



Special Measures to Protect Child Victims of Sexual Abuse while Safeguarding the Rights of Accused Persons to Fair Trial; Lessons that children courts in Kenya can learn from.

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ABSTRACT:- A review of several literature reveals that the procedure applied by children courts in Kenya when handling child sexual abuse is not child friendly. In most cases the child victim is re-victimized as they testify due to lack of special measures to protect them in court. This article reviews literature on what measures have been undertaken by different jurisdictions to protect child victims of sexual abuse (CVSA) as they testify. The article discusses how the measures protect CVSA while safeguarding the accused person's right to a fair trial. Specific measures discussed include; preparation of CVSA for court and social support, child sensitive investigation of CSA and the taking of CVSA evidence, suppressing the presence of the accused person through the use of screens and television links, removing the accused person from the courtroom, modifications of the open courtroom, reducing courtroom formality, relaxation of commonlaw rules on hearsay evidence. The article concludes that Kenya can learn and borrow from other jurisdictions, measures that have been adopted to protect CVSA as they testify in court.

Keywords: Child, Measures, Safeguard, Special, Victims

I. INTRODUCTION

Child Victims of Sexual Abuse (CVSA) may not appreciate the nature of court business and language. When they find themselves as witnesses in court, the intimidating environment sometimes impacts negatively on their ability to testify about the abuse. The court rules of procedure and evidence protect the rights of accused persons to a fair trial. Due to their vulnerability, CVSA need special protection so as to participate in the trial process. It is only by taking deliberate measures to protect CVSA that the trial process can be said to be fair to both accused persons and CVSA.

Although the principles of criminal trial aim at ensuring fair procedural justice to accused persons, and have over the years been recognized as fundamental rights of accused persons to fair trial in criminal proceedings generally, when it comes to trials of Child Sexual Abuse (CSA), some measure of injustice is caused to CVSA by the observance of the rights of accused persons without corresponding measures to protect the vulnerable CVSA. This has over the years necessitated concerns that there may be need to re-think the rights of accused persons when it comes to CSA trials in order to ensure fairness and justice to both the accused persons and CVSA.

Although the international community recognizes the need to protect accused persons' rights in criminal proceedings, 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. This article examines the vulnerability of CVSA and their special interests/concerns that may need to be taken into account as they testify in CSA trials if procedural fairness is to be achieved for both CVSA and accused persons. Different jurisdictions have different ways of ensuring that the crucial evidence of CVSA is not lost due to the rigours of the adversarial court procedures. Some measures taken by different countries are discussed in the following sections.

II. PREPARATION OF CVSA FOR COURT AND SOCIAL SUPPORT

Courts have shown an appreciation that preparing CVSA for their court appearance produces tangible benefits by reducing unnecessary anxiety and improving the quality of the evidence of CVSA. In England and Wales as well as in Scotland, CVSA preparation is taken seriously due to its potential benefits to the entire court process. Researches have also been undertaken to enhance specific cognitive training techniques to improve children's memory and communication skills in the courtroom.¹

Pre-trial preparation programmes have been found to enhance CVSA participation in the court process in five key areas namely; recalling of information completely and accurately, understanding the lawyer's questions and indications of non-compliance, resisting compliance with leading questions, coping with anxiety and understanding the trial process.² The United Kingdom has greatly succeeded in preparing CVSA to go to court by organizing familiarization trips for CVSA to court, before their testimony and explaining to them the court process using the court visits and booklets developed for such purposes. All children called to testify in Scotland are issued with an explanatory leaflet 'Going to Court' by the prosecutor while in England and Wales the responsibility rests with the court.

In Canada, CVSA preparation programmes include work with courtroom model and dolls, role plays and familiarization with the courtroom procedures. Stress reduction techniques which include breathing exercises, muscle relaxation and cognitive restructuring are taught to CVSA to help reduce the stress associated with testifying in court.³

The availability of support and comfort from other people is known to reduce stress in any situation.⁴ Children provide more information in the company of a friendly person who is not involved in the trial as an interested party.⁵ CVSA therefore derive emotional comfort from the presence of a support person and there is the added advantage of reduced anxiety by the CVSA which ultimately improves the quality of their evidence. Such support can be derived from family, friends, social workers or professionals in that discipline. In cases of incest, professional support service is required to enable the CVSA testify. In USA, Britain, New Zealand, Canada and Australia, social support services are available to CVSA throughout the justice process beyond the testimony until the CVSA recovers fully from the abuse effects.⁶

III. CHILD SENSITIVE INVESTIGATION OF CSA AND THE TAKING OF CVSA EVIDENCE

Many countries have established specialist police units for dealing with child sexual abuse and CVSA. According to Morgan and Zedner⁷ in certain jurisdictions, CSA cases are allocated to officers with relevant experience. In Kenya, many of the officers who handle CSA cases have less than 5 years' experience. In 1991, the Crown Office in Scotland issued procurators fiscal with guidance notes for the investigation and prosecution of cases involving children. Subsequently, a similar manual was prepared for the English Crown Prosecution Service. The issuance of such manual was in recognition that the conduct of investigation and trial has significant impact on any victim's ability to cope with the stress associated with testifying.

In 1990, the Lord Justice General of Scotland (the most senior judge) issued practice direction to judges giving guidance on the use of discretionary measures in cases where children were victims or witnesses. Trial judges therefore have considerable discretion regarding the manner in which a child's evidence should be presented in court. Where children are to give evidence in open court, there are a number of modifications to the standard trial procedure making the court appearance less stressful to children. Such measures include;

¹ T Fundudis, 'Young Children's Memory: How Much do we Know About It?' (1997) 2 *Child Psychologies and Psychiatric Review* 150.

² L Hoyano and C Keenan, *Child Abuse: Law and Policy Across Boundaries* (Oxford University Press, 2010) 598.

³ L Dezwirek-Sas, 'Empowering Child Witnesses for Sexual Abuse Prosecution' in H Dent and R Flin (eds), *Children as Witnesses* (Chichester: Wiley, 1992)167.

⁴ T Cox, *Stress* (Macmillan, 1978) 596.

⁵ S Moston S, 'Social Support and the Quality of Children's Eye Witness Testimony' in H Dent and R Flin (eds), *Children as Witnesses* (Chichester: Wiley, 1992) 185.

⁶ *Op. cit* 2.

⁷ J Morgan and L Zedner, *Child Victims: Crime, Impact and Criminal Justice* (Oxford: Clarendon Press, 1992)114.

Taking of the evidence of CVSA in advance of the trial

In England, sections 42 and 43 of the Children and Young Persons Act of 1933 allowed a court to take the evidence of a child/young person anywhere else apart from the courtroom, in the absence of the accused person. The evidence would be admitted in evidence against an accused person in criminal proceedings, so long as the accused persons/counsel is given adequate opportunity to challenge it by cross-examining the child witness, victim. The provisions of The Children and Young Persons Act were however limited to written depositions and did not allow for video-recorded evidence. In 1963, part of the Children and Young Persons Act was consolidated into the Magistrates' Courts Act of 1980 and under section 102, it allowed the replacement of live evidence of a child with a written statement if the accused person did not object. In 1991, the Criminal Justice Act removed the requirement of no-objection by the accused person under the Magistrates' Courts Act of 1980. The Act allowed the prosecution to produce the written statement of CVSA instead of producing the child to give evidence without the approval of the accused person.

In 1999, the Youth Justice Criminal Evidence Act (YJCEA) was enacted. The Act provide for amongst other measures, the admission in evidence of video recordings of interviews with CVSA. The video recorded evidence takes the place of CVSA's evidence-in-chief. The recording is treated as the equivalent of direct oral testimony. The CVSA would therefore not need to appear in court, unless the court is satisfied as to the necessity of such appearance if any matter raised by the defense was not adequately covered by the video recording. In such circumstances, the options of a television link may be considered for purposes of the facts not adequately covered by the video recorded evidence. Under the television link, CVSA testify in a different room linked to the courtroom by television. The people inside the courtroom, who include accused persons/counsel, can see the CVSA through the television link on the screen. The screen blocks the face to face contact between the accused person and CVSA.⁸ This technology enables the court to protect CVSA from any intimidation that may result from face to face contact, while it provides an opportunity for the admission of evidence in the presence of the accused.

Of importance in determining the admissibility of the video recorded evidence is the way the interview of the child is conducted. It must not contain leading questions and clues to CVSA as to what to say in response to questions. Further, the desirability to admit the evidence must not cause any prejudice to the accused person, hence the need to balance the interests of both the accused person and the CVSA.⁹

Examination of CVSA through an intermediary

The YJCEA also introduced the concept of CVSA testimony being taken during examination-in-chief through the use of an intermediary. This is the most powerful measure introduced to protect CVSA from court associated stress. It involves CVSA testifying through an intermediary, a person whose function is to explain to CVSA questions asked by defence or court, and to explain CVSA's response to whoever asked the question. The intermediary must carry out the functions as stipulated by court rules. The use of an intermediary can also be combined with video recording interviews. All court officers must be able to hear and communicate with the intermediary who is identified from a list of properly trained and accredited individuals or from specific institutions.¹⁰

The use of intermediaries is not unique to the adversarial system. In continental jurisdictions, defence questions may be asked through the investigating judge, a procedure that the European Commission of Human Rights upheld in the case of *Baegen v Netherlands*.¹¹ In many legal systems, including some in the adversarial system, the evidence of CVSA is taken in advance of the trial. In the USA; several such measures commenced in the early part of 1980s to accommodate children's evidence.¹² In New Zealand and Australia, the protective measures were introduced in the early parts of the 1990s.¹³

⁸ J Cashmore and N De Haas, *The Use of Closed Circuit Television for Child Witnesses in the ACT* (Research Paper 1 Australia Law Reform Commission, 1992).

⁹ I H Dennis, *Law of Evidence* (Sweet & Maxwell, 2007) 604.

¹⁰ M Latham, *Evidentiary and Procedural Trends in Child Sexual Assault Litigation in USA* (Report to the New South Wales Law Foundation, 1987)15.

¹¹ *Baegen v Netherlands* App no16696/90.

¹² J Myers, 'The Child Witness: Techniques for Direct Examination, Cross-Examination and Impeachment' (1987)18 Pacific Law Journal 801.

¹³ K Warner, 'Child Witnesses-Developments in New Zealand and Australia' in J Spencer and others (eds), *Children's Evidence in Legal Proceedings: An International Perspective* (Cambridge University Law Faculty, 1990)111.

Avoiding adversarial examination of CVSA

The main aim of cross-examination is to bring to the open all relevant evidence which would otherwise pass unnoticed by the court and to assist the court in the process of discovering the truth.¹⁴ However, although described by lawyers as the best engine ever invented to discover the truth, the process has been abused and turned into provocative, intimidatory and at times embarrassing sessions to witnesses who get confused and end up contradicting their earlier recorded statements.¹⁵ In England and Scotland, judges have a duty to intervene and stop the intimidation of witnesses and statutory limits have been imposed on the extent to which victims of sexual offences can be cross-examined. Protective measures towards sexual assault victims have included the rape shield statute and video recorded cross examination which are explained below.

(a) Rape shield statutes

In England, the rules regarding intrusive cross examination of sexual assault victims in general were relaxed by the introduction of the so called 'rape shield statutes.'¹⁶ The first such statute in England and Wales was the Sexual Offences (Amendment) Act of 1976¹⁷ which prohibited evidence and cross examination on the past sexual history of the victim with any person other than the accused person except with the leave of the court. This provision was however found to be inadequate and in 1999, YJCEA was passed, imposing a general ban on cross examination of the victim by the accused person or his representative except with the leave of the court.¹⁸ The shield applied in cases of both child and adult victims of sexual assault.

The rape shield statute has been criticized for taking away the right to cross- examination of witnesses by an accused person. This matter was decided by the House of Lords in the case of *R v A (No.2)*¹⁹ where the court held that it was possible to read section 41 of the Youth Justice Act (Rape Shield Statute)('No evidence may be adduced and no question may be asked about any sexual behaviour of the complainant') to mean that 'evidence and questioning that is necessary to ensure a fair trial should not be excluded.' Thus, the court was finally in favour of protecting the accused person's right to a fair trial. The House of Lords took the position that the rape shield statute was incompatible with the accused person's right to cross examine witnesses in a fair trial and overturned the rule restricting the use of sexual history evidence in rape trials.

(b) Video recorded cross-examination

Under the YJCEA,²⁰ a video recorded interview of CVSA can also be admitted as CVSA's evidence in cross-examination and re-examination. The recordings must however be made as per set rules by the court or under its direction. Similarly, the recordings of the interview must be done in the absence of the accused person, but in the presence of such persons as directed by the court. The court officers, magistrate, legal counsel, interpreter and any person assisting CVSA must be able to hear and see the conduct of the interview. Though not required to be present at the interview room, the accused person must nevertheless be able to hear and see CVSA being interviewed and be able to communicate with his/her counsel as to what questions to ask. The cross examination is done under the control of the court and the accused person's rights are respected by ensuring his participation through his lawyer. This procedure is therefore in compliance with the right to a fair trial without the physical confrontation of CVSA. The presence of CVSA can thus be dispensed with since the accused person has an opportunity to challenge the evidence through his/her counsel. The process of taking the evidence of CVSA in advance of the trial is illustrated by figure 1 below;

¹⁴R J Spencer and R Flin, *The Evidence of Children, Law and Psychology* (Blackstone Press Ltd, 1998) 75.

¹⁵ Ibid.

¹⁶*Op. citn* 9.

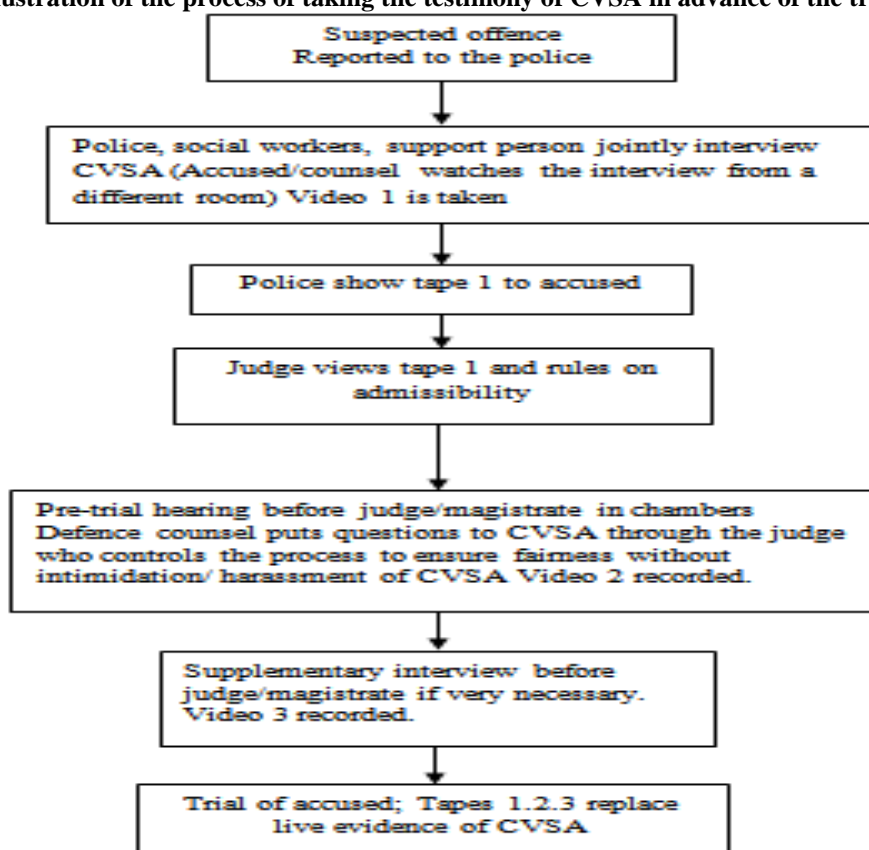
¹⁷ Section 2.

¹⁸ Section 41 of the YJCEA provided exceptions which include 1.if the refusal would render the jury's decision unsafe.2 where the evidence or question relates to a relevant issue.3.where the relevant issue is one of consent..

¹⁹*R v A (No.2)* 2001 UKHL 25, (2001)2 Cr App R 21.

²⁰ Section 28.

Figure1: An Illustration of the process of taking the testimony of CVSA in advance of the trial.



Source: Adopted from the Piggot Committee’s proposals to reform the child sexual abuse trial in Britain. (With some modification)

IV. SUPPRESSING THE PRESENCE OF THE ACCUSED PERSON THROUGH THE USE OF SCREENS AND TELEVISION LINKS

Another special protective measure taken to assist sexual assault victims generally under the YJCEA²¹ is the use of screens to shield the victim/witness from direct face to face contact with the accused person. The witness can however be seen by the accused person, judge, legal representatives and interpreters in court. The effect of the screen, according to Spencer and Flin, is to reduce the impact of face to face confrontation between the victim and the accused person. The European Commission on Human Rights approved the use of screens in Northern Ireland to protect intimidated witnesses from not only the accused person, but the public and the media in the case of *X v United Kingdom*.²²

In England, the Court of Appeal approved the use of screen by child witnesses in the case of *X, Y, Z*²³ where the test of ‘the balance of fairness’ was satisfied as they took into account not only the interest of the accused person, but that of the child witness too. The main argument in the use of screens is the necessity of the vulnerable child to give evidence, which outweighs any possible prejudice to the accused person. It also confirms the judges’ inherent common law power to vary the physical arrangement of the courtroom.²⁴

The issue of identification of the accused person by the victim remains an integral part of any trial procedure which presents difficulty in trying to protect CVSA from direct face to face confrontation with the accused person. In England, the problem is avoided since the courts readily accept as evidence that the accused was the person involved, evidence of identification parade prior to the trial or any other form of identification conducted by the police. The Scots have for long insisted on identification of accused person by the victim, but now apply the English procedure in cases of sexual assault.

²¹ Section 23.

²² *X v United Kingdom* (1992)15 EHRR CD 113.

²³ *X, Y, Z* (1990)91 Cr App R 36.

²⁴ *Op. citn* 9

The YJCEA²⁵ also provided for the use of live television link to aid vulnerable witnesses testify in court. The witness testifies from a room different from the court room, but is able to see and hear what goes on in court through the television link. Similarly, those present in court can hear and see the witness through the live link.²⁶ Where necessary, CVSA may be accompanied by a support person in the live link room to reduce the child's anxiety and enhance the quality of the evidence without influencing the child's evidence, but by offering psycho-social support services.²⁷

First introduced in England in 1988, live link has gained wide use in both physical and sexual abuse cases involving children in Britain, USA, Canada and Australia. Early research conducted on the effect of the use of live link in England showed that it greatly reduced the stress suffered by CVSA while testifying in court.²⁸

In *R v Davis*,²⁹ the United Kingdom House of Lords observed that even though face-to-face confrontation with trial witnesses was important, such confrontation was not necessarily an indispensable element of the constitutional right of an accused person to face his accusers. It may be dispensed with where it is necessary for public policy and where the reliability of the testimony is otherwise assured. The House of Lords further observed that the use of one-way closed-circuit television procedure, where it was necessary to further an important state interest, 'did not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause.'

In India, in what is arguably one of the leading judicial opinions in the Commonwealth on the use of video conferencing in giving and receiving evidence, the Supreme Court considered the case of *The State of Maharashtra v Praful*,³⁰ in which a witness who was willing to give evidence had stated that he was not ready to travel to India for that purpose. The High Court had ruled that it was mandatory for the witness to be in the actual physical presence of the court building. The Supreme Court observed that in video conferencing, both parties are in the presence of each other and that as long as the accused person or his lawyer/attorney was present when the evidence was recorded by video conferencing, that amounted to recording the evidence in the 'presence' of the accused person and such a procedure of taking evidence was in accordance with the law. In this case, the Supreme Court addressed itself to practical aspects of setting up the video conference and how to deal with certain concerns about the procedure that may be typically raised by parties opposed to it.

In Kenya the live link has been used in *Alishabhai Ali v Maritime Freight Company Ltd*³¹ by the Court of Appeal sitting in Nairobi to hear an appeal in Mombasa as a way of introducing information technology in the effective management of the judiciary. The High Court in Nairobi ruled in *R v KipsigeiCosmas & Another*³² that the absence of a specific legislation on the admissibility of video recorded evidence does not outlaw the admissibility of such evidence.

In the case of *Livingstone MainaNgare v R*³³ the court held that the trial magistrate erred in declining to take the evidence of two witnesses resident in the USA through video conferencing. The witnesses had expressed fear for their safety if they came to Kenya to testify in court. The High Court of Kenya ruled that it would allow the taking of evidence from the two witnesses by video conference. A judicial officer would be present in Washington at the witnesses' video terminal to administer the oath and to ensure that the witnesses were present and that they were not coached, harassed or otherwise interfered with. At the other video terminal in Nairobi would be the trial court and its officers, the accused person, his lawyer and the prosecutor or state attorney. The accused person would have every opportunity to cross-examine the witnesses as they were practically in his presence.

²⁵Section 24.

²⁶*Op. citm* 9.

²⁷*Op. citm* 2.

²⁸G Davies and E Noon, *Evaluation of the Live Link for Child Witness* (1991) 3-6.

²⁹*R v Davis* [2008] UKHL 36, (HL) {26(2)}.

³⁰*The State of Maharashtra v Praful*[2003] INSC 207.

³¹*Alishabhai Ali v Maritime Freight Company Ltd*. Court of Appeal at Mombasa Civil Application No. Nairobi 136/2003.

³²*R v KipsigeiCosmas & Another*[2011] e KLR.

³³*Livingstone MainaNgare v R*. High Court of Kenya Nairobi, Criminal Revision No 88 of 2011. [2011] e KLR.

The Judge observed that if the prosecution was forced to close its case without taking the evidence of the two witnesses by video conferencing, a procedure that would not prejudice the respondent; this would imperil the public interest in having all the evidence laid before the court in order for it to arrive at a just decision. The decision of the trial magistrate to exclude video conferencing as the medium of receiving the testimony of the two witnesses was ruled to be improper and an order was made for the evidence to be given at the expense of the prosecution.

The High Court decisions are authorities for the children courts in Kenya to admit video recorded evidence of CVSA in CSA trials. However, despite the High Court decisions in Kenya, the children courts are yet to employ the use of live television link in deserving cases of CSA at all.

V. REMOVING THE ACCUSED PERSON FROM THE COURTROOM

The most ideal way of ensuring CVSA testify without the fear of the accused person would be to remove the accused person from the trial during the testimony by CVSA. This is the situation in civil proceedings involving children such as wardship orders in Britain.³⁴ It is however generally assumed that the accused person cannot be excluded from his criminal trial since this would amount to a violation of accused person's right to be tried in his/her presence.

Where the accused person is unrepresented, this results into unfair procedure as it prevents the accused person from hearing the evidence of the witness. It therefore makes it impossible to challenge the evidence effectively. However, the argument is weak where the accused person is represented and the lawyer/counsel can listen to the evidence, cross-examine and look after the accused person's interests effectively in his absence.

There are indeed legal systems in which accused persons are excluded from their trial in the taking of evidence of a witness who has expressed fear of the accused persons. Such systems include France, Holland, Denmark and Germany.³⁵ In France and Holland, the judge has wide powers to do this and where necessary, the accused person is informed of the decision to exclude him/her from the witness testimony. However, after the witness testifies, the court informs the accused person of what the witness said in evidence in his absence immediately afterwards.

In Germany, the court can exclude the accused person from the testimony of a witness if the witness fears the accused person and if the witness is under 16 years of age and the welfare of the child requires so as in Denmark which interestingly follows the adversarial system of criminal procedure.³⁶ In Australia, the rules of evidence in Queensland have been changed giving powers to the courts to exclude the accused person from the taking of CVSA evidence if the child is under 12 years of age but the proceedings must be relayed to the accused person through a television link under section 22 of the 1977 Evidence Act. In Kenya, the courts are very conservative in adopting measures to protect CVSA despite wide discretionary powers provided by the Sexual Offences Act 2006.

VI. MODIFICATIONS OF THE OPEN COURTROOM

The ordinary courtroom is generally intimidatory and has the potential of instilling fear in even adult witnesses. The courtroom can be modified to create a conducive environment for CVSA to testify. This can be done in various ways as discussed below.

(a) Taking the testimony of CVSA in private as opposed to in open court

The YJCEA³⁷ provides for the evidence of intimidated witnesses to be taken in private by excluding all persons from the proceedings except the accused person, legal counsel, interpreter and court officers or those appointed to assist the CVSA. The exclusion power of the court is an exception to the fundamental principle of public trial/justice as stipulated by the European Commission on Human Rights.³⁸ In Kenya, majority of magistrates conduct CSA trials in the privacy of their chambers when taking the evidence of CVSA. This is the only best practice that appeared to be implemented by children courts at a near uniform level. However, this measure exposes the CVSA to intimidation by the accused through face to face confrontation, in the absence of the use of protective screens.

³⁴ *Op. citn 2.*

³⁵ *Op. citn 14.*

³⁶ P J Anderson, *The Anonymity of Witnesses, A Danish Development* (Criminal Law Review 363, 1985)32.

³⁷ Section 25.

³⁸ Article 6(1) excludes the press and public in trials where children are involved, or in sexual offence trials.

(b) CVSA's aids to courtroom communication

The YJCEA³⁹ provides for the use of communication aids that enable witnesses to express themselves. In this respect, CVSA have been allowed to use body diagrams and dolls to describe the genital organs. The use of courtroom communication aids in the Kenyan courts is very rarely applied, except for one prosecutor who attempted to aid a CVSA in describing to the court the genitalia by drawing a rough sketch of a human body. Australia, USA, Canada, Switzerland and France use various communication aids including motion pictures to assist CVSA in communicating details of the abuse to court.⁴⁰ These are innovations that Kenya can learn and borrow from to reform the criminal procedure in CSA trial.

VII. REDUCING COURTROOM FORMALITY:

There is no dispute that the tense atmosphere in the courtroom greatly contributes to the difficulties experienced by CVSA while testifying in court. The associated problems can be reduced in intensity by making the courtrooms more child friendly and less intimidating to CVSA. In Britain, judges and lawyers remove wigs and gowns when handling cases involving child witnesses. In Kenya, magistrates do not wear gowns or wigs at all. However, under the new Chief Justice, judges appear to relax the tradition of wearing gowns and wigs during court proceedings generally.

Rearrangement of the court to enable children be seen and heard without much difficulty is yet another way of making the courtroom less stressful for CVSA. In Kenya, only the Nairobi Children's Court has a conference court arrangement that enables all participating in the trial to sit in a conference set up, as opposed to the ordinary courts. In order to reduce the formalities in court and relax the environment to enable CVSA testify, England,⁴¹ Australia and the USA did away with the formal court dressing by both counsel and the magistrate/judge. The various measures to make the courtroom informal for cases involving children was discretionary in most jurisdictions, but slowly came to be given statutory force as is the case in the USA where a child has a statutory right to a support person under the Victims of Child Abuse Act of 1990.

VIII. RELAXATION OF COMMONLAW RULES ON HEARSAY EVIDENCE

England reformed its rules on corroboration,⁴² hearsay⁴³ and competence⁴⁴ to allow all children to give evidence so long as they understand the questions and can give answers. In France, Belgium and Holland, non-commonwealth jurisdictions, the hearsay rule does not exist at all in either civil or criminal proceedings as they follow closely an inquisitorial system that does not place much value on oral evidence.⁴⁵ Witnesses and suspects are almost invariably interrogated ahead of the trial and the written minutes of the interviews known as *procès-verbaux* in French and *processen-verbaal* in Dutch are part of a dossier which forms part of the evidence in the case.⁴⁶ If the witness testifies at the eventual trial, then the court has the *procès-verbaux* to supplement the oral evidence, but if the witness does not testify, it replaces the need for oral evidence and is admissible as evidence.⁴⁷

The *procès-verbaux* often includes statements made to the police in the early stages of the investigation and in serious cases such as CSA, a further round of pre-trial questioning takes place before a judicial officer called a *juge d'instruction* in French and *rechter-commissaris* in Dutch. This is a professional judge with discretionary powers to delegate the questioning to others. In France, the judge may be a specialist in questioning children. The judge sits in private, but with a clerk and lawyers who have a right to be present. The interrogation by the judge is recorded in writing. In cases of CVSA, the trial court reads the *procès-*

³⁹ Section 30.

⁴⁰ 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.

⁴¹ Section 26 of the YJCEA.

⁴² Section 34 of the English Criminal Justice Act of 1988.

⁴³ Hearsay evidence of what the CVSA was heard saying immediately upon the abuse has been admitted in evidence under the principle of *Res Gestae* as an exception to the rule against hearsay in the case of *Andrews* (1987) AC 281.

⁴⁴ The YJCEA of 1999 provides that all persons are competent to give evidence in criminal proceedings irrespective of their age unless it appears to the court that the person cannot understand and answer questions put to him/her.

⁴⁵ J K Saywitz et al, *Children's Knowledge of Legal Terminology in Language and Human Behaviour* (1990) 14, 523-35.

⁴⁶ *Op. cit* 14.

⁴⁷ Hans Schneikert (Chief Prosecutor of Berlin, 1904)

verbaux instead of hearing live testimony from the child. The French system insulates CVSA from the need to appear in court such that there is concern about CVSA who wish to appear in court to testify but are not allowed,⁴⁸ the exact opposite of what happens in Kenya.

In France and Holland, the judges have discretion to arrange for confrontation between accused persons and CVSA under a protective screen or television link. However in doing so, the courts safeguard the rights of accused persons in the following ways; the first safeguard is a number of procedural rules to regulate the pre-trial investigation. These include the presence of an official clerk at the interview, recording of the statement in writing, reading each page of the statement by the witness to confirm its contents, the signing of the statement by all parties present and provision of the statements to the accused person in advance of the trial.

The second safeguard is the right by accused person and prosecutor to ask for any witness, even if he/she had recorded a statement to give live evidence at trial. This does not however add value to the accused person since the witnesses are traditionally examined, not by defence counsel, but by the judge. In case the witness fails to turn up, the case still proceeds on the basis of the *proce`s-verbaux*. This is unlike the adversarial system where the case collapses if witnesses fail to testify in court.

The third safeguard is the practice of confrontation which has been enhanced by several ECtHR decisions which have insisted on accused persons being given adequate opportunity to challenge evidence against him/her.

The German inquisitorial system is less traumatizing to CVSA. CSA cases are tried in special children courts by specially trained judges who can communicate to children effectively. The judges, not accused persons or counsels ask CVSA questions and if CVSA fears the accused persons, they can be excluded from the trial. Although the German system depends on first hand oral evidence, it has mechanisms of taking evidence in advance of trial. Where the court appearance would cause psychological injury to CVSA, the court reads the previously recorded evidence of CVSA to the accused person who is allowed to ask questions which the court records and later asks CVSA to respond to. In addition, CVSA have a right to refuse to give evidence and the parents have a right to refuse on CVSA behalf if it would result into harm to the child. Legal representation of CVSA is a right in Germany as it is in Australia, USA and Canada.⁴⁹

Like the German system, in Japan, CVSA are required to give evidence orally, but Articles 158 and 227 of the Code of Criminal Procedure gives the judge power to conduct witness examination out of court and in advance of the trial especially due to the age of witnesses such as children. Additionally, formal statements made to the police are sometimes admissible as documentary evidence. The courts combine all the above options to avoid traumatizing CVSA through the court process.

The Scandinavian countries, USA, Israel and Italy which all follow the adversarial system of trial insist on oral evidence, but due to the difficulties children face in testifying in sexual offences, they have all taken measures to reform the traditional adversarial system of criminal procedure to accommodate CVSA. The reforms take three types;

The first type is the creation of an exception to the rule against hearsay so that adults can repeat to court what an absent CVSA told them about the abuse. The second type is change in rules of evidence so that CVSA evidence in court can be supplemented with the previously recorded evidence while the third type is the advance pre-trial examination of CVSA by the judge. Israel was the first to legislate on advance examination of CVSA in 1955 through the Law of Evidence Revision (Protection of Children) Law which set up the procedure of examining child witnesses by specialists.

Sweden and Norway also have schemes for taking the evidence of CVSA ahead of the trial, and the defence can challenge the evidence at a later stage after watching the pre-recorded video tape or reading the pre-recorded statement. In Sweden,⁵⁰ children below 15 years are not called to testify and the court can admit evidence of statements from potential witnesses recorded by police.

⁴⁸ H Hamon, 'The Testimony of the Child Victim of Intra-Familial Sex Abuse' in J Spencer and others (eds), *Children's Evidence in Legal Proceedings: An International Perspective* (Cambridge Law Faculty, 1990)346.

⁴⁹ *Op. citn* 2.

⁵⁰ T Havik, 'Official Ideals and Correct Practice in Work with Child Witnesses in Sexual Abuse Cases in Norway' in Losel *et al* (eds), *Psychology and Law: International Perspectives* (Walter de Gruyter, 1992)21.

IX. CONCLUSION

Like many countries, Britain from where Kenya inherited its trial procedure has found the traditional adversarial system of criminal trial unsuitable for CSA and taken steps to remedy the situation. There are lessons which Kenya can learn from and improve its criminal procedure to balance the rights of accused persons and those of CVSA in CSA trial. By doing so, the Kenyan court will be able to implement the rights of child victims and ensure their participation in the administration of justice in matters that affect them as required by the United Nations Convention on the Rights of the Child.

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