

**THE PLIGHT OF CHILD VICTIMS OF SEXUAL ABUSE IN KENYA: ARE OUR
PROCEDURAL LAWS ADEQUATELY PROTECTIVE?**

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DECLARATION

I **GITAU MERCY WAMBUI**, do hereby declare that this dissertation is my original work carried out by me as part of the fulfilment of the requirements of obtaining a Bachelor of Laws degree (LLB) at the University of Nairobi, School of Law and has not been submitted for examination in any other University. I also declare that any secondary information used has been duly acknowledged in this dissertation.

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DATE: 23/6/2015

DEDICATION

To my beloved family, especially to my mother, father and daughter: Charity Mkiwa. You have taught me to aim high enough and when I meet my target, to aim even higher. I am still aiming.

To all the children who have suffered in silence as a result of sexual abuse from perpetrators who have robbed them of their dignity. The law has neither been kind to your predicament nor has it ensured the justice you so earnestly desire. We can only hope that with amendments in the procedural laws, the road to justice will be smother and much more accessible. THERE IS HOPE.

To my friend Tabitha Wathuti, when we achieve justice for others, we shall consider ourselves to have conquered.

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Penal Code, Chapter 63 of the Laws of Kenya

Sexual Offences Act, No. 3 of 2006

Witness Protection Act, No 16 of 2006

Canada

Criminal Procedure Code

Evidence Act

South Africa

Child Care Act 1983

Prevention of Family Violence Act, 1993

South Africa Criminal law Sexual Offences Act, 2007

INTERNATIONAL CONVENTIONS

African Charter on the Rights and Welfare of Children OAU Doc. CAB/LEG/24.9/49 (1990), entered into force November 29, 1999.

United Nations Convention on the Rights of the Child OAU Doc. CAB/LEG/24.9/49 (1990), entered into force November 29, 1999.

ACRONYMS

ACRWC	African Charter on the Rights and Welfare of the child
ANPPCAN	African Network for the Prevention and Protection against Child Abuse
CJS	Criminal Justice System
CLAN	Children's Legal Action Network
CRADLE	Child Rights Advisory Documentation and Legal Centre
CST	Child Sex Tourism
CSA	Child Sexual Abuse
CVSA	Child Victims of Sexual Abuse
ECPIK	End Child Prostitution in Kenya
HVS	High Vaginal swabs
LVCT	Liverpool VCT Care and Treatment
PRC	Post Rape Care
PSSC	Psychosocial Support Service Centre
P3	Police Medical Report
STI	Sexually Transmitted Infections
UNCRC	United Nations Convention on the Rights of the Child
UNHCR	United Nations High Commissioner for Refugees

LIST OF CASES

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C.K. (A Child) & 11 Others v. Commissioner of Police/Inspector-General of the National

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M.B.O v Republic (2008) eKLR

Oiruri v Republic (2012) eKLR

Woolmington v DPP (1935) AC 462

CHAPTER ONE

INTRODUCTION

1.1 Background

Victims of sexual abuse face a lot of challenges and are exposed to both physical and psychological trauma. This is more severe when the victim is a child. A child is any human being under the age of eighteen years.¹ Child sexual abuse is wide in its scope; it involves any indecent acts² committed against a child, which include defilement, incest, child pornography, defilement of mentally impaired children and child sexual exploitation.³ Children are vulnerable members in our society. Kenya has laws⁴ that protect and shield child victims of sexual violence. There are institutions and key players in the Criminal Justice System who cater for the needs of the child victims of sexual violence.

Child sexual abuse mainly occurs in families or in educational institutions where the children should be made to feel safe and protected. The impact of the crime of sexual abuse has always been physiologically and emotionally traumatizing even for the family members and close friends of the victim. The topic of child sexual abuse is avoided and very contentious even for the family members. The less people talk about it, the better since it is considered that no person would want to associate with a victim of defilement let alone marry them when they are of age.⁵ Statistics on child sexual abuse greatly differ. The discrepancy in figures on child sexual abuse from key government departments dealing with the same issue indicates

¹ Constitution of Kenya(2010) Article 260

²Indecent act means any unlawful intentional act which causes any contact between the genital organs of a person, exposure or display of any pornographic material but does not include any act that causes penetration. See section 2 of the Sexual Offences Act,2006

³ Martin J, Anderson J, Romans S, Mullen P, O'Shea M (1993). "Asking about child sexual abuse: methodological implications of a two stage survey". *Child Abuse & Neglect*
www.childsexualabuseprevalence.org last accessed on 7th May 2015

⁴ These include: Sexual Offences Act ,2006 The Evidence Act,Cap 80 laws of Kenya, Criminal Law Miscellaneous Amendment Act No 5/2003, Children Act 2001

⁵ Child victimization is most common in religious societies where the sexual act though committed as a crime in cases of defilement is deemed reserved for marriage. www.culturalattitudestowardschildsexualabuse last accessed on 6th May 2015

that there could be more children abused, whose reports are not captured by the available statistics in Kenya. Society of Kenya received 125 cases of child sexual abuse in 2010, while CLAN recorded 522 in the same year. According to the Nairobi Women's Hospital (Gender Violence Recovery Centre), 1437 child sexual abuse cases were recorded in 2010.⁶

Justice Makau in the "160 girls"⁷ judgment noted that child victims of sexual abuse are exposed to horrible, unspeakable and immeasurable physical harm in the form of internal and external wounds. Further the consequences of unwanted pregnancies vested on children not physically mature enough to bear children, as well as psychological harm aggravated by the fear and reality of contracting HIV/AIDS and other sexually transmitted diseases or infections, negatively impacted child victims of sexual abuse.⁸

The Constitution seeks to protect the rights of children and to ensure that children are protected from abuse and all forms of violence and inhuman treatment.⁹ The best interests of the child are of paramount importance¹⁰. A report by CRADLE, a nongovernmental organization indicates that cases of sexual abuse in Kenya are on the rise, as compared to reported criminal cases.¹¹ In Kenya, the Children Act¹² was passed to domesticate the provisions of both the United Nation Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC). Provisions to protect

⁶ UNICEF, *Violence against Children in Kenya, Findings from a 2010 National Survey* (Kenya 2010) <www.togetherforgirls.org/docs/Findings_from_a_2010_National_Survey.pdf> accessed 5th May 2015

⁷ *C.K. A Child & 11 others -v- Commissioner of Police/ Inspector General of the National Police Service & 2 others* Petition No 8 of 2012, High Court of Meru, (2012) eKLR

⁸ Winifred Kamau and Kieya Kamau, Case Comment- victory for 160 girls defilement constitutional challenge Petition no 8 of 2012, High Court of Meru, *C.K. (a child) & 11 others -v- Commissioner of police/ Inspector General of the national Police Service & 2 others* Petition No 8 of 2012, High Court of Meru (2012) eKLR

⁹ Constitution of Kenya (2010) Article 53

¹⁰ Children Act (2001) No. 8 of 2001 Article 2

¹¹ UNICEF, (2005) "Violence against women in Western Kenya" Nairobi pages 3-8

www.omct.org/files/2005/09/3070/alt_report_on_violence_against_women_children_kenya.pdf last accessed 28th November 2014

¹² No 8 of 2001

children who have suffered defilement are enacted in the Sexual Offences Act¹³ which provides substantive laws on sexual offences, and the Witness Protection Act¹⁴ which attempts to provide protection to witnesses who may fear giving evidence and this includes children. An amendment of the Evidence Act allows courts to convict an accused person on the evidence of the child alone, thereby removing the requirement for corroboration.¹⁵

The Procedural laws are embodied in statutes which regulate the conduct of investigation, collection of evidence and the trial and post trial process. The statutes that regulate procedure in Kenya are; the Evidence Act, the Criminal Procedure Code, the Sexual Offences Act and the Witness Protection Act.¹⁶ Child friendly laws regulating procedure are contained in section 31(4)(a), (b), (c) and (e) of the Sexual Offences Act 2006 which provide for mechanisms of protecting sexual assault victims during their testimony such as the use of a witness protection box and intermediaries.¹⁷ However a study conducted by Scholastica Omondi, found that more than half of child sexual abuse trials are conducted in disregard of the protective measures due to lack of guidelines on how to implement the measures. Despite the requirement that there should be a witness protection box, only the Nairobi Children's court had one, and it was also not used for its intended purpose. The witness protection box was used for storage of books thereby defeating the purpose of its use.¹⁸ On the use of intermediaries a magistrate in her study stated that she had never been trained on who can be appointed as an intermediary or what qualifications are required.¹⁹

¹³ No 3 of 2006

¹⁴ Chapter 79 Laws of Kenya

¹⁵ The Criminal Law (Miscellaneous Amendment) Act No 5/2003.

¹⁶ Op cit 18

¹⁷ Section 31 of the Sexual Offences Act, No 3 of 2006

¹⁸ Omondi S.O (September 2013) "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" University of Nairobi

¹⁹ *ibid*

Evidence of children should also be taken in camera because of the vulnerability of children.²⁰ Our court systems experience great economic challenges, such as poor infrastructure in the remote parts of the country.²¹ The magistrates have few or even no courtrooms to conduct the public trial.²² Where there is a smaller space in the magistrate's chambers the distance between the child victim and the accused person is reduced and this further increases intimidation. This illustrates that in Kenya we have procedural laws regulating procedure in cases relating to child victims of sexual abuse; however there are challenges in implementation of the laws.

In Canada, the laws regulating procedure have been implemented and this has been effective in cases relating to child victims of sexual abuse. Use of recorded video evidence²³ of the child and use of various communication aids²⁴ to aid the child victims of sexual violence. Rape shield statutes in other countries have also shielded victims of sexual abuse.²⁵ In the Canadian courtrooms a protective screen was introduced to shield the victims and to reduce the intimidation.²⁶ There is a need for Kenya to adopt the best practice and my study seeks to make a comparative analysis of the Canadian jurisdiction.

1.2 Statement of problem

This study will seek to examine whether the laws on sexual abuse against children are adequate to deal with the contemporary forms of sexual abuse against children. The issue is that the Kenyan jurisdiction has not adequately addressed itself to laws that protect the needs

²⁰ Section 31(4)(c) of the Sexual Offences Act, No 3 of 2006

²¹ 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) Nairobi, Kenya page 6-19

²² Mainly in the North Eastern Province in Kenya(see Op cit n 21)

²³ The recording ensures that the child's demeanor as well as the manner of disclosure is recorded when it is still fresh in the child victim's mind (Op. cit n 18)

²⁴ This includes drawing rough sketches of the perpetrators body to assist in identification of body parts (Op. cit n 18)

²⁵ Mainly in Australia, Canada, England, Wales among other countries. (Op. cit n 18)

²⁶ Myers J(1987) "The Child Witness: Techniques for Direct Examination, Cross-Examination and Impeachment" 18 Pacific Law Journal page 801- 804

of child victims of sexual abuse. A comparative analysis with other jurisdictions such as Canada will shed light on laws which Kenya can adopt or borrow.

1.3 Justification of the study

I intend to carry out this study with an aim of examining the legal framework of laws relating to child victims of sexual abuse, making a comparative analysis of the Kenyan jurisdiction and the Canadian and South African jurisdiction and determining if the laws are adequate in our jurisdiction. I intend to contribute to knowledge and fill the legal void and to inform policy and practice.

1.4 Statement of objectives

1.4.1 General objectives

The general objective of this study is to identify the procedural laws relating to child sexual abuse related cases and to establish if they are adequately protective of the sexually abused children in Kenya. The adequacy of the laws will be assessed through a comparative analysis of Kenya's legal framework and Canada and South Africa's legal framework.

1.4.2 Specific objectives

1. To examine the procedural and substantive laws and mechanisms at the pre-trial, trial and post trial stage in child victims of sexual abuse related cases.
2. To assess the adequacy of the procedural mechanisms in cases involving child victims of sexual abuse.
3. To undertake a comparative analysis of the procedural mechanisms in Canada and South Africa with an aim of identifying best practices that Kenya can adopt.
4. To make recommendations for reform.

1.5 Research questions

1. What are the procedural and substantive laws in child victims of sexual abuse related cases?
2. Are there any inadequacies in the procedural laws in child victims of sexual abuse related cases?
3. What best practices can be identified from procedural mechanisms in Canada and South Africa?
4. What recommendations can be made in this area of law?

1.6 Hypothesis

This study is premised on the assumption that though we have procedural laws, they are not adequately protective on the sexually abused children in Kenya based on an analysis into the legal framework, and a comparative analysis of the Kenyan jurisdiction and the Canadian and South Africa jurisdiction.

Procedural laws function as the engine for implementation of substantive laws. The lack of implementation of procedural laws therefore impedes the realization of the goals of substantive laws.

2.0 Theoretical framework

Procedural justice theory is relevant to this research as far as it explains that fair procedures lead to fair outcomes. Procedures are simply steps leading to a decision, a means for reaching outcomes or legal decisions which have a goal to advance. The substance of a decision refers to the outcome sought, while procedures are the steps leading to the outcome. Such steps must reflect and respect the society's values while fulfilling the expectations of a section of the society whose interests are to be protected by them.²⁷

²⁷ Bentham's works as found in M Bayle's, *Procedural Justice: Allocating to Individuals* (Kluwer Academic Publishers,(France) 1990

Research demonstrates that child victims require special procedures if they are to be treated justly.²⁸ Aristotle identified the two major applications of justice as distributive justice and corrective justice.²⁹ This theory was expounded by John Rawls as the equality principle. This explains that society is just and fair when everyone has equal opportunities to rights and liberties. Equality principle is the component of justice as fairness, establishing distributive justice. Rawls awards the Fair equality of opportunity principle lexical priority over the difference principle.³⁰ The difference principle explains that social and economic differences must be distributed to the less advantaged in society.³¹ A society cannot arrange inequalities to maximize the share of the least advantaged while not allowing access to certain offices and positions.

The psychoanalysis theory shows that children have special needs as victims of sexual abuse. Sigmund Freud³² applied this theory as a therapy theory by tracing incidences in one's past life that cause conflict in adulthood and addressing them to change the individuals behavior. To understand this theory we need to understand personalities³³. Important elements are the id, ego and super ego. Freud argued that many of the patients seeking psychoanalytic help were indeed sexually abused as children.³⁴ Dodge³⁵ argues that during the five stages³⁶ of psychosexual development many children are vulnerable to sexual abuse and are easily sexually aroused.

²⁸ C McMahon, Due Process: Constitutional Rights and the Stigma of Sexual Abuse Allegations in Child Custody Proceedings (1999) 39 (California)

²⁹ Nichomachean Ethics by Aristotle, Translated by D W Ross (350 B C) 741.

<http://publish.uwo.ca/ndgault/phi/20/arpol.html> last accessed on 6th November 2014

³⁰ Justice as fairness, John Rawls Principle (2010) www.wikipedia.org/wiki/wiki/justice last accessed 8th November 2014

³¹ Rawls J, *A Theory of Justice*, (1997) <http://plato.stanford.edu/entries/original.position> last accessed 8th November 2014

³² C G Jung, H Reed, M Forthan, G Adler, *The Collected Works of C G Jung: Freud and Psychoanalysis* 2nd edition (Princeton University Press 1966) page 137

³³ 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 September 2014

³⁴ *ibid*

³⁵ F. Dodge. *Psychology* (Prentice Hall 1997) page 489

³⁶ Stages where the child's erogenous zones are most sensitive, this stages are the oral stage, anal stage, phallic stage, latency period and genital stage. (see Op. cit n 18)

The labeling theory³⁷ explains the challenges a child experiences associated with the stigma of being a child victim of sexual abuse. This theory explains what happens to people after they have been singled out and isolated. The first concern of proponents of this theory is what people term as deviant. The first challenge is that a child will fear testifying for the stigma of being termed as a bad child engaging in bad manners. The stigma may affect the child's self esteem in associating with the peers.³⁸ A child may opt not to report the assault or deny that it ever happened once it is reported. Labeling the child victim as deviant may cause the child to engage in the sexual activity for fear of being rejected by the society.

I have used the labeling theory, the procedural justice theory and the psychoanalysis theory because of their significance to my study. The labeling theory explains the fear of the child victims in talking about sexual matters in public. It explains why child victims may retract their statement especially in incest cases. The psychoanalysis theory necessitates that there should be special court procedures that help children victims to overcome trauma. The procedural justice theory connotes that fair procedures lead to fair outcomes and child victims of sexual abuse require child friendly procedures.

3.0 Literature review

According to a study conducted by the United Nations High Commissioner for Refugees (UNHCR) children are vulnerable to sexual based violence due to their limited ability to protect themselves. Low levels of participation by children may also exacerbate the risks that they face. Children face the risk of sexual exploitation from those who care for them or have unlimited access to them.³⁹ The best interest principle must be applied in all matters involving children. The best interest determination procedures describe a formal process that

³⁷ B C Little and S H Traub, *Theories of Deviance* (F E Peacock Publishers 1968) page 289.

³⁸ K Horney, *Neurotic Personality of our Time* (Norton 1937) page 213.

³⁹ UNHCR : '*Action against sexual and gender based violence: an updated strategy*' (June 2011) Cox Bazaar pages 8-10

is designed to determine the child's best interests for particularly important decision, thus requiring stricter procedural safeguards.⁴⁰

A commentary by Winifred Kamau and Kieya Kamau⁴¹ on the "160 girls case"⁴², points out that although there was adequate law in the form of the Sexual Offences Act 2006, that imposed strict penalties, enforcement of the law was marred by failure of the police to investigate complaints of sexual violence or to arrest the perpetrators. The commentary further examines the consequences of the defilement on the children, the violated rights under the Constitution and the police inaction which created a climate of impunity and tolerance. The Constitutional rights require further implementation, failure of which leads to further infringement of the rights.⁴³ This study is relevant to my study for the purpose of the procedure applied at the pre-trial phase.

Omondi⁴⁴ examines the rights of the child victims of sexual abuse in light of the rights of the accused persons. She examined the imbalance between the rights of the accused persons and the right of the child. The study examined the procedural laws and the substantive laws in Kenya that relate to child sexual abuse and strongly examined the weaknesses in implementation of the laws due to economic and social barriers and also due to lack of emotive and physical development of the child. In her recommendation, there should be development of guidelines on how to protect child victims of sexual abuse while testifying in court, the witness protection box and the use of an intermediary should be implemented and we should have a system that is child friendly. The study further compared our court systems

⁴⁰ *ibid*

⁴¹ Winifred Kamau and Kieya Kamau, Case Comment- victory for 160 girls defilement constitutional challenge Petition no 8 of 2012, High Court of Meru, *C.K. (a child) & 11 others –v- Commissioner of police/ Inspector General of the national Police Service & 2 others* Petition No 8 of 2012, High Court of Meru (2012) eKLR

⁴² *C.K A Child & 11 others –v- Commissioner of Police/ Inspector General of the National Police Service & 2 others* Petition No 8 of 2012, High Court of Meru, (2012) eKLR

⁴³ Winifred Kamau and Kieya Kamau, Case Comment- victory for 160 girls defilement constitutional challenge Petition no 8 of 2012, High Court of Meru, *C.K. (a child) & 11 others –v- Commissioner of police/ Inspector General of the national Police Service & 2 others*(2012) eKLR

⁴⁴ *Op. Cit* n 43

with other jurisdictions and recommended that like Australia, England and Canada our court systems can adopt effective child friendly systems such as video evidence since allowing the child to testify orally in court exposes the child to further trauma.⁴⁵ This study is relevant to my study in regard to the international, regional and local legal framework.

Lalor⁴⁶ contends that in Kenya and Tanzania, children engage in sex at a very young age and a degree of force, trickery or material exchange is not uncommon in sexual relations related to children.⁴⁷ His study looks at the prevalence of HIV/AIDS among young people and measures put in place to curb the vice, among them early child education.⁴⁸

Summit⁴⁹ showed that child victims of sexual abuse face secondary trauma in the crisis of discovery. The normal coping behaviour of the child is surrounded by the stigmatization by adults and the outer disbelief as the child recounts the experience. When the alleged perpetrator is a respectable, reasonable adult, and he is accused of perverse, assaultive behaviour by an uncertain, emotionally distraught child, most adults who hear the accusation will fault the child. Disbelief and rejection by potential adult caretakers increase the helplessness, hopelessness, isolation and self-blame that makes up the most damaging aspects of child sexual victimization. The purpose of the study was to provide a vehicle for a more sensitive and more therapeutic response to legitimate victims of child sexual abuse and to invite more active and more effective clinical advocacy for the child within the family and within the systems of child protection and criminal justice.⁵⁰

⁴⁵ Omondi S.O (September 2013) ‘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’ University of Nairobi Pages 270-292

⁴⁶ Lalor K. (2004) Child sexual abuse in Tanzania and Kenya, *Child abuse and neglect* (Nairobi, Kenya)

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ Child psychologist expert (see Op. Cit n 50)

⁵⁰ Summit, R. C (1983) The Child sexual abuse accommodation syndrome: *Child Abuse and Neglect*(Torrance)page177-193

Kameri Mbote⁵¹ examines the violence against women in Kenya and lays out the general International and national legal framework. The study notes the non-domestication of some International instruments on some rights relating to women. There is the discussion on the procedural laws having a bearing on violence on women and the acts which though violent do not have a bearing in the law.⁵² The author examines the failures in naming domestic crimes as crimes and merely terming them as ‘private.’⁵³

Brannon⁵⁴ noted that there is lack of development in the procedural laws and thereby low implementation of the substantive laws. This has led to violation of the rights of the children and minimized their trust in the court systems of our country. There are more cases reported in hospitals and few cases reported in courts and the few that are reported in courts lead to an acquittal for lack of evidence. The court systems in our country are technical and the procedure can be complex and is heavily inclined in proving the case against the accused person. The child victims in sexual abuse related cases are re-victimized⁵⁵ as they testify in courts, as their evidence is collected and as they suffer the stigma of sexual abuse.⁵⁶ Until recently, the victims were faced with the challenge of testifying in open court. They face the complexity that comes with re-examination and cross-examination from the accused person.

Whitcomb⁵⁷ stated that the challenges that children victims experience while testifying in court are due to their immaturity, with regard to their physical, emotive and cognitive

⁵¹ Professor, University of Nairobi (see Op. Cit n 52)

⁵² Kameri Mbote, An analysis of law, Policy and Institutions. *Violence against women in Kenya* last accessed on 28th November 2014 www.ierlc.org/content/w0001.pdf last accessed on 9th November 2014

⁵³ illegal Acts such as wife battery, committed against women in marriage (see Op. Cit n 50)

⁵⁴ Op. cit n 56

⁵⁵ They undergo the whole trauma again. (Ibid)

⁵⁶ L C Brannon, *The Trauma of Testifying in Court for Child Victims of Sexual Assault v The Accused Right to Confrontation* (1994) 18 Law & Psychology Review pages 439- 440

⁵⁷ Op cit n 58

development which greatly affects their ability to comply with expectations of the legal process.⁵⁸

A study that was conducted in 2010 by the Congressional Research services⁵⁹ cited the judicial system in Africa as one of the impediments to justice for sexual violence victims in Africa. According to this research, victims found it very difficult to face their abusers and narrate the intimate details of the abuse to the court. As a result many of the victims opt not to report the abuse to law enforcement authorities.⁶⁰

This research aims to borrow from what these authors have clearly researched, critiqued in the implementation of the laws regulating procedure and the impact of sexual abuse on child victims. The authors have analyzed the regional and international legal framework which I intend to rely on. This research further aims at identifying the challenges in the legal framework, relating to child victims of sexual abuse. It aims at contrasting these challenges in implementation of laws relating to procedure, with countries that have adequately implemented the procedural laws relating to child victims of sexual abuse.

4.0 Research methodology

This research will be desk based. I will use both primary sources and secondary sources. I will look at International Treaties and Conventions and government reports as my primary sources and I will also use books, internet searches and review various statutes as my secondary sources.

⁵⁸ 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)

⁵⁹ Congressional Research Services, „Sexual Violence in African Conflict“ (2010)
<<http://www.fas.org/sgp/crs/row/40956>> accessed 3 October 2014.

⁶⁰ ANNPCAN, *Proceedings of a Workshop in Kenya on the Challenges of Implementing the Sexual Offences Act 2006*, held in Nairobi in 2007

Chapter breakdown

Chapter 1 provides the introduction of the study, that is the background, statement of problem, justification, statement of objectives, research questions, hypothesis, theoretical framework, literature review and research methodology.

Chapter 2 will explore the situational analysis of child victims of sexual abuse. The impact of sexual abuse on child victims, forms of sexual abuse on children victims as well as the prevalence of sexual abuse on children.

Chapter 3 examines challenges in the legal framework governing child sexual abuse with a focus on International laws and National laws in relation to procedure relating to child victims of sexual abuse, medico legal evidence and the challenges experienced in the different stages of the trial process.

Chapter 4 seeks to make a comparative analysis of the best practices in procedural laws from Canada and South Africa with an aim of drawing out the best practices from them in regard to procedural laws relating to child victims of sexual abuse.

Chapter 5 brings together the salient findings of the study and makes recommendations and conclusions of the study on procedural laws governing child victims of sexual abuse.

CHAPTER TWO

SITUATIONAL ANALYSIS OF CHILD VICTIMS OF SEXUAL ABUSE

2.1 INTRODUCTION

This Chapter addresses the situational analysis of the child victims of sexual abuse. It highlights the forms of child sexual abuse as well as the statistics and the impact of sexual abuse on child victims as perceived by the victims, their families and the society. Sexual abuse is also referred to as molestation.⁶¹

The United Nations Convention on the Rights of the Child provides that all children have the right to be protected against all forms of violence, exploitation and abuse, including sexual abuse and sexual exploitation. The short- and long term effects of such violence and exploitation are severe, not only for the victims, but also for families and communities, and constitute a serious societal concern. Violence and exploitation of children include all forms of physical or psychological abuse, injury, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.⁶² Child sexual abuse violates the dignity of the children as it takes away their self esteem and dignity. It is a crime that takes place in private away from the glare of the public and this may present difficulties to the prosecution as the only witnesses are the victim and the perpetrator of the offence.⁶³

2.2 FORMS OF SEXUAL ABUSE ON CHILDREN

It can be very difficult to talk about sexual abuse and even more difficult to acknowledge that sexual abuse of children of all ages including infants happens every day. Sexual abuse of children has become the subject of great community concern and the focus of many

⁶¹ Szasz, Thomas "Sins of the Fathers: Is Child Molestation a Sickness or a Crime?" , 2002. <www.reason.com> (accessed May 5 2015)

⁶² Sexual Offences Act 2006

⁶³ J Temkin, *Rape and the Legal Process* (Oxford University Press 2002)

legislative and professional initiatives.⁶⁴ In Kenya, the Sexual Offences Act has defined various forms of sexual abuse on children. They are as follows:

2.2.1 Defilement

A person who commits an act which causes penetration on a child is guilty of an act known as defilement.⁶⁵ A person convicted of defilement shall be sentenced to imprisonment for life.⁶⁶ A person who attempts to commit an act which would cause penetration on a child is guilty of attempted defilement and upon conviction shall be sentenced to a term of not less than ten years imprisonment.⁶⁷

Defilement of children is both new and old in that it includes traditional practices and new in that globalization advances in technology and the HIV/AIDS pandemic are posing a different set of challenges. Globally the major causes of defilement of children include poverty, war and natural disasters, economic injustices, disputes between the rich and the poor and large scale migration and urbanization. Other factors include lack of education, disintegration of the family and social values, social attitudes, lack of protection to children at risk and underfunding or failure of social services. Poor systems of governance and inadequate legal systems also fail to prevent injustices towards children or to protect them from being sexually abused. Gender discrimination, gender gaps in education and information and a double standard of morality for men and women also contributes to the persistence of defilement in African states.⁶⁸

⁶⁴ Mwangi E., Sexual Abuse Continues Unabated, 2003 www.newsfromafrica.org last accessed on 28/05/2015

⁶⁵ Section 8(1) of the Sexual Offences Act 2006.

⁶⁶ Section 8(2) of the Sexual Offences Act 2006.

⁶⁷ Section 9 of the Sexual Offences Act

⁶⁸ Monica Gwitira, Child Defilement in The Times of HIV and AIDS, May 2015 www.afacast.org.zw last accessed on 28/5/2015

2.2.2 Child sex tourism

Child sexual tourism involves the facilitation of the travel of a child within or outside the boundaries of Kenya in order to facilitate any sexual activity with a child.⁶⁹ Globally it is the commercial sexual exploitation of children by persons who travel from one place to another and there engage in sexual acts with children. Often, these people travel from a richer country to one that is less developed, but child sex tourists may also be travellers within their own countries or region. Some child sex tourists (also referred to as preferential abusers and paedophiles) target children specifically. Most child sex tourists, though, are situational abusers who do not usually have a sexual preference for children, but take advantage of a situation in which children are made available to them. They may try to rationalize their actions by claiming sex with a child is culturally acceptable in the place they are visiting or that money or goods exchanged benefit the child and community.⁷⁰

2.2.3 Child prostitution

A person who causes a child to remain in such premises for the purposes of causing such a child to be sexually abused or to participate in any sexual activity or to participate in any sexual indecent or obscene activity or in any advertisement, film or threatens to use violence against the child shall be guilty of child prostitution and upon conviction shall be liable to a term of not less than ten years imprisonment.⁷¹

Child prostitution is an emerging phenomenon in Kenya. There is an increasing number of young children entering prostitution as a means of survival. Many of the children in Kenya are exposed to sex at an early age, especially children from the slums.⁷² A number of adults also keep destitute children in their own houses, under the guise of taking care of them, but

⁶⁹ Section 14 of the Sexual Offences Act 2006

⁷⁰ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. Adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000 (not in force)

⁷¹ Section 15 of the Sexual Offences Act 2006

⁷² Mwangi E., Sexual Abuse Continues Unabated, 2003 www.newsfromafrica.org last accessed on 28/05/2015

instead act as pimps and hire them out as prostitutes from time to time. Some children are also kept in brothels alongside adult prostitutes. This is common in Nairobi and the coastal towns of Mombasa and Malindi.⁷³

2.2.4 Child pornography

A person who has in his possession any image of a child or who lets to hire, distributes or publicly exhibits any obscene image of the child shall upon conviction be liable for a term of not less than six years and to a fine of not less than five hundred thousand shillings.⁷⁴

Child pornography is the sexual explicit reproduction of a child's image done for commercial purpose. Perpetrators accomplish their purpose by forcing or fooling children (often with the use of drugs) to pose for pornographic photographs or to take away a child's dignity and self-respect. They reduce the value of the child's body to nothing, teaching the child that the body is for sale and has no other value. This form of sexual prostitution has been found to be widespread in the coastal towns of Kenya. Unfortunately, these cases are rarely reported.⁷⁵

2.2.5 Incest

Any male person who commits an indecent act or an act which causes penetration to a person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence of incest and is liable for a term of not less ten years imprisonment.⁷⁶

Across the world, incest is associated with broken homes, worsened by alcoholism, drug abuse, joblessness and abuse spanning several generations. In Dagoretti most homesteads appear to suffer from these vices all at the same time, hence the incest phenomenon. Cases of fathers having sex with their own daughters in exchange for cash, property and jobs are very

⁷³ Ibid

⁷⁴ Section 16 of the Sexual Offences Act

⁷⁵ Mwangi E., Sexual Abuse Continues Unabated, 2003 www.newsfromafrica.org last accessed on 28/05/2015

⁷⁶ Section 20 of the Sexual Offences Act

common in Dagoretti. Some men are said to force their daughters into sex by threatening not to pay school fees. The helpless girl, eager to continue with her education succumbs to the demands and eventually, the relationship becomes a normal affair.⁷⁷

2.2.6 Child (or early) marriage

Child marriage, or early marriage, involves the marriage of children and adolescents below the age of 18.⁷⁸ It can be considered as a form of commercial sexual exploitation when a child is obtained and used for sexual purposes in exchange for goods or payment in cash or kind paid to a third party (usually the parents or family of the child). While early marriage with a “bride price” can be viewed as a form of commercial sexual exploitation of children, marriage of young children (under the legal age of consent) can also be classified as child sexual abuse.⁷⁹

In Kenya child marriages are common especially among the pastoral communities, in the Rift Valley districts of Kajiado and Transmara and the North-Eastern districts of Moyale, Wajir and Mandera. In some communities children are married off when they are as young as six years old. According to UNICEF 2000 reports, HIV/AIDS epidemic has also contributed to early marriages. Many adult males seek out young girls for sex or marriage in the mistaken belief that they are free from HIV, and that they are easy to please and control on the basis that they lack the means to cause trouble in case the relationship does not work out.⁸⁰

2.2.7 Indecent act against a child

A person who commits an indecent act with a child is liable to imprisonment for a term of not less than ten years.⁸¹ An “indecent act” means any unlawful intentional act which causes-

⁷⁷ Nairobi Chronicle, Incest in Dagoretti Becomes Normal (2008) <https://nairobiChronicle.wordpress.com> last accessed on 28/05/2015

⁷⁸ Article 45(2) of the Kenyan Constitution, adults, persons over the age of 18 years can marry.

⁷⁹ 2010 Kenya Violence against Children Study (VACS) *Violence Against Children in Kenya*, UNICEF Findings from the 2010 survey (2010) Kenya

⁸⁰ Mwangi E., Sexual Abuse Continues Unabated, 2003 www.newsfromafrica.org last accessed on 28/05/2015

⁸¹ Section 11 of the Sexual Offences Act

(a) Any contact between the genital organs of a person, his or her breasts and buttocks with that of another person;

(b) Exposure or display of any pornographic material to any person against his or her will, but does not include an act which causes penetration

The forms of sexual offences listed above, that is, defilement, incest, child sex tourism, child pornography can be said to constitute of an indecent act against a child.

2.3 PREVALENCE OF CHILD SEXUAL ABUSE

Child sexual abuse is a phenomenon that occurs globally and it occurs in private away from the glare of the public. Some of the perpetrators of the violence are often close family relatives who are known to the child victims and this invites shame to the victims and in other situations it leads to withdrawal of the child from normal activities which children their age would normally engage in. The act invades the privacy of the child and robs the child of their dignity. Child sexual abuse on girls robs them off their virginity, a precious status that cannot be quantified. In boys, sexual abuse robs them off their innocence which in adulthood may be exhibited as a relational problem.⁸²

2.3.1 STATISTICS ON CHILD SEXUAL ABUSE CASES IN KENYA

The 2010 Kenya Violence against Children Study⁸³ conducted a national survey on sexual violence against male and female children in Kenya. The findings from the survey indicated that violence against children is a serious problem in Kenya. Levels of violence prior to age 18 as reported by 18 to 24 year olds (lifetime experiences) indicate that during childhood, 32% of females and 18% of males experience sexual violence. The most common perpetrators of sexual violence for females and males were found to be boyfriends/girlfriends comprising of 47% and 43% respectively followed by neighbours at 27% and 21%

⁸² Omondi S.O (September 2013) "Implications of the adversarial legal systems, procedure to the special needs of the Child victims of Sexual abuse" University of Nairobi

⁸³ UNICEF, Violence against Children in Kenya, findings from a 2010 National Survey (Kenya 2010) page 7-8

respectively⁸⁴. About 7% of females aged 13 to 17 became pregnant as a result of physically forced or pressured sex. Among females aged 18 to 24 who experienced sexual violence prior to age 18, about 7% had ever received money for sex compared to 2% among those who had not experienced violence prior to age 18.⁸⁵

Most sexual abuse offenders are acquainted with their victims; approximately 30% are relatives of the child, most often fathers, uncles or cousins; around 60% are other acquaintances such as friends of the family, babysitters, or neighbours; strangers are the offenders in approximately 10% of child sexual abuse cases. Most child sexual abuse is committed by men.⁸⁶ In Kenya, statistics indicate that only 28% of females and 35% of males, age 13 to 17 who had experienced sexual violence and 11% of females and 16% of males, age 13 to 17, who experienced physical violence, knew of a place to go to seek professional help for physical violence. Ultimately less than 10% of those who had experienced either sexual or physical violence actually received any professional help.⁸⁷

Females aged 13 to 18 who reported experiencing sexual violence in childhood were significantly more likely to report feelings of anxiety, depression, suicidal thoughts and fair/poor health than those females who did not experience sexual violence. Among the child victims aged 13 to 17 who experienced at least one incident of sexual violence in the 12 months before the survey, females most often reported that the violence occurred while travelling by foot and males most often reported that the violence occurred while at school.⁸⁸

The Government of Kenya and local NGOs have been working to stop commercial sexual exploitation of children for many years. However, child sexual exploitation activities still

⁸⁴ UNICEF, Violence against Children in Kenya, findings from a 2010 National Survey (Kenya 2010) page 3-5

⁸⁵ Ibid

⁸⁶ Mayo Clinic Proc (Mayo Foundation for medical educationandresearch)<https://www.counseling.org/docs/disaster-and-trauma-sexual-abuse/long> last assessed 18/05/2015

⁸⁷ UNICEF, Violence against Children in Kenya, findings from a 2010 National Survey (Kenya 2010)

⁸⁸ Ibid

exist and have been increasing over the years. A study by UNICEF on the extent and effect of sex tourism and sexual abuse of children on the Kenyan Coast in 2006 estimates that about 30,000 children are involved in Child Sex Tourism(CST). A recent baseline survey on Child Sex Tourism conducted by End Child Prostitution in Kenya (ECPIK) in 2009 in Malindi, Mombasa and Nairobi estimates that about 50,000 children are involved in CST. Prevention efforts have been tried out especially with big hotels where they have signed the Code of Conduct for the Protection of Children from Sexual Exploitation in the Travel and Tourism industry.⁸⁹

2.4 IMPACT OF SEXUAL ABUSE ON CHILD VICTIMS

Sexual abuse and exploitation have potentially severe and long-term effects on all aspects of a child's development. In particular, children subject to such abuse and exploitation are vulnerable to experiencing such conditions as depression, low self-esteem, problems with trusting others, anger, poor social skills, substance abuse, HIV and other Sexually Transmitted Infections (STIs), various forms of physical harm, and suicide.⁹⁰ Furthermore, by robbing children of their ability to reach their full potential, sexual abuse and exploitation of children have negative implications for a society's development as a whole. Globally, sexual abuse and sexual exploitation of children are due to factors such as gender inequality and the low status of children (particularly girls), increased pressure on families to engage in monetized economies, separation of parents from children due to conflict, natural disasters and the migration of parents in search of employment.⁹¹ In Kenya, the factors are diverse, varying from decayed moral values to poor social structures which inculcate a value system among different ages of people in the society.

⁸⁹ Ibid

⁹⁰ Delaney, S. and Cotterill, C. 2005. *The Psychosocial Rehabilitation of Children who have been Commercially Sexually Exploited: A Training Guide*, 2nd edn, ECPAT International.

⁹¹ World Health Organization, *Global Estimates of Health Consequences due to Violence against Children, Background paper for the United Nations Study on Violence against Children*, (Geneva, 2006)

2.4.1 Social impact of sexual abuse

Sexual abuse is often accompanied by other forms of abuse such as social, physical, psychological as well as spiritual problems. Sexual abuse affects the normal healthy development of the child and is accompanied by intellectual, physical and emotional difficulty. Child sexual abuse is more common and more damaging to individuals and to the society than has ever been acknowledged by clinical or social scientists.⁹² Child victims of sexual abuse become more fearful, tentative and confused about the nature of the continuing sexual experience and the outcome of disclosure. Any child trying to cope with a sexualized relationship with an adult faces an uncertain and highly variable response from whatever personal or professional resources they enlist for help. The explosion of interests creates new hazards for the child victim of sexual abuse and may fail to protect the victim against the secondary assaults of an inconsistent intervention system.⁹³

For the child within a dependent relationship sexual molestation is not typically a one-time occurrence. The adult may be racked with regrets, guilt, fear and resolutions to stop, but the forbidden quality of the experience and the unexpected ease of accomplishment seem to invite repetition.⁹⁴ Whatever a child says about the sexual abuse, she is likely to reverse it. Beneath the anger of impulsive disclosure remains the ambivalence of guilt and the martyred obligation to preserve the family. The case of *Barack Osida Onam v Republic*⁹⁵ 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

⁹² Omondi S.O (September 2013) "Implications of the adversarial legal systems, procedure to the special needs of the Child victims of Sexual abuse" University of Nairobi

⁹³ World Health Organization, *Global Estimates of Health Consequences due to Violence against Children, Background paper for the United Nations Study on Violence against Children*, (Geneva, 2006)

⁹⁴ Herman, J.L. *Father-Daughter Incest*. (Harvard University Press, Cambridge, MA, 1981)

⁹⁵ Kisumu Criminal Appeal No 102 of 2009

especially child sexual abuse as matters which should not be discussed with children and that child sexual abuse would bring ridicule to the family.⁹⁶

A child molested by a father or other male in the role of a parent and rejected by the mother is psychologically orphaned and almost defenceless against multiple harmful practices. On the other hand, a mother who can advocate for the child and protect against re-abuse seems to confer on the child the power to be self-endorsing and to recover with minimum sequelae. When no adult intervenes to acknowledge the responsibility of the abuse or to fix the responsibility on the offending adult, there is a reinforcement of the child's tendency to incorporate a monstrous apparition of guilt, self-blame and rage.⁹⁷

2.4.2 Psychological impact of sexual abuse

Childhood sexual abuse has been correlated with higher levels of depression, guilt, shame, self blame, eating disorders, somatic concerns, anxiety, dissociative patterns, repression, denial, sexual problems, and relationship problems. Depression has been found to be the most common long term symptom among survivors.⁹⁸ Survivors may have difficulty in externalizing the abuse, thus thinking negatively about themselves. After years of negative self thoughts, survivors avoid others because they believe they have nothing to offer. Survivors often experience guilt, shame, and self blame. It has been shown that survivors frequently take personal responsibility for the abuse.⁹⁹ When the sexual abuse is done by an esteemed trusted adult it may be hard for the children to view the perpetrator in a negative light, thus leaving them incapable of seeing what happened as not their fault.¹⁰⁰

⁹⁶ Omondi S.O (September 2013) "Implications to the adversarial legal systems, procedure to the special needs of the Child victims of Sexual abuse" University of Nairobi

⁹⁷ Roland C.S, *Child Sexual Abuse Accommodation Syndrome* (Torrance 1983)

⁹⁸ Browne, A., & Finkelhor, D. (1986), *Impact of child sexual abuse: A review of the research*. Psychological Bulletin www.impactofchildsexualabuse/ibm last accessed on 19/05/2015

⁹⁹ Cunningham, J., Pearce, T., & Pearce, P. (1988). *Childhood sexual abuse and medical complaints in adult women*, *Journal of Interpersonal Violence* <https://www.counseling.org/docs/disaster-and-trauma-sexual-abuse/long> last assessed 18/05/2015

¹⁰⁰ Ibid

Stress and anxiety are often long term effects of childhood sexual abuse. Childhood sexual abuse can be frightening and cause stress long after the experience or experiences have ceased. Many times survivors experience chronic anxiety, tension, anxiety attacks and phobia. Denial and repression of sexual abuse is believed by some to be a long term effect of childhood sexual abuse.¹⁰¹ Symptoms may include experiencing amnesia concerning parts of their childhood, negating the effects and impact of sexual abuse, and feeling that they should forget about the abuse. Some therapists believe that sexual abuse can cause enough traumas that the victim forgets or represses the experience as a coping mechanism. Others believe that recovered memories are false or that the client is led to create them. Survivors of sexual abuse may experience difficulty in establishing interpersonal relationships.¹⁰²

Symptoms correlated with childhood sexual abuse may hinder the development and growth of relationships. Common relationship difficulties that survivors may experience are difficulties with trust, fear of intimacy, fear of being different or weird, difficulty establishing interpersonal boundaries, passive behaviours, and getting involved in abusive relationships. Many survivors experience sexual difficulties. The long term effects of the abuse that the survivor experience are depression and dissociative patterns which affect the survivors sexual functioning. Sexual symptoms that often result from experiences of sexual abuse include avoiding, fearing, or lacking interest in sex; approaching sex as an obligation; experiencing negative feelings such as anger, disgust, or guilt with touch; having difficulty becoming aroused or feeling sensation; feeling emotionally distant or not present during sex; experiencing intrusive or disturbing sexual thoughts and images; engaging in compulsive or inappropriate sexual behaviours; experiencing difficulty establishing or maintaining an

¹⁰¹ King, B.M., NJ: Pearson.. *Human sexuality today* (6thed.). (Upper Saddle River, 2009)

<https://www.counseling.org/docs/disaster-and-trauma-sexual-abuse/long> last assessed 18/05/2015

¹⁰² Long, L.L., Burnett, J.A., & Thomas, R., *Sexuality counseling: An integrative approach* (Upper Saddle River, 2006) <https://www.counseling.org/docs/disaster-and-trauma-sexual-abuse/long> last assessed 18/05/2015

intimate relationship; experiencing vaginal pain or orgasmic difficulties in women and experiencing erectile, ejaculatory, or orgasmic difficulties in men.¹⁰³

2.4.3 Health related effects of sexual abuse

Violence against children and the exploitation of children are global social, economic, human rights and public health issue, with significant negative health and social impacts. Children who are sexually abused, or who go through other trauma-inducing experiences, can develop mental health disorders and related problems. Indeed, trauma can fundamentally affect how a young person grows and develops.¹⁰⁴ Child sexual abuse disrupts the normal healthy development of its victim and results into coping difficulties both physically, intellectually or emotionally.¹⁰⁵

Symptoms that are significantly related to a history of childhood physical or sexual abuse in women in primary care practices include nightmares, back pain, frequent or severe headaches, pain in the pelvic, genital, or private area, eating binges or self-induced vomiting, frequent tiredness, problems sleeping, abdominal or stomach pain, vaginal discharge, breast pain, choking sensation, loss of appetite, problems urinating, diarrhoea, constipation, chest pain, face pain, frequent or serious bruises, and shortness of breath.¹⁰⁶ Childhood abuse is positively related to adult depression, aggression, hostility, anger, fear, anxiety disorders, and personality disorders. Women, who were sexually abused as children, have significantly greater lifetime prevalence's of agoraphobia, obsessive-compulsive disorder, social phobia, sexual disorders, Post Traumatic Stress Disorder, and suicide attempts.¹⁰⁷

¹⁰³ Cunningham, J., Pearce, T., & Pearce, P. (1988). *Childhood sexual abuse and medical complaints in adult women*, *Journal of Interpersonal Violence* <https://www.counseling.org/docs/disaster-and-trauma-sexual-abuse/long> last assessed 28/05/2015

¹⁰⁴ Ames, A.; Houston, D. A. *Child Sexual Abuse Syndrome*(1990)

¹⁰⁵ Ibid

¹⁰⁶ Boudewyn AC, Liem JH. *Childhood sexual abuse as a precursor of depression and self-destructive behavior in adulthood*. *Trauma Stress* www.ncbi.nlm.nih.gov/pmc/articles/PMC/1494926/ last assessed 18/5/2015

¹⁰⁷ Bifulco A, Bernazzi O, Moran PM, Ball C. *Lifetime stressors and recurrent depression: preliminary findings of the Adult Life Phase Interview (ALPHI)* *Soc Psychiatry Psychiatr Epidemiol* www.ncbi.nlm.nih.gov/pmc/articles/PMC/1494926/ last assessed 18/5/2015

2.5 FACTORS ATTRIBUTED TO PREVALENCE OF SEXUAL ABUSE ON CHILDREN

2.5.1 Cultural attitudes

Whilst sexual matters generally may be considered as taboo in sub-Saharan Africa, surveys have been successful in other regions of the world in accessing this most sensitive of topics and have been important instruments in creating awareness of the issue of child sexual abuse. The idea that one may ‘cleanse’ oneself of AIDS and other STDs (or misfortune generally) by having intercourse with a virgin or young girl is frequently referred to as a possible explanation for the apparent increase in the occurrence of child sexual abuse in Tanzania.¹⁰⁸ Poverty is frequently cited as the primary motive for involvement in prostitution by young girls in Kenya. Underage girls are often found in brothels engaging in sex with older men for money. Such children may engage in the sex trade for economic issues where the parents cannot afford to provide for them.¹⁰⁹ Often this children are not school going children due to financial constraints.

In Tanzania, named as a major cause of child sexual abuse was “an influx of foreign cultures which include women/girls dressing in mini-skirts, skin tights, and transparent clothing which attracts young men or boys”. The breaking away from traditional cultures where decency of dressing was highly acknowledged, a generation gap exists where girls are blamed for the dressing they wore as it is seen as an attraction of the opposite sex to ‘rape’ the girl. This is a wrong notion as child sexual abuse should not be taken lightly, as there is no excuse whatsoever for sexually abusing a child.¹¹⁰ In Kenya, some communities in the Rift Valley and North-Eastern Province marry off the girl child at a very young age. Such communities

¹⁰⁸ Lalor K., Dublin Institute of Technology, *Child Sexual Abuse in Tanzania and Kenya*, 2010 www.arrow.dit.ie last accessed on 2/06/2015

¹⁰⁹ *ibid*

¹¹⁰ *Ibid*

which engage in child marriages are perpetrators of child sexual abuse although to them it is part of their traditions.¹¹¹

Community awareness and acceptance of the reality of child abuse, particularly child abuse perpetrated by family members, has been slow. Beliefs that child's stories are untrustworthy, and beliefs that parents always act in the best interests of their children, appear to be easier for communities to accept. Such beliefs may present people with a means of turning a blind eye to the reality that child abuse is often perpetrated by adults well known to children, in children's own homes, and in other trusted environments.¹¹²

2.5.2 Stigmatization

Stigmatization refers to the negative connotations (e.g. shame, and guilt) that are communicated to the child around the experiences and that then become incorporated into the child's self-image. These negative meanings are communicated in many ways. They can come directly from the abuser, who may blame the victim for the activity, demean the victim, or furtively convey a sense of shame about the behaviour. Pressure for secrecy from the offender can also convey powerful messages of shame and guilt. But stigmatization is also reinforced by attitudes that the victim infers or hears from other persons in the family or community. Stigmatization may thus grow out of the child's prior knowledge or sense that the activity is considered deviant and taboo, and it is certainly reinforced if, after disclosure, people react with shock or hysteria, or blame the child for what has transpired. Children may be additionally stigmatized by people in their environment who now impute other negative characteristics to the victim (e.g., loose morals or "spoiled goods") as a result of the molestation. Stigmatization occurs in various degrees in different abusive situations. Some children are treated as bad and blameworthy by offenders and some are not. Some children,

¹¹¹ Mwangi E., *Sexual Abuse Continues Unabated*, (Nairobi, Kenya 2003) www.newsfromafrica.org last accessed on 28/05/2015

¹¹² 2010 Kenya Violence against Children Study (VACs) *Violence Against Children in Kenya*, UNICEF Findings from the 2010 survey (2010) Kenya

in the wake of a sexual abuse experience, are told clearly that they are not at fault, whereas others are heavily shamed. Some children may be too young to have much awareness of social attitudes and thus experience little stigmatization, whereas others have to deal with powerful religious and cultural taboos in addition to the usual stigma. Keeping the secret of having been a victim of sexual abuse may increase the sense of stigma, since it reinforces the sense of being different. By contrast, those who find out that such experiences occur to many other children may have some of their stigma assuaged.¹¹³ The negative impact of stigma is that child victims refrain from reporting cases of sexual abuse.

2.5.3 Police attitudes

The police force in Kenya has a legal mandate to be involved in child abuse and neglect investigations. The issues are not over whether they will be involved, but rather how and to what degree. What is expected of the police force is that they report, investigate, and provide emergency services to suspected cases of abuse or exploitation. Ethically, the police force has the sworn duty and obligation to uphold the law and the responsibility of the welfare of the citizens it serves. In Kenya, there are gender desks which are intended to attend to victims of child sexual abuse; most of the victims who report to these desks have experienced negative perceptions by the police officers who at times are unwilling to assist the victims. In some of the police stations the 'gender desks' are non-operational and some are full of men while the child victims would prefer to narrate their traumatic experience to a female police officer.¹¹⁴

Police attitudes towards the victims of sexual violence in the '160 girls case'¹¹⁵, highlight problematic social attitudes. This is evident from the way in which the police treated the

¹¹³ David, Angela Brownie, *The Traumatic Impact of Child Sexual Abuse: A Conceptualization*, (University of New Hampshire, Durham 2008)

¹¹⁴ Kim Thuy, Hellen, *The Investigation and Prosecution of Sexual Violence*, University of California, Berkely, May 2011)

¹¹⁵ *C.K. A Child & 11 others –v- Commissioner of Police/ Inspector General of the National Police Service & 2 others* Petition No 8 of 2012, High Court of Meru, (2012) eKLR

petitioners in this case; that is without any sympathy, empathy or care, as in the case of the 2nd petitioner who was interviewed loudly, within the hearing of all those present and then eventually denied any assistance until the birth of the child who was conceived out of the sexual abuse she suffered. The police seemed aloof and uncaring of the trauma that the victims in this case suffered, thereby subjecting them to further humiliation and degrading treatment. These police attitudes reflect deeper seated cultural issues within the wider society, whereby the Kenyan culture seems to support, condone and even promote the sexual objectification of women and girls.¹¹⁶

In Kenya, in some instances the policemen are the main perpetrators of the violence while they are supposed to enforce law and order. Some child victims hold back from reporting such incidences when the police officer is the perpetrator of the violence.¹¹⁷

2.6 CONCLUSION

Childhood sexual abuse is a traumatic experience that has many consequences throughout the person's life. The effects of childhood sexual abuse last into adulthood and have negative implications on the adult ranging from resentment, anger, hostility, anxiety disorders and feelings of rejection among others. Clinicians attempt to assist victims in coping with these negative effects and to enable child victims to cope with the traumatic effects of the sexual ordeal. Child sexual abuse may lead to further detrimental effects when the cultural attitudes, police attitudes and the effects of the stigma weigh on the child victim. A proper system for counselling of victims should be implemented to help child victims of sexual abuse.

¹¹⁶ Meroka A., The 160 Girls Decision- Broader Developmental Concerns *C.K. A Child & 11 others -v- Commissioner of Police/ Inspector General of the National Police Service & 2 others* Petition No 8 of 2012, High Court of Meru, (2012) eKLR

¹¹⁷ Omondi S.O (September 2013) "Implications to the adversarial legal systems, procedure to the special needs of the Child victims of Sexual abuse" University of Nairobi

CHAPTER THREE

CHALLENGES IN THE LEGAL FRAMEWORK GOVERNING CHILD SEXUAL ABUSE

3.1 INTRODUCTION

The previous chapter provided the situational analysis on sexual abuse on children and discussed the psychological, physical and social impact of child sexual abuse. This chapter will seek to identify the challenges child victims of sexual abuse face, based on the legal framework in Kenya. The law consists of both substantive and procedural law. The main focus in this research is the procedural laws. An overview of the international law, regional law and domestic law will be provided. Procedural laws will be examined with an aim of determining if there is inadequacy of the law or lack of implementation of the existing laws. Medico legal evidence as a part of the process in collection of evidence will be analyzed in brief and the various stages in the trial process will be analyzed with an aim of summarizing the challenges in the legal system in relation to child victims of sexual abuse related cases.

3.2 LAWS RELATING TO CHILD VICTIMS OF SEXUAL VIOLENCE

Sexual violence has become widely accepted at the national and the international levels as a crime.¹¹⁸ Both international laws and Kenyan laws have been formulated to protect child victims of sexual violence to enable them to access justice.

3.2.1 International law

Under Article 2(4) of the Constitution,¹¹⁹ all international treaties or conventions ratified by Kenya are now part of Kenya's law. Kenya is a signatory to the United Nations Convention on the Rights of the Child, (UNCRC) and the African Charter on the Rights and Welfare of

¹¹⁸ "Gender Mainstreaming," United Nations, Office of the Special Advisor on Gender Issues and Advancement of Women Department of Economic and Social Affairs,

<http://un.org/womenwatch/osagi/gendermainstreaming.htm> last accessed 24/05/2015

¹¹⁹ Article 2(4) of the Constitution of Kenya 2010

the Child (ACRWC) as a commitment towards response and prevention of all forms of violence against children. At the national level, Kenya passed the Children Act 2001 to domesticate the provisions of both the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.¹²⁰

3.2.1.1 United Nations Convention on the Rights of the Child (UNCRC)

Global commitment to combat sexual abuse and commercial sexual exploitation of children is evident in the principles and provisions of the widely ratified United Nations Convention on the Rights of the Child, which came into force in 1990. Article 19 of the UNCRC requires States Parties to take all appropriate measures to protect the child from “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”¹²¹ Article 34 is particularly relevant; binding States to protect the child from “all forms of sexual abuse and exploitation” and specifically to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity.
- (b) The exploitative use of children in prostitution or other unlawful sexual practices.
- (c) The exploitative use of children in pornographic performances and materials.¹²²

Article 35 of the UNCRC protects children from abduction, sale and trafficking, and the Optional Protocol to the UNCRC on child prostitution, child pornography and sale of children further strengthens protective measures for children from these forms of abuse and exploitation.¹²³ Kenya is not a signatory to the Optional Protocol to the UNCRC. It would

¹²⁰ Omondi S.O (September 2013) “Implications to the adversarial legal systems, procedure to the special needs of the Child victims of Sexual abuse” University of Nairobi

¹²¹ Article 19 of the United Nations Convention on the Rights of the Child

¹²² Article 34 of the United Nations Convention on the Rights of the Child

¹²³ Article 35 of the UNCRC

benefit by being a signatory from the provisions that protect children from forms of abuse and exploitation.

Since this milestone in children's rights was adopted, many other international commitments have been made to address child sexual abuse and exploitation, supported by the impetus created by key global and regional meetings.

There are five fundamental principles of child protection in this Convention which are as follows:

- (1) Child's right to have their best interests considered as paramount by any individual or institution in any matter concerning them.¹²⁴ In child sexual abuse cases the courts must take into account the best interest of the child in the trial process.
- (2) No child should be discriminated against on any ground.¹²⁵ The right to non-discriminate does not preclude the trial process.
- (3) Any child capable of forming his or her own views has the right to express those views freely in all matters affecting them.¹²⁶ Child victims of sexual abuse therefore have a right to express themselves freely in court.
- (4) Children must be treated with dignity and their respect upheld.¹²⁷ Child victims of sexual abuse therefore have a right to be treated fairly under court procedures.
- (5) Children have a right to be protected from any activity that may be harmful to their physical development.¹²⁸ The court process therefore has a duty to protect child victims as they give their testimony in court.

¹²⁴ Article 3 of the UNCRC

¹²⁵ Article 2 of the UNCRC

¹²⁶ Article 12 of the UNCRC

¹²⁷ Article 39 of the UNCRC

¹²⁸ Article 32 of the UNCRC

3.2.1.2 African Charter on the Rights and Welfare of the Child (ACRWC)

At the regional level, the African Charter on the Rights and Welfare of Children (ACRWC) 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.¹²⁹ Among some of its provisions is the obligation to states to protect children from sexual abuse.¹³⁰

Article 16 of the African Children Charter follows the wording of Article 19 of the UN Convention on the Rights of the Child and protects children against abuse and torture. Article 27 of the African Children's Charter likewise repeats the content of the prohibition on the sexual exploitation of children contained in Article 34 of the UNCRC. What is interesting about the African Children's Charter is that the rights of children are placed in cultural perspective. Children are, for instance, protected against harmful social and cultural practices. A good example is the prohibition of child marriage and betrothal of children under the age of eighteen years.¹³¹

Child victims of sexual abuse have rights under legal standards such as UNCRC and the ACRWC¹³² that have been elaborated above they however equally have entitlements to procedural rights without which they cannot enforce their substantive rights under this conventions.

¹²⁹ T Kaime, *The African Charter on the Rights and Welfare of Children: A Socio-Legal Perspective* (Pretoria University Law Press 2009)

¹³⁰ Article xxvii of the African Charter on the Rights and Welfare of the Child

¹³¹ South African Law Commission, *Sexual Offences Against Children*, 1997 www.justice.gov.za last accessed on 2/6/2015

¹³² The ACRWC and the UNCRC are substantive laws

3.3 KENYAN LAWS

Kenya as a country applies both procedural laws and substantive laws in relation to child sexual abuse cases. Procedural laws are the main focus in this research. Procedural laws function as the engine for implementation of substantive laws.¹³³ Kenya as a country has made achievements in the substantive laws that protect children from abuse and child sexual abuse in particular; however there may be difficulty in implementation of procedural laws and there may also be inadequate laws relating to procedure on child victims of sexual abuse.¹³⁴

3.3.1 The Constitution

The Constitution of Kenya is the supreme law of the land and any law that is inconsistent with the Constitution, including customary law, is void to the extent of the inconsistency. The Constitution therefore lays a solid foundation for the protection of equal rights of women and girls in Kenya, including their bodily integrity and dignity. Article 2(4) of the Constitution, provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya. Article 53 is solidly committed to the rights of children. Article 53 provides as follows

Every child has a right to a name and nationality from birth, to free and compulsory basic education, to basic nutrition, shelter and health care, to be protected from abuse...., to a parental care and protection, and not to be detained...

and in subsection (2) it states

... that the child's best interests are of paramount importance in every matter concerning the child.

¹³³ Omondi S.O (September 2013) "Implications to the adversarial legal systems, procedure to the special needs of the Child victims of Sexual abuse" University of Nairobi

¹³⁴ UNICEF, *Violence Against Kenyan Children Excessive*, UNICEF Report Finds (2012) www.voanews.com/content/kenya-girls-at-risk-of-sexual-violence.org accessed 20th February 2015

The best interests of the child means considering the child before a decision affecting his/her life is made. This is a principle that has established itself through all matters and legislation affecting the well-being of the child. It is an overarching common law principle that has been used to assist primarily courts and other institutions in the decision-making process. It should be borne in mind that courts are the upper guardians of minor children and, if the need arises, have a final say in determining the overall welfare of the child. This they do through a relatively delicate balancing of interests.¹³⁵ These interests themselves are particularly sensitive when they relate to family interests and in this case when the perpetrator is a family member, for instance in incest cases.

Article 48 of the Constitution mandates the state to ensure access to justice for all persons. Child victims of sexual abuse are protected under this provision. Some child victims of sexual abuse, who are unable to testify coherently without court protection of their interests, are hindered from accessing justice, contrary to Article 48 of the Constitution.¹³⁶

3.4 Substantive laws as they relate with procedural 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. Both substantive and procedural laws are concerned about fair treatment of individuals who seek redress through them. Procedures are therefore fair if they ensure fair treatment of all those who stand to benefit from fair treatment or lose from unfair treatment. In Kenya, there is no statute on special procedure in child sexual abuse trial hence the applicable procedural laws are the Criminal Procedure Code and the Evidence

¹³⁵ Kruger, J & B Currin, *Interpreting a Bill of Rights*, 3rd Ed Kenwyn: Juta & Co. Ltd, (Namibia, 1994)

¹³⁶ Article 48 of the Constitution of Kenya

Act. In a study carried out by Omondi, a magistrate when questioned about the procedural laws responded as follows:

“There is no separate or special procedure applicable in child sexual abuse 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 child sexual abuse cases. At times it causes a miscarriage of justice but what can we do? We have no other alternative.”¹³⁷

From the words of the magistrate, there is possible insinuation that the Evidence Act and the Criminal Procedure Code provide inadequate protection for child victims of sexual abuse.

3.5 PROCEDURAL LAWS

Procedural laws include statutes which regulate the conduct of the court process. They include the Evidence Act Cap 80, the Criminal Procedure Code Cap 75, Witness Protection Act of 2006 and the Sexual Offences Act which is primarily a substantive law but it contains some aspects of procedural laws.¹³⁸

3.5.1 Sexual Offences Act

The Sexual offences Act 2006¹³⁹ was passed in order to deal with the problems of Sexual violence in Kenya. This Act was enacted in 2006 to delineate the acts that qualify as sexual offences and to establish a means of punishing offenders, in an effort to prevent such offences and to protect all persons from unlawful sexual acts. Prior to the enactment of the Act, sexual offences were provided for under the Penal code¹⁴⁰ and were categorized under offences against morality. The Sexual Offences Act sought to consolidate all laws relating to sexual

¹³⁷ Omondi S.O (September 2013) “Implications to the adversarial legal systems, procedure to the special needs of the Child victims of Sexual abuse” University of Nairobi

¹³⁸ Ibid

¹³⁹ No 3 of 2006

¹⁴⁰ Chapter 63, Laws of Kenya

offences and repealed most of the laws in the Penal Code relating to sexual offences.¹⁴¹ The Sexual Offences Act 2006¹⁴² defines sexual assault to include any unlawful penetration or manipulation of any part of a person's body by another. It also defines other sexual offences committed against child victims such as child pornography, incest, defilement and child trafficking.¹⁴³ The Sexual Offences Act is primarily a substantive law; however it contains some aspects of procedure which are relevant to this study.

3.5.1.2 Procedural safeguards in the Sexual Offences Act for child victims of sexual abuse

The Sexual Offences Act has several safeguards that relate to child victims of sexual abuse. They are stipulated in section 31(4)(a), (b), (c) and (e) of the Sexual Offences Act which provides for mechanisms of protecting sexual assault victims during their testimony (the use of a witness protection box, intermediary, avoiding the open court, prohibiting the identity of the complainant including the publication of information that may lead to identification of the complainant and any other measure that the court deems just and appropriate).

The Sexual Offences Act is not explicit in its provision of “any other measure that the court deems just and appropriate”, as it could be subject to abuse or misuse. The courts are active in protecting child victims of sexual abuse by prohibiting the identity of the complainant.

3.5.1.3 Witness protection box

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; however there seems to be no procedure as to how this can be done. In addition, there are no witness protection boxes provided in the

¹⁴¹ Winifred Kamau, *Legal Treatment Of Consent In Sexual Offences In Kenya*, February 2013

¹⁴² No. 3 of 2006

¹⁴³ Sexual Offences Act

courts. This makes it very difficult to apply the Sexual Offences Act in protecting child victims of sexual abuse.¹⁴⁴

Omondi in a study carried out in 2013 found that more than half of the child sexual abuse trials were conducted in total disregard of the protective measures due to lack of guidelines on how to implement the measures. The Nairobi Children's court had a witness protection box in compliance with the provisions in section 31(4). According to her study, this was the only court that complied. The rest of the children's courts did not have a witness protection box. However the witness protection box was not used for the intended purposes, instead it was used to store court files therefore defeating the purpose for which it was set up.¹⁴⁵

3.5.1.4 Use of intermediaries

An "intermediary" means a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counselor, guardian, children's officer or social worker.¹⁴⁶ Omondi in her study sought to find out why courts fail to use intermediaries as stipulated under section 31(4) of the Act and one magistrate responded that though the Sexual Offences Act was intended to protect victims of sexual abuse and it had provided various ways of doing this, its operationalization is hampered by a lack of specific procedures, regulations or guidelines that we can use while applying the provisions. The magistrate stated that she had never been trained on the protective mechanisms in regard to child victims of sexual abuse and that in reference to the intermediaries, there was no list of who can be appointed as an intermediary or what their qualifications are and their specific functions.¹⁴⁷

¹⁴⁴ Section 31(4) of the Sexual Offences Act, No 3 of 2006

¹⁴⁵ Op Cit n 137

¹⁴⁶ Section 2 of the Sexual Offences Act, No.3 of 2006

¹⁴⁷ Op Cit n 137

3.5.1.5 Cross-examination

There are specific procedures on how child victims are supposed to be cross-examined. The magistrate may in some cases step in to protect the child victim from what they deem to be harassment from the defence lawyer. The intimidating cross-examination of child victims of sexual abuse is inconsistent with Article 3 of UNCRC, which provides for children's right to participate in judicial proceedings, in which they are involved. Section 34 of the Sexual Offences Act states that:

“...no evidence as to any previous sexual experience against or in connection with whom any offence of a sexual nature is alleged to have been committed will be adduced... and no question in regard to such a conduct shall be put”

This provision was enacted to protect victims from the negative implications of bad character evidence, where previously it was used to discredit the complainant's evidence. The courts have often failed to intervene and protect child victims from such cross-examination. For example, in the case of *Oiruri v Republic*¹⁴⁸, the court record showed that a 15 year old child victim of sexual abuse became shy upon cross-examination, when asked to state exactly what happened when she was defiled. She did not have an idea what a P3 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. When interviewed after the court session, the magistrate in her defence stated that her role was to remain as an impartial arbitrator failure to which the defence counsel will raise an objection that she is favouring the prosecution.¹⁴⁹ It is not clear whether the defence appealed against the decision of the magistrate.

¹⁴⁸Eldoret Criminal Case No. 295 of 2012 eKLR www.kenyalaw.org

¹⁴⁹ *ibid*

Due to lack of regulation or guidelines on how to cross-examine child victims of sexual abuse in child sexual abuse cases, it may be difficult for judicial officers to apply the provision of section 34 of the Sexual Offences Act, without objection being raised by the defence counsel. A defence counsel interviewed by Omondi admitted that it was easy to win a case for the client since if he succeeded in intimidating the child victim of sexual abuse, they were not able to testify coherently and they ended up contradicting their evidence. Due to lack of proper regulations and guidelines, the child sexual abuse trial leads to a miscarriage of justice.¹⁵⁰

3.5.2 Evidence Act

Section 62 of the Evidence Act, requires that all evidence in a trial must be oral and must be taken in the presence of the accused person or his advocate. Section 62 and 63, form the basis for the courts 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.¹⁵¹

An amendment of the evidence Act¹⁵² has played a major role in the legal system in regard to child victims of sexual abuse. Section 124 of the Evidence Act states

...in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

¹⁵⁰ Omondi S.O (September 2013) “Implications to the adversarial legal systems, procedure to the special needs of the Child victims of Sexual abuse” University of Nairobi

¹⁵¹ Section 62 of the Evidence Act

¹⁵² The Criminal Law (Miscellaneous Amendment) Act No 5/2003.

The significance of this amendment is to allow the court to convict an accused person based on the evidence of a child alone, therefore removing the requirement for collaboration.¹⁵³

Under section 107, the prosecution should discharge the burden of proof beyond reasonable doubt in all matters relating to child victims of sexual abuse. If any doubt is raised in the prosecution case it is given to the accused person who is subsequently set free.¹⁵⁴ Sections 107 and 108 of the Evidence Act in Kenya restate the ruling in *Woolmington v DPP*¹⁵⁵ which provides 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.¹⁵⁶ This is also a reflection of Article 50(2) (k) of the Constitution of Kenya.

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. A statute may place the burden of proving on the accused person. The legal burden refers to the prosecution's duty to convince the court of the guilt of the accused person, beyond any reasonable doubt. It lies entirely on the prosecution, and is fixed at the beginning of the trial. The legal burden remains on the prosecution and never shifts to the accused person at any stage of the trial. 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.¹⁵⁷ When the evidence of a child victim of sexual violence is contradictory and it raises doubt, the benefit is to the accused person as per section 111(1) of the Evidence Act.

¹⁵³ Omondi S.O (September 2013) "Implications to the adversarial legal systems, procedure to the special needs of the Child victims of Sexual abuse" University of Nairobi

¹⁵⁴ Section 107 of the Evidence Act

¹⁵⁵ [1935] AC 462

¹⁵⁶ *ibid*

¹⁵⁷ Omondi S.O (September 2013) "Implications to the adversarial legal systems, procedure to the special needs of the Child victims of Sexual abuse" University of Nairobi

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.¹⁵⁸ This section should not be used to attack the child victim of sexual abuse when there is a previous sexual history of the child, as it will be in contravention of section 34 of the Sexual Offences Act.

3.5.3 Criminal Procedure code

Under the Criminal Procedure Code the role of the judicial officers is stated under section 89 where the judicial officer is of the opinion that a complaint does not disclose an offence the officer may make an order refusing to admit the complaint. Sections 210 and 211 provide that the judicial officers rule on whether the accused person has a case to answer or not. Sections 215 and 216 provide for the pronouncement of judgment and passing of sentence as the main functions of the judicial officers.¹⁵⁹

Section 186 provides that when a person is charged with defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the Sexual Offences Act, he may be convicted of that offence although he was not charged with it.¹⁶⁰ This means that the accused person will be charged of the offence under the Sexual Offences Act although he was not charged with it.

Section 194 requires that all evidence in a trial must be oral, direct and taken in the presence of the accused person or his advocate. This section is similar to section 62 of the Evidence Act. This is the basis upon which child victims of sexual violence must give oral evidence in court in the presence of the accused person and identify him/her as the one who committed

¹⁵⁸ Section 154 of the Evidence Act

¹⁵⁹ Section 215 and 216 Criminal Procedure Code

¹⁶⁰ Section 186 of the Criminal Procedure Code

the offence under trial. The identification implies direct face to face contact between child victims of sexual violence and the accused during oral evidence.¹⁶¹ The child is likely to feel intimidated when there is direct face to face contact with the perpetrator.

Under Section 215 of the Criminal Procedure Code, the court having heard both the accused persons and the complainant may make a decision to convict or acquit the accused person. It is the court's evaluation of the evidence produced before them that determines the acquittal or conviction of the accused persons. Subsequently therefore, it is the magistrate's who make a determination as to whether the child should be protected or assisted in any way including making orders as to medical, counselling and psycho-social support services.¹⁶² The significance of this section is the discretionary power of the court in making orders which are in the best interests of the child.

Section 394 of the Criminal Procedure Code provides for witness reimbursement of travelling expenses to court once they testify. Lack of this information by the child victims of sexual abuse guardians is attributed to the failure by the courts to ensure that child victims of sexual abuse are adequately informed of their rights.¹⁶³

3.5.4 Witness Protection Act

The Witness Protection Act¹⁶⁴ provides protection to witnesses who have vital information but fear for their life in case they testify in court. Child victims of sexual abuse require special protective court procedure yet they appear not to be provided for under the Witness Protection Act, as the wording of the Act does not focus on the special needs of children. 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

¹⁶¹ Section 194 of the Criminal Procedure Code

¹⁶² Section 215 of the Criminal Procedure Code

¹⁶³ Section 394 of the Criminal Procedure Code

¹⁶⁴ Witness Protection Act, No 16 of 2006

Act fails to make this clarification which is important in its operationalization to protect children.¹⁶⁵

3.6 INADEQUACIES OF THE LAW

3.6.1 Mis-interpretation and lack of implementation

There are certain difficulties that are encountered in interpretation and implementation of substantive laws. These difficulties include counselling. Counselling of victims of sexual abuse is provided for under section 35 of the Sexual offences Act, but there is no procedure to address the traumatic effects of child sexual abuse when victims narrate their experiences in court. A study by Omondi found that no government agencies provide for psycho-social support to child victims of sexual abuse. Most of the victims of sexual abuse who she had interviewed reported that they had not received counselling prior to attending court.¹⁶⁶

3.6.2 Lack of reporting

There are also inadequacies in the law such as the lack of mandatory reporting laws in Kenya. There is no law in Kenya that makes it mandatory to report a suspected case of child sexual abuse. The study by Omondi found that there is no statutory provision on mandatory reporting of child sexual abuse 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 child sexual abuse.¹⁶⁷

3.6.3 Lack of awareness

Section 35(3) of the Sexual Offences Act provides that:

¹⁶⁵ Omondi S.O (September 2013) "Implications to the adversarial legal systems, procedure to the special needs of the Child victims of Sexual abuse" University of Nairobi

¹⁶⁶ Op. Cit n 165

¹⁶⁷ Op. Cit n 165

“the Minister responsible for health shall prescribe circumstances under which a victim of a sexual offence may at any time access treatment in any public hospital or institution”

Treatment will be at the expense of the state, there is lack of public awareness in this regard. Most child victims of sexual abuse incur hospital expenses at their own cost, and most of the victims prefer private hospitals to public hospitals due to the stigma associated with child sexual abuse.¹⁶⁸

3.6.4 Difficulty in proper wording

Child victims of sexual abuse, encounter difficulty in narrating the words of what happened to them. They experience difficulty in pronouncing the words of private parts, and therefore they are unlikely to respond adequately when asked questions about sexual organs. As a result the case is likely to be dismissed due to lack of sufficient evidence. In the case of *M.B.O v Republic*,¹⁶⁹ the accused was charged with the offence of defilement contrary to section 8(1) (2) of the Sexual Offences Act.¹⁷⁰ The particulars of the charge were that the accused person caused his penis to penetrate the vagina of the child victim of sexual abuse; a girl of seven years. The child victim of sexual abuse gave evidence three months after the offence. Her evidence was that, the accused person urinated on her thighs using his *chuchu*.¹⁷¹

The accused person was acquitted as the court reasoned that there was a variance between the child victim of sexual abuse’s evidence and the particulars of the charge as it appeared in the charge sheet. Evidence was produced in court showing that the child victim of sexual abuse was examined two weeks after the abuse. However, the report by the medical officer who examined child victim of sexual abuse indicated that there was no injury to the child victim of

¹⁶⁸ Op cit 137

¹⁶⁹ Nairobi Criminal Case No. 342/2008 eKLR www.kenyalaw.org

¹⁷⁰ Act no 3 of 2006

¹⁷¹ A vernacular name used to describe the penis

sexual abuse's private parts. According to the magistrate, there was a doubt raised in the prosecution case. The charge was therefore not proved and the accused person was acquitted. This case illustrates that terminologies referring to sexual organs or activities present difficulties to children.

In the case of *Juma Rashid Lolwe v Republic*,¹⁷² the child victim of sexual abuse 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.¹⁷³ The boy was asked about the ordeal and he used the phrase “*nyuma yangu*”¹⁷⁴ a response which evoked cross examination by the defence counsel and the prosecutor stepped in to assist the boy by drawing a sketch of a human body to which the boy clearly indicated what he meant by “*nyuma yangu*”¹⁷⁵ this case illustrates the difficulties of language expression and how the prosecution can be effective in assisting the victim to testify.

Child victims of sexual violence may experience shock upon seeing the perpetrator and may react by refusing to talk as a coping mechanism. However, the evidentiary rules do not recognize post traumatic depression and therefore the failure of a child victim to testify amounts to lack of sufficient evidence on the prosecution case.

3.6.5 Omissions in the Sexual Offences Act

The repealed section 144(3) of the penal code provided:

¹⁷² Kisumu Criminal Appeal No. 331/2007 eKLR www.kenyalaw.org

¹⁷³ www.kenyalaw.org

¹⁷⁴ Swahili word for anus

¹⁷⁵ Swahili word for anus

Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture or exhibits any object, intending that the word or sound shall be heard, or that the gesture or object shall be seen, by the woman or girl, or intrudes upon the privacy of the woman or girl, is guilty of a misdemeanour and is liable to imprisonment for one year.

This section had played a very central role in checking some behaviour that may not fit in the definition of indecent assault. Kiarie Waweru,¹⁷⁶ in his report made an observation of this omission in the Sexual Offences Act 2006. In a case he had tried, where an accused person harassed a girl of 12 years by words whereby he constantly nagged her to have sexual intercourse with him until she had to run away from home. As the Sexual Offences Act did not cater for such behaviour, the accused person was thereby acquitted in spite of his obnoxious behaviour. Kiarie Waweru made a recommendation that the Sexual Offences Act ought to be amended to incorporate the provisions of Section 144(3) of the Penal Code, now repealed.¹⁷⁷ This section however is not in reference to procedural law but rather to substantive law.

3.7 MEDICAL-LEGAL EVIDENCE

The collection and documentation of medico-legal evidence is an especially important element in response to child sexual abuse because it is central to the success of prosecution efforts and positive legal outcomes. Existing literature suggests that cases of sexual violence where evidence is collected and well documented are more likely to move forward in the criminal justice system than cases where evidence is not collected. Successful utilisation of medico-legal evidence is however dependent on three factors:

- 1) The collection of samples;
- 2) Documentation of examination and laboratory results by health professionals; and

¹⁷⁶ Acting Senior Principal Magistrate Kibera Law Courts, July 2007

¹⁷⁷ Kiarie Waweru Kiarie, "The Sexual Offences Act: Omissions and Ambiguities." Available at www.kenyalaw.org/Articles.

3) Entry of that evidence into police records.¹⁷⁸

While the importance of forensic evidence collection is widely recognised, research demonstrates that the collection of medico-legal evidence that is required by the criminal justice system for corroborative purposes has been inconsistent, limited in quality or at times non-existent.

3.7.1 Medical examination form (P3) (see annex 1)

The police medical report (P3) form is the primary evidence document admissible in court. A signed P3 form by the police officers and examining doctors, acts as evidence that can be used in prosecuting sexual assault cases. The P3 form is used to request for medical examination by a medical officer of health in order to determine the nature and extent of bodily injury sustained by a complainant in assault cases (inclusive of sexual assault cases).¹⁷⁹ Upon sexual abuse taking place, victims have to get a Medical Examination Report (P3 form) after reporting the crime to the police before she can be examined by a doctor. The form is a document that is used by victims to detail acts done against them. It is divided into two sections that are supposed to be filled in by the police and a doctor. This may necessitate several trips to the doctor if the victim cannot be examined immediately.¹⁸⁰

Getting this form however, is at times very difficult in terms of issuance by the police who insist on bribery, despite the fact that the form should be free and readily available. For a number of victims, they are forced to bribe the police in order to get the form. This has

¹⁷⁸ Ajema, Mukoma, Mugwenyi, Meme, Mulwa, *Improving The Collection, Documentation and Utilization of Medico Legal Evidence in Kenya*, LVCT (Kenya, 2012)

¹⁷⁹ LVCT, *Sexual Abuse: When It Happens* www.svri.org/bronchures last accessed on 21/05/2015

¹⁸⁰ Joseph Kibugu, Country Director, IJM-Kenya, interview with Kim Thuy Seelinger, (Nairobi, Kenya, October, 2010)

discouraged many victims of sexual abuse from going to get the form. In cases in which the perpetrators happen to be the police themselves, victims fear trying to obtain a form.¹⁸¹

3.7.2 Post rape care form (see annex 2)

A second form known as the “post rape care” (Annex 2) form affords Kenyan healthcare providers an opportunity to record details relevant to a sexual attack when a victim comes forward for care. The revised PRC form of 2011 allows for key elements of medico-legal evidence captured on this form to be entered directly onto the P3 form. This reduces the paperwork required for each case and circumvents disagreements between the police and health care workers.¹⁸² It allows for the reporting of a more detailed examination of the sexual abuse victim, including provision for the examination of the whole body for cuts and bruises and not only of the genitals.¹⁸³ The PRC form – though more responsive to sexual violence documentation – does not yet carry the evidentiary weight of the P3 form, and in practice is often treated as an optional “supplement” to the primary police document.¹⁸⁴ The form is produced in triplicate: 1) the original white copy of the PRC form alongside the Kenya Police medical examination form (‘P3’ form), constitute part of the police records; 2) the duplicate green copy of the PRC form is given to the survivor; 3) the yellow copy is retained in health facility records. Some of the shortcomings have been that the PRC forms are consistently incomplete due to limited evidence collection procedures and recording errors or omissions by health care workers.

¹⁸¹ Carol Ajema et al., *Standards required in maintaining the chain of evidence in the context of post rape care services* (Nairobi: Liverpool VCT, the Division of Reproductive Health, and Population Council, 2009)

¹⁸² Ajema, Mukoma, Mugwenyi, Meme, *Mulwa, Improving The Collection, Documentation and Utilization of Medico Legal Evidence in Kenya*, LVCT (Kenya, 2012)

¹⁸³ Amnesty International Document - Kenya: Rape - The Invisible Crime (Afr 32/001/2002)www.rapetheinvisiblecrime.org last accessed on 23/05/2015

¹⁸⁴ Ibid

3.7.3 Forensic evidence

In order to obtain evidence for possible prosecution, victims may need to submit to forensic investigation, which is defined as a medical examination conducted in the knowledge of the possibility of judicial proceedings in the future requiring medical opinion. Forensic evidence can include samples of hair, or trace blood, semen, or saliva (which can contain the perpetrator's DNA); foreign material from the crime scene; urinalysis evidence of victim sedation or other poisoning; and other physical evidence. It can establish whether an assault occurred. It can place the accused at the crime scene. It can even indicate the use of force or the lack of ability to consent.¹⁸⁵

3.8 SHORTCOMINGS IN THE MEDICO-LEGAL EVIDENCE

3.8.1 Poor documentation of collected evidence

In Kenya, research conducted by LVCT¹⁸⁶ found that while the criminal justice system relies heavily on medico-legal evidence collected by health care providers, however significant gaps exist in how that evidence is collected and recorded. The gaps include: use of the generic term “assault” in documenting cases reported, instead of the specific type of SV as stipulated in the sexual offences act; shortage or absence of the equipment required and skills in their usage to collect samples; diversity in the type of evidence collected from survivors; lack of understanding of the national documents to be used in capturing survivor or data; and lack of storage facilities for evidence collected.¹⁸⁷

3.8.2 Interference with evidence

There is inadequate public awareness of the proper collection and preservation of child sexual abuse evidence. Most child victims of sexual abuse, parents and guardians, investigating

¹⁸⁵ Dr. Cristian Orrego (Criminalist supervisor in forensic genetics, California State Department of Justice DNA Laboratory), interview by Kim Thuy Seelinger, December 3, 2010 (Richmond, California, 2010)

¹⁸⁶ Liverpool VCT care and treatment

¹⁸⁷ Ajema, Mukoma, Mugwenyi, Meme, Mulwa, *Improving The Collection, Documentation and Utilization of Medico Legal Evidence in Kenya*, 2012, LVCT(Kenya, 2012)

officers and prosecutors acknowledged in a study conducted by Scholastica Omondi¹⁸⁸ that due to lack of knowledge, a lot of evidence is often destroyed at the crime scene as the child victims of sexual abuse takes a shower or washes the clothes or unknowingly tampers with the scene of the abuse before the matter is reported to the police.¹⁸⁹ Victims of sexual abuse may experience myriad challenges that can obstruct their road to justice.¹⁹⁰

3.8.3 Lack of the required evidence collection tools.

Health care providers lacked the essential tools and equipment to facilitate the immediate retrieval, analysis and storage of evidence such as blood, urine, high vaginal swabs (HVS) and foreign materials on the body or clothing of the survivor during the initial comprehensive examination of survivors. This has resulted in health care workers not collecting relevant and comprehensive evidence especially from children.¹⁹¹ Where equipment may be available, some health providers lack the skills in their usage to collect evidence from children. The Kenyan national guidelines on the medical management of survivors of sexual violence clearly state the types of evidence to be collected but do not specify the type of equipment required to do this.¹⁹¹

3.8.4 Failure in adducing health facility medico-legal documentation as evidence in the police station.

Copies of PRC forms rarely get filed within the police records alongside the P3 forms. This could be attributed to many factors, including : lack of knowledge by both police and Health Care Workers on how the original copy of the PRC form gets delivered to the police; or

¹⁸⁸ Op Cit n 137

¹⁸⁹ Op. cit 187

¹⁹⁰ "Gender Mainstreaming," United Nations, Office of the Special Advisor on Gender Issues and Advancement of Women Department of Economic and Social 2006

Affairs <http://un.org/womenwatch/osagi/gendermainstreaming.htm>.last accessed 23/03/2015

¹⁹¹ Ibid

failure by the health care workers to accurately or duly fill in all the required variables on the PRC form.¹⁹²

3.9 STAGES IN CHILD SEXUAL ABUSE CASES

Child victims of sexual abuse experience challenges at each stage of the “life-cycle” of a sexual violence case that is at the pre-investigation stage, the investigation and prosecution phase, the trial phase and the post trial phase.¹⁹³

3.9.1 Pre-investigation stage

The first stage is the pre-investigation stage, when victims must decide if, and how, they will seek accountability for the crime committed against them. For victims living in small or remote villages, physical access to the legal system may be difficult, as well. If a victim does not live near a police station or courthouse, the travel required to report a crime (as well as seek medical treatment) can be a significant obstacle. Many victims have no prior experience with the legal system and do not know how to proceed in sexual violence cases.¹⁹⁴ A threshold challenge in the investigation of sexual violence is that, due to the particularly sensitive nature of these experiences, victims may have greater difficulty speaking about their ordeal than victims of less intimate and/or stigmatized crimes. The situation may be worse where the policeman has not been trained in gender sensitive matters; it thereby becomes extremely difficult for the child victim to narrate her ordeal.¹⁹⁵ These challenges are:-

3.9.1.1 Fear of retaliation

The fear to speak may be compounded where the victim lives in the same community as her aggressor and may fear retaliation from the aggressor for having made a report to the police.

¹⁹² Op Cit n 188

¹⁹³ Kim Thuy, Hellen, *The Investigation and Prosecution of Sexual Violence*(University of California, Berkely , May 2011)

¹⁹⁴ Ibid

¹⁹⁵ Ibid

Even non-victims may fear retaliation by the aggressor for narrating the account of the ordeal as witnesses, for fear of their own safety.¹⁹⁶

3.9.1.2 Traumatic impact as a hindrance

The impact of the trauma may also deter the victim from coherently narrating their ordeal to the police officers. Memory loss may result as well as numbness from the experience. The insensitive attitudes of police officers may deter child victims from coming forward or prevent them from pursuing a case.¹⁹⁷

3.9.1.3 Insensitivity of police officers

In the '160 girls case'¹⁹⁸ this was reported by several girls as a major hindrance when the police officers who were handling the cases were often rude and in some incidence the police officers were the perpetrators of the violence committed against the girls. The police officers aloof and uncaring about the trauma the child victims were facing would interview them loudly within the hearing of all those present.¹⁹⁹ A commentary by Winifred Kamau and Kieya Kamau highlighted this case²⁰⁰ as the first one where the government had been sued for inaction and failure to protect children rights against sexual violence and it had serious implications on the future police handling of sexual violence cases. The 11 petitioners had all experienced sexual abuse at the hands of family members, caregivers, neighbors, employers, and in the case of one girl, a police officer. As a result of the abuse, some of girls became pregnant; some contracted sexually transmitted diseases, while others sustained physical injuries requiring surgery. The police response in all the cases was inadequate ranging from

¹⁹⁶ Roland C, *Sexual abuse syndrome, an analysis of the California report*,(California ,2010)

¹⁹⁷ Kim Thuy, Hellen, *The Investigation and Prosecution of Sexual Violence*(University of California, Berkely, May 2011)

¹⁹⁸ Petition no 8 of 2012, High Court of Meru, C.K. (a child) & 11 others –v- Commissioner of police/ Inspector General of the national Police Service & 2 others(2012) eKLR www.kenyalaw.org

¹⁹⁹ Ibid www.kenyalaw.org

²⁰⁰ Petition no 8 of 2012, High Court of Meru, C.K. (a child) & 11 others –v- Commissioner of police/ Inspector General of the national Police Service & 2 others(2012) eKLR www.kenyalaw.org

the failing to record the complaints to asking for transport money and interrogating the victims in a humiliating way.²⁰¹

3.9.1.4 Inadequacy of training

Investigators may not be trained on how to deal with a victim's psychological difficulties and may also not know when to refer a traumatised witness for supportive counselling.²⁰²

Investigators may themselves also suffer vicarious traumatisation from repeatedly listening to accounts of sexual violence.²⁰³

3.9.1.5 Language barrier

Difficulty may arise if the investigator does not speak the victims first language, for flawed interpretation can often lead to confusion, misunderstanding and even unjustified concerns about the witness credibility. The introduction of interpretations may lead to witness unwillingness to proceed. This may apply mainly where the terminologies used are vague or where there is a sense of embarrassment or where the cultural taboos or judgement may affect both the interpreter and the victim of the sexual ordeal. Security and confidentiality may be compromised where the witness and the interpreter are from the same community.²⁰⁴

3.9.2 Investigation and prosecution stage

The second stage is the investigation and prosecution phase, when investigators must explore the often intimate factual aspects of an assault and prosecutors must formulate a coherent and gender-sensitive strategy to prove the charged offenses.²⁰⁵

²⁰¹ Ibid www.kenyalaw.org

²⁰² Wakabi Wairagala, "Expert Describes Trauma Among Central African Rape.2009 Victims," *The Trial of Jean-Pierre Bemba Gombo: A Project of the Open Society Justice Initiative*, <http://www.bembatrialco.ke> last accessed on 14/05/2015

²⁰³ Kim Thuy, Hellen, *The Investigation and Prosecution of Sexual Violence*(University of California, Berkely, May 2011)

²⁰⁴ R. Karl Hanson, "*The Psychological Impact of Sexual Assault On Women and Children*, (Harvard University, 2010)

²⁰⁵ Kim Thuy, Hellen, *The Investigation and Prosecution of Sexual Violence*(University of California, Berkely, May 2011)

3.9.2.1 Failure in collection of evidence

At the investigation stage one of the major challenges that is encountered is the failure in collection of evidence. In the ‘160 girls case’²⁰⁶ the police failed to collect the evidence and preserve it, and also failed to bring the evidence to court or visit the crime scenes. This caused further psychological and physical harm to the victims as the perpetrators continued to roam free and make threats against the girls and their families. Justice Makau in his judgment on this case held that the police officers had created a culture of impunity in which the perpetrators could commit crimes against innocent children without fear of apprehension and prosecution. He further stated that “once a report or complaint is made it is the duty of the police to move with speed and promptly, commence investigation and apprehend and interrogate the perpetrators of the offence and the investigation must be conducted effectively, properly and professionally, Anything short of this amounts to violation of fundamental rights of the complainant.”²⁰⁷ The decision by the court made recognition of the obligation on the Kenyan police to conduct proper investigations in cases of sexual abuse and held the police accountable for any wrongful treatment of defilement victims.²⁰⁸

3.9.2.2 Inadequacy of police-doctors

One obstacle to the successful prosecution of these cases is the difficulty presenting sufficient evidence. Aside from lack of police capacity to collect and preserve physical evidence of rape, additional problems occur due to the requirement that medical evidence of rape (examination, report, and in-court testimony) come from a “police doctor.” This can pose significant challenges – particularly since there is only one “police doctor”²⁰⁹ in all of

²⁰⁶ Petition no 8 of 2012, High Court of Meru, C.K. (*a child*) & 11 others –v- Commissioner of police/ Inspector General of the national Police Service & 2 others(2012) eKLR www.kenyalaw.org

²⁰⁷ Dr. Winifred Kamau and Kieya Kamau, Case Comment- victory for 160 girls defilement constitutional challenge Petition no 8 of 2012, High Court of Meru, C.K. (*a child*) & 11 others –v- Commissioner of police/ Inspector General of the national Police Service & 2 others(2012) eKLR www.kenyalaw.org

²⁰⁸ Ibid

²⁰⁹ A qualified doctor who has also undergone a cadet course and is well versed with police work who can be called upon to appear on the stand and testify. www.kenyanationalassemblyofficialhansard last accessed on 18/05/2015

Nairobi. There are three police doctors in the country currently, the last two graduated from Kenya Police College in Kiganjo, after completing their six months cadet course.²¹⁰ The few cases that do proceed to court often risk being dismissed due to the “police doctor’s” failure to appear on the stand.²¹¹

3.9.2.3 Humiliation by police officers

A study by the Institute of Economic Affairs in Kenya of victims who had reported gender-based crimes (including forms of sexual violence) found that 51.9 percent of women felt that police officers “were not helpful.” Twenty-eight percent said they were “humiliated” by the police and 20 percent reported being asked for bribes.²¹²

3.9.2.4 Preference for medical care to legal care

In areas characterized by a lack of confidence in the law enforcement or judiciary, victims of sexual violence may be more likely to seek medical care than police or legal assistance right after the attack. Strengthening the links between the legal system and the hospitals and clinics where victims seek medical care can increase the number of sexual violence cases that are ultimately filed in court. These linkages establish an entry point into the legal system for victims who decide to pursue a claim after seeking medical attention; they can also help ensure that case-related information is transferred properly between the medical sector and the legal sector.²¹³

²¹⁰ Kenya National Assembly Official Record(Hansard), Parliamentary Debate, September 2007 www.kenyanationalassemblyofficialhansard last accessed on 18/05/2015

²¹¹ United States Department of State Bureau of Democracy, Human Rights, and Labor, 2010 *Country Report on Human Rights Practices* “Challenges experienced by service providers in the delivery of medico-legal services to survivors of sexual violence in Kenya,” *Journal of Forensic and Legal Medicine (in press, 2011)*

²¹² Status of Gender Desks at Police Stations in Kenya, www.kenyapolice.org last accessed 14/03/2015

²¹³ L. Harris and J. Freccero *Sexual Violence: Medical and Psychosocial Support* (Berkeley: Human Rights Center, 2011)

3.9.3 Trial stage

The third stage is the trial phase,²¹⁴ during which victims are called on to revisit painful memories, often in front of skeptical judges, harassing defence attorneys and the perpetrator of the crime, victims of sexual abuse experience fear anxiety and trauma as they await to testify in an adversarial court system. Where the police or magistrate belongs to the same gender as the abuser, some child victims of sexual abuse 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. Matters regarding sex are not openly discussed in the Kenyan society especially with children. This contributes to child victims of sexual abuse's difficulty in narrating sexual abuse details to the police and court.²¹⁵ In cases where the child victim of sexual violence is known to the perpetrator, the child may experience difficulties in testifying due to intimidation by the perpetrator of the violence.²¹⁶

3.9.4 Post-trial stage

The fourth stage is the post-trial phase, when courts must determine appropriate sentences and review appeals. A study by Cluss reveals that the adversarial criminal trial system neglects the concerns of the welfare of child victims of sexual violence and does not protect them after they testify in court.²¹⁷ Child victims of sexual abuse like many other witnesses face challenges of their safety after testifying in court. In addition they have to incur expenses on account of their physical, emotional and psychological injuries that result from sexual abuse without any assistance from the court. The court can exercise its discretionary powers to intervene in such circumstances. In the absence of a follow up by the court on the

²¹⁴ Kim Thuy, Hellen, *The Investigation and Prosecution of Sexual Violence*(University of California, Berkely May 2011)

²¹⁵ Hoyano & Keenan, Wolf, Herman & Hirschman, *Gender Based Violence*, 2000, www.genderbasedviolenceagainstwomenandchildren last accessed 12/03/2015

²¹⁶ Op. cit

²¹⁷ 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 www.psychologycrimes.org last accessed on 11/06/2015

witnesses, the adversarial trial procedure treats victims as mere suppliers of information for the wheels of justice to roll. After giving evidence, victims of sexual abuse become forgotten parties while they bear the burden of giving evidence in court and its consequences.²¹⁸

3.10 CONCLUSION

Lack of proper procedural laws hampers the realization of substantive laws. The inadequacies in the procedural law namely, lack of procedure on how to counsel child victims of sexual victims, lack of procedure on use of procedural safeguards under section 31(4) of the Sexual Offences Act, difficulty encountered by children as they define private terms have all hampered the road to justice for child victims of sexual violence. At the different stages in the investigation process, there are various challenges that are encountered; these are fear of retaliation for the victims, insensitivity of the police officers, lack of adequate training and failure in collection of evidence which is a major challenge in the legal framework.

In making a brief commentary on the Sexual Offences Act in Kenya, it is noteworthy that the Act exists as a strong legal framework against child sexual offences and provides procedural safeguards on how child sexual abuse cases should be dealt with. The best interests of the child are of paramount importance in the strict adherence of the statute; however in the absence of implementation of the procedural law in the Sexual Offences Act, the child victims will continue to suffer injustice despite the provisions of the Act.

The next chapter will examine the law in the Canadian jurisdiction and the South African jurisdiction with an aim of establishing the best practices which Kenya can borrow from these jurisdictions.

²¹⁸ A P Frazier & B Haney, *Sexual Assault Cases in the Legal System: Police, Prosecutor and Victim Perspectives*, Law and Human Behaviour (1996) www.sexualassaultcases last accessed on 11/06/2015



**THE KENYA POLICE
MEDICAL EXAMINATION REPORT**

P3

PART 1-(To be completed by the Police Officer Requesting Examination)

From.....Ref.....
.....Date.....

To the.....Hospital/Dispensary

I have to request the favour of your examination of:-

Name.....Age.....(If known)

Address.....Date and Time of the alleged offence.....

Sent to you/Hospital on the.....20.....under escort of.....

.....and of your furnishing me with a report of the nature and extent of bodily injury sustained by him/her.

Date and time report to police.....

Brief details of the alleged offence.....

Name of Officer Commanding Station

Signature of the Officer Commanding Station

PART 11-MEDICAL DETAILS - (To be completed by Medical Officer or Practitioner carrying out examination)

(Please type four copies from the original manuscript)

SECTION 'A'-THIS SECTION MUST BE COMPLETED IN ALL EXAMINATIONS

Medical Officer's Ref.NO.....

1. State of clothing including presence of tears, stains (wet or dry) blood, etc.

2. General medical history (including details relevant to offence).....

3. General physical examination (including general appearance, use of drugs or Alcohol and demeanour)

**SECTION ‘B’- TO BE COMPLETED IN ALL CASES OF ASSAULT,
INCLUDING SEXUAL ASSAULTS, AFTER THE
COMPLETION OF SECTION ‘A’**

1. Details of site, situation, shape and depth of injuries sustained:-
 - a) Head and neck.....
.....
.....
 - b) Thorax and Abdomen.....
.....
.....
 - c) Upper limbs.....
.....
.....
 - d) Lower limbs
.....
.....
2. Approximate age of injuries (hours, days, weeks).....
.....
3. Probable type of weapon(s) causing injury.....
.....
4. Treatment, if any, received prior to examination.....
.....
5. What were the immediate clinical results of the injury sustained and the assessed degree, i.e. ‘harm’, or ‘grievous harm’.*

DEFINITIONS:-

‘Harm’ Means any bodily hurt, disease or disorder whether permanent or temporary.

‘Maim’ means the destruction or permanent disabling of any external or organ, member or sense

‘Grievous Harm’ Means any harm which amounts to maim, or endangers life, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent, or serious injury to external or organ.

.....
Name & Signature of Medical Officer/Practitioner

Date.....

**SECTION "C"-TO BE COMPLETED IN ALLEGED SEXUAL OFFENCES
AFTER THE COMPLETION OF SECTIONS "A" AND "B"**

1. Nature of offence.....Estimated age of person
examined.....

2. FEMALE COMPLAINANT

a) Describe in detail the physical state of and any injuries to genitalia with
special reference to labia majora, labia minora, vagina, cervix and
conclusion.....

.....

b) Note presence of discharge, blood or venereal infection, from genitalia or
on body externally.....

.....

3. MALE COMPLAINANT

b) Describe in detail the physical state of and any injuries to
genitalia.....

.....

c) Describe in detail injuries to anus.....

.....

d) Note presence of discharge around anus, or/ on thighs, etc.; whether recent
or of long standing.....

.....

SECTION "D"

4. MALE ACCUSED OF ANY SEXUAL OFFENCE

a) Describe in detail the physical state of and any injuries to genitalia especially penis.....

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

b) Describe in detail any injuries around anus and whether recent or of long standing.....

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

5. Details of specimens or smears collected in examinations 2 ,3 or 4 of section "C" including pubic hairs and vaginal hairs.....

.....
.....

6. Any additional remarks by the doctor.....

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

.....
Name & Signature of Medical Officer/Practitioner

Date.....



Date	Day	Month	Year	Province Code	District Code	OP/IP No.						
				Facility Name		PRC reg. No						
Last Name		First Name		Date of birth	Day	Month	Year	<input type="checkbox"/> Male				
									<input type="checkbox"/> Female			
Contacts (Residence and Phone number) _____												
Disabilities (Specify) _____						Marital Status (specify) _____						
Orphaned vulnerable child (OVC) _____						Citizenship _____						
Date and time of Examination				Date and Time of Assault				No. of perpetrators				
Day	Month	Year	Hr	Min	<input type="checkbox"/> AM	Day	Month		Year	Hr	Min	<input type="checkbox"/> AM
					<input type="checkbox"/> PM							<input type="checkbox"/> PM
Alleged perpetrators (Indicate relation to victim)				<input type="checkbox"/> Male	<input type="checkbox"/> Female	Estimated Age _____						
<input type="checkbox"/> Unknown				<input type="checkbox"/> Known		Occupation of perpetrator _____						
Place Assault Occurred /Where incidence occurred _____												
Administrative location _____												
Chief complaints / Presenting Symptoms _____												
Circumstances surrounding the incident (survivor account) remember to record penetration (how, where, what was used? Indication of struggle?) _____ _____ _____												
Type of Assault	Use of condom?		Incident already reported to police?									
<input type="checkbox"/> Oral	<input type="checkbox"/> Yes		<input type="checkbox"/> No <input type="checkbox"/> Yes (indicate which police station)									
<input type="checkbox"/> Vaginal	<input type="checkbox"/> No		Date and time of report	Day	Month	Year	Hr	Min	<input type="checkbox"/> AM			
<input type="checkbox"/> Anal	Attended a health facility before this one?		Were you treated?		Were you given referral notes?							
<input type="checkbox"/> Other (specify) _____	<input type="checkbox"/> No <input type="checkbox"/> Yes (Indicate name of facility)		<input type="checkbox"/> Yes		<input type="checkbox"/> Yes							
	<input type="checkbox"/> No <input type="checkbox"/> Yes		<input type="checkbox"/> No		<input type="checkbox"/> No							
Date		Day	Month	Year	Hr	Min	<input type="checkbox"/> AM	<input type="checkbox"/> PM				
Comments												
Significant medical and/or surgical history												

ANNEX Z

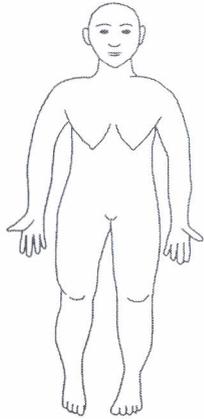
OB /GYN History	Parity	Contraception type	LMP	Known Pregnancy? <input type="checkbox"/> Yes <input type="checkbox"/> No		Date of last consensual sexual intercourse
General Condition	BP	Pulse Rate	RR	Temp	Demeanor /Level of anxiety (calm, not calm)	
Forensic						
Did the survivor change clothes? <input type="checkbox"/> Yes <input type="checkbox"/> No		State of clothes (stains, torn, color, where were the worn clothes taken?)				
Were the clothes put in a non-plastic paper bag? <input type="checkbox"/> Yes <input type="checkbox"/> No			Were the clothes given to the police? <input type="checkbox"/> Yes <input type="checkbox"/> No			
Did the survivor have a bath? <input type="checkbox"/> Yes <input type="checkbox"/> No			Did the survivor go to the toilet? <input type="checkbox"/> Long call? <input type="checkbox"/> Short call?			
Comments:						
Does the survivor have any details on the assailant? Is the assailant known, is there any relation? Did the survivor leave any marks on the assailant? <input type="checkbox"/> Yes <input type="checkbox"/> No						
Comments						
Genital Examination of the survivor-indicate discharges, inflammation, bleeding						
Describe in detail the physical status						
Physical injuries (sign in the body map) _____						
Outer genitalia _____						
Vagina _____						
Hymen _____						
Anus _____						
Other significant orifices _____						
Comments						
Immediate Management	PEP 1st dose <input type="checkbox"/> No <input type="checkbox"/> Yes (No of tablets)	ECP given <input type="checkbox"/> No <input type="checkbox"/> Yes	Stitching /surgical toilet done <input type="checkbox"/> No <input type="checkbox"/> Yes(Comment)	STI treatment given <input type="checkbox"/> No <input type="checkbox"/> Yes(Comment)		

Physical examination [indicates sites and nature of injuries, bruises and marks outside the genitalia]

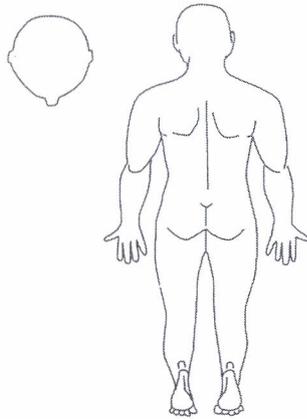
Please use the sketches below to indicate injuries, inflammations, marks on various body parts of the survivor

Sketch of person

Anterior view



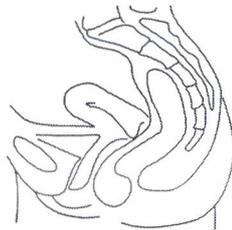
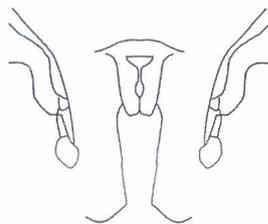
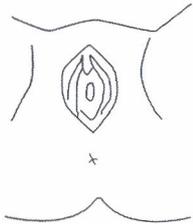
Posterior view



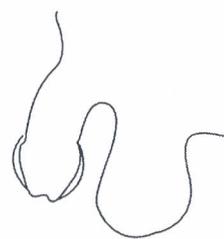
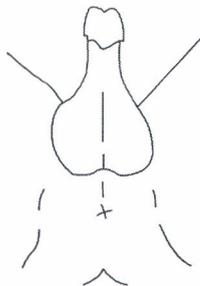
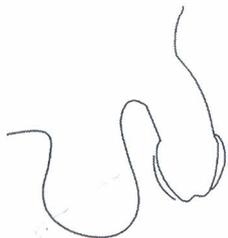
Comments



Female Genitalia



Male Genitalia



Any other treatment / Medication given /management?

Referrals to

Police Station HIV Test Laboratory

Legal Trauma Counseling Safe Shelter

OPD/CCC/HIV Clinic Other (specify)

Name of Examining Medical/clinical/Nursing Officer

Signature of Examining Medical/clinical/Nursing Officer

D a t e	Day	Month	Year

L A B O R A T O R Y S A M P L E S	Sample Type	Test	Please tick as is applicable		Comments
			National government Lab	Health Facility Lab	
	Outer Genital swab	Wet Prep Microscopy			
	Anal swab	DNA			
	Skin swab				
	Oral swab	Culture and sensitivity			
	Specify				
	High vaginal swab	Wet Prep Microscopy			
	Urine	Pregnancy Test			
		Microscopy			
		Drugs and alcohol			
		Other			
	Blood	Haemoglobin			
		HIV Test			
		SGPT/GOT			
		VDRL			
		DNA			
	Pubic Hair	DNA			
	Nail clippings	DNA			
	Foreign bodies	DNA			
	Other (specify)				

Chain of custody

These /All / Some of the samples packed and issued (please specify)

To	Police Officer's Name	Signature	Day	Month	Year
By	Medical/clinical/Nursing Officer's Name	Signature	Day	Month	Year

CHAPTER FOUR

A COMPARATIVE ANALYSIS OF BEST PRACTICES IN PROCEDURAL LAWS FROM CANADA AND SOUTH AFRICA

4.1 INTRODUCTION

The previous chapter addressed the challenges in the legal framework on child sexual offences in Kenya. This chapter closely examines Canada and South Africa for the purpose of a comparative analysis and to establish the best practices in procedural laws that Kenya can borrow from these jurisdictions.

4.1.1 Summary of the challenges in the Kenyan Legal framework

In Chapter Three, there were a number of challenges that were elaborated that depicted that there is likely to be lack of implementation of procedural laws and at the same time there is a probability that there is inadequacy of procedural laws. Section 31(4) of the Sexual Offences Act provides for the use of intermediaries, use of a witness protection box, avoidance of an open court and prohibition of publication of the identity of the complainant. These measures seem to be lacking in implementation as elaborated in chapter three. Section 35 on counseling of victims seems to be lacking given that there are no government agencies for psycho-social support to child victims of sexual abuse. Mandatory reporting in Kenya is non-existent yet it has worked well in other jurisdictions as will be demonstrated in this chapter. The Witness Protection Act also lacks measures in protecting victims of child sexual abuse. The inability of children to express themselves in court due to their tender age is also a major challenge.

In the South African jurisdiction and the Canadian jurisdiction, a demonstration of the laws that have worked well in relation to procedure will elaborate what Kenya can borrow from these jurisdictions.

4.2 CANADA

Under Canada's legal system, the federal government has authority for the criminal law and the provincial and territorial governments have responsibility for the administration of justice. The Criminal Code and the Canada Evidence Act are two federal laws covering criminal

justice matters that also have implications for the provincial and territorial administration of justice. With the coming into force of the new provisions of these laws concerning the sexual abuse of children, the provincial and territorial governments have revised their laws and are considering what other changes to provincial and territorial practices may be required to accommodate the new provisions²¹⁹.

The Canadian Government in a handbook²²⁰ which outlined the criminal justice process and its principles in relation to child victims of sexual abuse made a commitment to improve the criminal justice system to ensure justice for child victims. When a child has been sexually abused, there exists a societal responsibility not only to ensure the ongoing protection of the child, but also to prevent the abuser from continuing with any further abusive behaviour toward this child or any other child. Child abusers must be held accountable for their actions. The child welfare system is in place to protect children, while the criminal justice system protects society from harmful acts and sets forth consequences for offenders.²²¹ Although both the child welfare system and the criminal justice system strive to protect individuals, they must also preserve individual liberty and maintain minimum interference by the state into people's private lives.

The changes to the Criminal Code and the Canada Evidence Act on January 1, 1988, created new child sexual abuse offences and expanded the opportunities for courts to receive children's testimony in cases of child sexual abuse.²²²

4.2.1 Requirement for amendments in the Canadian Law

In Canada, sexual offences against children and youth began, to be recognized as a serious problem in the late 1970s. In December 1980, Parliament established a special committee to enquire fully into the matter and make recommendations. The Report of the Committee on

²¹⁹ Wells Mary, 'Canada's Law on Child Sexual Abuse' *The Metropolitan Chairman's Special Committee on Child Abuse* (Ottawa, Canada 1990)

²²⁰ Ibid

²²¹ Ibid

²²² Ibid

Sexual Offences Against Children and Youth (the Badgley Report) confirmed what front-line personnel were beginning to suspect: child sexual abuse is a problem of major proportions, having significant implications for Canada's children²²³.

The Badgley Report(1980) documented the limited ability of the pre-1988 federal law to protect children from the recurrence of sexual abuse. Research referred to in the report indicated that the Criminal Code definitions of sexual offences against child were inadequate to deal with the sexual abuse of children. In addition, laws on the rules of evidence and the rules of procedure required that a child's testimony always be supported by other testimony. These rules usually did not provide younger children with the chance to testify. As a result, it was often difficult to call in the powers of the criminal justice system to deal with incidents of child sexual abuse. As victims, children therefore did not enjoy the same protection that adults had before the law. In recognition of these "gaps" in the law, Bill C-1S was introduced in Parliament and amendments were made to the Criminal Code and the Canada Evidence Act. The changes came into effect on January 1, 1988.²²⁴

4.2.2 Amendments to the Criminal Code to deal with child victims of sexual abuse

4.2.2.1 Corroboration not required²²⁵

The rules of evidence in the Canadian Jurisdiction were changed to make it easier for child witnesses to be heard in court. In prosecutions of child sexual abuse, corroboration (supporting evidence) of a child victim's or witness's testimony was no longer required to convict an accused.²²⁶

Section 274 provides:

²²³ Op Cit 218

²²⁴ Wells Mary, 'Canada's Law on Child Sexual Abuse' *The Metropolitan Chairman's Special Committee on Child Abuse* (Ottawa Canada,1990)

²²⁵ Section 274 of the Criminal Code in Canada

²²⁶ Similar provision to the amendment of the Evidence Act in Kenya

..it is not essential to have additional evidence to corroborate (support) the testimony of a child victim or witness in order to convict someone of a sexual offence. The evidence of the victim or witness may be sufficient to secure a conviction.

This section²²⁷ acknowledges that child sexual abuse usually takes place in private without any witnesses and that there is usually little physical evidence. It allows for a conviction without requiring further corroborative evidence.²²⁸

In Kenya, we have a similar provision. An amendment of the Evidence Act under section 124 has allowed the court to convict an accused person based on the evidence of the child alone.

4.2.2.2 Testimony of child victims

Child victims may testify from behind a screen or other device within the courtroom or in an out-of-courtroom setting via closed-circuit television. This is allowed where the judge is of the opinion that these measures are necessary and where there is evidence that testifying in front of the accused would prevent the child victim from giving a full and candid account of the sexual offence, but the judge must be allowed to observe the giving of the testimony.²²⁹ It should not be assumed that the use of a screen or an out-of-courtroom setting will ensure that the child will not feel anxious or intimidated. The goal of this provision is to allay these feelings to the extent that the child will be able to communicate fully and candidly.²³⁰

Kenya does not have this law specifically relating to child victims of sexual abuse; however video evidence under section 40A of the Evidence Act is admissible. Kenya can borrow this practice from Canada so as to protect victims from victimization as they testify in court.

4.2.2.3 Rules respecting recent complaint abrogated

Under the previous "recent complaint" rule, if the child victim failed to complain immediately after the offence, this fact could be used to discount the complainant's

²²⁷ Section 274 of the Criminal Code in Canada

²²⁸ Wells Mary., 'Canada's Law on Child Sexual Abuse' *The Metropolitan Chairman's Special Committee on Child Abuse* (Ottawa Canada 1990)

²²⁹ Section 486 of the Criminal code in Canada

²³⁰ Wells Mary., 'Canada's Law on Child Sexual Abuse' *The Metropolitan Chairman's Special Committee on Child Abuse*(Ottawa Canada,1990)

credibility. This rule was revoked for all sexual assault offences in the 1983 amendments to the Criminal Code. The new law eliminates this rule with respect to child sexual abuse offences.²³¹ It is not necessary for the child victim to have reported the offence to someone soon after the incident; the credibility of the report is not automatically weakened by a delay in reporting. Delayed disclosure of sexual abuse is a common pattern and should not be used to lock out victims. This delay is often due to fear for punishment and reprisals especially where the perpetrator is a close relative. However under the amended law, the child victim may be asked to explain the delay so as to understand if there is possible coercion.²³²

Kenya can borrow this practice in order to enable victims who report late to file a complaint against the perpetrators.

4.2.2.4 No evidence concerning sexual activity

Strict limitations exist on an accused's ability to present evidence of other sexual activity by a victim of sexual assault.²³³ This section places limits on questions concerning the child victim's previous sexual activities. No questions may be asked about a child victim's prior sexual activity with a person other than the accused except:

- (a) As a rebuttal to evidence about such sexual activity first presented by the Crown
- (b) To prove the actual offender is someone else, or
- (c) Where the other sexual activity occurred at the same time as the conduct that has led to the charge before the court and where this evidence relates to the issue of consent. If the accused wants to present evidence about previous sexual activity the court will hold a hearing behind closed doors to determine if this line of questioning will be allowed.²³⁴

²³¹ Section 275 of the Criminal Code in Canada

²³² Ibid

²³³ Section 276 of the Criminal code in Canada

²³⁴ Wells Mary., 'Canada's Law on Child Sexual Abuse' *The Metropolitan Chairman's Special Committee on Child Abuse* (Ottawa Canada, 1990)

In Kenya, section 34 of the Sexual Offences Act has a similar provision where questions in regard to previous sexual experience are not allowed. In Chapter three, case law²³⁵ was used to elaborate the negative implications this line of questioning may have on the child victim if the judicial officers do not interfere to disallow such questions. For proper implementation, the court should also take it upon itself to prohibit such line of questioning when it is raised by the accused person.

4.2.2.5 Reputation evidence

Evidence of the child victim's sexual reputation is not admissible for the purpose of challenging or supporting the victim's credibility.²³⁶ Although the sexual behaviour patterns of the child or young person may be highly relevant in therapeutic counselling, this information is not admissible in evidence for the purpose of either challenging or supporting the child or young person's credibility in court.²³⁷

Kenya has similar provisions under section 34 of the Sexual Offences Act.²³⁸ The rationale is to protect child victims from the negative implications of bad character evidence. The credibility of the child's evidence cannot be attacked based on their previous sexual reputation.

4.2.2.6 Video-taped evidence of the complainant

Under section 715 of Canada's Criminal Code, videotaped evidence is allowed in court in relation to child victims of sexual abuse. A videotape of the testimony of a child victim can be used in court, if it was made within a reasonable time after the alleged offence and if the child adopts the contents of the videotape while testifying.²³⁹ This applies only to offences of

²³⁵ *Oiruri v- Republic* eKLR2012

²³⁶ Section 277 of the Criminal code in Canada

²³⁷ *Ibid*

²³⁸ Section 34 of the Sexual Offences Act

²³⁹ Section 715 of the Criminal Code in Canada

a sexual nature. There is no legislated admissibility of videotapes for other kinds of offences. The use of videotaped evidence does not mean that the child does not have to testify in court. At the least, the child must appear in court to confirm the contents of the videotape and may be subject to cross-examination on what he or she says, both on the videotape and on the witness stand.²⁴⁰ When videotaped interviews are conducted, the interviewing technique may be intensively scrutinized for any indication of leading or suggestive questions. Special procedures should be followed when the videotape is made. A clock or time code should be visible in the video shot, and the videotape recorder should be kept running during the full interview²⁴¹.

In Kenya, the Evidence Act allows for video-taped evidence under section 40A. However this provision is not specific to child victims of sexual abuse. The preference of a provision to allow for videotaped evidence by child victims of sexual abuse would be for the purpose of creating a child friendly environment by ensuring that the child does not have to see the accused when testifying. Kenya can borrow from this practice.

4.3.0 The Evidence Act

4.3.1 Amendments to the Canada Evidence Act to deal with child witnesses

The changes in the rules of evidence and the rules regarding the testimony of children have been designed to make it easier for children to testify, offsetting the disadvantages they have previously experienced owing to their immaturity, undeveloped communication skills and lack of experience in speaking in public.²⁴²

²⁴⁰ Wells Mary., 'Canada's Law on Child Sexual Abuse'' *The Metropolitan Chairman's Special Committee on Child Abuse* (Ottawa Canada ,1990)

²⁴¹ Wells Mary., 'Canada's Law on Child Sexual Abuse'' *The Metropolitan Chairman's Special Committee on Child Abuse* (Ottawa Canada ,1990)

²⁴² Ibid

4.3.1.1 Testimony of child victims

The question of whether a particular child or young person will be able to testify is often a concern, and may influence the decision as to whether to lay a charge. In the past, there has been a bias against bringing very young children forward as witnesses, although in recent years more and more children of very young years (down to age three-and-a-half or four) have given testimony. The language of the legislation appears to be broad enough to allow quite young children to testify as long as they are able to communicate the evidence and to promise to tell the truth.²⁴³ Assessment of the child's developmental maturity, emotional strength or potential to become emotionally stronger may be an important part of the child protection worker's role in advising the police or crown prosecutor about the child's ability to be a credible witness.²⁴⁴

In Kenya, under section 127(2) of the Evidence Act, judicial officers can take the evidence of the child if they are convinced upon questioning the child²⁴⁵ that he is possessed of sufficient knowledge to justify the reception of his evidence and understands the duty of speaking the truth.

4.3.1.2 Illustrations by use of explicit dolls

Where owing to immaturity or due to lack of physical development the child victim of sexual abuse is unable to demonstrate the act committed against them, the law aids such children to ensure that evidence is collected effectively. Use of explicit dolls to demonstrate and illustrate the offence committed against children is allowed under section 16 of the Evidence Act. In Kenya there is no provision relating to the use of explicit dolls. We can borrow from this practise to enable child victims to illustrate the act committed against them where they are unable to do so due to lack of physical development or immaturity.

²⁴³ Ibid

²⁴⁴ Ibid

²⁴⁵ Otherwise known as a voir dire test

4.3.2 The spouse of the accused can be compelled to give evidence in child abuse related cases.

In most criminal cases, the spouse of the accused cannot be required to testify for the prosecution. However, spouses of persons accused of sexual offences may be compelled by the crown prosecutor to give evidence.²⁴⁶ This includes spouses of persons accused of child sexual abuse offences. Therapeutic counselling of non-offending spouses should take this provision into account. A husband or wife of the accused can be subpoenaed and required to testify. When a non-offending spouse is a competent and compellable witness for the Crown, conversations between spouses during the marriage that are relevant to the charge against the accused spouse are not privileged and can be brought up in court.²⁴⁷

Kenya can borrow from this practice, since the spouses of the accused may adduce evidence that is crucial in the child sexual abuse case.

4.3.3 Investigation of sexual abuse on a child

Child protection agencies and police forces act cooperatively to conduct the initial investigation. The child protection worker needs information to determine whether the child needs protection; the police officer has a responsibility to determine whether a crime has been committed. Both agencies have the interests of the child as their central concern, but act from different perspectives in seeking to protect the child and maintain law and order.²⁴⁸

In Kenya, there is necessity for child protection agencies to ensure protection for child victims of sexual abuse. Kenya can borrow from Canada on creation of these agencies.

²⁴⁶ Section 4(2) of the Evidence Act in Canada

²⁴⁷ Ibid

²⁴⁸ Wells Mary., ‘*Canada’s Law on Child Sexual Abuse*’ *The Metropolitan Chairman’s Special Committee on Child Abuse* (Ottawa Canada, 1990)

4.3.4 Interviewing a child victim

The interview with the child may consist of straightforward questioning, but may also be supplemented by the use of various play objects such as puppets, dolls (both regular and sexually explicit), drawing materials, dollhouses and toy telephones. Reassurance, adaptability, and spontaneity in responding to the child help to create an atmosphere of trust and security, especially if the interview is led in a gentle progression from less sensitive to more sensitive areas. Most interviewers proceed slowly with questioning and do not attempt to rush or pressure the child.²⁴⁹ Stress reduction techniques which include breathing exercises, muscle relaxation and cognitive restructuring are taught to child victims of sexual abuse to help reduce the stress associated with testifying in court.²⁵⁰

As discussed earlier, video evidence may be taken. Videotaping children's interviews serves several purposes. It can help eliminate the trauma caused by repeated interviewing of child victims by the various professionals who become involved; it can serve clinical purposes by enabling experts to assess some of the psychodynamics of sexual abuse, as revealed by the child's behaviour and expressions. It can also serve as evidence in criminal cases.²⁵¹

Kenya can borrow from this practice as engaging the child with puppets and play objects will engage the child and create an atmosphere of trust and security. The sensitization of police officers is a measure Kenya can borrow from, training of police officers on such sensitive investigation when relating with child victims is a measure that the Government agencies can borrow from Canada.

²⁴⁹ Ibid

²⁵⁰ Omondi S.O (September 2013) "Implications to the adversarial legal systems. procedure to the special needs of the Child victims of Sexual abuse" University of Nairobi

²⁵¹ Ibid

4.3.5 The trial-process

Supportive counselling of children who appear as witnesses is an expanded role for child protection workers. In pre-trial preparation of child victims, they may offer support and assistance to help reduce the children's anxiety about appearing in court or seeing the accused.²⁵² Part of the ongoing work with such children may include therapeutic counselling to counteract feelings of shame or guilt concerning the sexual abuse. Unless they are helped to address and resolve such emotional conflicts, they may find it very difficult to describe their experiences in court.²⁵³ Pre-trial counselling may also yield information about a child's communication skills and level of understanding, and any specific fears about the trial or the accused. In consultation with the crown prosecutor, trial proceedings should be explained as simply as possible to child witnesses.²⁵⁴

Child victims of sexual abuse should be made aware of the right to request a ban on publication of their identities, and the possibility of giving evidence behind a screen or in an out-of-courtroom setting if these procedures are available. In trial preparation, some practitioners use role-playing, sometimes with puppets, to give children an opportunity to take on the roles of all the different persons who will be in court -not only themselves as witnesses, but also defence counsel, crown prosecutor, judge and defendant. As the child imaginatively takes on these roles, anxiety often becomes diffused, questions can be anticipated, and the process and purpose of the trial become clearer as they are examined from new perspectives.²⁵⁵

²⁵² Halliday, *Sexual Abuse: Interviewing Techniques for Police and other Professionals*. (Campbell River, B.C.: Ptarmigan Press, 1986)

²⁵³ Wells Mary., "Canada's Law on Child Sexual Abuse" The Metropolitan Chairman's Special Committee on Child Abuse Ottawa, Canada (1990)

²⁵⁴ Ibid

²⁵⁵ Ibid

It is important to explain to any child the possibility that the accused could be acquitted. It can be hard for a child to understand that, because of the principles of justice (innocent until proven guilty, proof beyond a reasonable doubt, etc.) The court could render a decision that may confuse the child. A child protection worker should be sensitive to a child's reaction to a "not guilty" verdict. Feelings of self-blame or self-doubt may arise, and additional support for the child may be necessary.²⁵⁶

There are provisions in the Sexual Offences Act that seek to protect the identity of child victims, section 31(4) has these procedural safeguards, however proper implementation is lacking. Kenya can borrow from this practice by ensuring that child victims of sexual abuse are adequately informed and prepared during the trial process. Information regarding the court process, information on a ban of identities to protect the child victims and explanation on acquittals, is important in creating an atmosphere of security for the child.

4.5 SOUTH AFRICA

Throughout the world there is a general awareness that child abuse and neglect is a serious and growing problem. However, as recently reflected in the media²⁵⁷ the rate of child abuse in South Africa is appalling.²⁵⁸ The South African National Youth Victimization Survey of 2005 found that only 11.3% of child rapes are reported to the [South African Police Service]. This means that if 60 child rapes are reported every day, in reality 531 cases take place. That is 'one child that is raped every three minutes!' ²⁵⁹ However this statistics were reported to be slightly flawed as they included children over the age of 18 years. The most recent police

²⁵⁶ Wells Mary., "Canada's Law on Child Sexual Abuse" The Metropolitan Chairman's Special Committee on Child Abuse Ottawa Canada (1990)

²⁵⁷ A Misdad teen kinders *A Child Abuse A Disgrace The Citizen; A Lenient treatment for child abuse offenders* Pretoria News, 10 April 1997

²⁵⁸ Evan Schurink A Statistics of shame: SA Child Protection System Disintegrating 1996

www.shamestatistics.org last accessed on 08/06/2015

²⁵⁹ Africa Check, Sorting Fact From Fiction, Is a Child Raped Every Three Minutes in South Africa? 2014 www.africacheck.org/reports lack accessed on 15/06/2015

data showed that almost 51 cases of child rape were reported per day in the previous financial year. But many more could be committed without being recorded.²⁶⁰

The Sexual Offences Act, 1957 is the main statute relating to child sexual abuse. It covers some specific aspects and forms of child sexual abuse, e.g. child prostitution, abduction of a minor for sexual purposes, conspiracy or fraud or the use of drugs or alcohol to involve a female victim in sexual activities, and sodomy. In addition, the Films and Publications Act, 1996 prohibits the production, possession and distribution of pornographic material depicting children who are younger than sixteen years, and provides for the protection of children from exposure to pornographic material.

4.5.1 Reporting of child sexual abuse cases

It is a well-known fact that only a very small percentage of crimes against children are reported. Under-reporting and the lack of systematic research, co-ordinated record-keeping and a centralised register all contribute thereto that the true extent of child abuse and neglect remain unknown. In order to encourage the reporting of child abuse, South Africa has enacted both of the following provisions²⁶¹:

4.5.1.1 Voluntary reporting

Among the factors contributing to low levels of reporting are young children's lack of capacity and ability to report abuse to appropriate authorities, their fear of being harmed by people close to them if they tell about the abuse, and the social acceptance of practices like corporal punishment and sexual harassment.²⁶² An amendment to the South Africa Sexual Offences Act was made to encourage voluntary reporting, by protecting a person who reports in good faith from being sued for defamation, and from professional disciplinary action for

²⁶⁰ South Africa Criminal law Sexual Offences Act, 2007

²⁶¹ Ireland Law Reform Commission Report on Child Sexual Abuse page 67

²⁶² DGMT, Reporting Child Abuse and Neglect, Cape Town South Africa www.dgmt-community.co.za last accessed on 15/06/2015

disclosure in breach of ethics exist under the South African law to encourage people to report cases of child sexual abuse²⁶³.

4.5.1.2 Mandatory reporting

The Children's Act and the Sexual Offence Act both establish mandatory reporting obligations to report abuse. Failure to report is a criminal offence, but more importantly it could leave a child at risk without support and services.²⁶⁴ A mandatory reporting law, requiring people in specified groups, or generally, to report if they suspect a child is being maltreated. In South Africa, section 42 of the Child Care Act, 1983 obliges a range of health care workers doctors, teachers, parents and medical practitioners to report circumstances giving rise to the suspicion that a child suffers from any injury caused by sexual abuse, the cause of which probably might have been deliberate.²⁶⁵ Persons who notify the Director-General are indemnified from legal proceedings in respect of any notification given in good faith.²⁶⁶

In Kenya, we do not have provisions that require for mandatory or voluntary reporting of sexual offences on children. We can borrow from South Africa on mandatory reporting laws as this will encourage teachers and parents to report any suspicious behaviour on the child that could imply that the child has suffered sexual abuse.

4.5.2 Use of closed-circuit television and or screens

The courtroom environment is generally regarded as extremely intimidating for witnesses of any age, and particularly for children. One of the means of dealing with this, is the use of closed-circuit television or screen, so that a child can give evidence in a separate room, but be

²⁶³ Ibid

²⁶⁴ DGMT, Reporting Child Abuse and Neglect, Cape Town South Africa www.dgmt-community.co.za last accessed on 15/06/2015

²⁶⁵ Section 42(1) of the Child Care Act, 1983

²⁶⁶ Section 42(6) of the Child Care Act, 1983

seen and heard by everyone in the courtroom.²⁶⁷ One of the main advantages claimed for closed-circuit television or screens is that it allows the child to give evidence without directly confronting the accused person.

In Kenya, there is no provision relating to use of circuit television for child victims of sexual abuse in specific. The Evidence Act allows for admissibility of video evidence however it is not specific to child victims of sexual abuse.

4.5.3 Use of anatomical dolls

Many foreign jurisdictions and our own allow the use of anatomical dolls to assist children in relating to their allegations of abuse. An anatomically correct doll is one equipped with parts resembling genitalia. One normally finds a set of dolls consisting of adult dolls of each gender and child dolls also of each gender. The child may demonstrate activity by using the dolls when the verbal skills are limited.²⁶⁸ Kenya can borrow from this practice so as to allow children to demonstrate to the court the act committed against them by the perpetrator.

4.5.4 Evidence of sexual history

The enactment of section 227(2) of the Criminal Procedure Act, 1977 of evidence relating to the sexual experience of the complainant (outside the act complained of) will be inadmissible, and cross-examination of the complainant on such matters impermissible, without the leave of the court, which leave will not be granted unless the court is satisfied that such evidence or questioning is relevant. The courts notion of what is relevant, then becomes the sole criterion in determining admissibility, and any eccentricities that there may have been in the common law may be jettisoned.²⁶⁹

²⁶⁷ Australian Law Reform Commission Research Paper 1: The use of closed-circuit television for child witnesses in the ACT www.australianlaws.org last accessed on 03/06/2015

²⁶⁸ Harvey and Dauns Sexual Offences against Children and the Criminal Process 156 www.sexualoffences.org last accessed on 03/06/2015

²⁶⁹ Section 227(2) of the Criminal Procedure Code

Kenya has a similar provision under section 34 of the Sexual Offences Act which protects victims from cross-examination on their sexual history.

4.5.5 Presenting evidence without the child's participation at the trial

There are two ways in which a child's evidence might be given without a requirement to appear at the trial. One is by using an intermediary or a surrogate witness. That is, someone who presents the child's evidence on the child's behalf. The second is by presenting the child's evidence in the form of a recording, such as a videotape.²⁷⁰ Kenya can borrow from this two practices and implementation on the use of an intermediary under section 31 of the Sexual Offences Act will be beneficial to child victims of sexual abuse.

4.5.5.1 Surrogate witness

The best known example of a surrogate witness approach is that introduced in Israel in 1955.²⁷¹ Its main features are:

- (a) A child victim of a sexual offence is interviewed at an early stage by a youth interrogator
- (b) The child is not required to give evidence in court unless the interrogator gives permission. If the child does testify, the court may excuse the child if the interrogator considers continuation may cause emotional harm.
- (c) If the child does not testify, the interrogator presents the evidence and may be cross-examined; an accused cannot be convicted on the evidence of the interrogator unless it is corroborated by additional evidence that the crime was committed and that the accused was guilty of it.

The major advantage of this approach is that it greatly restricts the exposure of the child to proceedings which may be harmful. The major disadvantage of the system is that the courts

²⁷⁰ Law Reform Commission of Victoria Report No. 18: Sexual Offences against Children 103 - 105.

²⁷¹ Law Reform Commission of Victoria Report No. 18: Sexual Offences against Children 103 - 105.

do not directly supervise the examination of the child, and have to rely upon the interrogator for interpretation and assessment of the evidence.²⁷²

The use of a surrogate is a good practice and Kenya can adopt it to protect child victims of sexual abuse from harmful proceedings.

4.5.5.2 Intermediary

The intermediary system was introduced in South Africa in 1991 by section 170A which was an amendment to the Criminal Procedure Act, 1977. It reads as follows:

Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if he testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his evidence through that intermediary.²⁷³

The success of the intermediary system in South Africa has not been evaluated authoritatively. What appears necessary is that intermediaries should be experienced in interviewing children and specially trained in child language, psychology and the relevant law with particular emphasis on the law of evidence.²⁷⁴

In Kenya, under section 31(4) of the Sexual Offences Act, the use of an intermediary is provided for; however the use of an intermediary is hampered by weak implementation.

4.5.6 Protection of victims

Intimidation of victims and their families is a major concern in many areas. It is important to ensure that a child who has allegedly been sexually abused is protected from possible further abuse and intimidation by the offender. This can be done by court order involving the alleged

²⁷² Harvey and Dauns Sexual Offences against Children and the Criminal Process 156 www.sexualoffences.org last accessed on 03/06/2015

²⁷³ Section 170 of the Criminal Procedure Code

²⁷⁴ South African Law Commission, Issue Paper 10, Project 108, Sexual Offences Against Children 1997 www.southafricanlawagainstsexualabuse.org last accessed on 3/6/2015

offender, the child victim, or both. There are two main means by which a court can act against an alleged offender.²⁷⁵

Custody and bail conditions If the alleged offender has been charged, a court may order that he or she be kept in custody until the matter has been tried, or may release him or her on bail subject to conditions. The accused has a fundamental right to be released from detention if the interests of justice permit, subject to reasonable conditions.²⁷⁶ Bail is usually granted unless for example, the court is satisfied that there is an unacceptable risk that the accused will commit new offences or interfere with witnesses in ordinary bail applications. The onus is on the state to prove that it will not be in the interests of the justice to release an accused on bail.

Interdict with regard to family violence. Under the Prevention of Family Violence Act, 1993, a judge or magistrate in chambers may grant an interdict in respect of a person alleged to have assaulted or threatened a family member.²⁷⁷ The interdict may impose any restriction on the alleged offender that the court believes are necessary or desirable, including an order prohibiting him or her from remaining in the aggrieved family members house. A court may act to protect a child by making a protection order under the Child Care Act, 1983.²⁷⁸ A child found by a court to be in need of care and protection may be ordered to be removed from any place to a place of safety.

In Kenya, judicial officers may make orders where there is need for child protection. Such orders may be in regard to medical, counselling and psycho-social support services. This provision is under section 215 of the Criminal Procedure Code.

²⁷⁵ Ibid

²⁷⁶ Section 35(1)(f) of the Constitution, 1996; section 60 of the Criminal Procedure Act, 1977

²⁷⁷ Section 2 of the Prevention of Family Violence Act, 1993

²⁷⁸ Section 15 of the Child Care Act, 1983

4.5.7 Excluding the public from the trial

A complainant in a sexual case may find it extremely embarrassing to testify in open court. Section 153 of the Criminal Procedure Act, 1977, however, provides for the circumstances in which criminal proceedings shall not take place in open court. In criminal proceedings relating to a charge that the accused committed or attempted to commit any indecent act towards or in connection with any other person; any act for the purpose of procuring or furthering the commission of an indecent act towards or in connection with any other person; or extortion or any statutory offence of demanding from any other person some advantage which was not due and, by inspiring fear in the mind of such other person, compelling him to render such advantage, the court before which such proceedings are pending may, at the request of such other person or, if he is a minor, at the request of his parent or guardian, direct that any person whose presence is not necessary at the proceedings or any person or class of persons mentioned in the request, shall not be present at the proceedings: Provided that judgment shall be delivered and sentence shall be passed in open court if the court is of the opinion that the identity of the other person concerned would not be revealed thereby.

Where a witness at criminal proceedings before any court is under the age of eighteen years, the court may direct that no person, other than such witness and his or her parent or guardian or a person *in loco parentis*, shall be present at such proceedings, unless such person's presence is necessary in connection with such proceedings or is authorized by the court.

In Kenya, section 31(4) of the Sexual Offences Act has these safeguards for child victims of sexual abuse. Evidence of victims is not taken in an open court. This practice is exercised in our courtrooms. Judicial officers direct that persons who are not related to the child or who have no connection to the child's case to leave the court room when it is a case of a child victim of sexual abuse.

4.5.8 Protection of the identity of the complainant

No person shall publish any information which might reveal the identity of any complainant where the court has made an order in terms of section 153(3) of the Criminal Procedure Act, 1977.²⁷⁹ Nor shall any person at any stage before the appearance of an accused in a court on a charge referred to in section 153(3) of the Criminal Procedure Act, 1977 or at any stage after such appearance but before the accused has pleaded to the charge, publish any information relating to the charge in question.²⁸⁰

In Kenya, under section 31(4) of the Sexual Offences Act prohibition of the identity of the complainant is a measure to ensure protection of child victims of sexual abuse. Court cases involving child victims are often cited by use of initials as a measure to ensure protection of child victims of sexual abuse. Section 19 of the Children Act and Article 8 of the UNCRC also require that the names of child victims are excluded to preserve the identity and protect the privacy of child victims.

4.6 CONCLUSION

Amendments of the Canadian Evidence Act and the Criminal Procedure Code have been effective in improving the access to justice for child victims of sexual abuse. Amendments to the rules of evidence to remove the requirement for corroboration ensure that the accused can be convicted based on the evidence of the child alone. Collection of evidence by use of closed circuit television protects child victims from re-encountering the accused person in a court room setting. Canada similarly as Kenya has provisions prohibiting evidence concerning sexual history of the child victim where attack on the child's reputation is not allowed for the purpose of ensuring that the child's credibility is not attacked. Child witnesses' evidence is also admissible if it can be shown that the child appreciates the nature of the evidence given and commits to speak the truth. Use of dolls by child victims is used for

²⁷⁹ Section 154(2) (a) of the Criminal Procedure Act, 1977

²⁸⁰ Section 153 of the Criminal Procedure Act, 1977

illustration of the act committed on the child victim. Spouses of the accused person can also be compelled to give evidence.

In South Africa, there are provisions in the Sexual Offences Act relating to mandatory reporting, use of anatomical dolls, use of closed circuit television which is a similar provision to Canada and also presentation of evidence by means of an intermediary which is also a provision under the Sexual Offences Act in Kenya. However, Kenya does not have a provision for use of a surrogate. In South Africa, judicial officers may protect child victims by means of denying bail where the court is satisfied there is a risk, interdiction is also granted in respect of a threatened family member. Closed court hearings and prohibition of the identity of the child victims are provisions in South Africa, Kenya has similar provisions which have been effective in ensuring protection of child victims of sexual abuse.

Kenya can learn from Canada and South Africa and make necessary reforms such as taking video-taped evidence, use of anatomical dolls, mandatory reporting among other practices so as to ensure child victims of sexual abuse are protected in accordance with Article 53(2) of the Constitution of Kenya. The next chapter will make recommendations and conclusions in this area of law, based on the findings of the previous chapters.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0 CONCLUSION

This paper has examined the situational analysis of child victims of sexual abuse and the implications of the sexual abuse on children. The different forms of sexual abuse on children range from defilement, child sex tourism, child prostitution, child pornography, incest and child early marriage. Causes of sexual abuse on children: range from poverty, lack of education and disintegration of family and social values. The impact of the sexual act committed against children is appalling and the statistics as they were in the year 2010 have been briefly detailed in Chapter Two. The impact on the child victim can be viewed as negative socially, psychologically and emotionally and the effects can be long term extending to the child's adulthood. Health related effects of sexual abuse on a child can lead to the child contracting diseases such as HIV, Sexually transmitted diseases and other effects can be unwanted pregnancies, post traumatic stress disorders as well as suicide attempts. Child sexual abuse encompasses a wide variety of abusive acts or experiences involving children's private body parts. It is associated with a broad spectrum of emotional responses, with some children exhibiting great resilience, while others displaying varying levels of distress. Effective treatment is available for many of the mental health problems associated with child sexual abuse.²⁸¹

The factors that have led to the prevalence of child sexual abuse such as cultural attitudes, stigmatization and police attitudes indicate that the phenomenon has had wide implications on the lives of child victims. The number of reported cases of children who are victims of child sexual abuse remains low due to ignorance, lack of reporting and the secretive nature of

²⁸¹ National Council for Children's Services, *The National Plan of Action Against Sexual Exploitation on Children in Kenya*, (Nairobi Kenya 2013)

the crime. Prevention of child sexual abuse has mainly been in the form of awareness creation. Kenya has largely succeeded in awareness creation on the existence of the problem.²⁸² However, further work needs to be done towards prevention of child sexual abuse in the region because other aspects of prevention, such as access to education, family education, development assistance and the promotion of behavioural change in the exploiters have not been given adequate attention. Prevention measures against child sexual abuse and exploitation must be improved and increased in number. Poverty, religious and socio-cultural factors, impunity of male violence along with strong patriarchal structures perpetuate the low status of women and girls. Limited opportunities for quality basic education, particularly for girls and the culture of silence and denial surrounding child sexual abuse contribute to children's vulnerability to sexual abuse.²⁸³

Child sexual abuse has been recognized as a continuing crime whose implications are traumatizing on the child victims. However the fight against child victims of sexual abuse has not entirely been lost. Internationally and locally, there are laws that have been passed to protect child victims of sexual abuse. Among other laws and conventions related to issues of children, the Constitution of Kenya offers a significant opportunity for renewed progress in the field of child protection. The Constitution commits the government to invest in the welfare and protection of children as equal citizens in Kenya.²⁸⁴ The Bill of Rights for children is set out in Article 53. In tandem with international children's rights, the Constitution establishes in Kenyan law internationally acclaimed principles on the rights of

²⁸² Op Cit n 281

²⁸³ Ibid

²⁸⁴ National Council for Children's Services, *The National Plan of Action Against Sexual Exploitation on Children in Kenya*, (Nairobi Kenya 2013)

children, such as best interests of the child which is now paramount in every matter concerning children.²⁸⁵

Kenya's commitment to investing in children and young people has been further demonstrated Internationally and Nationally through ratification of the United Nations Convention on the Rights of the Child (UNCRC,1989) and the African Charter on the Rights and Welfare of the Child(ACRWC,1990).²⁸⁶ The Sexual Offences Act harmonizes sexual violence legislations into a single law, it provides a comprehensive definition of indecent acts against children, minimum sentences, criminalizes sexual harassment and expands sexual offenses to include gang rape, aiding rape, deliberate infection with sexually transmitted diseases, trafficking of children for sexual exploitation and child pornography. The Government of Kenya has also developed the National Plan of Action for Children (2008-2012) which contains a wide range of proposed activities aimed at safeguarding children's rights to survival, development, protection and participation.²⁸⁷

This paper has focused in particular on the procedural laws relating to child victims of sexual abuse. Challenges in the legal framework governing child sexual abuse has been the focus of Chapter Three. The current court procedure overlooks child victims of sexual abuse rights to protection, despite the same being provided for by the Sexual Offences Act and the Constitution of Kenya. The courts depend on the Evidence Act and the Criminal Procedure Code for their trial procedure. However, the two Acts do not provide for special procedure in child sexual abuse 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. When child-victims come face to face with the system, they are often

²⁸⁵ Op Cit 281

²⁸⁶ National Council for Children's Services, The National Plan of Action Against Sexual Exploitation on Children in Kenya, (2013) Nairobi Kenya

²⁸⁷ Ibid

regarded as criminals or initiators of the offence. The response process in the hands of untrained and insensitive law enforcement personnel further victimizes the victims (children). A child friendly protection system is therefore indispensable in the fight against all forms of child sexual abuse and commercial sexual exploitation of children. Existing laws are not always enforced as they should be. There is, therefore, a need to ensure that appropriate actions and follow-ups are taken for full implementation of these laws.²⁸⁸

The legal framework has extended to the medico-legal linkages of child victims of sexual abuse and their limitations and challenges in achieving justice for the victims. Further, forensic management which is essential in helping survivors access justice by ensuring availability of credible evidence that sexual violence indeed took place and help link the perpetrator to the crime is lacking in Kenya. There is need to strengthen the capacities of service providers to improve their knowledge, skills and competence in handling evidence of victims of sexual violence, including investigating acts of violence and forensic management.²⁸⁹

Challenges during the pre-trial process, such as inability of children to communicate effectively due to their lack of physical development and the absence of child friendly mechanisms to assist the child victims as they testify in court, have hindered them from achieving justice. Cross-examination of child victims though a process in ensuring fair trial in the Constitution of Kenya has served in further victimization of the child victims.

Chapter Four made a comparative analysis of the practices and laws in Canada and South Africa. Canada has significant amendments in the Criminal Code and in the Evidence Act to improve on procedure relating to child victims of sexual abuse. These practices include

²⁸⁸ National Council for Children's Services, *The National Plan of Action Against Sexual Exploitation on Children in Kenya*, (Nairobi Kenya 2013)

²⁸⁹ Ibid

removal of the requirement for corroboration, taking a child's evidence behind a device to enable the child to communicate candidly; limitations on questions on the child's sexual history are some of the practices that have created a child friendly environment for child victims in the court rooms. South Africa has also enacted laws aimed towards improving the procedure relating to child victims of sexual abuse. Some of the practices include, similarly use of television screens so as to limit direct confrontation of the child by the accused person, use of anatomical dolls to assist children in relating to their allegations of the abuse, limit on questions relating to the child's sexual history. In addition there is the use of intermediaries and surrogates and protection of child victims by avoiding open court as well as prohibition of identification of the child.

Kenya has made positive strides in enactment of procedural laws relating to child victims of sexual abuse. These include procedural laws under section 31(4) of the Sexual Offences Act which provide for the use of a witness protection box, intermediaries, protection of the identity of the complainant by excluding their names in any publication, avoiding open court and any other measure that the court may deem fit. Prohibition on questions on the child's sexual history is also a measure under section 34 of the Sexual Offences Act. However, these procedures have been hampered by weak implementation and there exists gaps in our procedural laws. Kenya lacks procedural laws relating to mandatory reporting, use of closed circuit television, video taped evidence of the complainant, illustrations by use explicit dolls and therapeutic counseling of child victims. Kenya can borrow from South Africa and Canada on the best practices in procedural laws relating to child victims of sexual abuse. These practices will inform the recommendations that will follow.

The paper therefore concludes that in Kenya, we have inadequate laws relating to child victims of sexual abuse and at the same time, there is weak implementation of the existing procedural laws.

5.1 RECOMMENDATIONS

Based on the findings of the study, I wish to make the following recommendations. These recommendations will be categorised under legal reforms, procedural reforms and policy reforms.

5.1.1 Legal reforms

(a)Mandatory reporting

There is no law in Kenya that makes it mandatory to report a suspected case of child sexual abuse. Neither the Children Act nor the Sexual Offences Act obligates parents, guardians or professionals handling children to report suspicions of child sexual abuse. Reporting of child sexual abuse thus depends on concerned adults or child victims of sexual abuse themselves who may not even know they have been abused.

There is need to include a provision in the Sexual Offences Act on mandatory reporting of child sexual abuse by anyone who suspects that a child may have been sexually abused. Such a provision is useful in ensuring that medical practitioner, teachers, caregivers or anyone with information on reasonable suspicion of child sexual abuse to report to the police for investigation and prosecution. In addition, such persons are potential prosecution witnesses in child sexual abuse cases and can enhance the detection, investigation, prosecution and the truth seeking process in child sexual abuse cases.²⁹⁰

²⁹⁰ Op Cit n 137

(b)Limit of cross-examination on previous sexual history of the child victims of sexual abuse

Kenya has a provision on the limit of cross-examination on previous sexual history of the child victims under section 34 of the Sexual Offences Act. However the practical applicability of this provision has been hampered by weak implementation as was depicted in the case of *Oiruri v Republic*²⁹¹ in Chapter Three.

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. However, although it is the best engine ever invented to discover the truth, the process has been abused and turned into provocative, intimidatory and at times, embarrassing sessions to child victims of sexual abuse , who get confused and end up contradicting their earlier recorded statements. Protective measures towards sexual assault victims include the, rape shield statute and video recorded cross examination.

(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. This means that No evidence may be adduced and no question may be asked about any sexual behaviour of the complainant.²⁹²

Kenya can learn from Canada and South Africa that judicial officers have an obligation to protect child victims of sexual abuse 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

²⁹¹ Eldoret Criminal Case No. 295 of 2012 eKLR www.kenyalaw.org

²⁹² L Ellison, *Cross-Examination in Rape Trials* (1998) Criminal Law Review www.criminallawtrial.org last accessed on 14/06/2015

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.²⁹³

Defence counsels 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.²⁹⁴ In this respect, the study suggests that the Law Society of Kenya takes initiative to provide for the ethical regulation of cross examination of child victims of sexual abuse. 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.²⁹⁵

(c) Amendment of the Criminal Procedure Code

There is need to amend the Criminal Procedure Code so as to regulate cross examination of child victims of sexual abuse in cases where such cross examination may cause trauma to child victims of sexual abuse 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 child victims of sexual abuse by the accused persons/advocates, in all child sexual abuse trials, the court should appoint intermediaries as provided by Section 31(4) of the Sexual Offences Act.²⁹⁶

5.1.2 Procedural reforms

(a) Use of video-recorded interviews of child victims of sexual abuse

Kenya can learn from Canada and South Africa which uses video- taped interviews with the victims when the child victims of sexual abuse are unable to testify in court. There are

²⁹³ *Wong-kam-Ming v R* [1980] AC 247.

²⁹⁴ L Hoyano and C Keenan, *Child Abuse: Law and Policy Across Boundaries*(Oxford University Press 2010)

²⁹⁵ Op Cit 281

²⁹⁶ Omondi S.O (September 2013) "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" University of Nairobi

however conditions which must be adhered to in recording the evidence of child victims of sexual abuse. 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 statement must not be in response to any questions calculated to lead the child to make particular statements.²⁹⁷

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 as evidence in court. Lastly, the child victim of sexual abuse must be available for cross examination (without necessarily having face to face confrontation). 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 child victim of sexual abuse as to what to say in response to questions.²⁹⁸

(b) Use of television link in taking child victims of sexual abuse testimony

Video linked testimonies or teleconferences as they are variously known enable child victim of sexual abuse 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 child victim of sexual abuse through a video linked to the courtroom. They can ask questions to child victims of sexual abuse which are answered by child victims of sexual abuse from the different room or location. The television link protects child victims of sexual abuse from the direct face-to-face contact associated with testifying orally in court. Subsequently, the chances of the accused person intimidating child victims of sexual abuse

²⁹⁷ Ibid

²⁹⁸ Omondi S.O (September 2013) "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" University of Nairobi

are reduced and the atmosphere created enables child victims of sexual abuse to testify effectively.²⁹⁹

(c) Examination of child victims of sexual abuse through an Intermediary

The study recommends that the children courts in Kenya make more use of intermediaries in cases where child victims of sexual abuse 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.³⁰⁰ The use of an intermediary is thus, a fair trial right which is available to complainants. 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. The role of intermediaries in a child sexual abuse trial is to filter questions and explain answers for child victims of sexual abuse with communication problems due to learning difficulties or physical impairment.³⁰¹

(d) The use courtroom aids for effective communication by child victims of sexual abuse

In South Africa and Canada there was the introduction of the use of communication aids that enable witnesses to express themselves. Kenya can borrow from these practices. In this respect, child victims of sexual abuse have also been allowed to use body diagrams and dolls to describe the genital organs. An anatomically correct doll is one equipped with parts resembling genitalia. One normally finds a set of dolls consisting of adult dolls of each

²⁹⁹ Ibid

³⁰⁰ Article 50(7) of the Constitution of Kenya

³⁰¹ Omondi S.O (September 2013) "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" University of Nairobi

gender and child dolls also of each gender. The child may demonstrate activity by using the dolls when the verbal skills are limited. The use of an anatomical doll has proved to be effective in South African and Canada. The use of diagrams can also be effective where the dolls are unaffordable.³⁰²

5.1.3 Policy Reform

(a) Recovery and reintegration of child victims of sexual abuse

There exists a gap in how child victims are treated after they have suffered from the trauma of sexual abuse. Recovery and reintegration is necessary to enable child victims of sexual abuse to recover psychologically socially and physically. Recovery and reintegration includes provision of social, medical and psychological counseling along with legal aid assistance and judicial remedies to child victims of sexual abuse and exploitation. It also prescribes alternative means of livelihood for children who have been rescued from sexual exploitation as a means to guard against further abuse. NGOs have for many years been the primary actors involved in the recovery and reintegration of child victims of commercial sexual exploitation and sexual abuse. Services provided for recovery include counseling, non-formal education, vocational training, legal advice, income generation activities and medical care.³⁰³

(b) One-stop Psychosocial Support Service Centre

There exists a gap on a child friendly environment for victims to record their statements. The study recommends the establishment of a One Stop Psychosocial Support Service Center (PSSC) for child victims of sexual abuse to receive all the necessary services away from the police station. Such a centre would ensure that the police carry out the investigation and record the child victim of sexual abuse statement from the center. Counselling services may

³⁰² Ibid

³⁰³ National Council for Children's Services, *The National Plan of Action Against Sexual Exploitation on Children in Kenya*. (Nairobi Kenya, 2013)

also be availed to child victims of sexual abuse at the same center where medical attention and other psychosocial support services would be made available.³⁰⁴

(c) Policy guideline on treatment of victims

There exists a gap relating to the treatment given to child victims after the negative impact of sexual abuse. The Ministry of gender, children and social development should develop a child sexual abuse policy guideline on the treatment of child victims of sexual abuse 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 child victim of sexual abuse testifies so as to ensure follow-up measures until the child victim of sexual abuse overcomes the problems caused by the abuse.³⁰⁵

(d) Decentralization of gender violence and recovery centres

There are two main gender violence and recovery centers where victims of child sexual abuse and exploitation can get treatment and counselling. One is located at the Kenyatta National Hospital and the other at the Nairobi Women's Hospital.³⁰⁶ However, these facilities cannot serve the overwhelming number of children who fall victims to sexual abuse and exploitation in the country. Therefore, there is need for these services to be mainstreamed and made available throughout the country. The services need to be provided at the district hospitals and, therefore health managers of these hospitals should be adequately sensitized.³⁰⁷

³⁰⁴ Omondi S.O (September 2013) "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" University of Nairobi

³⁰⁵ Ibid

³⁰⁶ National Council for Children's Services, *The National Plan of Action Against Sexual Exploitation on Children in Kenya*, (Nairobi Kenya, 2013)

³⁰⁷ Ibid

5.1.4 Education and training

(a) Police training

There is need to educate police officer on the best way to handle child victims of sexual abuse. Cultural transformation of the police attitudes towards child sexual abuse is necessary. Sensitization on care towards child victims is necessary in order to create a child friendly environment which similarly encourages reporting of sexual abuse by victims. There is need to handle victims with care and not forget that they are traumatized. This causes them to engage even better with the justice system.³⁰⁸ In the '160 girls'³⁰⁹ case, police attitudes towards child victims were considered to cause negative implications on the victims and was a measure which caused minimal reporting. Training centres should be created where police officers will be educated and trained on how to handle child victims of sexual abuse during pre-trial as they collect evidence and record statements given by child victims of sexual abuse. During trial as prosecution is ongoing and as the evidence is presented before the courts. Gender desks should also be friendlier.

(b) Judicial training

Judicial training is also necessary to ensure that judicial officers adhere to the existing procedural safeguards in the Sexual Offences Act. This is anchored in the Constitution under Article 172(1) (d) which provides for continuing education and training of judges and judicial officers.

It is hoped that once the necessary reforms are made, they will go a long way towards ensuring that child victims of sexual abuse effectively access justice.

³⁰⁸ FIDA, Implementation of the Sexual Offences Act – Justice Sector www.urpn.org/uploads last accessed on 16/06/2015

³⁰⁹ Petition no 8 of 2012, High Court of Meru, C.K. (*a child*) & 11 others –v- Commissioner of police/ Inspector General of the national Police Service & 2 others(2012) eCLR www.kenyalaw.org

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Appendix I Declaration Form for Students

UNIVERSITY OF NAIROBI

Declaration of Originality Form

This form must be completed and signed for all works submitted to the University for examination.

Name of Student	<u>Mercy Wambui Gitau.</u>
Registration Number	<u>G34/39385/2011</u>
College	<u>HUMANITIES & SOCIAL SCIENCES.</u>
Faculty/School/Institute	<u>OF LAW</u>
Department	<u>PRIVATE LAW</u>
Course Name	<u>RESEARCH PAPER II</u>
Title of the Work	<u>THE PLIGHT OF CHILD VICTIMS OF SEXUAL ABUSE IN KENYA: ARE OUR PROCEDURAL LAWS ADEQUATELY PROTECTIVE?</u>

DECLARATION

1. I understand what Plagiarism is and I am aware of the University's policy in this regard
2. I declare that this DISSERTATION (Thesis, project, essay, assignment, paper, report, etc) is my original work and has not been submitted elsewhere for examination, award of a degree or publication. Where other people's work or my own work has been used, this has properly been acknowledged and referenced in accordance with the University of Nairobi's requirements.
3. I have not sought or used the services of any professional agencies to produce this work
4. I have not allowed, and shall not allow anyone to copy my work with the intention of passing it off as his/her own work
5. I understand that any false claim in respect of this work shall result in disciplinary action, in accordance with University Plagiarism Policy

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Date _____

23/06/2015