.

¹⁵⁷⁸ H Tham, A Ronneling and L L Rytterbro, 'Crime and Justice' (2011)40 JSTOR 556, 611.

¹⁵⁷⁹ *Ibid*.

this argument, the procedural justice framework for CSA trial aims at achieving a balance between the rights of accused persons to fair trial, with the protection of CVSA.¹⁵⁸⁰

In striking the balance, protection measures taken by the court to protect CVSA need to respect the rights of accused persons to fair trial.¹⁵⁸¹ Where it becomes necessary in order to ensure fairness to CVSA, certain aspects of the right to fair trial may be limited.¹⁵⁸² This study argues that the serious circumstances of a public emergency that necessitate limitation of the right to fair trial may be equated to the seriousness of CSA and its devastating effects to the victim.¹⁵⁸³ The only difference is that a public emergency affects the entire public whereas CSA has localized effects on the victim, but nevertheless very serious and devastating.¹⁵⁸⁴ The effects of CSA may result into situations where CVSA are unable to testify.¹⁵⁸⁵ Under such circumstances, limitation of the rights of accused persons to fair trial is in my view, justified in order to obtain the evidence of CVSA which is crucial in arriving at the truth. Where the limitation of the right to fair trial is deemed necessary, the court must ensure adequate and appropriate opportunity is availed, to the accused person to challenge the evidence.¹⁵⁸⁶

In various parts of the world such as America, it has been possible for the fair trial rights of accused persons such as confrontation to be limited without violating the constitution because the American Constitution, just like the ICCPR does not list fair trial rights as non-derogable. The drafters of the Constitution of Kenya however, in their wisdom thought it wise to protect fair trial rights from any limitation under Article 25(c) of the Constitution of Kenya. The implication of the non-derogability of the fair trial rights in Kenya is that any attempt to limit the fair trial rights discussed in this chapter so as to protect CVSA would be unconstitutional unless Article 25(c) of the Constitution is amended as already argued in various sections in this chapter. The study recommends that Article 25(c) of the Constitution of Kenya be amended appropriately to accommodate the

¹⁵⁸⁰ Ibid.

¹⁵⁸¹ S Garkawe, 'Crime Victims and Prisoners' Rights' in D Brown & M Wilkie (eds), *Prisoners as Citizens* (The Federation Press 2002) 257, 260.

¹⁵⁸² *Op. cit* n 1362.

¹⁵⁸³ K Thuet, 'Child Witnesses in Sexual Abuse Cases and the Sixth Amendment Confrontation Clause' (1994) Honors Projects Paper 27 <http://digitalcommons.iwu.edu/polisci_honproj/27> accessed 9 August 2013.

¹⁵⁸⁴ *Op. cit* n 75.

¹⁵⁸⁵ Ibid.

¹⁵⁸⁶ *Op. cit* n 220.

various proposals made in this study so as to balance the rights of accused persons to fair trial and the constitutional right to protect CVSA in their best interest under Article 53(2) of the Constitution.

5.12 Conclusion

In concluding discussions in this chapter, the study finds that the adversarial trial procedure of CSA cases in Kenya, gives more recognition to the rights of accused persons while there exists inadequate recognition of the rights of CVSA including such rights recognized by Article 53(2) of the Constitution of Kenya such as having the best interests of children as paramount consideration in matters affecting them. Whereas the rights of accused persons to a fair trial are well known to legal practitioners, the study found that many lawyers, judges and magistrates did not think that CVSA have enforceable rights which need to be balanced with those of accused persons. The inadequacy was more apparent in cases where the court needed to make protective orders to CVSA in the course of the trial.

Due to the lack of a comprehensive statute on what procedure is to be followed in CSA cases, the current court procedure overlooks CVSA rights to protection, despite the same being provided for by the Sexual Offences Act and the Constitution of Kenya. The courts depended on the Evidence Act and the Criminal Procedure Code for their trial procedure. However, the two Acts do not provide for special procedure in CSA trial.

The gains made by the Children Act and the Sexual Offences Act, cannot therefore be fully realized due to the lack of procedural laws as a vehicle for their implementation. The study concludes the current CSA trial procedure in Kenya is inadequate in as far as it does not balance the rights of accused persons with the need to protect concerns of CVSA.

The study therefore finds that the pure traditional system of adversarial trial, though very consistent with Article 14 of the ICCPR on the rights of accused persons to a fair trial, is nevertheless very disadvantageous in the trial of CSA. Likewise, the pure inquisitorial system of trial is more appropriate in CSA trial due to its wide judicial control of pre-trial investigations, but is seen as eroding the impartiality of the judges and being less compliant with the rights of accused persons to a fair trial under the ICCPR. A hybrid system of trial that combines the positive aspects of both adversarial and inquisitorial

systems with a human rights approach is more appropriate to the trial of CSA and fits into the procedural justice framework. In the next chapter, the study evaluates the post-trial procedure in CSA cases in Kenya using the procedural justice framework for CSA trial.

CHAPTER SIX

POST-TRIAL PROCEDURE IN CSA CASES IN KENYA

6.1 Introduction

This chapter presents the study findings on post-trial procedure in CSA cases in Kenya. Using the procedural justice framework for CSA trial, the post-trial procedure was evaluated based on the following themes which reflect the study concern. Post testimony effects of the trial on CVSA, court orders to protect CVSA after their testimony and concerns about CVSA safety and welfare after their testimony.

6.2 Post Testimony Effects of the Trial on CVSA

The study found that the adversarial trial procedure in CSA re-victimizes CVSA as they testify. This confirms Temkin's argument that the adversarial trial procedure results into an institutionalized re-victimization of CVSA.¹⁵⁸⁷ Subsequently, the already vulnerable and traumatized CVSA develops psychological and emotional disturbances which often have financial implications on CVSA's family.¹⁵⁸⁸ As a result, CVSA and their families have to deal with the traumatic effects of legal involvement at the expense of the system's negative impact on them.¹⁵⁸⁹ The study established that many CVSA developed behavioural disturbances after testifying in court. Behavioural disturbances refer to unusual behaviour inconsistent with the normal development of a child following a traumatic event.¹⁵⁹⁰ The following are some of the effects of the adversarial trial procedure on CVSA.

All CVSA reported detrimental effects of the court process to their education. Many CVSA reported a drop in their academic performance. This is attributed to the stress and psychological trauma that occupies their mind before, during and after the adversarial trial.¹⁵⁹¹ In the words of one CVSA:

I could not perform well in school. I used to be between number one and three. Ever since I was required to go to court, my performance dropped to

¹⁵⁸⁷ *Op. cit* n 3.

¹⁵⁸⁸ *Op. cit* n 75.

¹⁵⁸⁹ *Op. cit* n 89.

¹⁵⁹⁰ E Stachowicz, *Therapeutic Jurisprudence in Juvenile Drug Courts* (2009)12 The Michigan Child Welfare Law Journal issue 3, 48, 59.

¹⁵⁹¹ *Op. cit* n 209.

almost the bottom of the class. I kept on thinking about the court process, how it will end up. I did not know if the magistrate and the prosecutor would believe me. I feared that they might blame me like everybody else. I did not know if I would be jailed or not. Everyone told me that those who go to court are the ones who have committed offences and are jailed.¹⁵⁹²

The view of the above CVSA confirms the insensitivity of the adversarial trial procedure to CVSA's needs and best interest which should be the paramount principle. This should be the guiding principle in all matters concerning children in the administration of justice according to Article 53(2) of the Constitution of Kenya as already discussed. All CVSA interviewed said that they found it very difficult to handle the effects of the societal social stigma. They experienced embarrassment from their peers, once they knew that CVSA were required to testify in court. Some CVSA reported being teased and mocked by their teachers for missing classes to attend court as a result of 'engaging in bad manners'. As a result, many CVSA lost a number of school friends and neighbourhood playmates whose parents had warned them not to associate with the CVSA:

Many of my friends no longer wanted to be associated with me since they learnt that I was required to testify in court on CSA. Their parents had warned them that I am a bad influence and so they should keep off. I therefore became lonely, I lost my playmates and I had nobody to talk to. I wish I never told anybody I was sexually abused. I wish I never testified in court. Now everybody knows about it.¹⁵⁹³

The study found that many CVSA experienced increased conflict and violence within the family as a result of having to testify in court in incest cases. Family members were divided on whether CVSA should testify or not. Some CVSA reported being blamed for lying in court so that the accused person could be jailed. Some siblings differed on whether the CVSA should testify or not, so as to protect the accused person from being jailed. In addition, the conflict was about saving the family name from embarrassment and societal stigma, associated with CSA. This study finding supports the labeling theory discussed in chapter one. It also supports Herman and Hirschman's argument on family

¹⁵⁹² Respondent no 80 in Appendix K.

¹⁵⁹³ Respondent no 85 in Appendix K.

conflict and the stress CVSA undergo after testifying in incest cases.¹⁵⁹⁴ In one very severe case, a CVSA said that:

My grandmother demanded that I leave the home for having testified in court against her son who is my stepfather and accused of sexually assaulting me. I had to leave home and stay away from my mother and my step siblings since the accused person was jailed. It has been very difficult. I am blamed by my siblings for lying so that our father could be jailed. They now treat me so badly. The court did not protect me in any way even after I gave evidence. I now cannot stay with them anymore because they might hurt me. They have all become so hostile towards me.¹⁵⁹⁵

As at the time of the interview, the CVSA was staying with her maternal grandmother. This case highlights the impact of CVSA involvement in the legal process. It also illustrates the lack of post-trial procedures that ensure their safety after they testify. The study finds that the CJS is only interested in CVSA testimony, as a supplier of information to keep the wheels of justice rolling. Immediately after they testify, CVSA become the forgotten party in the Kenyan CJS. Sadly, the courts are not concerned about the impact of their testimony and their safety. This shows that the Kenyan CJS is still based on the traditional goal of the CJS which is focused on establishing the innocence or guilt of an accused person.¹⁵⁹⁶ It however does not concern itself with issues of the welfare of victims of crime whose duty it appears is simply to testify.¹⁵⁹⁷

Majority, eighty percent of CVSA told the study that after testifying in court, they lost trust in adults. Only 20 % of the CVSA felt that after testifying in court, they can still trust adults. This comprised of the group that had the benefit of psycho-social support, and felt better after testifying.

Nobody believed that I was sexually abused. Not even my own family. They kept on blaming me for having invited the abuse. I was innocent but nobody seemed to understand. In court, the magistrate doubted my

¹⁵⁹⁴ *Op. cit* n 89.

¹⁵⁹⁵ Respondent no 105 in Appendix K.

¹⁵⁹⁶ *Op. cit* n 254.

¹⁵⁹⁷ *Ibid.*

credibility and set the accused person free. The prosecutor asked me too many repeated questions. The accused person's advocate embarrassed me and said that I was lying to the court. Nobody came to my protection. They all watched and laughed. It is like they were in agreement to make me cry. How can I trust adults anymore? I cannot report any further abuse again to the CJS. I would rather die silently than be subjected to this process again.¹⁵⁹⁸

The sentiments of CVSA above adequately reflect the pain and suffering of CVSA as they testify in CSA cases under the adversarial trial procedure in Kenya. It confirms that the adversarial trial procedure does not take into account the inadequacies of children and their inability to fully participate in the trial process which does take into account their needs.¹⁵⁹⁹ It captures and reinstates the problem that this study sought to examine. Yet there is no post-testimony procedure through which the court can find out the impact of the court testimony on CVSA. The study found no avenue for feedback from CVSA to the court at all.

The court process left many CVSA with many unresolved issues and questions. CVSA did not understand whether it was the accused persons or them to be blamed for the abuse. They questioned the rationale for the oral testimony, publicity of the trial, cross examination, confrontation by the accused person, all of which were protective of the accused person. They wondered whether the court really protects them or the accused person. Was it the CVSA to prove their innocence or tell their story? This and many more questions were left unanswered in the minds of CVSA after their testimony. The study finds that testifying in court under the adversarial trial system in Kenya, traumatizes CVSA who appear before it. This study finding is consistent with Patton and Woods' finding in Australia, that CVSA who go through the adversarial trial procedure while testifying suffer more harm than those who do not.¹⁶⁰⁰

The post-trial effects of the adversarial system in CSA cases are not confined to CVSA alone. The study found that prosecutors, judges, magistrates and advocates are all

¹⁵⁹⁸ Respondent no 59 in Appendix K.

¹⁵⁹⁹ *Op. cit* n 109.

¹⁶⁰⁰ *Op. cit* n 209.

negatively affected by the adversarial manner in which CSA cases are handled in Kenya. This confirms the effects of the adversarial system on everyone involved in the trial. In the words of a judicial officer in Queensland, Australia:

I feel sick every time I put CVSA through the trial... it could be a written statement, video statement, audio statement, anything. I often feel sick until they have got through it and then sometimes, they miss the main one and I have to rule that the charge be dropped or that the accused person is not guilty. When I think of it, I want to throw up. It might have taken a kid two years to get to that point, and because in thirty seconds they cannot remember it, the whole charge goes. It is just so uncivilized. It is also archaic.¹⁶⁰¹

This confirms narratives by Kenyan High Court judges that the trial procedure traumatizes everyone involved in the trial.¹⁶⁰²

Despite the above negative impact of adversarial testimony on CVSA, the study found that once CVSA testified, they ceased to be important in the trial process. There is no procedure of informing them about the subsequent progress of the case as victims. This is a violation of CVSA's right to information under Article 35(b) of the Constitution of Kenya and Article 13 of the UNCRC, to which Kenya is a signatory and forms part of the laws of Kenya under Article 2(6) of the Constitution of Kenya. In addition, the study found that there was no mechanism of making sure that at the time of reading the court judgment, the CVSA are present in court to know the court's decision. It is up to CVSA and their families to find out whether the case is concluded and the court findings. As already discussed, this amounts to a violation of CVSA's right to effective participation in the judicial process under Article 12 of the UNCRC and part VII of the UNGJMCCVWC.

The study also found that the sentencing of the accused persons, if found guilty, does not take into account views and wishes of CVSA, contrary to their right to have their views considered in matters affecting them according to Article 12 of the UNCRC and Part VII

¹⁶⁰¹ Ibid pg 109.

¹⁶⁰² Respondent no 36 and Respondent no 38 in Appendix K.

of the UNGJMCCVWC. When the accused persons are acquitted, CVSA are not informed contrary to Article 35(b) of the Constitution of Kenya. The study found that in cases where CVSA are dissatisfied with the court finding as to the innocence of the accused person or the sentence if convicted, there is no mechanism that enables CVSA and their families to appeal against such findings. This is contrary to part IX of the UNGJMCCVWC. The post-trial procedure in CSA cases was described by many CVSA as a 'blackout' to them since they never know what happens after they testify.

Recommendation

The study makes the following recommendation:

There is need to develop an information guide that is given to CVSA and their families in compliance with Article 35 (a) and (b) of the Constitution of Kenya which provide for access to information as a constitutional right. This recommendation is based on the study finding that most CVSA and their families did not have access to information on various aspects of the trial process. According to one CVSA:

...It started off in a nice way in a small room where I was asked by a gentle lady to tell her, how the accused defiled me. It was difficult, but I managed and I thought that was all. After few days a man whom I later learnt was the prosecutor, asked me to read my statement and confirm that what I recorded was correct, which I did and he also asked me many questions in his office. That same day I was asked to go to a room with many people to narrate again how I was defiled as the accused looked at me. I do not understand why I had to go through all that and tell my ordeal to strangers. Nobody told me what to expect or what was expected of me in the process. It is so much, I still do not know if they will call me again to tell more people. What will happen to me now that I have told so many people about the abuse? The accused had told me not to say anything to anyone. My family is embarrassed, my friends are embarrassed, and I am embarrassed too. I just want to be left alone.¹⁶⁰³

The above narrative indicates that many CVSA are not informed about the court process contrary to Article 35 (a) and (b) of the Constitution. There is need to establish a

¹⁶⁰³ Respondent no 60 in Appendix K.

procedural mechanism that ensures CVSA/family continuously receive information on the progress of the case even after they have testified. In this respect, the study recommends the development of an information guide to victims, detailing what their rights are as victims of crime, what services they are entitled to in the CJS, how to access the services, which agencies to consult on the provision of the services, what information they are entitled to, how to access the information and many other related issues. Such a guide should be made available in both English and Kiswahili, being the official languages in Kenya.¹⁶⁰⁴ The information guide should be written in child friendly language that enables most CVSA to understand the court process and make it easier for them to participate. Kenya can learn from Britain, Scotland and Australia which have developed simple guidelines in the form of brochures to assist child victim's participating in the judicial process.¹⁶⁰⁵ This is in conformity with Article 35(b) of the Constitution of Kenya which provides for access to information.

Kenya can also learn from jurisdictions like Canada, Britain, Australia and South Africa which have developed Victim Service Charters which detail the various rights and services available for victims of crime.¹⁶⁰⁶

In addition, the study recommends that the National Assembly in Kenya should enact legislation providing for the protection of victims of crime before, during and after their testimony. The legislation should clearly provide for specific rights of victims of crime. In addition, the legislation should provide measures to ensure the safety and welfare of victims of offences. In enacting such legislation, parliament would be implementing Article 50(9) of the Constitution of Kenya which recognizes that victims of crime have fair trial rights and need protection and provision for their welfare. The Article specifically obligates parliament to enact such legislation. The study however established that by the time of conducting this study, such legislation had not been enacted.

The views of CVSA and their family concerning the sentencing of the accused person or their safety in cases of acquittal should be sought by the court, recorded and taken into account. It is important that the CVSA/family are present in court when the judgment is

¹⁶⁰⁴ *Op. cit* n 40 Article 7(2).

¹⁶⁰⁵ *Op. cit* n 52.

¹⁶⁰⁶ *Op. cit* n 47.

made and the sentence is passed because they have an interest in their own safety and welfare which is affected directly by the release or imprisonment of the accused person.¹⁶⁰⁷ Taking into account views of CVSA and their family in passing the sentence is consistent with effective participation in the judicial process according to Article 12 of the UNCRC. It is also a right to accessing justice under Article 48 of the Constitution of Kenya.

This study argues that access to justice by victims does not stop after they give evidence in court but continues and includes their welfare and protection by the courts after their testimony.¹⁶⁰⁸ CVSA have an interest in ensuring that the court is informed of any potential threats to them and their families by the accused which may occur upon the release of the accused person.¹⁶⁰⁹ The legitimacy of this interest is recognized by some jurisdictions that require that courts consider views of victims upon making decisions during bail hearings or sentencing hearings.¹⁶¹⁰ Section 299 of the Criminal Procedure Act of South Africa directs the court to allow victims of crime to give their input or make their representations when the offender's placement on parole is considered.

Section 299 of the Criminal Procedure Act of South Africa, empowers the court to consult the victim before making its decision in matters that would affect their safety and welfare. According to Makiwane, such a provision gives an opportunity to the victims, to express their concerns about their safety, upon the release of the accused persons.¹⁶¹¹ The courts are therefore in a position to issue appropriate protective orders where necessary.¹⁶¹²

Every CVSA and/or family who testifies in court should receive psycho-social support to deal with the after effects of the legal process. This should take place whether or not the accused person is found guilty or not. Kenya can learn from Britain, South Africa, Canada and USA which have developed measures and guidelines that ensure psycho-social support to CVSA and their families.¹⁶¹³ The state of Alabama in the USA has a

¹⁶⁰⁷*Op. cit* n 1581.

¹⁶⁰⁸*Op. cit* n 193.

¹⁶⁰⁹ *Ibid.*

¹⁶¹⁰ Section 3142(e) of the Michigan Bail Reform Act of 1984.

¹⁶¹¹*Op. cit* n 254.

¹⁶¹² *Ibid.*

¹⁶¹³*Op. cit* n 47.

successful programme of psycho-social support to victims of sexual assault which Kenya can borrow from.¹⁶¹⁴ The programme involves the entire family of CVSA and is commenced immediately upon report of the abuse and continues beyond the court trial until the victims and their families resume their normal life.¹⁶¹⁵ The psycho-social support has enabled many victims and their families to report sexual abuse of children to the CJS due to its ability to deal with the trauma that they go through as a result of the abuse whether or not the court finds the accused person guilty.¹⁶¹⁶

There is need to conduct public awareness to support CVSA as they testify in court. In addition, there is need for public education on CSA in schools so that children understand the effect of the abuse and support, instead of ridiculing their peers who fall victims of CVSA.

The study recommends that the Children's Department and the Ministry in charge of social services develop and implement an awareness creation program nationally to ensure that everyone understands the subject of CSA and the importance of encouraging CVSA to report the abuse and testify in court. Since the study established that social stigma affects CVSA's ability to report the abuse and testify in court, the study recommends increased awareness creation on CSA and the importance of encouraging open discussions on this subject with children. Negative knowledge results into negative perception which is reflected in negative attitude exhibited in the way an individual acts on a particular issue in the society.¹⁶¹⁷ Likewise, positive knowledge and positive perception of an issue by an individual is exhibited through positive attitude and action by the individual in the society.¹⁶¹⁸ Attitude is a manifestation of the knowledge and perception of the individual about an issue.¹⁶¹⁹ The study recommends a change of attitude in the Kenyan society on discussing issues of sexuality with children. This would encourage CVSA to speak more confidently without the fear of being labeled by the society as bad children engaging in bad manners.

¹⁶¹⁴ *Op. cit* n 384.

¹⁶¹⁵ *Ibid.*

¹⁶¹⁶ *Ibid.*

¹⁶¹⁷ S S Brehm, S M Kassin, S Fein, *Social Psychology* (Houghton Mifflin Company 2002) 92.

¹⁶¹⁸ *Ibid.*

¹⁶¹⁹ *Ibid.*

In respect of this recommendation, the study argues that the African society's knowledge and perception of matters related to sexuality being perceived negatively has resulted into the stigma and inability to openly discuss the issues with children.¹⁶²⁰ This is supported by the study findings that many CVSA and their families found it difficult to report and testify about CSA. The study therefore recommends a change of attitude in the Kenyan society by encouraging open educational talks, both formal and informal on issues of sexuality with children to enhance their knowledge and capacity in detection, reporting and testifying about incidences of CSA.¹⁶²¹

There is need to establish a mechanism through which if CVSA and their families are not happy with the court judgment or sentence, then they can appeal. The participation of CVSA in the CJS if properly conducted under a process that is sensitive to their needs may aid in their recovery, as argued by Freud in his psychoanalytic theory, which also views psychoanalysis as a therapy.¹⁶²² An effective participation of CVSA in the legal process may increase their satisfaction with the CJS and provide an incentive for continued cooperation with it.¹⁶²³ In addition, CVSA's satisfactory participation in the legal process may enable the prosecutor, the judge and the society to have important information that is otherwise locked out from the truth seeking process.¹⁶²⁴

Since the study established that not only CVSA but everyone else involved in the CSA trial is traumatized by the process, the study recommends regular de-briefing sessions for stakeholders involved in CSA trials in the form of consultative workshops, in which the officers share their experiences and interact with experts such as sociologists, counselors, socio-legal experts, psychiatrists, child experts and many others. Recognizing the important role of the judiciary in the trial process, the study suggests that the Judicial Service Commission is better placed to develop such a debriefing programme workshop to be conducted once or twice in a year as part of its constitutional mandate to build the capacity of judicial officers under Article 172(1) (d) of the Constitution of Kenya. Although conducted by the Judiciary through the Judicial Training Institute, the study recommends that the Judiciary invites all the actors in the CSA trial which includes

¹⁶²⁰*Op. cit* n 98.

¹⁶²¹*Ibid.*

¹⁶²²*Op. cit* n 91.

¹⁶²³*Op. cit* n 384.

¹⁶²⁴*Op. cit* n 89.

lawyers, children officers, probation officers, prosecutors, investigators, social workers amongst many others for an interactive session. Further, the study recommends that during such workshops, a professional counselor be invited to help court officers who may have undergone trauma in the course of CSA trials. Such a debriefing programme has worked successfully in the state of Alabama in the USA under what is known as the Huntsville Project.¹⁶²⁵

6.3 Court Orders to Protect CVSA after their Testimony

The study found that there are no procedural mechanisms to protect CVSA after testifying. From the interviews, FGD, court record perusals and observations, the study established that the children courts do not make any protective or follow-up orders at all to ensure the welfare of CVSA after they testified. The courts seemed to be more interested on the evidence of CVSA, after which the focus shifts back to the accused person. This is consistent with the traditional perception of the role of the CJS.¹⁶²⁶ It is a confirmation that the Kenyan trial system is the classic adversarial trial procedure that relegates the victims concern's on CSA matters. The constitutional provision of the best interest of the child principle¹⁶²⁷ does not appear to guide the courts in matters concerning children.

This point was illustrated by an incident in Nakuru where a 12 year old CVSA was observed by the study testifying with difficulty against the father in an incest case. She appeared nervous, terrified and hesitant to give evidence. However, it was observed that at the end of the testimony, the court never gave any order at all as to where the child would stay or any other protective orders. Since the accused person was on bail and the CVSA had been brought to testify in court by the mother and the children officer, the CVSA was left exposed to possible revenge attacks by the accused person, whom she had already testified against. In the absence of court protective orders, such CVSA are left exposed to the after effects of testifying in court and the possible family conflict that may ensue.

The court records further revealed that even after the acquittal or conviction of the accused persons, no further orders were made by the courts in respect of CVSA

¹⁶²⁵ *Op. cit* n 384.

¹⁶²⁶ *Op. cit* n 352.

¹⁶²⁷ *Op. cit* n 40 Article 53(2).

protection. The interviews revealed that one of the factors that discouraged CVSA and their families from testifying in court is that a conviction predisposed CVSA to a repeat of the abuse, as a form of revenge by the accused person (once out of jail) or of his/her family.

An acquittal has the same effect, yet CVSA were not given protection orders to shield them from any contact, interference or harm by the accused person. This confirms Saywitz argument that CVSA need protection from the accused persons after their testimony, due to their vulnerability and possibility of revenge attacks.¹⁶²⁸

Failure of the court to make follow up/ protective orders to shield CVSA from the accused persons after their testimony, enhances CVSA's vulnerability and trauma beyond the court testimony. Pickands,¹⁶²⁹ writing on the vulnerability of subordinate military female officers to rape by their senior male officers in the USA military, described the female victims as being vulnerable twofold. In the first instance, the female victims suffer harm from the unwanted sexual intercourse. They suffer loss of their dignity, personal integrity and honour.¹⁶³⁰ The use of force or coercion results into physical injuries which may be visible and psychological effects of being brutalized.¹⁶³¹ Coercion completely overwhelms and subdues one's will.¹⁶³² The psychological effects endure long after the disappearance of physical injuries.¹⁶³³ The victims are also robbed of their privacy by being deprived of the most private choice of choosing who and when to share herself with and in what circumstances.¹⁶³⁴

Pickands further argues that, the victims are vulnerable by the fact that the law drags them to the courtroom, and requires them to lay bare, the intimate embarrassing details of the rape, which they would wish to forget and keep secret to avoid societal stigma.¹⁶³⁵ For those who opt to keep the rape secret and fail to report to the police for prosecution to take place, they have to face the isolation of silent suffering without justice, as a

¹⁶²⁸ *Op. cit* n 109.

¹⁶²⁹ Pickands, N Alexande, 'Reveille for Congress: A Challenge to Revise Rape Law in the Military' (2004) 45 William and Mary Law Review 9.

¹⁶³⁰ *Ibid.*

¹⁶³¹ *Ibid.*

¹⁶³² *Op. cit* n 1494.

¹⁶³³ *Op. cit* n 75.

¹⁶³⁴ *Op. cit* n 1629.

¹⁶³⁵ *Ibid.*

precaution against exposing themselves to the rigours of court process.¹⁶³⁶ From Pickands' explanation of vulnerability, victims of sexual abuse suffer during the violation and during the court process. This is due to a lack of procedures that are sensitive to their special needs of compassion, sympathy, fair treatment, counseling, legal aid and psycho-social support, after the legal process is over.¹⁶³⁷

Vulnerability of a witness has been described by Dennis thus:

The fact that such witnesses' experience as victims of crime, or their particular personality characteristics, or their susceptibility to intimidation, may mean that they are liable to suffer more than normal amount of stress associated with being a witness, and are unlikely to be able to give best evidence without the help of certain protective measures.¹⁶³⁸

Dennis' description of a vulnerable witness indicates that the court process subjects sexual abuse victims to further victimization. This necessitates protective orders after their testimony. However, the study found that the Kenyan court procedure in CSA trial does not, incorporate post-trial protection measures to protect CVSA after they testify.

Spencer and Flin, analyzing the adversarial criminal procedure in respect of children as lawyer and psychologist, respectively, together present sound and realistic arguments on CVSA as vulnerable witnesses, who require special protection measures after they testify in the adversarial trial of CSA.¹⁶³⁹ They argue that generally, the adversarial system of criminal trial is stressful to adults when giving evidence.¹⁶⁴⁰ This supports the study finding that the situation is worse for child victims and witnesses who do not understand the court process. Accordingly, the court must issue protection orders to ensure the safety of CVSA after they testify.

Prior to the reform of the English criminal procedure to accommodate child victim's needs, the magistrates observed that young CVSA often took cover under the court

¹⁶³⁶ Ibid.

¹⁶³⁷ *Op. cit* n 89.

¹⁶³⁸ *Op. cit* n 123.

¹⁶³⁹ *Op. cit* n 52.

¹⁶⁴⁰ Ibid.

clerks' desks upon seeing the accused persons during trials of CSA cases due to lack of protective mechanisms.¹⁶⁴¹ In one such case, a little girl experienced a total breakdown when she was asked to point at the man who sexually attacked her.¹⁶⁴² The case was adjourned to the following day when the court was informed that psychiatric treatment had to be arranged for her as she was unable to continue with the testimony.¹⁶⁴³ In such cases, the consequence is that CVSA suffer PTSD and fear revenge attacks or intimidation from the accused person.¹⁶⁴⁴ This is supported by the words of a CVSA interviewed by the study in Nakuru who said:

I was defiled by a man well known to my family. Telling my parents about it was very difficult, but facing him in court was impossible as he stared at me directly which reminded me of the threats he issued to me after the abuse that if I tell anybody about it, he will punish me. I remembered the threat and felt like he was sexually assaulting me again in front of everyone in court who just kept quiet. Nobody came to my rescue. I could not testify at all and of course the accused person was set free.¹⁶⁴⁵

The above case shows the need for children courts to ensure CVSA's safety through court orders after they testify due to the nature of sexual abuse and the consequent vulnerability and safety concerns of CVSA.

Due to the social stigma associated with CSA in the African society,¹⁶⁴⁶ CVSA found it very difficult to narrate the embarrassing and off putting details of sexual abuse in front of a group of people in court. As a result, CVSA need protection because narrating such details in court embarrasses not only them but also the accused person, members of his/her family, CVSA's family and many other people.¹⁶⁴⁷ This is consistent with the

¹⁶⁴¹ Magistrates Association (1962) Memorandum on Criminal Procedure and Child Victims of Sexual Offences presented at a conference of the Magistrates Association in Britain.

¹⁶⁴² *Op. cit* n 1237.

¹⁶⁴³ *Ibid.*

¹⁶⁴⁴ *Op. cit* n 51.

¹⁶⁴⁵ Respondent no73 in Appendix K.

¹⁶⁴⁶ *Op. cit* n 83.

¹⁶⁴⁷ *Ibid.*

labeling theory discussed in chapter one.¹⁶⁴⁸ CVSA face rejection, loneliness and lack of support from those affected by their testimony in court.¹⁶⁴⁹

The effects of CSA and the trial process on CVSA are illustrated by table 2 below. The table demonstrates why CVSA need court orders to protect them from further vulnerability. Protection orders are meant to ensure their safety after they testify in court, according to Spencer and Flin model of stress and its effects to CVSA.¹⁶⁵⁰

¹⁶⁴⁸*Op. cit* n 98.

¹⁶⁴⁹*Op. cit* n 89.

¹⁶⁵⁰*Op. cit* n 52 pg 364.

Table 2: Model of Stress Factors for Child Witnesses

CAUSES (STRESSORS)	MEDIATING FACTORS	EFFECTS
<p>Crime Being a victim of crime</p> <p>Pre-Trial Repeated interviews Lack of knowledge Waiting for the trial Rescheduling of cases</p> <p>Trial Waiting period Lack of Knowledge Courtroom layout Confronting Accused Examination/Cross-examination</p> <p>Post-trial No de-brief/follow up Unsuccessful prosecution Successful prosecution</p>	<p>Investigation</p> <p>CVSA preparation/Age/Support</p> <p>Conduct of trial/Age/Personality/Family reaction</p>	<p>Crime Post-traumatic stress</p> <p>Pre-trial Anxiety Apprehension Disruption of sleep/appetite</p> <p>Trial Anxiety, excitement, fear, tension Emotional effect such as crying Disrupted cognitive/communication skills Fear, re-experience of the abuse Poor quality of evidence</p> <p>Post-trial Negative emotional/behavioural disturbance Loss of trust in court Positive-relief, satisfaction, achievement</p>

Recommendation

The study recommends measures to protect all CVSA after their testimony irrespective of whether the accused person is found guilty or not. In this respect, courts should issue orders which ensure that all CVSA receive psycho-social treatment to protect them from the emotional and psychological effects of court testimony. The orders should clearly indicate that CVSA receive the treatment until such a time that they are found to have healed from the negative impact of testifying in court. In this respect, psycho-social support services should not only be availed to CVSA, but to their families as well. In addition, the court order should clearly state the protection of CVSA from anyone who poses a danger to CVSA's safety.

In connection with the safety of CVSA, the court should appoint a guardian at the beginning of the trial to take care of the interest of the CVSA. This is an advocate for CVSA whose duty it is to protect their best interest. The guardian must have a party status in the trial so that if there is anything that happens after CVSA testimony that threatens their safety, the guardian can go back to court and apply for further protection orders. This is the practice in the state of Michigan in the USA under The Child Abuse Prevention and Treatment Act of 1974. The measure has successfully worked and enhanced the public's perception about the CJS' response to CSA.¹⁶⁵¹ In addition, there has been increased reporting of incidences of CSA to the police in Michigan.¹⁶⁵² The study recommends that courts should issue orders of risk assessment of likelihood of CSA occurring again to the specific CVSA by the accused person, or any other person and issue appropriate orders. This recommendation requires that a probation officer and a social worker write a comprehensive report to court on the circumstances surrounding the abuse and the likelihood of a repeat of such an abuse to the CVSA.¹⁶⁵³ Such information can assist the court in making the relevant protective orders if need be.

Kenya needs to shift its focus on the CJS from the finding of guilt or otherwise of the accused person in CSA cases, to a balance with the protection of CVSA in CSA matters. The CJS should adopt the contemporary goal of dealing with the concerns of victims as

¹⁶⁵¹ *Op. cit* n 384.

¹⁶⁵² *Ibid.*

¹⁶⁵³ *Op. cit* n 52.

well.¹⁶⁵⁴ In particular, courts should issue orders to probation officers to investigate the cause of the abuse so that it can be dealt with, if it relates to the accused person (e.g. accused person is an alcoholic or is a paedophile) then appropriate treatment be ordered to protect other children from subsequent abuse by that particular accused person.

In Britain, Australia, Canada and USA, children officers and probation officers work together in CSA cases to find out and address the root cause of CSA.¹⁶⁵⁵ Once the cause is identified, the accused person is not only punished for the offence an order is issued by the court to compel him/her to seek a solution to the root cause of the CSA.¹⁶⁵⁶ As an example, the state of Wisconsin has family therapy programs where accused persons who are convicted of incest type of CSA are referred to for therapy.¹⁶⁵⁷ They must complete the required number of sessions and a progress report is sent to the court by the responsible officer carrying out the therapy.¹⁶⁵⁸ The program has worked successfully and assisted in reconciling family members in cases of intra-familial sexual abuse cases.¹⁶⁵⁹

Court orders to protect CVSA in this respect must compel the accused person upon conviction to seek appropriate treatment. In addition, the courts should issue orders to the children department, to find out, if it is the circumstances of the CVSA that predispose him/her to the abuse e.g. poor parenting or neglect, and deal with the cause to protect the CVSA from future abuse by anybody else. In Britain, where the court finds that a child is subjected to abuse as a result of poverty or neglect, the court can make orders assisting the family out of the poverty situation by ensuring that they receive social welfare support from the state.¹⁶⁶⁰

In issuing protective orders, courts should give CVSA and their families an opportunity to express themselves and give their views which must be taken into account in issuing such orders. In incest cases, CVSA may not wish to be re-united with the family.¹⁶⁶¹ They may

¹⁶⁵⁴ *Op. cit* n 191.

¹⁶⁵⁵ *Op. cit* n 384.

¹⁶⁵⁶ *Ibid.*

¹⁶⁵⁷ *Ibid.*

¹⁶⁵⁸ Wisconsin Treatment Guide for CSA Offenders.

¹⁶⁵⁹ *Op. cit* n 47.

¹⁶⁶⁰ *Op. cit* n 52.

¹⁶⁶¹ *Op. cit* n 89.

also require specialized care outside the home.¹⁶⁶² This should be respected by the courts.¹⁶⁶³

Courts must issue specific orders that prevent accused persons from having any contact with CVSA and their family after the court testimony.¹⁶⁶⁴ However, in incest cases, caution must be taken not to cause undue conflict and psychological trauma to the CVSA and family.¹⁶⁶⁵ Although it is important to punish the accused person if found guilty, other factors need to be taken into account.¹⁶⁶⁶ These include the impact of the court order on the family and the importance of psycho-social support to the entire family.¹⁶⁶⁷ Of paramount importance is the best interest of the child which should be the guiding principle in striking the delicate balance in incest cases as stipulated in Article 53(2) of the Constitution of Kenya. Where possible, reunification of the family may be in the best interest of the child after the punishment of the offender.¹⁶⁶⁸

6.4 Concerns about CVSA Safety and Welfare after Testimony

The study found that the overall effect of the difficulties experienced by CVSA while testifying negates the main goal of protecting them. The difficulties hindered their access to justice.¹⁶⁶⁹ CVSA who went through the court system and testified in cases where the accused was acquitted blamed themselves. Subsequently they had to live with the guilt, self-blame and exposure to potential further abuse by the same accused or any other potential abuser. This was occasioned by the lack of court protective/ follows up orders or essential psycho-social support services such as counseling.

The difficulties experienced by CVSA while testifying were summed up by a CVSA who described the process as: ‘worse than the sexual abuse itself’.¹⁶⁷⁰ In the opinion of the CVSA, asking her to testify was equal to making her repeat the details of what happened in front of strangers and the accused who just looked at her directly. The CVSA wondered

¹⁶⁶² *Op. cit* n 3.

¹⁶⁶³ *Op. cit* n 47.

¹⁶⁶⁴ *Op. cit* n 384.

¹⁶⁶⁵ *Op. cit* n 75.

¹⁶⁶⁶ *Op. cit* n 47.

¹⁶⁶⁷ *Op. cit* n 109.

¹⁶⁶⁸ J Long, J Wikinson & J Kays, ‘10 Strategies for Prosecuting Child Sexual Abuse at the Hands of a Family Member’ (2011) Issue 5 of Strategies: The Prosecutor’s Newsletter on Violence Against Women 3.

¹⁶⁶⁹ *Op. cit* n 109.

¹⁶⁷⁰ Respondent no 96 in Appendix K.

why the accused was not asked any question by the magistrate or prosecutor. In her view, the court process implied that she was the one on trial and had to prove her innocence. She swore never to testify again under such procedures due to the intimidatory cross examination by defence lawyers. The CVSA could not understand why everyone in court including the magistrate kept quiet as she went through the ordeal of cross examination.

Such sentiments of CVSA were confirmed by all respondents who were in agreement that the children court procedures under the adversarial system cause difficulties to CVSA and negatively affect their ability to testify in court against the abuser. Subsequently, some CVSA saw themselves as being the ones on trial for having allowed the abuse to occur, despite the fact that they may not be in a position to stop the occurrence of the abuse. The post-trial procedures are not in the best interest of CVSA as they do not take into account the traumatic experience that CVSA are subjected to during their testimony. The lack of protective procedures is in disregard to the requirement by part XIV of UNGJMCCVWC that CVSA be protected beyond their testimony in court.

The FGD, the court observations and the court file perusal confirmed that immediately CVSA give evidence in court, they are released with no orders as to follow up or about their special needs which ought to be addressed. The implication is that the CVSA as victims of crime are mere supplier of information to the CJS as a witness whereas the case actually belongs to the state.¹⁶⁷¹

Immediately after their testimony, CVSA as actors in the justice process disappear from the stage and the curtains fall behind them, leaving the accused person, the magistrate, prosecutor and the lawyers as the key actors in the trial of child sexual abuse. Eventually, the court decision lacks input by CVSA. Many CVSA wondered how they would know the court decision and why the court does not ask for their opinion in terms of the final court decision and sentence. The study therefore found that CVSA's right to information as per Article 35 of the Constitution is violated under the post-trial procedure. The study concludes that the trial procedure is more concerned about establishing the guilt or otherwise of the accused person as opposed to mitigating the trauma occasioned to CVSA and concerns about justice in a balanced trial within the context of procedural justice.

¹⁶⁷¹*Op. cit* n 254.

This explains why no protective or any other orders regarding the welfare of CVSA were made by the children courts either in observations, court records or from the interviews.

The study therefore finds that the post-trial procedure is inconsistent with the procedural justice framework for CSA trial, since it neither ensures CVSA safety nor takes into account the wishes and views of CVSA contrary to their best interest principle as stipulated in Article 53(2) of the Constitution and Article 12 of the UNCRC. The post-trial procedure is therefore not in the best interest of CVSA, contrary to the best interest of child principle discussed in chapter two.

Courts did not take into account the wishes of CVSA at all in their decisions contrary to Article 53(2) of the Constitution of Kenya and part VIII of the UNGJMCCVWC. The study found that CVSA had their own wishes which they would want the courts to grant if given an opportunity to be heard on the sentencing of accused persons in CSA.

Forty percent of CVSA said that the accused person should face justice and a harsh sentence should be passed on them. Thirty four percent of the CVSA said that the accused persons should be given life imprisonment. Six percent of the CVSA said that the accused persons should be subjected to corporal punishment while another six percent suggested that the accused persons, if convicted should be sentenced to death. Four percent of the CVSA felt that the accused persons should be forgiven if they pleaded guilty to the charge, but should be jailed if they pleaded not guilty to the charge but are found to have committed the offence, for having subjected the CVSA to the trauma of proving their guilt by testifying in court. In this respect the CVSA appeared to be asking for plea bargaining, restorative justice and punitive sentence only as a last resort. Two percent of the CVSA, accounting for incest victims, felt that the accused persons should be released for fear of having given evidence that leads to the accused person's imprisonment. The study finding shows the dilemma of CVSA in incest related cases and supports the argument by Herman and Hirschman that prosecuting CSA presents special challenges to the prosecution's ability to discharge the burden of proof. Six percent of the CVSA could not say what they would like to be done to the accused person but hoped that the courts would fairly decide on the sentence. The concern by CVSA that their views should be taken into account by the court is consistent with the requirement that judges/magistrates

should allow for, and give appropriate weight to, input at sentencing from victims of violent crimes.¹⁶⁷²

In South Africa, section 279(1) of the Criminal Procedure Act and clause (f) of the South African Service Charter for Victims of Crime 2004 provide that courts may make orders for compensation and restitution of victims of crime in the course of the criminal proceeding. However, despite the provision, Makiwane argues that this provision is rarely applied since prosecutors do not normally advise the victims of the existence of this provision.¹⁶⁷³

The study found that the children courts in Kenya do not make orders for financial assistance or reimbursement to CVSA. There were also no orders made by the court to compensate CVSA for the financial loss resulting from CSA. Tsoukalas argues that such claims are treated as civil claims regulated by the Civil Procedure Code for which a separate plaint has to be filed in a civil court.¹⁶⁷⁴ The proceedings in the criminal trial of sexual abuse would therefore only serve as evidence of the fact that the victim has a claim against the respondent.¹⁶⁷⁵ In New South Wales, victim compensation is provided for by the Victims Rights Act (1996). Victim compensation is also provided for by the DBPJVCAP and part XIII of the UNGJMCCVWC. In California, compensation of CVSA is provided for by the Victim of Child Abuse Act 1990.

Under part XII of the UNGJMCCVWC, financial assistance and compensation of victims for damage occasioned by the crime is specifically provided for under the right to reparation. The study however found that no court records showed that courts attempt to record the effects of CSA on CVSA. Likewise, no financial computation is done by the courts to find out the financial implications of the abuse on CVSA and the family. On the contrary, the study found that all CVSA and their families incurred medical expenses in seeking treatment, reporting to the police, travelling to and from the court to testify and other related offences.

¹⁶⁷² *Op. cit* n 195.

¹⁶⁷³ *Op. cit* n 254.

¹⁶⁷⁴ Tsoukalas *Penal Procedure* (in Greek) (1943) cited in Spinellis 1997 *Israel Law Review* 337 357.

¹⁶⁷⁵ *Ibid*.

Since the abuse occurred, I have spent a lot of money treating the child, coming to court and many other related offences yet the case is not yet over. The court has not provided us with any financial assistance. They do not even provide meals for CVSA when they come to testify. Being a witness in court is a very expensive affair. So when an accused person is acquitted, CVSA and the family lose in many ways. The courts should look into the possibility of providing financial assistance even if it is only to cater for transport to and from the courts.¹⁶⁷⁶

Therefore, apart from the physical, psychological and emotional effects of CSA, CVSA and their families had to shoulder the financial burden as a consequence of the testifying in court.

The study also found that even in cases where the accused person was convicted, there are no court orders to compel the accused person to reimburse the expenses incurred by CVSA and their family as a consequence of the abuse. Neither the state nor the accused person takes responsibility for the financial burden.

As already indicated before in this chapter, all CVSA suffered emotional and psychological trauma, while undergoing the legal process. However, the study found no court orders compelling government institutions to treat CVSA. In the absence of court orders that ensure CVSA receive psycho-social support, medical treatment and financial as well as legal aid, many CVSA and their families saw the legal process as an additional baggage to them as illustrated by the views of a guardian to one of the CVSA.

The process of going to court has been very expensive. I have had to shoulder the medical expenses and other related financial obligations alone. If I fail to bring the child to court, a warrant of arrest is issued to arrest me yet the court does not attempt to find out whether I have the money to bring the child to court. I stay about 50 kilometers away from the court. That means expenditure on transport for the child and myself. Every

¹⁶⁷⁶ Respondent no 23 in Appendix K.

time I come to court I have to miss work. My employer is not very happy with me now. This process is very expensive in many ways.¹⁶⁷⁷

The study established that after conviction, CVSA or their families were not informed of the progress of the case. There were no measures to ensure that they gave their views during parole board hearings for release of the accused persons. In addition, there were no measures to ensure their safety upon the release of the accused person from jail. This is contrary to the principle of the best interest of children according to Article 53(2) of the Constitution. It is also a violation of their right to participate in the judicial and administrative process under Article 12 of the UNCRC. This study argues that the participation of CVSA in the judicial process does not end with the conviction of an accused person. The subsequent release of an accused person on parole or after serving the sentence has implications for CVSA safety, protection and welfare. It is therefore in the best interest of CVSA that they present their views to parole boards or to courts when considering matters of releasing the accused person on bail pending appeal or on parole or upon completing the imprisonment term.

Fenwick argues that victims of crime should not be given an opportunity to contribute their views in matters of sentencing since to allow them to do so amounts to seeking views that might lead to revenge in the sentencing of accused persons.¹⁶⁷⁸ In addition, Fenwick argues that the adversarial trial system is a two party contest between the prosecution and the accused person and as such the crime victim has no status in matters of sentencing.¹⁶⁷⁹ Fenwick's argument is based on the traditional perception of the function of the CJS.¹⁶⁸⁰ However, the traditional justice system's functions have evolved over time and today include the protection of victims as well.¹⁶⁸¹

In New South Wales in Australia, sections 147 and 190 of the Crimes Administration of Sentences Act (1999) allows victims of crime to give sworn oral evidence that is subjected to cross examination before parole board hearings on the release of offenders on parole. This provision has enabled victims of crime to present their concerns about

¹⁶⁷⁷ Respondent no 25 in Appendix K.

¹⁶⁷⁸ Fenwick, 'Procedural Rights of Victims of Crime: Private or Public Ordering of the Criminal Justice Process' (1997) *Modern Law Review* 317.

¹⁶⁷⁹ *Ibid.*

¹⁶⁸⁰ *Op. cit* n 234.

¹⁶⁸¹ *Ibid.*

safety matters before the parole boards for consideration before offenders are released on parole. The measure has increased the society's perception of the CJS' concern for victims' and public safety.¹⁶⁸²

Kenya can therefore learn from New South Wales.

Recommendation

Courts need to make follow up orders immediately after CVSA testify. This should include psycho-social services, medical treatment and financial aid to assist CVSA and family settle to normal development of the CVSA. Such follow up orders would ensure that CVSA re-adjust to normal life and continue with their education uninterrupted. There is need for a multidisciplinary committee to handle the effects of CVSA involvement in the legal process. In this respect, there is need for the establishment of a CVSA protection unit.

There is need to provide measures that ensure CVSA protection by the criminal justice agencies. As an example, the Rhode Island constitution was amended in 1986 to provide that:

A victim of crime shall, as a matter of right, be treated by agents of the state with dignity, respect and sensitivity during all phases of the criminal justice process. Such person shall be entitled to receive, from the perpetrator of the crime, financial compensation for any injury or loss caused by the perpetrator of the crime, and shall receive such other compensation as the state may provide. Before sentencing, a victim shall have the right to address the court regarding the impact which the perpetrator's conduct has upon the victim.¹⁶⁸³

In addition, the California constitution was amended in 1982 to provide, among other things, that:

All persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted from the crimes for losses they suffer. Restitution shall be ordered from the convicted persons in every case regardless of the sentence or disposition imposed, in which a

¹⁶⁸² *Op. cit* 1581.

¹⁶⁸³ The Constitution of Rhode Island 1776.

crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary.¹⁶⁸⁴

From the discussions in this chapter so far, there are lessons on post-trial procedure from different jurisdictions which Kenya can learn from and improve the post testimony response to CVSA's concerns.

6.5 Conclusion

In concluding discussions in this chapter, the study finds that there are no formal post-trial procedures followed by the courts or any other criminal agency officials after the CVSA testify. The lack of protective post-trial measures enhances CVSA vulnerability and exposes them to further intimidation and abuse by the accused person or any other potential abuser. This is inconsistent with and a violation of CVSA rights to protection and their best interest under Article 53(2) of the Constitution of Kenya which the courts must be guided by. The post-trial procedure is therefore inconsistent with the procedural justice framework for CSA trial. It is contrary to the rights theory. It defeats the contemporary goal of CJS which is to balance the rights of parties in a dispute as illustrated by the developments at the ICC.¹⁶⁸⁵ In the next chapter, the study discusses conclusions arrived at and makes recommendations for intervention to reform the adversarial trial procedure in CSA cases in Kenya.

¹⁶⁸⁴ Article 1 Section 28 of the Constitution of California.
¹⁶⁸⁵ *Op. cit* n 494.

CHAPTER SEVEN

CONCLUSION AND RECOMMENDATIONS

7.1 Introduction

This chapter presents the study conclusion and recommendations. In order to arrive at the conclusion and recommendations, the chapter is presented along the following thematic areas: summary of the study, study findings, conclusion and recommendations.

7.2 Summary of the Study

This study sought to examine the classical adversarial trial procedure and its impact on ability of CVSA to coherently testify in CSA cases in Kenya. The study was concerned that the adversarial trial procedure fails to take into account the rights of CVSA, while safeguarding the rights of accused persons in CSA cases. As a result, the failure to balance the rights of accused persons and CVSA at time leads to a miscarriage of justice in CSA trial in Kenya.¹⁶⁸⁶ The purpose of the study was to identify inadequacies of CSA trial in Kenya and develop appropriate interventions that balance the rights of CVSA and accused persons in Kenya.

The study collected data from Nairobi, Kisumu, Mombasa, Nakuru and Eldoret Children courts. The study used observation, interviews, FGD and records review to collect data. The target respondents were CVSA who had testified in court and whose cases were listed for testimony during the data collection period. Key respondents included judges, magistrates, prosecutors, lawyers (both for the accused and CVSA), psycho-social service providers (children officers and social workers), parents and guardians of CVSA.

The overall objective of the study was to examine the use of the adversarial legal system's court procedure in CSA trial in Kenya, with a view to exploring how the rights/interest of CVSA can be balanced with those of accused persons. The specific objectives of the study were;

1. To investigate whether the adversarial trial procedure as applied by the children's courts balances the rights of accused persons to a fair trial with the rights and concerns to protect CVSA in CSA trials in Kenya.
2. To identify the inadequacies of the CSA trial process in Kenya.

¹⁶⁸⁶*Op. cit* n 19.

3. To find out how other jurisdictions balance the rights of accused persons and CVSA in CSA trial.
4. To explore the extent to which the rights of accused persons may be limited to ensure a balance with the rights and concerns for the protection of CVSA in CSA trial in Kenya.

In order to achieve the objectives of the research, the study was guided by the following research questions:

- Q1. Does the adversarial trial procedure as applied by the children's courts balance the rights of accused persons to a fair trial with the rights and concerns for the protection of CVSA in Kenya?
- Q2. What are the inadequacies of the adversarial procedure in CSA trial in Kenya?
- Q3. How have other jurisdictions attained the balance between the rights of accused persons and concerns for the protection of CVSA in CSA trials?
- Q4. To what extent can the rights of accused persons be limited to accommodate the rights and concerns of CVSA protection in Kenya?

The study was guided by the following hypothesis:

CSA trial under the adversarial system causes an imbalance between the rights of accused persons and CVSA at times resulting into a miscarriage of justice.

Since Kenya is a signatory to the UNCRC the study assumed that the rights of the children are protected as stipulated in the convention.

7.3 Study Findings

The study evaluated CSA trial procedure in three parts namely pre-trial, trial and post-trial procedures. The main study finding is that the adversarial procedure applied by the children courts in CSA trial in Kenya fails to take into account the special needs of CVSA, leading to an imbalance between the rights of accused persons and the need to protect CVSA.

Pre-trial procedures

The study found that pre-trial procedures do not take into account the effect of CSA on CVSA's ability to participate in the investigation of CSA. In addition, the existing

investigation process is inadequate and a lot of crucial evidence is lost due to inadequate training of investigating officers. The investigation process lacks a detailed pre-trial procedure and supervision by a judicial officer or special prosecutor as is the case in the ICC and inquisitorial systems.

The study found that the pre-trial procedures fail to prepare CVSA for their testimony as required by the UNCRC and the UNGJMCCVWC. However, the pre-trial procedures safeguard the rights of accused persons and cushion them against self-incrimination. Pre-trial procedure is unbalanced, and inconsistent with the rights theory and procedural justice framework for CSA trial. CSA is an offence that takes advantage of the inherent vulnerability of its victims due to the power, knowledge and gratification differentials between the accused persons and the CVSA.¹⁶⁸⁷ The traumatic effects of CSA and associated social stigma generally make it difficult for CVSA to testify and even harder if the accused person is known to CVSA as happens in incest cases.¹⁶⁸⁸ The finding is consistent with Freud's psychoanalytic theory,¹⁶⁸⁹ the labeling theory discussed in chapter one and the literature reviewed in chapter two. It is also consistent with PTSD suffered by victims of sexual abuse that at times inhibit the victims from talking about the traumatic event such as CSA.¹⁶⁹⁰

Linked to the above finding is the lack of psychosocial support and orientation/preparation of CVSA to testify which further enhances their vulnerability and negatively impacts on their ability to effectively participate in the trial process and give their best evidence.¹⁶⁹¹ The failure of the court procedure to address the psychosocial needs of CVSA therefore results in an imbalance between the accused persons' right to remain silent and the requirement that the already traumatized CVSA give oral direct evidence in the presence of the accused person during examination in chief. In the absence of legal requirement and procedure that CVSA receive pre-trial psychosocial support, it is difficult to enforce their right to have their best interests as paramount in matters affecting children as provided by Articles 3 of the UNCRC and 53(2) of the Constitution of Kenya respectively.

¹⁶⁸⁷ *Op. cit* n 47.

¹⁶⁸⁸ *Op. cit* n 89.

¹⁶⁸⁹ *Op. cit* n 91.

¹⁶⁹⁰ *Op. cit* n 75.

¹⁶⁹¹ *Op. cit* n 109.

Trial procedures

The study found that the trial procedure is characterized by the classical adversarial principles of criminal trial as developed in England.¹⁶⁹² The principles aim at safeguarding the rights of accused persons and protecting them from arbitrary use of state power.¹⁶⁹³ The specific principles which cause a miscarriage of justice in CSA trial are the burden of proof, orality of evidence, publicity of the trial, the right to cross examination and re-examination, the right to confrontation, impartiality of the trial judge, accused person's right to bail and the role of the prosecutor as an officer of the court whose function it is to protect public interest.

Although the study appreciates the function of the principles as hallmarks of a criminal trial, the study found that their unregulated application in CSA trials causes an imbalance between the rights of CVSA and those of accused persons. In many cases, the study found miscarriage of justice is caused due to the unregulated application of the adversarial rules of procedure.

The current children court procedure is largely adversarial in nature, insensitive to the special needs of CVSA, and subjects them to further trauma, disempowers them from expressing themselves, hence violates their right to be heard and express their opinion as provided by Article 12 of the UNCRC. The court procedure is anchored in the Criminal Procedure Code and the Evidence Act as procedural laws which contain evidentiary rules of procedure that safeguard the rights of accused persons. However, the evidentiary rules are unjustifiable in the protection of CVSA. The finding supports Rawls procedural justice theory (discussed in chapter one) that both accused persons and CVSA should receive equal protection of the law while distributing the liberties to benefit the least advantaged, in this case CVSA.¹⁶⁹⁴

Although cross-examination is a right of the accused person and acknowledged by most lawyers as the best way of testing the truth of witnesses' evidence,¹⁶⁹⁵ the lack of its regulation and the impartial/passive role of the trial judge/magistrates under the adversarial trial results into unnecessary intimidation/harassment of CVSA. The

¹⁶⁹² *Op. cit* n 123.

¹⁶⁹³ *Op. cit* n 234.

¹⁶⁹⁴ *Op. cit* n 107.

¹⁶⁹⁵ *Op. cit* n 377.

imbalance between accused persons' right to cross-examination and the concerns for the protection of CVSA sometimes leads to a miscarriage of justice. The finding is consistent with the works of all scholars as reviewed in chapter two who include Temkin,¹⁶⁹⁶ Abrams and Ramsey,¹⁶⁹⁷ Saywitz,¹⁶⁹⁸ Hoyano and Keenan¹⁶⁹⁹ amongst others.

The Kenyan CJS remains focused on the traditional function of criminal justice in the world which is to prevent and control crime by apprehending, trying, convicting and sanctioning members of the community who fail to observe the basic rules of existence.¹⁷⁰⁰ While the criminal law has traditionally spelt out what is an offence and provided punishment thereof, the criminal justice system has for a long time been perceived as being focused towards the finding of guilt or innocence of the accused person.¹⁷⁰¹

A study of the criminal justice system today reveals the fact that the concept of human rights has gradually been incorporated into reforms in the criminal justice system.¹⁷⁰² The aim is to uphold the rights and liberties of the accused person while balancing with the interests and concerns of the victims of crime, through an empowerment model.¹⁷⁰³ CVSA as victims in Kenya therefore need special court procedures under the constitutional framework¹⁷⁰⁴ that serve their best interest and which provide for special measures that cushion them against the trauma and court battle associated with the adversarial legal system as provided under Article 53(2) of the Constitution of Kenya.

The study found that whereas Britain (from where Kenya inherited the current court procedures) has substantially moved away from the strict adversarial legal system court procedures in respect of CSA cases,¹⁷⁰⁵ the Kenyan legal system is still stuck with the strict observance of legal principles in the country's law books which do not recognize

¹⁶⁹⁶ *Op. cit* n 3.

¹⁶⁹⁷ *Op. cit* n 5.

¹⁶⁹⁸ *Op. cit* n 109.

¹⁶⁹⁹ *Op. cit* n 47.

¹⁷⁰⁰ Berman J Harold and Greiner R William, *The Nature and Functions of the Law* (The Foundation Press 1966) 28-33.

¹⁷⁰¹ *Op. cit* n 254.

¹⁷⁰² *Op. cit* n 241.

¹⁷⁰³ F G Cole, *The American System of Criminal Justice* (Duxbury Press 1975) 34.

¹⁷⁰⁴ *Op. cit* n 40 Article 53.

¹⁷⁰⁵ *Op. cit* n 52.

the incapacity of the CVSA to play an active role in the dispute resolution process since the playground is uneven and tilted in favour of the accused person.

Commonwealth countries such as India, Australia, Canada and New Zealand have reformed their adversarial procedures to accommodate the special needs to protect CVSA in CSA trials.¹⁷⁰⁶ Inquisitorial jurisdictions such as France, Belgium, Holland and Argentina have also reformed their criminal trial systems to accommodate the special needs of CVSA.¹⁷⁰⁷ The USA and Britain are leading in measures that balance the rights of CVSA and accused persons in CSA trials.¹⁷⁰⁸ Such measures include: use of screens, television links, use of intermediaries, exclusion of the accused person from the trial process, taking the evidence of CVSA in advance of the trial, shifting the burden of proof amongst many others.¹⁷⁰⁹

Kenya has enacted laws aimed at protecting children from abuse and enhancing their participation in the justice process. These include the Constitution, the Children Act, Sexual Offences Act, Witness Protection Act and the amendment to the Evidence Act that did away with corroboration.¹⁷¹⁰ These are however gains made in the substantive laws to protect CVSA. As already discussed in chapter three, the goals of substantive laws can only be achieved through procedures as the vehicle of implementation. In the absence of procedures to protect the rights of CSA declared by the substantive laws then Kenya cannot boast of enacting laws that protect CVSA for their implementation is jeopardized.

Post-Trial Procedures

The study found that the post-trial procedures do not take into account the effect of the legal process on CVSA many of whom suffered trauma and in some cases PTSD. Post-trial procedures lack psycho-social support services to enable CVSA overcome the negative impact of testifying under the adversarial procedure. The post-trial procedures lack post testimony protection orders to shield CVSA from revenge attacks by the accused person and their family. The study found that post-trial procedures fail to take into account the need to ensure that CVSA cope with the consequences of the abuse and

¹⁷⁰⁶*Op. cit* n 47.

¹⁷⁰⁷*Op. cit* n 52.

¹⁷⁰⁸*Op. cit* n 384.

¹⁷⁰⁹*Op. cit* n 399.

¹⁷¹⁰*Op. cit* n 42.

the legal process after their testimony. The post-trial procedures are focused on the guilt/innocence of the accused persons but are lacking in concerns for CVSA welfare.

7.4 Conclusion

The study concludes that the pre-trial procedures fail to balance the rights of accused persons and concerns for CVSA protection. The pre-trial procedure is not in the best interest of CVSA according to Article 53(2) of the Constitution of Kenya but safeguards the rights of accused persons to a fair trial according to Article 50 of the Constitution of Kenya. The two constitutional rights are therefore in competition and conflict during CSA trial necessitating a balance to ensure a fair process. The pre-trial procedure is unsuitable for CSA trial. This finding is supported by the psychoanalytic theory as discussed in chapter one. According to the theory, victims of traumatic occurrences at times suffer PTSD.¹⁷¹¹ As a coping mechanism, some victims may opt not to talk about the incident. This explains the difficulty in getting information from CVSA about the abuse during the pre-trial investigation.

The trial procedure traumatizes CVSA due to the insensitivity of the evidentiary rules of procedure to the special needs of CVSA when they testify. The specific evidentiary rules of procedure that occasion a miscarriage of justice in CSA trial include: the burden of proof, orality of evidence, publicity of the trial, the right to cross examination and re-examination, the right to confrontation, impartiality of the trial judge, accused person's right to bail and the role of the prosecutor as an officer of the court whose function it is to protect public interest.¹⁷¹² This conclusion is consistent with arguments advanced by scholars such as Temkin,¹⁷¹³ Hoyano,¹⁷¹⁴ Abrams and Ramsey,¹⁷¹⁵ Saywitz¹⁷¹⁶ and many others as discussed in the previous chapters. The trial procedure is therefore unsuitable for CSA trial and is in need of reform.

The post-trial procedure lacks mechanisms to protect the already traumatized vulnerable CVSA against revenge attacks from accused persons. The post-trial procedure lacks court protection orders and concerns for CVSA's welfare after they give their evidence. The

¹⁷¹¹*Op. cit* n 75.

¹⁷¹²*Op. cit* n 52.

¹⁷¹³*Op. cit* n 3.

¹⁷¹⁴*Op. cit* n 47.

¹⁷¹⁵*Op. cit* n 5.

¹⁷¹⁶*Op. cit* n 109.

lack of protective post-trial procedures predisposes CVSA to a violation of their rights to protection after they testify. This is inconsistent with the rights theory which promotes the balancing of rights of all parties in the justice process. The entire trial procedure in Kenya is unsuitable for CSA cases as it is inconsistent with the procedural justice framework for CSA trial developed by the study.

The study concludes that the classic adversarial criminal trial procedure in some cases occasions a miscarriage of justice in CSA trial in Kenya. The evaluation of the Kenyan CSA trial procedure reveals that the system is inadequate in three respects:

- (i) The pre-trial procedures are not in the best interest of CVSA and fail to recognize the nature of CSA and vulnerability of CVSA.
- (ii) The trial procedure protects the rights of accused persons to a fair trial but lacks a balance with the concerns for CVSA protection.
- (iii) The post-trial procedure does not take the welfare of CVSA into consideration and lacks protective orders to CVSA after they testify.

The entire procedure is unsuitable for CSA trial and is in need of reforms to ensure justice for both CVSA and accused persons.

The study concludes that:

1. The classical adversarial criminal procedure as applied by children courts in Kenya is unsuitable for CSA trial.
2. The adversarial procedure as applied by the children courts in Kenya is inadequate as it fails to take into account the special needs and vulnerability of CVSA.
3. The adversarial trial procedure applied by the children courts in Kenya adequately protects the accused person's rights, but does not take into account the need to balance the same with the rights of CVSA.
4. The failure to balance the rights of accused persons with the need to protect CVSA sometimes leads to a miscarriage of justice in CSA trials in Kenya.
5. There is need for special procedures in CSA trials which balance the rights of accused persons with the need to protect CVSA so as to ensure justice to both parties.

Kenya can learn and borrow lessons from jurisdictions which have reformed their adversarial procedure in CSA trial. In the next section, the study makes specific

administrative, policy, research and legislative recommendations to reform CSA trial procedure in Kenya.

7.5 Recommendations

In order to reform the current adversarial court system applicable in CSA cases and allow for child friendly procedures, the study makes the following legislative, policy, administrative and research recommendations;

7.5.1 Legislative Reforms

The National Assembly needs to effect legislative amendments as follows:

1. The study recommends the enactment of a specific procedure in law to regulate the trial of CSA. This could be known as ‘Child Sexual Abuse Trial Procedure Act’. The agencies to be involved in implementing this recommendation include The Office of the Attorney General – Drafting Department, The Kenya Law Reform Commission, the Judiciary, the Children Services Department and the National Assembly.
2. Due to the nature of CSA and its effect on CVSA ability to testify, there is need for the evidential burden to be placed on the accused person to prove his/her innocence in CSA cases. This can be done by amending Article 50(2) (a) of the Constitution of Kenya so that a person charged with CSA is presumed to have committed the offence until the contrary is proved. Likewise Article 50(2) (i) needs to be amended so that in CSA cases the accused person does not remain silent but becomes obligated to help in the investigation of the case. In addition, Article 50(2) (l) should be amended to obligate accused persons in CSA cases to give evidence which they are seized of in connection with a matter so as to help with the search for the truth.
3. There is need to rethink the orality principle and relax the rule against hearsay and its exception which have been widely criticized and cause injustice in cases of CSA. The hearsay rule and its exceptions are complex, artificial, technical and sometimes do serve to exclude substantial evidence of probative value.¹⁷¹⁷ The rationale for the rule is that reported accounts of facts are not trustworthy and therefore not the best evidence.¹⁷¹⁸ The argument is that the evidence is not given on oath and therefore the truthfulness and accuracy of the author whose words are repeated through hearsay cannot be subjected to

¹⁷¹⁷*Op. cit* n 52.

¹⁷¹⁸*Op. cit* n 123.

cross-examination.¹⁷¹⁹ In addition, the demeanour of the author of the hearsay evidence cannot be observed.¹⁷²⁰

Whereas the rule serves an important purpose in criminal trials generally, in cases of CSA where CVSA retract their evidence or find difficulty in testifying, hearsay evidence may be more reliable than the first-hand account.¹⁷²¹ In cases where the CVSA is not able to testify, the hearsay evidence becomes a useful piece of probative value. In such cases therefore, to apply the hearsay rule in CSA cases is irrational since suppressing such evidence makes it hard to establish the truth as to the guilt or innocence of the accused. An appropriately drafted exception to the hearsay rule which includes documentary, videotaped or recorded evidence has the potential to ensure the availability of the best evidence in court where CVSA cannot or find it difficult to testify.¹⁷²²

There are three ways of addressing the concern about injustice caused by hearsay rule. The first is to formulate new hearsay exceptions for CSA. This ensures that out of court statements of CVSA become admissible in certain prescribed circumstances. In 1985, the state of Florida in the USA enacted a detailed exception to hearsay rule in criminal cases where children are victims of abuse.¹⁷²³ The exception provides that in cases where the CVSA is 11 years or less and testifying in court has the substantial likelihood of severe emotional or mental harm, then any statement made out of court by the child would be admissible in court.¹⁷²⁴ Subsequently, many more American states enacted similar hearsay exceptions.¹⁷²⁵

Evidence of a complainant recently or promptly made by the victim of sexual assault is admissible in criminal prosecutions for sexual offences.¹⁷²⁶ Another exception that could be included is spontaneous utterances made by a child shortly before or after a sexual

¹⁷¹⁹ Ibid.

¹⁷²⁰ Ibid.

¹⁷²¹ *Op. cit* n 399.

¹⁷²² *Op. cit* n 1494.

¹⁷²³ Evidence Code chapter 90 Section 803 was amended to create a hearsay exception that allows admission into evidence of statements of a child victim of abuse including sexual abuse where the child is unable to testify.

¹⁷²⁴ Ibid.

¹⁷²⁵ *Op. cit* n 384.

¹⁷²⁶ D Bryne & P J Heydon, *Cross on Evidence* (3rd aust edn, Butterworths 1986) 67.

assault.¹⁷²⁷ This is admissible under the *Res Gestae* and constitutes an exception to the hearsay rule.¹⁷²⁸ The importance of this exception in CSA cases is strictly limited to contemporaneous statements. The *Res Gestae* doctrine is the basis of admitting statements concerning a contemporaneous state of mind or emotion or physical sensation.¹⁷²⁹ Therefore, a doctor who treats a CVSA should be allowed to testify in court and say what the CVSA said at a medical examination about the physical symptoms or state of mind of the child to prove that it was as a result of the sexual abuse.¹⁷³⁰

Another exception is where a child makes an allegation in the presence of an accused person and a third party that the accused person sexually assaulted the child.¹⁷³¹ If the accused person acknowledges the truth of the allegation by the CVSA in the presence of the third party then if CVSA is unable to testify, such a statement can be admissible if produced in evidence by the third party, in whose presence it was made.¹⁷³²

The third exception that could be introduced is the evidence of a previous identification of the accused person by a CVSA which may be given by another witness who was present and witnessed the identification in case the child is subsequently not in a position to testify or identify the accused person in court.¹⁷³³

The last exception can be borrowed from Tasmania. The Tasmania Evidence Act, (1910) at Section 81B allows documentary evidence of a statement to be admitted. The incidence in the documentary evidence must be fresh in the memory of the witness. This applies in situations where the witness recalls very well the facts of the abuse which are documented but the CVSA is unable to testify in court. The documentary evidence is therefore admissible in court either through video or audio recording.

The second way of addressing the injustice caused by the hearsay rule is to amend the Evidence Act. There is need to amend the Evidence Act in Kenya so as to incorporate best practices in the trial of child abuse cases such as video recording, television link and

¹⁷²⁷ *Op. cit* n 47.

¹⁷²⁸ *Op. cit* n 280.

¹⁷²⁹ *Ibid.*

¹⁷³⁰ *Ibid.*

¹⁷³¹ *Op. cit* n 1494.

¹⁷³² M Aronson & J B Hunter, *Litigation: Evidence and Procedure* (3rd edn, Butterworths, 1998) 745.

¹⁷³³ *Op. cit* n 825 para 16, 31.

others. Likewise the amendment should include as an exception to the hearsay rule evidence by any person of what a CVSA may have told him or her about the abuse in cases where the CVSA is unable to testify in court. The Evidence Act should be amended to exclude the requirement of competence of witnesses which was found to lock out some CVSA from testifying. In Britain the law has been amended¹⁷³⁴ and all witnesses including children are competent to give evidence so long as they understand questions asked by the court.

In addition hearsay evidence is admissible¹⁷³⁵ in Britain where the court finds that it is in the interest of justice to admit such evidence since failure to do so would occasion injustice. The Court of Appeal in England allowed the admission of statements by CVSA as to the colour of her attacker and an out of court confession¹⁷³⁶ by a third party to the crime which the accused person was charged with.¹⁷³⁷ Kenya needs to amend the Criminal Procedure Code and the Evidence Act so as to include similar provisions to safeguard the interests of CVSA.

The third way of addressing injustice in CSA matters caused by the orality principle is to expand or revise the existing exceptions to the hearsay rule under the Evidence Act. Part IV of the Evidence Act should be amended to include a section which provides for the out of court statements by CVSA in CSA cases. In addition, Part I of the Evidence Act should be amended to shift the burden of proof to the accused person in CSA cases. The Evidence Act should provide that courts should take cognizance of the effect of PTSD on CVSA's ability to testify in CSA cases.

4. There is need to amend the Criminal Procedure Code so as to regulate cross examination of CVSA in cases where such cross examination may cause trauma to CVSA or to have such cross examination conducted under the direction of the trial court. Similarly the study proposes that instead of direct cross examination of CVSA by the accused persons/advocates, in all CSA trials, the court should appoint intermediaries as provided by Section 31(2) of the Sexual Offences Act. This does not in any way violate the right of

¹⁷³⁴ Criminal Justice Act 2003.

¹⁷³⁵ Ibid section 114 (1) (d).

¹⁷³⁶ Such a confession was in admissible at common law as held in *Cooper* (1969) 1 Q.B 267; *Turner* (1975) 61 Cr. App. R 67; *Blastland* (1986) AC 41.

¹⁷³⁷ *Sparks vs. R* (1964) A CA 964.

the accused persons to cross examination. In addition, there is need to develop regulations to moderate cross examination of CVSA in CSA cases as already discussed in chapter five.

5. The study recommends a paradigm shift away from the classical adversarial legal system towards a hybrid legal system that blends positive features that protect the accused persons with positive aspects of the inquisitorial system that protect CVSA such as the fact finding role of a judicial officer as happens at the ICC. In such a system, the judicial officer (Magistrate/Judge) plays a fact finding role in the case as opposed to a passive role in the current children court procedures under the adversarial legal system. This proposal will help to build confidence of CVSA in the court system. Further it has the ability to enable the magistrates play an active role in protecting CVSA from adversarial cross examination by accused persons/advocates.
6. In order to ensure that CSA trial is fair to both accused persons and CVSA, there is need to amend Article 25(c) of the Constitution of Kenya by providing an exception that in CSA cases, the accused person's right to fair trial can be limited. Subsequently, the right to cross examination, the right to confrontation, publicity of the trial, presumption of innocence and the right to remain silent should be limited in CSA trials.

The study recommends a balancing of the accused person's right to a fair trial and the CVSA's right to equal protection by the law, protection from discrimination, preservation of their dignity, privacy, access to justice and upholding of the paramount principle of the best interest of children in matters affecting them. In this regard, the study proposes a specific procedure for CSA trial along the lines of the procedural justice framework for CSA trial developed by the study under chapter three. The study therefore develops and presents a draft bill for CSA trial to be known as The Child Sexual Abuse Trial Procedure Act as presented below.

THE CHILD SEXUAL ABUSE PROCEDURE DRAFT BILL
ARRANGEMENT OF ARTICLES

PREAMBLE

PART I

DEFINITIONS

PART II

GENERAL PROVISIONS ON ASSISTANCE TO CHILD VICTIMS OF SEXUAL ABUSE

PART III

ASSISTANCE TO CVSA DURING THE CRIMINAL JUSTICE PROCESS

A-General Provisions

B-Assistance to CVSA during Pre-Trial stage

C-Assistance to CVSA during the Trial stage

D-Post-Trial assistance to CVSA

PART IV

MISCELLANEOUS

Considering the recognition of children as vulnerable members of society and in need of special protection of their rights as provided by the Bill of Rights under the Constitution of Kenya which was promulgated on the 27th August 2010,

Considering the vulnerability and emotional, physical, psychological and mental under development of children as recognized by the United Nations Guidelines on Justice in Matters Concerning Child Victims and Witnesses of Crime (2005)

Recognizing the provisions of the Sexual Offences Act 2006 in respect of measures to protect victims of sexual violence generally,

Bearing in mind the rights of accused persons to a fair trial which includes child sexual abuse trials as provided by the International Covenant on Civil and Political Rights,

Recognizing the existing imbalance in child sexual abuse trials between the rights of accused persons and the rights of child victims of sexual abuse in the trial process,

Recognizing the need to strike a balance between the rights of accused persons to a fair trial and the need to protect child victims of sexual abuse during the trial of child sexual abuse,

Considering the principles of non-discrimination, the right to participation and expression of views by children in matters that affect them and the right of every child to have his/her best interests given paramount consideration as provided by the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of Children as domesticated by the Children Act 2001,

Bearing in mind the following rights of any victim of crime as provided by the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985)

- a) The right to be treated with dignity and compassion**
- b) The right to be protected from any form of discriminatory treatment**
- c) The right to information as to what to expect and what is expected of the victim by the criminal process, his/her role in the process and general information as to the progress of the case at each stage**
- d) The right to be heard and express their views and concerns**
- e) The right to effective assistance in the criminal process**
- f) The right to privacy**
- g) The right to be protected from hardships during the justice process**
- h) The right to special protective measures**
- i) The right to reparation**

Recognizing the importance of special protective measures for child victims of sexual abuse that enable them to narrate the intimate details of the abuse in court to assist in the truth seeking process,

Appreciating that the goal of criminal justice process has shifted from the traditional focus of establishing the guilt/innocence of the accused person to one that not only safeguards the rights of the accused persons but also protects the rights and concerns of victims of crime,

Recognizing that procedural justice which is the measure of a fair trial dictates that the trial must be fair to both accused persons and victims of crime,

- 1. This Act may be cited as the ‘Child Sexual Abuse Procedure Act.’**
- 2. The Act shall apply in all trial procedures involving child sexual abuse.**
- 3. It shall come into effect upon publication in the official Kenya Gazette by the Minister responsible for matters concerning Justice.**

PART I –DEFINITIONS

For the purposes of this Act, the following definitions shall apply:

“Child” Has the same meaning as in the Children Act 2001 and refers to anyone below the age of 18 as at the time of the offence of child sexual abuse.

“Child Sexual Abuse (CSA)” has the same meaning as defined by the Children Act 2001.

“Court” refers to any court handling child sexual abuse trial at any level and includes the subordinate courts, the High Court, the Court of Appeal and the Supreme Court, including any tribunal set up to deal with any aspect of CSA.

“Child Victim of Sexual Abuse (CVSA)” means a person under the age of 18 who is a victim of child sexual abuse.

“Professionals” mean persons who, in the course of their work, are in contact with CVSA or are responsible for addressing the needs of children in the justice system and to whom this Act is applicable. This includes but is not limited to the following; CVSA advocates and support persons, child protection service practitioners, child welfare agency staff, defence lawyers, staff of agencies concerned with matters of domestic violence, prosecutors, medical and mental health professionals and personnel, magistrates and judges, court staff, law enforcement officials, probation officers, children officers, social workers.

“Justice Process” includes detection of child sexual abuse, the reporting and investigation, prosecution, trial and post-trial procedures regardless of whether the case is

handled by ordinary subordinate courts, the children court or the informal methods of dispute resolution before the matter is filed in court.

“**Child Sensitive**” means an approach that gives primary consideration to CVSA rights to protection and that takes into account CVSA individual needs and views.

“**Support Person**” means a specially trained person designated to assist CVSA throughout the justice process in order to prevent the risk of duress, re-victimization or secondary victimization.

“**Guardian**” means a person who has been formally recognized as responsible for looking after the interest of CVSA where the parents do not have parental responsibility or are dead.

“**Guardian *ad litem***” has the same meaning as defined by the Children Act 2001 and means a person appointed by the court to protect the interests of CVSA in proceedings affecting his/her interests.

“**Secondary victimization**” victimization that occurs not as a direct result of sexual abuse, but through the response of institutions and individuals that handle CVSA after the abuse.

“**Re-victimization**” means a situation in which CVSA suffers more than one incident of any form of abuse over a short period of time.

PART II -GENERAL PROVISIONS ON ASSISTANCE TO CVSA

Article 1 Best interest of the child

Every CVSA has the right to have his/her best interests given primary consideration, while safeguarding the rights of an accused person in a child sexual abuse trial.

Article 2 General Principles

1. A CVSA shall be treated without discrimination of any kind, irrespective of the CVSA or his/her parents/guardian’s race, colour, religion, belief, age, family status, culture, language, ethnicity, national or social status/origin, citizenship, gender, sexual orientation, political or other opinions, any disabilities, status of birth, property or any other conditions.
2. CVSA shall be treated in a caring and sensitive manner that respects his/her dignity throughout the legal process, taking into account his/her personal situation and immediate and special needs, age, gender, disabilities if any and the level of maturity.

3. Any interference in the private life of CVSA shall be limited to the minimal level necessary only as may be defined by any law in order to ensure high standard of evidence and a fair and equitable outcome of the trial as a whole.
4. CVSA shall have their privacy respected and protected.
5. Any information that may lead to the identification of CVSA shall not be published without the express permission of the court in consultation with the guardian *ad litem*/parent of the CVSA and where the CVSA can express his/her view, such opinion must be respected.
6. CVSA shall have the right to express his/her views/opinion and belief freely in his/her own words, and shall have the right to contribute to decisions affecting his/her life, including those taken in the course of the justice process.

Article 3 Duty to report Child Sexual Abuse

1. Teachers, doctors, social workers and other professionals working with children shall have a duty to notify the law enforcement authority of any suspicions of child sexual abuse upon any reasonable cause to believe that a child may be a victim of child sexual abuse.
2. The persons referred to in paragraph I of this Article shall assist CVSA to the best of their abilities until the CVSA is provided with the appropriate professional assistance.
3. The duty to report CSA as established in paragraph1 of this Article supersedes any obligations of confidentiality, except in the case of lawyer-client confidentiality.

Article 4 Protection of Child Victims of Sexual Abuse from contact with accused persons

1. Any person convicted of any offence against a child shall not be eligible to work in a child service institution or agency providing services to children such as courts, hospitals, schools, police stations, children department just to mention a few.
2. Institutions or agencies providing services to children shall take appropriate measures to ensure that those charged with CSA do not come into contact with CVSA.
3. For the purposes of paragraph 1 and 2 of this Article, the Minister for the time being responsible for children's services shall develop regulations in respect of
 - a) A definition of qualifying offences against children which if anyone is convicted of, that person should not be allowed to come into contact with children.
 - b) A definition of institutions and agencies providing services to children.

- c) Measures to be taken by institutions and agencies offering services to children to ensure that persons charged with CSA do not come into contact with CVSA.
- 4. The trial court in which a CSA case is filed shall issue an order preventing such accused persons from coming into contact with the CVSA in every respective case.
- 5. Anyone who knowingly violates paragraphs 1, 2 and 4 of this article shall be guilty of a criminal offence and shall be liable upon conviction to a term of imprisonment not exceeding twelve months or to a fine of Kenya Shillings One Hundred Thousand or to both.

Article 5 Child Victim of Sexual Abuse Protection Unit

1. A Child Victim of Sexual Abuse Protection Unit is hereby established as a unit within the Witness Protection Agency under the Witness Protection Act 2006.
2. The Unit shall comprise of the following;
 - a) A person who qualifies as a judge of the High Court of Kenya.
 - b) A representative of the office of the Director of Public Prosecutions.
 - c) A representative of the police.
 - d) A representative of the Ministry responsible for children services.
 - e) A representative of the Ministry responsible for health and mental services.
 - f) A representative of the Ministry responsible for social services.
 - g) A representative of the Law Society of Kenya specialized in cases involving children.
 - h) A representative of registered victim support organizations.
 - i) A representative of the Ministry of Education.
 - j) A representative from the Ministry of Finance.
 - k) One person co-opted by the unit based on extensive experience in children issues.
3. The members of the unit shall be appointed by the Minister responsible for justice matters.

Article 6 Functions of the Child Victim of Sexual Abuse Protection Unit

1. It shall formulate national policies on CSA and the treatment of CVSA.
2. It shall recommend relevant preventive and protective programs and submit to relevant public agencies for implementation.
3. It shall promote and coordinate the services of institutions that provide services to CVSA.

4. It shall monitor the implementation of child friendly procedures in CSA at the investigation, trial and post-trial stages, including legal representation, placement, and establishment of such procedures which are not in existence.
5. It shall make relevant recommendations to relevant ministries/government agencies on necessary regulations in CSA cases.
It shall establish guidelines for the establishment of mechanisms for reporting CSA.
6. It shall establish guidelines for the training of professionals working with CVSA.
7. It shall initiate research on matters relating to CSA.
8. It shall be responsible for the dissemination of information on CSA and CVSA amongst individuals and institutions offering services to CVSA.
9. It shall be responsible for the publication of annual reports on the performance of institutions which are subject to this Act.

Article 7 Confidentiality

1. In addition to any existing legal protection of the privacy of CVSA in accordance with Article 3 paragraph 3 of this Act, all persons working with CVSA and all members of the CVSA Protection Unit established under Article 5 of this Act shall maintain the confidentiality of all information on CVSA that they may come across in the performance of their duty towards CVSA.
2. Anyone who violates paragraph 1 of this Article shall be guilty of an offence and shall be liable to imprisonment for a term not exceeding twelve months or a fine of One hundred Thousand Kenya Shillings or both.

Article 8 Training

1. Professionals working with CVSA shall undergo appropriate training on issues related to CSA and CVSA.
2. Where possible, the CVSA Protection Unit developed under Article 5 of this Act shall develop and publish training curricula for professionals working with CVSA. Such training shall cover the following areas of concern;
 - a) Relevant human rights norms, standards and principles, including the rights of the child.
 - b) Principles and ethical duties related to the performance of their functions.
 - c) Signs and symptoms that indicate that a child has been sexually assaulted.
 - d) Crisis assessment skills and techniques, especially for making referrals, with an emphasis placed on the need for confidentiality.

- e) The dynamics and nature of violence against children and the impact and consequences, including negative psychological and physical effects of child abuse.
- f) Special measures and techniques to assist CVSA in the justice process.
- g) Information on children's developmental stages as well as on cultural and age related linguistics, ethnic, religious, social and gender issues in reference to CSA.
- h) Appropriate adult-child communication skills, including a child-sensitive approach.
- i) Interview and assessment techniques that minimize distress or trauma to CVSA while maximizing the quality of information received from CVSA, including skills to deal with CVSA in a sensitive, understanding, constructive and re-assuring manner.
- j) Methods to protect preserve and present evidence in CSA cases.
- k) The roles of each professional and methods used by each professional in relating to CVSA.

CHAPTER III-ASSISTANCE TO CVSA DURING THE JUSTICE PROCESS

A-General Provisions

Article 9 Right to be informed

1. A CVSA, his/her parent/guardian/lawyer or support person, if designated, or other appropriate person designated to provide assistance to CVSA shall be contacted upon the CVSA's first contact with the justice process. Throughout the process they shall be promptly kept informed of the progress of the case by the authority responsible for the stage at which the case is at any given time. In particular, they shall be informed of the following to the extent that is feasible and appropriate;
 - a) Procedures of the investigation/prosecution process, including the role of CVSA as victims and witnesses, the importance, timing and manner of testimony and the ways in which interviews are to be conducted at every stage of the justice process.
 - b) Existing support mechanisms for CVSA when making a complaint at the police station and mechanisms available at the court during the testimony, including availability of a lawyer for legal services to CVSA.
 - c) Specific places and times of hearings and any other relevant specific events.
 - d) Existing mechanisms for the review of decisions affecting CVSA.
 - e) Relevant rights of CVSA according to the Children Act, the Sexual Offences Act, the United Nations Convention on the Rights of the Child and the Guidelines and

Declarations of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly.

In its resolution 40/34 of 29 November 1985 and the United Nations Guidelines on Justice in Matters Concerning Child Victims and Witnesses of Crime (2005) adopted by the United Nations Economic and Social Council in its resolution 2005/20 of 22nd July 2005.

- g) Existing opportunities to obtain reparation from the accused person or the state either through the same criminal process, alternative civil proceedings or through other processes.
- h) Availability and functioning of any restorative programs or schemes.
- i) Availability of health, psychological, social and other relevant services and the means of accessing such services which include emergency financial support if available.
- j) The progress and disposal of the specific case, including apprehension, custodial status of the accused person, prosecutorial decision, and relevant post-trial development and outcome of the case.

Article 10 Legal Assistance

A CVSA shall be assigned a lawyer by the state free of charge throughout the justice process. Such assignment shall be made by the court from a list of lawyers specialized in children matters to be maintained by the CVSA Protection Unit, upon the request of the CVSA, his/her parent/guardian, support person or by the court on its own motion if the court considers such assignment to be in the best interest of CVSA.

Article 11 Protective Measures

At any stage in the justice process where the safety of CVSA is deemed to be at risk, the CVSA Protection Unit shall arrange to have protective measure put in place for CVSA, The measures shall include but not limited to the following;

- a) Avoiding direct face to face contact between the accused person and CVSA at any point in the justice process. In this respect, the court shall on application by the CVSA lawyer, support person or parent/guardian of CVSA issue such restraining orders as to ensure the safety of CVSA from contact with the accused.
- b) At the time of granting bail to the accused person, the court may if the situation calls for it and if it is proved that the accused person has attempted or succeeded in

intimidating/interfering with CVSA, order that the bail is granted on condition that the accused person does not get into contact with CVSA.

- b) Protection order for CVSA and non-disclosure of CVSA whereabouts for safety reasons.
- c) Other protective orders for CVSA as deemed appropriate by the court, on the advice of the lawyer, support person and CVSA parent/guardian.

Article 12 Language, Interpretation and other Special Assistance Measures

1. The court shall ensure the use of simple language comprehensible to CVSA during the proceedings in which CVSA testify.
2. Where CVSA need an interpreter, the same shall be provided by the court and interpretation conducted into a language understood by CVSA.
3. Any special assistance measures required by CVSA in order to testify or participate in the proceedings in any manner at any stage of the justice process shall be provided so long as the accused person is granted adequate and appropriate opportunity to challenge any evidence against him/her.

B-Assistance to CVSA during Pre-Trial stage/Investigation

The provisions of this Article shall apply to all agencies/institutions involved in the investigation of CSA.

Article 13 Specially trained investigator

1. An investigator specially trained in dealing with CSA shall be appointed by the Inspector General of Police to guide the interview of CVSA, using child-sensitive approaches.
2. The investigator shall, to the extent possible, avoid repetition of the interview during the justice process in order to prevent secondary victimization of CVSA.
3. The interview of CVSA shall take place in any other place suitable to CVSA, other than the police station. Such places shall include but not limited to CVSA home, a children's home or hospital.
4. Neither the accused person nor his/her counsel shall be present in the same room as the CVSA at the time of interview, but they may follow the proceedings from a different room through video-link.
5. The Chief Justice shall develop regulations under which such videotaping of CVSA shall be carried out.

6. Where the videotaping of CVSA interview is carried out under the required rules as developed by the Chief Justice, the video tape shall be admissible in evidence in addition to CVSA court testimony or without hearing CVSA in court, so long as the accused person is given adequate opportunity to challenge the evidence.
7. The accused person/counsel may challenge the evidence during the interview of CVSA from a different room by putting questions to CVSA through the interviewer or the questions may be put to CVSA at a later date after accused person watches the videotaped interview. In either case, the accused person must not put any questions to CVSA directly.

Article 14 Medical examination and the taking of bodily samples

1. A CVSA shall be subjected to medical examination or to the taking of a body sample only if the following conditions are met;
 - a) CVSA guardian/parent/support person is present, unless CVSA decides otherwise.
 - b) Written authorization has been provided by the court, a senior police officer or the prosecutor where there is reasonable ground to believe that such examination or taking of bodily fluids is necessary.
2. At any time in the investigation process, if there is doubt as to the health or mental condition of CVSA, the investigator shall ensure a comprehensive medical examination by a physician as soon as possible.
3. Following such examination, the investigator shall use its best endeavors to ensure that CVSA receives such treatment as recommended by the physician, including where necessary, admission to hospital.
4. All interviews with CVSA at pre-trial stage must be videotaped to preserve the quality of evidence and may be used at trial in addition to or where CVSA is unable to testify due to age or other factors.

Article 15 Support Person

Right from the onset of the investigation and throughout the entire justice process, CVSA shall be supported by a person with training and professional skills to communicate with and assist CVSA of different ages and backgrounds in order to prevent the risk of duress, re-examination and secondary victimization.

Article 16 Designation of a support Person

1. The investigator shall inform the CVSA Protection Unit of the intention to invite CVSA for an interview and shall ask for the designation of a support person.

2. The support person shall be designated by the CVSA Protection Unit in consultation with CVSA and the parent/guardian in respect to the gender of the support person to be designated.
3. The support person shall be given adequate time to bond with CVSA before the first interview takes place.
4. When inviting CVSA to the interview, the investigator shall inform CVSA and the support person of the time and place of the interview.
5. All interviews of CVSA **SHALL** take place in the presence of the support person.
6. The CVSA Protection Unit shall ensure the continued relationship between the support person and CVSA to the greatest extent possible.
7. The CVSA Protection Unit shall monitor the work of the support person and assist him/her deliver the necessary service.
8. In case the support person fails to perform the stipulated duties under this Act, the CVSA Protection Unit shall designate a replacement support person after consultation with CVSA and parents/guardian.

Article 17 Functions of the Support Person

The functions of the support person shall include but not limited to the following;

- a) Provision of general emotional support to CVSA.
- b) Provision of assistance in a child-sensitive manner to CVSA during the entire justice process. Such assistance may include measures to alleviate the negative effects of CSA on CVSA, measures to assist CVSA in carrying out his/her daily life and measures to assist CVSA in dealing with administrative matters arising from the circumstances of the case.
- c) Advise the CVSA Protection Unit whether therapy or counseling is necessary.
- d) Liase and communicate with CVSA parents/guardians/family/friends/lawyer as may be appropriate.
- e) Inform CVSA of the composition of the investigating team, trial team and other issues related to the trial.
- f) Discuss with the lawyer representing CVSA or in the absence of such lawyer, the court, CVSA guardian/parents, the different options available for CVSA to give evidence, such as video recording and other measures that safeguard the best interest of CVSA.
- g) Together with the lawyer representing CVSA, the support person shall discuss with the police, court, prosecutor the appropriateness of any protective orders.

h) Request the court to issue any special protective measures as necessary.

Article 18 Information to be Provided to the Support Person

In addition to information to be provided under Article 9 of this Act, at all stages of the justice process, the support person shall be kept informed of

- a) The charge against the accused person.
- b) The relationship between the accused person and CVSA.
- c) The custodial status of the accused person.

Article 19 Functions of the Support Person in case of the Release of Accused Person

1. Where the accused person has been in custody and is released from such custody, the court making the release order must notify the support person of such release.
2. The support person shall upon receiving such information on the release of the accused person inform the CVSA parents/guardians and together with the lawyer for CVSA apply for appropriate protection orders to CVSA if necessary.

C-Assistance to CVSA during the Trial stage

Article 20 Reliability of CVSA Evidence

1. A CVSA is deemed to be a capable witness unless proved otherwise through a competency examination administered by the court in accordance with Article 21 of this Act. CVSA testimony shall therefore not be presumed to be invalid or untrustworthy by reason only of CVSA age provided that CVSA age and maturity allow the giving of intelligible and credible testimony.
2. For the purpose of this section (C-The Trial Phase) a CVSA testimony includes testimony given with technical communication aids or through the assistance of an expert specialized in understanding and communicating with children.
3. The weight given to the evidence of CVSA shall be in accordance with CVSA age and maturity.
4. Irrespective of whether or not a CVSA will testify, he/she shall have an opportunity to express his/her personal views and concerns on matters related to the case, his/her involvement in the justice process in particular his/her safety with respect to the accused person, his/her preference to testify or not and the manner in which the testimony is to be given, any other relevant matter affecting him/her. Where CVSA

views are not accommodated, CVSA shall be given clear reasons as to why the views were not taken into account.

5. A CVSA shall not be required to testify against his/her own will or without the knowledge of the parents/guardians who shall be invited to accompany CVSA except in the following circumstances;
 - a) The parent/guardian is the person accused of sexually abusing the CVSA.
 - b) The CVSA does not wish to be accompanied by the parent/guardian.
 - c) It is not in the best interest that the CVSA be accompanied by the parent/guardian.

Article 21 Competency Examination of CVSA

1. A competency examination of CVSA may be conducted only if the court determines that there are compelling reasons to do so which shall be recorded by the court. The best interests of CVSA shall be a paramount consideration in deciding whether or not to conduct a competency examination of a CVSA.
2. The competency examination is aimed at determining whether or not CVSA is able to understand questions that are put to him/her in a language that he/she understands and the importance of telling the truth. The age of CVSA alone is not a compelling reason to conduct a competency examination.
3. The court may appoint an expert for the purpose of conducting the competency examination. Only the following people shall be present at the competency examination of CVSA;
 - a) The magistrate or judge.
 - b) The prosecutor.
 - c) The lawyer for CVSA.
 - c) The support person.
 - d) The defence lawyer.
 - f) Any other persons including CVSA parents/guardians, guardian *ad litem*, whose presence is in the opinion of the court necessary for CVSA welfare.
4. Where the court does not appoint an expert, the competency examination shall be conducted by the trial magistrate/judge on the basis of questions submitted to court by the public prosecutor and the defence lawyer for that purpose only.
5. The questions shall be asked in a child-sensitive manner appropriate to the age and developmental level of the CVSA. The questions shall not be related to the issues

involved at the trial. The questions must focus on determining the ability of CVSA to understand simple questions and answer them truthfully.

6. Psychological or psychiatric examination to assess the competency of CVSA shall not be ordered unless compelling reasons to do so are demonstrated.
7. A competency examination shall be recorded by the court and shall not be repeated.

Article 22 Oath

1. CVSA who understands the consequence of taking an oath may testify under oath.
2. If CVSA does not understand the consequence of taking an oath, the court shall exercise its discretion to allow the CVSA to testify upon undertaking by CVSA to tell the truth.
3. No CVSA may be denied the opportunity to testify only on the basis of not understanding the nature of an oath.
4. A CVSA shall not be prosecuted for giving false testimony.

Article 23 Designation of a Support Person during the Trial

1. Before summoning CVSA to testify in court, the trial magistrate/judge shall verify that the CVSA is already receiving the necessary assistance from a support person.
2. If no support person has been designated to CVSA by the time he/she is required to give evidence in court, the magistrate/judge shall, in consultation with the CVSA Protection Unit appoint a support person to assist CVSA during the trial .
3. The court must in such cases give the support person adequate time to bond with CVSA and familiarize him/her with the case.
4. The trial magistrate/judge shall inform the support person of the date and venue of the trial.

Article 24 Waiting Areas

1. There shall be a waiting area for CVSA different from adult waiting room.
2. The court shall ensure that CVSA waiting area is equipped appropriately and is child-friendly.
3. CVSA waiting area shall not be visible to or accessible by accused persons.
4. Where necessary, the court shall ensure that CVSA wait in a different location away from the courtroom and invite them to court at the time of taking their testimony.

5. In order to minimize anxiety to CVSA, the court shall reduce the waiting period by prioritizing the taking of CVSA testimony.

Article 25 Emotional Support for CVSA

1. In addition to CVSA parents/guardian, lawyer or other appropriate person designated to provide assistance to CVSA; the court shall allow the support person to accompany CVSA throughout the trial in order to reduce anxiety and or stress to CVSA.
2. The court shall inform the support person that he/she may ask for recess whenever it becomes necessary in the interest of CVSA.
3. When it appears to the court that it is in the best interest of CVSA for anyone to be excluded from the testimony of CVSA, the court shall make such order.

Article 26 Courtroom Facilities

1. The trial magistrate/judge shall ensure that the courtroom arrangement and facilities are appropriate, adequate and suitable for the taking of CVSA testimony. These may include but not limited to a conference table court- set up, elevated seats for CVSA and any other requirements.
2. The courtroom arrangement must ensure that CVSA sit next to the parent, guardian and support person or CVSA lawyer during the court proceedings.
3. There shall be provided a one-way glass screening witness protection box to shield CVSA away from accused persons as they testify, but it must be such as to allow the accused person to see the CVSA and hear his/her testimony.

Article 27 Examination –in –chief, Cross-Examination and Re-examination.

1. Where there appears to be difficulty in CVSA giving oral evidence, the court shall consider measures stipulated in Article 28 in admitting CVSA evidence so long as the accused person is given adequate and appropriate opportunity to challenge the evidence of CVSA.
2. Where applicable and with due regard to the rights of the accused person, the trial magistrate/court shall not allow cross-examination of CVSA by the accused person.
3. Such cross-examination may be undertaken by the defence lawyer under the supervision of the trial court. The defence shall submit the questions for re-

examination to the court and the court may either ask the CVSA to respond to the questions or allow the defence counsel to ask the questions to the CVSA.

4. The trial magistrate/judge has a duty to protect CVSA from any intimidating, embarrassing or unnecessary cross-examination by the defence counsel. The role of the trial judge/magistrate in child sexual abuse trial is therefore one of an active arbitrator in balancing the rights of accused persons and protection of CVSA as opposed to the passive umpire.
5. Re-examination must be limited to matters that need clarification by CVSA only.
6. Where necessary, the court shall examine CVSA in court as part of the truth seeking process for purposes of clarity of issues. Such examination by the court must however balance the interest of CVSA and the rights of accused persons to a fair trial.

Article 28 Measures to protect the privacy and well-being of CVSA

Article 28(1) Presumption as to Child Sexual Abuse

Where a person is prosecuted for the offence of Child Sexual Abuse or aiding or attempting to commit the offence under the Sexual Offences Act of 2006, Children Act of 2001, the Penal Code or any other law, the court shall presume that such person has committed the offence unless the contrary is proved.

Article 28(2) The court, acting on its own, or at the request of CVSA, parents, guardians, support person, lawyer or any other person designated to take care of the interests of CVSA, may issue any of the following protective orders so as to protect the privacy, physical and mental well-being of CVSA and to prevent undue distress and secondary victimization;

- a) Expunge from the public records any names, addresses, workplaces, professions or any other information that could lead to the identity of CVSA.
- b) Forbid the defence lawyer from revealing the identity of CVSA or disclosing any material information that may lead to CVSA identity.
- c) Order the non-disclosure of any records that identify CVSA until such time as the court finds it appropriate do otherwise.
- d) Assign a pseudonym or a number to CVSA in which case the full names and date of birth of CVSA shall be revealed to accused person within reasonable period to enable him/her prepare the defence.

- e) Take measures to conceal physical features of CVSA while giving evidence so as to prevent distress or any harm to CSA. In such cases, CVSA may testify;
 - i. Behind an opaque shield.
 - ii. Use of image/voice alteration.
 - iii. Through examination at a different place from the courtroom, transmitted live to court by means of closed circuit television.
 - iv. By way of video-taped examination of CVSA prior to the hearing at investigation stage, attended by defence counsel who has opportunity to put questions to CVSA either at that time of video-taping the evidence or at a later date.
 - v. Through a qualified and appropriate intermediary, especially in cases of CVSA with special needs such as hearing, sight, speech and mental disability.
- f) Holding closed court sessions in private chambers.
- g) If CVSA refuses to give testimony in the presence of accused persons, or circumstances show that the presence of accused persons will intimidate CVSA and affect CVSA ability to testify and tell the truth, the court may order the accused persons to leave the court, but the defence lawyer must be present to ensure the evidence of CVSA is challenged and defence right to confrontation is effectively safeguarded.
- h) Allow recess during the testimony of CVSA.
- i) Scheduling hearings at times and days convenient and appropriate to the age and maturity of CVSA.
- j) Taking any other measures necessary to ensure CVSA testimony is admissible while taking into account the best interest of CVSA and the balance required with the rights of accused persons.

D-Assistance to CVSA in the Post-Trial Period

At the time of passing the sentence or acquitting the accused person, the court shall, where necessary make such protective orders as may be necessary to secure the safety and wellbeing of CVSA, in particular, the protection from accused person.

Where necessary CVSA shall through a court order continue to receive support in terms of counseling; emotional and any other necessary services from the CVSA Protection Unit until such time that CVSA is able to fully cope with the effect of the abuse.

Article 29 Right to Restitution and Compensation

1. Where the accused person is found guilty, the court shall assess any damage and injuries to CVSA and his/her property and order taking into account any bodily harm and psychological, emotional and mental consequences suffered by CVSA in assessing the amount of restitution and compensation which shall be payable by the state to CVSA.
2. Having paid CVSA the restitution and compensatory amount, the state shall recover the same from the accused person.

Article 30 Information about the Release of Accused Person from Prison

Where a person convicted of child sexual abuse is imprisoned, at least one month before his/her release, the prison authority shall inform the CVSA Protection Unit that shall get in touch with the CVSA and make any arrangements as to the safety of CVSA where necessary in consultation with CVSA and the family, especially in cases of incest to protect CVSA from any likely revenge attack by the ex-convict.

PART IV-MISCELLANEOUS

Article 31 Conflicts between this Act and any other procedural law in respect of children

This Act supersedes any other law on judicial procedure in matters involving children.

Article 32 Appeals

Any appeals arising from court decisions in respect of any matter under this Act may be filed at the High Court.

Article 33 Review of this Act

This Act shall be reviewed from time to time so as to ensure it is in conformity with international standards of procedure in matters involving children in the administration of justice.

7.5.2 Policy Reform

The study makes the following policy recommendations;

1. The Ministry for the time being in charge of justice matters to develop and implement policy guidelines on the trial of CSA cases to all criminal justice agencies which need to work as one system in order to take the evidence of CVSA at the earliest time possible. This would address the existing gap created by the independent workings of different criminal justice agencies namely; The Judiciary, Director of Public Prosecution Office, Children's Department, The Court, the Law Society of Kenya and the Probation Department.

The study recommends the establishment of a One Stop Psychosocial Support Service Center (PSSC) for CVSA to receive all the necessary services away from the police station. Such a center would ensure that the police carry out the investigation and record the CVSA statement from the center. Counseling services may also be availed to CVSA at the same center where medical attention and other psychosocial support services would be made available.

2. The Director of Public Prosecution should develop and implement policy guidelines for the prosecutions of child sexual abuse cases with particular emphasis on victim centered approach to detection, investigation and prosecution as well as post-testimony measures to safeguard the interest and welfare of CVSA. As a prosecution policy, CSA cases should be prosecuted by state counsel specially trained and skilled in child sexual abuse matters. There should be one such prosecutor per case without changing from one prosecutor to another in one case. In addition, there should be a special prosecutor who ensures and oversees detailed pre-trial investigation of CSA in line with the inquisitorial pre-trial procedure.
3. The Ministry for the time being in charge of gender, children and social development should develop a child sexual abuse policy guideline on the treatment of CVSA which should include social, emotional, psychological and spiritual support services right from the detection of the sexual abuse through to the court system and after the CVSA testify so as to ensure follow-up measures until the CVSA overcome the problems caused by the abuse.

4. There is need to establish a multidisciplinary CSA prevention committee. The committee should comprise of experts from several related disciplines relevant in this area. Members of the committee should meet regularly and discuss areas of co-operation in order to enhance CVSA's participation in the legal process. Such experts should include lawyers, doctors, child rights advocates, psychiatrists, psychologists, sociologists, social workers, teachers, parents, guardians, policy makers, civil society, academicians and researchers.

7.5.3 Administrative Reforms

The following administration recommendations can be taken by the specific government departments;

1. Effective and Efficient Service Delivery in CSA Cases

Several steps have been undertaken by the Judiciary under the Judiciary Transformation Framework¹⁷³⁸ to improve services to the members of the public. The transformation framework lists its mandate as:

- a. Expeditious administration of justice to all irrespective of status. In this respect CVSA, just like accused persons are entitled to expeditious disposal of cases without unnecessary and undue delays.
- b. Administration of justice without undue regard to procedural technicalities. This mandate is directly relevant to the study whose findings may assist the judiciary in achieving this mandate.
- c. Protect and promote the purpose and principle of the Constitution of Kenya. The preamble of the Constitution recognizes values of human rights, equality, social justice and the rule of law. Also recognized in the preamble is the commitment to the protection of the wellbeing of all citizens. The Bill of rights under the Constitution provides under Article 53(2) that children's best interest is of paramount importance in matters affecting them. The courts are therefore mandated to observe this principle and be guided by it in CSA trials.

In addition, Article 48 of the Constitution of Kenya obligates the state to ensure access to justice for all persons. The implication is that the state must address issues that hinder people's access to justice. In this respect, the Judiciary has a duty to reform the CSA trial procedure so as to enable CVSA access justice. Article 27(1) of the Constitution of Kenya provides that everyone is equal before the law and has a right to equal protection and

¹⁷³⁸*Op. cit* n 945.

equal benefit of the law. The courts therefore have a duty to apply the law in CSA trials in a manner that protects CVSA on an equal measure with the protection of the accused person through balancing of their rights. Article 27(2) of the Constitution of Kenya provides that equality includes the full and equal enjoyment of all rights and fundamental freedoms. CVSA's right to protection and decisions to be made in their best interest is therefore consistent with this constitutional provision and they should be given equal protection as the accused persons during the CSA trial that enables them to fully enjoy all their rights as discussed in this study.

The first pillar of the Judiciary Transformation Framework provides for a people focused delivery of justice. The aim is to create a legal system which ensures equality of all before the law and ensures that the concerns of parties who appear before the court are addressed. In this regard, there is need for CSA trial to be sensitive to the needs of CVSA. Another pillar of the judiciary transformation framework is the incorporation of Information Communication Technology in the administration of justice (telejustice). In this respect, CVSA trial should incorporate measures such as taking the testimony of CVSA through video recording, television link and teleconferencing as already discussed in chapter five.

2. The role of the National Council of the Administration of Justice in CSA Cases

The National Council on the Administration of Justice is a state corporation established under the Judicial Service Act (2011). The council's membership is comprised of the following: the Chief Justice, Cabinet Secretary responsible for matters relating to the judiciary, Attorney General, Director of Public Prosecution, the person in charge of the National Police Service, the Commissioner of Prisons, the Law Society of Kenya, the Principal Secretary in charge of the cabinet in public service, the Principal Secretary in charge of gender, children and women affairs, the Principal Secretary in charge of labour, environment and land, the Director of the Witness Protection Agency, the Director of Probation and Aftercare, Representatives of human rights organizations which deal with legal aid to women, representatives of human rights organizations dealing with legal aid to children, representatives from Non-Governmental Organizations dealing with human right issues and legal aid, representatives from the private sector.

Its core mandate is to ensure a coordinated, efficient, effective and consultative approach in the administration of justice. In addition, it is tasked with the formulation of policies,

monitoring, evaluation and review of administration of justice strategies. It is this council whose role it is to mobilize resources to ensure efficient administration of justice as stipulated by Section 35(1) (d) of the Judicial Service Commission Act. The council is therefore in a good position to ensure improved access to justice by CVSA. In this respect, some of the achievements made by the council since its launch in August 2011 include: the development of a policy on human rights and the implementation of the Witness Protection Act by establishing a witness protection agency. The council can therefore work with the courts and other stakeholders in the administration of justice to ensure reforms towards child sensitive court procedures in CSA cases.

The Commission on Administrative Justice created by Article 59(4) of the Constitution of Kenya and Commission on Administrative Justice Act (2011), has equally made some progress in the drafting of the National Legal Aid Bill and the Victims of Offences Bill which aim at improving the administration of justice in Kenya generally.

Despite the achievements by the National Council on Administration of Justice and the Commission on Administrative Justice, there is need for the Judiciary to build the capacity of all government officers involved in the trial of CSA cases. They need to be equipped with relevant skills in handling CVSA. Such skills include counseling and child psychology. However, specific officers need specific courses directly relevant to their role in CSA trial. Whereas judicial officers require skills on how to conduct CSA trial when CVSA testify, the police require specialized skills on detection, investigation and prosecution of CSA cases with special emphasis on interviewing of CVSA. Children officers and social workers require specialized training on psycho-social support services to CVSA.

3. Capacity of Officers by Judicial Service Commission and Law Society of Kenya

One of the functions of the Judicial Service Commission (JSC) under the constitution¹⁷³⁹ is capacity building of judicial officers which can be carried out at the Judicial Training Institute located in Nairobi. Equally, the Law Society of Kenya (LSK) can incorporate training on CSA trials for lawyers under the existing Continuing Legal Education (CLE) Programmes. The police department can also organize relevant training programs for prosecutors and investigators on child sexual abuse investigatory and prosecutorial skills

¹⁷³⁹*Op. cit* n 40 Article 172(1)(d) which obligates the Judicial Service Commission to develop and implement programmes for continuing education and training for judges and other judicial officers.

at the Criminal Investigation Department (CID) - Nairobi and the Police Training College at Kiganjo – Nyeri.

4. Public Legal Education by the Civil Society and the Government.

The study recommends public legal education on child sexual abuse to the members of the public to create awareness of the problem and responsibility to report the abuse to the police as well as collect and preserve evidence to be presented in court. In this regard both the civil society and the government can form a partnership towards public legal education on child sexual abuse issues in the society.

5. Practice Direction by Chief Justice.

There is need for the Chief Justice of the Republic of Kenya to issue practice direction on how child sexual abuse cases are to be prosecuted according to the law for purposes of protecting CVSA and creating uniformity of procedure at the children courts. Likewise it should be directed that section 176 of Criminal Procedure Code¹⁷⁴⁰ should not be used to reconcile cases of child sexual abuse.

6. Computerization of Children Courts

The study recommends the computerization of all the children courts and linkage with the relevant criminal justice agencies. This should involve the office of the Attorney General (AG), Office of the Director of Public Prosecutions (DPP), The Children Department, the Social Services Department, The Police, The Law Society of Kenya/Advocates and the Probation Department undertaking child sexual abuse cases. This will ensure that all the stakeholders in the trial of child sexual abuse cases are well informed and ready for the trial so as to reduce unnecessary delays and forge co-operation between the various agencies.

7. Incorporation of child sexual abuse related courses in University syllabi

Professions that ordinarily deal with children in the course of their work should include child sexual abuse as part of the courses taught in order to equip the professionals with the knowledge on CSA. Such professions include Law, Sociology and Social work, Teaching, Psychology, Medicine and Nursing amongst many others.

¹⁷⁴⁰*Op. cit* n 123.

8. Introduction of CSA information/awareness into the school teaching syllabus at primary level.

The study proposes that the ministry of education incorporate the teaching of CSA to students at both primary and secondary level to ensure that children know about CSA and what steps to take to prevent them from being victims of CSA. In the event that children become victims they will be well equipped with the knowledge of what to do.

9. The courts and the police should make use of Section 394 of the Criminal Procedure Code¹⁷⁴¹ to pay CVSA daily subsistence allowance (DSA) to enable them attend court to testify.

7.5.4. Research

The study recommends that the National Centre for Crime and Research should take the following steps:

1. Initiate collaborative, comprehensive and integrated research in the areas of psychology, sociology and law to find out the impact of the court testimony on CVSA development and wellbeing. Such interdisciplinary research will help formulate policy guidelines for the relevant government ministry/agency for the necessary after care service required by the CVSA after testifying in court.
2. Whereas this study focused on the court procedures, there is need to document and examine the procedures that CVSA go through while reporting CSA to the police. Other areas of research in this respect include: the suitability of criminal prosecution in incest cases.
3. The area of children and the law is one that requires the co-operation of various disciplines in order to understand and provide effective solutions to issues that affect the development of children and their ability to realize their full potential as envisaged by the UNCRC, ACRWC, The Constitution of Kenya and the Children Act. A multidisciplinary research in the area of children and the law is vital in the realization of enhanced access to justice by children as envisaged by Vision 2030.

¹⁷⁴¹ Ibid.

4. There is need to conduct a study on the implications of the legal process on families in incest cases.

7.6 Conclusion

The study sought to examine the adversarial legal system's court procedure's imbalance between the rights of accused persons and CVSA in CSA trial in Kenya. The aim was to explore the extent to which accused persons' rights can be limited. This is to ensure a balanced protection of the rights/interests of CVSA with those of accused persons within the context of procedural justice/ fairness to both accused persons and CVSA.

The study found the current adversarial procedure applied in CSA trial by the children's courts in Kenya to be inadequate in addressing the special needs of CVSA. The procedure is insensitive to children and not child friendly. It lacks a balance between the rights and need to protect CVSA while they testify and the rights of accused persons to a fair trial. Consequently, adversarial court procedure incapacitates many CVSA from effectively participating in the trial process by giving their best evidence coherently and confidently, in some cases resulting into a miscarriage of justice.

The study findings prove the hypothesis that the adversarial procedure of CSA trial in Kenya causes an imbalance between the rights of accused persons and the rights and concerns for the protection of CVSA, sometimes leading to a miscarriage of justice. The adversarial trial procedure of CSA in Kenya is therefore in need of reform to accommodate the rights and concerns for CVSA protection. This can be achieved through the enactment of a specific law to regulate CSA trial procedure as proposed by the study. However, legislative guarantee alone is insufficient to protect CVSA. It fails to address two important issues that necessitate constitutional amendment. The first inadequacy of legislative guarantee is the failure to achieve uniform implementation of rights of CVSA and accused persons. Secondly, legislative guarantee does not establish a standing for CVSA to assert their rights in court.

Fortunately, the Constitution of Kenya recognizes both accused person's rights and CVSA's rights. By implication therefore, both are constitutional rights. The setback in guaranteeing and implementing CVSA rights is the fact that accused person's rights are non-derogable. The implication is that CVSA's rights of protection are inferior to the

accused person's rights. The only way to cure this inadequacy is to amend Article 25(c) of the Constitution so as to provide that in CSA cases fair trial rights are not protected from derogation. It is only through such an amendment that the enactment and implementation of the proposed Child Sexual Abuse Procedure Act can achieve its goal of protecting CVSA. CVSA in Kenya have a right to be protected, treated with dignity, protected by the law and participate in the judicial process under the Constitution just like accused persons. All these rights are however violated by the adversarial criminal trial procedure.

While appreciating the rigours of amending a Constitution, it is reasonable to require that proponents of change demonstrate not only the need for change but the value of particular change that protects the vulnerable such as CVSA. In applying and interpreting provisions of the Constitution that protect all citizens, the CJS has lost an essential balance by failing to protect CVSA while safeguarding the rights of accused persons in CSA cases in Kenya.

It is important to emphasize that this study does not in any way vitiate the fair trial rights that protect those accused of crimes before court. While recognizing the importance of fair trial rights, the study equally argues that the adversarial trial system deprives the vulnerable CVSA of its protection. The essence of constitutional protection is that all citizens who appear before a judicial process must be accorded equal protection of the law. This is not the case with CVSA as shown by the study. The inequality that the law creates in CSA trial must be addressed. The constitution is the foundation of national freedom, a source of national spirit, and a guardian of national societal values which is to protect everyone without any discrimination whatsoever. However, the findings of this study have highlighted the miscarriage of justice occasioned in CSA cases due to the application of the classical adversarial procedure in CSA trial. The only way to address this is to amend Article 25(c) of the Constitution.

In conclusion, I wish to reiterate the words of Thomas Jefferson who said:

I am not an advocate for frequent changes in laws and constitutions. But laws and institutions must go hand in hand with the progress of the human

mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions changed, with the changes of circumstances, institutions must advance also to keep pace with the times.¹⁷⁴²

The study therefore achieved its set objectives and contributes additional knowledge needed to reform the Kenyan Judiciary by adopting best practices from other parts of the world so as to improve access to justice for children as envisaged in the Vision 2030.

¹⁷⁴² Available at <www.goodreads.com/quotes/94629-i-am-not-an-advocate-for-frequent-changes-in-laws> accessed 26 June 2013.

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APPENDICES

APPENDIX A: INFORMED CONSENT

Research Title: Implications of the Adversarial Legal System's Procedures to the Special Needs of Child Victims of Sexual Abuse: Balancing the Rights of Accused Persons and Child Victims of Sexual Abuse in Kenya.

Researcher: Scholastica Omondi (Ph.D. Candidate School of Law,
University of Nairobi.)

Please read (listen) to the following information.

1. The purpose of the research is to fulfill the requirements of the University of Nairobi, School of Law for the award of a degree of Doctor of Philosophy.
2. The aim of the research is to find out if the CJS addresses the special needs of CVSA.
3. The findings of the research will be used to make recommendations that may inform policy makers in improving the delivery of service and accessibility of justice to children.
4. The research will be carried out by observing and recording the procedures that the CVSA is taken through in the CJS.
5. It will also interview the selected CVSA to get their views about the procedures that they undergo in the CJS.
6. The views of criminal justice officers who interact with the CVSA in the CJS will also be sought.
7. Participation in this research is voluntary, and participants can withdraw from the study at any time without any consequences to them.
8. There are no risks whatsoever associated with the research
9. There is no material benefit for participating in this research, but the contributions by the respondents will improve the delivery of service and accessibility to justice by children.
10. Participants' responses, views and opinion will be received and held in strict confidence for the purposes of the research only.

11. The respondents will not be linked to the data collected in any way and their identities will not be revealed in any way at all.
12. A subject number will be assigned to the respondents and only that number will be used in the data collection forms, which will be locked in the researcher's office.

If you consent to participate, you will be interviewed by the researcher who will ask your views on various aspects of the criminal justice procedures and CVSA.

You may now ask any questions concerning the above points for clarification.

I HAVE READ & UNDERSTOOD THE NATURE AND PURPOSE OF THE RESEARCH AND VOLUNTARILY ACCEPT TO TAKE PART IN THE STUDY.

(Signature of subject/respondent)

Date

(PRINTED NAME OF RESPONDENT/SUBJECT GUARDIAN/PARENT

NAME OF RESEARCHER

APPENDIX B: INTERVIEW GUIDE FOR JUDGES, MAGISTRATES AND LAWYERS

SERIAL NO _____

COURT/STATION _____

1. Gender

(a) Male []

(b) Female []

2. Rank/designation?

3. What is your role in the trial of child sexual abuse cases?

4. In your view does the job require you to have specialized skills to handle cases of child sexual abuse?

5 a) Do you consider yourself adequately equipped with the required special skills?
(Probe for any relevant course or training received)

b) Explain

6. In your view what is the experience of the Child Victims of Sexual Abuse while testifying during:

A-Examination-in-chief

B-Cross-examination

C-Re-examination

7. From your experience and observation, are Child Victims of Sexual Abuse able to testify with ease under the existing procedures?

(a)Yes [] (b) No []

Please Explain Your Answer

8. What specific aspects of the court procedures present difficulty to the Child Victims of Sexual Abuse?

9. How does the difficulty in the procedures affect the child's ability to testify in court against the abuser?

10. How do the difficulties affect the need to protect CVSA?

11. Do you think that Child Victims of Sexual Abuse have any special needs that may need to be addressed by the CJS?

(i) Before the trial? (a) Yes [] (b) No []

Give reasons for your answer (state the special needs too)

(ii) During trials? (a) Yes [] (b) No []

Give reasons for your answer (state the special needs too)

(iii) After the trials? (a) Yes [] (b) No []

Give reasons for your answer (state the special needs too)

12. Are there any measures in place to deal with the special needs of Child Victims of Sexual Abuse during trials?

(a) Yes [] (b) No []

Kindly Explain Your Answer

13. What effect does the court procedure have on the special needs of Child Victims of Sexual Abuse?

14. Are there any advantages of the current court procedures in handling special needs of Child Victims of Sexual Abuse?

15. What are the challenges you experience in handling the Child Victims of Sexual Abuse during their court appearances?

16. Suggest ways of improving court procedures to enable Child Victims of Sexual Abuse testify with ease.

**APPENDIX C: INTERVIEW GUIDE FOR PROSECUTORS AND
INVESTIGATING OFFICERS**

SERIAL NO _____

COURT/STATION _____

1. *Gender*

(a) Male []

(b) Female []

2. Level of education:

3. Rank/designation?

4. What is the length of your experience in prosecuting/ investigating cases of CVSA?

5. What is your role in the trial of child sexual abuse cases?

6. How do you find CVSA as witnesses?

7. What would you say about your success rate in prosecuting/investigating cases CVSA?

8. What are the main challenges court procedures present to CVSA while in the witnesses box?

9. In your view does your job require any specialized skills to handle cases of child sexual abuse?

10 a) Do you consider yourself adequately equipped with the special skills? (*Probe for any relevant course or training received*)

b) Explain

11. Please describe the experience of the Child Victims of Sexual Abuse while testifying during:

A-Examination-in-chief

B-Cross-examination

C-Re-examination

12. From your experience and observation, are Child Victims of Sexual Abuse able to testify with ease under the existing procedures?

(a) Yes [] (b) No []

Please Explain Your Answer

13. What specific aspects of the court procedures present difficulty to the Child Victims of Sexual Abuse?

14. How does the difficulty in the procedures affect the child's ability to testify in court against the abuser?

15. How do the difficulties caused by court procedures affect the need to protect CVSA while testifying in court?

16. Do you think that Child Victims of Sexual Abuse have any special needs that require to be addressed by the CJS?

(i) Before the trial? (a) Yes [] (b) No []

Give reasons for your answer (state the special needs too)

(ii) During trials? (a) Yes [] (b) No []

Give reasons for your answer (state the special needs too)

(iii) After the trials? (a) Yes [] (b) No []

Give reasons for your answer (state the special needs too)

17. Are there any measures in place to deal with the special needs of Child Victims of Sexual Abuse during trials?

(a) Yes [] (b) No []

Kindly Explain Your Answer

18. What is the effect of court procedures on the special needs of Child Victims of Sexual Abuse?

19. Are there any advantages of the current court procedures in handling special needs of Child Victims of Sexual Abuse?

20. What are the challenges you experience in handling the Child Victims of Sexual Abuse during their court appearances?

21. Suggest ways of improving court procedures to enable Child Victims of Sexual Abuse testify with ease.

**APPENDIX D: QUESTIONNAIRE FOR SOCIAL WORKERS (NGOs
WORKING WITH CHILDREN) AND PARENTS/GUARDIANS**

Serial No _____

Station _____

1. Kindly indicate your *gender*

(a) Male [] (b) Female []

2. Please state your exact Age?

(a) Under 25 years []

(b) 26 – 35 years []

(c) 36-45 years []

(d) 46-55 years []

(e) Above 55 years []

3. What is your highest level of education?

(a) Below secondary

(b) Secondary

(c) Tertiary/College

(d) University

(e) Post graduate

4. What is your relationship with the Child Victim of Sexual Abuse?

(a) Social worker (b) parents (c) guardians

5. How did you learn that the child was sexually abused?

6. What immediate steps did you take upon receipt of the report on child's sexual abuse?

7. In your observation, how did the sexual abuse affect the child?

8. What special needs, if any, do you think the child developed as a consequence of the sexual abuse?

9. Who made the decision to take the matter to court?

10. (a) In general as you prosecute/investigate a child sexual abuse case, do you expect an acquittal or a conviction?

(b) Explain

11. How did the Child Victim of Sexual Abuse react when told that she/he would be required to testify in court?

12. What would you say was the child's expectation from court?

13. Have your expectations as well as those of the child been met?

(a) Yes [] (b) No []

Please explain your answer

15. So far the child has testified, what aspects of the court procedures were you satisfied with?

16. Please explain the reasons for your answer in 15 above.

17. What aspects of the court procedures were you **NOT** satisfied with?

18. Please explain in details the reasons for your answer in 17 above?

19. Please suggest ways of dealing with the issues you raised in 17 above.

20. Do you think that the gender of the criminal justice officers has any effect on the child's ability to testify in court in anyway?

(a) Yes [] (b) No []

Please explain your answer.

21. In your view, what can be done to ensure that the Child Victims of Sexual Abuse are protected by court as they testify?

23. Please give any other suggestion that may help to improve the CJS's response to the special needs of the Child Victim of Sexual Abuse.

APPENDIX E: INTERVIEW GUIDE FOR THE CHIEF JUSTICE

1. In your view, do CVSA receive justice from the courts under the current adversarial legal system?

Explain:

2. Since the Children Act came into operation in 2001, what special court procedures has the judiciary put in place to enable the CVSA testify with ease?

3. There is currently a call to reform the judiciary, what proposals are envisaged in procedural reforms in the children courts to cater for special needs of CVSA?

4. What is your view on procedural justice and restorative justice in addressing the special needs of CVSA?

5. What reforms would you recommend to be undertaken to help address the special needs of CVSA while testifying in courts?

APPENDIX F: INTERVIEW GUIDE FOR CHILDREN OFFICERS AND CHILD HELPLINE OFFICERS

Serial No _____

Station _____

1. Kindly indicate your *gender*

- (a) Male [] (b) Female []

2. Please state your exact Age?

(a) Under 25 years []

(b) 26 – 35 years []

(c) 36-45 years []

(d) 46-55 years []

(e) Above 55 years []

3. What is your highest level of education?

(a) Below secondary

(b) Secondary

(c) Tertiary/College

(d) University

(e) Post graduate

4. Designation?

- a) Children's Officer [] b) Child Helpline Officer []

5. How did you learn that the child was sexually abuse?

6. What immediate steps did you take upon receipt of the abuse report?

7. In your observation, how did the sexual abuse affect the child?

8. What special needs if any do you think the child developed as a consequence of the sexual abuse?

9. Who made the decision to take the matter to court?

10. What do you expect the court to do so as to protect CVSA while testifying in court?

11. How did the Child Victim of Sexual Abuse react when told that she/he would be required to testify in court?

12. What would you say was the child's expectation from court?

13. Have your expectations as well as those of the child been met?

(a) Yes [] (b) No []

Please explain your answer

15. So far the child has testified, what aspects of the court procedures were you satisfied with?

16. Please explain the reasons for your answer in 15 above.

17. What aspects of the court procedures were you **NOT** satisfied with?

18. Please explain in detail the reasons for your answer in 17 above?

19. Please suggest ways of dealing with the issues you raised in 17 above.

20. Are there any services that you provide to Child Victims of Sexual Abuse?

a) Yes [] b) No []

If Yes state which ones

21. What support do you provide to Child Victims of Sexual Abuse during testimony in courts?

22. Do you think that the gender of the criminal justice officers has any effect on the child's ability to testify in court in anyway?

(a) Yes [] (b) No []

Please explain your answer.

23. In your view, what can be done to ensure that the Child Victims of Sexual Abuse are protected by court as they testify?

24. Please give any other suggestion that may help to improve the CJS's response to the special needs of the Child Victim of Sexual Abuse.

APPENDIX G: INTERVIEW GUIDE FOR CHILD VICTIM OF SEXUAL ABUSE

1. Gender

(a) Male [] (b) Female []

2. Age: _____

3. How did you learn that you were to come to court?

4. What kind of people did you expect to find in court?

5. Were you told what you were coming to do in court?

(a) Yes [] (b) No []

If Yes, what was it that you were to come and do in court?

6. How did you feel when you learnt that you were to come to court? (*Probe for reasons for the answer*)

7. Who took you to court?

8. How would you describe the people you met in court?

(a) Friendly []

(b) Unconcerned []

(c) Hostile []

(d) Others (specify) []

9. Describe what happened when you reached court?

10. You told the court how you were sexually abused by the accused, can you describe your feelings as you went through the following procedures:

a. Entering the courtroom

b. The waiting period before you were asked to talk in court.

- c. Seeing the accused
- d. Taking the witness stand

- e. Taking the oath/affirmation

- f. Narrating the experience of the sexual abuse in court

- g. Being asked questions by the accused/lawyer

- h. Being asked questions by the prosecutor.

- i. The language used in court

- j. The court arrangement

- k. The people in court

11. Did you understand what was going on in court?

12. a) What did you like about the court process?

b) Please explain your answer above.

13. a) What did you not like about the court process?

b) Please explain your answer above.

14. Please give suggestions of what can be done to make CVSA testify confidently without any problem

15. Why do you think it was necessary that you tell the judge/magistrate about the sexual abuse?

16. What would you want the court to do with the accused?

17. What would you want the court to do for you?

18. Please describe what you think about the following people

- a. Judge/Magistrate
- b. Prosecutor
- c. Court clerk
- d. Accused
- e. Accused's lawyer
- f. Social Worker

APPENDIX H: FOCUS GROUP INTERVIEW GUIDE

My name is Scholastica Omondi. I am a student from the University of Nairobi, carrying out a research on the topic, **‘The Need For Special Procedures In Child Sexual Abuse Trial In Kenya: Balancing The Rights Of Accused Persons And Child Victims Of Sexual Abuse.**

The information derived from this interview will be useful to the criminal justice system in evaluating the effectiveness of the system’s child protection. Your cooperation and contribution is therefore of valuable importance to this study and I take this early opportunity to thank you all for accepting to be a participant in this study.

1. What is the effect of sexual abuse on the CVSA?
2. Are there any special needs that the CVSA develops as a result of the sexual abuse? If so list them and explain.
3. Identify and list in a chronological order the various procedures that a CVSA goes through in court?
4. Is the CVSA able to go through the stages with ease?
5. What are the difficulties that the CVSA may face at each stage of the court process?
6. How do the difficulties identified in 3 above affect the CVSA’s ability to testify in court?
7. What is the effect of the difficulties identified in 3 above, on the court’s attempts to protect CVSA from sexual abuse?
8. Does the current court procedure have any impact on the CVSA and their families in reporting of CSA to the police? Discuss
9. What measures can be taken to ensure that the court procedures respond adequately to the special needs of CVSA?

APPENDIX I: OBSERVATION CHECKLIST

1. The appearance and behaviour of the CVSA throughout the court from the time he/she enters the court.
2. Reaction of the child towards the accused.
3. The interaction between the CVSA and the prosecutor, the defence counsel and the magistrate.
4. The CVSA response to questions by the accused/advocate, prosecutor and magistrate.
5. The court environment and court layout
6. Body language of all the actors in court
7. Behaviour and expression of all the court actors
8. The choice of words used in reference to sexual organs and sexual assault by both the CVSA and other court actors.

APPENDIX J: LIST OF INSTITUTIONS VISITED

1. Child Legal Action Network -(CLAN) - Nairobi
2. CRADLE- Nairobi
3. ANNPCAN KENYA - Nairobi
4. ANNPCAN Africa – Nairobi
5. Women Rights Awareness Programme(WRAP) – Nairobi
6. CLEAR – Nairobi
7. Kituo Cha Sheria - Mombasa
8. Fida – Nairobi, Kisumu, Mombasa
9. Nairobi Children Remand Centre – Nairobi
10. Nairobi Children’s Home – Nairobi
11. Mama Ngina Children’s Home – Nairobi
12. Child Welfare Society of Kenya – Nairobi, Mombasa, Kisumu, Nakuru
and Eldoret
13. Arap Moi Children’s Home - Eldoret
14. Rift Valley Law Society - Nakuru
15. Nakuru Remand Home - Nakuru
16. New life children’s home – Kisumu, Nairobi
17. Nairobi Children’s court. Nairobi
18. Nakuru Children’s court - Nakuru
19. Mombasa Children’s court - Mombasa
20. Eldoret Children’s court - Eldoret
21. Kisumu Children’s court - Kisumu
22. Kilimani Police Station - Nairobi
23. Kamukunji Police Station - Nairobi
24. Central Police Station, Mombasa - Mombasa

APPENDIX K: LIST OF RESPONDENTS

Description	Place and date of Interview
Police Prosecutors and Investigators	
1. Male University graduate inspector of 3 years' experience.	Mombasa -11/10/2010
2. Male 'A' level chief inspector of 7 years' experience.	Mombasa- 11/10/2010
3. Female 'O' level graduate police constable of 2 years' experience.	Nakuru -11/10/2010
4. Male O level graduate police inspector of 5 years' experience.	Nakuru -11/10/2010
5. Male Senior Superintendent of police of 13 years' experience.	Kisumu - 12/10/2010
6. Female O level corporal of 8 years' experience.	Eldoret- 12/10/2010
7. Female O level police constable of 4 years' experience.	Eldoret- 12/10/2010
8. Male diploma superintendent of police of over 20 years' experience.	Eldoret- 12/10/2010
9. Female O level corporal of 6 years' experience.	Nairobi- 11/10/2010
10. Female O level constable of 1 year experience.	Nairobi -11/10/2010
11. Female O level inspector of police of 6 months experience	Nairobi-12/10/2010
12. Female O level senior sergeant of 5 years' experience.	Kisumu- 11/10/2010
13. Male O level corporal of 4 years' experience.	Mombasa- 12/10/2010
14. Female A level police constable of 1 year experience-	Nairobi-12/10/2010
15. Male senior sergeant of police of over 20 years' experience.	Kisumu 11/10/2010

Parents/Guardians

16. Female parent	Nakuru-15/10/2010
17. Female parent	Nakuru-15/10/2010
18. Female parent	Nairobi- 15/10/2010
19. Male parent	Nairobi- 15/10/2010
20. Male parent	Mombasa15/10/2010
21. Female parent	Mombasa-15/10/2010
22. Female guardian	Kisumu - 15/10/2010
23. Female guardian	Kisumu-15/10/2010
24. Male parent	Eldoret- 15/10/2010
25. Female parent	Eldoret-15/10/2010

Social workers/Children Officers/Help line Officer (Psycho-social support service providers)

26. Male postgraduate children officer	Nairobi-13/10/2010
27. Male postgraduate children officer	Mombasa-14/10/2010
28. Female University graduate children officer	Kisumu- 14/10/2010
29. Male postgraduate children officer	Eldoret-14/10/2010
30. Female University graduate children officer	Nakuru-13/10/2010
31. Female University graduate helpline officer	Nairobi-14/10/2010
32. Male O level social worker	Nakuru-13/10/2010
33. Female University graduate social worker	Nairobi-14/10/2010
34. Female University graduate social worker	Mombasa-14/10/2010
35. Female University graduate social worker	Eldoret-13/10/2010
36. Female University graduate social worker	Kisumu-14/10/2010

Lawyers, Judges and Magistrates

37. High Court Judge	Mombasa-18/10/2010
38. High Court Judge/Principle Judge of the High court	Nairobi- 8/11/2010
39. High Court Judge/Judge of the Interim Independent Constitutional Dispute Resolution Court	Nairobi-19/11/2010
40. High Court Judge/Head of Family Division	Nairobi- 2/11/2010
41. Court of Appeal Judge	Nairobi-5/11/2010.
42. Principal Magistrate	Kisumu- 22/10/2010
43. Principal Magistrate	Eldoret -22/10/2010
44. Senior Resident Magistrate	Nairobi-19/10/2010
45. Resident Magistrate	Mombasa-19/10/2010
46. Senior Resident Magistrate	Nakuru - 21/10/2010
47. Advocate for CVSA	Nakuru-18/10/2010
48. Advocate for CVSA	Kisumu-19/10/2010
49. Advocate for CVSA	Nairobi-20/10/2010
50. Advocate for CVSA	Mombasa-19/10/2010
51. Advocate for CVSA	Eldoret-22/10/2010
52 Advocate for accused	Mombasa-20/10/2010
53. Advocate for accused	Kisumu-18/10/2010
54. Advocate for accused	Nakuru-19/10/2010

55. Advocate for accused
56. Advocate for accused

Eldoret- 18/10/2010
Nairobi -19/10/2010

CVSA

57. Female 18 years old
58. Female 16 years old
59. Female 14 years old
60. Male 11 years old
61. Male 10 years old
62. Female 14 years old
63. Female 13 years old
64. Female 12 years old
65. Female 14 years old
66. Female 18 years old
67. Female 14 years old
68. Female 13 years old
69. Female 10 years old
70. Female 14 years old
71. Female 12 years old
72. Female 10 years old
73. Female 14 years old
74. Female 15 years old
75. Male 13 years old
76. Male 11 years old
77. Female 14 years old
78. Female 11 years old
79. Female 10 years old
80. Female 13 years old
81. Female 17 years old
81. Female 14 years old
82. Female 15 years old
83. Female 16 years old
84. Female 10 years old
85. Female 16 years old

Mombasa-8/10/2010
Mombasa-8/10/2010
Mombasa - 8/10/2010
Mombasa- 12/10/2010
Mombasa-12/10/2010
Mombasa- 13/10/2010
Mombasa -14/10/2010
Mombasa -16/10/2010
Mombasa- 16/10/2010
Mombasa-13/10/2010
Nakuru-8/11/2010
Nakuru-8/11/2010
Nakuru- 8/11/2010
Nakuru- 12/11/2010
Nakuru - 13/11/2010
Nakuru- 13/11/2010
Nakuru -14/11/2010
Nakuru - 14/11/2010
Nakuru- 14/11/2010
Eldoret-16/11/2010
Eldoret-16/11/2010
Eldoret-16/11/2010
Eldoret-16/11/2010
Eldoret-17/11/2010
Eldoret-17/11/2010
Eldoret -17/11/2010
Eldoret-18/11/2010
Eldoret 18/11/2010
Eldoret-19/11/2010

86. Female 17 years old	Kisumu-14/11/2010
87. Female 17 years old	Kisumu- 14/11/2010
88. Female 10 years old	Kisumu-14/11/2010
89. Female 15 years old	Kisumu 15/11/2010
90. Female 10 years old	Kisumu 15/11/2010
91. Female 13 years old	Kisumu-15/11/2010
92. Female 14 years old	Kisumu-17/11/2010
93. Female 16 years old	Kisumu-18/11/2010
94. Female 12 years old	Kisumu-18/11/2010
95. Male 13 years old	Kisumu-20/11/2010
96. Female 17 years old	Nairobi-15/11/2010
97. Female 10 years old	Nairobi-15/11/2010
98. Female 16 years old	Nairobi-16/11/2010
99. Female 11 years old	Nairobi-17/11/2010
100. Male 15 years old	Nairobi-18/11/2010
101. Female 13 years old	Nairobi-18/11/2010
102. Female 10 years old	Nairobi- 19/11/2010
103. Female 13 years old	Nairobi-19/11/2010
104. Female 12 years old	Nairobi 19/11/2010
105. Female 13 years old	Nairobi-20/11/2010

APPENDIX L: UNITED NATIONS GUIDELINES ON JUSTICE MATTERS INVOLVING CHILD VICTIMS AND WITNESSES OF CRIME

Adopted by the Economic and Social Council in its resolution 2005/20 of 22 July 2005

I. Objectives

1. The present Guidelines on Justice for Child Victims and Witnesses of Crime set forth good practice based on the consensus of contemporary knowledge and relevant international and regional norms, standards and principles.
2. The Guidelines should be implemented in accordance with relevant national legislation and judicial procedures as well as take into consideration legal, social, economic, cultural and geographical conditions. However, States should constantly endeavour to overcome practical difficulties in the application of the Guidelines.
3. The Guidelines provide a practical framework to achieve the following objectives:
 - a) To assist in the review of national and domestic laws, procedures and practices so that these ensure full respect for the rights of child victims and witnesses of crime and contribute to the implementation of the Convention on the Rights of the Child,¹ by parties to that Convention;
 - b) To assist Governments, international organizations, public agencies, nongovernmental and community-based organizations and other interested parties in designing and implementing legislation, policy, programmes and practices that address key issues related to child victims and witnesses of crime;
 - c) To guide professionals and, where appropriate, volunteers working with child victims and witnesses of crime in their day-to-day practice in the adult and juvenile justice process at the national, regional and international levels, consistent with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power;
 - d) To assist and support those caring for children in dealing sensitively with child victims and witnesses of crime.
4. In implementing the Guidelines, each jurisdiction should ensure that adequate training, selection and procedures are put in place to protect and meet the special needs of child victims and witnesses of crime, where the nature of the

victimization affects categories of children differently, such as sexual assault of children, especially girls.

5. The Guidelines cover a field in which knowledge and practice are growing and improving. They are neither intended to be exhaustive nor to preclude further development, provided it is in harmony with their underlying objectives and principles.
6. The Guidelines could also be applied to processes in informal and customary systems of justice such as restorative justice and in non-criminal fields of law including, but not limited to, custody, divorce, adoption, child protection, mental health, citizenship, immigration and refugee law.

II. Special considerations

7. The Guidelines were developed:
 - a) Cognizant that millions of children throughout the world suffer harm as a result of crime and abuse of power and that the rights of those children have not been adequately recognized and that they may suffer additional hardship when assisting in the justice process;
 - b) Recognizing that children are vulnerable and require special protection appropriate to their age, level of maturity and individual special needs;
 - c) Recognizing that girls are particularly vulnerable and may face discrimination at all stages of the justice system;
General Assembly resolution 44/25, annex.
 - d) Reaffirming that every effort must be made to prevent victimization of children, including through implementation of the Guidelines for the Prevention of Crime;²
 - e) Cognizant that children who are victims and witnesses may suffer additional hardship if mistakenly viewed as offenders when they are in fact victims and witnesses;
 - f) Recalling that the Convention on the Rights of the Child sets forth requirements and principles to secure effective recognition of the rights of children and that the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power sets forth principles to provide victims with the right to information, participation, protection, reparation and assistance;
 - g) Recalling international and regional initiatives that implement the principles of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of

Power, including the *Handbook on Justice for Victims and the Guide for Policy Makers on the Declaration of Basic Principles*, both issued by the United Nations Office for Drug Control and Crime Prevention in 1999;

- h) Recognizing the efforts of the International Bureau for Children's Rights in laying the groundwork for the development of guidelines on justice for child victims and witnesses of crime;
- i) Considering that improved responses to child victims and witnesses of crime can make children and their families more willing to disclose instances of victimization and more supportive of the justice process;
- j) Recalling that justice for child victims and witnesses of crime must be assured while safeguarding the rights of accused and convicted offenders;
- k) Bearing in mind the variety of legal systems and traditions, and noting that crime is increasingly transnational in nature and that there is a need to ensure that child victims and witnesses of crime receive equivalent protection in all countries.

III. Principles

- 8. As stated in international instruments and in particular the Convention on the Rights of the Child as reflected in the work of the Committee on the Rights of the Child, and in order to ensure justice for child victims and witnesses of crime, professionals and others responsible for the well-being of those children must respect the following cross-cutting principles:
 - a) *Dignity*. Every child is a unique and valuable human being and as such his or her individual dignity, special needs, interests and privacy should be respected and protected;
 - b) *Non-discrimination*. Every child has the right to be treated fairly and equally, regardless of his or her or the parent's or legal guardian's race, ethnicity, colour, gender, language, religion, political or other opinion, national, ethnic or social origin, property, disability and birth or other status;
 - c) *Best interests of the child*. While the rights of accused and convicted offenders should be safeguarded, every child has the right to have his or her best interests given primary consideration. This includes the right to protection and to a chance for harmonious development:

- i. *Protection*. Every child has the right to life and survival and to be shielded from any form of hardship, abuse or neglect, including physical, psychological, mental and emotional abuse and neglect;
 - ii. *Harmonious development*. Every child has the right to a chance for harmonious development and to a standard of living adequate for physical, mental, spiritual, moral ² Resolution 2002/13, annex. and social growth. In the case of a child who has been traumatized, every step should be taken to enable the child to enjoy healthy development;
- d) *Right to participation*. Every child has, subject to national procedural law, the right to express his or her views, opinions and beliefs freely, in his or her own words, and to contribute especially to the decisions affecting his or her life, including those taken in any judicial processes, and to have those views taken into consideration according to his or her abilities, age, intellectual maturity and evolving capacity.

IV. Definitions

9. Throughout these Guidelines, the following definitions apply:
- a) “Child victims and witnesses” denotes children and adolescents, under the age of 18, who are victims of crime or witnesses to crime regardless of their role in the offence or in the prosecution of the alleged offender or groups of offenders;
 - b) “Professionals” refers to persons who, within the context of their work, are in contact with child victims and witnesses of crime or are responsible for addressing the needs of children in the justice system and for whom these Guidelines are applicable. This includes, but is not limited to, the following: child and victim advocates and support persons; child protection service practitioners; child welfare agency staff; prosecutors and, where appropriate, defence lawyers; diplomatic and consular staff; domestic violence programme staff; judges; court staff; law enforcement officials; medical and mental health professionals; and social workers;
 - c) “Justice process” encompasses detection of the crime, making of the complaint, investigation, prosecution and trial and post-trial procedures, regardless of whether the case is handled in a national, international or

regional criminal justice system for adults or juveniles, or in a customary or informal system of justice;

- d) “Child-sensitive” denotes an approach that balances the child’s right to protection and that takes into account the child’s individual needs and views.

V. The right to be treated with dignity and compassion

10. Child victims and witnesses should be treated in a caring and sensitive manner throughout the justice process, taking into account their personal situation and immediate needs, age, gender, disability and level of maturity and fully respecting their physical, mental and moral integrity.
11. Every child should be treated as an individual with his or her individual needs, wishes and feelings.
12. Interference in the child’s private life should be limited to the minimum needed at the same time as high standards of evidence collection are maintained in order to ensure fair and equitable outcomes of the justice process.
13. In order to avoid further hardship to the child, interviews, examinations and other forms of investigation should be conducted by trained professionals who proceed in a sensitive, respectful and thorough manner.
14. All interactions described in these Guidelines should be conducted in a child-sensitive manner in a suitable environment that accommodates the special needs of the child, according to his or her abilities, age, intellectual maturity and evolving capacity. They should also take place in a language that the child uses and understands.

VI. The right to be protected from discrimination

15. Child victims and witnesses should have access to a justice process that protects them from discrimination based on the child’s, parent’s or legal guardian’s race, colour, gender, language, religion, political or other opinion, national, ethnic or social origin, property, disability and birth or other status.
16. The justice process and support services available to child victims and witnesses and their families should be sensitive to the child’s age, wishes, understanding, gender, sexual orientation, ethnic, cultural, religious, linguistic and social background, caste, socio-economic condition and immigration or refugee status,

as well as to the special needs of the child, including health, abilities and capacities. Professionals should be trained and educated about such differences.

17. In certain cases, special services and protection will need to be instituted to take account of gender and the different nature of specific offences against children, such as sexual assault involving children.
18. Age should not be a barrier to a child's right to participate fully in the justice process. Every child should be treated as a capable witness, subject to examination, and his or her testimony should not be presumed invalid or untrustworthy by reason of the child's age alone as long as his or her age and maturity allow the giving of intelligible and credible testimony, with or without communication aids and other assistance.

VII. The right to be informed

19. Child victims and witnesses, their parents or guardians and legal representatives, from their first contact with the justice process and throughout that process, should be promptly and adequately informed, to the extent feasible and appropriate, of, inter alia:
 - a) The availability of health, psychological, social and other relevant services as well as the means of accessing such services along with legal or other advice or representation, compensation and emergency financial support, where applicable;
 - b) The procedures for the adult and juvenile criminal justice process, including the role of child victims and witnesses, the importance, timing and manner of testimony, and ways in which "questioning" will be conducted during the investigation and trial;
 - c) The existing support mechanisms for the child when making a complaint and participating in the investigation and court proceedings;
 - d) The specific places and times of hearings and other relevant events;
 - e) The availability of protective measures;
 - f) The existing mechanisms for review of decisions affecting child victims and witnesses;
 - g) The relevant rights for child victims and witnesses pursuant to the Convention on the Rights of the Child and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

20. In addition, child victims, their parents or guardians and legal representatives should be promptly and adequately informed, to the extent feasible and appropriate, of:

- a) The progress and disposition of the specific case, including the apprehension, arrest and custodial status of the accused and any pending changes to that status, the prosecutorial decision and relevant post-trial developments and the outcome of the case;
- b) The existing opportunities to obtain reparation from the offender or from the State through the justice process, through alternative civil proceedings or through other processes.

VIII. The right to be heard and to express views and concerns

21. Professionals should make every effort to enable child victims and witnesses to express their views and concerns related to their involvement in the justice process, including by:

- a) Ensuring that child victims and where appropriate witnesses are consulted on the matters set forth in paragraph 19 above;
- b) Ensuring that child victims and witnesses are enabled to express freely and in their own manner their views and concerns regarding their involvement in the justice process, their concerns regarding safety in relation to the accused, the manner in which they prefer to provide testimony and their feelings about the conclusions of the process;
- c) Giving due regard to the child's views and concerns and, if they are unable to accommodate them, explain the reasons to the child.

IX. The right to effective assistance

22. Child victims and witnesses and, where appropriate, family members should have access to assistance provided by professionals who have received relevant training as set out in paragraphs 40 to 42 below. This may include assistance and support services such as financial, legal, counseling, health, social and educational services, physical and psychological recovery services and other services necessary for the child's reintegration. All such assistance should address the child's needs and enable him or her to participate effectively at all stages of the justice process.

23. In assisting child victims and witnesses, professionals should make every effort to coordinate support so that the child is not subjected to excessive interventions.
24. Child victims and witnesses should receive assistance from support persons, such as child victim/witness specialists, commencing at the initial report and continuing until such services are no longer required
25. Professionals should develop and implement measures to make it easier for children to testify or give evidence to improve communication and understanding at the pre-trial and trial stages. These measures may include:
 - a) Child victim and witness specialists to address the child's special needs;
 - b) Support persons, including specialists and appropriate family members to accompany the child during testimony;
 - c) Where appropriate, to appoint guardians to protect the child's legal interests.

X. The right to privacy

26. Child victims and witnesses should have their privacy protected as a matter of primary importance.
27. Information relating to a child's involvement in the justice process should be protected. This can be achieved through maintaining confidentiality and restricting disclosure of information that may lead to identification of a child who is a victim or witness in the justice process.
28. Measures should be taken to protect children from undue exposure to the public by, for example, excluding the public and the media from the courtroom during the child's testimony, where permitted by national law.

XI. The right to be protected from hardship during the justice process.

29. Professionals should take measures to prevent hardship during the detection, investigation and prosecution process in order to ensure that the best interests and dignity of child victims and witnesses are respected.
30. Professionals should approach child victims and witnesses with sensitivity, so that they:
 - a) Provide support for child victims and witnesses, including accompanying the child throughout his or her involvement in the justice process, when it is in his or her best interests;

- b) Provide certainty about the process, including providing child victims and witnesses with clear expectations as to what to expect in the process, with as much certainty as possible. The child's participation in hearings and trials should be planned ahead of time and every effort should be made to ensure continuity in the relationships between children and the professionals in contact with them throughout the process;
- c) Ensure that trials take place as soon as practical, unless delays are in the child's best interest. Investigation of crimes involving child victims and witnesses should also be expedited and there should be procedures, laws or court rules that provide for cases involving child victims and witnesses to be expedited;
- d) Use child-sensitive procedures, including interview rooms designed for children, interdisciplinary services for child victims integrated in the same location, modified court environments that take child witnesses into consideration, recesses during a child's testimony, hearings scheduled at times of day appropriate to the age and maturity of the child, an appropriate notification system to ensure the child goes to court only when necessary and other appropriate measures to facilitate the child's testimony.

31. Professionals should also implement measures:

- a) To limit the number of interviews: special procedures for collection of evidence from child victims and witnesses should be implemented in order to reduce the number of interviews, statements, hearings and, specifically, unnecessary contact with the justice process, such as through use of video recording;
- b) To ensure that child victims and witnesses are protected, if compatible with the legal system and with due respect for the rights of the defence, from being cross-examined by the alleged perpetrator: as necessary, child victims and witnesses should be interviewed, and examined in court, out of sight of the alleged perpetrator, and separate courthouse waiting rooms and private interview areas should be provided;
- c) To ensure that child victims and witnesses are questioned in a child-sensitive manner and allow for the exercise of supervision by judges, facilitate testimony and reduce potential intimidation, for example by using testimonial aids or appointing psychological experts.

XII. The right to safety

32. Where the safety of a child victim or witness may be at risk, appropriate measures should be taken to require the reporting of those safety risks to appropriate authorities and to protect the child from such risk before, during and after the justice process.
33. Professionals who come into contact with children should be required to notify appropriate authorities if they suspect that a child victim or witness has been harmed, is being harmed or is likely to be harmed.
34. Professionals should be trained in recognizing and preventing intimidation, threats and harm to child victims and witnesses. Where child victims and witnesses may be the subject of intimidation, threats or harm, appropriate conditions should be put in place to ensure the safety of the child. Such safeguards could include:
 - a) Avoiding direct contact between child victims and witnesses and the alleged perpetrators at any point in the justice process;
 - b) Using court-ordered restraining orders supported by a registry system;
 - c) Ordering pre-trial detention of the accused and setting special “no contact” bail conditions;
 - d) Placing the accused under house arrest;
 - e) Wherever possible and appropriate, giving child victims and witnesses protection by the police or other relevant agencies and safeguarding their whereabouts from disclosure.

XIII. The right to reparation

35. Child victims should, wherever possible, receive reparation in order to achieve full redress, reintegration and recovery. Procedures for obtaining and enforcing reparation should be readily accessible and child-sensitive.
36. Provided the proceedings are child-sensitive and respect these Guidelines, combined criminal and reparations proceedings should be encouraged, together with informal and community justice procedures such as restorative justice.
37. Reparation may include restitution from the offender ordered in the criminal court, aid from victim compensation programmes administered by the State and damages ordered to be paid in civil proceedings. Where possible, costs of social and educational reintegration, medical treatment, mental health care and legal services

should be addressed. Procedures should be instituted to ensure enforcement of reparation orders and payment of reparation before fines.

XIV. The right to special preventive measures

38. In addition to preventive measures that should be in place for all children, special strategies are required for child victims and witnesses who are particularly vulnerable to recurring victimization or offending.
39. Professionals should develop and implement comprehensive and specially tailored strategies and interventions in cases where there are risks that child victims may be victimized further. These strategies and interventions should take into account the nature of the victimization, including victimization related to abuse in the home, sexual exploitation, abuse in institutional settings and trafficking. The strategies may include those based on government, neighbourhood and citizen initiatives.

XV. Implementation

40. Adequate training, education and information should be made available to professionals, working with child victims and witnesses with a view to improving and sustaining specialized methods, approaches and attitudes in order to protect and deal effectively and sensitively with child victims and witnesses.
41. Professionals should be trained to effectively protect and meet the needs of child victims and witnesses, including in specialized units and services.
42. This training should include:
 - a) Relevant human rights norms, standards and principles, including the rights of the child;
 - b) Principles and ethical duties of their office;
 - c) Signs and symptoms that indicate crimes against children;
 - d) Crisis assessment skills and techniques, especially for making referrals, with an emphasis placed on the need for confidentiality;
 - e) Impact, consequences, including negative physical and psychological effects, and trauma of crimes against children;
 - f) Special measures and techniques to assist child victims and witnesses in the justice process;
 - g) Cross-cultural and age-related linguistic, religious, social and gender issues;

- h) Appropriate adult-child communication skills;
 - i) Interviewing and assessment techniques that minimize any trauma to the child while maximizing the quality of information received from the child;
 - j) Skills to deal with child victims and witnesses in a sensitive, understanding, constructive and reassuring manner;
 - k) Methods to protect and present evidence and to question child witnesses;
 - l) Roles of, and methods used by, professionals working with child victims and witnesses.
43. Professionals should make every effort to adopt an interdisciplinary and cooperative approach in aiding children by familiarizing themselves with the wide array of available services, such as victim support, advocacy, economic assistance, counseling, education, health, legal and social services. This approach may include protocols for the different stages of the justice process to encourage cooperation among entities that provide services to child victims and witnesses, as well as other forms of multidisciplinary work that includes police, prosecutor, medical, social services and psychological personnel working in the same location.
44. International cooperation should be enhanced between States and all sectors of society, both at the national and international levels, including mutual assistance for the purpose of facilitating collection and exchange of information and the detection, investigation and prosecution of transnational crimes involving child victims and witnesses.
45. Professionals should consider utilizing the present Guidelines as a basis for developing laws and written policies, standards and protocols aimed at assisting child victims and witnesses involved in the justice process.
46. Professionals should be enabled to periodically review and evaluate their role, together with other agencies in the justice process, in ensuring the protection of the rights of the child and the effective implementation of the present Guidelines.