Quest Journals
Journal of Research in Humanities and Social Science
Volume 2 ~ Issue 3 (2014) pp: 38-60
ISSN(Online) : 2321-9467
www.questjournals.org

Research Paper

The Right to a Fair Trial and the Need to Protect Child Victims of Sexual Abuse: Challenges of Prosecuting Child Sexual Abuse under the Adversarial Legal System in Kenya

Dr. Scholastica Omondi (Ph. D)
Department of Humanities and Social Sciences, Criminal Justice Studies, United States International University- Africa, Nairobi, Kenya.

Received 07 March, 2014; **A**ccepted 24 March, 2014 © The author(s) 2014. Published with open access at **www.questjournals.org**

ABSTRACT:- *This study reviews literature on the rights of accused persons in criminal proceedings and the importance of protecting child victims of sexual abuse (CVSA)in child sexual abuse (CSA) trials under the adversarial legal system's procedures. The review is organized in seven different parts. The first part discusses the importance of protecting the rights of accused persons to a fair trial in criminal proceedings, while the second part reviews literature on the emerging need to safeguard the interests of victims of crime generally in criminal proceedings, by protecting their rights and being sensitive to their concerns.*
The third part analyses the unique challenges of prosecuting CSA under the classical adversarial court procedure while safeguarding accused persons' rights and the difficulties experienced by CVSA while testifying in CSA cases. The fourth part analyses challenges of protecting child victims of sexual abuse in Kenya.The fifth part is a summary of gaps identified by the literature review as occasioned by the lack of a balance between the rights of accused persons and the rights of CVSA. The sixth part is an examination of the rights of CVSA in CSA trial as well as their concerns which need to be taken into account if the trial is to be seen to be fair to them on an equal basis with the accused persons. In the seventh part, the study concludes with recognition of the importance of safeguarding the rights of accused persons which however creates an imbalance with the rights/ interests/concerns of CVSA. The study recommends balancing of the rights of CVSA with fair trial rights.

Keywords:- *children, fair, protection, rights, trial*

I. INTRODUCTION

The right to a fair trial in criminal proceedings is synonymous with the trial process itself and has over the centuries gained international recognition through codification in various international instruments following several years of implementation and practice. As early as 1789, the French Declaration of the Rights of Man provided for the presumption of innocence and prohibited the arbitrary arrest and detention of citizens, unless as authorized by law.[1] In 1791, the United States, through the 6th Amendment to the United States Constitution, provided that any person accused of any criminal conduct has a right to a speedy and public trial by an impartial jury, to be informed of the nature and cause of the charges against him/her, to confront witnesses against one and cross examine them, to have a compulsory process of obtaining one's own witnesses and a right to assistance of a defence counsel.

The right to a fair trial therefore has a long history and has to a large extent retained its original form over the years, indicative of its universal character and status as an important rule of customary international law.[2] Codified in the Universal Declaration of Human Rights under Article 10 after the Second World War, the right to a fair trial is today clearly defined in Articles 14 and 16 of the International Covenant on Civil and Political Rights (ICCPR).[3]The ICCPR provides for the basic right to a fair trial, presumption of innocence,

[1] R M K Smith, *International Human Rights* (Oxford Press, 2007) 235.
[2] D F J Curtis, *Introduction to International Human Rights Law* (CD Publishing, 2006) 13.
[3] The ICCPR was adopted by the UN General Assembly in 1966 and came into force on 23 March 1976.

minimum fair trial rights in criminal proceedings, prohibition of double jeopardy and the right to review of sentence /conviction by a higher court.[4]The right to a fair trial is one most extensive human right enshrined in more than one article by most human rights instruments.[5]It is one of the most litigated human rights and has attracted substantial case law on its interpretation as a fundamental right to accused persons in the criminal trial process as was the case in *Barker v Wingo*[6]where the United States Supreme Court held that the right to a speedy trial is a due process right that must be upheld in all criminal trials.

The central goal of the rights of accused persons to a fair trial is to ensure proper administration of justice. So important is the right of accused persons in a criminal trial that the judicial body/tribunal presiding over a case must be competent, independent and impartial in order to administer justice fairly. The fairness of such judicial bodies has been challenged by concerned human rights monitoring organs whenever there is reason to believe that the criminal process is not fair and the rights of accused persons have been violated.

As an example, the right to be heard in person is guaranteed by article 6(1) of the European Convention on Human Rights(ECHR).In the case of *Botten v Norway*[7]the European Court of Human Rights (ECtHR) held that the Supreme Court of Norway violated the applicant's right to be heard in person when it gave a new judgment,convicting and sentencing the applicant, without summoning or hearing him in person, despite the fact that the Supreme Court proceedings showed a public hearing in which the applicant was represented by a counsel. In the view of the ECtHR, the Supreme Court of Norway was under a duty to take positive measures to summon the applicant and hear evidence from him directly in person before passing judgment.The case demonstrates the seriousness with which the accused persons' rights in a criminal trial are treated by judicial and human rights bodies.

Sir John Smith, a Queens Counsel in England, writing on the importance of the evidentiary rules of the classical adversarial legal system in protecting innocent people from the serious consequences of jail, points out seven fundamental principles of a fair trial in any criminal procedure.[8] The principles, not listed in any order of priority are; the presumption of innocence, the right to silence, the passive role of the trial judge, oral evidence, the burden of proof, the standard of proof and the right to cross-examination by an accused person either in person or through a lawyer. The right to a fair trial as already discussed is amongst the principles pointed out by Smith and recognized not only in international instruments, but by many constitutions as well.[9]

In yet another example of the importance attached to fair trial rights, a report by Human Rights Watch (HRW)[10] criticized the Bolivian government for gross human rights violations based on a law[11] passed by the Bolivian Parliament in March 2010, allowing retroactive prosecution of leaders for corruption cases allegedly committed before the passing of the law, contrary to the freedom from *ex post facto* laws and retroactive application of heavier penalties than those that could be imposed when the crime was committed.[12]The same law[13] also allowed for the prosecution of suspects *in absentia* contrary to the right to a fair trial that accused persons must be present during their trial in order to defend themselves.

[4] Ibid. Article 14.

[5] Articles 3,7 and 26 of African Charter on Human and Peoples' Rights, Articles 5,6,and 7 of the European Convention on Human Rights, Articles 3,8,9 and 10 of the American Convention on Human Rights.

[6]Barker v Wingo, United States Supreme Court (1972) 407 U S, 514-515.

[7]Botten v Norway. Judgment of 19th February 1996 (50? 1994/497/579) <http://www.norway-coe.org/general/hr/echr/Cases-against-Norway/ECHR---Cases-against-Norway/2-CASE-OF-BOTTEN-v-NORWAY/> accessed 3 July 2012.

[8] J Smith, 'Evidence in Criminal Cases' in M McConville M and G Wilson (eds), The Handbook of The Criminal Justice Process (Oxford University Press, 2002) 183.

[9] Article 50 of the Kenya Constitution 2010, Section 28 of Uganda's Constitution, Section 119 of Tanzania's Constitution, Section 18 of Zimbabwe's Constitution.

[10] Human Rights Watch, World Report<http://www.hrw.org/word-report2011/Bolivia> accessed 3 July 2012.

[11] 'Law Against Corruption, Illicit Enrichment and the Investigation of Assets' (in Spanish) <www: business-anti-corruption.com/country profiles/latin-america-the Caribbean.bolivia/general-information/> accessed 3 July 2012.

[12] Retroactive and ex post facto legislation are contrary to fair trial rights under the international instruments.

[13] Op. cit n 11.

So concerned is the international community about the rights of accused persons that in October 2010, the Inter-American Court of Human Rights[14] found Bolivia responsible for multi-violations of human rights of suspects who disappeared during the military dictatorship of Hugo Banzer in the early 1970s.[15]The ECtHR, the top judicial body responsible for the protection of basic human rights and freedoms in Europe, also found Turkey responsible for gross violations of accused persons' right to fair trial in 126 out of 356 cases in the year 2009 which were too prolonged as to violate the right to a speedy trial.[16]

The African Charter on Human and Peoples Rights (ACHPR), adopted by the Organization of African Union (as it was known) in 1981, also provides for fair trial rights under Article 7 which contains many rights such as the right to appeal, presumption of innocence and trial within a reasonable time by an impartial tribunal/court as found in other human rights instruments. Although Article 7 does not expressly refer to the relevant components of a right to a fair trial as mentioned in the ICCPR,when read together with Article 60, it is clear that the provisions are to be interpreted broadly to include other components of fair trial as contained in the UDHR,ICCPR and other international instruments.

In Kenya, the rights of accused persons in criminal proceedings are protected by the Constitution of Kenya 2010[17] which echoes the provisions of ICCPR on fair trial rights. In a judgment delivered by the Kenyan Court of Appeal on 18th March 2011 to uphold the right of accused persons to a fair trial, the court held that accused persons have a right to the services of a lawyer at the government's expense in the case of *David Njoroge Macharia v Republic*.[18]Globally therefore, the rights of accused persons in criminal trials are accepted as fundamental principles of criminal trial which must be observed and protected by all concerned authorities.

Suffice it to say at this stage that accused persons' right to a fair trial is so well established as a cardinal rule of criminal procedure to which no derogation is permitted except where derogation is provided by the constitutions of various countries in times of public emergency. Derogation from the right to a fair trial is therefore only permissible in times of public emergency in some jurisdictions but not in Kenya; otherwise it is regarded as a peremptory norm of general international law from which no derogation is otherwise allowed.[19]Although the ICCPR and the American Convention on Human Rights (ACHR) do not list the right to fair trial among the non-derogable rights, the Constitution of Kenya 2010 includes the right to a fair trial amongst rights and freedoms that shall not be limited such as the freedom from torture, cruel, inhuman and degrading treatment or punishment, freedom from slavery or servitude and the right to an order of *habeas corpus*.[20]

Despite the universal consensus on the importance of upholding the rights of accused persons in criminal proceedings, there has been an appreciation and recognition of the need to take into consideration concerns and interests of victims of crime as well. The International Criminal Tribunal for the former Yugoslavia (ICTY), while observing the highest standard of fair trial in the case of *Prosecutor v Norman, Kallon and Gbao*[21] in which the applicants argued that their right to a fair trial was violated by delays in having witnesses testify, held that the right to an expeditious trial is not just a right of accused persons only but also

[14] The Inter-American Court of Human Rights is the highest tribunal on the Americas. It is an autonomous judicial institution based in the city of San Jose, Costa Rica. Together with the Inter-American Commission on Human Rights it forms the human rights protection system of the Organization of American States (OAS) .It serves to protect and uphold basic human rights and freedoms in the Americas. The Organization of Americas States refers to the following; Argentina, Barbados, Chile, Bolivia, Brazil, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras ,Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela.

[15] *Op. cit* n 10.

[16] European Court of Human Rights' Annual Report 2011 <http://|ecohr.wordpress.com|2011|01|11> accessed 3 July 2012).

[17] Constitution of Kenya 2010 Article 50.

[18] *David Njoroge Macharia v Republic* Criminal appeal 497 of 2007 <http://kenyalaw.org/CaseSearch/case_search_one.php?casParties=David+Njoroge+Macharia+v+Republic+&casSubject=&chk1=checkbox&casNumber=&casCourt=&casJudges=&casType=&casAdvocates=&casCitation=&casYear=&check_submit=1&submitter=Searching+.+.+.> accessed 3 July 2012.

[19] Articles 14(2) of the ICCPR, Article 15 of the European Convention on Human Rights, Article 27 of the American Convention on Human Rights.

[20] *Op. cit* n 17, Article 25(c).

[21] *Prosecutor v Norman, Kallon and Gbao* [2003] ICTY Case No.SCSL-2003-09-PT.

belongs to the victims of crime and the international community. The fact that the ICTY, recognized and ruled in favour of a balance between the accused persons rights and the rights of victims of crime was a major development in the jurisprudence of victims' concerns in the criminal proceedings. The next section of the paper reviews literature on the changing perception of criminal trials as processes that need to balance the rights of accused persons as well as victims of crime.

II. CONCERNS ABOUT VICTIMS OF CRIME IN CRIMINAL PROCEEDINGS

Concerns have been raised about the focus of criminal trials on the establishment of the guilt or innocence of the accused persons, while ignoring the interests of victims of crime who are key players in criminal proceedings since they play an important role in reporting crime, furnishing evidence, identifying the offender and testifying in court.[22] The reliance of the criminal justice process on the victim is therefore a powerful bargaining twist in the recognition of their interest and concerns.[23]

The criminal justice system has for a long time failed to recognize the burden it places on victims which hinders their accessibility to justice and sometimes causes them to withdraw from the criminal process, resulting into a limitation of its ability to pursue cases effectively.[24]The impact of the criminal justice process on the victim, in the absence of consideration of their needs, is according to Zedner[25] tantamount to secondary victimization of the victims. Some challenges faced by victims in the criminal justice process include inadequate provision of information, delays in the trial process, or unexplained decisions by police to drop a case without reference to victims.[26]

In Britain, the central organ of the victim movement, Victim Support, started as a local initiative in Bristol in 1974 and grew in the subsequent years. Noting that accused persons had clear rights in the criminal justice system, while the victims had none, the movement sought legislative changes for the promotion of victims' rights enforceable under the law. They demanded that victims should have a right to be heard, to be kept informed about the progress of their case, to be provided with information, be protected by law enforcement agencies and receive compensation, be treated with respect, recognition and provided with necessary support.

Subsequently, provision of services to victims became a central part of the criminal justice system policy in Britain, culminating into the Victim's Charter in 1990 which signified the advancement in recognition of victims' interests. It has since been reinforced by the publication of several Standards of Service for Victims such as the Crown Prosecution Service Statement on the Treatment of Victims and Witnesses (1993), the Court Users Charter (1994) and the Report on the Royal Commission on Criminal Justice (1993) whose recommendations sought to ensure that victims got better information about the progress of their case, that their views were obtained and considered and that they received proper facilities and assistance in court.

In 1996, a second Victim's Charter was developed in Britain, setting twenty seven standards which the various criminal justice agencies were to deliver to victims. Broadly, they are categorized into; provision of information to the victim, taking views of victim into account, treating the victim with respect and being sensitive to them in court as well as provision of support services. Concerns about victims' rights in Britain finally led to the enactment of the Youth Justice and Criminal Evidence Act of 1999.

In 1984, a report by the Attorney General's Task Force on Family Violence in USA,[27] urged parliament, judges and prosecutors to adopt new procedures for dealing with family violence which includes some aspects of child sexual abuse such as incest. Amongst the findings was that the court procedure was insensitive to child victims of sexual abuse (CVSA) in the trial of child sexual abuse(CSA) cases. The report recommended that the National Institute of Justice develops ways of reducing trauma of trial preparations and

[22] L Zedner, 'Victims' in M Maguire and R Morgan and R Reiner R(eds),The Oxford Handbook of Criminology (Oxford University Press, 2002) 419.
[23]Op. cit n 8.
[24]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.
[25]Op. cit n 11.
[26]R J Spencer and R Flin, The Evidence of Children, Law and Psychology (Blackstone Press Ltd, 1998) 75.
[27]Attorney General's TaskForce Report, 'Family&Relationships' (1984) <http://books.google.co.ke/books/about/Attorney-General-s-Task-Force-on-Family.html?id=BGRqAAAAMAAJ&redir-esc=y> accessed 3 July 2012.

court appearance to CVSA. The report emphasized the need for approaches that maintain the right of the accused persons and the integrity of the justice system, while addressing the needs of victims.

It was not only in the USA and Britain that victims' issues in the criminal process gathered momentum, but the concerns became widespread globally, culminating into the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) (DBPJVCAP)[28] by the United Nations, which spelt out rules on access to justice and fair treatment of victims of crime and abuse of power. Although not binding on state parties, the DBPJVCAP contains guidelines on fair treatment of child victims and witnesses of crime, an emphasis of the need to provide for child victims and witnesses of crime. In order to appreciate the plight of CVSA, the next section discusses problems which are unique to the trial of CSA while safeguarding the rights of accused persons under the adversarial system of procedure.

III. UNIQUE CHALLENGES IN PROSECUTING CSA AND THE IMBALANCE BETWEEN THE RIGHTS OF ACCUSED PERSONS AND CVSA UNDER THE ADVERSARIAL PROCEDURE.

Legal intervention to protect CVSA is mainly through criminal prosecution of the abuser which depends on several factors such as the seriousness of the abuse, whether the abuse is within the family or by a stranger and the ability of CVSA to narrate the abuse in court.[29]There is consensus that the appearance of children as victims of crime in criminal proceedings generally causes special problems to them due to their immaturity, sometimes resulting into traumatic experience according to Zedner, Whitcomb, Spencer and Flin amongst other authors.[30]According to the Office of the United Nations High Commissioner for Human Rights, although the United Nations Convention on the Rights of the Child (UNCRC) is a milestone in the universal protection of child rights, there are still many challenges which hinder the full realization of child protection in the administration of justice.[31]This study is concerned about the effect of the adversarial court procedures on CVSA ability to coherently narrate the abuse in court and the need to balance the rights of accused persons and those of CVSA in CSA trials.

Several studies reveal that unlike most offences, victims of CSA experience far reaching emotional, psychological, physical and medical problems. These include both short and long term effects. The short term effects include sleep disorders, eating disturbances, fears, phobias, depression, guilt, shame and anger which may result into serious problems requiring clinical intervention.[32]The long term effects of CSA include self-destructive ideation and behaviour, increased anxiety, tension, nightmares and sleeplessness.[33]In very extreme situations, CVSA may suffer Post Traumatic Stress Disorder (PTSD), a medical condition described as the most severe effect of sexual abuse by psychiatrists.[34]According to psychoanalytical theory, the traumatic consequences of CSA, if not properly addressed may affect the victims' ability to narrate the abuse in court.[35]

A study conducted in the year 2010 by Congressional Research Services, the judicial system in African countries was cited as one of the impediments in access to justice by victims of sexual violence in Africa.[36]The Congressional Research Services was concerned with factors that affect the prevention and protection of victims of sexual violence in African countries in conflict situations and found that although there existed programs that assist victims of sexual violence such as psycho-social support programs, victims of sexual violence found it

[28]Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, (1985) (DBPJVCAP). UN doc. A/CONF.144/20, Annex, Guide for Practitioners.

[29] D C Bross, 'Terminating the Parent-Child Relationship as a Response to Child Sexual Abuse' (1995) in D E Abrams and S H Ramsey (eds), *Children and the Law: Doctrine, Policy and Practice* (Minn: West Group, 2000) 377.

[30] *Op. cit* n 22, 24 and 26.

[31] Office of the High Commissioner for Human Rights, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (United Nations, 2003) 47.

[32] *Op. cit* n 26.

[33] D R Kosovich, *Stress in Everyday Life: A Global Experience* (Viva Books, 2006) 50.

[34] PTSD is a psychiatric condition in which the victim re-experiences trauma occasioned by the traumatic event. The intrusive recollection of the traumatic event persists in recurrent dreams and the victim feels and acts as if the event was actually happening. This is triggered by any recollection or association with any object or incident that reminds the victim of the traumatic experience.

[35]*Op. cit* n 26.

[36] Congressional Research Services, 'Sexual Violence in African Conflict'(2010) <http:/www.fas.org/sgp/crs/row/40956> accessed 3 July 2012.

very difficult to face their abusers and narrate the intimate details of the sexual assault in court. As a consequence, many victims of sexual violence opt not to report the abuse to law enforcement authorities.
Abrams and Ramsey,[37] while criticizing the American trial procedure of CSA before procedural reforms were undertaken to improve CSA trial to accommodate concerns of CVSA, noted that CVSA who were already burdened with the consequences of the abuse were required to narrate the details in court for the purpose of proving the innocence or guilt of the accused. Arguing that the American CSA prosecution system at that time was insensitive to the limitations of children, Abrams and Ramsey pointed out several difficulties faced by the prosecution in the trial process. The initial difficulty in the prosecution of CSA is the requirement that the prosecution must establish a *prima facie case* against accused persons and to discharge the burden of proof, beyond any reasonable doubt. The first bottleneck in the prosecution case is therefore the fact that CSA is very difficult to detect and prosecute largely because in most cases there are no witnesses except the child victim.[38]This makes it difficult for the prosecution to prove the guilt of the accused person beyond any reasonable doubt as a fundamental principle of criminal prosecution.

As argued by Abrams and Ramsey, unlike the trial of other offences, CSA prosecution is rarely supported by physical evidence or a non-participant eyewitness to the abuse. The situation is worsened by the fact that CVSA are generally not forceful, convincing or consistent in their allegations and can easily be manipulated to change their story. The trial of CSA therefore narrows down to a credibility contest between the accused person and CVSA necessitating expert psychological testimony as a determinant factor.

The evidentiary challenge of CSA trial becomes clearer as the young CVSA, in many cases already traumatized testifies in front of the abuser who may be a respectable person in society or in incest cases, a family member.[39]Abrams and Ramsey emphasized that because most CSA cases occur in private, the CVSA may be the only witness and the prosecution's case may collapse if the court finds the CVSA incompetent to testify, or if the prosecutor or the child's family decide that the CVSA should not testify because of additional trauma associated with the court procedure or to save the family from social stigma. This argument is consistent with the labeling theory which explains that because society perceives CVSA as children engaged in 'bad manners' and the secrecy surrounding discussions on issues related to sex and sexuality, some families may not encourage CVSA to talk about the abuse in order to protect the family name.

In situations where CVSA are encouraged to testify, further hurdles are encountered by the prosecution. The evidentiary requirement of presentation of evidence orally and that CVSA must face the accused person in court, narrate the sensitive details of the abuse under intense and direct cross-examination by the accused person or counsel is another impediment to CSA prosecution.[40]During such examination, the CVSA's cognitive and verbal communication skills and understanding of the court language are put to test. In most cases, according to Abrams and Ramsey, many CVSA are not able to give consistent, spontaneous and detailed accounts of their experience during the sexual abuse. This situation is further complicated if there occurs delay in the taking of the evidence of CVSA from the time of the abuse, since the longer the period, the more the CVSA is likely to forget about the minute, but important details of the abuse. This may provide an opportunity to the accused person/counsel to argue that there are doubts in the CVSA evidence, the benefit of which serves to set the accused person free,based on the prosecution's 'failure' to prove the case beyond any reasonable doubt. Protecting the rights of the accused persons in such situations without taking into account the concerns of CVSA creates an imbalance in the trial procedure.

Another concern raised by Abrams and Ramsey is that where the prosecution succeeds in having CVSA testify, some CVSA may feel guilty and blame themselves for testifying against the accused persons, especially where the accused person is a family member or is known to the CVSA as in cases of incest or abuse by teachers. The acquittal of the accused person in such cases may lead to the CVSA "feeling of a sense of hopelessness" and the possible reprisals from the accused persons. The imbalance of the rights of accused persons and CVSA concerns in some cases therefore leads to a miscarriage of justice.

The prosecution of CSA cases, adds Abrams and Ramsey, is further compounded by the fact that children do not often readily report CSA out of fear of being blamed for the abuse or fear that no one will

[37]Abrams E D and Ramsey H S, *Children and the Law: Doctrine Policy and Practice* (Minn West Group, 2000) 541.

[38] Ibid.
[39]J Temkin, *Rape and the Legal Process* (Oxford University Press, 2002) 4.
[40] Ibid.

protect them from revenge by the accused person, especially where they were threatened against reporting the abuse by the accused person during or after the sexual abuse.CVSA who must testify against accused persons whom they have held in trust such as fathers or teachers do experience "feelings of anger, fear and confusion" and may retract their evidence due to family pressure or insensitivities in the legal process. This argument supports the labeling theory which explains such behaviour by CVSA to avoid being labeled in the family and the social stigma associated with CSA.

CVSA face other challenges encountered by child witnesses in court generally. Because of their mental and cognitive under development, children sometimes confuse dates, times and frequencies of events and where questions are not phrased in child-age-appropriate language; their answers may contradict their earlier recorded statements resulting into inconsistencies in their testimony and in some instances, counsels for the accused persons urge the courts to interpret the inconsistencies to mean unreliability of CVSA as a prosecution witness.[41]

The above challenges of proving a CSA case are compounded by the fact that there may be lack of physical or medical evidence in most CSA cases which according to Abrams and Ramsey are often found in only ten to fifteen percent of confirmed cases of CSA, especially where the accused person uses threats and intimidation rather than violence to induce CVSA into submission. Some types of CSA such as fondling may also not leave lasting physical or medical evidence noticeable during the examination of CVSA upon reporting of the abuse.

Proving CSA, according to Abrams and Ramsey proves to be a difficult task for the prosecution, because of reliance heavily on CVSA as the key witness in establishing a *prima facie case* against the accused persons and discharging the burden of proof beyond any reasonable doubt. Both Abrams and Ramsey were concerned that apart from the difficulty in establishing a *prima facie case* and discharging the burden of proof, further complications are occasioned by the right of the accused persons to confront witnesses in cross-examination and the co-related rule against the admissibility of hearsay evidence in CSA trials.

In supporting Abram and Ramsey on the unique challenges in the trial of CSA and the need to recognize children's limitations as victims and witnesses in criminal proceedings, Mosteller[42] argues for the re-thinking of the right of accused persons to confront child witnesses and victims as well as a modification of the rule against the admissibility of hearsay evidence in CSA trials. Basing the arguments for the reform of laws relating to children on the fact that CSA is a growing and major concern for the society and that society must appreciate the fact that children are different from adults, Mosteller calls on the society to rethink procedures and evidentiary rules regarding CSA trial in the USA, beginning from the presumption that the ground rules for CSA trial should be different from other trials involving adults.

Mosteller further argues that the issue that needs to be addressed in the reform of laws relating to CSA trial is not whether there is need to change the procedure and evidentiary rules, but rather, what needs to be changed and to what extent, in order for the trial of CSA to be fair to both CVSA and accused persons. One of the proposals by Mosteller in balancing the interests of CVSA and accused persons is to shield CVSA from the associated courtroom trauma by introducing an exception to the rule against hearsay evidence in situations where CVSA is already under trauma, cannot testify in court, but there exists evidence in statement/video of the CVSA or a narration to a third party by the CVSA which contains details of the abuse.

Mosteller's argument therefore is that to admit hearsay evidence in such cases ensures the required details of the abuse is recorded by court while the accused person has a chance to ask any questions concerning the hearsay evidence through the court. Mosteller called for the review of the accused persons' rights under both the Confrontation Clause and the Compulsory Process Clause of the American Constitution.[43]Mosteller's proposal amongst other scholars provides a testing ground for both hearsay rule and the fair trial rights of accused persons in CSA cases in order to strike a balance between the rights of accused persons and concerns about CVSA.

---

[41] *Op. cit* n 26.

[42] R P Mosteller, 'RemakingConfrontationClause and Hearsay Doctrine under the Challenge of Child Sexual Abuse Prosecutionsin Abrams E D and Ramsey H S(eds), *Children and the Law: Doctrine Policy and Practice* (Minn West Group, 2000) 215.

[43] The Sixth Amendment to the United States Constitution states inter alia: "In all criminal prosecutions, the accused shall enjoy the right… to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour…"The first of these rights is called the Confrontation Clause, and the second the Compulsory Process Clause. Both clauses express the accused persons' rights to fair trial.

In Britain, concern about the trauma that CVSA are subjected to by the court procedure led to several calls for the reform of the prosecution of CSA cases. In July 1983 the press covered the trial of television actor Peter Adamson (Le Fairclough to those who watched 'Coronation Street') for indecently assaulting two eight year old girls in a Lancashire swimming- bath. One of the CVSA was so traumatized by the thought of appearing in court to testify against the accused person in his presence that she attempted to commit suicide.[44]

The incident and the apparent distress the CVSA were subjected to as they testified was highlighted by the press and calls for the reform of court procedures in CSA cases gained momentum with scathing criticisms of the evidentiary rules of evidence.

The defence counsel, George Carman, a Queens Counsel who cross-examined the CVSA in the Adamson case, reportedly said:
'It may be that a case such as this may require the law to look again and reappraise the problem of how children may give evidence more informally and more privately rather than in the presence of the public and the press.'[45]

Subsequently, a number of cross-disciplinary conferences brought lawyers, sociologists, policemen, civil servants, psychiatrists, psychologists and pediatricians together to look into the need to reform the area of children and court evidence.[46]

Jane Wynne, a paediatrician in Britain, while discussing incest cases pointed out that, the court appearance is child abuse in itself.[47] Wynne was a medical practitioner and expressed her views about the British court procedures. It was an observation made in a different country with similar court procedures to the Kenyan system. Wynne's contribution to the legal reforms in Britain gives a multi-disciplinary approach to CSA and emphasizes concerns by other professionals on the continued abuse that CVSA are subjected to through insensitive court procedures that fail to balance the rights of accused persons and concerns about CVSA.According to Wynne,CSA trial procedures need to take into account the effects of the abuse on the CVSA and their ability or otherwise to narrate the details in stressful court environment.Wynne's concern is consistent with procedural justice theorists such as Rawls,Galligan and Solumn who argue that procedures must be fair to both parties who must be treated equally and the distribution of liberties must benefit the vulnerable members of the society such as CVSA.

Wynne's view is shared by Witcomb, Shapiro and Stellwagen[48] who all refer to the court process as a 're-victimization or a second rape' of CVSA. Witcomb, Shapiro and Stellwagen argued that children need special protection as they are vulnerable by virtue of their age, psychological, mental, and emotional under-development. Their inability to resist or defend themselves against sexual assault may amplify their vulnerability, resulting into trauma and fear of subsequent attacks. According to Witcomb, Shapiro and Stellwagen, children develop in stages and acquire new functions at different stages and many are not emotionally and psychologically developed to handle the effects of CSA. This argument is consistent with Freud's psychoanalytic theory on the vulnerability of children to CSA.

Children, argues Witcomb, Shapiro and Stellwagen, cannot be expected to function like adults in the criminal justice system. They faulted the competence rule required of witnesses, the rule against hearsay evidence, examination in chief, cross examination and the technical court procedures as inhibitors of access to justice by CVSA.

According to Spencer and Flin,[49] cross examination of any victim of crime by the accused person or his advocate can be a very traumatizing experience. Flin and Spencer interviewed a small group of child witnesses waiting to testify and found that most of them felt anxious and nervous. Some children were observed crying in the waiting room before testifying in sexual abuse cases while some described the court experience as 'terrifying, frightening and nerve-racking.' Whereas Flin and Spencer interviewed child witnesses waiting to testify in England, this study interviewed CVSA in Kenya after their testimony, while making observations about them from the time they arrived at the court premises up to when they left the courtroom.

[44] *The Sun* (London, 27 July 1983) a British daily newspaper.
[45] Ibid.
[46] D Russell, *The Secret Trauma: Incest in the Lives of Girls and Women* (Basic Books, 1986) 45.
[47] *The Times* (London 17 April 1986) A British Daily Newspaper.
[48] *Op. cit* n 24.
[49] *Op. cit* n 26.

An additional observation by Spencer & Flin was that the usual court room-set up is quite often intimidating to children and the tense atmosphere quite frightening. CVSA may subsequently block out certain vital details while testifying due to the terrifying atmosphere. Other intimidating factors are the audience, the silence in court, the judge / magistrate, the defendants' promise to retaliate, fear of the unknown, being removed from home to unfamiliar court grounds, and being in the glare / focus of attention by everyone. This study observed selected children's courts proceedings to find out if the setup and the atmosphere within the Kenyan children courts is child friendly or the same as in ordinary courts.

While criticizing the evidentiary rules applied in the prosecution of CSA in England and Wales, Spencer & Flin point out that the evidentiary rules of procedure were designed in accordance with lawyers' assumption that children are fit to act as witnesses in court, forgetting that they have cognitive and other limitations. If Britain, from where Kenya inherited the current court procedure has found it necessary to rethink their evidentiary rule in CSA cases, then the Kenyan court procedures may be in need of an examination as well. This study interviewed lawyers, judges, magistrates, defence counsel and lawyers 'watching brief' for CVSA and obtained their views on CVSA ability to testify under the current court procedures in Kenya.

McConville and Wilson[50] agree with the other scholars on the unsuitability of the adversarial court procedures in prosecuting CSA.They both argue that although the rationale for the development of the evidentiary rules was justified to protect citizens against possible arbitrary abuse of state power, the same justification cannot be sustained in the trial of CSA due to the vulnerability and limitations of CVSA as they testify.

Zedner[51] confirms McConville and Wilsons's arguments on the unsuitability of the adversarial court procedures in the trial of CSA and adds that victims of sexual abuse generally take longer to recover from the psychological impact of the crime and some may not want to be reminded of the abuse in any form. Asking CVSA to narrate the abuse in the presence of, and be confronted by the accused during cross-examination, is in the words of Zedner, the 'most insensitive aspect of the court procedure' in the trial of CSA.

A study by Eastwood and Patton[52] described the experiences of CVSA in the Australian CJS as 'another level of child abuse, institutionalized by the adversarial legal system.' The cross-examination of CVSA left them more intimidated than before the trial. Some children reportedly said that they would never report further sexual abuse if they had to undergo the court experience again. Whereas the Australian study was conducted by way of quantitative research alone, this study adopted both qualitative and quantitative methods of data collection. By seeking the views of CVSA and observing the goings on in court, the study findings form the foundation for policy and legal reforms to accommodate special needs of CVSA in the trial of CSA.

Temkin,[53] writing on the experiences of rape victims through the CJS in England and Wales, argues that rape victims who participate in judicial proceedings suffer more serious effects and psychological harm than those who opt out of the court process. Whereas Temkin's study focused on the police and court experiences of rape victims, this study seeks to document the views of CVSA about the court procedure they are subjected to while testifying in the Kenyan children's courts. Temkin identified some of the special needs of CVSA from a psychological perspective, but did not relate how these needs affect the child while testifying in court.

It is not clear how a child undergoing such psychological distress can be able to provide evidence in court to secure justice for the ills committed against him/her and this study seeks to explore mechanisms used by courts to enable traumatized CVSA testify in CSA cases by balancing the rights of accused persons and CVSA concerns. Whereas Temkin's study observed the CVSA as they waited to testify outside the courtrooms, this study carried out the observation of CVSA outside the courtrooms before their testimony, during and after they gave evidence. In addition, the study interviewed some CVSA after their testimony and sought the opinion of their guardians as well on the suitability of the adversarial procedure for the taking of CVSA testimony.

[50] McConville, and G Wilson, *The Handbook of the Criminal Justice Process* (Oxford University Press, 2002)1.
[51] Lucia Zedner, 'Dimensions of Crime' in M Maguire, R Morgan and R Reiner(eds), *The Oxford Handbook of* Criminology(3rd edn Oxford University Press) 419.
[52] C Eastwood and W Patton, 'The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System' (2002) <http://www.aic.gv.au/reports/eastwood.html> accessed 16 February 2012.
[53] *Op. cit* n 39.

Criticizing the lack of special court procedures for children in Britain before the reform of the court procedures, Lockton and Ward[54] argued that children develop in stages, acquiring capacities for new functions and understanding with time. When they become victims of sexual abuse, they are thrust into an adult system that classically does not differentiate between adults and children. The court procedure seems indifferent to the legitimate special needs that arise from their participation having suffered the effects of the abuse.

Many psychologists agree that while reactions to CSA are highly crime specific, psychological distress is the dominant reaction, most severe and has been formally recognized professionally as PTSD,[55] a condition that alters the CVSA ability in many ways, thereby reducing their capacity to testify coherently in the presence of the abuser. The CVSA is thus disadvantaged and may not testify with ease or at all due to PTSD, unlike other victims of crime.[56] Criminal procedure rules do not seem to take into account cases where CVSA may have suffered post-traumatic stress disorder and fail to testify, thereby occasioning a miscarriage of justice.

Lockton and Ward were however of the view that criminal prosecution, if handled with sensitivity, can be therapeutic for CVSA. The court process may be viewed by CVSA as a sign that the society has taken the allegation seriously, and a conviction, if obtained, places the blame squarely on the perpetrator. This review of literature reveals that medical practitioners recognize the effect of PTSD on a child's ability to testify and this study seeks to find out how the effects of PSTD on CVSA can be balanced with the rights of CVSA in a fair trial.

Herman and Hirschman[57] are other scholars who are concerned about the effect of the court testimony to incest child victims. They confirmed the observations by other scholars as already discussed and emphasized the particular challenges that the prosecution of CSA presents to CVSA.They were concerned that although CSA appears to attract severe punishment in most jurisdictions, showing the society's concern to punish CSA offenders, in reality they are rarely punished because of the difficulties in proving the case by the prosecution against accused persons. They argued that CVSA are often afraid to testify in court because they think that nobody may believe them, or that they may be punished by their families for 'bringing upon the family shame associated with CSA in the society.' This reasoning by CVSA is consistent with the labeling theory.

Another reason why CVSA fear testifying in court according to Herman and Hirshman is the possibility of being punished by the accused person for revealing the details of the abuse. This argument confirms that of Abrams and Ramsey which is also discussed under this section in the preceding paragraphs. Herman and Hirschman also argued that CSA cases are difficult to prove because CSA offenders are often aware that they are breaking the law, but since it is only the CVSA likely to be at the scene of crime, they enjoin them to keep secret the details of the abuse by either giving promises of reward or issuing threats of injury to CVSA if they disclose the abuse to anyone. The action by the accused persons may be followed by a constant reminder to the CVSA to keep their part of the 'bargain', being intimidated into ensuring that they do not testify in court.

Herman and Hirschman also concurred with Abrams and Ramsey that CSA cases are difficult to prove since the accused persons have greater legal protection than the CVSA in the form of constitutional safeguards which include the presumption of innocence, the right to confront CVSA and other witnesses in court under a public trial and the right to cross-examination. The insensitivity of the court proceedings to CVSA, according to Herman and Hirschman is further enhanced by the fact that the rights of accused persons in a criminal trial were designed for the adversary proceedings between adults and in the case of CSA,it results into 'uneven playground' due to the limitations of CVSA as children.

The court contest between the prosecution and the accused persons is further complicated where the accused is related to or in a position of authority to the CVSA such as teacher-pupil or father-daughter relationship. In such circumstances, the CVSA may find it extremely difficult to testify against the accused whom they may have trusted and held in high esteem, especially if the accused is the bread winner for the CVSA family. This situation, may compound pressure on CVSA to retract their statements or face the family's wrath. When CVSA, find themselves in such helpless positions, in the absence of any strong external support from an advocate or social worker, they may deny that the abuse ever took place so as to avoid being vilified or ostracized from the family in accordance with the labeling theory.

---

[54] D Lockton and R Ward, *Domestic Violence* (Cavendish Publishers, 1997) 29.

[55] *Op. cit n 34.*

[56] *J K Saywitz, 'Improving Children's Testimony: The Questions, the Answer and the Environment' in M S Zaragoza and others (eds), Memory and Testimony in the Child Witness (Thousand Oaks, CA: Sage, 1995) 87.*

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

Herman and Hirschman also concurred with Saywitz[58] on the effect of the technical court language and pain of narrating details of the abuse to people seen by CVSA as 'strangers' in court just to meet the demands of accused persons' right to public trial and confrontation of witnesses. In the face of the above difficulties amongst many others, concludes Herman and Hirschman, many CSA cases collapse before conviction of the accused due to the failure by the legal system to recognize the difficulties faced by CVSA, who lack the emotional strength to endure the ordeal of the trial process during their court testimony. Herman and Hirschman, like many other scholars criticized the classical adversarial legal system as lacking a balanced approach to the rights of accused persons and concerns for CVSA protection.

Although the traditional legal systems have been slow to recognize the special needs of CVSA, some lawyers have led the way in appreciating the difficulties occasioned by the adversarial legal system in CSA cases by pointing out the effects of the trial on CVSA. One such Scottish barrister, Archibald Crawford, representing an accused in a CSA trial said:
'Not only counsel, but all concerned are harassed almost beyond endurance. It is as if all in court were in conspiracy to rape the child again'.[59]

Crawford's remarks are confirmed by a research conducted in New Zealand in the year 2008 which found that many defence lawyers admitted using aggressive misleading cross-examination and playing on the myth about child sexual abuse while taking advantage of the vulnerability of CVSA to ensure the accused persons are set free.[60]

Judges too have not been left behind in expressing their concern about the imbalance between the rights of accused persons and the need to protect CVSA.Some judges have therefore added their voice to the concern about apparent injustice caused to CVSA by the continual adherence to the traditional evidentiary rules of the classical adversarial court procedures. Judge Pickles of Scotlandhad this to say about the need to reform the Scottish court procedures in CSA cases:

The child may be so overcome as to be incapable of giving any evidence or any coherent evidence or may only come out with part of what he/she would like to say, and therefore, in that case, justice may well not be done. A person may be acquitted because the child just cannot give the details required.[61]

Judge Pickles' sentiments were shared by Judge Piggot,[62] an experienced English Judge who expressed concern that the fear by CVSA to give evidence in court had direct impact on low/non-reporting of CSA. In supporting the case for special procedures in CSA cases Judge Piggot said:

For various reasons many cases do not even reach the courts and when they do, they are often abruptly terminated by the inability or unwillingness of the witnesses to recall painful events. In our search for justice, it is often forgotten that when a guilty person is not charged or if charged, the court case does not reach its proper conclusion but is terminated abruptly because of the failure of the key witness to give evidence or come up to proof, that can be as much failure or miscarriage of justice as if an innocent person had been convicted.[63]

Judge Piggott's remarks directly call for the balancing of accused persons' right to fair trial with concerns about CVSA vulnerability in CSA trial to ensure justice, not only to the accused, but to CVSA as well.

In yet another show of concern to address the court procedure in CSA trials, the Lord Chancellor of England, Lord Mackay, while giving an opening address at an international conference on children's evidence in June 1989 said:

Today there is growing recognition by all those involved that, where a child has suffered or is a witness to a serious, violent or sexual attack, to appear in court, seeing the perpetrator again, and facing cross-examination can cause anguish, may often be terrifying, and can sometimes have traumatic effects. Unnecessary

[58] *J K Saywitz et al, Children's Knowledge of Legal Terminology in Language and Human Behaviour (1990) 14, 523-35.*
[59] A Crawford, *Guilty as Libelled* (A Marker Ltd, 1938) 121.
[60] Emily Watt, 'Courts Fail Child Sexual Abuse Victims' *The Dominion Post*(31 March 2008)<*http://www.stuff.co.nz/dominion post/44575296479.html*>accessed 10 March 2012.
[61] Judge Pickles was talking to the British Broadcasting Cooperation (BBC) 'Panorama' on the 8th September 1986.
[62] *Op. cit* n 26.
[63] Pigot Judge T, 'Women and Children First' in J Spencer, G Nicholson, R Flin and R Bull (eds), *Children's Evidence in Legal Proceedings: An International Perspective* (Cambridge Law Faculty, 1990) 210.

stress in such a situation cannot be in the interest of the unfortunate children involved and it certainly does nothing to further the interests of justice.[64]

The Lord Chancellor's comments reflect a general change of attitude and acceptance by the legal profession that courts are unnecessarily stressful for child witnesses and victims. Such pronouncements by the judges in Scotland, England and other parts of the world fortify claims by other professionals that there is need to re-think court procedures in CSA trials.

At an international forum, a study by the NGO group for the Convention on the Rights of the Child, prepared for the 1996 World Congress in Stockholm, Sweden against the Commercial Sexual Exploitation of Children, reported that technical court procedures were a major hindrance to the protection of children from sexual abuse. The study reported that the courts appeared to uphold the rights of the accused persons which were clearly stated by the constitutions of various countries to the disadvantage of women and CVSA. The review of literature so far shows that commonwealth countries that adopted the adversarial legal system's procedures have found it unsuitable for the trial of CSA.

IV. CHALLENGES OF PROTECTING CHILD VICTIMS OF SEXUAL ABUSE IN KENYA

Kenya inherited its criminal procedure law from Britain, one of the countries that have found the classical adversarial legal system in need of reform in the trial of CSA cases. However, few studies have been carried out in Kenya to ascertain the suitability of the classical adversarial court procedures in the trial of CSA. The findings of a study[65] carried out in Kenya on the challenges of protecting children from child abuse found the adversarial court procedure to be one of the challenges. The study took a sociological approach and was concerned about factors that affect the implementation of the Children Act 2001 in protecting children against child abuse generally and found court procedures and its impact on the CVSA to be one of the factors which affect the protection of children from child abuse. Whereas the study was concerned with factors affecting the implementation of the Children Act 2001 in Kenya, this study examines the imbalance in the rights of accused persons and concerns for the protection of CVSA in the adversarial trial of CSA in Kenya.

Another Kenyan scholarly work relevant to this study is by Adam[66] which examined the Kenyan Sexual Offences Act 2006.Whereas Adam's study was an analysis of the Kenyan Sexual Offences Act 2006 and focused on the definitions of sexual offence and the punishment provided, this study specifically concerns the trial of CSA and the need to balance the rights of accused persons' to a fair trial with the rights of CVSA.Muhui,[67] another Kenyan scholar was concerned about the penalty for sexual offences in Kenya and the way forward in the face of increasing sexual offences. Both Adam and Muhui point out that the court procedure in sexual offences in Kenya is insensitive to the plight of sexual offence victims generally.

Another Kenyan study by Waichigo[68] examined the rights of children in third world countries with a focus on the implementation and violation of the UNCRC and the ACRWC and recommended the development of effective institutions to implement the rights of children generally while a study by Onyango,[69] focused on access to criminal justice in Kenya with special reference to Kibera in Nairobi. The study found the court procedure to be one of the factors hindering people's access to justice in Kibera.

Despite Kenya's ratification of the UNCRC and subsequent domestication through the enactment of the Children Act 2001, there are still concerns that the Sexual Offences Act 2006 which was passed to deal with sexual offences is difficult to implement especially in matters concerning children. This was the conclusion of a

[64] Lord Mackay of Clashfern in his opening speech at an international conference on children's evidence in J Spencer, G Nicholson, R Flin and R Bull (eds), *Children's Evidence in Legal Proceedings: An International Perspective* (Cambridge Law Faculty, 1990) 1.

[65] S A Omondi, 'Protecting Children from Abuse: Challenges Associated with the Implementation of the Children Act cap 586 of the Laws of Kenya'(Unpublished Master's thesis, University of Nairobi 2007) 97.

[66] A N Adam, 'A Critique of Sexual Offences and the Law in Kenya' (Unpublished Masters thesis, University of Nairobi, 2006) 15.

[67] M T Muhui, 'Sexual Offences Law in Kenya: The Penal Concerns and the Way Forward'(Unpublished Masters thesis, University of Nairobi, 2006) 33.

[68] W E Waichigo, 'The Right of The Child in Third World Countries: A Closer Look at the Implementation and Violation of the UNCRC and the ACRWC' (Unpublished Masters thesis, University of Nairobi, 2002) 29.

[69] O J Onyango,'Access to Criminal Justice in Kenya: A Case Study of Kibera' (Unpublished Masters thesis, University of Nairobi, 2008) 56.

conference held in Nairobi in 2007 on CSA and the implementation of the Sexual Offences Act 2006.The conclusion by the Nairobi conference prompted the Attorney- General to set up a task force in February 2008, to look into the implementation challenges of the Sexual Offences Act 2006.In September 2008, the task force completed its work and submitted the report of its findings to the Attorney General citing several difficulties in implementing the Act.

Relevant to this study is the task force finding that the victims of sexual violence found it difficult to follow the legal process in pursuit of court protection and that they felt the investigation and prosecution process did not handle them well and failed to take their feelings into account. Likewise victims felt frustrated by the court system which according to them was slow compared to the traditional dispute resolution mechanisms which they preferred to the courts.

In 2006 the Witness Protection Act was passed to provide protection to witnesses generally who require state protection to testify in criminal cases. An analysis of the Act however shows that it targets witnesses in high profile cases such as money laundering, drug trafficking and such like cross-border crimes. This is because although children are mentioned as vulnerable groups to be protected, the Act does not provide specific procedural measures to protect the CVSA while testifying during a CSA trial. Substantive laws such as the Children Act Cap 586, the Sexual Offences Act 2006 and the Witness Protection Act 2006 provide for child protection against sexual abuse but in the absence of appropriate procedural reforms, little can be achieved in their implementation.

The Sexual Offences Act provides that vulnerable witnesses may be protected by the court through several options. The first option is to allow CVSA to testify under the cover of a witness protection box. This is much like a witness box, but is made of glass that allows the CVSA to testify in court while screened from the accused person and public glare. It works in a way that enables the CVSA to be seen by everyone in court including the accused person through the glass, but the CVSA, being inside the glass cannot see them. The importance of the witness protection box is to allow CVSA to give their evidence –in- chief without the fear and intimidation associated with face to face contacts with the accused person.

The second protective option is for the court to direct that CVSA give evidence through an intermediary. The use of an intermediary saves CVSA from the stress and trauma associated with the court process and ensures that CVSA can receive justice from the courts without necessarily being subjected to stressful procedures in court. The third option is for the court to direct that the proceedings may not take place in open court while the fourth option is for the court to prohibit the publication of any information that may lead to the identity of the CVSA and their families.

The third and fourth provisions echo the concern of the Children Act that allows the magistrate to clear the court of all members of the public except court officers. The fifth provision is a wide discretion to the court to take any other measure it deems just and appropriate to protect vulnerable witnesses. The wide unlimited power by the court, if properly used can protect CVSA in many ways as they testify in court if there exists appropriate procedures as vehicles for implementing substantive laws such as the Sexual Offences Act 2006.

Although the Children Act creates special children courts to handle children matters and provides that children be given an opportunity to express their views on matters affecting them and that their best interests be taken into consideration, a review of the procedural laws which serve as the engine for the implementation of substantive laws reveals inadequate response by the Criminal Procedure Code cap 75 and the Evidence Act Cap 80 to the needs of the CVSA.

The lack of appropriate procedural laws to implement the provisions of substantive laws that protect CVSA implies that CVSA still testify under the adversarial court procedures guided by the Evidence Act cap 80 and the Criminal Procedure Code cap 75.The only amendment to the Evidence Act in this respect is the Criminal Law Amendment Act 2003 which amended section 124 of the Evidence Act by removing the requirement to corroborate a child's evidence.

However, the requirement by the Evidence Act that evidence to prove facts alleged must be adduced orally and must be direct may have the potential ofleading to direct/face to face contact between the accused person and CVSA in court and may disempower CVSA from giving evidence coherently and confidently according to Temkin and other scholars. The psychological trauma associated with seeing the accused person in court, according to Wolf, may in some cases remind the CVSA of the abuse, causing intense trauma that blocks the brain from remembering the details of the abuse as a coping mechanism. In such circumstances, the

provision of direct evidence does not serve the interest of CVSA who may fail to testify leading to the acquittal of the accused person in CSA cases.

Likewise, the Criminal Procedure Code requires that all evidence in a trial be taken in the presence of the accused person or his advocate and is therefore the basis upon which CVSA must give oral evidence in court in the presence of the accused person and identify him/her as the one who committed the offence under trial. This provision has no regard to situations where the CVSA is vulnerable and easily intimidated by the accused person. The need to protect CVSA and safeguard the rights of accused persons to a fair trial such as confronting witnesses and challenging their evidence, calls for the balancing of the rights of both in a fair procedural process. The existing evidentiary rules of procedure appear to protect accused persons' rights to a fair trial at the expense of the CVSA's rights to protection. Despite substantial achievements in enacting laws that protect children from abuse, there exists an imbalance in the trial procedure between the rights of both CVSA and the accused persons in the context of procedural fairness in Kenya.

Judicial reforms in the Kenyan judiciary under the Constitution of Kenya 2010 led to the appointment of a new Chief Justice in 2011 through a process regarded as open, fair and competitive in which the position of the Chief Justice was advertised in the local dailies and applicants subjected to interviews in public, aimed at getting a Chief Justice who can reform the judiciary and ensure delivery of service to the people. The process culminated in the appointment of Dr. Willy Mutunga as the first Chief Justice appointed under the Constitution of Kenya 2010.

In his public address to the country on the 19th October 2011, detailing the progress on the transformation of the judiciary in the first one hundred and twenty days since his appointment, Dr. Justice Mutunga stated that by the time he took office in 2011,

…we found an institution so frail in its structures; so thin on resources; so low on its confidence; so deficient in integrity's weak in its public support that to have expected it to deliver justice was to be wildly optimistic…The Kenyan public has expressed its frustrations with the inefficiencies in the judiciary's case management system which has contributed to huge backlogs…We are considering modalities for fast-tracking certain matters relating to children, victims of sexual offences and older persons.[70]

The observation by the HonourableChief Justice of Kenya sums up the perceived problem of the Kenyan judiciary in its delivery of justice. Of relevance to this study is the concern about the inefficiency of the courts in administering justice to children, particularly the low confidence in the system with regard to the procedure adopted by the courts in taking the evidence of CVSA in CSA trial.

Legal processes are concerned about the way individuals are treated in the context of procedural fairness especially to less advantaged groups like CVSA. Despite many studies on child rights issues and the judicial process in Kenya, there is no known study that has been undertaken to examine Kenyan court procedure in CSA trial with the aim of analyzing in detail the imbalance between the rights of accused persons and concerns for the protection of CSA.This is the gap that this study seeks to fill.

V. GAPS IDENTIFIED BY LITERATURE REVIEW

The review of literature on the effects of the classical adversarial legal system's court procedure revealed a major gap in the balancing of the rights of CVSA and the rights of accused persons to a fair trial in CSA cases. The following are the specific procedural gaps in the trial of CSA;

The first procedural gap is the nature of CSA which mostly occurs in private and its psychological and emotional impact that overwhelm CVSA during their testimony making them vulnerable witnesses. It is widely accepted that some witnesses are vulnerable in the sense that their experiences as victims of crime, or their personality traits or their susceptibility to intimidation may make them suffer more than the normal amount of stress associated with being a witness. Subsequently, such witnesses may not be able to give best evidence without certain protective measures.[71]

[70] Mutunga W, 'Progress Report on the Transformation of the Judiciary the First one Hundred and Twenty Days' (2011). The Honourable Chief Justice of the Republic of Kenya, in a speech he delivered on the 19th of October 2011 just one hundred and twenty days after his appointment to the highest office in the judiciary.

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

Children are generally vulnerable and so when they become victims of sexual abuse, the presumption of innocence prejudices the prosecution case even more. The procedural significance of the presumption of evidence as the foundation of the right to a fair trial was stressed by the ECtHR in the case of *Selabiaku v France*[72]when it held that the presumption of innocence prevented the legislatures from stripping trial courts of their powers to assess the evidence of the defendant's guilt. The same reasoning was echoed by Lord Bingham in the case of *Sheldrake v DPP* when he said that:
'The overriding concern in a criminal trial is that it should be fair, and the presumption of innocence is a fundamental right directed to that end'.[73]

The principle of presumption of innocence is that an accused person is presumed innocent until proven guilty by an impartial court in a fair trial and is privileged from giving self-incriminating evidence.[74] As much as the privilege against self-incrimination generally protects accused persons in other offences, in the trial of CVSA,the fact that the accused person, apart from the CVSA may be the only other person possessed of the facts of the abuse, gives undue advantage to the accused as the adversarial court system fails to appreciate the nature and impact of CSA on the CVSA and the subsequent inability to testify especially in situations where the CVSA may have been threatened by the accused against testifying.[75]

Where CVSA may be the only prosecution eye-witness, proving the prosecution case against the accused person who is shielded from giving any information that may incriminate him/her presents a challenge in prosecuting CSA cases under the adversarial system where the parties are solely responsible for the gathering and presentation of evidence in court.[76]Much as the prosecution may have all the resources to collect the evidence against the accused person, in CSA cases, this is hindered by the fact that the accused person may have the most crucial information needed to establish the truth in CSA cases, where the CVSA may be unable to testify or talk about the abuse.

The aim of the criminal justice system should not only be to safeguard the rights of accused persons, but also to ensure mechanisms that assist the court to arrive at the truth. The ends of justice cannot be said to be served where the accused person is acquitted simply because the CVSA fails to testify if it can be proved that the accused person was at the scene of crime, yet protected from self-incrimination. There is a gap in this respect and the need to balance the truth seeking role of the court in protecting CVSA and the right of accused persons in CSA trial to be protected from self-incrimination and the fundamental presumption of innocence as the hallmark of an adversarial trial.Controversial as this matter may be, in CSA cases, there is need to re-think this principle.

Secondly is the prosecution's burden of proof which must be discharged beyond any reasonable doubt, if the court is to find that the accused person is guilty of CSA.[77]There are two related rules under the phrase 'burden of proof.'The first is about which party to a criminal proceeding should lead evidence in a case in order to convince the court to investigate it. The rule is that the person who makes the allegation must provide evidence about it, failure which he/she cannot complain if the court fails to consider it.[78]In CSA cases therefore, it is for the prosecution, on behalf of the State, to provide some evidence before court that the accused person committed CSA against the CVSA.The evidence so tendered by the prosecution must also show that the accused person committed the offence with any degree of fault required as an ingredient of the offence. The prosecution therefore bears the 'evidential burden' in CSA cases like other criminal offences and relies on witnesses, who include CVSA to give the evidence to prove the offence.

The second set of rules determine which party in a criminal proceeding loses if there is a gap in the evidence produced in court.[79]The gap could be on an important point, or a severe conflict in evidence by the witnesses that the court is unable to decide whom to believe. In such situations, a doubt is created in the

[72]*Selabiaku v France* (App no 379) (1988) 13 EHRR 379.
[73]*Sheldrake v DPP* (No 4 of 2002) Re [2004] UKHL 43; [2005]1AII ER 237 at 21.
[74] C M Bradley, *Criminal Procedure; A worldwide study* (Carolina Academic Press, 2007) 3.
[75]L Hoyano and C Keenan, *Child Abuse: Law and Policy Across Boundaries* (Oxford University Press, 2010) 598.
[76]Ibid.
[77]M Damaska, *Evidence Law Adrift* (Yale University Press, 1997) 40.
[78]*Op. cit* n 26.
[79]UNICEF, 'A Situational Analysis of Child Sexual Abuse' <http://.unicef.org.protection/index-exploitation-html> accessed 24 February 2012.

evidence as to whether the accused person committed the offence, whether he/she meant to do it and whether the circumstances surrounding the offence gave rise to some general defence. The benefit of the doubt is given to the accused person as the prosecution, bearing the 'burden of proof' loses the case. The inability of some CVSA to coherently and confidently testify in CSA cases sometimes creates a doubt in the prosecution case, leading to an acquittal of the accused persons and injustice to CVSA.[80]

Closely linked to the burden of proof is the standard of proof required in criminal cases. The rule is that the guilt of the accused person must be proved 'beyond any reasonable doubt'.[81]This rule means that the court should only find the accused person guilty of the offence if the court is very sure, based on the evidence provided in court that the accused committed the offence. The rationale for this rule, as already discussed is that the purpose of criminal proceeding is to punish the accused person if found guilty, and since the consequences of punishment by court are very serious, the society should not punish innocent people, but only those that the court is really sure committed the offence. Spencer and Flin emphasize that if a guilty man escapes punishment; the harm done to the society is less serious than when an innocent person is punished for what he/she did not do.

The third procedural gap identified by the review of literature is the rule on competence of child witnesses. Competency hurdle is one of the legal rules that prevent successful prosecution of CSA under the classical adversarial system of criminal trial.[82] Under the common law, children above the age of 14 were presumed to be competent witnesses.[83]In England, the rule since the 18th century was that all witnesses must give evidence on oath or in case of religious or any other objection, they would be affirmed. Any witness being sworn under oath must be competent to do so, meaning that they must understand the nature of an oath. The same applies to witnesses who opt for a solemn declaration/affirmation.

Adults are presumed to possess the requisite understanding of the nature of an oath, while children under the age of 14 are presumed not to possess such understanding. The trial judge is therefore expected to interrogate child witnesses below 14 years of age to ascertain their understanding of the nature of an oath before allowing them to testify.However,where the child witness below 14 years is found not to understand the nature of an oath, the law[84] allowed the court to take the testimony of the child witness if satisfied that the child witness is possessed of sufficient intelligence to justify the reception of the testimony and that the child understands the duty of telling the truth.

The application of the rule assumes that children below 14 years of age are not competent as witnesses and have to be subjected to interrogation by the presiding judge/magistrate to find out if they are competent to testify. The interrogation by the judge/magistrate is in the view of many children unnecessary and only meant to intimidate them by threats of punishment if they fail to tell the truth.[85]Once intimidated, the CVSA may not testify as confidently and coherently as when not under intimidation. The rule also locks out CVSA below 14 years of age who after interrogation by the court are found not to possess sufficient intelligence to understand the duty of telling the truth, yet are victims of CSA and the court needs to listen to their evidence. Such cases become more complicated due to the rule against hearsay evidence.

The fourth procedural gap identified by the review of literature is the rule against the admissibility of hearsay evidence which is closely linked to the rule on competence of witnesses. The rule against hearsay excludes the admissibility in court of any evidence that is not from someone who either saw or heard it with his/her own eyes or ears.[86]This rule excludes all evidence otherwise relevant and reliable in other areas of life because those who may have heard or seen it are not called to court to give their version of the incident. In CSA cases, the rule bars the prosecution from calling a parent, policeman, doctor or any other person to tell the court what the CVSA told them. The CVSA must be produced in court to tell the story in person. In cases where the competency rule locks out a child as incompetent to testify, the hearsay rule combines with it to the disadvantage of the CVSA, while evidence is not admissible.

[80]*Op. cit* n 26.
[81] J McEwan, *Evidence and the Adversarial Process: The Modern Law* (Blackwell Publishers, 1992) 128.
[82]Ibid.
[83]*Op. cit* n 71.
[84] English Children and Young Persons Act 1933,s 38.
[85]*Op. cit* n 56.
[86]C Tapper, *Cross and Tapper on Evidence* (12th edn Oxford University Press, 2010) 176.

Closely linked to hearsay evidence rule is the common law requirement on corroboration.[87]The law required the evidence of children and complainants in sexual offences to be corroborated. The basis for this rule, according to Spencer and Flin, Temkin and Saywitz is because of an assumption that children and women were more likely to lie as witnesses and are unreliable especially in claims of sexual assault and so the law provided that no one may be convicted on the evidence of a single witness in all general offences, whether sexual or not. In CSA trial the rule jeopardizes the prosecution case since according to Abrams and Ramsey, Temkin, Saywitz, Herman and Hirschman, CSA sometimes occurs in private and the only witness may be the CVSA.

The fifth procedural gap identified by the review of literature is the accused persons' right to public trial and to be confronted by his/her accuser.[88] The prosecution witnesses, including CVSA must, under this rule give oral testimony based on the assumption that oral testimony of a live witness is more superior to any other type of evidence. This is the basis of excluding hearsay evidence and the absence of any other procedure through which a witness can give evidence before the trial. Oral evidence is preferred by common law due to the following reasons; that it is free from errors of transmission, the court can observe the demeanour of the witnesses, see the non-verbal communication from the witness, the evidence is given on oath/solemn declaration which imposes a duty on witnesses to tell the truth, the honesty of witnesses can be tested by cross-examination, it gives the accused person opportunity to confront the allegation against him/her.[89]

Despite the advantages to an accused person of an oral testimony, Abrams and Ramsey, Spencer and Flin, Temkin and all other scholars critical of the adversarial system of trial of CSA agree that it causes stress to CVSA who may not be able to testify coherently and confidently in the presence of the accused person and other people in court who are not known to CVSA who see them as 'strangers.'[90]In some cases oral evidence takes place a long time after the event in question with the possibility of CVSA forgetting some important details of the abuse and this may create doubts in the prosecution case.

The sixth procedural gap identified in the literature review is the accused persons' right to confront witnesses under cross-examination.[91]According to Spencer and Flin, many lawyers describe cross-examination of witnesses as 'the greatest engine ever invented for the discovery of truth.' American Writer, Wigmore described cross-examination as 'the greatest and permanent contribution of Anglo-American system of law to improved methods of trial procedure.[92]Any proposals to amend the rule on cross-examination has according to Spencer and Flin, met the stringent opposition from lawyers since cross-examination is an art that gas been so perfected by lawyers that it is one single tool available to them to create doubts in the evidence of a witness and set the accused persons free in line with the rule that any benefit of a doubt in the prosecution evidence is given to the accused persons.

In the words of Scheneikert,[93] cross-examination is the 'best means of working upon witnesses and leading them astray.Scheneikert recognized the fact that any witness needs a calm and serene atmosphere to testify, but when subjected to cross-fire of interrogation and counter-interrogation,examination, cross-examination and re-examination which every witness must endure at the hands of two adversarial opponents, a child witness is not likely to testify confidently and coherently. Cross-examination of child witnesses has been criticized on the ground that it distorts adult's evidence and therefore unless specially regulated, cross-examination of CVSA can be a worse distortion of the child's evidence.[94]

Some British lawyers also questioned the value of cross-examining CVSA, noting the trial of CSA is not an ideal forum for in which the art of cross examination can flourish since the court atmosphere is unsympathetic to the vulnerability of CVSA.[95]Obviously there can be no justice in a criminal trial unless the defence version of the events can be put to the witness by somebody at some time and some examination of the witness's

[87]*Op. cit* n 71.
[88]Op. cit n 39.
[89] S C Thaman, Comparative Criminal Procedure: A Casebook Approach (Carolina Academic Press, 2008)48.
[90] Saywitz K J, 'Children in Court: Principles of Child Development for Judicial application' in J Bulkley & C Sandt (eds), A Judicial Primer on Child Sexual Abuse (American Bar Association, 1994)<https://www.ncjrs.gov/App/publications/Abstract.aspx?id=149722> accessed 3 July 2012.
[91] J Bulkley, Innovations in the Prosecution of Child Sexual Abuse Cases (American Bar Association, 1981)72.
[92] H J Wigmore, Evidence in Trials at Common Law (revised by H J Chadbourn Little, Brown & Co 1979)151.
[93] Hans Schneikert (Chief Prosecutor of Berlin, 1904)
[94]W Walter, W H Charles and D M Samuel, Children in The Legal System: Cases and Materials (Foundation Press) 477.
[95] M Stone, Cross-Examination in Criminal Trials (Butterworths, 1988)170.

intelligence, honesty and ability to tell the truth is tested. Spencer and Flin harshly criticized cross-examination of CVSA by stating that:

…it is however not wise to pretend that a CVSA honesty, intelligence and ability to tell the truth can only be tested by the method of subjecting them to the classical live-cross-examination, in open court, on the trial day, or to even think that that is the best method of doing so.[96]

Most scholars are in agreement that cross-examination of CVSA is the most traumatizing part of the court procedure in CSA trial and cross-examination of CVSA was variously described as 're-victimization, second rape of the victim, worse than the abuse itself' by scholars such as Temkin, Abrams and Ramsey and many others.[97]

A further procedural gap identified by the review of literature is the passive role of the trial judge as an impartial arbitrator in the trial of CSA cases. At common law the trial judge's role is confined largely to that of an umpire of the contest between the prosecution and the defence, while ensuring that the parties abide by the rules of evidence.[98]Traditionally, the criminal trial also had the presence of the jury whose role it is to enter a verdict of guilty or not guilty based on questions of facts, leaving issues of the law to the judge. The judge is tasked with directing the jury on issues of the law and consequently the jury applies the law as to the facts.

The fact finding role of the judge is strictly limited in an adversarial trial, being confined to weighing the evidence adduced by both parties to the case and making decisions based on the burden of proof. The effectiveness of the role of a judge in an adversarial trial of criminal cases in obtaining the truth and promoting values such as defending the rights of accused persons and vulnerable witnesses has been questioned, and arguments advanced that the passive role of judges in classical adversarial system of trial contributes to injustice in cases of vulnerable witnesses such as CVSA.[99]

The last procedural gap identified by the literature review is the courtroom set up which appears intimidating to CVSA especially during their first appearance.Saywitz, Temkin, Herman and Hirschman, Abrams and Ramsey all seem to suggest that the ordinary courtroom layout is so serious that it may frighten even the most confident person due to the serious nature of the court business.[100] When CVSA who may not appreciate the nature of court business and language find themselves as witnesses in court, the intimidating environment sometimes impacts negatively on their ability to testify about the abuse.

In all the procedural gaps identified above, one common concern in all of them is that the principles of criminal trial aimed at ensuring fair procedural justice to accused persons have over the years been recognized as fundamental rights of accused persons to fair trial in criminal proceedings generally.However,when it comes to trials of CSA,some measure of injustice is caused to CVSA by the observance of the rights of accused persons as already enumerated above, necessitating concerns that there may be need to re-think the rights of accused personswhen it comes to CSA trials in order to ensure fairness and justice to both the accused persons and CVSA.

The next section of this paper reviews literature on the rights of CVSA and their special interests/concerns that may need to be taken into account as they testify in CSA trials if procedural fairness according to procedural justice theory.

VI. THERIGHTS/INTERESTS/CONCERNS OF CVSA IN CSA TRIAL

Although the international community recognized the need to protect accused persons' rights in criminal proceedings as evidenced by the court cases already discussed and arguments by scholars as well as the codification of the same in ICCPR and other international, regional and domestic human rights instruments, the need to take into account the concerns and rights of child victims and witnesses in the administration of justice has not escaped the attention of the same international community.

[96]Op. cit n 26.

[97]Op. cit n 39, 37.

[98] M Damaska, Evidentiary Barriers to Conviction and the Two Models of Criminal Procedure: A Comparative Study (University of Pennsylvania Law Review, 1973) 507.

[99] D Luban, Lawyers and Justice: Ethical Study (Princeton University Press, 1988)50.

[100] The courtroom arrangement with the judges' seat at a raised platform, the accused sitting opposite the witness stand from where witness testify, uniformed police officers, judges in robes, court clerks in dark suits and the general silence, all express the serious nature of the court environment.

Historical Background to child rights and protection

After the First World War, nations had to come to terms with the effects of the war which included wanton destruction of property and loss of human life. The worst affected groups were ethnic and religious minorities and vulnerable groups of children and women. Children needed special protection from child abuse and neglect. CSA therefore became a world concern as many children were sexually abused during the war.[101]

In 1920, nations came together to form the League of Nations with the main task being the development of an international legal framework for the protection of minorities and the vulnerable. In 1924, the fifth Assembly of the League of Nations adopted the first declaration on the need to protect children. This declaration, known as the Geneva Declaration of 1924 emphasized the material needs[102] of children devastated by the First World War. Apart from the minorities and the vulnerable, protection of all human beings became a central issue of focus for the international community. This led to the establishment of the current international system of binding human rights protection, under the United Nations, formed in 1948. Its core function is to promote and encourage respect for all human rights and fundamental freedoms for all.

In 1948, the range of fundamental human rights that belonged to all individuals by virtue of their status as human beings were codified into the first single document known as the Universal Declaration of Human Rights(UDHR).[103] The declaration set out a wide range of rights in all aspects of life and provides that all human beings are born free and equal in dignity and rights.[104]

The UDHR has been expressed as a common standard of achievement for all nations. Some of the declaration's provisions now form rules of customary international law. Although not set out in a treaty, these, are norms that through practice of states have come to be seen as legally binding rules. The entire declaration appears to possess this status of recognition. All states have a commitment to promote respect for the rights and freedoms set out in the declaration, and to take measures, both at the national and international levels to secure their universal and effective recognition and observance.

Although as the name suggests, the UDHR is just a declaration, and not a directly legally binding treaty, it is of high moral force, representing the first internationally agreed protection of all people as a result of violations. It laid the foundation for later binding treaties some of which have been domesticated by states, forming the domestic laws.

Of relevance to this study is the recognition by the UDHR that due to their physical and mental immaturity, children generally need special safeguards and care including appropriate legal protection.[105] The provision is an affirmation of the international community's concern and recognition of the fact that children are vulnerable, hence the need for special safeguards. It highlights the role of the state in taking appropriate deliberate measures that recognize the vulnerability of children (CVSA included).

The UDHR was followed by the 1959 Declaration on the Rights of the Child, which declared several rights[106] to children based on the premise that humanity owed to children the best it could offer them. This declaration is the origin of the principle of best interest of a child. The 1959 Declaration however, failed to provide for children's freedoms, liberties or autonomy, although it gave children a little more than just declaration of their rights.

The United Nations declared 1979 the International Year of the Child, focusing on the plight of children worldwide. It was followed by the Convention of 1989 and the World Summit of 1990 leading to the adoption of the United Nations Convention on the Rights of the Child (UNCRC)[107] which drew mixed reaction

[101] M D A Freeman and P E Veerman, The Ideologies of Children's Rights (Martinus Nijhoff Publishers, 1992)95.

[102] Needs requisite for normal development such as food, nursing care, assistance to the disabled and orphans, shelter and clothing.

[103] The UDHR adopted by the United Nations General Assembly Resolution 217A (III) of 10th December 1948.

[104] Ibid. Article I.

[105] *Op. cit* n 103, Preamble 8.

[106] The 1959 Declaration provided some rights such as respect and freedoms to children, laying emphasis on duties to children, without stating on whom the obligations to protect children lay.

[107] Convention on the Rights of the Child, adopted 20th November 1989 (entered into force 2 September 1990) GA Res. 44/25 (1989), UN Doc. A/RES/44/25 (1989). Text also available in (1989) 28 *International Legal Materials* 1448 and (1990) 29 *International Legal Materials* 1340. CRC has been ratified by every state in the

by African countries under the Organization of African Union (now African Union -AU).Subsequently, the African nations developed the African Charter on the Rights and Welfare of Children (ACRWC)[108] to provide for peculiar socio-cultural situation of the African child in terms of protection.

International Framework on Child Rights and Protection

The ICCPR (1966) which provides for the right to fair trial for accused persons also imposes obligations on member states to protect children as required by their status as minors.[109]In 1989, the United Nations Convention on the Rights of the Child (UNCRC) was adopted by the United Nations General Assembly Resolution-44/25 of 20th November 1989.[110] It is the single international convention that specifically provides for the rights of children and their protection, in recognition of their physical and mental immaturity, hence their vulnerability which is emphasized in the Convention's preamble that echoes the provision for children as contained in the UDHR which also proclaimed that childhood is entitled to special care and assistance.[111]

The UNCRC entered into force on the 2nd September 1990 and is the only international instrument that has a near universal ratification, having been ratified by all member states of the United Nations except the United States of America and Somalia.[112]Kenya signed it on the 30th, July 1990.

The UNCRC[113] reinforces and elaborates ICCPR's provision on member states' obligations to protect children from all forms of physical, mental violence including sexual abuse.[114]Article 3(1) of the UNCRC requires that in all actions concerning children undertaken by courts of law or administrative authorities, the best interests of the child must be a primary consideration. Under Article 12(2), the UNCRC requires that legal systems must respect children's rights to be heard in any judicial proceedings affecting them. The two provisions of the UNCRC are therefore the most relevant provisions that are applicable in the trial of CSA in so far as the protection of CVSA rights is concerned. The UNCRC therefore provides for two important principles of child protection that courts in member states are under obligation to observe in the trial of CSA.They are the principle of the best interests of the child and the right of children to be heard in any matter affecting them. It is worthy to note that the UNCRC did not go into details of how children rights are to be protected when they become victims of crime or are witnesses in the criminal justice system but left this to individual states.

In 1997,recognizing that child witnesses and victims of crime have legitimate concerns in the way they are treated by the criminal proceedings, which in some cases disable them from coherently and confidently testifying in court and leading to injustice in cases involving children, the international community responded by adopting the Guidelines for Action on Children in the Criminal Justice System as annexed to the Economic and Social Council Resolution 1997/30.Although not legally binding, the guidelines were a step further in appreciating that children need to be treated differently from adults when they participate in the court process. The guidelines were based on the DBPJVCAP[115] which stated that:

'States parties should undertake to ensure that child victims and witnesses are providedwith appropriate access to justice and fair treatment, restitution, compensation and social assistance'.[116]

The guidelines specifically provide that child victims should be treated with compassion and respect for their dignity. It further provides for child victims' entitlement to assistance that meets their special needs such as

world except Somalia and the United States of America. See Office of the United Nations High Commissioner for Human Rights 'Status of ratifications of the principal international human rights treaties' <http://www.ohchr.org/english/countries/ratification/11.htm>The UNCRC is the first single universal document that provides for children's rights.

[108]African Charter on the Rights and Welfare of the Child, adopted July 1990 (entered into force 29th November, 1999) OAU Doc.CAB/LEG/24.9/49 (1990). ACRWC was also passed to give effect to the provisions of the African Charter on Peoples and Human rights in respect to child welfare.

[109]*Op. cit* n 3.

[110]*Op. cit* n 107.

[111]*Op. cit* n 103.

[112] C P Cohen and H A Davidson, *Children's Rights in America; UN Convention on the Rights of the Child Compared with United States Law* (American Bar Association, 1990) 3.

[113]*Op. cit* n 107.

[114]Ibid.

[115]*Op. cit* n 28.

[116] Ibid paragraph 43.

advocacy, reintegration, physical and psychological recovery services, economic, counseling, health, social and protection services.[117]

The guidelines provide that judicial and administrative mechanisms should be established and strengthened to enable child victims obtain redress through procedures that are prompt, fair and accessible.[118] Of more relevance to this study is the guideline's provision that states need to review, evaluate and improve the evidential and procedural laws in their countries to enable child witnesses participate in criminal proceedings. It encourages magistrates, prosecutors and judges to apply more child-friendly practices such as video-taping the evidence of children and presenting the video tape in court as evidence in cases where the child is unable to testify in court.[119]

Recognizing the need to protect the rights of child victims and witnesses of crime, the UN Economic and Social Council, in 2005, adopted Guidelines on Justice Matters involving Child Victims and Witnesses of Crime, (UNGJMCVWC).[120]One of the special considerations by the Council was the fact that much as the rights of accused persons have to be safeguarded in criminal proceedings, there is need to ensure the protection of the rights of child victims and witnesses of crime in appreciating their vulnerability and need to give effect to the provisions of UNCRC in this respect.

Although not binding, the objective of the UNGJMCVWC was to assist member states review their national laws and procedures, taking into account the legal, social, economic, cultural and geographical conditions of their counties in ensuring full respect for the rights of child victims and witnesses of crime. The UNGJMCVWC is based on four principles derived from the UNCRC to be adhered to in handling child victims and witnesses of crime namely the dignity, non-discrimination, best interest of the child and the right to participation.

Kenya not only domesticated the UNCRC, but also enacted an enabling legislation, the Children Act.[121] Further, the provisions of all the international conventions are generally accepted, through practice, by states, as rules of customary international law that are of persuasive authority.[122]Kenya took another step by reaffirming this position and provides that the general rules of international law shall form part of Kenyan law under the Constitution of Kenya 2010.[123]Therefore the provisions of the UNCRC relevant to CVSA protection discussed above are binding on Kenya as a signatory of the UNCRC.The guidelines are however not binding but a good reference point in the trial of CSA.

VII. CONCLUSION

In concluding the discussions, the study makes seven conclusions as follows;

Firstly,the review of literature shows that there is universal consensus on the importance of accused person's rights in criminal proceedings and the need to safeguard them so as to ensure procedural fairness to accused persons. This is consistent with procedural justice theory. Secondly, the review also shows that child victims and witnesses of crime have rights and legitimate concerns under the UNCRC that should be enforced and respected respectively when they appear in court to testify.

Thirdly, there is consensus amongst various scholars that the classical adversarial court procedures cause trauma to CVSA and in some cases disables them from testifying coherently and confidently. Specific evidentiary rules that also protect the rights of accused persons which were identified as causing challenges in the prosecution of CSA are the presumption of innocence, the burden and standard of proof, the rule on competence of witnesses, the rule on the admissibility of hearsay evidence, the requirement that evidence should be adduced orally in examination –in- chief, the right to cross-examination by the accused person, the passive role of the trial judge, the requirement that criminal proceedings be held in public and the courtroom set up.

[117] Ibid paragraph 45.
[118] Ibid paragraph 47.
[119] Ibid paragraph 49.
[120]Guidelines on Justice Matters involving Child Victims and Witnesses of Crime (GJMCVWC) UN Resolution N0.2005/20 of 22 July 2005.
[121]The Children Act 2001.
[122] M D Marty, *The Criminal Process and Human Rights*: *Towards a European Consciousness* (Martinus Nijhoff Publishers, 1995) 9.
[123]*Op. cit* n 17 Article 2(5) (6).

Fourthly, there is recognition that the rights of CVSA as provided by the UNCRC are human rights internationally recognized and should be respected to give effect to the implementation of the UNCRC. Fifthly, there is concern about the need to re-think the evidentiary rules of the classical adversarial court procedure in CSA trials. Sixthly, there is recognition that the rights of CVSA are human rights and are as important as those of accused persons, therefore need to be enforced in criminal proceedings.

Lastly, Britain from where Kenya inherited the classical adversarial legal system has reformed its CSA trial procedure, as have the USA and Australia amongst other countries. Limited study in Kenya shows that there is concern about the challenges caused by court procedures in CSA trials.However,there has not been a study specifically focused on examining the effects of the court procedures on CVSA ability to testify in CSA cases and how to strike a balance between the rights of accused persons and those of CVSA to ensure procedural justice and fairness to both the CVSA and the accused persons.

REFERENCES

[1]. R M K Smith, International Human Rights (Oxford Press, 2007) 235.
[2]. D F J Curtis, Introduction to International Human Rights Law (CD Publishing, 2006) 13.
[3]. The ICCPR was adopted by the UN General Assembly in 1966 and came into force on 23 March 1976.
[4]. Articles 3,7 and 26 of African Charter on Human and Peoples' Rights, Articles 5,6,and 7 of the European Convention on Human Rights, Articles 3,8,9 and 10 of the American Convention on Human Rights.
[5]. Barker v Wingo, United States Supreme Court (1972) 407 U S, 514-515.
[6]. Botten v Norway. Judgment of 19th February 1996 (50? 1994/497/579) <http://www.norway-coe.org/general/hr/echr/Cases-against-Norway/ECHR---Cases-against-Norway/2-CASE-OF-BOTTEN-v-NORWAY/> accessed 3 July 2012.
[7]. J Smith, 'Evidence in Criminal Cases' in M McConville M and G Wilson (eds), The Handbook of The Criminal Justice Process (Oxford University Press, 2002) 183.
[8]. Article 50 of the Kenya Constitution 2010, Section 28 of Uganda's Constitution, Section 119 of Tanzania's Constitution, Section 18 of Zimbabwe's Constitution.
[9]. Human Rights Watch, World Report <http://www.hrw.org/word-report2011/Bolivia> accessed 3 July 2012.
[10]. 'Law Against Corruption, Illicit Enrichment and the Investigation of Assets' (in Spanish) <www: business-anti-corruption.com/country profiles/latin-america-the Caribbean.bolivia/general-information/> accessed 3 July 2012.
[11]. European Court of Human Rights' Annual Report 2011 <http://|ecohr.wordpress.com|2011|01|11> accessed 3 July 2012).
[12]. Constitution of Kenya 2010 Article 50.
[13]. David Njoroge Macharia v Republic Criminal appeal 497 of 2007 <http://kenyalaw.org/CaseSearch/case_search_one.php?casParties=David+Njoroge+Macharia+v+Republic+&casSubject=&chk1=checkbox&casNumber=&casCourt=&casJudges=&casType=&casAdvocates=&casCitation=&casYear=&check_submit=1&submitter=Searching+.+.+.> accessed 3 July 2012.
[14]. Articles 14(2) of the ICCPR, Article 15 of the European Convention on Human Rights, Article 27 of the American Convention on Human Rights.
[15]. L Zedner, 'Victims' in M Maguire and R Morgan and R Reiner R(eds),The Oxford Handbook of Criminology (Oxford University Press, 2002) 419.
[16]. 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.
[17]. R J Spencer and R Flin, The Evidence of Children, Law and Psychology (Blackstone Press Ltd, 1998) 75.
[18]. Attorney General's TaskForce Report, 'Family & Relationships' (1984) <http://books.google.co.ke/books/about/Attorney-General-s-Task-Force-on-Family.html?id=BGRqAAAAMAAJ&redir-esc=y> accessed 3 July 2012.
[19]. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, (1985) (DBPJVCAP). UN doc. A/CONF.144/20, Annex, Guide for Practitioners.
[20]. D C Bross, 'Terminating the Parent-Child Relationship as a Response to Child Sexual Abuse' (1995) in D E Abrams and S H Ramsey (eds), Children and the Law: Doctrine, Policy and Practice (Minn: West Group, 2000) 377.
[21]. Office of the High Commissioner for Human Rights, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers (United Nations, 2003) 47.
[22]. D R Kosovich, Stress in Everyday Life: A Global Experience (Viva Books, 2006) 50.
[23]. Congressional Research Services, 'Sexual Violence in African Conflict'(2010) <http:/www.fas.org/sgp/crs/row/40956> accessed 3 July 2012.
[24]. Abrams E D and Ramsey H S, Children and the Law: Doctrine Policy and Practice (Minn West Group, 2000) 541.
[25]. J Temkin, Rape and the Legal Process (Oxford University Press, 2002) 4.
[26]. R P Mosteller, 'RemakingConfrontationClause and Hearsay Doctrine under the Challenge of Child Sexual Abuse Prosecutionsin Abrams E D and Ramsey H S(eds), Children and the Law: Doctrine Policy and Practice (Minn West Group, 2000) 215.
[27]. The Sun (London, 27 July 1983) a British daily newspaper.
[28]. D Russell, The Secret Trauma: Incest in the Lives of Girls and Women (Basic Books, 1986) 45.
[29]. The Times (London 17 April 1986) A British Daily Newspaper.
[30]. McConville, and G Wilson, The Handbook of the Criminal Justice Process (Oxford University Press, 2002)1.
[31]. Lucia Zedner, 'Dimensions of Crime' in M Maguire, R Morgan and R Reiner(eds), The Oxford Handbook of Criminology(3rd edn Oxford University Press) 419.
[32]. C Eastwood and W Patton, 'The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System' (2002) <http://www.aic.gv.au/reports/eastwood.html> accessed 16 February 2012.
[33]. D Lockton and R Ward, Domestic Violence (Cavendish Publishers, 1997) 29.
[34]. J K Saywitz, 'Improving Children's Testimony: The Questions, the Answer and the Environment' in M S Zaragoza and others (eds), Memory and Testimony in the Child Witness (Thousand Oaks, CA: Sage, 1995) 87.
[35]. J L Herman and L Hirshman, Father-Daughter Incest (Harvard University Press, 2000)129.
[36]. J K Saywitz et al, Children's Knowledge of Legal Terminology in Language and Human Behaviour (1990) 14, 523-35.
[37]. A Crawford, Guilty as Libelled (A Marker Ltd, 1938) 121.

[38]. Emily Watt, 'Courts Fail Child Sexual Abuse Victims' The Dominion Post (31 March 2008)<http://www.stuff.co.nz/dominion post/44575296479.html>accessed 10 March 2012.
[39]. Pigot Judge T, 'Women and Children First' in J Spencer, G Nicholson, R Flin and R Bull (eds), Children's Evidence in Legal Proceedings: An International Perspective (Cambridge Law Faculty, 1990) 210.
[40]. Lord Mackay of Clashfern in his opening speech at an international conference on children's evidence in J Spencer, G Nicholson, R Flin and R Bull (eds), Children's Evidence in Legal Proceedings: An International Perspective (Cambridge Law Faculty, 1990) 1.
[41]. S A Omondi, 'Protecting Children from Abuse: Challenges Associated with the Implementation of the Children Act cap 586 of the Laws of Kenya'(Unpublished Master's thesis, University of Nairobi 2007) 97.
[42]. A N Adam, 'A Critique of Sexual Offences and the Law in Kenya' (Unpublished Masters thesis, University of Nairobi, 2006) 15.
[43]. M T Muhui, 'Sexual Offences Law in Kenya: The Penal Concerns and the Way Forward'(Unpublished Masters thesis, University of Nairobi, 2006) 33.
[44]. W E Waichigo, 'The Right of The Child in Third World Countries: A Closer Look at the Implementation and Violation of the UNCRC and the ACRWC' (Unpublished Masters thesis, University of Nairobi, 2002) 29.
- J Onyango,'Access to Criminal Justice in Kenya: A Case Study of Kibera' (Unpublished Masters thesis, University of Nairobi, 2008) 56.

[45]. Mutunga W, 'Progress Report on the Transformation of the Judiciary the First one Hundred and Twenty Days' (2011). The Honourable Chief Justice of the Republic of Kenya, in a speech he delivered on the 19th of October 2011 just one hundred and twenty days after his appointment to the highest office in the judiciary.
[46]. I H Dennis, Law of Evidence (Sweet & Maxwell, 2007) 604.
[47]. C M Bradley, Criminal Procedure; A worldwide study (Carolina Academic Press, 2007) 3.
[48]. L Hoyano and C Keenan, Child Abuse: Law and Policy Across Boundaries (Oxford University Press, 2010) 598.
[49]. M Damaska, Evidence Law Adrift (Yale University Press, 1997) 40.
[50]. UNICEF, 'A Situational Analysis of Child Sexual Abuse' <http://.unicef.org.protection/index-exploitation-html> accessed 24 February 2012.
[51]. J McEwan, Evidence and the Adversarial Process: The Modern Law (Blackwell Publishers, 1992) 128.
[52]. English Children and Young Persons Act 1933,s 38.
[53]. C Tapper, Cross and Tapper on Evidence (12th edn Oxford University Press, 2010) 176.
[54]. S C Thaman, Comparative Criminal Procedure: A Casebook Approach (Carolina Academic Press, 2008) 48.
[55]. Saywitz K J, 'Children in Court: Principles of Child Development for Judicial application' in J
[56]. Bulkley & C Sandt (eds), A Judicial Primer on Child Sexual Abuse (American Bar Association, 1994) <https://www.ncjrs.gov/App/publications/Abstract.aspx?id=149722> accessed 3 July 2012.
[57]. J Bulkley, Innovations in the Prosecution of Child Sexual Abuse Cases (American Bar Association, 1981)72.
[58]. H J Wigmore, Evidence in Trials at Common Law (revised by H J Chadbourn Little, Brown & Co 1979) 151.
[59]. W Walter, W H Charles and D M Samuel, Children in The Legal System: Cases and Materials (Foundation Press) 477.
[60]. M Stone, Cross-Examination in Criminal Trials (Butterworths, 1988) 170.
[61]. M Damaska, Evidentiary Barriers to Conviction and the Two Models of Criminal Procedure: A Comparative Study (University of Pennsylvania Law Review, 1973) 507.
[62]. D Luban, Lawyers and Justice: Ethical Study (Princeton University Press, 1988) 50.
[63]. M D A Freeman and P E Veerman, The Ideologies of Children's Rights (Martinus Nijhoff Publishers, 1992) 95.
[64]. The UDHR adopted by the United Nations General Assembly Resolution 217A (III) of 10th December 1948.
[65]. Convention on the Rights of the Child, adopted 20th November 1989 (entered into force 2 September 1990) GA Res. 44/25 (1989), UN Doc. A/RES/44/25 (1989). Text also available in (1989) 28 International Legal Materials 1448 and (1990) 29 International Legal Materials 1340
[66]. African Charter on the Rights and Welfare of the Child, adopted July 1990 (entered into force 29th November, 1999) OAU Doc.CAB/LEG/24.9/49 (1990).
[67]. C P Cohen and H A Davidson, Children's Rights in America; UN Convention on the Rights of the Child Compared with United States Law (American Bar Association, 1990) 3.
[68]. Guidelines on Justice Matters involving Child Victims and Witnesses of Crime (GJMCVWC) UN Resolution N0.2005/20 of 22 July 2005.
[69]. The Children Act 2001.
[70]. M D Marty, The Criminal Process and Human Rights: Towards a European Consciousness (Martinus Nijhoff Publishers, 1995) 9.