



UNIVERSITY OF NAIROBI

SCHOOL OF LAW

**AN INQUIRY ON CREDIBILITY ASSESSMENT OF CHILD VICTIMS OF SEXUAL
ABUSE IN KENYAN COURTS**

**LLM THESIS SUBMITTED IN FULFILMENT OF THE AWARD OF THE MASTER OF
LAWS (LL.M) DEGREE**

COURSE: GPR 602-MASTERS THESIS

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18TH NOVEMBER, 2020

DECLARATION

I hereby declare that this thesis is my original work submitted in partial fulfilment of the Masters of Laws (LL.M) at the University of Nairobi; and has not been submitted in its entirety or in part at any other University for a degree. All citations have been duly acknowledged.

Signature..........

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Approval

This Study has been submitted with my approval as the University of Nairobi Supervisor.

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DEDICATION

I dedicate this work to all the children victims of sexual abuse who have to navigate the justice system. Your stories matter. Your best interests matter.

ACKNOWLEDGMENTS

My keen interest in children matters overflows from the fact that I am the beloved child of Abba Father. He has given me all things that pertain to life, including the intellect and ability to complete this study. My deepest gratitude to my better half and resident tutor, Rogo, for his unwavering support and his constant reading bed-time stories to me as I attended evening classes. To my parents Mr. and Mrs. Ngonge, for educating the girl-child in me and giving me wings to fly.

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I also write as a parent - to my fantastic four, the awesome privilege to see you grow up continues to give me a better appreciation of what it means to be a steward. You reminded me that the constant between adult learning and sibling feuds is the mom-factor. Aunty Pamela, I am grateful for your silent support, you kept the meals warm as I read late into the night. My once colleagues in Kisumu – Charles, Janet, Lilian and Rachael, thank you for your words of encouragement as I began this journey. I am grateful to all the magistrates who took the time to respond to my online survey, your contribution to the success of this Study is invaluable. I am not able to mention everyone by name however, I am grateful to everyone who contributed towards this study directly or indirectly. Thank you so much. To the many children I interact with in different spaces, to the children in the justice system, whether in contact with or in conflict with the law, I write this because I owe you a duty of care and protection.

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Witnesses of Crime

The National Institute of Child Health and Development (NICHD) Protocol to Child Forensic
Interviews

LIST OF ABBREVIATIONS

ACRWC	African charter on the Rights and Welfare of the Child
COK	Constitution of Kenya
COVID 19	Coronavirus Disease of 2019
CRC	Convention on the Rights of the Child
CVSA	Child Victim of Sexual Abuse
HIV	Human Immuno-Deficiency Virus
ICCPR	International Covenant on Civil and Political Rights
KLR	Kenya Law Reports
NICHD	National Institute of Child Health and Development
SOA	Sexual Offences Act
UDHR	Universal Declaration on Human Rights
UN	United Nations
USA	United States of America

Abstract

Sexually abused children suffer trauma and may develop various coping mechanisms. While some retreat and clearly display signs of trauma, others learn to hide the trauma by developing a “thick skin.” The various coping mechanism are displayed in court when the child victim of sexual abuse (CVSA) takes the witness stand in the quest for justice; this, compounded with the children’s susceptibility to coaching and their evolving capacities to comprehend certain matters, may make them seem as though they are weaving stories against the accused. The court is at task to assess the child’s credibility given the seriousness of the allegation and the penalty that a conviction attracts.

Although Kenyan courts are given discretion to assess credibility of CVSAs, there are no guidelines on how this is to be done. This leaves the interpretation of CVSA credibility to the subjective standard of the trial court; this may compromise the best interest of the Child. Therefore, this Study seeks to investigate the assessment of credibility of CVSAs by Kenyan courts with a view of establishing how this is safeguarded within the legal framework. This is discussed in the context of supporting best interests of CVSAs within their quest for justice.

The Study discusses the challenges a CVSA faces as a witness in his/her own case before their testimony can be taken as credible. This is done by employing a qualitative approach to purposively seek views on credibility assessment from magistrates handling CVSAs in different counties in Kenya. The Study also explores the international legal framework that exists to uphold the best interest of CVSAs during credibility assessment. This is further discussed within the Kenyan context analysing how the constitution and other laws seek to protect and promote rights of CVSAs as vulnerable members of the society.

The study reveals that the existing legal framework does not give Kenyan courts clear child-centred guidelines for assessing credibility of CVSAs. The practise is that credibility is inter-changed with competency test which often fails to take into account the evolving capacities of the child. From a

child protection perspective, the study recommends the support to CVSAs during credibility assessment by adoption of a standard evidence-based tool for questioning like the ten-step child forensic interview. A multi-sectoral approach is also proposed to aid the court in assessing the credibility of CVSA testimony.

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CHAPTER ONE

1.0 Introduction

“...abused children have been damaged and rarely present the image of the perfect child. Long-term abuse is likely to produce a young adolescent with disturbed behaviour – not a sympathetic figure to a jury. These are the children who are targeted by paedophiles.”

– Laura Hoyano

A sexually abused child is a damaged child. The child has suffered trauma and to compound it, probably in the hands of a trusted caregiver. The effect of such abuse is negative behaviour modification which is hard to cope. The picture is disturbing. Such behaviour may lead to the child as being seen to ‘behave like an adult’ in their desire for sexual activities. During trials, inconsistencies in their testimony may seem to indicate fabrication of stories to incriminate the offender. The child, finding herself/himself in a strange environment about to give evidence against a trusted adult may fidget or freeze. In this confusion the defence counsel picks his first punching point - to cast doubt on the child’s credibility. This is followed by a gruesome cross-examination. The stage is set with the silent expectation that the child has to be a “perfect” child to be believable. A damaged child needs protection and rehabilitation over suspicion and interrogation. The child’s needs require to be safeguarded even as he/she is being assessed for credibility during trial. Witness credibility and reliability are issues that courts grapple with in criminal prosecutions. As each party presents their side of the story, questions in the mind of the court range from who to believe to adequacy of evidence or lack of it. More often than not, a judicial officer will be in a dilemma if there is no other evidence tendered in court to support sexual allegations.

In sexual offences this arises when the medical evidence tendered is considered as a “weak” and the only other available evidence is the testimony of the victim. How does the court weigh the evidence of a child when the decision is to find someone guilty beyond reasonable doubt? The situation

becomes more complex when the victim is a child because of special adaptations for the judicial system that come with child testimonies.

Unfortunately, a child victim of sexual abuse (CVSA) is usually treated with distrust as he or she is traditionally viewed as not being able to tell truth from fantasy and is susceptible to coaching. This may lead to further victimisation as opposed to protection by the law. Given that the standard of proof for criminal cases is beyond reasonable doubt,¹ a judge will want to base his finding of guilt on reliable evidence given by credible sources. It is worth noting that a reliable witness may not necessarily be a credible witness and vice versa.

Although the Evidence Act,² does not give the definition for a credible and reliable witness. It provides for competency of persons. Part I of Chapter V defines Competency of Witnesses. Section 125(1) of the Act creates a presumption that all persons are deemed competent to testify. The limitation being that unless the court considers that they cannot understand the questions put to them or able to give rational answers to those questions by reason of tender years, extreme old age, physical or mental illness or any other similar reason.

The peculiar nature of sexual offences is that they happen in seclusion and more often than not, the only witness available is the victim who is the complainant. Sexual offences belong to the class of crimes that are committed against the person's body. As such, only the person harmed can give comprehensive evidence to the occurrence of the crime and the identity of the perpetrator. More often than not in child abuse cases the child victim doubles up as the complainant and the only eye witness to the crime. Section 2 of the Sexual Offences Act³ (SOA) gives the term "child" the meaning given in the Children Act,⁴ that is, any person below 18 years of age. The SOA also places children in the category of "vulnerable persons" thus, placing a duty of care and protection on the State. Some of the sexual crimes that can be committed against children include defilement,

¹ Cap 80 Laws of Kenya Sec 107, Sec 111(1), *Woolmington v DPP* [1935] MAC 462

² *Ibid.*

³ Sexual Offences Act No. 3 of 2006, Laws of Kenya

⁴ Children's Act 2001, Chapter 141, Laws of Kenya

attempted defilement, gang rape, indecent act with a child, promotion of sexual offences with a child, child trafficking, child sex tourism, child prostitution and child pornography.⁵

Medical evidence is proof of penetration, a key ingredient for the sexual offences. Usually where a medical report is given, it corroborates the testimony of the complainant. However, we have instances where a complaint is made late, days after the occurrence of the event, thus the medical P3 Form, shows 'weak' evidence. Another common scenario is where there is continued abuse. A good example is where the perpetrator is a guardian of the victim. By the time the victim reports, there may be no medical evidence to be collected in as much as the abuse has been going on for several months or even years. This Study will investigate how the court treats the uncorroborated testimony of CVSAs.

In the absence of corroboration, which is more often the case in sexual offences, two problems presenting at the conclusion of trial, in my opinion, are:

1. CVSA fabricating lies due to an underlying feud with the accused, leading to a conviction based on the uncorroborated testimony (false positive error). This is a gross miscarriage of justice.
2. CVSA who is telling the truth but the trial magistrate hold that he or she is not credible and sets the perpetrator free to continue with his criminal acts on vulnerable victims (false negative error) - another gross miscarriage of justice.

Child psychologists have shared several hypotheses to allegations of sexual abuse by children.⁶ These range from honest mistakes or a misunderstanding of the child's statement to undue or due influence of the child's testimony. A child may deliberately lie for his/her own peculiar reasons. There is a gap in the information available on the basis for which Kenyan law courts assess the credibility of a CVSA considering the welfare of the individual child within the criminal justice

⁵ Ibid. note 5

⁶ State of Michigan, Governor's task force on child abuse and neglect and department of health and human services, Forensic interview protocol, 4th Edition

framework. This study seeks to investigate the legal framework that promotes and protects the credibility of CVSA in the course of trial.

1.2 Problem Statement

Although courts in Kenya have discretion to determine the credibility of a CVSA, there are no child-centred guidelines in how this discretion is exercised. One of the challenges in child abuse cases is that the child who happens to be the victim is also the only witness. The child may present a demeanour or behaviour that may lead to further victimization rather than protection. This may be occasioned by the trauma suffered in addition to the evolving capacities of children. In the absence of a standard way of questioning, the credibility test is left to the subjective opinion of the magistrate. Similarly, courts face the daunting task of eliciting a credible and reliable testimony from a child witness. However, Kenyan courts lack child-centred practise guidelines for interviewing CVSA.

1.3 Research Objectives

The overall objective is to examine the legal and policy frameworks that enable courts' determination of testimony credibility in the best interest of CVSAs.

The specific objectives are:

1. To illustrate the theoretical and conceptual justifications for guaranteeing the best interests of CVSAs during credibility assessment in court
2. To find out the legal framework in place to adequately support CVSAs best interests in court during credibility assessment
3. To identify the gaps in law and policy which weaken the testimony credibility as a best interest of CVSAs in Kenya
4. To make recommendations that would support Kenyan courts in assessing credibility in view of CVSA's best interest.

1.4 Research Questions

The study is informed by the following study questions:

1. What are the theoretical and conceptual justifications for guaranteeing the best interests of CVSAs during credibility assessment in court?
2. What is the existing legal framework to adequately support CVSAs best interests in court during credibility assessment?
3. What policy and practise gaps exist in Kenyan courts for testimony credibility assessment in view of CVSAs best interests?
4. What recommendations would support the best interest of CVSAs in Kenyan courts during testimony credibility testing?

1.5 Hypothesis

The existing Kenyan legal and policy framework does not adequately support courts in establishing the testimony credibility in view of CVSA's best interests.

1.6 Theoretical Framework

John Rawls' Theory of Justice⁷ informs this study. According to Rawls, men decide the principles that will govern them to give justice and equity. His theory outlines two principles of justice that are relevant to this Study:

- a) *Each person has an equal right and should extensively enjoy it without infringing on the rights of others.*

People of an impartial society enjoy same rights and liberties. In analysing the laws and policies enjoyed by persons, the interpretation is that CVSAs belong to this group. The UN Declaration on Human Rights guarantees the highest enjoyment of rights and freedoms to all persons. This is inspite of their age, economic status, or race. CVSAs are owed enjoyment of their rights within the

⁷ John Rawls, 'A Theory of Justice: Revised Edition' 562

court system during the testing for credibility. This would include the right to have their views heard and not to be discriminated on account of age.

b) Social and economic disadvantages to be considered so that they do not compromise and individual's enjoyment to his/her rights.

The second principle proposes the availability of opportunity for everyone even though the distribution of resources may not be equal. Accessibility by all needs to be a consideration to enable them actualise the first principle. CVSAs fall under a vulnerable group in the society by way of their tender age and the trauma suffered. This places an inequality before they start their quest for justice. Accordingly, such special circumstances should be taken into account by judicial and administrative bodies so that they do not cause CVSAs to be disadvantaged. This is may call for special considerations to be made to support the credibility testing of CVSAs to aid in the fullest enjoyment of their rights within the court system.

1.7 Limitations of the Study

This study was conducted under the prevailing circumstances of the unprecedented Corona Virus Disease (COVID-19) pandemic caused by the worldwide outbreak of the Coronavirus. In Kenya, the Ministry of Health has issued several directives to curb the spread of the disease, one of which is limiting social interactions. Due to this, there was no face-to-face interviews for data collection, online survey was used. Data was only be collected from magistrates across various stations handling CVSAs.

The scope of the study was also limited to credibility assessment in court, at the onset of trial. The study avoids looking into credibility during statement taking at the police station or at the prosecution's office. This is because the study will seek out the distinction between competency and credibility and the implications of this with regard to a CVSAs testimony in court in view of best interests.

1.8 Literature Review

The area of CVSA and criminal trials has been researched on. Notably, most research on interviewing of child victims of sexual abuse has been done from psychological and sociological perspectives. This study thus addresses the psycho-legal issues that arise in securing the best interests of the child in the credibility evaluation. The adversarial nature of legal system procedure to safeguarding the justice needs of child victims of sexual abuse in Kenya has been extensively discussed by Omondi.⁸ She postulates that the neutral role of the umpire hinders, rather than advances protection of the CVSA in how the trial is conducted. However, she does not look at the role of the umpire in child witness credibility specifically which is what this study will focus on.

McCarron and Williams assert that, “A child’s ability to demonstrate that they understand the difference between truth and lies and the importance of telling the truth is synonymous with competency.”⁹ A child’s credibility will determine whether or not they will testify in court. A child should be able to demonstrate that he or she understands the difference between truth and lies. The importance of truth telling becomes synonymous with competency.¹⁰ For most professionals, assessing whether a child understands truth or lie is a tall order. Their research seeks to develop an innovative tool to aid with this assessment. This study will focus on what can be done in Kenya to help judicial officers assess credibility of CVSA without compromising best interest.

Competency to take the oath is discussed by Lyon.¹¹ In his study he looks at the factors affecting CVSAs demonstration of competency in the truth-lie test, which he views as a morality-based testing. Some of the factors include motivation in terms of “rewards”, courtroom environment and age-inappropriate questioning. My study goes beyond the questioning for oath taking to assessment for credibility of the testimony taken (oath or no oath) in view of safeguarding best interests of

⁸ Omondi Scholastica Awino Ollando, ‘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’ 478.

⁹ McCarron, Ridgway and Williams (n 4)

¹⁰ *ibid.*

¹¹ Angela D Evans and Thomas D Lyon, ‘Assessing Children’s Competency to Take the Oath in Court: The Influence of Question Type on Children’s Accuracy’ (2012) 36 *Law and human behavior* 195.

CVSAs. Lyon¹² also demonstrates that children do have an early understanding of what is truth and what is untruthful. However, he asserts that truth-lie competency and promise to tell the truth do not increase honesty.¹³

The test for credibility is often posing questions to the child to elucidate whether they understand the difference between truth and lie. Lyon¹⁴ argues that this endears the child to promise to tell the truth but does not necessarily guarantee honesty. Evans and Lyon¹⁵ have examined children's accuracy in response to truth-lie competency questions asked in court. In countries like Kenya,¹⁶ and California,¹⁷ the truth-lie competency is required. These can be contrasted with countries like Australia (only required in two States), New Zealand, England, Scotland and Canada where the competency requirement of children has been eliminated.

Research has shown the effectiveness of a multidisciplinary approach in protecting the child's best interest during trial. Robinson¹⁸ discussed different innovations from various countries focusing on courtroom experiences of child witnesses. Challenges faced include biased perception of whether children are deemed incompetence due to their age, whether their testimony is regarded reliable and accurate due to suggestibility nature and if giving evidence in court will tend to re-traumatize a child witness.

Chang¹⁹ writes on the Taiwan's experience on a child's credibility based on the testimony and the medical evidence. This study focuses on the testimony credibility without getting into medical

¹² Thomas D Lyon, Jodi A Quas and Nathalie Carrick, 'Right and Righteous: Children's Incipient Understanding and Evaluation of True and False Statements' (2013) 14 *Journal of Cognition and Development: Official Journal of the Cognitive Development Society* 437.

¹³ Evans and Lyon (n 13)

¹⁴ Thomas D. Lyon, "Assessing the Competency of Child Witnesses: Best Practise informed by Psychology and Law." University of Southern California, *Children's Testimony: A Handbook of Psychological Research and Forensic Practise* (2011)

¹⁵ Angela D Evans, Thomas D. Lyon, "Assessing Children's Competency to take the Oath in Court: The Influence of Question Type on Children's Accuracy." *Law Hum Behav* 2012 June 36(3) 295-205

¹⁶ Evidence Act No. 46 of 1963 Laws of Kenya

¹⁷ California Evidence Code, 2010

¹⁸ Pantell RH, "The Child Witness in the Courtroom." *Committee on Psychosocial Aspects of Child and Family Health Pediatrics* 2017 Mar 139(3). E.pub 2017 Feb 20.

¹⁹ '(PDF) How to Ensure Children's Credibility of Testimony in Sexual Abuse Cases' (*ResearchGate*) <https://www.researchgate.net/publication/320104183_How_to_ensure_children's_credibility_of_testimony_in_sexual_abuse_cases> accessed 5 September 2020.

aspects. This is informed by the fact that in Kenya, the law is that a conviction can be made on the sole uncorroborated evidence of CVSAs.

Child witness demeanour and credibility has been discussed by Regan²⁰. Her research takes into account how the court interprets responses like crying, fear and confusion when assessing credibility. This study aims at advancing protection of CVSA by seeking out an objective mechanism of assessing credibility. Respondents from Regan's study indicated that they would perceive a crying child more credible than a calm one.

A study by Bala and others, showed that, "compared to adults, children are generally more likely while testifying to make errors due to limitations of their memory or communication skills or due to the effects of suggestive questions."²¹ Use of developmentally inappropriate questions to children also affects the reliability of their testimony. Their study also revealed that judges perceived children to be more honest than adult witnesses. This is the view taken by Burton²², explaining that young children are less willing to lie because of justifying motives that older children or adults. There is more motivation for being honest for a child on the stand as compared to an adult. They argue that children judge lying exclusively with whether what is said agrees with what is seen regardless of the motives of the speaker.

Bunusu²³ highlights the need for a concerted effort when handling CVSA towards best interests of the child together with unified protocol in the implementation of the SOA. Gaps in the legal system in the implementation of the SOA are also examined by Wambui.²⁴ The study identified that there is a gap linking other experts like child psychiatrists to support CVSAs as they are processed in the

²⁰ '(PDF) The Impact of Child Witness Demeanor on Perceived Credibility and Trial Outcome in Sexual Abuse Cases' (*ResearchGate*)

<https://www.researchgate.net/publication/251139709_The_Impact_of_Child_Witness_Demeanor_on_Perceived_Credibility_and_Trial_Outcome_in_Sexual_Abuse_Cases> accessed 5 September 2020.

²¹ Nicholas Bala, Karuna Ramakrishnan, Roderick Lindsay, Kang Lee, "Judicial assessment of the credibility of child witnesses." *Alta Law Rev.* 2005 Apr; 42(4): 995–1017

²² Burton Rv, Strichatz AF "Children on the stand: The obligation to tell the truth." *Journal of Developmental and Behavioural Paediatrics* 1991 Apr 12(2):121-8

²³ Bunusu Benson "Child sexual abuse: Challenges of prosecuting child sex offenders in Nairobi" UON 2011

²⁴ Wambui Mercy Gitau, "The plight of child victims of sexual abuse in Kenya: Are our procedural laws adequately protective?" UON 2015

criminal system. Barry²⁵ discusses the criteria used by courts to assess credibility. His research expounds on the challenges of long delays effects on memory and the influence of external factors to CVSAs credibility and competency.

Amboko²⁶ in her appraisal on the implementation of the sexual offences Act in Kenya looks at the factors that have hindered prosecution and convictions of sexual offenders. Komen²⁷ on the other hand looks at systemic hindrances to implementation of the SOA in Ainaabkoi sub-county in Kenya. There has been research in Kenyan laws that protect children from sexual abuse.²⁸ Section 38 of the SOA has been viewed as problematic and Aura²⁹ highlights the ambiguity of false allegations especially where an accused is acquitted on technicalities. Her discussions focus on protection of women against gender-based violence. However, this study seeks to fill in the gap in the area of laws on credibility assessment of CVSAs in Kenyan courts in view of their best interests.

A survey done by Melinder³⁰ revealed that psychiatrist and psychologist were more likely to use clinical techniques when questioning CVSAs than legal professionals. This study furthers that discussion and focuses on the CVSA being assessed for credibility and seeks to highlight the value other professions would add in aiding courts arrive at a more accurate assessment of credibility.

Kara³¹ advances protection of witnesses from humiliation and re-traumatization. The trial process is seen as the ultimate truth-seeking process and participation of the victim is essential. However, she does not look at steps followed by the courts in establishing the said truth. Similarly, De Souza³² interrogates the re-victimization being through a court process that requires CVSAs to give

²⁵ Barry Nurcombe, 'The Child as Witness: Competency and Credibility' (1986) 25 *Journal of the American Academy of Child Psychiatry* 473.

²⁶ Amboko Wanga, 'Combating Sexual Offences in Kenya: An Appraisal of the Implementation of the Sexual Offences Act' 89. UON 2018

²⁷ Diana Jelimo Komen, 'STRUCTURAL FACTORS INFLUENCING IMPLEMENTATION OF THE SEXUAL OFFENCES ACT IN AINABKOI SUB-COUNTY, KENYA' 91. UON 2018

²⁸ Cynthia Wangamati, 'Laws against Child Sexual Abuse Exist in Kenya. But There Are Gaps' (*The Conversation*) <<http://theconversation.com/laws-against-child-sexual-abuse-exist-in-kenya-but-there-are-gaps-124649>> accessed 6 September 2020.

²⁹ 'Kenya Law: Situational Analysis and the Legal Framework on Sexual and Gender-Based Violence in Kenya: Challenges and Opportunities' <<http://kenyalaw.org/kl/index.php?id=4512>> accessed 6 September 2020.

³⁰ Annika Melinder and others, 'Beliefs about Child Witnesses: A Survey of Professionals' (2004) 10 *Psychology, Crime & Law* 347.

³¹ Kara Christine Njeri "Enforcing and implementing the law on defilement in Kenya: A Critique." UON 2013

³² Eliana Mendes de Souza Teixeira Roque and others, 'Justice System and Secondary Victimization of Children and or Adolescents Victims of Sexual Violence in the Family' (2014) 23 *Saúde e Sociedade* 801

testimony several times and be subjected to cross-examination. My study seeks to find out whether the mode of questioning during credibility testing in Kenya protects the best interests of CVSAs.

1.9 Research Methodology

The study was qualitative. The methodology used was content analysis research methodology. I conducted a desk top research of the Kenyan legal framework as it relates to witness credibility in sexual offences. Best practises from Japan and Finland were also explored. A Sample of 18 magistrates were surveyed via google docs on their opinion on credibility of CVSAs. They were purposively drawn from courts handling sexual offences matters from different counties.

1.9.1 Sources of Data

Sources of data were both primary and secondary. The primary data was obtained by way of desktop research of international legal instruments, court decisions, Constitutional provisions, and national laws of Kenya. Data from the questionnaires also formed part of the primary data.

Secondary data from published periodicals and journal articles on the area of witness credibility was used.

1.9.2 Data analysis

The data collected was qualitative. This was analysed for the purpose of drawing an informed conclusion of the study. The raw data was analysed to show the existing legal and policy frameworks on testing CVSAs credibility while gauging if they protect best interest of children.

1.9.3 Data collection techniques and tools

A questionnaire was issued to at least 18 magistrates handling cases with CVSA in various counties. Magistrates handling SOA matters were identified and in random counties and issued with the questionnaire. This was done by online Survey to mitigate COVID 19 pandemic. Link to the questionnaire: <https://forms.gle/sb455WXpDyDvUcFq6>

1.9.4 Ethical considerations

Informed consent was sought from all the respondents. Answers on the google survey were anonymous to protect identity. All the information given was treated confidentially, particularly any specific details concerning a child.

1.10 Chapter Breakdown

This Study has five chapters broken down as follows:

Chapter one introduces the research by giving a background to the research problem and research hypothesis. The chapter sets out the research objectives which inform the research questions. The methodology of the research is discussed together with the limitation and ethical considerations. The literature review discussed other research in the area and brings out the gap to be filled by this research.

Chapter two discusses the theoretical and conceptual frameworks for protecting and promoting the credibility of CVSAs during trials.

Chapter three analyses the legal framework for the credibility testing of CVSAs in Kenya. It lays the international, regional and domestic levels in the involvement of CVSAs in criminal trials.

Chapter four will give the gaps in the legal framework and practise in Kenyan law courts on credibility testing. The study will discuss the best practice from two countries, Finland and Canada representing the European and American regions.

Chapter 5 discusses various recommendations in as proposed changes that can be made within the national legal framework and practise to safeguard the best interests of CVSAs during the test for credibility.

CHAPTER TWO

2.0 THEORETICAL AND CONCEPTUAL JUSTIFICATIONS CVSAS BEST INTEREST IN SAFEGUARDING THEIR CREDIBILITY

2.1 Introduction

This Chapter discusses the theoretical and conceptual justifications for protecting the testimony of CVSA in criminal trials. It illustrates the tenet principles and best interests which should protect the child victim from suffering from procedural and substantive injustices during trials. Further, the chapter will also discuss how a CVSA can be interviewed in a manner that protects his/ her dignity.

2.2 Core Principles anchoring safeguarding the testimony of CVSA as a child protection right

The guiding principle for any court when making a determination in child issues is the “best interests” of the child.³³ This would also apply in the case of credibility assessment. Whereas there is no single definition of “best interests”, reference is made by States to overriding goals and purposes that draw out best interests.³⁴ According to Child Welfare information Gateway,³⁵ general considerations are given to:

- a) The importance of family integrity and preference
- b) The well-being and general protection of the child
- c) The crucial and timely sustainable decisions
- d) The guarantee of care, treatment and ever abiding child removed from his/her home.

This study finds that integral to the best interests of a child is the doctrine of non-discrimination, protection, and respect for the views of the CVSA during criminal trials.

³³ Constitution of Kenya, 2010 article 53 (2)

³⁴ ‘What Does “Best Interests of the Child” Mean? - HG.Org’ <<https://www.hg.org/legal-articles/what-does-best-interests-of-the-child-mean-33834>> accessed 16 June 2020

³⁵ *ibid.*

2.2.1 Best Interests of the Child

The concept of best interests may be viewed as a right, a principle and a rule of procedure.³⁶ The principle has its history in the 1959 Declaration on the Rights of the Child. The principle is aimed at ensuring the full enjoyment of rights and holistic development of the child. The safety and protection of a child is paramount when looking at the best interests. If the test for credibility assesses a CVSA's testimony not good enough to stand trial, the case is defeated even before commencing and the child is exposed to further abuse. This is compounded by the waning confidence in the system thus decreasing the reporting of abuse.

The CRC Article 3 para 1 obligates States to facilitate the incorporation of child best interests in all public institutions which deal either directly or indirectly with children. It is in the best interests of the Child that guidelines are employed in the assessment of credibility in judicial processes. These will have the effect of taking care of the special needs of the child as well as give the court an objective outcome that is evidence based. In judicial decisions and legislation, states are obligated to demonstrate how best interests have been assessed and given weight in the decision.³⁷ The credibility assessment process to CVSA's has to show consideration for the best interests of the child.

2.2.2 Non-Discrimination

Non-discrimination is a key principle in human morality. This is closely linked with the understanding that all humans are born free and equal as articulated in the Universal Declaration on Human Rights (UDHR). The place of the child in most societies is seen to be lesser than that of the adult. This makes the child vulnerable to discrimination. Discrimination for children can be seen when there is unjust or prejudicial treatment based on age; not forgetting that already face additional discrimination based on their gender, disability, HIV Status, economic status, race, ethnicity, religion amongst others.

³⁶ 'OHCHR | Convention on the Rights of the Child' <<https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>> accessed 16 June 2020

³⁷ *ibid*

Until the adoption of the Convention on the Rights of the Child (CRC) in 1989, children were not seen as proper rights holders and were discriminated against adults. During trial, the child is discriminated when his/her testimony is deemed as less credible in comparison to an adult's. Tanaka J., in the *West Africa Case*³⁸ noted that although the principle is widely recognized, its' content is not clear. The International Covenant on Civil and Political Rights (ICCPR) defines discrimination as:

“any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”

Besson³⁹ summarizes this definition to give the meaning that the principle non-discrimination forbids treating differently alike circumstances without an objective justification. From this definition, the four elements below are of importance:

- a) *Differentiation of similar situations* – the converse of this, same handling of different circumstances often described as “distinction” may be discriminatory in effect. The similar treatment of CVSA in trial process is prejudicial to their access to justice. In the first instance, they are treated like adults in the manner of questioning and type of questions put to them in the determination of credibility. Secondly, there is no differentiation of the ages. There is a blind application in the credibility tests on the different age groups, for instance, how a four-year-old perceives truth and fabricates lies, is not the same way in which a teenager will do.

Similar treatment of different situation is seen in the like treatment of CVSA. This ignores the fact that although the crime is the same, the circumstances and effects are very distinct.

³⁸ [1962] I.C.J. 319, 592

³⁹ Samantha Besson, ‘The Principle of Non-Discrimination in The Convention on the Rights of the Child - Samantha Besson’ in Michael Freeman (ed), *Children's Rights: Progress and Perspectives* (Brill 2011) <<http://booksandjournals.brillonline.com/content/books/10.1163/ej.9789004190498.i-527.26>> accessed 20 June 2020.

The differences in each case are a matter of fact and this should be given meaning when assessing a CVSA's testimony for credibility for the enjoyment of the child's full rights.

- b) *Absences of legitimate ends* – not all differential handling is discriminatory, only those that do not have an objective justification⁴⁰. In the differential assessment of credibility for CVSA, there must be consideration for the “why” (aim) and the “so what” (the effect) of such measures. The measures must be well informed by other disciplines, like child development and psychology and herein lays the strength of court-room collaboration with other disciplines towards a just end for the child.
- c) *Lack of proportionality of means to ends* – there must be a reasonable connection between the difference in measures used and the end to be realized for a difference in treatment to be a justified distinction. Besson⁴¹ discusses the three settings for the proportionality firstly; the mechanism must be able to obtain the aim sought. As such, whatever measures put in place to assess credibility, must be able to distinguish a false testimony and a truthful one from a CVSA. The mechanism must also aid the court in obtaining a reliable testimony meeting the requisite threshold. Secondly, the means must be necessary and thirdly, be the least restraining towards achieving the goal.
- d) *Suspect classifications* – similar situations may be treated differently and vice versa for different reasons. To speak of discrimination, the treatment is based on a “suspect” or biased classification. The testimony of CVSA when treated in a different manner on the basis that children are “prone to lying” or “easily coached” is premised on discrimination. The starting point, rather should be that children need special modification of the legal system to be protected and fully enjoy their rights.

⁴⁰ 'Refworld | Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' <<https://www.refworld.org/docid/42d177274.html>> accessed 23 June 2020.

⁴¹ Besson (n 38)

2.2.3 Protection

This is closely linked with the best interests. A child who has to testify against his/her perpetrator is viewed to be “at risk”⁴² and vulnerable thus in need of protection. The importance of the abused child testifying must be well balanced with the risk of exposing them to additional harm by having them reconstruct the details of the atrocious act in the cold courtroom set up under the scrutiny of the perpetrator then subjected to cross-examination. Due regard must be given to protecting the child when assessing for credibility given the difficult position from where they are issuing their testimony.

The court needs to be well guided in assessing credibility of CVSA so that the end effect is the child, and many others, are protected from further abuse from the perpetrator. The processes used in credibility determination must not expose the child to further harm and trauma. They process need to take into consideration the factors like the age (tender years or teens) that enable it to be child appropriate and does not antagonize CVSA. In the assessment of credibility, the CVSA’s right to a fair trial, together with other rights guaranteed in law should be protected and promoted.

2.2.4 Respect for the views of the Child

Children are understood differently across varied cultures. They are generally perceived to lack competency, knowledge and judgment; their involvement will slow down processes or lead to excessive demands. However, it has been noted that such attitudes are not evidence based⁴³. Given the opportunity, and time, children can express their views and this can positively contribute to decisions that concern them.

Respecting the views of the child or participation is closely linked with civil and political rights like freedom of expression and right to information. When making a determination on the best interests of a child, their views must be heard. States are obligated to create necessary environment in judicial processes to integrate views of CVSAs. The measures should exhibit consistency and

⁴² ‘Protecting the Child Witness in Abuse Cases on JSTOR’ <<https://www.jstor.org/stable/25740299>> accessed 23 June 2020.

⁴³ https://www.unicef.org/french/adolescence/files/Every_Childs_Right_to_be_Heard.pdf Accessed on 27.06.2020

appropriateness. This underscores the need to have dependable child-centred guidelines in the assessment of credibility.

2.2.5 Forensic interviewing for CVSA

Children are usually subjected to forensic interviews where the testimony is to be used in court where they are the complainant or witnesses to a crime. As such, the assessment for credibility interview is also a forensic interview. A child forensic interview is not only about truthfulness but also supports the child to give a reliable testimony by guiding the child with age-appropriate questioning. The accuracy of children's reports for legal purposes has been an area of concern. Modern research reveals that when given the appropriate support and asked meaningful questions, children can be accurate witnesses.⁴⁴

2.2.5.1 Basic purpose and principle of forensic interview

The goal of assessing the credibility of CVSA is to determine whether or not s/he can make a competent witness by giving the court truthful and reliable account of the crime. Where there is a lack of medical or physical evidence, the child's testimony becomes the crucial evidence upon which a conviction can be made⁴⁵. It is thus critical for such an assessment to be done analytically with utmost care to avoid inaccurate conclusions. Two goals are paramount: guarding against false accusations of innocent persons and detecting actual abuse so that children are protected⁴⁶. Following established practises to obtain accurate information from children in forensic interviews safeguards these two goals.

There is general agreement amongst practitioners that a forensic interview should be done with minimal distress to the child as possible.⁴⁷ A CVSA is recovering from the trauma of the event and thus, needs to be protected from further distress in the course of testing or credibility. A key way of ensuring this is by having the forensic interview conducted by a well-trained and sensitive

⁴⁴ Alison Perona, Bette Bottoms and Erin Sorenson, 'Research-Based Guidelines for Child Forensic Interviews' (2006) 12 *Journal of Aggression, Maltreatment & Trauma*.

⁴⁵ Wang and others (n 51)

⁴⁶ Perona, Bottoms and Sorenson (n 44)

⁴⁷ *ibid.*

interviewer. This brings out the need to enhance the capacity of judicial officers, to conduct child forensic interview.

Another key principle in child forensic interviews is to protect against improper influences on memory. This can occur by suggestive questioning. Social science research shows that children tend to give accurate reports if the information is freely generated by the child.⁴⁸ When assessing for credibility, the interviewer, should create a questioning environment that enhances free recall of events and minimizes interviewer influences. The use of structured protocol in interviews with CVSA may support the forensic interviewer in making a credibility judgment.

2.3 Conclusion

This chapter has discussed the theoretical framework that safeguards the protection of credibility assessment of CVSAs. This is clearly defined in the context of best interest as a right, principle and rule of procedure in judicial processes. There is a growing body of research on child psychology, development and the evolving capacities and how this affects a child's understanding. This information can enrich judicial processes to protect best interests of the child within the criminal trial. Principles of non-discrimination, protection and respect of the views of the child have been discussed within the context of CVSAs testimony. Child forensic interviews have been highlighted as a methodology of taking testimony that promotes the best interests of CVSAs.

⁴⁸ *ibid.*

CHAPTER III

3.0 LEGAL FRAMEWORK IN SUPPORT OF CVSAS DURING CREDIBILITY ASSESSMENT IN COURT

3.1 International Legal Framework and Policies on Credibility of CVSAs in Trials

This chapter explores the legal framework and policies that safeguard the best interests of CVSAs with regard to their credibility. Legal provisions enabling support to CVSAs by virtue of their vulnerabilities are discussed both at international and national contexts. The chapter inquires to what extent the international policy and framework has been replicated into regional and national laws and policies. Protocols, UN guidelines and model laws with regard to children matters will be highlighted as prototypical frameworks for CVSAs credibility.

3.1.1 Universal Declaration of Human Rights

Article 1 of the UDHR,⁴⁹ recognizes that all human beings are born free and equal in rights and dignity. States are obligated to protect human rights by the rule of law. The rights of children are encompassed in this declaration as it collectively recognizes all human beings as specie regardless of age, sex, amongst others.

In its preamble, States declare that the UDHR shall serve as a common standard for all nations to promote and respect the rights and freedoms guaranteed therein for the people. Although non-binding, the UDHR as adopted in 1948, is generally accepted as the foundational document for international human rights. Article 2 emphasizes the entitlement to all rights and freedoms for everyone without distinction of any kind. Of particular interest to this Study is the distinction of birth. This removes the distinction of age as would be interpreted from date of birth. This means that if age of maturity is used as pointer to CVSA testimony credibility, the assessment then, denies the child his/her rights.

⁴⁹ Universal Declaration on Human Rights, 2015

Article 6 provides call for recognition of all persons before the law. This means that the child in a court room, being assessed for credibility, should be accorded the full recognition as a person before the law and accorded the necessary support towards enjoyment of all his/her rights. This is further emphasized by Article 7 which provides that all people are equal before the law and should not be discriminated. Any distinctions made in the assessment of credibility should not have a discriminatory effect that compromises the participation of a CVSA in the trial process thus, limiting the rights.

Article 12 provides for protection of privacy. Irrelevant issues should not be incorporated as a way of discrediting the story teller. A CVSA's propensity to truth telling should not be pegged on the child's history on telling the truth or not. This may amount to be an attack on their reputation. The use of guidelines would help to gauge the credibility of the particular event in question without getting into the character of an already traumatized child to determine whether s/he is in the habit of telling truth or otherwise. Guidelines follow requisite parameters to protect a CVSA's privacy and attacks based on family reputation.

Article 27 provides for free participation in cultural life of a community as a social advancement of individuals. This caters for children. The social researches should be used to get the genesis for fostering positive societal growth for children. This helps in setting an environment which protects children from any predator attacks. The benefits derived from social research and the advancements in processes advices by such evidence-based research. As indicated in the literature review, studies that inform legal, psychological and sociological perspectives on truth telling of CVSA have been conducted leading to development of processes for credibility evaluation. CVSA's should be able to benefit from findings of such research when being assessed for credibility.

3.1.2 International Covenant on Civil and Political Rights

The ICCPR,⁵⁰ in its preamble recognizes inherent dignity and equality in accessing rights of everyone is the foundation of co-existence in the world. It further recognizes that the citizens can only fully enjoy their civil and political rights if the State *creates conditions* (emphasis mine) where such rights can be enjoyed. For a CVSA to fully express his/her views in the criminal trial process, the obligation is upon the State to ensure that the process creates an environment that enables participation in obtaining a credible and reliable testimony.

Article 2 (1) obligates States to respect and ensure all individuals without any discrimination to issues like gender, sex, birth or other status. Under Article 2(2) States are required to undertake necessary measures that give effect to the provisions of the Covenant where such laws or other measures do not exist. In the assessment of credibility of CVSAs, other measures would include an inter-disciplinary approach in the trial process. The use of research and evidence-based approaches in the assessment of CVSAs would work towards their best interest and protection during trial.

3.1.3 Convention on the Rights of the Child

Since the beginning of the 20th Century, the world began to appreciate that children needed to be protected.⁵¹ In 1948 the League of Nations issued the ten point on the Universal Declaration on the Rights of the Child. Important to note is that one of the points was to have children assisted in their needs. The Convention on the Rights of the Child was ratified in 1989 and became law in 1990⁵². It has 54 Articles relating to both the rights of the child and the responsibilities of the State, parents and other adults in the society. The CRC is complemented by 3 protocols and its fulfilment backed by the Committee on the Rights of the Child.

⁵⁰ Aulona Haxhiraj, 'The Covenant on Civil and Political Rights'

⁵¹ 'The History of the "Convention of the Rights of the Child"' (*ProFuturo Foundation | Committed to Education*, 23 November 2017) <<https://profuturo.education/en/2017/11/23/the-history-of-the-convention-of-the-rights-of-the-child/>> accessed 27 June 2020

⁵² *ibid*

The CRC introduces best interests as a dynamic concept as a right, principle and rule of procedure requiring an assessment appropriate to the context.⁵³ The principle of best interests under the Convention is aimed at ensuring full enjoyment of the rights and holistic development of the child. In its preamble, the CRC bears on mind that children need special safeguards and care, including appropriate legal protection because of their physical and mental immaturity.⁵⁴ Article 1 of the convention defines a child to mean every human being below the age of 18 years unless the law provides for an alternative age of majority.

Article 2 protects the child from any form of discrimination by providing that rights of children under the Convention must be enjoyed by every child without any discrimination from any quarter. The child has equal access to his/her human rights regardless of age. Failing to have mechanisms that assist children in determining their credibility to testify in court amounts to discriminating them and limiting their right to access justice. This article further protects the child from any social and cultural nuances that may exist that prejudice the child's ability to be a credible witness. This is seen from the protection from being discriminated due to national, ethnic or social origin. Research has shown that children of married parents are likely to be viewed as credible.⁵⁵

Article 3 states the prominence of the principle of "best interests" of the child in all actions concerning children, including courts of law. Individuals and institutions legally responsible for the child are required to take appropriate legislative and administrative actions to actualize the best interest of the child. This is emphasized in Article 4. The justice system needs to take steps to ensure that a CVSA's best interest is taken care in the test for credibility bearing in mind that special measures may need to be put in place considering the age and maturity of the child. Article 5 takes cognisance of the "evolving capacities of the child" in giving appropriate direction and guidance to the child in exercise of his/her rights.

⁵³ 'OHCHR | Convention on the Rights of the Child' (n 51)

⁵⁴ *ibid*

⁵⁵ Ling-Hsiang Wang and others, 'Credibility Judgment Predictors for Child Sexual Abuse Reports in Forensic Psychiatric Evaluations' (2019) 16 *Psychiatry Investigation* 139

Article 12 gives a child the right to express his/her view freely and the same to be given due weight in accordance with age and maturity of the child. In matters affecting the child, s/he is to be given an opportunity to be heard in any judicial or administrative proceedings. This is loosely linked to Article 13 on freedom of expression. Article 19 protects children from physical and mental violence amongst others. A CVSAs testifying in court needs to be protected from further mental anguish while in court. A test for credibility should have appropriate measures to bring out the testimony without subjecting the child to secondary abuse or mental anguish in re-constructing the torturous crime. The judicial system, seen as the avenue to accessing legal rights, should itself, be well aligned with systems that protect and support the child's best interests.

3.1.4 UN Guidelines Justice in Matters Concerning Child Victims and Witnesses of Crime (CVSA)

The UN Economic and Social Council adopted the Guidelines on Justice in Matters involving CVSA. This study takes note that sexual abuse is a crime thus, the applicability of the Guidelines in credibility assessment for CVSA. The guidelines form part of the UN standards and norms in crime prevention and criminal justice that are internationally recognized normative principles.⁵⁶ The guidelines provide a practical framework to assist and support persons dealing with CVSA to deal sensitively. The guidelines reaffirm the need to protect children from victimization and suffering additional hardship if viewed as offenders rather than victims of crime. Further, children and their families will be more willing to report crime and cooperate with the justice system when there is improved response and support to CVSA.

Part V of the guidelines provide for dignified and compassionate handling of the child. Article 13 recommends for interviews or investigations to be carried out by trained professional to avoid further hardship for the child. Article 14 underscores the use of child sensitive approaches that accommodate the special needs of the child taking into account the age, ability and evolving capacity. The language should be one that the child understands.

⁵⁶ 'Justice in Matters Involving Child Victims and Witnesses of Crime: Model Law and Related Commentary' 76

Part VI protects the child from discrimination on account of age. Article 18 states,

Age should not be a barrier to a child's right to participate fully in the justice process. Every child should be treated as a capable witness, subject to examination, and his/her testimony should not be presumed invalid or untrustworthy by reason of the child's age alone as long as his/her age of maturity allow the giving of intelligible and credible testimony, with or without communication aids and other assistance.

The CVSA is deemed as a credible witness and any suggestion to the contrary has to be clearly demonstrated.

Part VIII safeguards the respect for the view of the child principle. As per Article 21, every effort should be made to enable the CVSA to express their views and concerns, and if such views are disregarded, the reason to be explained to the child. Part IX provides for the right to effective assistance. Article 25 tasks professionals to come up with systems that make it easier for CVSA to give evidence, and improve communication and understanding during trial.

Part XI protects the child from hardship during trial. Article 29 affirms the upholding of the best interests of CVSA and protects them from hardship during the judicial process and requires sensitive handling. Inter-disciplinary services are recommended to offer the child support as needed. Article 31 calls for special procedures for collection of evidence from CVSA including how cross-examination may be done, use of child sensitive questioning, testimonial aids and trained professionals.

Part XV provides for implementation of the guidelines. Training, education and information sharing is a key starting point improving attitudes and approaches in dealing with CVSA. Article 41 provides for the need for professionals' training and creation of specialized units to cater for CVSA. Article 42(h) provides appropriate adult-child communication skills to be part of the training. Part (i) provides for interviewing and assessment techniques that minimize trauma to the child while maximizing the quality of information received from the child. For a CVSA, this would mean a credibility assessment that is less traumatizing for the child while getting reliable responses in a

manner that clearly demonstrates the child knew what s/he was being tested for. The quality of responses should help gauge the credibility of the testimony. The training should also cover methods on how to present evidence to and question children. In the credibility test, the questions applied should be child-appropriate. An inter-disciplinary approach is encouraged as information is shared on methods used by professionals working with CVSA.

3.1.5 The UN Model law

The UN Model law⁵⁷ has been developed in conformity with the principles above to assist States on drafting of national legislation that reflects the principles.

Article 20 of the Model Law deems the child to be a capable witness unless shown otherwise through a competency examination as provided for in Article 21. The article protects the child from being presumed incredible by reason of age and maturity. Article 20(4) safeguards the respect for the views of the child. Whether or not the testimony of the child is taken, s/he should be given an opportunity to express his/her views and concerns on the case. In instances where his/her views are not accommodated, the child has a right to receive a clear explanation for the omission.

Article 21 outlines the competency examination. The child's protection from age discrimination is seen at Article 21(1) where the court may only conduct a competency examination if there are *compelling* (emphasis mine) reasons to do so and such a reason recorded by the court. The best interests of the child are paramount in the decision on whether or not to carry out a competence examination.

The goal of a competency examination is twofold as given in Article 21(2) - to determine whether or not the child is able to understand questions that are put to him/her, in a language that s/he understands as well as the importance of telling the truth. The Article states, "*The child's age alone is not a compelling reason for requesting a competency examination.*"

The Model law takes cognizant of inter-linkage of professions by making room for the competency examination to be done by an expert (Article 21(3)). In the absence of an expert, the court can

⁵⁷ *ibid.*

conduct the examination on the basis of questions submitted by prosecutor and defence lawyer. The questions should be asked in a child-sensitive manner appropriate to the age and development of the child and not be related to the issue at trial. They shall focus on the child's ability to understand simple questions and answer them truthfully.⁵⁸

The child is protected from being subjected to wanton psychological or psychiatric tests. These can only be done when compelling reasons to do so are demonstrated to the court. A competency exam is only to be done once. Article 22 makes a distinction of oath taking and truth telling. Taking an oath is subject to understanding the consequences of taking an oath. If a child does not appreciate the consequences of oath taking, s/he is given an opportunity to promise to tell the truth. Either way, the court has to take the child's testimony. Article 20(3) provides that the weight given to a child's testimony shall be in accordance with his/her age and maturity. The Model Law precludes any bearing of weight of testimony on oath taking.

Article 27 protects the child from cross-examination by the accused person. The rights of the accused person are catered for by allowing cross-examination by the defence lawyer under the supervision of a judge or magistrate. The magistrate is to check on any questions that may intimidate or distress the child.

3.1.6 The National Institute of Child Health and Development (NICHD) Protocol to Child Forensic Interviews

The NICHD Protocol was developed in the 1990's for use as an evidence-based tool for training child forensic interviewers.⁵⁹ This was done after years of psychological research and experiments on aspects of a child's memory and development. A poorly done interview or test for credibility may lead to false results. The Protocol was designed to give interviewers an evident structure with child appropriate questioning strategies that overcome memory distortions.⁶⁰ The Protocol takes into account evolving capacity of the child while optimizing conditions under which children are

⁵⁸ *ibid.*

⁵⁹ David La Rooy and others, 'The NICHD Protocol: A Review of an Internationally-Used Evidence-Based Tool for Training Child Forensic Interviewers' (2015) 1 *Journal of Criminological Research, Policy and Practice* 76.

⁶⁰ La Rooy and others (n 59)

likely to accurately describe their experiences of abuse. The Protocol has also been adapted into “The ten-step investigative interview”.⁶¹

In the “Ground rules” section, children are informed on the need to tell the truth as they describe the events in details as the interviewer was not present and thus, is not aware of what happened. This creates a relaxed and supportive environment as opposed to condescending questioning. The child is given the option to say, “I don’t know” and “I don’t remember when unsure”. This approach has shown a reduction of errors when taking evidence from children.⁶²

The Protocol is flexible to accommodate the diverse set ups of different countries. In Utah, there have been changes to conform to courtroom experiences. In the USA, the ground rules consist of an additional rule eliciting a promise to tell the truth. In Canada,⁶³ children are given control to discuss any event they choose in the first half of the interview, in the second half, the interviewer takes control and changes the topic to one of the issues in question.

3.2 Regional Instruments

3.2.1 African Charter on the Rights and Welfare of the Child

The ACRWC in its preamble takes note that there are unique cultural, socio-economic and developmental circumstances that make the African child vulnerable and thus, appropriate measures should be taken to protect and promote the rights and welfare of the African Child. Article 2 defines a child as any human being below the age of 18 years. Article 3 protects the child from any form of discrimination. This offers the child protection from being regarded as an incompetent witness by virtue of age. In safeguarding the best interests of the child, Article 4 provides for the child to be given an opportunity to give his/her views in any judicial or administrative proceedings affecting him/her. The test for credibility should be one that gives CVSAs an opportunity to air their view

⁶¹ ‘The Kelly Michaels Case’ (n 62)

⁶² La Rooy and others (n 59).

⁶³ *ibid.*

and or give an account of the allegation as opposed to an open-ended inquiry. The freedom of expression is stressed in Article 7 subject to lawful restrictions.

It is worth noting that the Charter highlights the relevant principles concerning children without going into details of the child in the court process save for the right to express his/her views. The Charter is silent on the competency of the child to testify as well as offering of the requisite support taking into account the evolving capacity of the child.

3.3 Domestic Level

Kenya has shown commitment to safeguarding the rights of children by signing to the CRC. There are efforts to espouse the provisions of the CRC through national legislation, more particularly the Children's Act of 2001. However, provisions with regard to the child in the judicial system are scattered in the various statutes that provide for judicial procedures as discussed in this chapter.

3.3.1 The Constitution of Kenya, 2010

The people of Kenya through the preambular declaration of the Kenyan Constitution (CoK) commit to the nurturing, protection and wellbeing of the individual⁶⁴ whereas article 53 (2) lays an emphasis on the paramount importance of the best interests of the child. Article 260 defines a child as “*an individual who has not attained eighteen years of age.*” In applying the principle of non-discrimination, the rights guaranteed to “persons” or “individuals” in the CoK, would extend to children as well.

Under article 53, children are owed protection from abuse and all forms of violence, this includes sexual violence. The Article underscores the supremacy of the best interest in all matters concerning the child. It is necessary for courts to effectively assess for credibility bearing in mind protection of the child from future sexual abuse.

In application of the Bill of Rights in article 20, a person is entitled to enjoy his/her rights to the greatest extent in line with the right. CVSAs ought to have their rights promoted and protected even

⁶⁴ The Constitution of Kenya, 2010

in the course of their seeking justice. Their access to right of a fair trial as guaranteed in the constitution can be greatly compromised during the credibility assessment if not adequately supported by evidence-based strategies to bring out the requisite information.⁶⁵

In the implementation of rights and freedoms, the State is obligated to promote the rights and carry out any required measures in law reforms, policies and setting standards to actualize such rights as articulated in Article 21. The needs for vulnerable groups, wherein children fall, are to be considered. Having undergone a traumatic event, it follows that mental health aspects of CVSAs is an area of need. One of the socio-economic rights in the CoK Article 43 (1) (a) is the right to the highest attainable standard of health and access to health care services.

CVSAs need the support of mental health specialist within the credibility test strategy. Their role is two-fold. In view of best interests of the child, their role is two-fold; first, mental wellness and protection of CVSA from further re-traumatization through “hard questioning”. Secondly, is to provide to the court a better understanding on the behaviour of the child, any fidgeting, skirmishes and odd answers that CVSA the court may interpret as a “sign of dishonesty”. This takes into account the evolving maturity of the child which affects the way s/he responds to questioning.⁶⁶

3.3.2 The Children Act 2001

The Children Act seeks to domesticate the CRC and the ACRWC. Section 4 (2) of the Act mandates all institutions like courts of law, to take into consideration the best interests of the child in all actions concerning children. Judicial and administrative institutions in section 4 (3) are mandated to take course of action that will safeguard and promote the rights and welfare of the child. Whereas there is no specific provision on how a child is to be supported in the justice system, there is general provision for taking actions that will promote the rights and welfare of the child. In the determination of credibility, the court should then, adopt actions that promote the rights and welfare of the CVSA.

⁶⁵ *Seeking Justice in Child Sexual Abuse: Shifting Burdens and Sharing Responsibilities* (Columbia University Press 2010) <<https://www.jstor.org/stable/10.7312/stal14614>> accessed 16 June 2020

⁶⁶ Guardian Staff, ‘The Burden of Proof’ *The Guardian* (29 November 1999) <<https://www.theguardian.com/world/1999/nov/29/law.theguardian>> accessed 16 June 2020

In matters affecting the child, s/he should be accorded an opportunity to express his /her views⁶⁷. In evaluating the testimony of the child, the court is tasked to take into account the age and the degree of maturity. This should be done carefully so as to protect the child from discrimination. CVSAs credibility should not be disregarded on account of mere age.⁶⁸ The legal provision here for opportunity to express views may be understood as the support a CVSAs will need to navigate the credibility testing based on scientific based evaluations as opposed to a mere subjective moral test. Further, section 13(1) provides for a child's protection from both physical and psychological abuse. Sexual violence suffered by CVSAs is a physical abuse from which they are owed protection. The law thus, also provides for protection from psychological re-traumatization even as they are questioned for credibility in line with promotion of the rights and welfare of the child.

3.3.3 The Children's Bill 2017

The Children's Task Force has made several attempts to bring amendments to the current Children Act to bring it into conformity with the current legal trends. As at the time of this Study, the Children Bill 2017 was still under review by the Task Force. The Bill has attempted to widely define "best interests" at Section 5(2) (b) and the fourth Schedule. It emphasizes best interest should be the underlying consideration for all actions taken by any judicial and administrative bodies. The Bill requires judicial bodies and/or their officers to secure guidance and correction as is necessary for the welfare of the child and in public interest⁶⁹. This puts the responsibility of assisting the child with guidance during the credibility test on the judicial system or the officer handling the CVSA.

The Bill further provides for giving the child an opportunity to express his/her views. This can be done through an intermediary. The child's age and maturity are to be taken into account when considering such an opinion. However, there is no clarity on the process to be used when making such considerations. Section 6 of the Bill protects the child from discrimination. It goes further in

⁶⁷ The Children Act Sec 4(4)

⁶⁸ Ann-Christin Cederborg, 'The Construction of Children's Credibility in Judgements of Child Sexual Abuse' (1999) 42 Acta Sociologica 147

⁶⁹ The Children Bill First Draft 2019, Section 5 (3) (c)

section 7 to make general provision for differential treatment in so far as such treatment is towards the best interests of the child.

Differential treatment will not be interpreted as discriminatory especially if the child who does not receive the treatment is of a greater age. If passed into law, this provision will pave way for giving direction on differential treatment of CVSAs during the credibility test on the aspect of “taking into account age and maturity”. The use of an intermediary gives room for inter-disciplinary approach in the credibility test where a trained professional can work together with the courts to support the CVSA.

An interesting feature of this Bill is the creation of Children’s Court at county level in section 85. Whilst the Bill is silent on the credibility of children, it makes provision for taking into account the individual needs of children considering health, age and gender.⁷⁰ For a CVSA, this would be useful when taking consideration of both physical and mental health affected by the trauma of the violation.

3.3.4 The Oaths and Statutory Declarations Act

Whereas taking of Oaths and testing for credibility are distinct. It is important to study the legal framework pertaining to oath taking in Kenya as the two are usually inter-linked. Administering an oath is usually the first step in evidence taking in court. The Act gives the court the duty to assess if a child understands the duty of speaking the truth before proceeding to administer the oath.⁷¹ A child who gives false evidence after taking the oath shall be guilty of perjury, punishable by imprisonment. The Act affirms that the lack of a religious belief should not affect the validity of the oath.⁷² This in turn, implies that the lack of a religious belief should not affect the validity of evidence given by CVSAs.

⁷⁰ Ibid. Section 87(3)(a)

⁷¹ Oaths and Statutory Declarations Act, section 19(1)

⁷² Ibid. Section 21

3.3.5 The Victim Protection Act

The Victim Protection Act of 2014 is a unique legislation on provisions to protect the victims. It is explicit in its application as it pertains victims of sexual offences in section 5 (2). The Act defines victim support services as, “all the services offered to the victim of an offence to secure restoration of their emotional, mental, physical, legal or economic status from any harm occasioned by the offence committed.” Support services for a CVSA would entail emotional and mental support during credibility testing. Further, CVSAs fall in the category of vulnerable victims due to age and the trauma of the violation that, the Act recognizes may need special justice and support.⁷³

The general principles of the Act are geared towards protection of the victim from re-victimization in the justice process. Questioning for credibility for CVSAs should not be in a manner that may re-victimize the child. The Act seeks to bring collaboration between all the state department and other organizations or bodies involved with working with victims of crime. CVSAs are protected from secondary victimization in judicial proceedings and as a vulnerable witness, entitled to legal and social services at the State’s expense.⁷⁴

Generally, the support to be given should enable the victim to access and participate in the criminal justice system.⁷⁵ A standardized evidence-based credibility test would empower CVSAs to meaningfully participate in testing for credibility. One of the responses from the magistrates’ survey indicated that often cases fail, not because CVSAs lack the evidence but that the questions posed do not bring out the evidence as required by law.

3.3.6 The Evidence Act

Section 124 as Amended by Act No.3 of 2006 provides that the court is mandated to convict upon the evidence of a CVSA if it believes the truthfulness of the testimony. The reasons for such belief are to be recorded. From the study survey, it was noted that magistrates interpret this as giving them

⁷³ Victim Protection Act, section 2(1)

⁷⁴ Ibid section 4(2)(g)

⁷⁵ Ibid section 14(2)(b)

discretion. This was emphasized in *Lazaro Ocharo vs Republic*.⁷⁶ The court stated that corroboration is not necessary if the court finds that a CVSA is telling the truth.

The Act declares all persons to be competent witnesses unless the court is satisfied that they cannot understand the questions or give rational answers by reason of age or other factors.⁷⁷ CVSAs given the necessary support would be able to understand questions on credibility and give suitable answers. This question and answer process to assist the court form an opinion on the competency of child witness is popularly referred as *Voir Dire* (telling the truth). The aim of this test was explained in the case of *Johnson Muiruri vs R*,⁷⁸ as to determine whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth.⁷⁹

It was also emphasized in *Japheth Mbitha vs Republic*⁸⁰ that the purpose of *voir dire* is to satisfy the court that the minor understands the solemnity of the oath and the importance of being truthful. Failure of a magistrate to record this may be fatal to a case. In *Kivevelo Mboloi vs R*,⁸¹ the complainant's evidence was nullified on appeal as the trial magistrate had failed to conduct *voir dire*. In this case, it was stated that the court needs to be satisfied as to the intelligence (competency) of the CVSA and his/her appreciation of truth telling.

From the foregoing, it may seem that the court starts off on a footing that a child is not a competent witness whereas the law of evidence, as discussed above, provides for an assumption of competency for all persons. The court should record reasons for incompetency, not vice versa. Interestingly, no such test is administered to adults, who are also prone to giving false testimonies, making the practice discriminatory. One of the survey respondents indicated that a child's evidence should not

⁷⁶ [2014] eKLR

⁷⁷ Evidence Act, Section 125(1)

⁷⁸ [1983] KLR 445

⁷⁹ 'Criminal Appeal 24 of 2018 Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/171258>> accessed 30 August 2020

⁸⁰ Ibid.

⁸¹ 'Criminal Appeal 34 of 2013 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/93553>> accessed 30 August 2020

be treated with suspicion and to be admitted without *voir dire*. This is only possible if there exists a clear standard on how a child's testimony is to be taken.

3.3.7 The Criminal Procedure Code

It is mandatory for an oath to be administered before evidence is taken in all criminal matters.⁸² As discussed above, CVSAs need to demonstrate they understand the implications of oath taking as it relates to truth telling before their evidence is taken. Section 114 of the Penal Code makes any false swearing to amount to perjury, a misdemeanour.

3.4 Conclusion

This chapter has discussed the legal and policy framework that providing for mechanisms that support CVSAs in the criminal justice system during credibility assessment. The UDHR has placed the obligation of protecting the best interest of children in the judicial on States. The protection of children against re-traumatization is articulated in the CRC. The international provisions are mirrored in the Kenyan Constitution which further gives life to the Victim Protection Act and national laws that seek to promote the rights of CVSAs within judicial processes.

⁸² The Criminal Procedure Code, section 151

CHAPTER FOUR

4.0 ANALYSIS ON THE STATUS OF THE CREDIBILITY OF CVSAS IN CRIMINAL TRIALS IN KENYA AND BEST PRACTICES

4.1 Introduction

This chapter will analyse findings from the desk review and field research on credibility of CVSAs in Kenyan courts interrogating the extent of protection of best interest advanced. The chapter will also identify areas within the law and practise of courts that need strengthening to support courts in assessment of credibility without compromising protection of CVSAs. It will finally illustrate the best practices from three jurisdictions: Canada and Finland. These two jurisdictions have witnessed robust and comprehensive legal development on the status of CVSAs during trial.

4.2 Status on how CVSA are treated in Kenya

In Kenya, although national legislation makes provision of taking into account the age and degree of maturity of the child, they fail to give directives on how the ages will be differentiated and evolving maturity will be considered. The “degree of maturity” is entirely left to subjectivity of the court. In the *Ocharo* Case,⁸³ the accused was acquitted of defilement when the appellant court found that the trial court erred in failing to take into consideration that the “the girl enjoyed intimacy like an adult” putting the victim, rather than the appellant at trial,⁸⁴ which should not be the case. Notably, “innocence of the child” and “character of the child” are some of the considerations whilst testing credibility as seen from qualitative data collected to inform this study.

4.2.1 Data from questionnaires

From the 18 questionnaires disseminated, a total of 12 responses were received with 75% of the respondents being female and 25% male.

⁸³ [2016] e KLR

⁸⁴ ‘Defilement: Acquittal of a Convicted Man Raises Need to Review Our Positions on Sexual Offences’ <<http://www.kenyafreepress.com/magazine/gender-matters/74/defilement--acquittal-of-a-convicted-man-raises-need-to-review-our-positions-on-sexual-offences>> accessed 24 August 2020.

1. Please select your sex

12 responses

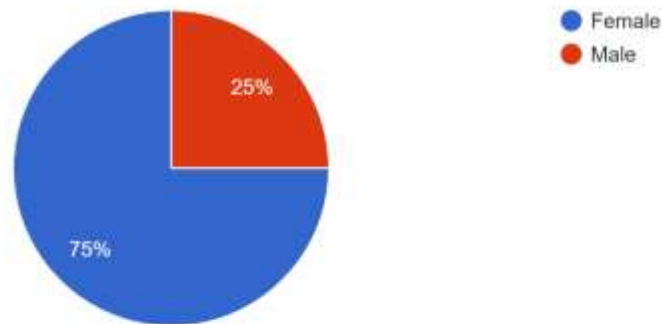


Fig. 4.1 Pie chart: Sex of the respondents

They were drawn from various stations as per fig 4.2 below:

2. what is your duty station

12 responses

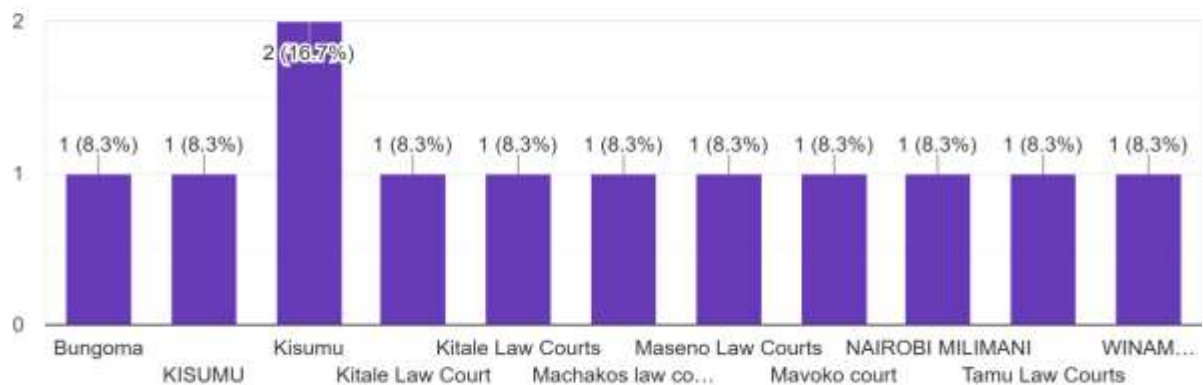


Fig 4.2 Respondents' duty stations

Their years handling CVSAs matters ranged from one and a half years (least) to 19 years (highest), with a majority recording 7-8 years of experience.

3. How many years have you been handling cases of Child victims of Sexual Abuse (CVSAs)?

12 responses

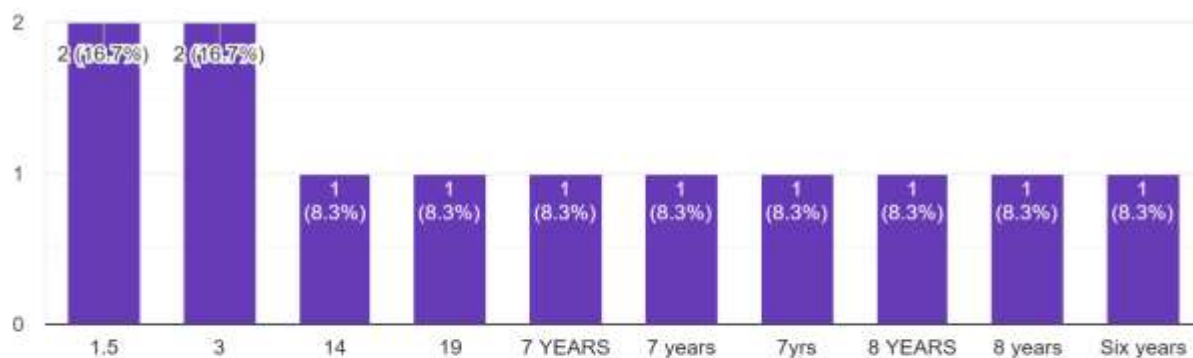


Fig. 4.3 Years of experience

On the question of factors considered when determining credibility of CVSAs, half of the respondents quoted the demeanour of the child. The level of intelligence of the child, body language and confidence when giving their testimony followed. The law does not give practise guidelines on what to look out for in demeanour, intelligence or confidence. This is a subjective test that already expects the child to be “believable” and to carry themselves out in a particular manner. A child with contrary behaviour as a coping mechanism is easily passed off as not credible.

Consistency and ability to recollect events were also mentioned to be key in determining whether a CVSA is telling the truth or not. This was closely tied with ability to understand the questions in both examination-in-chief and cross examination. These considerations fail to take into account the evolving capacities of the child with respect to memory recollection. A CVSA may fail to understand questions in court not because s/he is bent on lying but because of how the questions are framed, to quote two respondents on the challenges faced by CVSA’s:

“Credibility assessment for children applies the same standards expected of adults. It is bound to cause injustice as it fails to take into account their circumstances as vulnerable persons.”

4.2.1.1 Technological gaps

A major concern registered by the respondents was that Kenyan courts do not employ the use of any scientific methodology or give any guidelines to assess credibility and thus, the discretion is left to the observation, judgment or bias of the trial court. At least four respondents indicated that when they could not ascertain credibility, they would require corroboration by way of medical evidence or other witnesses. This means that cases with “weak” medical evidence and without other witnesses, which is often the case in sexual offences, would not stand a chance of trial. This greatly compromises the protection of CVSA in such situations.

Kenya has not adopted the concept of forensic child interview even though this is a scientific proven methodology of taking CVSAs evidence that takes into consideration aspects of credibility and reliability. For instance, the NICHD protocol uses child-centred questioning and encourages the use of open prompts to elicit further information from the CVSA such as “then what happened”, “tell me more about that.” The interviewer may ask if the abuse occurred, “one time or more than one time.” While this is not an open-ended question, it is important to help the child overcome the difficulty of estimating occurrences and compromise credibility⁸⁵. Only one respondent indicated to have an idea of how a child forensic interview ought to be conducted.

4.2.1.2 Guidelines for credibility assessment of CVSAs

Notably the research revealed that in Kenya test of competency is interchangeably used as the test for credibility. Whereas the law provides for *voir dire* test for competency, the specific questions to be asked are left to the discretion of the court. Ability to understand the nature of oath and the need to tell the truth was recorded as one of the considerations when assessing credibility of CVSAs. The research findings reveal that Kenyan law is not specific on what courts should look into when determining credibility of a CVSA. One respondent stated, “The current law is not adequate. There is need for proper guidelines within the law on assessment of credibility of CVSAs.”

⁸⁵ La Rooy and others (n 60).

There is a discrepancy between what the law currently provides, and what is practised. This is partly because there are numerous new laws after the enactment of the 2010 Constitution. For instance, the law on evidence provides that the lack of a religious belief should not affect the validity of an oath. However, 65% of the survey respondents felt conflicted if a CVSA indicated that they did not believe in God during the *Voir dire* examination. The respondents viewed the questions used to find out of a child appreciated the importance on truth telling to be discriminatory on religious grounds. The respondents indicated that:

“The fact that children of tender years must be taken through voir dire is discriminatory.”

“Voir dire is an open intrusion to the dignity of the victim by presuming that a child cannot appreciate the meaning of telling the truth hence ought to be examined first.”

To enhance the protection of CVSAs during credibility assessment, one of the respondents suggested that:

“The testimony of a child should be received without voir dire. The evidence should not be treated with suspicion from the word go.”

There was a general consensus that the views of a CVSA were not taken into account. It was noted that a child is taken through “predetermined motions” to assess credibility. A respondent noted that the assumption has been that most CVSAs tend to receive external pressure thus the courts are hesitant to take “their views” as it may not represent their actual views. This is a contrast to legal provisions that call for a respect to the views of the child. It was noted that the courts should be able to support a CVSA to give their views as this is paramount in upholding their best interest. If they were to be considered not credible, and thus, their testimony not considered, an explanation why that decision was reached should be given in court and recorded in the proceedings.

While there is an appreciation that a CVSA needs assistance to process trauma, this has largely been treated as an “out-of-court” process. The role of counsellors is seen as just before the child comes to court or after they are through the trial. The courts fail to draw from other experts like child psychiatrists during trial. Experts from other disciplines would be useful in supporting CVSAs with

regard to the questioning in court. Experts well versed in the evolving capacities of a child would advise courts on responses received from CVSAs and aid in credibility determination. The respondents appreciated the need to have child centred programs to aid courts in assessing credibility while at the same time upholding the best interest. Age-appropriate questioning and a friendly court environment were seen as some of the approaches that would be non-discriminative when assessing CVSAs credibility. The respondents were agreeable to receiving and other assistance that would aid them in assessing credibility without having the effect of re-traumatizing CVSAs.

4.3 The Status of CVSAs judicial credibility assessment: best practices from other jurisdictions

Different jurisdictions have adopted various ways of taking CVSAs testimony. Legislative reforms have been crucial to this in a bid to promote the best interest of CVSAs. The study will do a comparative analysis with Canada as this is seen as the leading jurisprudence when it comes to credibility⁸⁶ assessment. Finland is also considered as this is one jurisdiction that has specialized university hospital units⁸⁷ to support CVSAs during forensic interviews by ensuring a child-friendly and expert setting during the pre-trial investigations.

4.3.1 Canada

Historically, Canadian law viewed CVSAs as untrustworthy witnesses and prone to fantasy⁸⁸. However, research showed that given the proper support and age-appropriate questions, children

⁸⁶ Nicholas Bala and others, 'Judicial Assessment of the Credibility of Child Witnesses' (2005) 42 Alberta law review 995.

⁸⁷ Julia Korkman, Tom Pakkanen and Taina Laajasalo, 'Child Forensic Interviewing in Finland: Investigating Suspected Child Abuse at the Forensic Psychology Unit for Children and Adolescents', *Collaborating Against Child Abuse: Exploring the Nordic Barnahus Model* (2017).

⁸⁸ 'Children Witnesses in the Criminal Courts: Recognizing Competence and Assessing Credibility - LawNow Magazine' <<https://www.lawnow.org/children-witnesses-in-the-criminal-courts-recognizing-competence-and-assessing-credibility/>> accessed 14 November 2020

could distinguish reality from fantasy and give reliable testimonies. In *R v F*⁸⁹ the court upheld the validity of review of Section 709 of the Canadian Criminal Procedure Code to admit electronic evidence via a third party. The court further noted that adult tests should not be applied when testing for credibility in children.

The Canadian criminal justice system has recorded improvement on how CVSAs are handled. Court related child-centered support services are available for CVSAs in their journey for justice. The system ensures that a CVSA is handle by only one prosecutor throughout his/her case as opposed to meeting different prosecutors at each court appearance. Cases are resolved within a reasonable time to avoid re-traumatization by having to narrate events again. A support person is available to accompany the child, and at times, a therapy/support dog if need be. Over the years, Canada has also recorded a remarked improvement for the equipment and technology used for video-recording child forensic interviews. These legal changes have contributed to Canada's support to CVSAs in the judicial system and effectiveness in dealing with questions of credibility of CVSAs⁹⁰.

4.3.2 Finland

The Finnish model employs a two-pronged approach. The child's evidence is taken during pre-trial by the use of a multi-professional team. The team comprises of experts in forensic psychology, child developmental experts and social workers. The expert interviewers take down the evidence of the child. The evidence is subjected to the second stage which is hypothesis testing ensuring an evidence-based outcome. This has led to adoption of a system where children are not required to be present in court for their evidence to be taken. In Finland, the emphasis is on training of the interviewer to produce high quality and evidence-based reports.

The balance to fair trial for the accused person is achieved by giving him the opportunity to ask questions through the interviewer after watching the recorded interview. In Finland, the theoretical framework for use of experts to interview CVSAs has been derived from case law and the

⁸⁹ [1997] 3 SCR 1183

⁹⁰ *ibid.*

realization that there is need of use of particular skills to interview children. This led to the development of guidelines and the use of the NICHD protocol. Expert statements are accepted as part of the evidence in courts and this combined approach has led to more accurate outcomes⁹¹.

4.4 Conclusion

The findings of this chapter are central to the needed legal reform to cater for the interests of CVSAs. The credibility of CVSAs must be guarded against any manipulation tendencies by the defence. Such manipulation often results into miscarriage of justice in addition to the continual committing of cases by the set free offender. Technological measures are seen as the key components in preserving the integrity of CVSAs. Evidence-based methodologies when applied serve as the ‘silent’ witnesses who corroborate the undermined CVSAs testimony.

CHAPTER FIVE

5.0 CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The study highlights the need to safeguard best interests of CVSAs during credibility assessment as they are a vulnerable group in the society. The enabling Kenyan legal framework in existence is in need of reforms to support CVSA in view of their evolving capacities and effects of trauma which have a bearing on how their credibility is assessed.

A standardized way of assessing credibility will introduce more objectivity and advance justice in Kenya. Promoting the welfare of the child means continuous engagement with persons who handle CVSAs. This means the need for capacity building of magistrates on forensic child interviews and regular update on current laws and practise with regard to CVSAs. A concerted effort by all persons handling CVSAs creates synergy as the judicial process is advantaged by the various expertise when assessing credibility. The responsibility to protect and promote the best interests of the child is upon the State and upon us individually. We can work together to promote the welfare of CVSAs by adopting child-centred mechanisms to test for credibility and taking of evidence.

The NICHD Protocol would be useful for a credibility test based on the facts of the allegations. The truth at times can be deduced from the alleged facts. Allowing a CVSA to give their story would yield more accuracy rather than dismissing them from the onset based on a few questions on truth telling.

5.1.1 Study Findings

The findings noted that although national legislation makes provision of taking into account the age and degree of maturity of the child, they fail to give directives on how the ages will be differentiated and evolving maturity will be assessed in achieving justice during and after criminal hearings. The credibility of CVSAs is equally an area in need of reform. The study noted that more than 65% of the survey respondents felt conflicted if a CVSA indicated that they did not believe in God during

the *Voir dire* examination. The respondents viewed the questions used to find out of a child appreciated the importance on truth telling to be discriminatory on religious grounds. Consequently, the use of technology becomes a crucial component which can protect the integrity of the information by CVSAs during testimony. However, such technology has not fully been invested in the criminal justice system.

5.2 Recommendations

The study makes the following recommendations toward promoting the best interest of CVSAs.

5.2.1 Legislative Recommendations

- a) The Criminal Procedure Code should be amended to incorporate trial procedures which expressly cater for CVSAs as a special and vulnerable group in the criminal justice system.
- b) Section 34 (2) (b) of the Victim Protection Act, 2014 should be operationalized by designing regulations to address on the standards to be incorporated on child victims in criminal trial processes.

5.2.2 Policy Recommendations

- a) The National Council on Administration of Justice (NCAJ) should design a policy geared at adoption of a standard evidence-based tool for testimony taking of CVSAs that takes into consideration best interest and credibility issues. A good starting point would be for NCAJ to modify the NICHD Protocol to the Kenyan context as NICHD has yielded more accuracy on the reliability of CVSAs testimony. This would mean replacement of the competency test with evidence-based methodology. As per the provisions of the Evidence Act all children are deemed competent and thus, the competency test would only need to be taken if there is reason to doubt, and such reasons recorded. The use of NICHD protocol or the 10-step interview to take CVSAs testimony would offer the support required to secure their best interest while also assisting the court to make a proper determination on the credibility and reliability aspects.

5.2.3 Administrative Recommendations

- 1) Judiciary Training Institute (JTI) should be used as a forum of training judges and magistrates on forensic interview for CVSAs. This would sensitize magistrates on proper questioning of CVSAs to support their understanding and participation in the credibility testing. Such an avenue for training will also offer continuous professional development for judicial officers handling children matters. The training should bring out specific laws on handling CVSAs and explore the application of the same in the best interests of the child.
- 2) The Law Society of Kenya should initiate training of advocates at the Continuing Professional Development seminars and workshops on interviewing CVSAs. The training of child forensic interviewers is to equip them with techniques to question children to elicit narrative information of the facts. The training may not necessarily turn them into “experts” but can equip persons already handling CVSA.
- 3) Other government agencies like the National Police Service should adopt intentional trainings for CVSAs in order to extract and record information from the victims without feeling victimized. In Canada, a full week’s training in NICHD Protocol is offered to police officers as part of a four-week program of child investigations. In Finland, police are given a 10-step forensic interview training on child development. In Japan, it was noted that trainees confused forensic interview with counselling due to the empathy aspects. This was countered by modifying the Protocol appropriately. Without negating the need for training, it is worth noting that the Protocol has achieved accurate results even in instances where the interviewer had no training. In countries like Canada where the Protocol is being used, there still remains a challenge in that the number of forensic interviewers is not adequate to cover the cases reported. Another challenge is that most legal systems are not child-oriented. Incorporation of the protocol in with CVSA will take a systemic change. Portugal has recently initiated the process of adopting the protocol within their legal system recording

improvement in judicial processes. This will inform change in legal policy in handling of CVSA.

- 4) Multi-disciplinary approach when handling CVSAs so as to offer support from different fields even when testing credibility. This would mean integration of scientific social research on CVSAs to inform the judicial process. Further, involvement of forensic child psychiatrist to support both the CVSA and the court during trial. It is high time the justice sector invited the participation of other stakeholder when looking at psycho-legal issues towards the protection and welfare of the child.

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APPENDICES

APPENDIX A: QUESTIONNAIRE FOR MAGISTRATES (SEXUAL OFFENCES ACT MATTERS)

Research Title: An Inquiry on Credibility Assessment of Child Victims of Sexual Abuse (CVSA) in Kenyan Courts.

Researcher: Agnes Nzisa Rogo, University of Nairobi

If you consent to taking part in the research, kindly proceed to fill in the questions below.

1. Gender:

___ Male

___ Female

2. Where is your duty station? _____

3. How many years have you been handling cases of child victims of sexual abuse (CVSA?)

4. What factors determine the credibility of CVSA?

5. What are your concerns about the credibility assessment of CVSAs?

6. Does the Kenyan law adequately address concerns about credibility assessment of CVSA?

Explain briefly considering the best interests of the child.

7. In your observation, what challenges do CVSA experience in the use of the *voire dire* test to determine competency/credibility in court?

8. What is your opinion on the existing credibility criteria of CVSA with regard to:

a) Non-discrimination

b) Protection

c) Respect of the views of the child

9. What is your understanding of “child forensic interview”?

10. What suggestions can you make to enhance CVSA's support during credibility test with regard to:

- a) Non-discrimination _____
- b) Protection _____
- c) Respect of the views of the child _____

Any other useful information that you deem useful in credibility testing of

CVSAs? _____

APPENDIX B

GUIDELINES ON JUSTICE MATTERS INVOLVING CHILD VICTIMS AND WITNESSES OF CRIME

Adopted by the Economic and Social Council in its resolution 2005/20 of 22 July 2005 I

Guidelines on Justice Matters involving Child Victims and Witnesses of Crime

Adopted by the Economic and Social Council in its resolution 2005/20 of 22 July 2005

I. Objectives

1. The present Guidelines on Justice for Child Victims and Witnesses of Crime set forth good practice based on the consensus of contemporary knowledge and relevant international and regional norms, standards and principles.
2. The Guidelines should be implemented in accordance with relevant national legislation and judicial procedures as well as take into consideration legal, social, economic, cultural and geographical conditions. However, States should constantly endeavour to overcome practical difficulties in the application of the Guidelines.
3. The Guidelines provide a practical framework to achieve the following objectives:
 - (a) To assist in the review of national and domestic laws, procedures and practices so that these ensure full respect for the rights of child victims and witnesses of crime and contribute to the implementation of the Convention on the Rights of the Child,¹ by parties to that Convention;
 - (b) To assist Governments, international organizations, public agencies, non- governmental and community-based organizations and other interested parties in designing and implementing legislation, policy, programmes and practices that address key issues related to child victims and witnesses of crime;
 - (c) To guide professionals and, where appropriate, volunteers working with child victims

and witnesses of crime in their day-to-day practice in the adult and juvenile justice process at the national, regional and international levels, consistent with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power;

(d) To assist and support those caring for children in dealing sensitively with child victims and witnesses of crime.

4. In implementing the Guidelines, each jurisdiction should ensure that adequate training, selection and procedures are put in place to protect and meet the special needs of child victims and witnesses of crime, where the nature of the victimization affects categories of children differently, such as sexual assault of children, especially girls.

5. The Guidelines cover a field in which knowledge and practice are growing and improving. They are neither intended to be exhaustive nor to preclude further development, provided it is in harmony with their underlying objectives and principles.

6. The Guidelines could also be applied to processes in informal and customary systems of justice such as restorative justice and in non-criminal fields of law including, but not limited to, custody, divorce, adoption, child protection, mental health, citizenship, immigration and refugee law.

II. Special considerations

7. The Guidelines were developed:

(a) Cognizant that millions of children throughout the world suffer harm as a result of crime and abuse of power and that the rights of those children have not been adequately recognized and that they may suffer additional hardship when assisting in the justice process;

(b) Recognizing that children are vulnerable and require special protection appropriate to their age, level of maturity and individual special needs;

(c) Recognizing that girls are particularly vulnerable and may face discrimination at all

stages of the justice system;

(d) reaffirming that every effort must be made to prevent victimization of children, including through implementation of the Guidelines for the Prevention of Crime;²

(e) Cognizant that children who are victims and witnesses may suffer additional hardship if mistakenly viewed as offenders when they are in fact victims and witnesses;

(f) Recalling that the Convention on the Rights of the Child sets forth requirements and principles to secure effective recognition of the rights of children and that the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power sets forth principles to provide victims with the right to information, participation, protection, reparation and assistance;

(g) Recalling international and regional initiatives that implement the principles of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, including the *Handbook on Justice for Victims and the Guide for Policy Makers on the Declaration of Basic Principles*, both issued by the United Nations Office for Drug Control and Crime Prevention in 1999;

(h) Recognizing the efforts of the International Bureau for Children's Rights in laying the groundwork for the development of guidelines on justice for child victims and witnesses of crime;

(i) Considering that improved responses to child victims and witnesses of crime can make children and their families more willing to disclose instances of victimization and more supportive of the justice process;

(j) Recalling that justice for child victims and witnesses of crime must be assured while safeguarding the rights of accused and convicted offenders;

(k) Bearing in mind the variety of legal systems and traditions, and noting that crime is increasingly transnational in nature and that there is a need to ensure that child victims and

witnesses of crime receive equivalent protection in all countries.

III. Principles

8. As stated in international instruments and in particular the Convention on the Rights of the Child as reflected in the work of the Committee on the Rights of the Child, and in order to ensure justice for child victims and witnesses of crime, professionals and others responsible for the well-being of those children must respect the following cross-cutting principles:

(a) *Dignity*. Every child is a unique and valuable human being and as such his or her individual dignity, special needs, interests and privacy should be respected and protected;

(b) *Non-discrimination*. Every child has the right to be treated fairly and equally, regardless of his or her or the parent's or legal guardian's race, ethnicity, colour, gender, language, religion, political or other opinion, national, ethnic or social origin, property, disability and birth or other status;

(c) *Best interests of the child*. While the rights of accused and convicted offenders should be safeguarded, every child has the right to have his or her best interests given primary consideration. This includes the right to protection and to a chance for harmonious development:

(i) *Protection*. Every child has the right to life and survival and to be shielded from any form of hardship, abuse or neglect, including physical, psychological, mental and emotional abuse and neglect;

(ii) *Harmonious development*. Every child has the right to a chance for harmonious development and to a standard of living adequate for physical, mental, spiritual, moral and social growth. In the case of a child who has been traumatized, every step should be taken to enable the child to enjoy healthy development;

(d) *Right to participation*. Every child has, subject to national procedural law, the right to express his or her views, opinions and beliefs freely, in his or her own words, and to contribute

especially to the decisions affecting his or her life, including those taken in any judicial processes, and to have those views taken into consideration according to his or her abilities, age, intellectual maturity and evolving capacity.

IV. Definitions

9. Throughout these Guidelines, the following definitions apply:

(a) “Child victims and witnesses” denotes children and adolescents, under the age of 18, who are victims of crime or witnesses to crime regardless of their role in the offence or in the prosecution of the alleged offender or groups of offenders;

(b) “Professionals” refers to persons who, within the context of their work, are in contact with child victims and witnesses of crime or are responsible for addressing the needs of children in the justice system and for whom these Guidelines are applicable. This includes, but is not limited to, the following: child and victim advocates and support persons; child protection service practitioners; child welfare agency staff; prosecutors and, where appropriate, defence lawyers; diplomatic and consular staff; domestic violence programme staff; judges; court staff; law enforcement officials; medical and mental health professionals; and social workers;

(c) “Justice process” encompasses detection of the crime, making of the complaint, investigation, prosecution and trial and post-trial procedures, regardless of whether the case is handled in a national, international or regional criminal justice system for adults or juveniles, or in a customary or informal system of justice;

(d) “Child-sensitive” denotes an approach that balances the child’s right to protection and that takes into account the child’s individual needs and views.

V. The right to be treated with dignity and compassion

10. Child victims and witnesses should be treated in a caring and sensitive manner throughout the justice process, taking into account their personal situation and immediate needs, age, gender,

disability and level of maturity and fully respecting their physical, mental and moral integrity.

11. Every child should be treated as an individual with his or her individual needs, wishes and feelings.

12. Interference in the child's private life should be limited to the minimum needed at the same time as high standards of evidence collection are maintained in order to ensure fair and equitable outcomes of the justice process.

13. In order to avoid further hardship to the child, interviews, examinations and other forms of investigation should be conducted by trained professionals who proceed in a sensitive, respectful and thorough manner.

14. All interactions described in these Guidelines should be conducted in a child-sensitive manner in a suitable environment that accommodates the special needs of the child, according to his or her abilities, age, intellectual maturity and evolving capacity. They should also take place in a language that the child uses and understands.

VI. The right to be protected from discrimination

15. Child victims and witnesses should have access to a justice process that protects them from discrimination based on the child's, parent's or legal guardian's race, colour, gender, language, religion, political or other opinion, national, ethnic or social origin, property, disability and birth or other status.

16. The justice process and support services available to child victims and witnesses and their families should be sensitive to the child's age, wishes, understanding, gender, sexual orientation, ethnic, cultural, religious, linguistic and social background, caste, socio-economic condition and immigration or refugee status, as well as to the special needs of the child, including health, abilities and capacities. Professionals should be trained and educated about such differences.

17. In certain cases, special services and protection will need to be instituted to take account of

gender and the different nature of specific offences against children, such as sexual assault involving children.

18. Age should not be a barrier to a child's right to participate fully in the justice process. Every child should be treated as a capable witness, subject to examination, and his or her testimony should not be presumed invalid or untrustworthy by reason of the child's age alone as long as his or her age and maturity allow the giving of intelligible and credible testimony, with or without communication aids and other assistance.

VII. The right to be informed

19. Child victims and witnesses, their parents or guardians and legal representatives, from their first contact with the justice process and throughout that process, should be promptly and adequately informed, to the extent feasible and appropriate, of, inter alia:

(a) The availability of health, psychological, social and other relevant services as well as the means of accessing such services along with legal or other advice or representation, compensation and emergency financial support, where applicable;

(b) The procedures for the adult and juvenile criminal justice process, including the role of child victims and witnesses, the importance, timing and manner of testimony, and ways in which "questioning" will be conducted during the investigation and trial;

(c) The existing support mechanisms for the child when making a complaint and participating in the investigation and court proceedings;

(d) The specific places and times of hearings and other relevant events;

(e) The availability of protective measures;

(f) The existing mechanisms for review of decisions affecting child victims and witnesses;

(g) The relevant rights for child victims and witnesses pursuant to the Convention on the Rights of the Child and the Declaration of Basic Principles of Justice for Victims of Crime and

Abuse of Power.

20. In addition, child victims, their parents or guardians and legal representatives should be promptly and adequately informed, to the extent feasible and appropriate, of:

(a) The progress and disposition of the specific case, including the apprehension, arrest and custodial status of the accused and any pending changes to that status, the prosecutorial decision and relevant post-trial developments and the outcome of the case;

(b) The existing opportunities to obtain reparation from the offender or from the State through the justice process, through alternative civil proceedings or through other processes.

VIII. The right to be heard and to express views and concerns

21. Professionals should make every effort to enable child victims and witnesses to express their views and concerns related to their involvement in the justice process, including by:

(a) Ensuring that child victims and where appropriate witnesses are consulted on the matters set forth in paragraph 19 above;

(b) Ensuring that child victims and witnesses are enabled to express freely and in their own manner their views and concerns regarding their involvement in the justice process, their concerns regarding safety in relation to the accused, the manner in which they prefer to provide testimony and their feelings about the conclusions of the process;

(c) Giving due regard to the child's views and concerns and, if they are unable to accommodate them, explain the reasons to the child.

IX. The right to effective assistance

22. Child victims and witnesses and, where appropriate, family members should have access to assistance provided by professionals who have received relevant training as set out in paragraphs 40 to 42 below. This may include assistance and support services such as financial, legal, counselling, health, social and educational services, physical and psychological recovery services

and other services necessary for the child's reintegration. All such assistance should address the child's needs and enable him or her to participate effectively at all stages of the justice process.

23. In assisting child victims and witnesses, professionals should make every effort to coordinate support so that the child is not subjected to excessive interventions.

24. Child victims and witnesses should receive assistance from support persons, such as child victim/witness specialists, commencing at the initial report and continuing until such services are no longer required.

25. Professionals should develop and implement measures to make it easier for children to testify or give evidence to improve communication and understanding at the pre-trial and trial stages. These measures may include:

- (a) Child victim and witness specialists to address the child's special needs;
- (b) Support persons, including specialists and appropriate family members to accompany the child during testimony;
- (c) Where appropriate, to appoint guardians to protect the child's legal interests.

X. The right to privacy

26. Child victims and witnesses should have their privacy protected as a matter of primary importance.

27. Information relating to a child's involvement in the justice process should be protected. This can be achieved through maintaining confidentiality and restricting disclosure of information that may lead to identification of a child who is a victim or witness in the justice process.

28. Measures should be taken to protect children from undue exposure to the public by, for example, excluding the public and the media from the courtroom during the child's testimony, where permitted by national law.

XI. The right to be protected from hardship during the justice process

29. Professionals should take measures to prevent hardship during the detection, investigation and prosecution process in order to ensure that the best interests and dignity of child victims and witnesses are respected.

30. Professionals should approach child victims and witnesses with sensitivity, so that they:

(a) Provide support for child victims and witnesses, including accompanying the child throughout his or her involvement in the justice process, when it is in his or her best interests;

(b) Provide certainty about the process, including providing child victims and witnesses with clear expectations as to what to expect in the process, with as much certainty as possible. The child's participation in hearings and trials should be planned ahead of time and every effort should be made to ensure continuity in the relationships between children and the professionals in contact with them throughout the process;

(c) Ensure that trials take place as soon as practical, unless delays are in the child's best interest. Investigation of crimes involving child victims and witnesses should also be expedited and there should be procedures, laws or court rules that provide for cases involving child victims and witnesses to be expedited;

(d) Use child-sensitive procedures, including interview rooms designed for children, interdisciplinary services for child victims integrated in the same location, modified court environments that take child witnesses into consideration, recesses during a child's testimony, hearings scheduled at times of day appropriate to the age and maturity of the child, an appropriate notification system to ensure the child goes to court only when necessary and other appropriate measures to facilitate the child's testimony.

31. Professionals should also implement measures:

(a) To limit the number of interviews: special procedures for collection of evidence from

child victims and witnesses should be implemented in order to reduce the number of interviews, statements, hearings and, specifically, unnecessary contact with the justice process, such as through use of video recording;

(b) To ensure that child victims and witnesses are protected, if compatible with the legal system and with due respect for the rights of the defence, from being cross-examined by the alleged perpetrator: as necessary, child victims and witnesses should be interviewed, and examined in court, out of sight of the alleged perpetrator, and separate courthouse waiting rooms and private interview areas should be provided;

(c) To ensure that child victims and witnesses are questioned in a child-sensitive manner and allow for the exercise of supervision by judges, facilitate testimony and reduce potential intimidation, for example by using testimonial aids or appointing psychological experts.

XII. The right to safety

32. Where the safety of a child victim or witness may be at risk, appropriate measures should be taken to require the reporting of those safety risks to appropriate authorities and to protect the child from such risk before, during and after the justice process.

33. Professionals who come into contact with children should be required to notify appropriate authorities if they suspect that a child victim or witness has been harmed, is being harmed or is likely to be harmed.

34. Professionals should be trained in recognizing and preventing intimidation, threats and harm to child victims and witnesses. Where child victims and witnesses may be the subject of intimidation, threats or harm, appropriate conditions should be put in place to ensure the safety of the child. Such safeguards could include:

(a) Avoiding direct contact between child victims and witnesses and the alleged perpetrators at any point in the justice process;

- (b) Using court-ordered restraining orders supported by a registry system;
- (c) Ordering pre-trial detention of the accused and setting special “no contact” bail conditions;
- (d) Placing the accused under house arrest;
- (e) Wherever possible and appropriate, giving child victims and witnesses protection by the police or other relevant agencies and safeguarding their whereabouts from disclosure.

XIII. The right to reparation

35. Child victims should, wherever possible, receive reparation in order to achieve full redress, reintegration and recovery. Procedures for obtaining and enforcing reparation should be readily accessible and child-sensitive.

36. Provided the proceedings are child-sensitive and respect these Guidelines, combined criminal and reparations proceedings should be encouraged, together with informal and community justice procedures such as restorative justice.

37. Reparation may include restitution from the offender ordered in the criminal court, aid from victim compensation programmes administered by the State and damages ordered to be paid in civil proceedings. Where possible, costs of social and educational reintegration, medical treatment, mental health care and legal services should be addressed. Procedures should be instituted to ensure enforcement of reparation orders and payment of reparation before fines.

XIV. The right to special preventive measures

38. In addition to preventive measures that should be in place for all children, special strategies are required for child victims and witnesses who are particularly vulnerable to recurring victimization or offending.

39. Professionals should develop and implement comprehensive and specially tailored strategies and interventions in cases where there are risks that child victims may be victimized further.

These strategies and interventions should take into account the nature of the victimization, including victimization related to abuse in the home, sexual exploitation, abuse in institutional settings and trafficking. The strategies may include those based on government, neighbourhood and citizen initiatives.

XV. Implementation

40. Adequate training, education and information should be made available to professionals, working with child victims and witnesses with a view to improving and sustaining specialized methods, approaches and attitudes in order to protect and deal effectively and sensitively with child victims and witnesses.

41. Professionals should be trained to effectively protect and meet the needs of child victims and witnesses, including in specialized units and services.

42. This training should include:

- (a) Relevant human rights norms, standards and principles, including the rights of the child;
- (b) Principles and ethical duties of their office;
- (c) Signs and symptoms that indicate crimes against children;
- (d) Crisis assessment skills and techniques, especially for making referrals, with an emphasis placed on the need for confidentiality;
- (e) Impact, consequences, including negative physical and psychological effects, and trauma of crimes against children;
- (f) Special measures and techniques to assist child victims and witnesses in the justice process;
- (g) Cross-cultural and age-related linguistic, religious, social and gender issues;

(h) Appropriate adult-child communication skills;

(i) Interviewing and assessment techniques that minimize any trauma to the child while maximizing the quality of information received from the child;

(j) Skills to deal with child victims and witnesses in a sensitive, understanding, constructive and reassuring manner;

(k) Methods to protect and present evidence and to question child witnesses;

(l) Roles of, and methods used by, professionals working with child victims and witnesses.

43. Professionals should make every effort to adopt an interdisciplinary and cooperative approach in aiding children by familiarizing themselves with the wide array of available services, such as victim support, advocacy, economic assistance, counselling, education, health, legal and social services. This approach may include protocols for the different stages of the justice process to encourage cooperation among entities that provide services to child victims and witnesses, as well as other forms of multidisciplinary work that includes police, prosecutor, medical, social services and psychological personnel working in the same location.

44. International cooperation should be enhanced between States and all sectors of society, both at the national and international levels, including mutual assistance for the purpose of facilitating collection and exchange of information and the detection, investigation and prosecution of transnational crimes involving child victims and witnesses.

45. Professionals should consider utilizing the present Guidelines as a basis for developing laws and written policies, standards and protocols aimed at assisting child victims and witnesses involved in the justice process.

46. Professionals should be enabled to periodically review and evaluate their role, together with other agencies in the justice process, in ensuring the protection of the rights of the child and the effective implementation of the present Guidelines.

APPENDIX C

REVISED INVESTIGATIVE INTERVIEW PROTOCOL

Revised Investigative Interview

Protocol Version 2014

Introduction

My name is [name]. Today's date is [date], and it is now [time]. I'm interviewing [child's name] at [location].

Verify that the recorder is on.

Hello, [child's name], I am glad to meet you today, How are you?

My name is _____ and my job is to talk to children about things that have happened to them.

As you can see, we have a video-camera here. It will record us talking so I can remember everything you tell me. Sometimes I forget things and the recorder allows me to listen to you without having to write everything down.

In the introduction, gestures of goodwill are appropriate:

Are you comfortable?

Can I do anything to make you more comfortable?

A. Rapport building and narrative training

B.1 Now, [child's name], I want to get to know you better. Tell me about things you like to do.

Wait for child to respond

If the child responds, express appreciation and reinforcement:

Thank you for sharing that with me, it helps me get to know you. I am glad I am starting to get to know more about you.

Then skip to B.3, if you think the child should go directly into narrative training from here.

If the child does not answer, gives a short answer, or gets stuck, you can say: I know this is the first time we have met and I really want to know about you. I am glad I can talk to you today [Child's name].

Skip to B.2, if you think more rapport building is necessary.

If the child displays nonverbal cues of avoidance or resistance (e.g., gaze aversion), address it right away:

[Child's name], let me see your eyes.

[Child's name], go ahead and sit closer to me.

[Child's name], I can see you're [crying, quiet], tell me what is happening so I can help.

[Child's name], thanks for letting me listen to you today. Please tell me about what you're going through.

B.2 I really want to know you better [child's name]. I would like you to tell me about things you like to do at school, during recess, after school].

Wait for an answer

If the child continues showing avoidance or resistance:

Invite him/her to talk about a neutral topic chosen before the interview began (e.g., child's caregiver may have been asked to report about activities the child enjoys):

I heard you like [activity, hobby]. Tell me about [activity, hobby].

Ask about distinctive items (e.g., of clothing):

I can see you are wearing [a unique item, e.g., soccer team T-shirt]. Tell me about [that item].

Offer the child the opportunity to draw (See "Rapport Building Drawing Supplement" Appendix 1): [Child's name] would you like to draw a picture of something [you like to do, something fun that happened]? Here are some crayons and paper for you.

B.3 Now, [child's name], Tell me more about [activity the child already mentioned].

*Avoid TV shows, videos or
fantasy. Wait for an answer.*

B.4 [Child's name], Tell me about something fun that has happened to you [at school,
kindergarten]?

B.5 Tell me about [something the child mentioned]. Use various invitations to ask about
different topics; one of those invitations should focus on internal contents: thoughts, feelings,
sensations, or emotions.

APPENDIX D

TEN STEP INVESTIGATIVE INTERVIEW

Thomas D. Lyon, J.D., Ph.D. tlyon@law.usc.edu © 2005 (version 2) (Adaptation of the NICHD Investigative Interview Protocol)

1. DON'T KNOW instruction

If I ask you a question and you don't know the answer, then just say, "I don't know."

So if I ask you "What is my dog's name?" what do you say?

OK, because you don't know.

But what if I ask you "Do you have a dog?"

OK, because you do know.

2. DON'T UNDERSTAND instruction

If I ask you a question and you don't know what I mean or what I'm saying, you can say, "I don't know what you mean." I will ask it a different way.

So if I ask you "What is your gender?" what do you say?

That's because "gender" is a hard word. So I would say, "Are you a boy or a girl?"

3. YOU'RE WRONG instruction

Sometimes I make mistakes or say the wrong thing. When I do, you can tell me that I am wrong.

So if I say, "You are thirty years old," what do you say?

OK, so how old are you?

4. IGNORANT INTERVIEWER instruction

I don't know what's happened to you.

I won't be able to tell you the answers to my questions.

5. PROMISE TO TELL THE TRUTH

It's really important that you tell me the truth. Do you promise that you will tell me the truth? Will you tell me any lies?

6. PRACTICE NARRATIVES

LIKE TO DO/DON'T LIKE TO DO

First, I'd like you to tell me about things you LIKE to do.

Follow up with TELL ME MORE questions.

e.g., "You said you like to play soccer. Tell me more about soccer."

Now tell me about the things you DON'T LIKE to do.

Follow up with TELL ME MORE questions.

LAST BIRTHDAY

Now tell me about your last birthday. Tell me everything that happened.

FOLLOW UP with WHAT HAPPENED NEXT questions.

e.g., "You said you played in the bouncy. What did you do next?"

7. ALLEGATION

(If child discloses abuse, go directly to ALLEGATION FOLLOW UP. Determine IN ADVANCE which allegation questions you will ask.)

- a. Tell me why I came to talk to you.

Or, Tell me why you came to talk to me.

It's really important for me to know why I came to talk to you/you came to talk to me.

- b. I heard you saw

e.g., “I heard you saw a policeman last week. Tell me what you talked about.”

c. Someone’s worried

e.g., “Is your mom worried that something may have happened to you? Tell me what she is worried about.”

d. Someone bothered you

e.g., “I heard that someone might have bothered you. Tell me everything about that.”

e. Something wasn’t right

e.g., “I heard that someone may have done something to you that wasn’t right. Tell me everything about that.”

8. ALLEGATION FOLLOW UP

You said that (repeat allegation). Tell me everything that happened.

e.g., “You said that Uncle Bill hurt your pee-pee. Tell me everything that happened.”

9. Follow up with TELL ME MORE and WHAT HAPPENED NEXT questions

Avoid yes/no and forced-choice questions.

10. MULTIPLE INCIDENTS

Did (repeat allegation) happen one time or more than one time?

Tell me everything that happened the time you remember the most...

Tell me everything that happened the first time...

Tell me everything that happened the last time...

Was there another time