



Re-Victimizing Child Victims of Sexual Abuse: An Analysis of Post Trial Procedure and the Impact of Court Testimony on Child Victims of Sexual Abuse in Kenya

Dr.Scholastica Omondi

Department of Humanities and Social Sciences, Criminal Justice Studies, United States
International University: Nairobi-Africa

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ABSTRACT:- This article presents an analysis of post-trial procedure in child sexual abuse (CSA) cases and the effect of giving evidence by child victims of sexual abuse in Kenya. The paper is presented under the following headings: post testimony effects of the trial on child victims of sexual abuse (CVSA), court orders to protect CVSA after their testimony, concerns about CVSA safety and welfare after their testimony and some strengths of CSA trial procedure in Kenya. The analysis concludes that the Kenyan post-trial procedure lacks mechanisms of protecting CVSA and therefore leaves them more traumatized than before they testified. The paper recommends various measures to protect CVSA after they testify in court.

Keywords:- child, impact, post, procedure, testimony

I. INTRODUCTION

The presumption of innocence is an important pillar of the trial procedure in criminal cases. It has gained recognition worldwide and today places a heavy responsibility on anyone who seeks court protection to prove the guilt of the suspect by testifying in court. It is generally accepted that the trial must be conducted in public so that the trial judge's conduct can be open to public scrutiny as to the fairness of the procedure. The suspect under trial is granted several safeguards to ensure that the state does not arbitrarily violate his/her rights in the process of the trial. Such rights include the right to confront witnesses in court and cross examine them. Naturally therefore, witnesses are required to appear in court and give their evidence. Child victims of sexual abuse in Kenya are therefore required by law to testify in court in the presence of the accused person or his/her advocate who must have an opportunity to test the evidence through cross examination. Whereas such court appearance is necessary for the procedure to be seen as fair, it results into a miscarriage of justice in child sexual abuse cases by leaving the Child victim more traumatized than before the court testimony. This study was conducted in five selected children courts in Kenya by observing child victims of sexual abuse and interviewing some of them immediately after their testimony.

II. POST TESTIMONY EFFECTS OF THE TRIAL ON CVSA

The study found that the adversarial trial procedure in CSA re-victimizes CVSA as they testify. This confirms Temkin's argument that the adversarial trial procedure results into an institutionalized re-victimization of CVSA.¹ Subsequently, the already vulnerable and traumatized CVSA develops psychological and emotional disturbances which often have financial implications on CVSA's family. As a result, CVSA and their families have to deal with the traumatic effects of legal involvement at the expense of the system's negative impact on them. The study established that many CVSA developed behavioural disturbances after testifying in court. Behavioural disturbances refer to unusual behaviour inconsistent with the normal development of a child

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

following a traumatic event.² The following are some of the effects of the adversarial trial procedure that require CVSA to testify in court.

All CVSA reported detrimental effects of the court process to their education. Many CVSA reported a drop in their academic performance. This is attributed to the stress and psychological trauma that occupies their mind before, during and after the adversarial trial.³ In the words of one CVSA,

I could not perform well in school. I used to be between number one and three. Ever since I was required to go to court, my performance dropped to almost the bottom of the class. I kept on thinking about the court process, how it will end up. I did not know if the magistrate and the prosecutor would believe me. I feared that they might blame me like everybody else. I did not know if I would be jailed or not. Everyone told me that those who go to court are the ones who have committed offences and are jailed.⁴

The view of the above CVSA confirms the insensitivity of the adversarial trial procedure to CVSA's needs and best interest which should be the guiding principle in all matters concerning children in the administration of justice.

All CVSA interviewed said that they found it very difficult to handle the effects of the societal social stigma and embarrassment from their peers once they knew that CVSA were required to testify in court. Some CVSA reported being teased and mocked by their teachers for missing classes to attend court as a result of "engaging in bad manners". Consequently, many CVSA lost a number of school friends and neighbourhood playmates whose parents warned them not to associate with CVSA. In the words of one CVSA,

Many of my friends no longer want to be associated with me since they learnt that I was required to testify in court on CSA. Their parents warned them that I am a bad influence and so they should keep off. I therefore became lonely, I lost my playmates and I have nobody to talk to. I wish I never told anybody I was sexually abused. I wish I never testified in court. Now everybody knows about it.⁵

The study found that many CVSA experienced increased conflict and violence within the family as a result of having to testify in court in incest cases. Family members were divided on whether CVSA should testify or not. Some CVSA reported being blamed for lying in court so that the accused person could be jailed. Some siblings differed on whether the CVSA should testify or not so as to protect the accused person from being jailed. In addition, the conflict was about saving the family name from embarrassment and societal stigma associated with CSA. This study finding is consistent with the labeling theory which explains that negative labels on a child may destroy their esteem and negatively impact on their development and growth. It also confirms Herman and Hirschman's argument on family conflict and the stress CVSA undergo after testifying in incest cases.⁶

In one very severe case, the CVSA's grandmother demanded that the child leaves the home for having testified in court against her son who was a stepfather to the CVSA in a CSA case. Subsequently, the CVSA had to be separated from her mother and step siblings as the accused person was jailed. Unfortunately, there was no court order to protect the CVSA or ensure her welfare. As at the time of the interview, the CVSA was staying with her maternal grandmother. This case highlights the impact of CVSA involvement in the legal process and the lack of post-trial procedures that ensure their safety after they testify. The study finds that the criminal justice system is only interested in CVSA testimony as a supplier of information to keep the wheels of justice rolling. Immediately after they testify, CVSA become the forgotten party in the Kenyan justice system. The courts seem not concerned about the impact of their testimony and their safety.

80 % of CVSA told the study that after testifying in court, they lost trust in adults. Only 20 % of the CVSA felt that after testifying in court, they can still trust adults. This comprised of the group that had psycho-social support and felt better after testifying. In the words of one CVSA,

² E Stachowicz, Therapeutic Jurisprudence in Juvenile Drug Courts (2009)12 The Michigan Child Welfare Law Journal issue 3, 48, 59.

³ C Eastwood and W Patton, 'The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System' (2002) <<http://www.aic.gov.au/reports/eastwood.html>> accessed 16 February 2012.

⁴ Respondent number 1, a thirteen year old female CVSA interviewed in Eldoret on the 16th of November 2010.

⁵ Respondent no 2, sixteen year old female CVSA interviewed in Eldoret on the 19th of November 2010.

⁶ J L Herman and L Hirshman, *Father-Daughter Incest* (Harvard University Press 2000) 129.

Nobody believed that I was sexually abused. Not even my own family. They kept on blaming me for having invited the abuse. I was innocent but nobody seemed to understand. In court, the magistrate doubted my credibility and set the accused person free. The prosecutor asked me too many repeated questions. The accused person's advocate embarrassed me and said that I was lying to the court. Nobody came to my protection. They all watched and laughed. It is like they were in agreement to make me cry. How can I trust adults anymore? I cannot report any further abuse again to the police and the court. I would rather die silently than be subjected to this process again.⁷

The sentiments of CVSA above adequately reflect the pain and suffering of CVSA as they testify in CSA cases under the adversarial trial procedure in Kenya. It confirms that the adversarial trial procedure does not take into account the inadequacies of children and their inability to fully participate in the trial process which is not tailor made for their needs. It captures and reinstates the problem that this study sought to examine. Yet there is no post-testimony procedure through which the court can find out the impact of the court testimony on CVSA. The study found no avenue for feedback from CVSA to the court at all.

The court process left many CVSA with many unresolved issues and questions. CVSA did not understand whether it was the accused persons or them to be blamed for the abuse. They questioned the rationale for the oral testimony, publicity of the trial, cross examination, confrontation of the accused person, all protective of the accused person. They wondered whether the court really protects them or the accused person. Was it the CVSA to prove their innocence or tell their story? This and many more questions were left unanswered in the minds of CVSA after their testimony. The study finds that testifying in court under CSA trial system in Kenya causes more harm to CVSA. This study finding is consistent with Patton and Woods finding in Australia that CVSA who go through the adversarial trial procedure while testifying suffer more harm than those who do not.⁸

The post-trial effects of the adversarial system in CSA cases are not confined to CVSA alone. The study found that prosecutors, judges, magistrates, advocates are all negatively affected by the adversarial manner in which CSA cases are handled in Kenya. This confirms the effects of the adversarial system on everyone involved in the trial. In the words of a judicial officer in Queensland Australia,

I feel sick every time I put CVSA through the trial... it could be a written statement, video statement, audio statement, anything. I often feel sick until they have got through it and then sometimes they miss the main one and I have to rule that the charge be dropped or that the accused person is not guilty. When I think of it, I want to throw up. It might have taken a kid two years to get to that point and because in thirty seconds they cannot remember it, the whole charge goes. It is just so uncivilized. It is also archaic.⁹

Despite the above negative impact of adversarial testimony on CVSA, the study found that once CVSA testified, they ceased to be important in the trial process. There is no procedure of informing them of the subsequent progress of the case as victims. This is against CVSA's right to be informed of the progression of their case in their best interest. In addition, the study found that there was no mechanism of making sure that at the time of reading the court judgment, the CVSA are present in court to know the court's decision. It is up to CVSA and their families to find out whether the case is concluded and the court findings.

The study also found that the sentencing of the accused persons if found guilty does not take into account views and wishes of CVSA contrary to their right to have their views considered in matters affecting them. When the accused persons are acquitted, CVSA are not informed. The study found that in cases where CVSA are dissatisfied with the court finding as to the innocence of the accused person or the sentence if convicted, there is no mechanism that enables CVSA and their families to appeal against such findings. The post-trial procedure in CSA cases was described by many CVSA as a "blackout" to them since they never know what happens after they testify.

III. COURT ORDERS TO PROTECT CVSA AFTER THEIR TESTIMONY.

The study found that there are no procedural mechanisms to protect CVSA after testifying. From the interviews, FGD, court record perusals and observations, the study established that the children courts do not

⁷ Respondent no 3, fourteen year old female CVSA interviewed in Mombasa on the 8th of September.

⁸ C Eastwood and W Patton, 'The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System' (2002) <<http://www.aic.gov.au/reports/eastwood.html>> accessed 16 February 2012.

⁹ J K Saywitz et al, Children's Knowledge of Legal Terminology in Language and Human Behaviour (American Psychological Association Press 1990) 14, 523-35..

make any protective or follow-up orders at all to ensure the welfare of CVSA after they testified. The courts seemed to be more interested on the evidence of CVSA, after which the focus shifts back to the accused person. This is consistent with the traditional perception of the role of the criminal justice system.¹⁰ It is a confirmation that the Kenyan trial system is the classic adversarial trial procedure that relegates the victims concern's on CSA matters. The constitutional provision of the best interest of the child principle¹¹ does not appear to guide the courts in matters concerning children.

This point was well illustrated by an incident in Nakuru where a 12 year old CVSA was observed by the study testifying with difficulty against the father in an incest case. She appeared nervous, terrified and hesitant to give evidence. However, it was observed that at the end of the testimony, the court never gave any order at all as to where the child would stay or any other protective orders. Since the accused person was on bail and the CVSA had been brought to testify in court by the mother and the children officer, the CVSA was left exposed to possible revenge attacks by the accused person whom she had already testified against. In the absence of court protective orders, such CVSA are left to cope with the after effects of testifying in court and the possible family conflict that may ensue.

The court records further revealed that even after the acquittal or conviction of the accused persons, no further orders were made by the courts in respect of CVSA protection. The interviews revealed that one of the factors that discouraged CVSA and their families from testifying in court is that a conviction predisposed CVSA to a repeat of the abuse as a form of revenge by the accused person (once out of jail) or of his family.

An acquittal has the same effect, yet CVSA were not given protection orders to shield them from any contact, interference or harm by the accused person. This confirms Saywitz argument that CVSA need protection from the accused persons after their testimony due to their vulnerability and possibility of revenge attacks.¹²

Failure of the court to make follow up/ protective orders to shield CVSA from the accused persons after their testimony enhance CVSA's vulnerability and trauma beyond the court testimony.

Pickands,¹³ writing on the vulnerability of subordinate military female officers to rape by their senior male officers in the USA military, described the female victims as being vulnerable twofold. In the first instance, the female victims suffer harm from the unwanted sexual intercourse. They suffer loss of their dignity, personal integrity and honour.¹⁴ The use of force or coercion results into physical injuries which may be visible and psychological effects of being brutalized.¹⁵ Coercion completely overwhelms and subdues one's will. The psychological effects endure long after the disappearance of physical injuries. The victims are also robbed of their privacy by being deprived of the most private choice of choosing who and when to share herself with and in what circumstances.¹⁶

Pickands further argues that the victims are vulnerable by the fact that the law drags them to the courtroom and requires them to lay bare the intimate embarrassing details of the rape which they would wish to forget and keep secret to avoid societal stigma.¹⁷ For those who opt to keep the rape secret and fail to report to the police for prosecution to take place, they have to face the isolation of silent suffering without justice as a precaution against exposing themselves to the rigours of court process.¹⁸ From Pickands' explanation of vulnerability, victims of sexual abuse suffer during the violation and during the court process. This is due to a lack of

¹⁰ J Doran, *The Judicial Role in Criminal Proceedings* (Hart Publishing 2000)145.

¹¹ Kenya Gazette Supplement No 55 (The Constitution of Kenya) 2010 Part 2-The Bill of Rights.

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

¹² J K Saywitz et al, *Children's Knowledge of Legal Terminology in Language and Human Behaviour* (American Psychological Association Press 1990) 14, 523-35..

¹³ Pickands, N Alexande, eveille for Congress: A Challenge to Revise Rape Law in the Military. (William and Mary Law Review 2004) 2425 Vol.45/Issue 5 Article 9 <<http://scholarship.law.wm.edu/wmlr> vol45/iss5/9> accessed 12 April 2012.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

procedures that are sensitive to their special needs of compassion, sympathy, fair treatment, counseling, legal aid and psycho-social support after the legal process is over.¹⁹

Vulnerability of a witness has been described by Dennis thus;

The fact that such witnesses' experience as victims of crime, or their particular personality characteristics, or their susceptibility to intimidation, may mean that they are liable to suffer more than normal amount of stress associated with being a witness and are unlikely to be able to give best evidence without the help of certain protective measures.²⁰

Dennis' description of a vulnerable witness clearly indicates that the court process subjects sexual abuse victims to further victimization. This necessitates protective orders after their testimony. However, the study found that the Kenyan court procedure in CSA matters does not incorporate post-trial protection measures to protect CVSA after they testify.

Spencer and Flin,²¹ analyzing the adversarial criminal procedure in respect of children as lawyer and psychologist respectively, together present sound and realistic arguments on CVSA as vulnerable witnesses who require special protection measures after they testify in the adversarial trial of CSA. They argue that generally, the adversarial system of criminal trial is stressful to adults when giving evidence. This confirms the study finding that the situation is worse for child victims and witnesses who do not understand the court process. Accordingly, the courts need to issue protection orders to ensure the safety of CVSA after they testify.

At a conference by the Magistrates' Association in Britain²² prior to the reform of the English criminal procedure to accommodate child victim's needs, the magistrates observed that young CVSA often took cover under the court clerks' desks upon seeing the accused persons during trials of CSA cases due to lack of protective mechanisms. In one such case, a little girl experienced a total breakdown when she was asked to point at the man who sexually attacked her.²³ The case was adjourned to the following day when the court was informed that psychiatric treatment had to be arranged for her as she was unable to continue with the testimony.²⁴ In such cases, the consequence is that CVSA suffer post-traumatic stress disorder(PTSD) and fear revenge attacks or intimidation from the accused person.²⁵ This is confirmed by the words of a CVSA interviewed by the study in Nakuru who said:

I was defiled by a man well known to my family. Telling my parents about it was very difficult, but facing him in court was impossible as he stared at me directly which reminded me of the threats he issued to me after the abuse that if I tell anybody about it, he will punish me. I remembered the threat and felt like he was sexually assaulting me again in front of everyone in court who just kept quiet. Nobody came to my rescue. I could not testify at all and of course the accused person was set free.²⁶

The above case shows the need for children courts to ensure CVSA safety through court orders after they testify in court due to the nature of sexual abuse and the consequent vulnerability and safety concerns of CVSA.

Due to the social stigma associated with CSA in the African society, the study established that CVSA found it very difficult to narrate the embarrassing and off putting details of sexual abuse in front of a group of people in court. As a result CVSA need protection because narrating such details in court embarrasses not only them but also the accused person, members of his/her family, CVSA's family and many other people. This is consistent with the labeling theory. CVSA may therefore face rejection, loneliness and lack of support from those affected by their testimony in court. As one CVSA interviewed by the study said;

¹⁹ J L Herman and L Hirshman, *Father-Daughter Incest* (Harvard University Press 2000) 129.

²⁰ I H Dennis, *Law of Evidence* (Sweet & Maxwell 2007) 604.

²¹ R J Spencer and R Flin, *The Evidence of Children, Law and Psychology* (Blackstone Press Ltd 1998) 75.

²² Magistrates Association (1962) Memorandum on Criminal Procedure and Child Victims of Sexual Offences.

²³ J Plotnikoff, 'Support and Preparation of the Child Witness: Whose Responsibility?' (1990) 1 *Journal of Law and Practice*, 21-31.

²⁴ *Ibid.*

²⁵ D Whitcomb, E R Shapiro and L D Stellwagen, *When the Victim Is a Child: Issues for Judges and Prosecutors* (National Institute of Justice 1985)17.

²⁶ A 14 year old female CVSA .Respondent No.4 interviewed at Nakuru on the 14/11/2010.

making her repeat the details of what happened in front of strangers and the accused who just looked at her directly. The CVSA wondered why the accused was not asked any question by the magistrate or prosecutor. In her opinion, not the accused but the CVSA was on trial to prove her innocence. She swore never to testify again under such procedures due to the intimidatory cross examination by accused's advocates. The CVSA could not understand why everyone in court including the magistrate kept quiet as she went through the ordeal of cross examination.

Such sentiments of CVSA were confirmed by all respondents who were in agreement that the children court procedures under the adversarial system cause difficulties to CVSA and negatively affect their ability to testify in court against the abuser. Subsequently, some CVSA saw themselves as being the ones on trial for having allowed the abuse to occur despite the fact that they may not be in a position to stop the occurrence of the abuse. The post-trial procedures are not in the best interest of CVSA as they do not take into account the traumatic experience that CVSA are subjected to during their testimony. The lack of protective procedures is in disregard to the requirement by the United Nations Convention on the Rights of the Child that CVSA be protected beyond their testimony in court.

The focus group discussion, the court observations and the court file perusal confirmed that immediately CVSA give evidence in court, they are released with no orders as to follow up or about their special needs which ought to be addressed. The implication is that the CVSA is a mere supplier of information to the CJS as a witness whereas the case actually belongs to the state.

Immediately after their testimony, CVSA as actors in the justice process disappear from the stage and the curtains fall behind them, leaving the accused person, the magistrate, prosecutor and the lawyers as the key actors in the trial of child sexual abuse. Eventually, the court decision lacks input by CVSA. Many CVSA wondered how they would know the court decision and why the court does not ask for their opinion in terms of the final court decision and sentence.

The study therefore found that CVSA's right to information is violated under the post-trial procedure. The study concludes that the trial procedure is more concerned about establishing the guilt or otherwise of the accused person as opposed to mitigating the trauma occasioned to CVSA and concerns about justice in a balanced trial within the context of procedural justice. This explains why no protective or any other orders regarding the welfare of CVSA were made by the children courts either in observations, court records or from the interviews.

The study therefore finds that the post-trial procedure is inconsistent with the procedural justice in CSA trial since it neither ensures CVSA safety nor takes into account the wishes and views of CVSA. The post-trial procedure is therefore not in the best interest of CVSA, contrary to the best interest of child principle.

The study noted that the courts did not take into account the wishes of CVSA at all in their decisions, contrary to the provisions of the Children Act and the Constitution. The study found that CVSA had their own wishes which they would want the courts to grant if given an opportunity to be heard on the sentencing of accused persons in CSA.

Forty percent of CVSA said that the accused person should face justice and a harsh sentence should be passed on them. Thirty four percent of CVSA said that the accused persons should be given life imprisonment. Six percent of CVSA said that the accused persons should be subjected to corporal punishment. Six percent of CVSA suggested that the accused persons if convicted should be sentenced to death. Four percent of CVSA felt that the accused persons should be forgiven if they pleaded guilty to the charge, but should be jailed if they pleaded not guilty to the charge, but are found to have committed the offence for having subjected the CVSA to the trauma of proving their guilt by testifying in court. In this respect the CVSA appeared to be asking for plea bargaining, restorative justice and punitive sentence only as a last resort.

Two percent of the respondents, accounting for incest victims, felt that the accused persons should be released for fear of having given evidence that leads to the accused person's imprisonment. The study finding shows the dilemma of CVSA in incest related cases. Six percent of the CVSA could not say what they wanted to be done to the accused person, but hoped that the courts would fairly decide on the sentence. The concern by

CVSA that their views should be taken into account by the court is consistent with recommendations that judges should allow for, and give appropriate weight to, input at sentencing from victims of violent crimes.³⁰

The study found that the courts do not issue compensatory/financial assistance orders to CVSA. Ordinarily, such claims would be treated as civil claims regulated by the Civil Procedure Code for which a separate claim has to be filed in a civil court. The proceedings in the criminal trial of sexual abuse would therefore only serve as evidence of the fact that the victim has a claim against the respondent. However, under the United Nations Guidelines on Justice Matters Concerning Child Victims and Witnesses of Crime (UNGJMCCVWC), financial assistance and compensation of victims for damage occasioned by the crime is specifically provided for. The study however found that no court records showed that courts attempt to record the effects of the abuse on CVSA for purposes of compensation. Likewise, no financial computation is done by the courts to find out the financial implications of the abuse on CVSA and the family. On the contrary, the study found that all CVSA and their families incurred medical expenses in seeking treatment, reporting to the police, travelling to and from the court to testify and other related offences. Therefore, apart from the physical, psychological and emotional effects of CSA, CVSA and their families had to shoulder the financial burden as a consequence of the abuse.

The study also found that even in cases where the accused person was convicted, there are no court orders to compel the accused person to reimburse the expenses incurred by CVSA and their family. Neither the state nor the accused person takes responsibility for the financial burden. All CVSA suffered emotional and psychological trauma while undergoing the legal process. However, the study found that no court orders are issued to compel the government institutions to treat CVSA. In the absence of court orders that ensure CVSA receive psycho-social support, medical treatment and financial as well as legal aid, many CVSA and their families perceive the legal process as an additional baggage to be avoided if possible. The implication is that there could be many child victims of sexual abuse and their families who opt to suffer in silence instead of reporting to the criminal justice system. Such perception contributes to the public mistrust of the legal process, contrary to Kenya Vision 2030 which aims at increasing access to justice for all by the year 2030.

The study established that after conviction, CVSA or their families were not informed of the progress of the case. There were no measures to ensure that they gave their views during parole board hearings for release of the accused persons. In addition, there were no measures to ensure their safety upon the release of the accused person from jail. In one case in Bungoma County, an accused person attempted to sexually assault a neighbor's daughter, but the mother of the child reported the case to the police. The suspect was arrested and prosecuted, but he warned the victim and her mother and siblings against testifying in court against him. Four months later, the accused was set free for lack of sufficient evidence. Four days after the accused person's release, he was seen around the home of the victim and the following morning, the victim, her two sisters and their mother were found murdered in their house. Neighbours reported that the victim and their mother received death threats from the accused who was suspected to have killed them. The Director of the Witness Protection Agency was interviewed by a local television saying that the victims need to report such threats to the police so that they can be protected. This case raises several questions. Are ordinary members of the public aware of the existence and function of the Witness Protection Agency? Since the constitution provides for devolution of government services, are the services of the Witness Protection Agency devolved to the county level or is it only available in Nairobi as the capital city where the office is located? Is there a Witness Protection office and officer in Bungoma County? Does the court and the Witness Protection Agency work together? The constitution mandates Parliament to enact legislation to protect victims of crime. The Bungoma Killings is therefore a violation of the victims' constitutional right to protection

V. ANALYSIS OF THE STRENGTHS OF CSA TRIAL PROCEDURE IN KENYA

Despite the weaknesses of the post-trial procedures discussed above, the study noted some positive aspects of the children court procedures that enhance CVSA's ability to testify. These were found to be friendly to CVSA and in their best interest. They included the following measures;

Enactment of Substantive Laws that Provide for the Protection of Children.

The study found that Kenya has enacted laws aimed at protecting children from abuse and enhancing their participation in the justice process. These include the Constitution 2010, the Children Act, Sexual Offences

³⁰ President's Ronald Regan's Taskforce Report on Victims of Crime (US Government 1982)76-77

Act, Witness Protection Act and the amendment to the Evidence Act that did away with corroboration.³¹ These are however gains made in the substantive laws to protect CVSA. The goals of substantive laws can only be achieved through procedures as the vehicle of implementation. In the absence of procedures to protect the rights of CSA declared by the substantive laws, Kenya cannot take pride in enacting laws that protect CVSA for their implementation is jeopardized by a lack of protective procedural mechanisms.

The Establishment of Special Children Courts and Appointment of Magistrates to Preside over Children Matters.

As per the requirement of the Children Act,³² the judiciary has set up specialized courts to handle children cases known as children courts, some of which were the subject of this study. Generally, magistrates were friendly to CVSA although they lacked specific skills required in handling children such as child psychology and counseling.

Acknowledging their skills shortfall in as far as children matters are concerned, legal practitioners had taken some steps to equip themselves with basic skills in handling CVSA in the course of their work. Out of the thirty key informants, 26% had acquired the basic skills of handling CVSA through hands on experience, 34% through trainings and seminars, 20% through training on counseling skills, 2% through educational advancement to masters degree level, 14% had only read the relevant statutes such as the Constitution, Sexual Offences Act, Children's Act, Witness Protection Act, Amendments to the Evidence Act and the Criminal Procedure Code, and as such only had legal knowledge of what the law provides on issues of CSA. 3% of the officers had acquired several skills through internet searches on how other jurisdictions handle CSA.

Magistrates and judges had undertaken basic training on the Children's Act conducted by the judiciary, but they considered the training too basic to equip them with the full capacity to handle CVSA.

The study observed that a Nakuru based magistrate in charge of the children's court was quite helpful to CVSA and appeared to be concerned about their needs. The magistrate conducted the hearing in the chambers as opposed to the open court and was patient with CVSA and allowed them time to play as they testified. This action by the magistrate relaxed the court atmosphere and some young CVSA were able to testify without realizing that the focus of attention was on them. This distracted them from the effects of face to face contact with the accused person and the formal tense court atmosphere.

The study finds that there is need for the judiciary to develop a juvenile justice syllabus for training of all children court officers at the Judiciary Training Institute. It should be mandatory that before appointment to preside over children courts, judicial officers undergo training on how to handle children in the administration of justice. In addition, the Judicial Service Commission is mandated by the constitution to create special courts. Just like the commission has created lands and environment high court division, there is need to set up family division of the high court that is handled by judges specially skilled in family and children matters. This is important so that the high court decisions can guide the subordinate courts through its rulings. It is also important that such a division be created so as to develop jurisprudence in this area. Currently, what is referred to as the family division of the high court deals with probate and succession matters. While not undervaluing the importance of such matters, an effective family division of the high court needs to first of all address matters that affect the family while alive, before a member of the family dies, occasioning probate and succession. Children matters must be given the special attention that they deserve by this division. Indeed, this is the right high court division to issue and effect orders of child victim protection in liaison with the Witness Protection Agency.

Use of an Intermediary to take Evidence of a CVSA

The study noted that in one case in Mombasa, Criminal Case number 1827/2010, the trial magistrate applied the provisions of the Sexual Offences Act³³ to enable the evidence of a five year old CVSA be adduced in court by the CVSA's mother. This measure enabled the court to admit the evidence as opposed to acquitting the accused person for lack of evidence. However the practice was not uniform in all courts as other magistrates did not apply this provision showing a lack of uniform approach in CSA trial which the magistrates attributed to

³¹ The achievements by Kenya in the area of Substantive laws include the ratification of the UNCRC and the ACRWC as well as the passing of the Children Act 2001, amendment of the Evidence Act to remove the corroboration requirement in the evidence of children, the passing of the Sexual Offences Act and the Witness Protection Act.

³² The Children Act 2001. Section 73.

³³ The Sexual Offences Act 2006section 31(4) (b).

lack of guidelines and a comprehensive law on CSA trial. Whereas this measure protects CVSA while testifying, there was still the notable lack of court protection orders after the testimony. This leaves the CVSA exposed to dangers such as the Bungoma County incident discussed in this article.

Conference like Court set up and Witness Protection Box at Nairobi Children Court.

Whereas all the other courts still used the ordinary court set up with the magistrates' position raised above the ground to form a platform, probably to emphasize the power and authority of the court, the Nairobi Children's Court had a conference table set up where the magistrate shared the same table with all actors in the case in a conference like set up. This arrangement had the effect of reducing the tension associated with court environment, therefore more child friendly. It was the only court which was near child friendliness in its set up while in the other courts the set up was more like the ordinary courts, very intimidating to CVSA. Nairobi Children's Court was also the only court that had a witness protection box³⁴ in compliance with section 31(4)(a) of the Sexual Offences Act³⁵ to shield CVSA from direct face to face contact with the accused person during their testimony. However, the witness box was not being used for its intended purpose, but as a storage area for court files and exhibits, negating the purpose for which it was set up. Protection of CVSA should begin immediately the abuse is reported and continue even after the case is disposed of. The courts must ensure CVSA are protected beyond their court testimony and their welfare and safety secured.

Use of Magistrates' Private Chambers to Take Evidence of CVSA

Majority of the CSA cases were mentioned in the open courts but later moved to the private chambers of the magistrates for hearings. Whereas this kept away members of the public from the proceedings and balanced accused persons' right to a public trial with the CVSA right to protection, it retained the direct face to face contact between CVSA and the accused person in a more reduced proximity between them as a result of the smaller office space compared to the open court. The result was more intimidation of CVSA due to close proximity with the accused person. This measure therefore left the CVSA more traumatized and exposed to possible revenge from the accused. The courts therefore need to liaise with the Witness Protection Agencies to ensure post-trial safety of CVSA.

The Role of Non-Governmental Organizations (NGOs) in CSA Trial

The study found that NGOs play an important role in the provision of legal aid and psycho-social support service to CVSA. Their role was particularly vital since the courts had no arrangements to provide the crucial services to CVSA. The study noted that CVSA supported by NGOs were able to overcome some of the court challenges and give coherent evidence that assisted the court in arriving at a conviction. This was observed in Kisumu Criminal Case No. 498/2009 where the CVSA had the support of family members, some of whom testified in court and the accused person was convicted. Such services extended beyond the court testimony to ensure CVSA welfare, safety and security, but were limited to a few CVSA due to lack of resources.

Amendment of the Evidence Act to do away with Corroboration

Kenya amended the Evidence Act³⁶ to do away with corroboration making it possible for courts to convict an accused person based on the evidence of a child alone. The amendment therefore enhanced access to justice by CVSA. However, CVSA still need to appear in court to testify. The CVSA therefore needs protection to ensure their safety after their testimony.

VI. CONCLUSION

In concluding discussions in this article, the study finds that there are no formal post-trial procedures followed by the courts or any other criminal justice agency officials after the CVSA testify. The lack of protective post-trial measures enhances CVSA vulnerability and exposes them to further intimidation and abuse by the accused person or any other potential abuser. This is a violation of CVSA constitutional rights to protection and their best interest which the courts must be guided by. The post-trial procedure is therefore inconsistent with procedural justice for CSA trial and defeats the contemporary goal of criminal justice, which is

³⁴ The witness box was reportedly an innovation by a magistrate who presided over the court up to the year 2003 long before the Sexual Offences Act 2006 was passed. Section 31(4) (a) provides for a witness box to enable vulnerable witnesses testify in court.

³⁵ The Sexual Offences Act 2006

³⁶ The Evidence Act Cap 80 Laws of Kenya

to balance the rights of parties in a dispute as illustrated by the developments at the International Criminal Court (ICC).³⁷

VII. RECOMMENDATIONS

The study makes the following recommendations:

There is need to establish a procedural mechanism that ensures CVSA/family continuously receive information on the progress of the case even after they have testified.

The views of CVSA and their family concerning the sentencing of the accused person or their safety in cases of acquittal should be sought by the court, recorded and taken into account. Victim impact statement should be given more weight by the courts and considered in issuing post-trial protection orders.

It is important that the CVSA/family should be present in court when the judgment is made and the sentence is passed.

Every CVSA and family who testifies in court should receive psycho-social support to deal with the after effects of the legal process on CVSA and family. This should take place whether or not the accused person is found guilty or not.

There is need to conduct public awareness on the need for CVSA to testify in court so as to encourage public support of CVSA when they appear in the legal process. In addition, there is need for public education on CSA in schools so that children understand the effect of the abuse and support instead of ridicule their peers who are CVSA.

There is need for a change of attitude in the Kenyan society on discussing issues of sexuality with children. This would encourage CVSA to speak more confidently without the fear of being labeled by the society as bad children engaging in bad manners.

Finally, there is need to establish a mechanism through which if CVSA and their families are not happy with the court judgment or sentence, then they can appeal. The participation of CVSA in the CJS if properly conducted under a process that is sensitive to their needs may aid in their recovery as argued by Freud in his psychoanalytic theory which also views psychoanalysis as a therapy. An effective participation of CVSA in the legal process may increase their satisfaction with the CJS and provide an incentive for continued cooperation with it. In addition, CVSA's satisfactory participation in the legal process may enable the prosecutor, the judge and the society to have important information that is otherwise locked out from the truth seeking process.

The study recommends measures to protect all CVSA after their testimony irrespective of whether the accused person is found guilty or not. In this respect, courts should issue orders which ensure that all CVSA receive psycho-social treatment to protect them from the emotional and psychological effects of court testimony. The orders should clearly indicate that CVSA receive the treatment until such a time that they are found to have healed from the negative impact of testifying in court. In this respect, psycho-social support services should not only be availed to CVSA but to their families as well. In addition, the court order should clearly state the protection of CVSA from anyone who poses a danger to CVSA's safety.

In connection with the safety of CVSA, the court should appoint a guardian *ad litem* at the beginning of the trial. This is an advocate for CVSA whose duty it is to protect their best interest. The guardian must have a party status in the trial so that if there is anything that happens after CVSA testimony that threatens their safety, the guardian can go back to court and apply for further protection orders. This is the practice in the state of Michigan in the USA under The Child Abuse Prevention and Treatment Act of 1974.

The study recommends that courts should issue orders of risk assessment of likelihood of CSA occurring again to the specific CVSA by the accused person or any other person and issue appropriate orders.

The study recommends that Kenya shifts its focus of the CJS on the finding of guilt or otherwise of the accused person in CSA matters. The CJS should adopt the contemporary goal of dealing with the concerns of victims as well. In particular, courts should issue orders to probation officers to investigate the cause of the abuse so that it can be dealt with whether it relates to the accused person (e.g. accused person is an alcoholic or is

³⁷ The Rome Statute- U.N.DOC A/CONF.183/9 of 17 July 1998.

a paedophile) then appropriate treatment be ordered to protect other children from subsequent abuse by that particular accused person. Court orders to protect CVSA in this respect must compel the accused person upon conviction to seek appropriate treatment. In addition, the courts should issue orders to the children department to find out if it is the circumstances of the child that predispose CVSA to the abuse e.g. poor parenting, neglect and deal with the cause to protect the CVSA from future abuse by anybody else.

In issuing protective orders, courts should give CVSA and their families an opportunity to express themselves and give their views which must be taken into account in issuing such orders. In incest cases, CVSA may not wish to be re-united with the family. They may also require specialized care outside the home. This should be respected by the courts.

Courts must issue specific orders that prevent accused persons from having any contact with CVSA and their family after the court testimony. However, in incest cases, caution must be taken not to cause undue conflict and psychological trauma to the CVSA and family, although it is important to punish the accused person if found guilty. Other factors need to be taken into account. These include the impact of the court order on the family and the importance of psycho-social support to the entire family. Of paramount importance is the best interest of the child which should be the guiding principle in striking the delicate balance in incest cases. Where possible, re-unification of the family may be in the best interest of the child after the punishment of the offender.

Courts need to make follow up orders immediately after CVSA testify. This should include psycho-social services, medical treatment and financial aid to assist CVSA and family settle to normal development of the CVSA. Such follow up orders would ensure that CVSA readjust to normal life and continue with their education uninterrupted.

There is need for a multidisciplinary committee to handle the effects of CVSA involvement in the legal process. In this respect, there is need for the establishment of a CVSA protection unit.

There is need to provide measures that ensure CVSA protection by the criminal justice agencies. As an example, the Rhode Island constitution was amended in 1986 to provide that:

A victim of crime shall, as a matter of right, be treated by agents of the state with dignity, respect and sensitivity during all phases of the criminal justice process. Such person shall be entitled to receive, from the perpetrator of the crime, financial compensation for any injury or loss caused by the perpetrator of the crime, and shall receive such other compensation as the state may provide. Before sentencing, a victim shall have the right to address the court regarding the impact which the perpetrator's conduct has upon the victim.

In addition, the California constitution was amended in 1982 to provide amongst other things that;

All persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted from the crimes for losses they suffer. Restitution shall be ordered from the convicted persons in every case regardless of the sentence or disposition imposed, in which a crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary.

In conclusion Kenya is still far from effectively protecting CVSA and needs to take appropriate measures to ensure CVSA protection after they testify.

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