WITNESS PROTECTION IN KENYA

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the University of Nairobi

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DECLARATION

I declare that this dissertation is my original work and has not been submitted for examination in any other institution or university.

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Date: 15th May 2014

G34/36520/2010

This dissertation has been submitted for examination with my approval as the University supervisor.

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DEDICATION

To my mum Jane Collins, sister Pauline, brothers Hillary,

Godwin and Ken

and to my fiancée Percy Mutuku;

from whom my strength and determination are sourced.
ACKNOWLEDGMENT

I owe thanks to a lot of people who offered their support to me in writing this dissertation. Most importantly I would like to acknowledge the Almighty God for His grace, blessings and providence throughout this period. I am thankful to Mr. Ogwang for his mentoring. He provided valuable support and helped me organize my thoughts. He made this though journey easier for me with his overall considerate approach.

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Thank you.
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<td>AU</td>
<td>African Union</td>
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<tr>
<td>CIPEV</td>
<td>Commission of Inquiry on Post-Election Violence</td>
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<td>CPC</td>
<td>Criminal Procedure Code</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ODM</td>
<td>Orange Democratic Movement</td>
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<td>PEV</td>
<td>Post-Election Violence</td>
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<td>PNU</td>
<td>Party of National Union</td>
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<td>SOA</td>
<td>Sexual Offences Act</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNODC</td>
<td>United Nations on Drugs and Crime</td>
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<td>US</td>
<td>United States of America</td>
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<td>VWU</td>
<td>Victims and Witnesses Unit</td>
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CHAPTER 1: INTRODUCTION

1.1 Introduction and Background of Study

Justice is a fundamental right that every society should enjoy for it to function properly. It often involves acting in a legal moral way that ensures fairness to those around. In the criminal judicial systems, justice often involves making perpetrators of crime accountable for their actions. Courts depend on the cooperation of both victims and witnesses of crime in order to achieve justice.¹ This cooperation if achieved, often assist courts in punishing lawbreakers, and in so doing deter future criminal activities. However, it does not mean the courts always depend solely on witness accounts. The prosecutors are still charged with the onerous task of gathering evidence to prove the accused person’s liability for the alleged crime committed.

With the law providing guidelines as to the procedure of handling cases in court, judges need witness accounts to help them ascertain the facts of any given case. Witness testimony is one of the oldest forms of evidence in criminal cases. This shows how important witnesses are in determining the outcome of a criminal case. In Kenya, several cases are thrown out of court due to lack of witnesses or witnesses who are reluctant to appear before the courts to give their testimonies. This often acts as a bottleneck in the judicial process at the trial stage. The lack of witnesses is largely attributed to the fact that potential witnesses opt not to give their statements due to them being affected mentally and physically by their experiences or them being threatened and/or intimidated with harm or injury should they give their

¹ The free online dictionary defines a witness as a person who testifies under oath in a trial with first hand or expert evidence useful in a lawsuit.
evidence in a court of law. These threats are often advanced by persons interested in the case either as the accused persons or third parties to the case. Sometimes the threats may be so serious to the extent that they endanger the lives of the witnesses. This in itself is in contravention of Article 26 of the Constitution of Kenya that provides the right to life for every person. Where a case is thrown out due to witnesses unwilling to testify, an injustice is committed as the perpetrators of the crimes are not made accountable for their actions.

The need to ensure that witnesses are comfortable to give their testimonies in court gave rise to the introduction of Witness Protection Programs to protect vulnerable witnesses and hence encourage them to testify.

These programs deal with the protection of witnesses, their family and other related persons who are threatened or who are vulnerable, before, during or after trial. This protection is often provided by the state from which the witness is a citizen, through agencies and programs put in place. The main reason for the existence of the witness protection program in any jurisdiction is for the government to give assurance to witness who feel threatened or vulnerable that their safety is guaranteed in exchange for them to testify or give their statements against perpetrators of crime. However, it

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2 The Constitution of Kenya 2010, Chapter Four: The Bill of Rights

3 Witness Protection Program is defined in the UNODC’S Good practices for the protection of witnesses in criminal proceedings involving organized crime of 2008 as a formally established covert programme subject to strict admission criteria that provides for the relocation and change of identity of witnesses whose lives are threatened by a criminal group because of their cooperation with law enforcement authorities

4 Witnesses in this case refer to both actual witnesses and potential witnesses
should be noted that witness protection should not be used as a motivation to testify, but rather to remove the fear experienced by a witness. In addition, the witness in question should give consent to be provided with the witness protection instruments. Where no consent is recorded, protection will be a mere waste of resource to the state.

Witness protection can be traced back to the 1970s, when it was first introduced in the United States of America as an additional help to aid in dismantling organized crimes in the form of Mafias. Members of these Mafias faced death if they broke their code of silence and cooperated with authorities. This convinced the United States Department of Justice that protection of witnesses was essential, leading to the introduction of the first witness protection program, which was extended to Joseph Valachi, a member of the Italian-American Mafia in exchange for him to break his silence.\(^5\)

Today, a number of countries have adopted Witness Protection as a tool used in combating organized crimes as well as offering protection to other witnesses. In Kenya, the Witness Protection Act was enacted in 2006 and further amended in 2010. The act establishes a Witness Protection Agency whose objective is to provide a framework and procedures for giving special protection on behalf of the state to persons in possession of important information and who are facing a potential risk or

intimidation due to their cooperation with prosecution and law.\textsuperscript{6} The Witness Protection Agency was established in 2009 by the 2010 Act as an attempt to offer protection to victims and witnesses of the infamous Post Election Violence experienced in the year 2007/2008. This was a milestone and a great attempt by the Kenyan government to assure victims and witnesses of their protection.

1.2 Statement of the Problem

The Witness Protection Agency is established under the 2010 Witness Protection Act. There has been concerns that although it was established in 2009, very few people know of its existence, which raises the question of whether or not its achieving its objective of offering protection to witnesses who are in danger or who face threats from accused persons. The 2010 Act also lacks certain important provisions such as including in its definition of a witness the defence witness.

The issue of determination therefore, is whether the Witness Protection Agency in Kenya is well functional. In other words; the matter to be determined is whether the Agency is operating effectively and efficiently. Another issue is whether the Witness Protection Act 2010 is well drafted to sufficiently provide guidelines for matters concerning witness protection in Kenya. The final question is whether Kenya can adopt measures from other jurisdictions to improve the performance and effectiveness of its Witness Protection Agency.

\textsuperscript{6}Witness Protection Act, Cap 79, Section 3B(1)
1.3 Justification of Study

Every individual deserves to be protected by the state from illegal threats. Witnesses more so should be provided with this protection if the courts want their help in determining criminal cases.

In the 2007/2008 Post-election violence experienced in Kenya, a number of crimes were committed. At the same time, there was a number of witnesses who witnessed these crimes and who could have been great assets in helping the courts bring the perpetrators of these crimes to justice. However, a number of these potential witnesses are reported to have fled the country due to fear.\footnote{https://www.amnesty.org accessed 14\textsuperscript{th} January 2014} This is a classic example of how Kenya’s judicial system is missing out on potential witnesses.

Having merely a witness protection program is not enough. It should be well functional and should receive enough support from the government. The Witness Protection Agency in Kenya is known to very few Kenyans. There has been limited efforts to create public awareness of its presence in the Country as well as its functions.

Being a fairly new concept in Kenya, very limited material with respect to witness protection is available. The Witness Protection Act 2010 is the only major document available. It is on this basis that this paper will attempt to critically examine the Witness Protection Agency and the Witness Protection Act. The paper will also compare Kenya’s Witness Protection Agency with that of the United States who were
the pioneer of this programme. In addition, the paper will propose measures that Kenya can adopt to improve the efficiency and effectiveness of its Witness Protection Agency. The paper will also look at the provisions on Witness Protection contained in the Rome Statute to which Kenya is a signatory.

1.4 Theoretical Framework

Witness protection is founded on human rights, morality and acts done to promote good in the society. The good acts referred to in this case include the giving of testimony by a witness in a court of law. This paper will therefore look at various theories as an attempt to explain this basis.

1.4.1 Deontology Principles

Deontology deals with duty, moral obligation and right action. It often focuses on the acts of individuals rather than the consequences of such actions.

The deontological principles were first explained by Immanuel Kant (1724-1804), an 18th-century German philosopher and founder of critical philosophy, whose ethics were much influenced by Christianity as well as by the Rationalism of the Enlightenment. Kant held that nothing is good without qualification except a good will, which is one that wills to act in accord with the moral law and out of respect for that law, rather than out of natural inclinations.\(^8\)

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\(^8\) Immanuel, Kant, First Section: Transition from the Common Rational Knowledge of Morals to the Philosophical, Groundwork of the Metaphysic of Morals, 1785
According to Kant, a person should always act in such a way that the maxim of their action should become a universal law and they should act so that they treat humanity, both in their own person and in that of another, always as an end and never merely as a means.  

The deontology principles therefore focus on an action rather than its consequence on other people. It does not have a middle ground and therefore an act is either wrong or right regardless of the intentions of the person doing it.

Under witness protection, a witness who offers to testify against an accused person is acting in a morally right way. The aim is always to help the prosecution or defense in their case. The fact remains that by giving their testimony they are doing the right thing. However, the fact that this principles do not look at the consequences of actions contradicts the fact that the aim of most actions including witness protection is to offer the witnesses a safe haven where they feel safe enough to give their testimonies. Looking merely at the protection aspect is not enough.

1.4.2 Legal Positivism

The theory of legal positivism is a jurisprudence theory that was first advocated for by Jeremy Bentham (1748-1832) and John Austin (1790-1859). In the 20th century, Herbert Lionel Adolphus Hart (H.L.A Hart) defended the positivist theory.

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9Immanuel, Kant, First Section: Transition from the Common Rational Knowledge of Morals to the Philosophical, Groundwork of the Metaphysic of Morals, 1785

10Modern legal positivism was further propelled by philosophers and theorists Thomas Hobbes (1588-1679) and David Hume (1711-1776)
This theory is built on the belief that what law is should be kept separate from what the law should actually be. John Austin puts it as “the existence of the law is one thing; its merits and demerits are another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it varies from the text, by which we regulate our approbation and disapprobation”\(^{12}\). According to Austin, laws are command issued by sovereigns to their juniors, backed by sanctions.\(^{13}\)

From this statement, it is clear that Austin believes that what a law in existence should be followed whether or not it fits into our expectations or whether or not it contains certain short falls. The fact that it is in existence is enough for it to be followed to the latter.

Bentham further insisted on the distinction between what law is and law as morality, without characterizing morality by reference to God but only by reference to the principles of utility. At this point, it can be noted that the positive theory contradicts the natural law theory, which ties morality to God. According to Thomas Aquinas, an advocate for the Natural theory, human laws are genuine laws only if they do not contradict divine or natural laws.


\(^{13}\) The command theory
Hart later addressed Austin's command theory by finding that such an approach was unable to distinguish pure power from institutions and rules accepted by the community.\(^\text{14}\) He later made a distinction of a person feeling obliged to act and a person having an obligation to act. According to him, one acts because one believes that one ought to do so, not because one fears the consequences of acting in a contrary way.\(^\text{15}\)

The positivism theory applies to this paper as it recognizes the importance of laws in the society and the importance of having those laws obeyed and followed. However, that application is only to the extent of recognizing the importance of laws but does not to the point of separating the law as it is and the law as morality. This is because witness protection depends largely on morality that requires the rights of everyone to be respected.

### 1.4.3 Natural Law Theory

Natural law theory was advocated by Aristotle\(^\text{16}\) and further propelled by Thomas Aquinas. The natural law theory addresses morality and often takes into consideration the interests of God. It addresses moral duties and natural rights.\(^\text{17}\) It proposes that law should be governed by morality and what is good for the entire society.

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\(^\text{14}\) Hart, Positivism and The Separation of Law and Morality, 1958, p. 603

\(^\text{15}\) Hart, The Concept of Law, 1961, p.82-86

\(^\text{16}\) An ancient Greek philosopher and scientist born in 388 BCE and died 322 BCE

\(^\text{17}\) William Sweet, Philosophical Theory and the Universal Declaration of Human Rights, 2003, pg 19
John Finnis, a prominent living legal philosopher, argues that natural law is not based on the human nature but rather in the notion of what is evidently good for human beings. He explains human rights based on centrality of duties and argues that a person should not act in a manner that damages the basic good, regardless of how beneficial the result will be. Human rights arise from respecting these goods and are subject to no exceptions. According to Finnis, these rights to which there are no exceptions include: not to be deprived life, not to be deceived in factual communications, not to be condemned on false charges, not to be deprived the capacity to procreate and to be accorded respectful consideration to any assessment of the common good.

Natural law forms the basis of human rights. Human rights are those rights that are universal to the entire human race and are applicable worldwide. They include right to life, security, liberty, equality before the law and freedom of movement and residence. Thomas Aquinas distinguishes aspects of nature to be self-preservation, sexual responsibility, duty to educate the young, duty to strive for knowledge of God and to maintain amicable relationships with fellow human beings. According to him, human beings are inclined to stay in being and natural beings generally are inclined to

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18 Finnis, Natural Law and Natural Rights, 1980, pg 33
19 Finnis, Natural Law and Natural Rights, 1980, pg 255
20 Finnis, Natural Law and Natural Rights, 1980, pg 255
21 Universal Declaration of Human Rights, adopted and proclaimed by the UN through resolution 217(III) in 1948
reproduce and inclined to knowledge and social order.\textsuperscript{22} It is therefore clear that human rights emerged from natural law basing on the fact that the aspects of nature as described by Aquinas are closely related to the current human rights in place.

Witness protection and human rights are interrelated. The mere fact that a witness needs protection implies that a certain human right to which he or she is entitled is being threatened. In most cases, it is often the right to life and freedom of movement.

This paper will therefore apply the natural law theory as the main theory because it contains the concept of human rights, which is a fundamental aspect of witness protection.

1.5 Research Objectives

General Objective

The main objective of this study will be to study the witness protection program in Kenya to evaluate how effective and efficient it is.

Specific objective

The specific objective of this paper is to analyse the Witness Protection Act and the Witness Protection Agency and to identify the factors affecting the operations of the Witness Protection Agency in Kenya.

The paper will also recommend various changes that may be incorporated into the Act to ensure it contains all the relevant provisions with respect to witness protection

\textsuperscript{22} Thomas Aquinas' Summa Theologica
and to propose measures that can be adopted to improve the performance of the
Agency.

1.6 Research Question

This paper will attempt to answer the following questions:

1. What important provisions are in the Witness Protection Act?

2. What are the structure and function of the Witness Protection Agency in
Kenya?

3. What factors limit the operations of the Witness Protection Agency in Kenya?

4. How does Kenya compare with the USA with respect to the Witness
Protection program in place?

5. What measures can Kenya adopt to improve the efficiency and effectiveness
of the Witness Protection Agency?

1.7 Hypothesis

This paper will proceed on the following hypothesis:

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

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

witness protection programs.

1.8 Research Methodology

Information contained in this paper will be collected mainly through library-based research. Data will be collected from earlier publications by various authors. The study will also adopt information from legal instruments such as acts.

1.9 Limitations

This paper will be limited to Criminal law and the criminal judicial system. This is due to the fact that the majority of cases in which witnesses require witness protection are often criminal cases. In addition to studying the Witness Protection Agency in Kenya, this paper will be limited to studying the witness protection program of the United States of America in order to compare it with Kenya. The paper will also be limited to, information gathered from books and journals found in the University of Nairobi School of Law library and the Milimani Law court library, materials found online as well as observations made in the Kenyan court process.

1.10 Literature Review

Being a fairly new concept in Kenya, there are very limited material on the subject of witness protection in Kenya. Majority of the literature available are newspaper articles which focus majorly on witness protection of the Kenyan witnesses in the cases at the International Criminal Court, as opposed to witness protection in Kenya.
"Turning Pebbles" Evading Accountable for Post-Election Violence in Kenya by Neela Ghoshal, Human Rights Watch

This was a report prepared after the occurrence of the post-election violence in Kenya during the disputed 2007/2008 elections and was based on a research done between February and November 2011 through interviews with victims of the violence, prosecutors, defense lawyers, police officers and judges among others. This report is important to this dissertation as it identifies the major weaknesses within the Kenyan criminal judicial system that contributed to the absence of the operative witness protection system in Kenya as well as point out how the government applied half-hearted efforts towards bringing perpetrators of the crimes committed during the violence to account for their actions. The report further points out court cases related to the post-election violence that were withdrawn due to the unwillingness of witnesses to testify for fear of their lives among other reason.

However, this report does not include information related to the Witness Protection Agency formed in 2011.

Rome Statute of International Criminal Court

This is one of the major international instruments that govern crimes against humanity. It is relevant to this paper because Kenya is a signatory to it and it contains provisions on the protection of witnesses. It is also relevant because currently there are three cases involving Kenyans at the International Criminal Court\(^2\) where this

\(^2\) Hereinafter referred to as ICC

14
instrument is being heavily relied on. In addition, the witnesses in these cases have been offered protection as per the provisions of this statute due to the sensitive nature of the cases.

Article 43 paragraph 6 of the statute provides for the establishment of a Victims and Witness Unit within the Registry of the ICC, which shall offer protective measures and security for witnesses and victims who appear before the court.

In addition, article 68 allows the court to undertake protective measures to protect the well being, dignity and privacy of witnesses.

This statute will therefore help in understanding how the issue of witness protection has been accommodated in the Kenyan cases at the ICC.


This is a publication by the UNODC, which is an office of the United Nations, UN, established in 1997. It is relevant to this paper because it tackles the aspect of witness protection in detail. Furthermore, Kenya is a member state of the UN and can therefore easily apply its provisions and recommendations.

This publication clearly defines who is a witness, what witness protection is and what a witness protection program is. It further describes the history of witness protection and how it was first adopted in the United States of America.

24 Hereinafter referred to as UNODC
The UNODC publication sets out measures that can be adopted in protecting witnesses. These are important as they will contribute to some of the recommendations that will be highlighted in this paper that the Kenyan Witness Protection Agency can adopt to increase its efficiency and effectiveness.

The publication also deals with factors that should be considered when setting up a witness protection program that will ensure it operates to maximize its objectives. In addition, it also points out potential future challenges that may be faced when operating a witness protection program.

This publication will be highly referred to throughout this dissertation due to its detailed approach to the study topic of this paper.
2.1 History and Development

Witness protection is a concept that first came into existence in the 1970s in the United States of America, as an attempt to convince members of the Mafia-style criminal gangs to break their code of silence and in exchange get quasi formal government protection. However, even with the prominence of this concept in the 1970s, it is still a fairly new concept in Kenya. This chapter will seek to analyse the historical and current status of witness protection in Kenya.

Initially, very little was available with respect to this subject. The Kenyan laws had no special or separate law to deal with the protection of vulnerable witness before, during or after trial. As much as the judicial system heavily relied on witness testimonies, the same system did not provide adequate protection to these witnesses to ensure that they felt safe enough to give the required testimonies.

In the early 1990s, Kenya was faced with a number of high-leveled corruption cases that involved millions of dollars, making them highly sensitive cases. In addition to the numerous corruption cases, Kenya also faced a number of terrorist attacks e.g the bombing of the United States Embassy on August 7th 1998, which left hundreds dead and the bombing of Paradise Hotel in Mombasa in 2002.

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25 Chapter three will discuss the history of witness protection in the USA in detail, while comparing the mechanisms put in place between the USA and Kenya

26 Eluma Ikemefuna Sylas, 'Terrorism: A Global Scourge', 2006, pp. 71
One of the corruption cases was the Goldenberg Scandal that involved high ranking persons in the then government.\textsuperscript{27} This scandal involved an agreement between the government and a Kenyan businessman Kamlesh Pattni, for the importation of gold from Democratic Republic of Congo and further exportation of the same gold to earn the country foreign exchange. The export compensation payable to an exporter depositing US Dollars into the Central Bank was however raised from 20 to 35 percent in violation of the trade policy present during that time.\textsuperscript{28}

An inquiry report presented to President Kibaki on February 3\textsuperscript{rd} 2006 by Justice Samuel Bosire, named several high ranking political leaders and senior civil servants who were serving in the then Moi government. Among them was the late Prof George Saitoti who was serving as the Education Minister.\textsuperscript{29} The cases against Kamlesh Pattni were thrown out by High Court Judge Joseph Mutava, citing unavailability of witnesses as one of the reasons that made the trial unfair on Kamlesh.

Due to the sensitivity and complexity of the corruption and terrorism cases, the Kenyan judicial system faced a lot of difficulty and problems in investigating and prosecuting these cases. The result was a lot of cases being thrown out of court due to unavailability of unwilling witnesses to testify. An example is the corruption case against Kamlesh Pattni in the Goldenberg scandal, as discussed above.

\textsuperscript{27} The Goldenberg Scandal is alleged to have occurred between 1991 and 1993 before it was exposed by a whistleblower David Munyakei, a banker working then in the Central Bank of Kenya as a clerk and involved approximately 600 million US Dollars

\textsuperscript{28} Duncan Okoth-Okombo, ‘Challenging the Rulers: A leadership Model for Good Governance’, 2011, pp. 15

\textsuperscript{29} This report was later to be known as the “Bosire Report”
In December 2006, the Witness Protection Act of 2006 Cap 79, was signed into law. This was the first legislation to be passed in Kenya dealing with the protection of witnesses exclusively. However, despite the signing of the Act in 2006 it still remained unimplemented for quite some time due to the lack of proper guidelines and came into operation in 2008. For example the special unit to protect witnesses who testified in sensitive cases that was to be set up in the Director of Public Prosecutions Office was still non existent by mid 2007. This meant that even with an Act in place, there were no actual measures taken on the ground to protect the vulnerable witnesses during this period.

In the general election held in December 2007, the Electoral Board announced Mwai Kibaki as the winner in the 2007 presidential elections over his rival Orange Democratic Movement’s (ODM) Raila Odinga. This announcement was received with a lot of opposition from citizens who saw Kibaki’s win as a result of unfair electoral process.

There were riots and protests and looting from the supporters of the opposition and in return the government responded by deploying its police officers to control the situation. However, the police used excessive force causing more deaths, injuries and even raping women. This whole occurrence was later to be called the Post-election violence (PEV) of 2007/2008. By the end of February 2008, approximately 1133 people were dead. Another 663, 921 were internally displaced.

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30 Ali Abdulsamad, 'Kenya: Govt to Shield Witnesses in Sensitive Cases', The Nation, 2 July 2007

The post-election violence period was marked with a lot of criminal activities such as assault, extrajudicial killings, looting and rape. These offences were committed by both common citizens and the police. However, it can be noted that very countable cases, were brought forward in courts against police officers who engaged in the same. In addition, several cases were lodged into different courts across the country but most remain pending to this date and several were thrown out due to reasons such as, the prosecution failing to tender relevant and adequate evidence and lack of willing witnesses to testify against the accused persons. For example, in Kisumu, the father of two victims of police shooting said he was willing to testify even though others were afraid to do the same because they were afraid they could be killed. This shows how much witness protection was needed during this period.

The post-election violence period and the occurrence after it drove Kenyans to the conclusion that the existing judicial system had failed them one too many times. The Witness Protection Act of 2006 was doing very little to help the situation as it was still very theoretical. This frustration made a large number of people to believe that the only way to solve these cases was through the International Criminal Court.


34 Human Rights Watch interview, Kisumu, May 9, 2011.

(ICC), hence the referral of six high profile cases relating to the post-election violence to the ICC.

In 2010, the Witness Protection Act of 2006 was amended to be the Witness Protection Act of 2010. One of the major amendments was the provision for the establishment of a Witness Protection Agency under Part 1A, which was an improvement from the 2006 Act. The 2010 Act made the Agency fully independent of the Attorney General’s office. The functions of this Agency will be discussed in detail later in this chapter.

Currently, the Witness Protection Act 2010 is the major legislation on witness protection in Kenya. Its provisions are implemented by the Witness Protection Agency as well as the Judiciary.

2.2 Legal Framework

2.2.1 Witness Protection Act 2010

2.2.1.1 Overview

This is the main legislation in Kenya that exclusively handles the aspect of witness protection. This Act was an amendment to the 2006 Act that was signed in 2006 but became operational in 2008. The Act governs the provision of special protection to persons possessing very important information and who are facing potential risk for co-operating with law enforcement agencies. The decision on protection is broadly dependent on the nature of crime and the severity of the threat to a witness.

Section 3 of part one defines a witness as a person who needs protection or risk which exists on account of his being as a crucial witness, who has agreed to give, evidence on behalf of the State in proceedings for an hearing or proceedings before an authority which is declared by the M Order published in the Gazette to be an authority to which this paragraph applies a person who has given or agreed to give evidence, otherwise than as mentioned above in relation to the commission or possible commission of an offence against a law of Kenya; or a person who has made a statement to the Commissioner of Police or a member of the Police Force; or a law enforcement Agency, in relation to an offence against a law of Kenya; or a person who is required to give evidence in a prosecution or inquiry held before a court, commission or tribunal outside Kenya for the purposes of any treaty or agreement to which Kenya is a party; or circumstances prescribed by regulations made under the Act.

Sections 3A to 3U of part one further provides for the establishment of the Witness Protection Agency, Witness Protection Advisory Board and the Witness Protection Appeals Tribunal. It sets out their objectives, functions and compositions.37

Section 4 obligates the Agency to establish and maintain a Witness Protection Programme and to take such action as may be necessary and reasonable to protect the safety and welfare of the protected persons. Such action include physical and armed protection, relocation or change of identity.

37 Further discussed in part 2.3.4 of this paper, page 30
Part four contains miscellaneous provisions including offences committed under the Act and their penalties. An example is section 30 that makes it an offence to disclose the identity of a witness in the programme without lawful excuse. It provides that such offence is punishable by imprisonment for a period not exceeding seven years.

2.2.1.2 Criticisms of the Act

Since the first Witness Protection Act was signed in 2006, various amendments have been made to it to form the current Witness Protection Act 2010.

However, certain criticisms have been put forward with respect to the current Act and many are of the opinion that this current Act can be improved.

In their document, Critique of the Witness Protection Act and Amendment Bill, the Kenyan Section of the International Commission of Jurists clearly point out various shortfalls in the Act, which was at that time the Amendment Bill. Those criticisms still apply to the 2010 Act since the provisions that were contained in the then Bill are almost identical to those in the 2010 Act.

Firstly, they indicate that the definition of a witness is still narrow as it does not include a person giving evidence on behalf of an accused person. It excludes a defence witness from the definition and therefore implies that protection given is one-sided which deviates from the requirements of justice.

Secondly, the composition of the Advisory Board established under section 3P of the Act may negatively affect the performance of the Agency. In the case of the post-election violence for example, where the police force was accused of extrajudicial
killings among other crimes, it is unacceptable to have the Director General of the National Security Intelligence Service and the Police Commissioner as members of the board which advices the Agency responsible for providing protection to witnesses, who may potentially give evidence against the police force.

Thirdly, the Director still unilaterally determines whether or not an individual should be admitted to the programme as provided in section 5 of the Act, leaving room for abuse of this provision or manipulation of the Director. The criteria for admittance to the programme is not strictly provided in the statute but is instead left up to the Agency to determine. This also allows for manipulation of the criteria.

Finally, the Agency has the discretion to employ such persons it deems fit to work as its staff. The Act does not specify the criteria to be used in terms of the history or past employment details of such potential employees. This position may result in a case where an employee’s past employment details may compromise the security of witnesses in protection.

2.2.2 Other Relevant Legislation

2.2.2.1 The Constitution

In Kenya witness protection remains a fundamental human right as clearly captured under the Bill of Rights (Chapter Four) in the Constitution. Article 48 guarantees the right to access to Justice while Article 50(9) has provided for the need to have legislation to provide for protection, rights and welfare of victims of offences. The two Articles read together, therefore, obligate the Government to protect witnesses in Kenya.
Specific sections of the Constitution that provides for the right to protection include; Article 29 which provides for freedom and security of person from any physical or psychological harm, Article 48 which guarantees the right of Access to Justice, Article 50(7) which provides for the right to a fair hearing and therefore the court allows an intermediary to assist the complainant or an accused person to communicate with the court, Article 50(8) provides for the right to protection of witnesses or vulnerable persons, Article 50(9) has provided for the need to have legislation to provide for protection, rights and welfare of victims of offences and under Article 50(8) as read together with Article 48, Government is obligated to protect witnesses in Kenya. While witnesses have a right to be protected, it is subject to certain established criteria and procedures. Under the Witness Protection Act, there is an application procedure, and the decision for admission into the protection programme is made by the Director of Witness Protection Agency.

2.2.2.2 The Sexual Offences Act No 3 of 2006 of Kenya

Section 31 and Section 32 of the Sexual Offences Act (SOA) provides for the protection of vulnerable witnesses in sexual and Gender based violence cases. Such cases are to be heard in camera. Section 31(11) of the SOA prohibits anyone from publishing information which would expose identity of witness.

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

Section 77 (2) of the CPC provides for in camera proceedings in cases relating to incest, abduction, rape and defilement.
2.2.2.4 The Children Act No 8 of 2001 of Kenya

Section 77(4) of the Children Act requires that cases involving children shall be held in the children's court at distinct times from other cases and that no unauthorized persons shall be allowed in the court room.

Section 75 (5) of the Children Act provides for the protection of the children by prohibiting the publication of the child's identity home or last place of residence or School in any proceedings.

In accord with this Act the Witness Protection Agency has designed a special Protection application form (Form ‘C’) to cater for the needs of child witnesses.

2.3 The Witness Protection Agency

The Witness Protection Agency is a body corporate established under section 3A of the Witness Protection Act of 2010 with perpetual succession and a common seal. The Agency’s operations are governed by the Act solely. It is therefore mandatory that reference be made to the Act when studying the Agency.

2.3.1 Objectives, Functions and Powers of the Agency

The Agency’s object and purpose as provided in section 3B of the Act is to provide the framework and procedures for giving special protection, on behalf of the State, to persons in possession of important information and who are facing potential risk or intimidation due to their cooperation with prosecution and other law enforcement agencies.

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38 Hereinafter referred to as The Agency
Section 3C clearly states out the functions of the Agency as follows; first to establish and maintain a witness protection programme, secondly to determine the criteria for admission to and removal from the witness protection programme, thirdly to determine the type of protection measures to be applied, fourth to advise any Government Ministry, department, Agency or any other person on the adoption of strategies and measures on witness protection, and last to perform such other functions as may be necessary for the better carrying out of the purpose of the Act. By having these provisions, the Act makes it clear for the Agency to perform its work in a manner that meets the functions provided in section 3C.

The powers of the Agency as provided by section 3D of the Act include:

a) to control and supervise its staff in a manner and for such purposes as may be necessary for the promotion of the purpose and the object for which the Agency is established,

b) to administer the funds and assets of the Agency, receive any grants, gifts, donations or endowments and make legitimate disbursement therefrom,

c) to enter into association with such other persons, bodies, or organizations within or outside Kenya as it may consider desirable or appropriate in furtherance of its object and purpose,

d) to enter into confidential agreements with relevant foreign authorities, international criminal courts or tribunals and other regional or international entities relating to the relocation of protected persons and other
e) witness protection measures,

f) to open bank accounts for the funds of the Agency, collect, analyze, store and disseminate information related to witness protection,

g) to give such instructions to a protected person as the Agency may consider necessary, to search the protected person and their property and seize items regarded by the Agency to be a threat to the protected person or another person or the integrity of the programme,

h) to summon a public officer or other person to appear before it or to produce a document or thing or information which may be considered relevant to the functions of the Agency

i) within a specified period of time and in such manner as it may specify, and

j) to invest the funds of the Agency not currently required for its purposes.

2.3.2 Appointments

The appointments made by the Agency with respect to its officers and staff are all governed by the Act.

First, the Agency shall appoint a Director under section 3E on recommendation of the Board39 on terms and conditions as the Minister40 may in consultation with the

39 The Witness Protection Advisory Board
40 The Minister for the time being responsible for matters relating to witness protection, section 3 of the Act
Committee\textsuperscript{41} approve. This Director will have all the powers necessary for the performance of his functions under the Act. Further, the Director, assistant directors and protection officers shall have the powers, privileges and immunities of a police officer in addition to any other powers they may have under the Act. This is provided for under section 3M. the Director will hold office for a period of five years and shall be eligible for re-appointment for one further term. Section 7 provides that the Director has the responsibility to decide whether or not to admit or exclude a person from the programme.

2.3.3 Operations

The independence of the Agency is provided for under section 3G of Part I A which states that the Agency shall have all the powers necessary for the performance of its functions without the interference from any authority. In addition, it will report to the Minister on the overall fulfillment of its object and purpose and performance of its functions.

The Agency operates through various stages in offering its services. It welcomes applications from individuals throughout the country who may be in need of its services. Once these applications are received from members of the public, they undergo a series of filtering procedures to identify those applications that may be genuine or that fall under the mandate of the Agency. This filtering process is carried out by the Investigating Officers who carry out an independent investigation to

\textsuperscript{41} States Corporation Advisory Committee established under the States Corporation Act, section 3 of the Act
corroborate the information they have received in the applications. They evaluate the cases to determine the nature of crime involved, the nature of threat; if it is a life threat and how critical the evidence involved is to a given case.

Once the genuine cases are identified, the Agency will evaluate the situation and identify the appropriate measure to deal with it. These measures vary from one case to the other and may include routine advice to the individuals and in extreme case relocation and change of identity.

2.3.4 The Witness Protection Advisory Board and The Witness Protection Appeals Tribunal

The Agency is complemented by the Board and the Appeals Tribunal.

Section 3P of Part1B of the Act establishes the Witness Protection Advisory Board whose principle function is to advice the Agency generally on the exercise of its powers and performance of its functions under the Act. The Board consists of the Minister as chairman, the Minister responsible for matters relating to Justice, the Minister responsible for matters relating to Finance, the Director-General, National Security Intelligence Service, the Commissioner of Police, the Commissioner of Prisons, the Director of Public Prosecutions, and the Chairperson of the Kenya National Commission on Human Rights. The Director shall be the secretary of the Board.

Section 3U of the Act establishes the Witness Protection Appeals Tribunal which consists of a chairman who shall be a person qualified to hold or who has held the
office of a Judge of the High Court of Kenya, who shall be appointed by the President on the recommendation of the Attorney-General, and two other members appointed by the Minister, who shall be persons possessing, in the Minister’s opinion, expert knowledge of the matters likely to come before the Tribunal. The main function of the Tribunal is to review and determine grievances by persons not satisfied with the decisions or orders of the Agency relating to admissions or terminations of placement into the programme. This function is provided for under section 3U(4) of the Act. The decision of the Tribunal is final.

2.3.5 Challenges faced by the Witness Protection Agency

Funding

One of the major problems facing the Agency is inadequate funding from the government. Any organization requires proper funding to run it. The Agency requires adequate funds to enable it implement its programmes as well as employ well trained personnel. These funds also help in the day to day running of the Agency as well as cover the salary of its employees and also help in offering protection for example relocation of witnesses. In the year 2011/2012, the Agency only received Ksh 35 million instead of the Ksh 1.2 billion requested. In such cases, further, in the year June 2012 to June 2013, the Agency received 235 million of the Ksh 1.5 billion requested.


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it therefore means that the Agency cannot take in many witnesses for protection, a situation that will result to witnesses failing to testify for fear of their lives.

**Public Awareness**

Although set up in 2009, most people are not aware that there exists a witness protection program in Kenya or even the Witness Protection Agency. This lack of awareness means that any witness who is in danger but is not aware of the Agency is locked out of the protective mechanisms available.

**Mandate of the Agency**

The Agency is meant to offer protection through the witness protection program, to witnesses whose lives are threatened as a result of their knowledge of critical evidence. However, due to the limited awareness, most members of the public misunderstand this mandate of the Agency. They tend to think that the Agency replaces the police officers who offer general protection to the public. As a result, most applications made to the Agency are dropped at the filtering stage as they do not fall within the mandate of the Agency.

**Decentralization**

Currently the Agency has only one Public Affairs Office, which is located in Nairobi. The Operations Officers are therefore forced to set up mobile offices while visiting various parts of the country. The absence of permanent offices makes the public question the presence of the Witness Protection Agency. In cases where an individual residing outside Nairobi seeks to access the office, it becomes a complicated subject.
The need for physical offices in different parts of the country is therefore crucial in letting the public know that there indeed exists such an office and where need arises they can easily access it.

**Boundary Testing**

There are instances where the public just want to check how far the system put in place by the Agency works. As a result the Agency will receive a lot of unserious applications which often leads to time wastage during the filtering process.

**2.3.6 Achievements of the Agency**

Despite the challenges mentioned above, in its five years of autonomy, the Agency has recorded some improvements in different areas of its scope. These include;

a) **Strengthening Human Resource base by competitively recruiting relevant professionals in all cadres**

b) **Running its own Finance Vote (previously relied on Attorney General’s Office)**

c) **Establishing a toll-free customer care line ;0800- 720 460**

d) **Establishing 24-hour hotlines manned by Operations staff ;(0711 222 441, 0725 222 442)**

e) **Establishing its own website; www.wpa.go.ke**

f) **Entering into Service Level Agreements/ MOUs with various organizations**

g) **Establishing a Liaison Office at the Milimani Law Courts, 4th Floor room 403.**
h) **Sensitization/Training workshops with various stakeholders**
Mass Awareness Campaign using Television advertisements

Launched its Logo as part of the Branding process

2.4 Witness Protection in the International Criminal Court, ICC

The International Criminal Court (ICC), located in The Hague, is the court of last resort for prosecution of genocide, war crimes, and crimes against humanity. Its founding treaty, the Rome Statute, entered into force on July 1, 2002. There are 121 states that are party to the Rome Statute, 33 of which are African states.44

2.4.1 The Link between Kenya and the ICC

There is a strong link tying Kenya to the ICC. Kenya became a party to the Rome Statute on 15 March 2005, agreeing that from that date the court may investigate, prosecute and try individuals accused of offences that might constitute genocide, war crimes and crimes against humanity committed in the territory of Kenya, or by Kenyan nationals. However, the ICC can exercise its jurisdiction only in cases where a state is unwilling or genuinely unable to carry out the investigation or prosecution in accordance with the principle of complementarity.45

Currently Kenya has three high profile cases at the ICC relating to the post-election crisis of 2007/2008. One of the main components of the negotiations that brought the post-election violence to an end was an agreement by the officials of the two political

44 https://www.hrw.org/topic/international-justice/international-criminal-court accessed on 16th March 2014

parties in disagreement, Party of National Unity (PNU) and ODM, to establish commissions of inquiry to provide insight on what actually happened. One of the inquiries was the Commission of Inquiry into Post-Election Violence (CIPEV). The CIPEV was established in February 2008 and was chaired by Justice Philip Waki, a Judge of Kenya’s Court of Appeal. The Commission was answerable to the AU Panel of Eminent African Personalities. After carrying out its investigations, the Commission presented its report, commonly known as the Waki report, on October 15th 2008 to then President and Prime Minister, Mwai Kibaki and Raila Odinga respectively. In its report, the Commission found that Kenya’s security agencies had failed to anticipate, prepare for and contain the post-election violence and were therefore guilty themselves of acts of violence and gross human rights violations.

Further, the Commission found that even though the post-election violence was spontaneous in some parts of the country, there were areas where the attacks were planned and organized and well coordinated.

The Commission recommended that a special tribunal with the mandate to prosecute crimes committed be established within one year starting July 2009, failure to which consideration will be given by the AU Panel of Eminent African Personalities to forwarding the names of the alleged perpetrators to the prosecutor at the ICC. The names of the alleged perpetrators of the post-election violence were passed to the ICC

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46 Later to be known as the Waki Commission


48 ibid p. viii
Prosecutor Luis Moreno Ocampo in July 2009. Failure to set up the tribunal within the one year would see the ICC would pick up the matter beginning August 2010. In 2010, the Prosecutor of the ICC Luis Moreno Ocampo announced that he was seeking summonses for six people: then Deputy Prime Minister Uhuru Kenyatta, Industrialisation Minister Henry Kosgey, Education Minister William Ruto, Cabinet Secretary Francis Muthaura, radio executive Joshua Arap Sang and former police commissioner Mohammed Hussein Ali, all accused of crimes against humanity. The six suspects, known colloquially as the ‘Ocampo six’ were indicted by the ICC’s Pre-Trial Chamber II on 8 March 2011 and summoned to appear before the Court. These six cases have since reduced to three, colloquially known as the ‘Bensouda three’. The pre-trial chamber at the ICC confirmed only four of the cases dismissing the case against Industrialisation Minister Henry Kosgey and former police commissioner Mohammed Hussein Ali. The case against Muthaura was also later dropped in March 2013.  

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2.4.2 Witness Protection under The Rome Statute of the ICC

The Rome Statute\(^{51}\) is a treaty that establishes the ICC. It was adopted in a diplomatic conference in Rome in 1998 and entered into force in 2002.\(^{52}\) It establishes four core international crimes: genocide, crimes against humanity, war crimes and crimes of aggression. This means that under the Statute the ICC can only investigate and prosecute only these four international crimes.

The Statute contains strong provisions with respect to victims and witnesses' rights and this is well depicted in its preamble where it states that ‘...during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of human dignity’. It further calls for the putting an end to impunity for the perpetrators of these atrocities.\(^{53}\) By having such provisions that aim to protect victims and witnesses, the Statue recognises the need to protect the rights of all individuals.

Article 68 of the Statute requires the court to undertake appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the court should take into account factors such as age, gender and health and the nature of the crime. It further requires the Prosecutor to also take such protective measures particularly during the investigation and prosecution, a provision that cements Article 54(1)(b) that requires the Prosecutor to

\(^{51}\) Hereinafter referred to as the Statute

\(^{52}\) Michael P. Scharf, 'Results of the Rome Conference for an International Criminal Court. The American Society of International Law', 1998

\(^{53}\) Rome Statute of International Criminal Court, p.1
respect the interests and personal circumstances of victims and witnesses for effective and efficient investigation and prosecution. Article 68 was intended to apply exclusively to victims and witnesses and proposals to include protective measures for accused persons under this article were rejected.\footnote{Huggo Stokkes, Arne Tostensen, 'Human Rights in development: Yearbook 1999/2000. The Millenium edition', 2001}

Article 57(3)(c) provides that in addition to its other functions, the Pre-Trial Chamber may where necessary provide for protection and privacy of victims and witnesses. Article 64(1) requires the Trial Chamber to conduct trials that are fair and expeditious while respecting the rights of the accused and due regard for the protection of victims and witnesses.

The Statute provides for the establishment of a Victims and Witnesses Unit within the Registry by the Registrar under Article 43(6). This unit, in consultation with the office of the Prosecutor, is required to provide protective measures and security arrangements, counseling and other appropriate assistance for witnesses and victims who appear before the court and others who are at risk on account of testimony given by such witnesses. The establishment of this unit under the Registry as opposed to under the office of the Prosecutor ensures that assistance is given to both prosecution and defence witnesses alike and therefore no conflict of interest arises between the goals of the prosecution and needs of the witnesses.

One of the biggest challenges for the Court during its operations have been that the provision of appropriate protective measures, as stipulated in Article 68(1) of the
Statute. The Court’s operations are mainly conducted in demanding conflict or post-conflict areas, where the law-enforcement structures are generally weak and the overall security situation is often subject to sudden changes. The establishment and implementation of a comprehensive, appropriate and adequate system of witness protection aims the addressing of these challenges in the best possible manner.
CHAPTER THREE: COMPARATIVE ANALYSIS BETWEEN USA AND KENYA

This chapter will discuss briefly the Federal Witness Protection of the US while making a comparison with that in Kenya.

3.1 History

3.1.1 USA

The USA was the first state to adopt a program that offered witnesses protection as an incentive to assure the witnesses of their security before, during and after trial of cases involving organized crimes.

Witness protection in the US can be traced back to the 1960s when there were a high number of organized crimes being recorded. These crimes were often carried out by well-run Mafias with strict rules that attracted heavy penalties. Members of these Mafias faced death if they broke their code of silence and cooperated with authorities.

In 1963, Joseph Valachi, a member of the Italian-American Mafia, was the first individual to be offered this quasi-governmental protection in exchange for him to break his silence and offer information to the US police department with regard to the structure of the Mafia he was involved in. Valachi was the “made member” of the powerful Genovese family. His testimony in 1963 before a congressional committee about the structure of the Mafia and its activities throughout the country was very sensational. Upon his collaboration with the government, it was feared that he could

be killed by Vito Genovese, the boss of the Genovese family. Therefore, at the time of his hearing before the congressional committee, almost 200 US marshals guarded him. It was widely rumored that a price tag of $100,000 was placed on his assassination. After his testimony, Valachi was put in protective custody and stayed behind bars until his death from a heart attack in 1971. He only had contact with the FBI agents, along with the Federal Bureau of Prisons staff, and was isolated from the other prisoners.56

The driving force for the establishment of WITSEC was the need to end organized crimes in the US and dismantle the Mafias that had become so rampant in the US.

3.1.2 Kenya

In Kenya, the realization of the need to have a witness protection program arose after a series of high level corruption cases were recorded in the early 1990s. These cases involved individuals who were considered ‘powerful’ due to the positions they held in the government.57 On the other hand, the Mafias in the US were also considered the ‘untouchables’ and no one was willing to testify against them in a court of law for their actions.

It is therefore clear that the need to have the witness protection program in both jurisdictions was propelled by the need to make the ‘high and mighty’ accountable

56 Hakan Cem Cetin, The Effectiveness Of The Witness Security Program In The Fight Against Organized Crime And Terrorism: A Case Study Of The United States And Turkey, May 2010

57 Detailed information on the Kenyan history discussed earlier in chapter two, page 20 to 23
for their actions without compromising the security of those witnesses giving testimonies.

3.2 Laws and Operations

3.2.1 USA

In the 1960s when Mafias were at their peak operations in the US, the Federal Witness Protection Program was created as part of the Organized Crimes Control Act of 1970. The first legislation to be passed was the was The Witness Security Program of the US (WITSEC) in 1970. The same was amended by the Comprehensive Crime Control Act of 1984. Under the title of “Protected Facilities for Housing Government Witnesses”, only one sentence refers to the program: “The Attorney General shall provide for the care and protection of witnesses in whatever manner is deemed most useful under the special circumstances of each case.” This one sentence was sufficient to pave the way for the foundation of the first witness security program in history. Congress aimed at WITSEC to provide protection and security by means of relocation for witnesses who testify against persons involved in organized crime activity or other serious offenses. Thus, WITSEC empowered the United States

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58 http://www.usmarshals.gov/witsec/

Attorney General to guarantee the protection of witnesses who had consented to testify against members and activities of the organized crime groups.\textsuperscript{60}

However, after its inception, the program was met with a lot of criticisms and in October 1984, after more than a decade in operation, the Witness Security Reform Act was enacted. According to Lawson\textsuperscript{61}, this reform act largely improved innocent third parties rights by providing a degree of compensation for wrongs wrought by WITSEC and thus, set up an execution structure for the program. Some of the reforms adopted were; \textsuperscript{62}

\begin{enumerate}
\item[a)] More strict admission standards, and an evaluation of the threat that ex-con witnesses may pose to the community they relocated to

\item[b)] Signing of a memorandum of understanding delineating the witness’s obligations upon entrance to the program.

\item[c)] Formation of a course of action for the revelation of information about participants in the program and penalties for this kind of act.
\end{enumerate}

\begin{flushleft}
\textsuperscript{60} J. S. Dep't of Justice, United States Attorneys manual 9-21.020 (1997).
\textsuperscript{61} Lawson, R.J. Lying, Cheating and Stealing at Government Expense: Striking a Balance between the Public interest and the Interest of the Public in the Witness P.P. Arizona State Law Journal, 1992, p.1429-1460
\end{flushleft}
d) Establishment of a fund to recompense victims exposed to crimes committed by participants after their entrance to the program.

e) Securing the rights of other persons, particularly the honoring of any non-relocated parent’s custody or visitation rights, and debts of participants.

f) Outlining of measures to be taken in case the memorandum is violated by the participants.

3.2.2 Kenya

In Kenya, the main legislation with respect to the subject matter is the Witness Protection Act of 2010 Cap 79. This Act is an amendment of the 2006 Act. The 2006 Act was amended to incorporate new provisions, the major one being the insertion of part one which contained provisions for the establishment of the Witness Protection Agency which in turn would run the witness protection program. This part also contained provisions that established the Witness Protection Advisory Board and the Witness Protection Appeals Tribunal whose functions are dealt with in detail in chapter two. The 2010 Act also replaced the Attorney General as the head of the witness protection program with the Director as the head of the Agency. Although this may be viewed as a move to solidify the Agency’s independency from the government, the idea of having one person to make all the important decisions as to who may be admitted to the program creates room for manipulation of that office. Even with these amendments, the 2010 Act still has a lot of loopholes that need to be
ironed out to ensure its provisions adequately provide for the needs of the program.\textsuperscript{63}

Both jurisdictions recognized the importance of the witness protection programme and adopted certain changes which led them to amend their legislative frameworks governing the programs.

3.3 Achievements

3.3.1 USA

Since its inception in 1970, WITSEC has recorded a number of achievements but three of these stand out. The first one is that since 1970, over 8500 individuals and over 9900 of their family members have been assigned new identities under this program. This number is a reflection of how well operational the system works so as to be able to accommodate these numbers.\textsuperscript{64}

Another remarkable achievement is that no witness protection participant who follows the set out security protocol has ever been harmed while under the protection of the US Marshall. This is a clear indication that the programme's security measures are intense, serious and are aimed at providing maximum protection to the participants.

Since the establishment of WITSEC in 1970, there has been a successful conviction rate of 89 percent with more than 10,000 convicted offenders in these criminal cases,

\textsuperscript{63} Criticisms of the 2010 Act are discussed in detailed under chapter two, page 23 to 24

\textsuperscript{64} \url{http://www.usmarshals.gov/witsec/}
when protected witnesses' testimony is used against defendants. According to Montanino, before WITSEC, due to the concerted efforts of the Mafia bosses, key witnesses could not be persuaded into testifying for the prosecution. He remarks that without WITSEC it might not have been possible to send many Mafia bosses behind bars, and accordingly dismantle the most notorious Mafia groups in the US. For instance, John Gotti, one of the most significant Mafia bosses prosecuted by the government, was sent to prison for life by the testimony of protected witness Salvatore Gravano who was the under-boss of the same Mafia group.

3.3.2 Kenya

Kenya has also recorded a number of achievements in the witness protection sector. However, its achievements are mostly theoretical and standard and do not reflect on the efficiency and effectiveness of the program but rather are an improvement on procedural matters. An example is the establishment of its own website, having a toll free line for customers to call the Agency.

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68 Discussed in chapter two, page 33
3.4 Challenges

3.4.1 USA

Even with its success, the US witness protection programme also faces a number of challenges.

Some of the participants in the program are career criminals. This means that even though they be under protection, they may still engage in criminal activities during this period. A good example is the Gravano case where Sammy Gravano, a former boss of the Gambino crime family, was granted government protection in exchange for his testimony against John Gotti, the godfather of the Gambinos. After sometime, Gravano got bored of living on the right side of the law. He came out of protection and returned to his old ways of committing crime. He was later convicted of drug dealing and sent to prison. In such a case, such career criminals create intolerable situations for the same government trying to protect them.

Another challenge faced by the US program is the fact that the program may be exploited by corrupt witnesses. There has been concern that where a witness is under the program, that mere revelation may sway the jury to believe that the accused person is actually intimidating to the witness and this may drive them to give a biased verdict.

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69 James Finckenauer, Mafia and Organised Crime: A beginner’s Guide,

It has been argued that the cost of running WITSEC is incredibly high meaning more tax for the citizens. Gerald Shur the founder of the program had estimated that approximately one witness would join the program every week amounting to an estimated budget of less than one million US dollars per year for the 25 to 50 witnesses. However this number increased to almost 500 witnesses per year and a cost of over 25 million US dollars per year.\textsuperscript{71}

The program is often faced with the challenge of keeping participants under protection forever. Most of these participants have a hard time transitioning from their normal lives to their newly relocated homes. Some tend to leave the program after some time in an attempt to go back to their old lives and in some cases these same people get killed by those who had posed threat to them initially.

\textit{3.4.2 Kenya}

The challenges faced by the Kenyan program are mostly operational and therefore greatly affect the operations of the Agency and implementation of the provisions of the Act. These challenges as previously discussed in chapter two include, lack of enough funding from the government, lack of public awareness by the public of the existence of the Agency as well as its mandate.

\textit{3.5 Summary}

It is evident that the US has a well functional witness protection program that is backed up with a well updated legislative framework. It is also evident that although

\textsuperscript{71} Jay Albanese, Organised Crime in Our Times, 6\textsuperscript{th} Edition, p 284
it requires a lot of money to run it, the program receives adequate funds from the
government as evidenced in the number of individuals under protection.

Although the US program is a success, its criticisms and the challenges it faces need to be taken into consideration to achieve maximum benefits.

Kenya may be in its infant stages with the program, however, this does not mean that reluctance and non-governmental support should be tolerated. There are numerous lessons that can be learnt from the US program to ensure that the Kenyan program improves in its operations. Chapter four will identify some of the measures that Kenya can adopt to improve its witness protection program.
CHAPTER FOUR: CONCLUSION AND RECOMMENDATIONS

4.1 Conclusion

The protection of witnesses is an important yet tough procedure to undertake. Be that as it may, it is still important to recognize that witnesses are an important component of the court system. Without witness testimonies, it will be difficult for the court systems to administer justice. Over the years, there has been an increase in criminal activities that affect human rights, human security and human development in one way or the other. These include human rights violations, corruption and drug trafficking. However, even with this increase, the criminal justice system is still facing difficulties in carrying out investigations and prosecuting these crimes. The inability to obtain information and evidence from cooperative victims and witnesses is just one of these difficulties. An attempt to correct this has been the growing recognition of the special role of witnesses in criminal proceedings and how important their evidence is crucial to securing the conviction of offenders hence the emergence of witnesses protection in the early 1970s.

By critically studying the provisions and shortfalls of the Witness Protection Act 2010 as well as the operations, challenges and achievements of the Witness Protection Agency, this paper has met its general and specific objectives as set out in its first chapter.

In addition, from the findings contained in this paper it is clear that the hypothesis set before the research was conducted, have all been proved to be the true position held in Kenya. There is indeed a Witness Protection Act which was first passed in 2006.
and later amended to be the 2010 Act, to include new provisions such as the establishment of the Witness Protection Agency under section 3A. However, the 2010 Act still lacks clarity and other important provisions to govern witness protection in Kenya, and therefore the need to further amend it arises.

It is also evident from the research that although the Witness Protection Agency is existence, it is not operating to its full potential, a position that affects its effectiveness and efficiency.

The research also found that the need to have a witness protection program in Kenya was propelled by the urge to make all perpetrators of criminal offences, without the regard of their social or political positions, be accountable for their actions. This could only be done by ensuring that witnesses to such cases felt secure enough to give their testimonies without being worried or exposed to threats from the accused persons or other third parties interested in the cases. After Kenya was rocked with a series of corruption cases involving high leveled individuals in government and the infamous Post-election violence, the government realized the need to come up with protective measures that would guarantee witnesses of their security before, during and after these sensitive trials. The introduction of the Witness Protection Act of 2006 was the beginning of these measures and it was further cemented by the establishment of the Witness Protection Agency in 2009.
4.2 Recommendations

From the study contained in this paper, it is evident that the Act and the Agency are very much in existence and in operation in Kenya. However, it is also clear that very few people are aware of the existence of the Agency and those who are aware sometimes confuse its mandate. Kenya needs to undertake certain changes in order to improve the efficiency of its witness protection program. Some of these changes can be borrowed from jurisdictions that have well operational witness protection programs such as the US as discussed in chapter three. These changes include amendments of the Kenyan Witness Protection Act 2010, creating more public awareness of the existence and mandate of the Agency and securing enough funding from the government to the Agency.

The Witness Protection Act 2010

The first step is ensuring that the legal framework governing the program is up to date and contains all the basic provisions required. Without proper guidelines, it is impossible to have a well operational organization. In the 2010 Act for example, the non-inclusion of defence witnesses in the definition of a witness under the Act prevents the Agency from offering protection to such individuals. Kenya can also adopt a provision similar to that in the US Witness Security Reform Act of 1984 that establishes a fund from which witnesses and victims may be compensated for crimes committed by those in the witness protection programme. In addition the Act should elaborate measures that may be followed to maintain the independency of the Agency provided for in section 3G (1).
The composition of the Board should also be reviewed to ensure its members are individuals whose positions in government do not adversely impair the decisions of the Board with respect to providing protection to witnesses.

**Funds**

Running a witness protection program requires a lot of funds to ensure it operates smoothly. By now the Agency is aware of how much money it requires in order to operate well. The Kenyan government should therefore ensure that it includes in its budget adequate funds to meet the program's needs. At the same time, to ensure accountability, the Agency should keep proper books as required by the Act to show its expenditure. A portion of those funds should also be reserved for emergencies. The Kenyan government should learn from the US government by ensuring that the funds provided to the Agency match its increasing costs every year caused by the increase in the number of persons taken into the protection program.

**The Agency**

Since the Agency is still young in its operations, it can take a few cases at a time in order to gauge its capacity while gaining experience and offering maximum protection. This can be borrowed from the US that had estimated that one witness will be joining its WITSEC programme each week when it was established, a number that has since gone up tremendously. Taking too much at once may compromise the whole aim of the program that is to offer protection.
By taking a few cases at a time, the Agency will be able to prioritize the type of cases that the program will be dealing with and will therefore spend less time filtering the applications received from the public.

Finally, the Agency should also embark on a frequent nationwide advertisement of their presence in the country to promote public awareness. Kenya can borrow from the US the aspect of using advocates and the office of the prosecution to disseminate witness protection information to witnesses and victims. In addition, it should also set up regional offices all over the country in order to give as many people the chance to benefit from their services.

In conclusion, it is clear that the concept of witness protection has been embraced by so many countries worldwide and Kenya is not an exception to this growing trend. The presence of the program strengthens and supports the operations of the court systems which in turn helps in ensuring justice is achieved by making perpetrators of criminal activities accountable for their actions. The Kenyan government should therefore give it the attention and support it requires to ensure it operates efficiently and effectively in providing its services to the public.
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