



**UNIVERSITY OF NAIROBI**

**SCHOOL OF LAW**

**CHALLENGES IN IMPLEMENTING THE VICTIM PROTECTION ACT, 2014**

**A RESEARCH PROJECT PAPER PRESENTED TO THE SCHOOL OF LAW OF  
THE UNIVERSITY OF NAIROBI IN FULFILMENT OF THE REQUIREMENT  
OF THE AWARD OF THE DEGREE OF MASTER OF LAWS (LL.M)**

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**G62/12614/2018**

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**18<sup>TH</sup> NOVEMBER, 2020**

## DECLARATION

I, **JULIUS KIPKOSGEI NG'ARNG'AR**, do hereby declare that this thesis is my original work submitted in partial fulfillment of the Masters of Laws (LL.M) at the University of Nairobi, School of Law (Kisumu Campus); and has not been submitted or is not pending submission for a diploma, degree or PhD in any other university. Moreover, references made to texts, articles, papers and journals, and other pertinent materials, have been fully acknowledged.



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## **DEDICATION**

To those who fight for victims of crimes. To those who celebrate the success of actively involving this group in the Criminal Justice System of Kenya.

## **ACKNOWLEDGEMENT**

The support of my supervisor Dr. Scholastica Omondi has been immeasurable. Her systematic guidance has yielded a beacon of hope and encouragement as I was undertaking this research. My family has been a moral pillar of support during this academic process. Finally, I thank the hand of Providence who has led me this far.

## **List of Constitution and Statutes**

### **Constitution**

Constitution of Kenya 2010, Promulgated on 27<sup>th</sup> August, 2010

### **Acts of Parliament**

Amendment Act No. 11 of 2008

Amendment Act No. 2 of 2010

Amendment Act No. 5 of 2003

Criminal Procedure Code (CPC) CAP 75 Laws of Kenya

Prevention of Torture Act No. 12 of 2017

Victim Protection Act (VPA) No. 17 of 2014 commenced on 3<sup>rd</sup> October 2014

Witness Protection Act No. 16 of 2006

## **List of International Conventions, Resolutions, Declarations and Guidelines**

### **Conventions**

European Convention on the Compensation of Victims of Violent Crimes, adopted on 24<sup>th</sup> November, 1983 and entered into force on 1<sup>st</sup> February, 1998

Nairobi Declaration on Women's and Girls' Right to Remedy and Reparation, (March 2007)

Rome Statute of the International Criminal Court, adopted on 17<sup>th</sup> July, 1998 and entered into force on 1<sup>st</sup> July, 2002

Rules of Procedure and Evidence of the Rome Statute of the International Criminal Court (2013)

### **Resolutions and Recommendations**

#### *United Nations General Assembly*

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted 16<sup>th</sup> December, 2005 (Resolution No. A/RES/60/147)

United Nations General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted on 29<sup>th</sup> November 1985 (Resolution A/RES/40/34)

#### *United Nations Security Council*

United Nations Security Council Resolution on threats to international peace and security caused by terrorist acts adopted on 8<sup>th</sup> October, 2005 in its 5053<sup>rd</sup> Meeting <Resolution S/RES/1566 (2004)>

United Nations Security Council Resolution on threats to international peace and security (Security Council Summit 2005) adopted on 14<sup>th</sup> September, 2005 in its 5261<sup>st</sup> Meeting < S/RES/1624 (2005)>

United Nations Security Council Resolution on threats to international peace and security caused by terrorist acts adopted on 7<sup>th</sup> March, 2005 in its 5223<sup>rd</sup> Meeting < S/RES/1611 (2005)>

United Nations Security Council Resolution on threats to international peace and security caused by terrorist acts adopted on 4<sup>th</sup> August, 2005 in its 5246<sup>th</sup> Meeting <S/RES/1618 (2005)

*African Commission on Human Rights and People's Rights*

Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa Adopted at the African Commission on Human Rights and People's Rights at its 32<sup>nd</sup> Ordinary Session from 17<sup>th</sup> October, 2002 to 23<sup>rd</sup> October, 2002

*Council of Europe's Committee of Ministers*

Recommendation 2006 (8) on Assistance to Crime Victims, Adopted by the Council of Europe Committee of Ministers on 14<sup>th</sup> June, 2006

Recommendation Number R (83) on Participation of the Public in Crime Policy, Adopted by the Council of Europe Committee of Ministers on 23<sup>rd</sup> June, 1983

Recommendation Number R (85) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure, Adopted by Council of Europe Committee of Ministers on 28<sup>th</sup> June, 1985

Recommendation Number R (87) 21 on Assistance to Victims and the Prevention of Victimization, Adopted by the Council of Europe Committee of Ministers on 17<sup>th</sup> September 1987

Resolution (77) 27 on the Compensation of Victims of Crimes, Adopted by the Council of Europe Committee of Ministers on 28 September 1977



## **List of Cases**

Gideon Mwiti Irea v DPP and 7 others [2015] eKLR

I P Veronica Gitahi & another v Republic [2016] eKLR

Kelly Kases Bunjika v Director of Public Prosecutions (DPP) & another [2018] eKLR

Mary Kinya Rukwaru v Ragnathan Santosh & Another [2014] eKLR

Republic v Nahashon Murithi [2019] eKLR

Republic v Paul Mwangi Macharia [2013] eKLR

Republic v Leliman & Four Others [2018] eKLR,

Roy Richard Elimma & Another v Republic Cr. Appeal No 67 of 2002

Veronica Gitahi and Another v Republic (CA) [2016] eKLR

Republic v Nahashon Murithi [2019] eKLR

Legal Resources Foundation Trust v Attorney General & 2 others; Council of Governors & 2 others (Interested Parties) [2019] eKLR

David Gathangu Nyaguthio v Republic [2017] eKLR

Chege Njoroge v Henry Karanja & another [1982] eKLR

Kimani v Kahara[1983] eKLR

Margaret Wanza Wambua v Kelvin Mutie Muinde & another [2019] eKLR

Republic v Mwiti Stanley Murea [2018] eKLR

Republic v James Kiarie Mutungei [2017] eKLR

Kuldip Madan Sapra & another v Director of Public Prosecutions [2019] eKLR

## ***Abstract***

*This research is premised on notions that the criminal justice system in Kenya has tremendously advanced since the promulgation of the Constitution of Kenya, 2010 and the enactment of the Victim Protection Act, 2014. This is evident through empowering the status of the victim. Further, the reality of this development is reflected through developments which are centering criminal trials on the victim. Thus, the research analyzes the changes, implications of the changes and challenges in implementing the Victim Protection Act, 2014 into the criminal justice system of Kenya.*

*The study used the qualitative research methodology is collecting data in analyzing the changes, implications and challenges in implementing the Victim Protection Act, 2014. It used questionnaires directed to different classes: judicial officers, prosecutors, criminal counsel, and investigators. The data collected was used to discuss the implications, challenges and recommendations in three themes under pre-trial stage, trial stage and post-trial stage.*

*The study reveals that the place of a victim in criminal justice system has transformed the traditional state-accused players, to actively incorporate the victim as a loud and conspicuous actor. Further, it displays the shortcomings and ill will by state agencies mandated to implement the Act. As a development in the legal system, the study illustrates the impact of the Act the legal system. This is through incorporating elements of inquisitorial system to the traditional adversarial system which has been witnessed in Kenya as reflected through court decisions.*

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## CHAPTER I

### 1.0 Introduction

A victim has been defined widely in the Kenyan legal jurisprudence. The Victim Protection Act, 2014 defines a victim as a “natural person who suffers injury, loss or damage as a consequence of an offence”<sup>1</sup>: this being the primary victim.<sup>2</sup> A family victim results from situations where the primary victim of the offence dies. This family victim must not suffer harm from the offence like the primary victim.<sup>3</sup> Further, a victim is considered as a person who has been subjected to cruel or inhuman treatment.<sup>4</sup> The practical application of a victim may also include a complainant.<sup>5</sup> Thus, victims are crucial in establishing the occurrence of an offence.

Historical views of the common law adversarial system, victims have been accorded a subordinate role of just being witnesses in criminal trial.<sup>6</sup> This ‘relegated’ role had been justified through the concept espousing of the victim’s injury by the state for the wider societal benefit. Further, the State was considered the arch complaint in any criminal trial in whose name all criminal prosecutions are brought.<sup>7</sup> The justification was premised on the fact that the criminal justice system (CJS) was focused on ensuring the balance between the State’s obligations towards protecting public order and rights of the accused.<sup>8</sup> Consequently, victims were tasked a peripheral role in criminal proceedings. Victims’ considerations were rarely taken in because of the passive role they were playing in trial processes. The consequences were that courts were

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<sup>1</sup> Victim Protection Act (VPA) No. 17 of 2014 commenced on 3<sup>rd</sup> October 2014, s. 2 (1)

<sup>2</sup> Criminal Procedure Code (CPC) CAP 75 Laws of Kenya, Section 329A

<sup>3</sup> *ibid*

<sup>4</sup> Prevention of Torture Act No. 12 of 2017, s. 2

<sup>5</sup> VPA, s 13

See also: Kelly Kases Bunjika v Director of Public Prosecutions (DPP) & another [2018] eKLR

<sup>6</sup> Sarah Moynihan, ‘The Voiceless Victim: A critical Analysis of the Impact of Enhanced Victim Participation in the Criminal Justice Process’ (2015) 31SLREV 25

<sup>7</sup> Roy Richard Elimma & Another v Republic Cr. Appeal No 67 of 2002

<sup>8</sup> Republic vs. Leliman & Four Others [2018] eKLR

denied the complete picture of disputes to achieve a fair determination and sentence.<sup>9</sup> These facts and realities led into the amendment of Kenyan laws since 2003.

The 2003 amendment to the Criminal Procedure Code,<sup>10</sup> introduced the application for the victim impact statements.<sup>11</sup> These statements are submitted to the court between the conviction and sentencing of the accused person.<sup>12</sup> Their implications are to give the victim a voice with regard to the sentencing of the offender. However, these statements serve their purposes at court's discretion.<sup>13</sup> This amendment initiated the transformation of a victim from a passive into an active actor in a criminal trial.

In 2010, two main developments were witnessed with regard to the victims of crime. The Constitution of Kenya, 2010 provides for the protection of victims of crime as a crucial component in guaranteeing the right to fair hearing and trial.<sup>14</sup> Further, the Witness Protection Act was amended in 2010,<sup>15</sup> to provide for the Victim Compensation Fund for the victims who are under the witness protection programme.<sup>16</sup> The constitutional provisions necessitated the enactment of a statute to protect victims of crime and their roles during trial.<sup>17</sup> This led into the legislation of the Victim Protection Act in 2014.

The 2014 legal regime has revolutionized the legal status of victims of crime. The 2014 Act provides for the rights and responsibilities of victims during trial,<sup>18</sup> provision for victim service

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<sup>9</sup> Christine Trueblood, 'Victim Impact Statement: A Balance between Victim and Defendant Rights', (2010) 3 Phoenix Law Rev 605

<sup>10</sup> Cap 75 Laws of Kenya, Amendment Act No.5 of 2003 s. 88

<sup>11</sup> CPC ss. 329A to 329F

<sup>12</sup> CPC s. 329 C (1)

<sup>13</sup> CPC s. 329 C

<sup>14</sup> Constitution of Kenya 2010 (CoK) article 50 (9)

<sup>15</sup> Amendment Act No. 2 of 2010 s. 5

<sup>16</sup> Witness Protection Act No. 16 of 2006 s. 3I

<sup>17</sup> CoK, article 261 (1) and the Fifth Schedule

<sup>18</sup> VPA, s. 9



aimed at the restoration of the victim,<sup>19</sup> creation of the Victim Protection Trust Fund,<sup>20</sup> and the establishment of the Victim Protection Board.<sup>21</sup>

These key legal enactments on the victims' rights in the CJS have resulted into legislation of criminal laws conscious of the status of victims since 2010. The legal standing of victims is no longer that of a passive by stander, but an active actor in the CJS. However, the active participation of a victim in the CJS has not been fully realized.

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<sup>19</sup> VPA, part IV

<sup>20</sup> VPA, part V

<sup>21</sup> VPA, part VI

## **1.1 Problem Statement**

The Victim Protection Act, 2014 has given victims of crime a higher pedestal in the criminal justice processes as compared to legal regime before 2014. This rapid shift has introduced critical changes in the criminal justice system. In analyzing these changes, this study examines implications brought by the Victim Protection Act 2014 into the criminal justice system in Kenya. These changes and their implications are often characterized with challenges in their implementation. This is either as a consequence of lack of resources, both human good will and funding, or through rigid traditional practices which are stagnating at the traditional state-accused relationship. This study will then identify these changes and challenges in implementing key and crucial provisions of the Act with respect to the rights and roles played by victims. To achieve this, the study examines the jurisprudence from the courts of law on the various provisions of the Act.

## **1.2 Research Objectives**

The study aims:

- i. To examine the provisions of Victim Protection Act, 2014 on the status of the victim in the criminal justice system in Kenya
- ii. To assess the implication of the changes brought by the Victim Protection Act, 2014 on the criminal justice system in Kenya
- iii. To analyse and document the challenges of implementing the Victim Protection Act, 2014 as currently constituted in the criminal justice system in Kenya
- iv. To propose possible remedies and measures to mitigate the challenges in implementing the Victim Protection Act, 2014 in the criminal justice system in Kenya

### **1.3 Research Questions**

The study will seek to answer the following questions:

- i. What provisions have been introduced by the Victim Protection Act, 2014 on the status of the victim in the criminal justice system in Kenya?
- ii. How has the changes brought by Victim Protection Act, 2014 impacted the criminal justice system in Kenya?
- iii. What are the challenges facing the implementation of the Victim Protection Act, 2014 in the criminal justice system in Kenya?
- iv. What are the possible remedies available to mitigate the challenges posing the implementation of the Act as currently constituted?

### **1.4 Justification of the Research**

In fulfilling the objectives of this study, the observations and conclusions made in this study stand to help the institutions, law practitioners and the general public to appreciate the provisions of the Act as interpreted by the courts of law in the following ways.

First, the findings of this research stand to help in the reform and development of the law related to victims of crime. This can be achieved by identifying possible areas in need of amendment, establishment of rules and making of policy initiatives relating to the victims of crime into the CJS of Kenya.

Second, the findings will aid in research focused in specific vulnerable groups as a consequence of the commissioning of offences. These groups may be in need of preferential treatment before a criminal justice system in Kenya. These groups include the children, elderly and persons living with disability.

Third, as a measure of fulfilling the national goals and aspirations under the Vision 2030, the findings stand to help in enhancing access to justice by victims and promoting the availability of services to the victims of crime under the CJS.

Finally, due to the unique active participation of a victim in the criminal trial, the findings of this study help in assessing the possibility of incorporating the inquisitorial system of justice in addition to the traditional adversarial which focuses on the state and accused as the key actors in a criminal trial. The inquisitorial system becomes evident where the court has a duty under the law to actively protect the interests of the victim.

## **1.5 Research Limitation**

Due to the global Corona Virus Disease pandemic (Covid-19) which calls for social distancing and limited movement, the interviews to be conducted will be limited to crime investigators, advocates of the High Court of Kenya, prosecutors, and judicial officers. The study will not conduct interviews from victims of crimes. This is because of limitations in movement within the republic of Kenya, the curfew, and the limited physical access of courts of law. Getting victims for the interview will be a hurdle due to the fact that they cannot be specifically ascertained and located in fulfilling the objectives of this study.

## **1.6 Research Methodology**

### **1.6.1 Research Design**

The research shall use the qualitative data collection as the most suitable method of data collection in order to achieve its objectives. Primary data shall be drawn from the law, and secondary data shall be from documented writings, commentaries, reviewed law journals, and publications. The ideas of this research are to be extracted from legislations, case laws, literature

of books, online electronic journals and newspaper articles. This data shall then be used to illustrate the legal foundation in the analysis of the Victim Protection Act, 2014 and its implications to the CJS.

### **1.6.2 Field Research**

The study will conduct interviews through questionnaires. The focus groups will be Crime investigators; advocates of the High Court of Kenya; prosecutors from the Office of Director of Public Prosecutions and judicial officers of the Judiciary. The mode of filling the questionnaires shall use electronic media to transmit the views from the focus groups. These methods will help in fulfilling the objectives and answering the questions of this study in the dawn of Covid-19 pandemic.

#### **1.6.2.1 Field Sites**

The study randomly sampled court stations throughout Kenya. The study divided the country into eight (8) regions namely: Nyanza, Western, Rift Valley, Nairobi, Eastern, North Eastern, Coast and Central. Each region represents the former provincial governance structure in Kenya. Out of the 8 regions, two court stations were randomly selected. Keroka and Siaya court stations from Nyanza. Bungoma and Vihiga court stations from Western region. Mavoko and Kibera court stations from Nairobi. Nyeri and Kiambu court stations from Central region. Kapsabet and Kitale court stations from Rift Valley region. Isiolo and Machakos court stations from Eastern region. Mombasa and Tana River court stations from Coast region.

#### **1.6.2.2 Data Collected**

The questionnaires were sent to forty (40) persons under four (4) main focus groups namely: judicial officers, prosecutors, advocates and investigators. Out of the 40 persons thirty seven (37)

responded to the questions under the questionnaires. This was ninety two percent (92.5%) response success. The responses were then divided into the 4 focus groups for data analysis and extraction. This data informed this study.

### **1.7 Theoretical Framework**

In order to achieve the objectives of this research, the study is informed by the Justice Theory by John Rawls. According to Rawls “each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others”.<sup>22</sup> Thus, in criminal trials, rights accorded to the accused should be balanced in a manner that the victim has an opportunity to exercise his or her rights while safeguarding against any prejudice the accused may occasion. Equality to enjoy rights is a key component to Rawls’ idea of fairness,<sup>23</sup> a concept which has been incorporated in the Constitution of Kenya, 2010 and the VPA.

In line with the first objective of this research, the study will illustrate how equality has been provided and enhanced through the Victim Protection Act, 2014. This is the equality of granting the victim substantive rights in the CJS. These rights include right to fair hearing and trial which have been expounded to apply to the victim as well as they apply to the accused.<sup>24</sup> The main objective is to give a sacred protection to the voice of victims of crime in the CJS just as the ideals of “innocence until proven guilty”<sup>25</sup> accorded to the accused. Ultimately, equality to these rights is a mean of achieving justice to the victim of crime in the CJS in Kenya.<sup>26</sup>

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<sup>22</sup> John Rawls, *A Theory of Justice* (1971) 302

<sup>23</sup> *ibid*

<sup>24</sup> Veronica Gitahi and Another v. Republic [2016] eKLR, “Free and fair hearing should not be confined to the accused person only; it is a right of every citizen”

<sup>25</sup> CoK, Art. 50 (2) (a)

<sup>26</sup> CoK, Art. 50

Further, Rawls' idea of justice opines the need of recognizing social differences of persons in a polity. A victim, like a child victim of sexual abuse due to his or her vulnerability must be granted some opportunities to address the social differences brought by the commission of the offence. This may be in form of psychological counseling in order to mitigate any trauma caused by the offence.<sup>27</sup> This balancing of rights for the vulnerable victims can lead to a "limitation of the rights of the accused person".<sup>28</sup> However, this balancing is critical and courts are mandated to ensure that rights of the accused are not infringed.

These opportunities accorded to these special groups must be assessed under the current legal framework in Kenya. This is to ascertain whether the current legal framework is adequately equipped to protect interests of these vulnerable victims. This assessment is mandatory. This is because it provides the best avenue of ascertaining whether the changes and implications of the VPA are being efficiently implemented in achieving justice. Further, the assessment of the regime before 2014 against the current legal regime helps appreciating the historical and legal developments of victim involvement in criminal processes. This will finally outline the systematic changes, implications and reforms needed in order to efficiently implement the VPA. This analysis helps in fulfilling the second and third objective of the study.

Another dimension in the application of the justice as a theory of law to this study is by viewing criminal trials as tools of achieving social justice to the victim. Martha Nussbaum<sup>29</sup> analyzes human entitlements which are the bare minimum to be maintained by a state through its laws and policies. These entitlements are social in nature and are core to attaining justice. These

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<sup>27</sup> Omondi Scholastica, *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* (2013), A Thesis submitted in fulfillment of the requirements for the award of the degree of Doctor of Philosophy of Law, University of Nairobi 19

<sup>28</sup> *ibid*

<sup>29</sup> Martha Nussbaum and Amartya Sen, *Capabilities and Well-Being*, (1993) The Quality of Life

entitlements involve the respect of the emotions of a person; protection of bodily integrity against any harm or harassment; and bodily health of individuals.<sup>30</sup> These entitlements are dominantly infringed and threatened in cases of victims of crimes. The infringements are illustrated through grievous bodily harm, sexual harassments or psychological injuries which alter a life of a victim completely. The healing avenue is having appropriate programs of victim support services which address these injustices. Currently, the VPA recognizes the need for victim support services. However, mere recognition does not suffice. Justice demands that implications of victim support services must be evident and verifiable. The role of this research is then to identify the hindrances which make victim support services a delusive dream to many victim countrywide. These will be discussed in line with the objective of analyzing the challenges facing the implementations of the provisions under the Act.

The justice theory gives us a perspective in seeing that the limitations exhibited in the pursuit of justice by the victim calls for measures beyond conviction of the accused. Justice is equally reflected through measures taken to mitigate the harshness of an offence committed. Where mitigation measures are lacking, justice calls for remedies. These remedies are embodied under the Act which to avenues for victim support services. Thus, an analysis on the challenges facing victims in accessing these remedies offers a plausible opportunity in recommending measures to achieving justice for victims.

Another perspective is by understanding justice as a mean and fulfillment of rights. Michael Freeman analyzes thoughts of Dworkin in understanding the perception of justice in a polity. For his understanding, rights are “grounded in a principle of equal concern and respect; so for a

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<sup>30</sup> *ibid*



judge to make a mistake about a legal right is a ‘matter of injustice’”.<sup>31</sup> The equality and respect notion under Dworkin’s theories of justice as rights calls for the examination of how those rights are protected when dealing with the dignity of victims of a crime. This explains why for instance, a victim has as a right to receive the evidence to be relied upon by both the prosecution and defense.<sup>32</sup>

Finally, the ideals of justice under VPA have incorporated the concept of restorative justice as an integral to the CJS. Restorative justice provides an approach in thinking about crime and responses beyond the conventional approaches witnessed in Kenya.<sup>33</sup> The ideals of restorative justice are facilitated by use of ADR approaches like reconciliation which foster healing.<sup>34</sup> This concept of restorative justice focuses further on reintegration between the victim and the offender. This reintegration can be initiated by the victim. Thus, by the fact that VPA recognizes that restorative justice is a right to the victim cements a huge development on how crimes and their responses have evolved.<sup>35</sup>

## **1.8 Literature Review**

The literature on the status and role of a victim in Kenya is scarce as scholars have not adequately ventured into the topic. However, lessons can be borrowed from the literature displayed through the common law jurisdictions in addition to the locally available literature.

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<sup>31</sup> Michael Freeman, *Introduction to Jurisprudence*, (2014) 9<sup>th</sup> edn, Thomson Reuters Limited 501

<sup>32</sup> VPA s 9

<sup>33</sup> Donald J Schmid, 'Restorative Justice: A New Paradigm for Criminal Justice Policy' (2003) 34 Victoria U Wellington L Rev 91

<sup>34</sup> Jozsef Vigh, 'Restorative Criminal Justice and Society' (2002) 43 Annales U Sci Budapestinensis Rolando Eotvos Nominatae 71

<sup>35</sup> Rick Sarre, 'Restorative Justice: Translating the Theory into Practice' (1999) 1 U Notre Dame Austl L Rev 11

Omondi<sup>36</sup> ventures into analyzing the balancing of rights of a child victim of sexual abuse (CVSA) and those accorded to the accused of sexual abuse offences in an adversarial system. She discusses this in three key stages: pre-trial; trial and post-trial.

At the pretrial stage, her study observes that the CSVA rights to participate at the pre-trial stage of investigation were inadequate and this led into loss of crucial evidence against the protection accorded to the accused through the right against self-incrimination.<sup>37</sup> This results into imbalances in the protection of the rights between the accused and CVSA. Further, her study observes that the CVSA were not accorded the psychological and appropriate financial support in participation of the processes in the criminal justice system leading the CVSA taking a shadowy passive role in the investigation of the offence committed.<sup>38</sup> This in end does not protect the sacred principle of considering the best interest of the child guaranteed in the Constitution of Kenya, 2010. However, her analysis was before the enactment of the Victim Protection Act, 2014 which accords victims like CVSA an active role in a criminal investigation and further outlay the victim support services accorded to victim due to their vulnerability to prepare them face the criminal justice system.

At the trial stage, her study observes the growing application of human rights in criminal trials to confer active participation rights to the victims.<sup>39</sup> In its finding, the criminal justice system requires special procedures to protect such special interests accorded to CVSA to help them in “the trauma and court battle associated with adversarial legal systems.”<sup>40</sup> She observes that the criminal justice system’s legal framework was adamant and stagnating in according the victims

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<sup>36</sup> Omondi (n-27)

<sup>37</sup> Ibid pp 161-162

<sup>38</sup> Ibid 155

<sup>39</sup> Ibid 145 and 249

<sup>40</sup> Ibid 364

such active participation in criminal trials in “dispute resolution since the playground is uneven and tilted in favour of the accused person”.<sup>41</sup> However, just like the findings at the pretrial stage, the observations made were before 2014’s enactment of the Victim Protection Act. At the post trial stage, her study observed that the criminal justice system was focused on the accused than the victim.

Robins,<sup>42</sup> undertakes a study into the status of the victims of Post-Election Violence (PEV) in Kenya 2007/2008 where he explores the need of restorative justice for the victims. He notes that compensation was the best solution in addressing injustices and crimes occasioned to them it being “the form of reparation most commonly referred to by the victims who expressed the need to be restored to their lives”. Compensation was not intended to replace the loss or injury as a result of the death of the loved one but intended to provide “redress for income and opportunities lost to the family due to the death of breadwinners”. His research then recommends that the state should implement a reparation program with the hope of helping the victims of crimes like the PEV. Whereas, Robins’ study explores and identifies restorative justice components to crimes associated with PEV, his study was done before 2014’s enactment of Victim Protection Act. In 2011, the status of the victim was blurred in a mirage of peripheral appearance of a victim before the criminal justice system avenues; them lacking an active voice. Further, whereas his study recommended the need of reparation programs which may have been expressed in the Victim Protection Act, 2014 through the establishment of Victim Protection Trust Fund, some key regulations and rules on how the Fund is to be utilized to help victims is lacking.

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<sup>41</sup> Ibid 365

<sup>42</sup> Simon Robins, ‘To live as other Kenyans Do: A Study of the Reparative Demands of Kenyan Victims of Human Rights Violations’ (2011) International Center for Transitional Justice.

At the regional level Naude, Prinsloo and Ladakos<sup>43</sup> researches on the victim support services across thirteen African countries and notes that victims support services are often “deemed inadequate” and “virtually non-existence” making the victims of a crime vulnerable and subjected into various forms of victimization. Their research observes that some offences report low victim support services than others. For instance South Africa recorded 20% in victims support services for victims of sexual offences whereas Namibia recorded 58.3%. Further, victim support services are so connected to community and other social cohesion and healing offered to the victim. Among the 13 African countries, Nigeria performs well at 63.4% whereas the neighboring Tanzania is third with 55.7%. The key gap in their research is that Kenya was not factored in the list of 13 countries. Despite the fact that Uganda and Tanzania were sampled, it may not give the best view of Kenya when the findings are applied into the Kenyan context. Further, the research has data collected in late 1990s and early 2000. Time has elapsed and the findings of their study cannot efficiently be used to paint the picture in Kenya, long after the inception of the Constitution of Kenya 2010 and most importantly the Victim Protection Act, 2014.

Internationally, Moynihan<sup>44</sup> examines the role of a victim in an adversarial common law system. She examines on the need of balancing the focus of a trial to accommodate the victim and the accused. She illustrates and critiques the traditional concept where the “criminal justice system uses victims to obtain a statement, prove a point and then relegate them to a subordinate role as a witness.” She supports the argument that there should be an auxiliary prosecution in addition to the public prosecution. This auxiliary prosecution acts at the victim prosecutor. She notes,

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<sup>43</sup> Naude CMB, ‘Experiences of Crime in Thirteen African Countries: Results from the International Crime Victim Survey’ (2006) Electronic Publication, Turin, UNICRI-UNODC

<sup>44</sup> Sarah Moynihan, ‘The Voiceless Victim: A critical Analysis of the Impact of Enhanced Victim Participation in the Criminal Justice Process’, (2015) 31SLREV 25

however, that giving the victim a greater voice in a criminal trial does not work well with an adversarial system. However, this may not reflect the developing legal systems which incorporates human rights and encourages the active participation of all actors. Even adversarial systems are awakening from the traditional conception of the playground for criminal trials being centered between the prosecution and the accused. A keen assessment of modern adversarial systems, there is an active and intentional incorporation of victims in a criminal trial. The designs of the system are the unprejudiced adjudication of guilt and the protection of the due process rights of the accused which sidelines the voice of the victim.

The application of Moynihan's analysis of an auxiliary prosecution has a mirage in the Kenyan legal system; however, Moynihan's analysis does not factor the developments in the Kenyan criminal justice system as portrayed post 2014 legal dispensation. As an index of similarity, Section 9 of the Victim Protection Act provides that a victim is entitled to a representative from the beginning to the conclusion of the trial. The victim is thus empowered with the right to receive and access both to the prosecution and defense evidence. The law further gives entitles the victim to make submission at different stages as permitted by the court.<sup>45</sup>

Wemmers<sup>46</sup> discusses the concept of victim participation at the International Criminal Court as a development of victim involvement in a trial. She discuss article 68 (3) of the Rome Statute of victim involvement in criminal proceedings in Edward's<sup>47</sup> four dimensions. The first dimension is control. Under this dimension, the preference of the victim is taken into consideration with the practical aim that the victim becomes the decision maker. This system is dominantly exercised in

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<sup>45</sup> VPA, s 9 (2)

<sup>46</sup> Jo-Anne Wemmers, 'Victims' Rights and the International Criminal Court: Perception within the Court Regarding the Victim's Right to Participate', (2010) *Leiden Journal of International Law* 629-643

<sup>47</sup> Ian Edward, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision Making', (2004) *British Journal of Criminology* 867

the Sharia law. Further, this dimension can be seen through the withdrawal of cases by complainant driven by the need to have a restorative justice or through the use of alternative dispute resolution in criminal cases in Kenya.<sup>48</sup> The second dimension is consultation. This places a duty on the authorities, the prosecution, to seek information from the victims before undertaking a decision. In the Kenyan application, the prosecution is mandated to take the views of the victim when dealing with plea bargaining.<sup>49</sup> The third dimension of victim's participation is provision of information. This places a duty to the victim to provide information when called upon. This information is crucial for a successful investigation and prosecution. This role has a practical application of a victim being a witness. The final dimension is expression. The law is designed in a manner to accord a witness a chance of expression. It comes as a right.<sup>50</sup> This is reflected under the Kenyan system through the provision of victim impact statements and the need to have an advocate watching brief for the victim. However, the Wemmer's conception is limited to the International Criminal Court and the international criminal justice system. Just as Moynihan's conception, the Wemmer's perspective lacks the Kenyan narrative.

Haley<sup>51</sup> examines the interaction of the victim and offender in the concept of restorative justice. To him, restorative justice "involves a wide variety of processes and that are more apt to restore both those who commit and those who suffer wrong."<sup>52</sup> However, for such concept to work, moral duties and obligations are placed on the offender and the victim. Firstly, the offender must acknowledge their wrongdoing in the committing the offence. This is to reduce the sense of grief of those who suffer wrong and is the initial step to reconciliation. Secondly, the offender must be

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<sup>48</sup> VPA 2014, s. 15

<sup>49</sup> CPC s. 137D

See Also; VPA, s. 9 (1)

<sup>50</sup> CoK, Art. 50 (9)

<sup>51</sup> John O Haley, 'Comment on Using Criminal Punishment to serve both Victim and Social Needs', (2009) Law and Contemporary Problems Vol 72 Issue 2

<sup>52</sup> Ibid

willing to accept the responsibilities of the harm caused to the victim. Finally, the victim must be willing to pardon and receive the offender into the society. The general aim is to ensure there is the victim-offender reconciliation. Kirchengast<sup>53</sup> supports the idea of restorative justice as being integral in sentencing. It gives accommodation to the feelings of the victim which may play a major role of reintegration of the offender back to the society. Section 2 of the Victim Protection Act, 2014 views the restorative justice as the promotion of reconciliation, restitution and healing the injuries from an offence. This concept has both the constitutional<sup>54</sup> and statutory support. Under the Victim Protection Act, participation in restorative justice is a right to a victim done under the supervision of the court. Restorative justice is also an object of the Victim Protection Act.

Grohovsky<sup>55</sup> examines the importance of allowing victims to express themselves at trial and sentencing in common law adversarial systems. She makes a case study for sexual offences. She critiques the idea of victims only giving testimony as witnesses only while they are kept dark of the whole judicial process. She opines “a victim's testimony is almost always the centerpiece of the prosecution's case in a sexual assault case, yet, many victims in England and Wales are kept ignorant about the judicial process and their role in it. In theory this is done to prevent 'undue' influence on the victim's testimony. In reality, this lack of information increases the level of stress the victim is undergoing.”<sup>56</sup> At the sentencing stage for sexual offences, she opines that “...victims should be permitted to speak at sentencing if they desire. Allowing victims to speak at sentencing returns some feeling of control over their life to them, serves to educate judges as

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<sup>53</sup> Tyrone Kirchengast, ‘The Landscape of Victim Rights in Australian Homicide Cases- Lessons from the International Experience’ (2011) Oxford J Legal Studies 133

<sup>54</sup> CoK 2010

<sup>55</sup> Julie A Grohovsky, ‘Giving Voice to Victims- Why the Criminal Justice System in England and Wales should allow Victims speak up to themselves’, (2000) Journal of Criminal Law 64 416

<sup>56</sup> *ibid*

to the effect of sexual assaults on victims, and makes the defendant face the consequences of his actions. Victims must be heard if the court is to understand the 'psychic injuries' associated with rape.”<sup>57</sup> The key gap of this conception in the Kenyan criminal justice system is the fact that the adversarial system still focuses only in the roles played by the state and accused. This has been the trend for a long time in Kenya, and an analysis into post 2014 legal regime provides a critique of the adversarial system and paves way for the incorporation of the inquisitorial system elements.

Kemph<sup>58</sup> takes us through the significance of victim impact statements. He discusses four main points why victim impact statements are important to the court. Firstly, they provide information to the court which would otherwise been left out. This is crucial because the law permits new information at the sentencing stage aimed at determining the nature of the sentence. Secondly, they provide benefit to the victim who has been left out of investigation and prosecution of the case. It is “as an acknowledgement by society of victims' suffering and their importance in the criminal prosecution, and allow victims who have lost their sense of control to regain a sense of dignity and respect rather than feeling powerless and ashamed.”<sup>59</sup> Thirdly, they help rehabilitate the offender by impressing upon the offender the ““human cost” of his crime and instill in him an understanding of societal norms to conform to in the future”<sup>60</sup>. Finally, they help in the perception of fairness in sentencing. This is achieved by victims presenting “evidence at sentencing for the same underlying reasons the [accused] is entitled to present mitigating evidence: to promote the appearance of justice.”<sup>61</sup> Equality, under the constitution of Kenya 2010 is so illumined to apply in every part of the Kenyan legal system, including criminal trials.

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<sup>57</sup> *ibid*

<sup>58</sup> Madison H Kemph, ‘Reconsidering the Use of Victim impact evidence’ (2018) 31 *Geo J Legal Ethics* 673

<sup>59</sup> *ibid*

<sup>60</sup> *ibid*

<sup>61</sup> *ibid*



However, the Kenya criminal justice system has not developed rules on how the victim impact statements are admissible before the courts.

## **1.9 Chapter Breakdown**

This study contains five chapters. Chapter one begins with the background of the study. It then discusses the problem statement, and examines the research questions and relates them to the objectives and the hypothesis of the study. It then concludes on the theoretical framework of this study and the literature review.

Chapter two analyses the changes brought by the Victim Protection Act, 2014 to the criminal justice system. To achieve this, it lays the historical and legal background on the development of the active involvement of victims in criminal justice system as witnessed at the international, regional and domestic levels. This chapter helps in the contextualization of the Act and shows the thematic areas of discussion at the international, regional and domestic platforms.

Chapter three discusses the impact of the changes and resulting legal jurisprudence brought by the Victim Protection Act in the criminal justice system. This chapter will discuss key case laws from the courts which have shaped and changed the traditional conception of state-accused being the only key actors in a criminal justice system.

Chapter four will discuss the challenges of the implications of the Act in its implementation as displayed through the latent conflict of marrying the provisions of the Act and the practice in our courts systems and the availability of both human and financial resources in implementing the Act.

Chapter five will discuss the conclusion and recommendations of the study. It discusses the possible remedies to the challenges portrayed through the implementation of the Act

## CHAPTER II

### 2.0 LEGAL DEVELOPMENT IN THE INVOLVEMENT OF VICTIMS IN CRIMINAL JUSTICE SYSTEM

Victim Protection Act, 2014 was enacted after long legal developments on the need for active involvement of a victim in the CJS at international, regional and domestic levels. Its provisions are a marriage from international and regional discussions and developments on the rights of the victim in the criminal justice system. A parlance at these legal discussions and developments help in the contextualization of the Victim Protection Act, 2014 in its efficacy to a CJS.

#### 2.1 International Level

The status of the victim was discussed and initiated at the international platform through bodies like the United Nations General Assembly (UNGA),<sup>62</sup> the United Nations Security Council (UNSC),<sup>63</sup> the United Nations Commission for Human Rights,<sup>64</sup> and the agreed Conventions.

##### 2.1.1 UNGA Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

This Resolution, adopted on 29<sup>th</sup> November 1985, seeks to address the plight of victims which are dominantly unaddressed under domestic legislations. The basis of this resolution stresses on the need to handle the victims with dignity;<sup>65</sup> and to ensure speedy determination of cases.<sup>66</sup> Further, the resolution is adopted to address wide ranges of victimization which exist: primary victimization which directly affect the victim due to the crime; and secondary victimization

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<sup>62</sup> Evidenced through the United Nations General Assembly Resolutions related to victims of crime

<sup>63</sup> Evidenced through the United Nations Security Council Resolutions related to victims of crime

<sup>64</sup> Evidenced through the United Nations Commission for Human Rights Resolutions related to victims of crime

<sup>65</sup> Declaration on Basic Principles of Justice for Victims, cl 4

<sup>66</sup> Declaration on Basic Principles of Justice for Victims, cl 6(e)

which is an indirect response to a crime due to how individuals and institutions like the police and judiciary handle crimes reported.<sup>67</sup> This resolution provided for the following:

Firstly is the need to have unhindered access to justice by the victims in a dignified and efficient manner.<sup>68</sup> To address this, the resolution recognizes the solemn roles placed on the judicial and administrative bodies which allow a victim air his or her views in a case;<sup>69</sup> to inform the victim of the roles to play at different stages in the criminal justice system; and informing the victim of different dispute resolution mechanism available for the victim.<sup>70</sup>

Secondly is the need to apply concepts of restitution<sup>71</sup> and compensation.<sup>72</sup> Restitution to place the victim to an almost near position the victim was before the crime and injury took place. Compensation is to be achieved through financial assistance and the establishing of funds to facilitate the required compensation. Thirdly is the need to provide medical, psychological help in addressing and mitigating the impact of the crime on the victim.<sup>73</sup>

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<sup>67</sup> United Nations Office for Drug Control and Crime Prevention: Centre for International Crime Prevention, “Handbook on Justice for Victims on the use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power” (1999) 4-10

<sup>68</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly (Declaration) Resolution 40/34 on 29<sup>th</sup> November, 1985 Clause 4

<sup>69</sup> Declaration, cl 5

<sup>70</sup> Declaration, cl 6

<sup>71</sup> Declaration, cls 8-11

<sup>72</sup> Declaration, cls 12 and 13

<sup>73</sup> Declaration, cls 14-17

### **2.1.2 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law**

These principles, adopted 16<sup>th</sup> December, 2005,<sup>74</sup> are based in the need to recognize victims' right to in reparation.<sup>75</sup> The Resolution provided the following components to be factored in by the member states:

Firstly the resolution encourages member states to develop mechanisms which promote care and avoid the victim's secondary victimization causing re-traumatizing experiences.<sup>76</sup>

Secondly the Resolution stresses the need for having a robust access to justice and information by the victim to avoid any inconvenience to the victims or their representatives<sup>77</sup> and ensure protection against infringement of victims' privacy.<sup>78</sup>

Thirdly the need for having appropriate reparation available for victims against the harm suffered.<sup>79</sup> This is achieved through restitution,<sup>80</sup> compensation,<sup>81</sup> and rehabilitation.<sup>82</sup> The responsibility is placed on the states to ensure that adequate initiatives are available for access of reparation from parties who may be unwilling or unable to meet the reparation obligations.<sup>83</sup>

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<sup>74</sup> Resolution No A/RES/60/147

<sup>75</sup> Preamble of Resolution No A/RES/60/147

<sup>76</sup> UNGA Resolution No A/RES/60/147, cl 10

<sup>77</sup> UNGA Resolution No A/RES/60/147, cl 12 (b)

<sup>78</sup> *ibid*

<sup>79</sup> UNGA Resolution No A/RES/60/147, part IX.

<sup>80</sup> UNGA Resolution No A/RES/60/147, cl 19

<sup>81</sup> UNGA Resolution No A/RES/60/147, cl 20

<sup>82</sup> UNGA Resolution No A/RES/60/147, cl 21

<sup>83</sup> UNGA Resolution No A/RES/60/147, cl 16

### **2.1.3 United Nations Security Council**

The development of the place of victims in the CJS is further echoed through resolutions of the Security Council. The focus, however, is shifted to victims of terrorist attacks. In its Resolution,<sup>84</sup> the UNSC requested for the possibility of establishing an international fund as a compensation fund for victims of terror attacks. This fund is to be financed either through willful contributions or seized assets from terrorist groups.<sup>85</sup> This was further stressed in the Resolution adopted on 7<sup>th</sup> July, 2005<sup>86</sup> condemning the terrorist attack in London.

### **2.1.4 Rome Statute**

The Rome Statute was adopted on 17<sup>th</sup> July, 1998 and entered into force on 1<sup>st</sup> July, 2002. The Statute is centred in four international crimes: crimes against humanity; genocide crimes; war crimes; and crimes of aggression.<sup>87</sup> The Statute establishes a court, International Criminal Court which has jurisdiction over the international crimes.<sup>88</sup> The Statute provides the platform where different actors in a criminal justice system play. These actors include victims of crime. Under the international criminal justice system, the Rome Statute provides a classic manner on how a victim can be incorporated in a criminal dispute. Thus, just as the Basic Principles of Victims of Crimes, the Statute displays a wide consideration for the involvement of the victim.

In accessing justice, the victims are allowed to make representations at the Pre-Trial Chambers and Trial Chamber,<sup>89</sup> and to make observations on court's jurisdiction and admissibility of the

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<sup>84</sup> UNSC Resolution on threats to international peace and security caused by terrorist acts adopted on 8<sup>th</sup> October, 2005 in its 5053<sup>rd</sup> Meeting <Resolution S/RES/1566 (2004)>

<sup>85</sup> Ibid.

<sup>86</sup> UNSC Resolution on threats to international peace and security caused by terrorist acts adopted on 7<sup>th</sup> March, 2005 in its 5223<sup>rd</sup> Meeting < S/RES/1611 (2005)>

<sup>87</sup> Rome Statute of the International Criminal Court (Rome Statute), art 4

<sup>88</sup> Rome Statute, art 1

<sup>89</sup> Rome Statute, art 15(3)

cases.<sup>90</sup> The victim can make application on her or his own capacity or through an intermediary or person acting with the consent of the victim.<sup>91</sup> The application is made to the Registrar of the Court who shall transmit to the relevant Chamber.<sup>92</sup> The victims have the right to choose their legal representative.<sup>93</sup> The legal representative is entitled to attend the proceedings before the court.<sup>94</sup> Further, he or she can question the witness before the court upon making an application to the Chamber. The Rules of Procedure places a mandatory duty on the Court to notify the victims and their legal representative on any development of the case including: the confirmation of charges; date of the hearings; any postponement; and any request or motions before the court.<sup>95</sup> Further, the Court is obliged to ensure a fair and expeditious justice.

The Statute also provides that the victim can apply for reparation which includes restitution, compensation, and rehabilitation.<sup>96</sup> The Victim is supposed to make a request for reparation to the court.<sup>97</sup> This request must describe the identity of the claimant; describe the harm occasion to the victim; indicate the date and location where the harm occurred; detailed description of the assets; details of the claims for compensation; and any documents in support of the request.<sup>98</sup> The court can also move on its own motion to effect reparation for the victim but must inform the accused and the States involved.<sup>99</sup> The court must at all-time take into account the scope and extent of the damages as the case may present.<sup>100</sup> Reparation proceedings being a unique

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<sup>90</sup> Rome Statute, art 19

<sup>91</sup> Rules of Procedure and Evidence of the Rome Statute of the International Criminal Court 2013 (Rules of Procedure), art 90

<sup>92</sup> Rules of Procedure, art 89

<sup>93</sup> Rules of Procedure, art 90

<sup>94</sup> Rules of Procedure, art 92

<sup>95</sup> *ibid*

<sup>96</sup> Rome Statute, art 75.

<sup>97</sup> Rules of Procedure, art 94

<sup>98</sup> *ibid*

<sup>99</sup> Rules of Procedure, art 95

<sup>100</sup> Rules of Procedure, art 97

proceeding must be publicized by the Registrar.<sup>101</sup> Reparation also involves the need to have a Trust Fund. This Trust Fund is established for the benefit of the victims where “the Court may order that an award for reparations against a convicted person be made through the Trust Fund”.<sup>102</sup>

The Statute provides for the protection and counseling of the victim.<sup>103</sup> This is achieved through protection of the victim’s privacy, dignity, safety, physical and psychological health.<sup>104</sup> The victim can make an application for protection by his or her motion on account of any testimony of any witness and the court is obliged to take special measures taking “into consideration that violations of the privacy of a victim may create risk to his or her security”.<sup>105</sup> Further, the Victims and Witnesses Unit is mandated to ensure the victims are counseled on any impact result from the crime.<sup>106</sup> The Victims Unit is thus responsible in ensuring that the victims obtain medical and psychological assistance and provide adequate protective and security measures.<sup>107</sup> The Units must maintain the confidentiality of the victims at all times and ensure that the staff assigned is aware of respecting victims’ security, integrity and dignity.<sup>108</sup>

The provisions of this Statute has influenced member states legislate laws which promote the active involvement of victims of crime. For instance, article 68 (3) of the Statute is duplicated in section 9 (2) of the Victim Protection Act which allows the victims to give views and concerns where personal interests have been affected during the criminal trial.

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<sup>101</sup> Rules of Procedure, art 96

<sup>102</sup> Rome Statute, art 79

<sup>103</sup> Rome Statute, art 43

<sup>104</sup> *ibid*

<sup>105</sup> Rome Statute, art 87 (1)

<sup>106</sup> Rome Statute, art 17

<sup>107</sup> *ibid*

<sup>108</sup> Rome Statute, art 18

## **2.2 Regional Level**

The development of victims' active involvement in criminal justice system was also spearheaded at the regional platforms. In Africa, the Nairobi Declaration and the Resolutions from the African Commission on Human and Peoples' Rights have played a key role in advocating the active participation of the victims in the criminal justice system and hence influencing our legal system.

### **2.2.1 Nairobi Declaration on Women's and Girls' Right to Remedy and Reparation**

This Declaration was agreed on at the International Meeting on Women's and Girls' Right to a Remedy and Reparation held in Nairobi in March 2007. The Declaration suggests measures of reparation as crucial segment in processes that aid communities and place an end to the cultural impunities.<sup>109</sup> This is achieved through incorporating perspectives of victims in the general broad definition of a "victim". Finally, the Declaration states that the process of decision making about reparation to victims must include the full participation of the victims.

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

This Resolution<sup>110</sup> recognizes the role to be played in responding to the needs of the victims. It recognizes the need to take necessary reparation measure in ensuring the victims are cushioned from harm occasioned to them. The resolution places the responsibility on the States in offering reparation to victims irrespective as to whether there has been a successful criminal

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<sup>109</sup> Nairobi Declaration, cl 2

<sup>110</sup> Adopted at the African Commission on Human Rights and People's Rights at its 32<sup>nd</sup> Ordinary Session from 17<sup>th</sup> October, 2002 to 23<sup>rd</sup> October, 2002



prosecution.<sup>111</sup> Further, the Resolution recognizes that victims should be availed with standard and appropriate social medical attention in terms of victim services.<sup>112</sup>

### **2.2.3 Norms from the European Union as a Regional Platform**

The European Union has an extensive legal framework on the place of a victim in a criminal justice system. This is illustrated through the Conventions, Recommendations, Directives and Decisions. These recommendations display the rights entitled to a victim in a criminal justice system which were ignored under the traditional perspective limited to the accused and the state. These recommendations influenced the enactment of domestic legislation in Europe similar to the Victim Protection Act, 2014.

The European Union witnessed developments on the need to actively involve victims of crimes in the CJS even before the United Nations General Assembly resolution of 1985. When compared to other regions like Africa, the EU was intentional in its systematic approach to victims' involvement in CJS of its member states. This justifies the need of having a study on it as a best practice in protecting victims of crime in a criminal justice system.

#### **2.2.3.1 European Convention on the Compensation of Victims of Violent Crimes**

This Convention was adopted on 24<sup>th</sup> November, 1983 and entered into force on 1<sup>st</sup> February, 1998. The Convention addresses the issue of reparation to victims of crime through compensation against the harm occasioned. The compensation is to cover to areas not limited to loss of earnings, medication costs and loss of sustenance to dependents. Further, the Convention provides that where the compensation is not fully available from the offenders of the crime, the

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<sup>111</sup> Clause 50 of the Resolution

<sup>112</sup> *ibid*

responsibility is on the State to contribute to the compensation to those who have occasioned serious bodily harm, or the dependents of the person who have died as a result of the crime.

### **2.2.3.2 Council of Europe Committee of Ministers Recommendations**

These recommendations from the Council of Ministers present a classic development of the victims' participation in criminal justice system in Europe.

Recommendation Number R (83) on Participation of the Public in Crime Policy<sup>113</sup> encourages the need to show consideration to victims of offences by designating advising fora to avoid any future occurrence of similar offences. This is achieved through counseling the victim through psychological and moral help, while taking their views on the areas of improvement. The Recommendation states that there should be institutional reforms and arrangements in the police and judiciary departments in identifying waiting rooms for the victims. Further, there should be encouraged the concept of compensation by the offenders as alternative to custodial sentencing.

Recommendation Number R (85) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure,<sup>114</sup> recognizes that it is a fundamental function of the criminal justice system to safeguards the interests of the victim in order to promote confidence in the victim and foster cooperation of the victim in his or her capacity as witness. It recommends that the police should be trained for them to be cognizant of them sympathetic to the victims and to ensure that the victim gets a report on the police's investigations. The victim's voice should be considered when the prosecutor makes a decision to prosecutor or not to prosecute. The Recommendation stresses the need of having the victim informed of the place and time of the hearing the case and an option of compensation should be considered by the courts in sentencing. According to the

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<sup>113</sup> Adopted by the Council of Europe Committee of Ministers on 23<sup>rd</sup> June, 1983

<sup>114</sup> Adopted by Council of Europe Committee of Ministers on 28<sup>th</sup> June, 1985

Recommendation, judges should consider attaching financial conditions when it decides to grant a suspended sentence to the offender.

Recommendation Number R (87) 21 on Assistance to Victims and the Prevention of Victimization,<sup>115</sup> recognizes that victimization results into negative physical, psychological, social and financial consequences. It recommends the support from the State Organs and Organizations which advance the interests of victims and fosters protection of the victims against retaliation from the offenders.

Recommendation 2006 (8) on Assistance to Crime Victims<sup>116</sup> recommends that victims should be protected from secondary victimization and places obligations on state to identify and develop measures and ways to alleviate the negative effects of crime. Further, it recognizes the paramount role played by public service involved in criminal justice system in ensuring that victims receive all appropriate information related to their situations. In addition to information, public service is mandate to provide assistance in form of emotional and social help while the confidentiality and privacy of victims is preserved. This Recommendation provides an elaborate measure of state compensation, provision of insurance and protection of victims.

### **2.3 National Level**

With the influence from the international and regional planes, Kenya has witnessed development of the involvement of victims in the criminal justice system. This has been manifest through parliamentary amendments, constitutional change and enactment of the present law governing issues related to victims in criminal justice system.

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<sup>115</sup> Adopted by the Council of Europe Committee of Ministers on 17<sup>th</sup> September 1987

<sup>116</sup> Adopted by the Council of Europe Committee of Ministers on 14<sup>th</sup> June, 2006

### 2.3.1 Participation of the Victim in Criminal Justice System before 2014

The participation of the victim in the CJS before the enactment of the Victim Protection Act can be summed in the words of Lesiit J in *Republic vs. Leliman & Four Others*:

“In Kenya, the place and role of a victim in criminal proceedings has been evolving. Initially, victims were silent observers in court, and were only visible as witnesses and were represented by an advocate through watching brief. In watching brief, counsel lacked the right of audience and could only channel concerns through the prosecution, except in inquests or enquiries where the victims counsel was allowed to cross-examine witnesses.

Concepts like watching brief were isolated into a passive role played by the victim or through the victim’s advocate, but that has changed over time due to the development of the law through constitutions solidifying human rights approach to trial and through enactment of legislations like Victim Protection Act. The Court of Appeal captured this development when it stated:<sup>117</sup>

Over the years the only practice known in a criminal trial where a victim or a victim’s family would participate in a trial was through an advocate watching brief, only as a passive observer, with no right of audience and could only communicate with the court through the prosecutor. The practice was based on the fact that the victim in a criminal trial is a third party, the case being between the State and the accused person (or the appellant). There is no debate; however, that a victim’s advocate can be just as important to them as defense counsel is to the accused person. It has been argued that by allowing the victims to participate in a trial they would run roughshod over the accused person’s right to a fair trial, prolong proceedings, increase expense and hinder the prosecutor’s ability to conduct a focused prosecution. As a result of these arguments, historically victims have been relegated to one role only-that of witnesses in trials.

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<sup>117</sup> I P Veronica Gitahi & another v Republic [2016] eKLR

Thus with the development of the law, new concepts which advocated for active participation of victims of crimes were legislated.

The 2003 amendments<sup>118</sup> to the Criminal Procedure Code introduced part IXA on Victim Impact Statement. This amendment was crucial in the CJS as it is a key door in giving the victim voice to air concerns before the sentencing of the offender. This recognition was further cemented in the 2014 enactment of the Victim Protection Act.

The 2008 amendments<sup>119</sup> to the Criminal Procedure Code introduced the procedure for Plea Bargaining Agreements. On the status of victims, the agreement provided for compensation and restitution by the accused to the victim. Thus, negotiations of the plea bargaining agreement must evidence the involvement of the victim. This has been stressed in the Criminal Procedure (Plea Bargaining) Rules, 2018.

The next key development of victim's right in the criminal justice system was the Constitution of Kenya, 2010. Under Chapter IV on the Bill of Rights and Article 50 on the right to fair hearing, the Constitution provides that Parliament of the Republic of Kenya must "enact legislation providing for the protection, rights and welfare of victims of offences." This provision recognizes that right to fair hearing, which is unlimited, incorporates the need to cater for the interests of the victim.

### **2.3.2 Victim Protection Act, 2014**

On 12<sup>th</sup> November, 2013, the Victim Protection Bill was presented at the Nation Assembly by Hon. Millie Odhiambo Mabona to fulfill the constitutional mandates under Article 50 (9). The

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<sup>118</sup> Act No.5 of 2003, s 88

<sup>119</sup> Act No. 11 of 2008, s 3

Victim Protection Act, No. 17 of 2014 was assented on 14<sup>th</sup> September, 2014 and commenced on 3rd October, 2014.

This Act provides for the rights of victims which include right to: access information,<sup>120</sup> compensation,<sup>121</sup> privacy,<sup>122</sup> confidentiality,<sup>123</sup> protection and specific rights for special groups of persons.<sup>124</sup> It provides different responsibilities by actors in the criminal justice system. Further, the Act establishes the Victim Protection Trust Fund,<sup>125</sup> and the Victim Protection Board.<sup>126</sup>

The provisions of the Act mirrors the international discussions on the rights of the victim in the criminal system and borrows leaf from the regional development illustrated through the African application and the comparative analysis from the European Union as discussed above.

### **2.3.3 Provisions of Victim Protection Act, 2014 on the Status of a Victim in the Criminal Justice**

The Act has introduced crucial provisions on rights and entitlements to the victim in the CJS. These provisions continue to revolutionize the criminal justice system in different ways. These key introductions include the concepts of watching brief, victim services, restorative justice and victim protection fund.

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<sup>120</sup> VPA s 19

<sup>121</sup> VPA, s 23

<sup>122</sup> VPA, s 8

<sup>123</sup> Ibid.

<sup>124</sup> VPA, s 17

<sup>125</sup> VPA, s 27

<sup>126</sup> VPA, s 31

### **2.3.3.1 Active Participation in Criminal Trials**

This has been an evolution of watching brief. Watching brief was developed in England as a tool providing the avenue for protecting rights of persons interested in the outcome of the case.<sup>127</sup>

Thus, it is a situation in criminal proceedings where an advocate observes the conduct of the trial on behalf of a client who is not a direct party to the case.<sup>128</sup>

The rationale of watching brief in criminal proceedings is to protect the rights and interests of a victim who, otherwise, would be sidelined in a matter that affected them: a method of presenting the victim's personal views and interests in the proceedings. Further, watching brief can be premised in the need of guarding against corrupt and lazy prosecutors and judicial officers who may botch the case for gain or personal reasons, and as a guarantee of ensuring the conduct of a proper criminal trial in order to achieve justice.

The Victim Protection Act, 2014 provides for active participation in diverse ways. These ways are manifested through rights and entitlements victims enjoy in a criminal trial processes.

#### **Active Participation of Victims in Criminal Trials: Rights under the Act**

The Act entitles a court or any administrative body to ensure that a victim is accorded legal and social services of his or her choice.<sup>129</sup> This means that the victim is entitled to be represented by the advocate just as the accused is entitled to this right. This entitlement extends into trial, and accords the victim the following key rights:<sup>130</sup>

- a) Right to commence and conclude a trial without any unreasonable delay;

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<sup>127</sup> Patmalar Ambikapathy, 'The Use of a Watching Brief as a Legal Tool for the Protection of Child Victims in the Criminal Justice Process' (Malaysia)

<sup>128</sup> Halsbury's Laws of England 3rd Edition, vol. 3, p. 621, para 1138; vol. 9, p. 674

<sup>129</sup> VPA s 4 (2)

<sup>130</sup> VPA s 9

- b) Right to make submissions in any plea bargaining;
- c) Right to information on the evidence to be relied by both the prosecution and the accused;
- d) Right to be informed in detail the charges facing the accused person; and
- e) Right to present views at different stages where the victim's interests are concerned.

The Act empowers the victim to present event at different stages of trial including during plea bargaining and at sentencing. This is an act of actively involve the victim in a criminal trial. The victim is empowered to present evidence either through himself/herself or an advocate. This occurs where the prosecution has left crucial evidence, meaning that this must be done before the ruling of a prima facie case has been made.<sup>131</sup> Further, the victim or through his or her advocate are entitled to present oral or written submission whether when rulings like bail application and prima facie case are made or before judgment.

The legal jurisprudence on watching brief has evolved from the traditional conception of a criminal trial to a contemporary trend since 2010. The debates are between whether the victim is accorded the active or passive role in a criminal trial before the court. As a departure point in the post 2010 dispensation in Korir J. in *Republic v. Paul Mwangi Macharia*<sup>132</sup> was of the opinion that:

I do not consider this application one of which I should make an expose on the place of victims in of crime in criminal trials. Suffice it to state that criminal jurisprudence recognizes the state as the complainant on the one hand and the accused as the defendant on the other. A victim of crime is not considered a party by extension, therefore, an

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<sup>131</sup> VPA s 13

<sup>132</sup> [2013] eKLR



advocate holding a watching brief has no right of audience before the court. Where therefore there are many concerns affecting the trial, the victims of the crime should bring the same on board through the prosecution.

However, this position changed with the enactment of the Victim Protection Act of 2014. Right to fair hearing was incorporated to encompass the victim. In *Mary Kinya Rukwaru vs. Ragunathan Santosh & Another*,<sup>133</sup> the accused person was charged with causing death by dangerous driving. The accused was given a bond. But the counsel for the victim took issue with the bond terms granted and applied to make submissions to oppose the bond terms. The accused cited lack of locus standi on the part of the applicant. Kimaru J in respond stated that:

“The Victim Protection Act, 2014 grants all the complainants in criminal cases audience before court to make representation during the cause of the trial.”

Four years later, Korir J. reversed his opinion on the status of the victim in the criminal trial which he held in Paul Mwangi Macharia’s case. The catalyst of his change of opinion was premised in the fact of development of the law: that the Victim Protection Act, 2014 was in operation. In *Gideon Mwiti Irea v DPP and 7 others*,<sup>134</sup> Korir J stated that:

“The arguments presented by the defence counsel are, certainly out of place, if adopted by this court, would be contrary to the Constitution and the Victim Protection Act, and by all means against progressive jurisprudence. The victim’s counsel can no longer be considered a passive observer”.

Courts have been critical in shaping the jurisprudence on the involvement of victims in the CJS through watching brief. This jurisprudence is crucial in understanding the traditional watching brief which accorded the victim a passive role in a criminal trial to the modern conceptions

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<sup>133</sup> [2014] eKLR

<sup>134</sup> [2015] eKLR

which have the constitutional and legal backing in according the victim a robust active role in criminal trials in the criminal justice system.

### **2.3.3.2 Victim Support Services**

Victim support services are crucial component introduced under the Act into the criminal justice system. The rationale is premised in the fact of relieving the victim of any victimization he or she may be subjected because of his or her status. This victimization can be either primary or secondary.

Primary Victimization has the following components. Firstly, is the need to cater for the physical and financial impact of victimization which includes the physical injuries occasioned to the victim and any other cost for destruction of property. Secondly, it is characterized by the need to address the psychological and social implications which included the mental health and stresses. Secondary victimization is manifested through conduct of investigation of the crime once reported and tried; the observance of the rights of victims during investigation and trial; the attitude of the officers handling the crime committed; and the general response from the society.<sup>135</sup>

Under the Act, victim support services take different form to ensure either that victimization is prevented or its effects are mitigated. The services range from ensuring a speedy investigation and prosecution of the cases, the free access of the avenues for justice,<sup>136</sup> to having appropriate cultural and religious sensitive support initiatives and availability of adequate medical services. These services hence help to curb the effects of primary victimization and avoid the occurrence

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<sup>135</sup> Handbook (n- 67) 4-10

<sup>136</sup> VPA s 22

of secondary victimization displayed through physical injury, trauma, financial inconvenience and any form of discrimination.<sup>137</sup>

### **2.3.3.3 Restorative Justice**

The Act introduces the concept of restorative justice to foster reconciliation, restitution, reparation and healing. Thus, the bells from restorative justice ring that a human being should be given an opportunity to return and to be reconciled in society again.<sup>138</sup>

The Act places restorative justice as a right to be enjoyed by the victim.<sup>139</sup> This right once exercised must be recorded as an agreement between the offender and the victim. This makes it akin to the concept of plea bargaining agreement.

Restorative justice may encompass the right to compensation by the offender to the victim for any economic loss occasioned by the offence, any personal or psychological injury and its treatment, and any loss to property.

### **2.3.3.4 Institutions established under the Act**

The Act established the Victim Protection Trust Fund and the Victim Protection Board. The Fund provides for the resources to protect victims' interests whereas the Board is mandated with the creation of policies and programs of implementing the Act.

The Fund is established under section 27 of the Act and is administered by the Board of Trustees. The Board of Trustees is mandated to make payments for expenses arising out of assisting victims of crime.<sup>140</sup>

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<sup>137</sup>VPA s 14

<sup>138</sup> Republic v Nahashon Murithi [2019] eKLR

<sup>139</sup> VPA s 15

The Board is established under section 31 of the Act. The Board is mandated to establish policies, programs and activities related to the protection of victims which range from dissemination of information on the law and issues related to victims to developing a charter for victims of crime.<sup>141</sup> The Board is must report once a year to the Cabinet Secretary responsible for victims and the National Assembly on the measures taken in implementing the Act.<sup>142</sup>

#### **2.3.4 Conclusion**

This chapter has discussed the historical legal developments on the active involvement in criminal justice system from the international, regional and domestic levels. These developments were crucial in the enactment of the Victim Protection Act, 2014. The chapter has then established the salient features of the Act which will aid the discussions of this study the succeeding chapters.

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<sup>140</sup> VPA s 28 (2) (a)

<sup>141</sup> VPA s 32

<sup>142</sup> VPA s 33

## **CHAPTER THREE**

### **IMPLICATIONS OF VICTIM PROTECTION ACT ON THE CRIMINAL JUSTICE SYSTEM IN KENYA**

#### **3.1 Introduction**

This chapter discusses the study findings on the implications of the changes introduced by the VPA into the CJS in Kenya. Firstly, the study examines the implications under three stages: the pre-trial stage; the trial stage; and the post-trial stage. Under each stage specific thematic areas are examined. At the pre-trial stage themes examined include: investigation of crimes; decision to prosecute; restorative justice; and victim services. At trial the study examines watching brief. At the post-trial the study examines the role of victims in criminal appeals. Secondly, the study examines the impact of the Act to other statutes namely: the Children Act; and the Criminal Procedure Code as related to the criminal justice system.

#### **3.2 Implications of VPA at Pre-trial stages of the criminal justice system in Kenya**

The key processes under pre-trial stage are: reporting of crimes; investigation of crimes; victim services; decision to prosecute; and restorative justice. These processes have been impacted by the VPA.

##### **3.2.1 Reporting and Investigation of Crimes**

The legal regime before 2014 did not provide for victim assessment reports once an offence has been reported. The practice existing then was subject the discretion of the officers handling the matter. However, VPA introduces the twenty four (24) hour rule in developing a preliminary victim assessment report once a crime has been reported.<sup>143</sup> This report must show the details of the victim and the alleged offender. The CJS under the 2010 Constitution provides a similar

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<sup>143</sup> VPA, s 6 (1)

concept but related to the accused person.<sup>144</sup> However, for victim of a crime, such provision is not expressly provided under the Constitution.<sup>145</sup> It is the VPA which provides for preliminary measures to be taken once a victim reports an offence. Such an act is considered as a measure of balancing between the rights guaranteed to both the accused and the victim.<sup>146</sup>

The basis for these reports is sacred. According to Skogan, the reports form the basis for determining the ‘ameliorative services’ the victim needs in order to provide the needed victim services.<sup>147</sup> These services are based on police referrals, underpinning the need for a rigorous training on preparation of this preliminary victim assessment reports in Kenya.<sup>148</sup> Further, proper assessment of the victim help to ease the psychological tension the victim may be facing. This helps in preventing secondary victimization occasioning to a victim due to poor handling of the cases by the administrative officers. These reports help further in establishing a good perception by the general public. Xie, Pagarsky and Lynch in their analysis into the role played by effective police in report of cases opines that the more fairly victims perceived they were treated by the police after being victimized; the less likely they are to report an ensuing victimization.<sup>149</sup>

Another aspect of this report acts as a foundational measure for investigating and preserving evidence. The 24 hour rule enables the officers handling the matter initiate the appropriate investigation, preserve the evidence, and accord the victim the appropriate victim services.

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<sup>144</sup> COK, art 49 (1) (f) (i), under this provision, the accused is supposed to be presented before a court of law for trial within twenty (24) hours of arrest.

<sup>145</sup> However, article 50 (9) provisions are left for legislation. The case is that the Constitution provides for an indirect manner on whether a victim enjoys any right within 24 hour of the reporting of a crime. With the VPA, we see a balance between the rights of the victim and the accused: present the accused to court within 24 hours of arrest; and prepare a victim report within 24 hours of the reporting of a crime.

<sup>146</sup> Ibid.

<sup>147</sup> Wesley G Skogan, 'Reporting Crimes to the Police: The Status of World Research' (1984) 21 J Res Crime & Delinquency 113.

<sup>148</sup> Ibid.

<sup>149</sup> Min Xie and Greg Pogarsky and James P Lynch and David McDowall, 'Prior Police Contact and Subsequent Victim Reporting: Results from the NCVS' (2006) 23 Just Q 481.

Closely related to reporting of crimes is investigation. Under the pre-2010 regime, prosecutors in many criminal cases were agents of the National Police Service.<sup>150</sup> These agents rarely shared investigation reports with the victim. Prosecutors generally usurped the role of both the state and the victim; and at many occasions, the dominant role of the state overshadowed the role played by a victim.<sup>151</sup> Investigation information was rarely shared with the victim, save for the purposes of preparing the victim as a witness. Further, notions of ‘trial by ambush’ were applied as related to the accused and consequently, keeping the victim unaware of any trial process.<sup>152</sup> The inception of VPA has created rights for the victim to obtain information. This information includes sharing investigation reports with the victim in order to adequately prepare the victim for trial.<sup>153</sup> According to justice Muchemi:<sup>154</sup>

The right to information under the Victim Protection Act includes all the material that a victim may need in the prosecution of his case against the perpetrator. It is my considered view that, a P.3 form is part of this vital information that will be needed in proof of criminal cases of assault and sexual offences

Sharing of investigation reports is a key development in involving victims of a crime at the investigation stage. It is also a tool of preparing the victim adequately for trial. A corporal responsible for investigations in Kitale having a vast experience of thirty three years notes that:

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<sup>150</sup> Criminal Procedure Code s 85 (2) (now repealed)

A 2012 article analyzing the hurdles faced by police prosecutors in adopting to the new legal regime under the 2010 Constitution: <https://www.standardmedia.co.ke/the-standard/article/2000055491/dpps-dilemma-on-police-prosecution>

In 2015, the ODPP recalled all police prosecutors with the aim of replacing them with prosecution counsels who are better equipped with legal procedures and other laws: <https://www.standardmedia.co.ke/article/2000151796/dpp-office-takes-over-prosecutorial-functions-from-police-in-new-changes>

<sup>151</sup> (n 8)

<sup>152</sup> Judgments on this topic always focused on the accused. For instance in *Juma v Republic* (2007) EA 461 the court held that: “We hold that the state is obliged to provide an accused person with copies of witness statements and relevant documents”. This did not fact in the need for the victim to be provided with such information.

<sup>153</sup> CoK art 50 (1) provides that every person has a right to ensure that any dispute is resolved by application of the law and in a fair public hearing. This applies to the victim as provided under section 9 (1) (b) of the VPA.

<sup>154</sup> *Legal Resources Foundation Trust v Attorney General & 2 others; Council of Governors & 2 others (Interested Parties)* [2019] eKLR para 92

Victims are normally made aware of the outcome of investigations in a bid to prepare them for court processes and [to create the perception and confidence] that justice is being done.

Such an impact into the criminal justice system of Kenya continues to raise the bar and role of a victim in investigation of crimes; according the victim an active role rather than the peripheral passive role of a by stander.

### **3.2.2 Victim Support Services**

There was no legal framework providing for victim services before the enactment of the Act. The importance of victim services cannot be overlooked in a CJS. It is a crucial component in enabling and safeguarding the rights of the victims in addressing the primary and secondary victimization.<sup>155</sup> The jurisprudence from courts offers insightful eye on the impact of the Act into the criminal justice system of Kenya. In a petition on whether the payment for P3 forms by the victims of a crime amounted to the violation of victims' rights to access services and justice, the court observed:<sup>156</sup>

Considering the foregoing decision, I am convinced that the fee charged on the issue and filling of P.3 forms is illegal and that the victims of assault, sexual offences and related crimes are entitled to the benefits of the principle of legitimate expectation...The law was purposed to help the victims of crime and abuse of power. The assistance included providing better information and support services to vulnerable victims. Such services are explained in Section 2 of the Act as **“all services offered to the victim of the offence to secure restoration of their emotional, mental, physical, legal or economic status from any harm occasioned by the offence committed”**.

Prior to the Constitution and VPA, the law on victim support services was a penumbra law: the practices varied from region to region.<sup>157</sup> Access to services was not guaranteed in the criminal justice system in Kenya. Whereas P3 form addresses services to be rendered to victims of violent

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<sup>155</sup> UN Handbook (n 67)

<sup>156</sup> (n 150) paras 78 and 88

<sup>157</sup> Ibid, charging of P3 fees varied from county to county a fact that led the court to observe that “The respondent has admitted it has no policy in place governing fees and the filling of P.3 forms. There is no justification for the levy being made in some counties while it is not done in others. There must be legislation and regulations to facilitate implementation of any constitution provision such as Article 209(4)” par 75



crimes effects, victim services must also be applied to nonviolent crimes. Sims, Yost and Abbot observe:<sup>158</sup>

There is no doubt that crime can have a debilitating, psychological effect on crime victims, especially victims of violent crime. Although that effect is greater for victims of a violent crime, however, individuals who suffer some nonviolent victimization, such as burglary, experience some degree of psychological suffering as well.

The efficacy of victim services cannot solely be placed on the public authorities like the police. An integrated approach is needed to include private organizations which promote the welfare of victims.<sup>159</sup> The criminal justice system in Kenya should embrace a field to be played by both state agencies and civil groups in offering victim services to victims of a crime. A robust and complimentary approach of integrating the governments and civil groups and entities will help in aiding devastating victims in whom secondary victimization is more lethal than primary victimization.

### **3.2.3 Restorative Justice in Prosecution**

Closely related to victim services, is the introduction of restorative justice as a right of the victim. Alternative dispute resolution mechanisms facilitate the realization of restorative justice in the CJS.<sup>160</sup> Restorative justice is seen as the better tool to ameliorate any psychological implications of a crime which the retributive justice cannot offer. Sims, Yost and Abbot observe:<sup>161</sup>

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<sup>158</sup> Barbara Sims and Berwood Yost and Christina Abbott, 'The Efficacy of Victim Services Programs: Alleviating the Psychological Suffering of Crime Victims' (2006) 17 Crim Just Pol'y Rev 387, different measures can be adopted to address the psychological suffering of victims. They observe that "crisis intervention counseling was the most common type of counseling provided by victim witness programs".

<sup>159</sup> Serbia has developed an integrated policy framework themed "The Role of Civil Society in the Development of Victims' Rights and Delivery of Victims' Services (2018)" promoting for the collaboration and cooperation of NGOs in providing victim services. The initial act for such a policy in Kenya must be from government organs responsible for implementing victim support services.

<sup>160</sup> CoK art 159 (2) (c)

<sup>161</sup> Barbra (n 153)

The impact of restorative justice programs is that victim-offender mediation programs can do more to alleviate the psychological impact of victimization than the traditional approach to providing services to crime victims.

Restorative justice is optional.<sup>162</sup> Once initiated it should not prejudice the rights of the accused.<sup>163</sup> The Act presents strict timelines within which the process must be undertaken.<sup>164</sup> Restorative justice may be considered as an improvement of victim support services. Further, the impact of restorative justice is enormous in the criminal justice system post 2014 where public officials are mandated to promote reconciliation. At the pre-trial stage some options for restorative justice are initiated with the aim of a plea bargain during trial.<sup>165</sup> A senior prosecutor in Kitale when asked on the place of restorative justice in criminal justice system in Kenya on whether prosecution can be initiated observed that:<sup>166</sup>

Many times the complainant and the accused family opt for the ADR provided that the complainant is satisfied with the agreement reached with the accused. The prosecutor is bound to promote the reconciliation. However, cases of public interest superseded this like sexual offences.

However, it is unclear whether reconciliation initiated at the pre-trial stage by the parties must be taken to a court of law for adoption. The courts have pronounced when it comes to reconciliation options during trial of a case by stating that:<sup>167</sup>

Reconciliation is limited only as to the type of case, common assault, cases relating to personal and or private matters, and cases that are not felonies. Again the terms of the reconciliation are subject to the approval of the court.

There has been development of policies at the prosecution department to advocate for the use of ADR.<sup>168</sup> The Diversion Policy is still being rolled out to all actors of the criminal justice system

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<sup>162</sup> VPA s 15

<sup>163</sup> VPA s 14 (2) (c)

<sup>164</sup> VPA s 15 (4)

<sup>165</sup> Criminal Procedure (Plea Bargaining) Rules, 2018

<sup>166</sup> Limo Norah, Questionnaire by JK Ngarngar, LLM Student, University of Nairobi, School of Law, 18<sup>th</sup> June, 2020

<sup>167</sup> David Gathangu Nyaguthio v Republic [2017] eKLR

<sup>168</sup> Office of Director of Public Prosecutions, 'Diversion Policy Guideline' 2019

as it provides a great platform for involvement of victims of a crime. This policy promotes the use ADR is the plea bargaining rules. The provision for restorative justice under the VPA cements the role of ADR in criminal cases, bringing an end to the arguments whether ADR was applicable in criminal cases. One prosecutor observes that:<sup>169</sup>

The policies [involving the victim in restorative justice] are limited. However, one of the greatest achievements is the implementation of the plea bargaining guidelines where the views of the complainant must be taken into account before a plea agreement is adopted. Also with the open door policy, the complainant can approach the office of the prosecution directly and air their views.

### **3.3 Implications of VPA at Trial stages of the criminal justice system in Kenya**

The central theme advanced by the VPA under the trial stage is the progressive development of watching brief. Watching brief has tremendously changed post 2014 legal regime.<sup>170</sup> However, the dramatic implications of watching brief under the VPA is centered on themes of the victim's right to present evidence and cross examine witnesses; and arguments of advancing the judicial justice system from the traditional adversarial system to one with inquisitorial elements.

The judicial system in Kenya is adversarial in nature under the guidance of common law principles.<sup>171</sup> However, legal practitioners have noticed the impact of the VPA in the judicial system. They observe a trend of the blending of the traditional adversarial systems with inquisitorial elements through the active involvement of the victims in trial. One defence advocate practicing in Kapsabet notes that the process of granting active participation roles to a victim of a crime under the Act insinuates the influence of the inquisitorial system elements. A judicial officer of nine (9) years' experience observes that "some of the provisions stipulated in

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<sup>169</sup> (n 166)

<sup>170</sup> Shifting from passive state into active state (n 134)

<sup>171</sup> The common law principles are considered at the appointment of judges of superior courts under Article 166 (2) (a) (b) of the Constitution which stresses on the need for the experience being gained at a commonwealth common law jurisdiction

the Act contradict the laid down principles that guide the traditional adversarial system”. The set-up of VPA is shifting the judicial system from strict state-accused relationship into state-victim-accused relationship. The conclusion is that a pure adversarial system cannot guarantee the rights accorded to the victim of a crime under the law.

The insufficiency of the adversarial system in criminal trials has been discussed by scholars. Omondi analyses the implications of the adversarial legal system to special needs of child victims of sexual abuse in Kenya. She notes that an inquisitorial system provides the trial judge with expanded roles in truth seeking and thus serving the best system with which the rights of the child victim of sexual abuse are protected. This is not always the result when dealing with an adversarial system where a judge plays the role of collecting evidence and applying the evidence to the evidentiary procedures. In such a system, the judge folds his or her hands without seeking into the tiny issues of the case. This adversarial system thus, in many times, leads to a miscarriage of justice, by the fact that a judge is a silent bystander in a trial process. The study observes that such a system cannot fully implement the provisions of VPA. VPA needs more of a fact finding judge than the analyst of evidence to procedure. Further, VPA is systematically influencing and leading to a change in the judicial system away from the traditional adversarial system. The full implications of VPA into the judicial legal system will be evident with the fruition of time. In the ruling on watching brief, the Court of Appeal observed the nature of an inquisitorial system. It observed:<sup>172</sup>

The system in the civil law tradition is inquisitorial, with the judge actively controlling the trial’s direction. In a system based on such tradition victims tend to play a more central role, for instance, by presenting any evidence they may have over and above that brought by the prosecution, cross-examine witnesses and make closing statements.

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<sup>172</sup> I P Veronica Gitahi & another v Republic [2016] eKLR

The practical effects of VPA under watching briefs accords a victim the roles highlighted by the judges in the ruling above.<sup>173</sup> The victims are empowered to present evidence,<sup>174</sup> make submissions,<sup>175</sup> and cross examine witnesses under the current legal framework and jurisprudence from courts.<sup>176</sup> Another advocate when asked whether the active involvement of the victim impacted the adversarial systems by having elements of the inquisitorial system agrees that “recent rulings which have given more powers to the victims and advocates watching brief” have elements of inquisitorial system. To understand the impact of the VPA in criminal trials, two Court of Appeal cases are of help. These are *Joseph Lendrix Waswa v Republic*,<sup>177</sup> and *IP Veronica Gitahi & Another v Republic* which has been discussed above.<sup>178</sup>

### **3.3.1 Joseph Lendrix Waswa v Republic (Court of Appeal decision)**

This is a case arising from a ruling from the High Court where a judge allowed the watching brief advocate to actively participate in the trial by making submissions on different stages and in all situations where a point of law arises in the course of trial; and to cross examine witnesses. The defence appealed the ruling in the Court of Appeal. According to the appellant advocate, a watching brief counsel operates under the direction of the prosecution counsel. The prosecution counsel also argued that the watching brief advocate could not enjoy the right of audience to make submission unless directed by the Director of Public Prosecution.

These arguments by the counsels present the diverse understanding on the implications of the VPA in the trial stage. Whereas the watching brief advocate makes a case under the VPA, the

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<sup>173</sup> Ibid

<sup>174</sup> VPA s 13 where the victim is a complainant

<sup>175</sup> VPA s 9 (2) (a)

<sup>176</sup> *Joseph Lendrix Waswa v Republic* [2019] eKLR

<sup>177</sup> [2019] eKLR

<sup>178</sup> I P (n 170)

prosecution and appellant advocates are held in the shackles of the traditional judicial system. The Court of Appeal, however, agreed with the watching brief advocate by stating that:<sup>179</sup>

The concept of “watching brief” in a criminal trial where an advocate for the victim does not play any active role in the trial process is now outdated. The Constitution and the VPA now gives a victim of an offence a right to a fair trial and right to be heard in the trial process to assist the court, and not the prosecutor, in the administration of justice so as to reach a just decision in the case having regard to public interest. That right of the victim to be heard persists throughout the trial process and continues to the appellate process.

This means that the VPA has fully empowered the victim with active participation in a criminal trial as a helper to the court in achieving justice. The watching brief advocate is thus not under the mercy of the prosecution counsel.

The court went ahead to analyse the status of a victim and watching brief advocate in cross examination of the witnesses. The Court of Appeal interpreted this right to be imbued under section 150 of the Criminal Procedure Code which gives a trial court general powers and discretion to call witnesses and may be examined by parties, including victims. The court observed that:<sup>180</sup>

A victim of an offence or his advocate or representative may exercise the plenitude of the powers of the court under section 150 of the Code with the permission and directions of the trial court.

The appellant dissatisfied with the Court of Appeal decision appealed the decision at the Supreme Court of Kenya on 9<sup>th</sup> July, 2019.

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<sup>179</sup> Lendrix (par 21)

<sup>180</sup> CPC s 150

### **3.3.2 Joseph Lendrix Waswa v Republic (Supreme Court Decision)**

In this appeal,<sup>181</sup> the appellant wholly challenged the decision of the Court of Appeal. In their submissions, the appellant argued that the decision of the Court of Appeal elevated the status of a victim of a crime as a secondary prosecutor. Further, the appellant opined that the rights of the accused person cannot be limited to accommodate the interests of the victim. To him, section 9 of VPA undermines the constitutional spirit of fair hearing by granting victims of crimes rights. The appellant argued that the court ought to choose a lesser evil which causes the least damage to the constitution by protecting the rights of accused person over interests of the victim. The Prosecution and watching brief counsels opposed the appeal. The Supreme Court while recognizing the importance of a victim in a criminal trial process stressed and held that:<sup>182</sup>

Although the adversarial criminal trial process is a contest between the State, represented by the DPP, and the accused, usually represented by defence counsel and the traditional role of victims in a trial is often perceived to be that of a witness of the prosecution, it is without doubt, that flowing from both the Constitution and the VPA and in particular section 9(2) (a) of the VPA, that a victim too, has the right to participate in criminal proceedings. The emerging picture therefore, is that the criminal justice processes should empower victims and that their voices should be heard, not only as witnesses for the prosecution but as rights holders with a valid interest in the proceedings and the outcome of the cause.

The importance of this decision is sacred. The highest court in the country has rubber stamped the position of victims of crimes during criminal trials as provided under the Constitution and the VPA.

### **3.3.3. Implications of VPA at Sentencing Stage**

VPA provides for the rights of participation of victims at sentencing stage. Before the enactment of VPA victim participation at sentencing was solely provided under the CPC. This participation is through victim impact statements. The CPC states that the victim impact statements are not a

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<sup>181</sup> Joseph Lendrix Waswa v Republic Petition Number 23 of 2019, Supreme Court of Kenya decision dated 4<sup>th</sup> September, 2020

<sup>182</sup> Ibid paras 51 and 64

mandatory procedure. One key provision under the CPC is that the victim impact statements are limited to scenarios where the primary victim has died or where the offence resulted in the physical bodily harm to any person.<sup>183</sup> However, the limitation to physical injury does not reflect the development of the law as provided under VPA. The VPA provides that victim impact statements can be done in areas beyond the physical injury occasioned to victims. These include psychological, emotional, economic and social impacts of an offence. The implication of VPA is that it widens the net beyond which CPC's provisions. Further, VPA considers victim impact statement as a right to victims.

One key development as a consequence of VPA is the Sentencing Policy Guidelines (2015). This policy provides robust avenues in the participation of victims at the sentencing hearing. It calls for the inclusiveness of both the offender and victim. Thus, the policy implements the provisions of VPA on the need for active participation of victims at sentencing, and the need for compensation and restitution. The policy encourages courts to issue compensation orders in as they fuse elements of restorative and retributive justice between the offender and victim. These orders are given when courts are satisfied that they are achievable and implementable by the offender.

### **3.4 Implications of VPA at Post-trial stages of the criminal justice system in Kenya**

The key reflection under this stage is appealing of criminal cases in the criminal justice system of Kenya. This study in discussing the impact of VPA at this stage narrows to two key issues:

- i. Whether a victim of a crime is entitled to appeal a decision of a trial court; and

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<sup>183</sup> CPC s 329B

See Also: Leonard Maina Mwangi v Director of Public Prosecutions & 2 others [2017] eKLR



- ii. Whether a victim who enjoyed watching brief at trial stage is entitled to be presented during appeals.

### **Whether a victim of a crime is entitled to appeal a decision of a trial court**

The jurisprudence on this theme is discussed under the status of a victim in public prosecutions; and private prosecutions.

Under private prosecution, a victim or through victim's representative prosecutes and ultimately is entitled to appeal the decision of the trial court.<sup>184</sup> Private prosecutions are geared at protecting any indolence by the public authorities who fail to investigate or prosecute the matter. It is therefore a constitutional safeguard under the Constitution of Kenya against any secondary victimization on the victim.<sup>185</sup> The nature of the victim being the prosecutor in private prosecutions means that a right of appeal is undeniably guaranteed.

Public prosecution presents a penumbra condition. It is an area left barren. No development of the statute law.<sup>186</sup> No jurisprudence from the courts. However, a resort is found under the process of revision. The Criminal Procedure Code provides for revision.<sup>187</sup> This occurs where the High Court may call for a record from a criminal proceeding to examine as to the legality, propriety or

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<sup>184</sup> Chege Njoroge v Henry Karanja & another [1982] eKLR, where the private prosecutor appealed the decision of the trial court

See also: Kimani v Kahara [1983] eKLR in which private prosecution cases enjoy the rights for revision

<sup>185</sup> Margaret Wanza Wambua v Kelvin Mutie Muinde & another [2019] eKLR

<sup>186</sup> Tyrone Kirchengast, 'Victim Lawyers, Victim Advocates, and the Adversarial Criminal Trial' (2013) 16 (4) *New Criminal Law Review: An International and Interdisciplinary Journal* 568-594, discusses the draft UN Convention proposed by the International Victimology Institute Tilburg and the World Society of Victimology on the legal rights of a victim to appeal decisions of prosecutors. However, it is unclear whether a victim can appeal a decision of a trial court.

<sup>187</sup> CPC s 362

correctness of any finding. Mabeya J making a decision in a criminal revision case holds the view that:<sup>188</sup>

Further, under *section 9 of the Victim Protection Act, 2014*, the victim must be informed and his/her views taken when any step in the proceedings is being taken affecting his/her interest. This means that the DPP cannot purport to withdraw a case without having involved the victim/complainant. That in effect means that the DPP's powers to terminate proceedings are not absolute. In this case, there is nothing to show that the victim had been involved in the proposed withdrawal of the charges.

This holding suggests that a victim is a central figure in a criminal trial that even the DPP should factor in before terminating a case.<sup>189</sup> An analysis is as to whether a victim can be considered as an aggrieved party in cementing his or her role in revision of cases. This is due to the fact that the courts have stressed on the status of a party being grieved as a condition in applying of revision. Nyakundi J notes that:<sup>190</sup>

The power of revision conferred by the provisions of section 362 as read with section 364 was left open for an applicant or any aggrieved party to be considered and taken before the final order in reference to the ongoing proceedings.

### **Whether a victim who enjoyed watching brief at trial stage is entitled to be presented during appeals**

The jurisprudence on this issue is settled by the courts. According to the courts, VPA empowers the active participation of a victim from trial of a case into the appeal stage.<sup>191</sup> The Court of Appeal has held that a victim of a crime is entitled to be presented during appeals and entitled to make submissions on any point of law. The court stated that:<sup>192</sup>

Any other counsel acting for the complaint, who is a victim, is at liberty to represent her, to be served with the motion, and to file and make submissions (if any).

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<sup>188</sup> Republic v Mwit Stanley Murea [2018] eKLR

<sup>189</sup> Tyrone (n 186)

<sup>190</sup> Republic v James Kiarie Mutungei [2017] eKLR

<sup>191</sup> Lendrix (n 176)

<sup>192</sup> Kuldip Madan Sapra & another v Director of Public Prosecutions [2019] eKLR

### **3.5 Impact of Victim Protection Act to other Substantive and Procedural Laws**

The VPA does not act in isolation. It has an interrelation with other statutes the criminal justice system namely: the Children Act; the Criminal Procedure Code; Persons Living with Disability Act.

#### **3.5.1 Children Act**

The status of a child victim is guaranteed under the VPA. Section 18 of the Act provides for protection of interests of a vulnerable victim. Section 2 of the Act provides for a child victim where a parent or guardian dies as a result of a crime. Such a child becomes a child in need of care and protection under the Children Act.<sup>193</sup> The VPA provides the road map on the need to protect a child victim,<sup>194</sup> whereas the Children Act provides the substantive ways and methods in ascertaining a child in need of care,<sup>195</sup> and the procedure of approaching the Children's Court.<sup>196</sup> However, there is no clear procedure on how a child victim of linking the provisions of the two acts. Under the Children Act, all matters on children in need of care and protection are dealt by the Children Court.<sup>197</sup> This means a duo process when it comes to a child victim of a crime: to follow the criminal court process; and finally approach the Children Court for practical fulfillment of provisions under the Children Act. The study opines that such a parallel system, reflected through the adversarial judicial system yields to an injustice. To this, the study holds that a criminal court, handling a matter where there is a child victim as results of death of the sole parent or guardian provider, should be equipped with a duo jurisdiction of addressing the

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<sup>193</sup> Children Act s 119 (1)

<sup>194</sup> VPA s 17 (5) (c) and s 18

<sup>195</sup> Children Act s 119 and 120

<sup>196</sup> Children Act s 120 (4)

<sup>197</sup> *ibid*

trial of the case; and acting as a children court under the Children Act. This has not escaped the jurisprudence from the court. Matheka J opines that:<sup>198</sup>

The Victims Protection Act 2014 makes provision for the welfare of Victims. But that is where it stops. The connecting threads between its provisions, those of the Children Act and the Criminal Justice System have not been clearly set out. Hence the glaring that upon the arrest of the perpetrator, the thinking of the Criminal Justice System is linear-single sight vision dealing with the perpetrator. There is need for a meeting point to ensure that these laws work hand in hand- a meeting point needs to be found to ensure that even as we deal with the criminal matter we are also dealing with the welfare of the victims – there should be no disjoint of efforts.

This meeting point can be achieved through establishing of the regulations under the VPA.<sup>199</sup>

These regulations must provide for the practical attainment of child victim welfare by a trial court. The welfare must address the basic component in the life of a child namely: the continuing of the basic education for the child; the provision for food and comfortable shelter; and provision for clothing. The law, as an instrument for social change, must prioritize on the interests of vulnerable children, especially the child victims beyond the notions of justice of convicting the offender into real practical solutions in providing education, shelter, clothing and care. To achieve this, any procedural hindrance must be removed in order to equip the trial court of a crime make orders which otherwise are reserved for the Children Court.

### **3.5.2 Criminal Procedure Code**

This code provides for the criminal rules and procedure to be followed by the courts in the criminal justice system of Kenya. It is relevantly important in the implementation of the VPA. It provides for the plea bargaining and victim impact statements,<sup>200</sup> which are rights bestowed to the victim under the VPA.<sup>201</sup> However, under the CPC these provisions are not considered as rights to victims, it is the VPA which cements that plea bargaining procedures must include the

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<sup>198</sup> Daniel Onyondi Moi v Republic [2019] eKLR

<sup>199</sup> VPA s 34 (2) (b)

<sup>200</sup> CPC part IXA.

<sup>201</sup> VPA s 9 (1) (c) and s 12

views of the victims, and that the victim impact statements fall squarely under the rights enjoyed by the victim. It is important to note that the rules and procedures under the code ranges back to the independence of the Republic of Kenya. They does not clearly capture the recent development of incorporating the voice of the victim. Many of the procedures are thus outdated. However as observed by the Court of Appeal,<sup>202</sup> some provisions under the code have aided the courts in permitting victims to cross examine witnesses.

### **3.6 Conclusion**

This chapter has discussed the implications of the Act into the criminal justice system. Whereas implications are crystal in the pretrial and trial stages, post-trial stage presents a vacuum on whether a victim of a crime can appeal a decision of the trial court. The impact of VPA to other statutes must be examined through the lenses of establishing rules of procedure under the Victim Protection Act. The Act is relying on criminal rules and procedures established way behind at independence. The modern judicial system which is centred on the status of the victim must develop rules and procedures which are in accordance to the Constitution, the Act, and generally accepted norms in criminal procedure.

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<sup>202</sup> Waswa (n 184)

## CHAPTER IV

### CHALLENGES IN IMPLEMENTING THE CHANGES BROUGHT BY THE VICTIM PROTECTION ACT

#### 4.0 Introduction

This chapter discusses challenges facing the smooth implementation of the Act. This is a buildup of chapter two which identified the key changes brought by the Act, and chapter three which analysed the impact of the changes under the criminal justice system of Kenya. The study observes that challenges facing the implementation are unique at different stages of the criminal justice system. Thus, the study discusses these challenges in three main stages: pretrial; trial and post-trial stages.

#### 4.1 Challenges facing the implementation of the Act at the pretrial stage

The challenges under pre-trial stage are discussed under two main areas: institutional challenges; and procedural challenges.

##### 4.1.1 Institutional challenges

These are internal challenges associated with the law enforcement agencies mandated to conduct investigations. The Act defines law enforcement agencies to include “the National Police Service; the office of the Director of Public Prosecution; and any other department, office or agency of the state or statutory body that is responsible for investigating or taking any action in relation to an offence punishable under any written law”.<sup>203</sup>

The study discusses on roles played by the National Police Service; Victim Protection Board and the office of Director of Public Prosecution in implementing the VPA. The study establishes key

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<sup>203</sup> VPA s 2

institutional challenges including on areas of training; corruption; availability of resources; establishment of programs; and educational requirements.

#### **4.1.1.1 Lack of Programmes**

This challenge is reflected in different dimensions under the pretrial stage. One investigation officer based in Kitale with an experience of thirty three (33) years observes that:<sup>204</sup>

“The Government is not keen to observe the implementation of Act since it has not established programs to support it.”

The mandate to design these programmes rests with the Victim Protection Board. The Board is obliged to “to advise the Cabinet Secretary on interagency activities aimed at protecting victims of crime and the implementation of preventive, protective and rehabilitative programmes for victims of crime”.<sup>205</sup> They take different forms: formulation of integrated programs to protect victims of crimes; enhancing coordinated activities to sensitize the measures; and rights of victims.<sup>206</sup>

The impact of these programmes serve as a backbone in providing basic trainings to law enforcement agencies who must be aware of the role to play in protecting victims under the 2014 legal regime.<sup>207</sup> These programmes ought to be sensitized through digital print media and social media as a modern approach to disseminating information. Unfortunately, there has been no development in any initiatives from the Board. Further, the Board does not have a working website to disseminate such information through digital media. Its existence is rarely known in

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<sup>204</sup> John Imbayi, Questionnaire by J.K Ngarngar, LLM Student University of Nairobi, School of Law, 23<sup>rd</sup> June 2020

<sup>205</sup> VPA s 32 (1)

<sup>206</sup> VPA s 32 (2)

<sup>207</sup> VPA s 32 (2) (c)

See also: Margaret Smith Ekman and Magnus Joseph Seng, 'On-Scene Victim Assistance Units within Law Enforcement Agencies' (2009) 32 Policing: Int'l J Police Strat & Mgmt 719, gives an exposition on the interaction of the police and victim specialists in US showing the lack of victim specialists. In Kenya, the Board ought to conduct such surveys across all police stations in order to recommend protective measures to be found at police stations in order to address to peculiar needs for victims. Just like Serbia (n 155), an integrated approach between government agencies and NGOs stands to provide better results.

the corridors of the criminal justice system in Kenya. One investigating officer based in Mavoko criminal court observes that “some of these agencies are just based in Nairobi”. They are not decentralized in order to deliver justice, even to remote areas where crimes occur against the subjugation of victims. The key avenue in educating the public on the right of victims of crime is marked by a deep silence of darkness.

One of the greatest misdeeds of the Board is failure to publicise and sensitize on the Victims’ Rights Charter. The importance of Charter cannot be overlooked. It provides for the nature of victim services; the status of police investigation; and the process and rights of victim in prosecution; the rights of the victim in the justice system.<sup>208</sup> The Charter is therefore crucial in developing right to information available to a victim.<sup>209</sup> However, despite the Charter being drafted in 2017, there has been no sensitization throughout the country. Lack of sensitization of the makes dim the provisions of VPA on victim services and confidentiality of information about the victim. Information about the victims must be preserved against any odds of threats leading to secondary victimization. These observations are captured by a magistrate presiding at Keroka who observes that:

Maintaining the confidentiality of victims’ personal information such as phone numbers is not always considered. This makes them vulnerable to attacks and blackmail. Further, access to victim services is difficult.

The study observes that none of the questioned judicial officers, prosecution counsels, defence counsels, or investigating officers alluded to the existence of the Charter. This has an effect that the Charter has not fully development. This is against the provision of the Act which mandated such a Charter be established within six (6) months of the commencement of the Act.

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<sup>208</sup> Ibid

<sup>209</sup> Brian Williams, 'The Victim's Charter: Citizens as Consumers of Criminal Justice Services' (1999) 38 How J Crim Just 384, the Victim Charter is crucial as it empowers citizens to report crimes and enables enforcement authorities design their priorities in enforcing designed measures of protecting the victims. The Victims Charter is thus a key service standards provider with minimum practices which must be satisfied when dealing with victims.



#### 4.1.1.2 Challenges to investigations

Another institutional challenge is associated with investigations.<sup>210</sup> Different investigating officers questioned by this study cited corruption; lack of trainings; lack of appropriate budgetary allocation; and low levels of education as key barriers in implementing the Act. One investigation officer based in Bungoma County observes that:<sup>211</sup>

Corruption has seen unqualified officers occupy key investigation offices despite lack of academic credentials hence reducing the efficiency of the investigation department.

This is relevantly true in Kenya which has seen high corruption levels within the National Police Service.<sup>212</sup> If people with low academic credentials occupy offices of trust like investigations, compromised and poor investigations are the fruit. The impact of this is that victims suffer injustice and crimes go on unchecked and undeterred. Investigation is key and crucial right for the victims of crimes. This justifies the provision under the Act that a victim can present evidence which is apparently omitted by the prosecution during trial.<sup>213</sup> While this right can be celebrated, its enjoyment is costly due to the fact that victims lack resources to do a thorough investigation as compared to the state. Further, trainings are rarely conducted in the investigation department. This is due to low budgetary allocation which is unable to incorporate the adequate technology in investigation; hence the victims' rights under the Act are infringed.<sup>214</sup>

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<sup>210</sup> Rama Devi Parajuli, 'Crime Victim Protection: Lessons from Republic of Korea' (2015) 9 NJA LJ 169, Korea has an integrated system in carrying investigations as provided under their Crime Victim Protection Act, 2005. This integrated system needs professionalism and academic competence. This ought to be applied to the Kenyan investigation system to enable the system work with professionalism with properly trained and competent officers.

<sup>211</sup> Anonymous Investigator based in Bungoma, Questionnaire by JK Ngarngar, LLM Student University of Nairobi, School of Law, 23<sup>rd</sup> June, 2020

<sup>212</sup> <https://www.standardmedia.co.ke/article/2001350006/ministry-of-interior-is-the-most-corrupt-says-eacc>

<sup>213</sup> VPA s 13 (a)

<sup>214</sup> P V Reddi, 'Role of the Victims in the Criminal Justice Process' (2006) 18(1) Student Bar Review

#### 4.1.2 Procedural Challenges

These are challenges initiated by law enforcement agencies like the National Police Service when dealing with the victim or victim counsel. A defence counsel based in Kapsabet observes that “the police are conservative, and they rarely release investigation statements to the victim during investigation”. This is echoed by another defence counsel in Mandera who observes that:

There is a lot of resistance by the investigation officers in allowing victims to actively participate in investigations. Essentially the investigators still believe that victims’ role begins during trial. More often victims’ counsels do not access statements until the court intervenes.

The study observes that these procedural challenges are propelled due to lack of sensitizing the Victims’ Rights Charter, which should provide for the status of police investigations.<sup>215</sup> This is the same with regard to awareness on the rights of a victim. A senior prosecutor based in Eldoret observes that:

Most victims are not aware of their rights as enshrined in the Act thus limiting their involvement in the process of decision to charge.

Prosecution department has introduced different programs geared at involving the victim in the criminal justice system. The efficacy of these programs is their publication and sensitization not only in urban areas but most importantly in rural areas. This has not really been the case. An advocate practicing in Mandera notes that lack of proper victim protection mechanisms in rural areas makes the participation of victims risky. The worst reality being that in counties like Mandera with high insecurity some victims may not be in a position to report offences for prosecution at a court of law.<sup>216</sup> Lack of protection measures provided under the Act in some places infringes on the rights of victims of crimes leading to secondary victimization. This

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<sup>215</sup> VPA s 19 (4) (f)

<sup>216</sup> Hussein Wethoo, Questionnaire by JK Ngarngar, LLM Student University of Nairobi School of Law, 22<sup>nd</sup> June, 2020

secondary victimization is further witnessed in cases where prosecutors demand “for unworthy gain from victims as a condition for lodging the charge” as observed by a magistrate.

#### **4.2 Challenges facing the implementation of the Act at the trial stage**

The challenges dealing with trial stage in implementing the Act have been dealt through various precedent setting decisions from our courts.<sup>217</sup> The rights enjoyed by the victim under watching brief have been reaffirmed through court jurisprudence. The study observes that some procedures and standards are not available in ensuring the victim enjoys the rights under trial stage. A magistrate based in Keroka observes that there is “lack of standards on quantifying the impact of damage to the victim in order for the victim to enjoy the rights to reparation, compensation and restitution”.<sup>218</sup>

Further, challenges with inadequacy of physical facilities to ensure victims are protected from any formidable intimidation. A magistrate observes that during trials “there are no formidable measures to protect the victim from the accused or accused agents making the victim stay away from participating in her or his case”. These facilities include waiting rooms for victims within the premises of the court. Lack of these measures occasions injustice more so vulnerable victims.

Another challenge during trial is the apparent competition between watching brief advocates and prosecution counsels. A defence counsel observes that there is resistance by most prosecution counsels in having the victim actively participate in criminal trials.<sup>219</sup> Most of the prosecution

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<sup>217</sup> I P Veronica Gitahi & another v Republic [2016] eKLR; and Joseph Lendrix Waswa v Republic [2019] eKLR

<sup>218</sup> Anonymous Magistrate based in Keroka, Questionnaire by J.K Ngarngar, LL.M Student University of Nairobi School of Law, 18<sup>th</sup> June, 2020

See Also: K I Vibhute, ‘Compensating Victims of Crime in Ethiopia: A Reflective Analysis of the Legislative Paradigm and Perspective’ (2009) 51 (4) Journal of the Indian Law Institute 439-466

<sup>219</sup> Kipkoech Cheruiyot, Questionnaire by J.K Ngarngar, LL.M Student, University of Nairobi, School of Law, 18<sup>th</sup> June, 2020

counselors consider watching brief counselors as usurping prosecutors powers hence claim of duplication of work”.<sup>220</sup>

#### **4.3 Challenges facing the implementation of the Act at the post-trial stage**

The main challenge is whether a victim can exercise the right of appeal. The procedural and substantive law is silent on this area. Jurisprudence from courts is equally silent. The Act does not clearly provide for the right of appeal on the victim. Jurisprudence from the courts recognize the continuing of the watching brief rights only.

#### **4.4 Conclusion**

The key challenge under the Act is lack of programmes and regulations operationalizing some crucial and important provisions of the Act. The programmes act as a method through which public awareness is achieved. This leads the public in understanding the importance of the Victims’ Right Charter which provides for rights of victims, and obligations of state agencies in fulfilling the provisions of the Act. Accordingly, proper training of enforcement and judicial officers is crucial in developing a criminal procedure and rules which appreciate the development of the active involvement of the victim.

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<sup>220</sup> Joseph Lendrix Waswa v Republic [2019] eKLR the court noted that “The constitutional and statutory role of the DPP to conduct the prosecution is not affected by the intervention of the victim in the process. The nature and scope of the victim’s intervention prescribed by the VPA should be interpreted in conformity with the Constitution and implemented by the trial court at the appropriate stages of proceedings as the justice of each case requires. It is the duty of the trial court to conduct a fair trial and to protect and promote the principles of the Constitution (*Article 159(2) (e)*).”

## **CHAPTER V**

### **5.0 CONCLUSION AND RECOMMENDATIONS**

#### **5.1 Introduction**

This chapter presents conclusions and recommendations of the study through four thematic areas: summary of the study; study findings; conclusion and recommendations

#### **5.2 Summary of the Study**

The study sought to examine challenges in implementing the Victim Protection Act into the criminal justice system of Kenya. The study was concerned with identifying the changes brought by the Victim Protection Act; implications of the changes to the criminal justice system; and finally the challenges associated with the implementing the Act. The purpose of the study was to illustrate the legal, procedural and policy challenges in need of address to ensure the utter implementation of the Act.

The study collected data from Mandera, Mavoko, Kitale, Bungoma, Keroka, Nairobi, Meru, Isiolo, and Moyale criminal court stations. The study used questionnaires in collecting responses. The key respondents to the questionnaires were judicial officers, prosecuting counsels, watching brief counsels, and investigators of criminal cases. The study also analyzed judicial decisions which have impacted the implementation of the Victim Protection Act in the criminal justice system.

The overall objective being to analyse the Victim Protection Act in the criminal justice system, the specific objectives were:

- a) To examine the provisions of Victim Protection Act, 2014 on the status of the victim in the criminal justice system in Kenya

- b) To assess the implications of the changes brought by the Victim Protection Act, 2014 in the criminal justice system in Kenya
- c) To analyse and document the challenges of implementing the Victim Protection Act, 2014 as currently constituted in the criminal justice system in Kenya
- d) To propose possible remedies and measures to mitigate the challenges in implementing the Victim Protection Act, 2014 in the criminal justice system in Kenya

To achieve the objectives of the research, the study was guided by the following research questions:

- i. What provisions have been introduced by the Victim Protection Act, 2014 on the status of the victim in the criminal justice system in Kenya?
- ii. How has the changes brought by Victim Protection Act, 2014 impacted the criminal justice system in Kenya?
- iii. What are the challenges facing the implementation of the Victim Protection Act, 2014 in the criminal justice system in Kenya?
- iv. What are the possible remedies available to mitigate the challenges posing the implementation of the Act as currently constituted?

### **5.3 Study Findings**

The study analyzed the Victim Protection Act, 2014 through different themes. These themes were designed as follows: identifying the changes brought by the Act into the legal system; the impact of those changes into the criminal justice system; the challenges facing the implementation of the changes; and finally the recommendations. These themes were structured in a manner to discuss each study objective.

### **5.3.1 The Changes brought by the Victim Protection Act, 2014**

These changes brought by the Act empower the legal status of a victim in the criminal justice system of Kenya. The transformation shifts the victim from being a lonely by stander into an active actor in criminal justice system under the Kenyan adversarial judicial system.<sup>221</sup> The changes touch on areas of watching brief, victim support services, restorative justice and institutional capacity.

Under watching brief, a clear transformation propelled by the Act is evident by the victim being accorded active rights of participation during criminal trials. Under the Act, the rights of the victim are so sacredly captured and have consequently been given breathe of life through jurisprudence from courts of law. These rights include the right to make submissions and to cross examine witnesses. The continual development of jurisprudence from courts has revolutionized watching brief to be the most evidence change under criminal trials.

The development of victim support services has been propelled by the Act in order to address any physical injuries, psychological and emotional challenges. This is geared at preventing secondary victimization often witnessed before the enactment of the Act.<sup>222</sup>

Another component introduced by the Act is the recognition of restorative justice as a right under the criminal justice system. This development has resulted into numerous reforms in the Kenya. Notably, is the establishment of plea bargaining rules in 2018 and Diversion rules of 2019.

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<sup>221</sup> Jonathan Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32 JL & Soc'y 294; the transformation has affected the traditional adversarial systems in ensuring that victims are proactively engaged through trials, a concept majorly seen in inquisitorial legal systems

<sup>222</sup> J Tamarit and C Villacampa and G Filella, 'Secondary Victimization and Victim Assistance' (2010) 18 Eur J Crime Crim L & Crim Just 281

Finally, the Act establishes the Victim Protection Board as the key institutional body in the implementation of the changes brought by the Act.

### **5.3.2 Implications of the changes in the criminal justice system**

The changes identified above impact the criminal justice system at various stages. The study discussed these implications under four themes. Firstly are the implications at pre-trial stage. Secondly are the implications at the trial stage. Thirdly, are the implications at post-trial stage. Finally, are the implications of the Act to other substantive and procedural statutes.

At pretrial stage, the Act has impacted the manner how victims are handled during reporting of cases. The Act necessitates that the recording officer prepares a preliminary victim assessment report indicating the details and state of the victim and suspected offender. The investigating officers who participated in this study's questionnaires indicated that preliminary victim assessment reports help in according the victim which needed help in accessing victim support services. Another impact under the pretrial stage touches on investigation. The Act provides as a right of the victim to access information towards prosecution of a case. This has led to disclosure of investigation reports to the victim, a practice which was previously marked by 'trial at ambush'. The victim is thus entitled to review the investigations conducted by the officers,<sup>223</sup> and is entitled to present any omitted evidence, where the victim is the complainant.

Post 2014 criminal justice system legal framework has also been influenced by the Victim Protection Act. Notably, is the development of plea bargaining rules and diversion rules which provide alternative dispute resolution mechanisms before or during trial of cases. Thus, the

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<sup>223</sup> A H Guhr, 'Victim Participation during the Pre-Trial Stage at the International Criminal Court' (2008) 8 Int'l Crim L Rev 109, the ICC has developed mechanisms through which the prosecutor closely involves victims in investigation in order to have a broad and wide picture of the matter under investigation, or to prepare an identify appropriate witnesses from the pool of victims



Victim Protection Act has influenced the development of the policy framework by state organs like the ODPP.

At trial stage, the study examined the implications of watching brief in particular controversial areas of cross examination of witnesses by victims and making submission. To this end, the study discussed Court of Appeal cases which have shaped jurisprudence on rights of the victim during trial. These cases affirm provisions of the Act in according rights to cross examine witnesses and make submissions at different stages as permitted by victims. The practical effect to this is that the criminal justice system is concerned with the victims at equal measure was the accused. The study analyzed as to whether such a development would be affecting the traditional adversarial system by adding components of inquisitorial judicial systems. Criminal counsels involved in responding to the questionnaire of this research held the opinion that recent rulings by courts suggest a shift away from the traditional adversarial system. The study further analyzed different scholars who opine that victims' rights, more so for child victims of sexual abuse, are better protected under an inquisitorial system than by an adversarial one by granting victims standing in proceedings.<sup>224</sup>

At post trial stage, the study examined on the rights of the victim during appeal. The jurisprudence from courts has affirmed that watching brief continues into appeal stage of the case. However, the concern of the study was as to whether a victim can initiate an appeal. The study pinned that such a right, as it is missing expressly under statutory law, could only be enjoyed in the nature of revision of criminal cases. Thus the victim can exploit the avenues of revision when dissatisfied by the decision of the court or prosecutor during the trial of a case.

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<sup>224</sup> Nico Steytler, 'Making South African Criminal Procedure More Inquisitorial ' (2001) 5 Law Democracy & Dev 1

Finally, the study examined on the impact of the Act as related to other substantive and procedural laws. A reflection into the status of child victims presents a lacuna in linking provisions on children under the Victim Protection Act and the Children Act. Whereas the Victim Protection Act recognizes the establishment of regulations related to children,<sup>225</sup> such regulations have not been established. This catalyzes the lacuna in law.

### **5.3.3 Challenges facing the implementation of the Act**

The study structured this discussion into three stages: challenges faced at pre-trial, challenges faced at trial and challenges faced at post-trial. Each stage discussed different themes in pinning out the challenges facing the implementation of the Act.

At pre-trial stage, the challenges were discussed under two divisions: institutional and procedural challenges. Institutional challenges are witnessed through lack or unwillingness to design programmes and initiatives geared at sensitizing on the rights of victims. These challenges are propelled by the fact that the Victim Protection Board has not sensitized on the Victims' Right Charter to actors in the criminal justice system in Kenya. The Board is thus inactive in discharging its duties, leaving the courts as the only custodians protecting and implementing the Act. Further, institutional challenges are reflected in the unwillingness by the Government to allocate sufficient funds to the investigation department in ensuring that all officers are trained as per the standards under the Act. Procedural challenges are reflected through actions of the state and through its agents in hindering access to information. Different advocates observed this as a stumbling block to the right to information as provided under the Act, and as a component under the Victims' Rights Charter.

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<sup>225</sup> VPA s 34 (1) (2) (b)

At trial stage, the key challenge identified during the trial of criminal cases with the dawn of the Victim Protection Act is the overreliance on the criminal procedures under the Criminal Procedure Code. These traditional practices have not evolved to reflect the developments under the 2014 legal regime. This is evident through the fact that the Victim Protection Act has no practice rules or procedures to be considered during trial of cases.

At post-trial stage the main challenge is the absence of a legal framework providing the victim with the right to appeal. This legal framework should provide for parameters of exercising this right so as not to infringe those enjoyed by the accused.

#### **5.3.4 Conclusion**

The study concludes that the Victim Protection Act has not fully been implemented by all state organs. Courts have taken a center stage in ensuring the Act is implemented during trial stages. However, the implementation of the Act at the pre-trial stage is conspicuously alarming. In particular; rights to information; sensitization of the Victims' Rights Charter and programmes, the establishment of initiatives; and funding have been given a dim light.

Investigating officers rarely provide victims with investigation reports which will enable victims participate actively in criminal trials. Victims are treated with the unconstitutional doctrine of availing documents at trial, a concept widely referred as 'trial by ambush'. This places the victim in insufficient position in analyzing investigation report to be informed as to whether to initiate plea bargaining or prepare to make submissions at early stages of bail hearing. The Victim Protection Board, while supposedly a crucial actor in criminal justice system, is rarely known in the corridors of justice. It has adamantly avoided sensitizing the Victims' Rights Charter which is resting at the State Law offices. Finally, the National Government has not fully allocated funds

which would enable investigating officers attain the required trainings equipped to implement the Act.

The study concludes that:

- i. The implementation of the Act at Pre-trial stages is not satisfactorily done in ensuring the rights of victims to receive investigation reports from investigating officers to ensure that the victim is fully informed before trial;
- ii. The hindrance associated with poor implementation of the Act at Pre-trial stages is propelled by the fact that the state has not fully allocated funds for training investigations officers;
- iii. The role of sensitizing the Act through Victims' Rights Charter programmes and initiatives at the pre-trial stages has not been performed by the Victim Protection Board;
- iv. The role played by courts at trial stages heavily relies on criminal procedures under the Criminal Procedure Code, which are archaic hence not capturing developments under the 2014 legal regime;
- v. The criminal courts lack clear standards and procedures of implementing some salient features of the Act like orders of compensation which would otherwise be exercised by civil courts; and
- vi. There is a legal lacuna as to whether a victim enjoys the right to appeal.

#### **5.4 Recommendations**

To ensure that the Act is fully implemented, the study makes the following legislative, policy and administrative recommendations

### 5.4.1 Legislative Reforms

The National Assembly should effect amendments as follows:

- 1) Amendment of the Criminal Procedure Code to accommodate the provisions of the Victim Protection Act in ensuring active participation of a victim in criminal trials. For instance, under the CPC the right to begin is a right enjoyed only by the accused and prosecution locking out the victim from making submissions at crucial stages. The only recourse for the victim lies with the discretion of the presiding officer. Provisions under the CPC should be viewed through a multi-dimensional, way beyond the duo approach of viewing criminal trial as a play field for the accused and prosecution. Through a multidimensional view of a criminal trial, the CPC should recognize the rights accorded to the victim in equal measure as compared to those guaranteed to the prosecution and accused. If a criminal trial's goal is discovering truth, according a voice to the victim cannot at any angle imbalance the rights enjoyed by the accused. The jurisprudence from courts of law should guide in this amendment to expand the statutory platform for addressing the court.
- 2) The CPC should be amended to expressly provide that victims are entitled to cross examine witnesses testifying. This right which has been recognized through jurisprudence from courts of law should be reflected in black and white provisions under the CPC. This brings certainty in the legal procedure during criminal trials.
- 3) The Victim Protection Act should be amended to include right of appeal by the victim in circumstances where criminal trials have been conducted in irregular manner. Subsequently, the CPC should show the perimeters and grounds to be satisfied for a victim to appeal decisions of trial court.

- 4) There should be enactment of procedures under the Victim Protection Act which regulates processes under pre-trial stage. Clear procedures on the participation of the victim during investigations and the active participation on decision whether to initiate prosecution must be enacted to guide different administrative policies being implemented by organs like ODPP and National Police Service.

#### **5.4.2 Policy reforms**

The study makes the following recommendations:

1. The Department of Justice must initiate policy measures which coordinate state organs responsible for implementing rights of victims in the criminal justice system. Beyond the recognition of rights of victims by courts of law, practical measures must be initiated which accord the victim equal status at pre-trial stages which are marked by administrative bureaucracies.
2. The Government should initiate policies which promote the involvement of civil groups and Non-Governmental Organizations (NGOs) who are in a better position to offer professionalized victim support services. These services are to address the psychological, emotional and physiological traumas as a result of crimes. The involvement of NGOs and civil groups appreciates the reality that the Government is limited in budgeting to allocate appropriate funds to proper implement the Victim Protection Act.

#### **5.4.3 Administrative Policies**

The study makes the following administrative policies:

- 1) The Victim Protection Board must sensitize the Victims' Rights Charter to administrative organs like the National Police Services, and judicial courts of law. Further, the Board

should initiate professional trainings for all officers handling crimes on victim protection measures. The Victim Protection Board should liaise with the Continuing Professional Development Committee to design appropriate programmes with respect to the status of the victim in the CJS. Further, the Board should liaise with Court Users Committees in all courts handling criminal matters in order to offer training to the enforcement officers and the public. Finally, the Board can further liaise with the Judiciary Training Institute as a platform to train judges and judicial officers of designed programmes like the victim right charter to enhance jurisprudence from court of laws in areas concerning victims of crimes.

#### **5.4.4 Research**

The study makes the following research initiatives:

1. That research is carried out on the impact of the Victim Protection Act to the adversarial judicial system in Kenya. Such a research will aim to show the elements of an inquisitorial judicial system under the Act. The conclusions to be drawn are whether the current adversarial judicial is an impediment to the realization of the Act.
2. That research is carried out on the criminal justice system procedures in Kenya with the aim of designing new procedures which are victim based rather than purely on accused.

#### **5.5 Conclusion**

The study sought to explore the Victim Protection Act under the criminal justice system under the post-2014 legal framework. The study established that the implementation of the Act is far from being realized. The study observed that only courts of law have initiated measures through judicial precedents which have affirmed the protection of the victim in the criminal justice

system. Other bodies under the Act like the Victim Protection Board and the National Police Service have slowed the pace of implementation of the Act.

The recommendations made by the study stand to help in reviewing the criminal justice system in Kenya through enactment or amendment of laws, establishment of policies, and advancement of research to some crucial and apparently controversial areas under the Act. These areas include the status of the victim in cross examination, the right of the victim to appeal criminal decisions, and the apparent changing of the judicial legal system to incorporate inquisitorial elements.



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## APPENDICES

### APPENDIX A

#### INFORMED CONSENT

**Research Title:** Challenges in Implementing the Victim Protection Act, 2014

**Researcher:** Julius Kipkosgei Ng'arng'ar

#### **Please read to the following information**

1. The purpose of the research is to fulfill the requirements of the University of Nairobi, School of Law for the award of a degree in masters (LLM).
2. The aim of the research is to find out the challenges facing the implementation of the provisions of the Victim Protection Act, 2014 (the "Act") in the criminal justice system.
3. The findings of the research will be used in the policy and legal developments geared at analyzing the impact of the Act to the judicial systems and implementation of key policies under the Act.
4. The research will interview different stakeholders in the criminal justice systems who have interacted with the changes brought by the Act.
5. Participation of this research is voluntary and participants will be free to withdraw at any time without any consequences attached to it.
6. The responses, views and opinions of the participants will be held in confidence in relation to the purpose of the research.
7. A subject number will be assigned to the respondent which will be used in the data collection form.

**If you consent to participate, you fill the questionnaire by the researcher seeking your views on various aspects in the implementation of the Victim Protection Act, 2014 in the criminal justice system.**

I HAVE READ AND UNDERSTOOD THE NATURE AND PURPOSE OF THE RESEARCH  
AND VOLUNTARILY ACCEPT TO TAKE PART IN THE STUDY.

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(Signature of subject/respondent)

(Date)

Name of the Respondent:

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**APPENDIX B**

**INTERVIEW GUIDE FOR JUDICIAL OFFICERS**

**Serial No:** \_\_\_\_\_

**Court Station:** \_\_\_\_\_

1. Gender
  - Male \_\_\_
  - Female\_\_\_
2. What is the length of your experience in presiding criminal trials?
3. In your opinion, has the Victim Protection Act, 2014 empowered the victim's views in:
  - a) Actively participating in investigation
  - b) During the prosecutor's decision to prosecute
  - c) Trial of the case
  - d) Appeals.
4. In your experience and observation, does the active involvement of the victim change the traditional adversarial judicial system clotting it with elements of inquisitorial system? *Briefly explain*
5. What are some of the challenges you have encountered in implementing the unique and new provisions of the Act in the criminal justice system in:
  - a) Victim's involvement in investigation and getting investigation reports
  - b) Victim's involvement in the decision to prosecute by the prosecutors
  - c) Victim's involvement in trials
  - d) Victim's involvement in appeals
6. What recommendations can you make to ensure the Act is fully implemented in relation to the rights of the Victim during:
  - a) Pre-trial stage on participating in investigation and the decision to prosecute
  - b) Trial stage
  - c) Appeals.

**APPENDIX C**

**INTERVIEW GUIDE FOR PROSECUTORS**

**Serial No:** \_\_\_\_\_

**Court Station:** \_\_\_\_\_

1. Gender

Male \_\_\_

Female\_\_\_

2. Rank/Designation

3. What is the length of your experience in prosecution/in criminal trials?

4. In your opinion, has the Victim Protection Act, 2014 empowered the victim to make views concerning the decision to prosecute /or not to prosecute an accused person?

**Yes/No**

*Please explain*

5. Do you personally consider the views of the victim before making a decision to prosecute?

6. Have you encountered situations where the victim seeks reconciliation with the accused person or opting for other restorative justice components provided under the Victim Protection Act, 2014 (under the rights of victim support services) instead of prosecuting the accused/suspect? *Please explain*

7. In your view, are there sufficient policies and initiatives of involving the victim in the decision to prosecute the suspect/accused in the prosecution department? *Please explain*

8. In your experience, does the active involvement of the victims during trial (through watching brief) change the traditional adversarial judicial system in Kenya? **Yes/No**  
*Briefly explain*

9. What are some of the challenges you have encountered in implementing the unique and new provisions of the Act in the criminal justice system in:

- i. Making the decision to prosecute
- ii. Taking the views of the victim who opt for restorative justice instead of prosecution
- iii. During trial of the case



**10.** What recommendations can you make to ensure the Act is fully implemented in relation to the rights of the Victim during:

- i. Pre-trial stage on the decision to prosecute
- ii. At trial stage.

**APPENDIX D**

**INTERVIEW GUIDE FOR DEFENCE ADVOCATES**

**Serial No:** \_\_\_\_\_

**Court Station:** \_\_\_\_\_

**1. Gender**

Male \_\_\_

Female\_\_\_

**2. What is the length of your experience in criminal trials?**

**3. In your opinion, has the Victim Protection Act, 2014 empowered the victim's views in:**

Actively participating in investigation

Making decision to prosecute Trial of the case

Participating during appeals

**4. In your observation, does this active involvement change the traditional adversarial judicial system to elements of an inquisitorial system? **Yes/No** Briefly explain What are some of the challenges you have encountered in implementing the unique and new provisions of the Act in the criminal justice system in:**

Victim's involvement in investigation and getting investigation reports

Victim's involvement in the decision to prosecute the suspect/accused

Victim's involvement in trials

Victim's involvement during appeals

**5. What recommendations can you make to ensure the Act is fully implemented in relation to the rights of the Victim during:**

Pre-trial stage on participating in investigation and the decision to prosecute

Trial stage

Appeals.

**APPENDIX E**

**QUESTIONNAIRE FOR INVESTIGATING OFFICERS**

**Serial No:** \_\_\_\_\_

**Court Station:** \_\_\_\_\_

1. Gender

Male \_\_\_

Female\_\_

2. Rank/Designation

3. What is the length of your experience in investigation?

4. In your opinion, has the role of a victim during investigation changed since the enactment of the Victim Protection Act, 2014? **Yes/No** *Please explain*

5. In your experience, have you ever shared an investigation report of a crime to the victim under the Victim Protection Act, 2014? *Please explain*

6. Is there a policy guide on the rights of victims and their involvement in investigations of a crime in the police service department?

7. What have been the challenges occasioned in implementing the requirement of the provisions of the Act as related to investigation?

8. What recommendations can you make to ensure the Act is fully implemented in addressing the rights of the Victim during investigation?