



A Critique of the Statutory Provisions on Child Sexual Abuse in Kenya

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ABSTRACT:- Although Kenya ratified the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, followed by domestication through the passing of the Children Act cap 586 of the Laws of Kenya, protection of child victims of crime, especially victims of sexual abuse still faces a lot of challenges. This article examines the statutory provisions on criminal procedure that are applicable in child sexual abuse cases in Kenya. The article analyses specific provisions within the context of the protection of child victims of sexual abuse. The article concludes that the drafters of the procedural statutes may not have envisaged the participation of children in the criminal justice system. Subsequently, the current criminal procedure laws are not specifically sensitive to the special needs of child victims of sexual abuse. The article concludes that there is a gap in the procedural statutes in protecting child victims of sexual abuse. The paper recommends the enactment of a special procedural statute applicable in child sexual abuse trials in Kenya.

Keywords:- child, procedure, protection, statutory, victim.

I. INTRODUCTION

Kenya is a signatory to the United Nations Convention on the Rights of the Child (UNCRC). The country also ratified the African Charter on the Rights and Welfare of the Child (ACRWC). The two instruments have been domesticated by the enactment of the Children Act Cap 586 of the laws of Kenya. The effect of domesticating the instruments makes their provisions part of the applicable laws that protect the rights of children in Kenya. Children rights are therefore recognized and protected in Kenya under the Children Act. The Act is however only declaratory as it declares the rights of children. In addition, the Children Act obligates the State and parents to ensure the protection of children. However, there is no special procedure in the justice system in Kenya which can enable the enforceability of the rights of children. Any attempt to access justice for child victims must therefore follow the formal legal procedures under the statutory laws on the procedure. Unfortunately, drafters of the statutory laws may not have had children in mind as they deliberated on procedural laws and guidelines. Consequently the implementation of the rights of child victims is hindered by the lack of special child victim friendly procedures. This article examines specific statutory provisions on procedures in the context of the protection of the rights of child victims of sexual abuse in a criminal trial. The statutes are analyzed as follows:

II. THE CRIMINAL PROCEDURE CODE CHAPTER 75 OF THE LAWS OF KENYA

The Criminal Procedure Code (CPC)¹ is the main statute that provides for the procedure to be followed in criminal cases including sexual offences under the Sexual Offences Act.² Together with the Constitution of Kenya 2010,³ the CPC greatly provides safeguards to suspects, but with no commensurate responsibility to

¹ Criminal Procedure Code, Cap 75 Laws of Kenya.

² Act no 3 of 2006.

³ Constitution of Kenya 2010, promulgated on the 27th of August 2010.

victims of crime generally. This therefore presents the biggest challenge to child victim of sexual abuse(CVSA) as they testify in child sexual abuse(CSA) cases under the adversarial legal procedures. The following discussion focuses on specific adverse provisions of the CPC that hinder CVSA ability to coherently and confidently testify in CSA matters.

Institution of a complaint

The first provision of the CPC that is adverse to CVSA is the requirement that for any complaint about a crime to be heard by a court, the proceedings must be instituted by either making a complaint or bringing the suspect before a magistrate.⁴ CSA is not just any crime and due to its peculiar occurrence within the confines of a private place/institution, home and the power that the abuser exercises over CVSA, it may not be easy for the CVSA to report the offence, especially if threatened against doing so by the abuser.

Ordinarily the reports are made not directly by CVSA but by their families, friends or relatives to the police, who subsequently decide whether to prosecute the case or not without necessarily taking into account the views of CVSA and their families. One of the grounds considered by the prosecution in deciding whether to prosecute or not is the likelihood of a conviction or an acquittal of the accused, not justice for the victim.⁵ In cases where the only witness is a young CVSA below four years, the prosecution may decide that there is no strong witness/evidence and drop the case. This provision seems to focus more on the suspect than the CVSA's search for justice. Such wide and uncontrolled discretion by the prosecuting authority, even if well-meant serves to discourage CVSA from instituting CSA cases. The reference to sexual matters as bad manners and the associated stigma also discourages victims of sexual abuse and their families from reporting the abuse.

Attorney General's exclusive power of Nolle Prosequi

The second provision of the CPC that is adverse to CSA cases is the Attorney General's (read director of public prosecutions) power to enter a *nolle prosequi*.⁶ When exercising this power, the Attorney General is not obliged to consult CVSA or their families, neither does the court need to be given a reason for such an application. Such wide powers vested in the prosecuting agency if not cautiously exercised may not serve the best interest of CVSA.

Withdrawal of a case by the prosecution

The third provision of the CPC adverse to CVSA is the prosecution's power to withdraw any case before a subordinate court, either upon the Attorney General's instruction or with the consent of the court.⁷ Such an application if allowed by the court has the effect of discharging the accused, if made before the prosecution closes its case, or acquitting the accused if made after the accused person is placed on his defence. The victim's views do not seem to be a factor for consideration in such applications, relegating the victim (CVSA included) to the position of a spectator in the decision making process of the trial of CSA cases.

Private prosecution

The fourth provision of the CPC⁸ adverse to CSA is the provision that any person may personally or through an advocate, with the permission of the court conduct a prosecution. This only happens where the prosecuting agency has failed to act as may be the situation in incest cases where the Attorney General fails to give consent to prosecute. Good as the provision may seem to be, the Attorney General still retains the power to enter a *nolle prosequi*⁹ in such private prosecutions. The section is however silent on who should bear the costs of investigation and prosecution in such instances which may be beyond CVSA's means.

⁴ Supra n 1 Section 89.

⁵ The National Prosecution Policy.

⁶ Supra n 1 Section 82 A *nolle prosequi* is an application by the Attorney General to court of the State's intention to discontinue proceedings before it. *Nolle prosequi* is different from a withdrawal under section 87 of the CPC in that it is not subject to court approval, but is an exclusive power of the Attorney-General who does not have to give any reason to the court.

⁷ Ibid Section 8.

⁸ Ibid Section 88. In *Richard Kimani and S. M vs. Nathan Kahara* .High Court of Kenya (Revision) case No 11 of 1983, it was held that the court hearing an application for private prosecution must be satisfied that a report made to the office of the Attorney-General for prosecution was never acted upon, that the applicant has *locus standi* and that he/she has suffered damage and that the motivation is not political or malice.

⁹ Ibid Section 82.

Provision as to Bail

The fifth provision of the CPC that is adverse to CSA cases is the fact that CSA is a bailable offence and so suspects charged with CSA have a right to be admitted to bail.¹⁰ Releasing a sexual assault suspect on bail may contribute to the interference of investigations as the suspect has the opportunity to either threaten CVSA and their families against testifying in court or coercing them into withdrawing the case altogether or settling it out of court. The fact that a sexual assault suspect is released on bail by the court has been viewed by the public as assign of the court's leniency on CSA cases.

Where only the accused has material facts about the abuse

The sixth provision of the CPC is where the only witness to the facts of the case called by the defence is the person charged, who shall be called as a witness immediately after the close of the prosecution evidence.¹¹ In cases of CSA, due to its private nature of occurrence, the only eye witness to the abuse in most cases is the accused person who further has a right to remain silent when placed on defence. Can the accused person be called to testify immediately after the close of the prosecution evidence, instead of waiting for the court's ruling as to whether or not there is a case to answer against him/her? Would it be unfair to the accused if obligated to reveal to the court the facts of the case within his/her knowledge in CSA cases?

Silence of the CPC on CVSA court appearance at plea stage

The seventh concern is the silence of the CPC on the need to present the CVSA to court at the time of plea taking in cases of CSA.¹² The appearance of CVSA in court at plea taking may enable the trial magistrate to see the CVSA soon after the abuse with possibility of some injuries and consequences of the abuse being evident. If noted by the court, such observation serves to strengthen the CSA case.

Oral, direct evidence in the presence of accused

The eighth adverse provision of the CPC is the requirement that all evidence in a trial must be taken in the presence of the accused or his advocate and is therefore the basis upon which CVSA must give oral evidence in court in the presence of the accused and identify him/her as the one who committed the offence under trial.¹³ This provision has no regard to situations where the CVSA is vulnerable and easily intimidated by the accused. Narrating the painful experience in the presence of the accused has been found by several studies to be very traumatic to all victims of sexual abuse.

Treatment of refractory witnesses by the court

The ninth provision adverse to CSA is the court's treatment of witnesses deemed to be refractory.¹⁴ The section does not exempt CVSA in cases of CSA, whereas it has been established that CVSA may change their story in court or refuse to answer any questions, especially in cases of incest for fear of being held responsible for the jailing of the accused in the event of a conviction. Such scholarly explanation however does not seem to be taken into account by the law which goes on to provide that such action by refractory witnesses, may lead to the acquittal of the accused.

Acquittal of the accused person for non-attendance of complainant

The tenth provision of the CPC¹⁵ adverse to CSA is the power of the court to acquit an accused on the ground of non-attendance/appearance of the complainant at a hearing. This section favours the accused at the disadvantage of the CVSA who often relies on a guardian to take them to court amongst other factors that may affect their court attendance. Paradoxically, the section appears to refer to the victim as the complainant whereas it is generally accepted that in criminal cases the complainant is the state, hence the framing of the charge as the State (through the Attorney-General) verses Another.

¹⁰ Ibid Section 123.

¹¹ Ibid Section 160 and section 211 that allows an accused to remain silent if placed on defence. Such an option denies the court an opportunity to know facts of the case which may only be knowledgeable to the accused, yet vital in making the determination of CSA cases.

¹² CVSA often appear in court for the first time when required to testify which may be long after the visible signs of the abuse have disappeared, denying the court an opportunity to observe and record the victim's demeanor, an important component of evidence that judicial officers should consider.

¹³ Ibid Section 194.

¹⁴ Ibid Section 152. Refractory witnesses are those who refuse to be sworn or answer questions put to the while at the witness stand in court.

¹⁵ Ibid Section 202.

Withdrawal of a case by a complainant

The eleventh provision of the CPC adverse to CSA is the provision that a complainant may withdraw a case upon an application to court which if allowed, the accused can be acquitted.¹⁶ This provision should not apply to CSA as it is likely to be abused by someone who pursues their own interest, as opposed to the best interest of CVSA in making such an application on behalf of the CVSA. Linked to this provision is the power of the court to promote reconciliation between parties in criminal cases which do not amount to a felony. CSA is so serious an offence that robs the victims of their privacy and dignity and therefore should be specified as not reconcilable by the court or any other person. In the absence of such express provision, the power may be abused at the future risk of the CVSA.

Acquittal on ground of insufficient evidence

Upon the close of the prosecution case, if the court establishes that there is insufficient evidence the accused is acquitted.¹⁷ The section does not clearly define what amounts to insufficient evidence, and coupled with the many safeguards to the accused, the section makes it easy for a CSA case to be dismissed by court.

Although many provisions of the CPC seem not to take into account the special needs of CVSA as is argued in the preceding discussions, there are some provisions which directly protect the interests of CVSA. These include;

Trial of sexual offences in private

One such provision is the requirement that the trial of sexual offences be held in private as opposed to ordinary crimes which are tried in open court.¹⁸ This provision takes into account the need to maintain the dignity and privacy of CVSA in cases of CSA as stipulated by the UNCRC,¹⁹ ACRWC,²⁰ the Children Act²¹ and the Constitution of Kenya 2010.²²

Victim impact statements

Finally the CPC requires the courts to take into account victim impact statement in making their decisions.²³ This is indeed a good provision that gives CVSA an opportunity to contribute and be heard in as far as court decision and sentencing is concerned.

The CPC,²⁴ being the major statute that guides prosecution in courts is largely not tailored for the prosecution of CSA cases and the existing gaps discussed necessitate the enactment of special procedures in cases of CSA.

III. THE EVIDENCE ACT CHAPTER 80 OF THE LAWS OF KENYA

The Evidence Act²⁵ is an Act of Parliament that applies to all judicial proceedings before court and regulates what facts are admissible and how the process of admissibility is to be conducted. This section discusses provisions of the Act adverse to CSA cases as well as those that are friendly to CVSA.

Provisions of the Evidence Act that is adverse to CSA

The requirement by the Evidence Act that evidence to prove facts alleged must be adduced orally and must be direct,²⁶ leads to direct/facial contact between the accused and the victim in court. The resulting fear of the accused by the victim has been found to disempower the victim from giving evidence coherently and confidently.²⁷ The psychological trauma associated with seeing the accused 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 in CSA cases.

¹⁶ Ibid Section 204

¹⁷ Ibid Section 210.

¹⁸ Ibid Section 77

¹⁹ Articles 4 and 16 of the United Nations Convention on the Rights of Children (UNCRC).

²⁰ Article 11(5) of the African Charter on the Rights and Welfare of Children (ACRWC).

²¹ Sections 14 and 19 of the Children Act 2001.

²² Articles 19(2) and 28 of the Constitution of Kenya 2010.

²³ Supra n 1 Section 392A.

²⁴ Ibid.

²⁵ Section 2 of the Evidence Act Cap 80 Laws of Kenya.

²⁶ Ibid Section 62.

²⁷ J Temkin, *Rape and the Legal Process* (Oxford University Press 2002) 60.

The Evidence Act places the burden of proof on the person who alleges facts.²⁸ This works well in adult cases, but does cause inequality in protection by the law to CVSA in CSA cases where the victim may not even be able to face the accused in court due to their vulnerability. The Evidence Act²⁹ provides for the manner in which evidence is adduced in court and verified by an adverse party under processes known as examination-in-chief, cross-examination and re-examination. This elaborate process of testifying in court, is founded on the assumption that not all witnesses tell the truth and not all documents produced in court are genuine. In cases of CSA, a strict adherence to this process of testing the witness evidence was described by some children as worse than the abuse itself.³⁰

Provisions of the Evidence Act that is friendly to CVSA

Not all provisions of the Evidence Act³¹ are adverse to CSA as some are positive towards CVSA though not directly.

Criminal Law Amendment Act of 2003

Prior to the year 2003, section 124 of the Evidence Act³² required that a child's evidence must be corroborated if it was to form the basis for a conviction in any case where children testified in court. This evidentiary rule occasioned injustice especially in cases where the only witness was a child. This requirement was finally done away with through an amendment to the Evidence Act³³. Courts can now safely convict an accused on the evidence of a child as a single witness. The importance of this amendment to the study is that the law finally ceased to treat children as liars whose evidence must be confirmed by that of an adult. Further, it is an appreciation of the fact that in certain circumstances, the child may be the only witness as happens in some cases of CSA.

Definition of Evidence and fact

Another positive aspect of the Evidence Act is the definition of 'evidence' to include observation by the court in its judicial capacity and the word 'fact' to include any mental condition, of which any person is conscious of.³⁴ Courts may observe unusual behavior from CVSA in court which psychologists link to CSA. An example is a condition psychologists refer to as Post Traumatic Stress Disorder (PTSD) which results from prolonged or intense exposure to a traumatic event such as CSA.

Responses to PTSD include persistent re-experiencing of the trauma in the form of thoughts, images dreams, and fear of a repeat of the event, and intense stimulus reaction to anything /body associated with /reminders of the trauma.³⁵

Some of the coping mechanisms that the victim of PTSD develops include avoidance of anything associated with the trauma (blocking/blanking) the mind to get rid of the memory of the traumatic event. There is a general consensus among psychologists that when children encounter trauma such as in cases of CVSA, they are unable to cope with the trauma and in the absence of any assistance, they are not likely to talk about the trauma at all. Since psychologists possess this vital knowledge on the behavior of a victim of trauma, the courts should consider invoking section 3 of the Evidence Act to admit expert psychologist's evidence in cases of CSA Where the CVSA 'refuses' to testify. Experts' opinion in this respect is further supported by section 49 of the Evidence Act.

Children have been known to refer to sexual abuse in their own language such as '*tabia mabaya, koko, dudu makamasi*', terms which are not ordinarily used and which have peculiar meaning. Defence advocates or accuseds may pin down CVSA to explain to court what they mean by such terms, thereby further traumatizing

²⁸ Section 107 of the Evidence Act Cap 80 Laws of Kenya.

²⁹ Ibid Sections 145 and 146.

³⁰ J R Spencer & R H Flin, *The Evidence of Children, the Law and the Psychology*, 2nd edition, (Blackstone Press limited 1993) 27.

³¹ Ibid.

³² Ibid

³³ Criminal Law Amendment Act No.5 of 2003 which repealed section 124 of the Evidence Act amongst other measures.

³⁴ Section 3 of the Evidence Act Cap 80 Laws of Kenya.

³⁵ D RKosovich, *Stress in everyday life, A global experience* (Viva Books Private Limited, 2006) 100.

the CVSA. The court can invoke the Evidence Act to invite social workers, child rights advocates or child psychologists to explain the meaning and use of such terms.³⁶

When it appears that the CVSA cannot recall the evidence as recorded by the police, the Evidence Act³⁷ allows the CVSA to refresh his/her mind by seeing and reading the statement previously recorded. This positive provision has the effect of reducing the number of CSA cases dismissed for lack of or insufficient evidence under the CPC.

The court's power to control indecent/scandalous questions

Finally in the event of unfair cross examination of CVSA by the accused/advocate, the court can exercise its powers³⁸ to control indecent or scandalous questions which may be meant to harass, annoy or discredit CVSA so that they give contradictory answers, an art perfected by most advocates.

The Evidence Act is not totally adverse to CVSA as there are certain provisions which take into consideration situations when children testify in court. However, these are general to all children, hence there is a need for specific evidentiary rules for taking the evidence of CVSA in cases of CSA.

IV. THE WITNESS PROTECTION ACT 2006

Cited as Act No 16 of 2006, the Witness Protection Act 2006 is an Act of Parliament passed to provide for the protection of witnesses in criminal cases and other proceedings. It defines a witness as one who has given or agreed to give evidence on behalf of the State in proceedings for an offence or before an authority, or in relation to an offence already committed or likely to be committed against a law in Kenya, but for any other reason requires assistance under the Act.³⁹

The above definition of a witness can be construed to include CVSA since they make statements to the police about CSA and are required to give evidence in court in respect of the sexual offence. Further they require protection due to their vulnerability and possible intimidation by the accused. The most relevant section of the Act is the provision for ways in which witnesses may be protected.⁴⁰ These include new identity to the witness, protection of the witness, witness relocation, accommodation, transport, financial assistance, counseling and vocational services. The most relevant of the services to CVSA is counseling which should be provided to ensure the CVSA is in a proper state of mind when testifying. Financial and transport services and important where necessary, and accommodation too, especially in cases of incest where it is important to shield CVSA from possible interference from the accused and the family.

Subsection 2(g) gives the Attorney General wide powers to take any measures considered necessary to ensure safety and welfare of witnesses. This provision serves as a framework for the development of protective procedural rules in cases of CVSA. Children can be placed under the witness protection programme as envisaged by the section 5(c) (1) which allows a parent to sign on behalf of a child witness. The circumstances surrounding CSA fit into factors to be considered by the Attorney General for placing a witness under the witness protection programme.⁴¹ The first factor is the seriousness of the offence, which CSA qualifies as one.

The second factor is the nature and importance of any relevant evidence or statement. The statement of CVSA recorded by the police is often the most important factor that makes the police decide to prosecute. Such statements are vital in court in establishing the guilt or innocence of the accused. Therefore there is need to protect CVSA from possible interference by the accused, which may result into CVSA denying the statements or changing their evidence or refusing to testify as argued by Temkin in her study of victims of sexual abuse.⁴²

The third factor is the nature of the perceived danger to the witness. This cannot be overemphasized as CSA is often accompanied with psychological, mental and physical abuse with threats of a repeat should the CVSA reveal the abuse to anyone, which is what the testimony in court does. The previewed threats by the CVSA may inhibit them from testifying, hence the need to put CVSA under the witness protection programme.

³⁶ Section 52 and 104 of the Evidence Act Cap 80 Laws of Kenya.

³⁷ Ibid. Section 168.

³⁸ Ibid Section 159.

³⁹ Section 3 of the Witness Protection Act, act no 16 of 2006.

⁴⁰ Ibid Section 4.

⁴¹ Ibid Section 6.

⁴² *Supra* n 27.

The fourth factor is the relationship of the witness to other witnesses being assessed for inclusion in the programme. This is particularly relevant in cases of incest where other siblings of the CVSA have either been sexually abused or are at risk of being sexually abused by the accused or other members of the family.

From the foregoing discussion of factors considered in deciding whether a witness qualifies to be placed under the witness protection programme, it is evident that CVSA qualify and so the Witness protection Act serves as a framework for developing special measures to protect CVSA as they testify in court since it does not have specific provisions for CSA, but contain provisions on children witnesses generally.

V. THE OATHS AND STATUTORY DECLARATION ACT

Cited as chapter 15 of the laws of Kenya, it is an Act of Parliament that provides for the appointment of a Commissioner for Oaths and to make provision in regard to the administration of Oaths and the taking of Statutory Declarations. The relevant provision of the Act to CVSA is section 19 that requires magistrates to interrogate children of tender years to establish their ability to understand the nature of an oath and tell the truth before allowing them to testify. This provision re-affirms the mistrust of children and the perception that whatever they say must be thoroughly scrutinized, thereby supporting the rationale of the requirement of corroboration of children's evidence which has since been done away with. This requirement may contribute to the CVSA's fear that everyone in court blames them as if it is them and not the accused on trial, contributing to their mistrust of the court. The Act therefore serves no purpose in furthering the best interests of children of tender years who are CVSA and as such there is need to review it with a view to doing away with the requirement of interrogating children of tender years who are required to testify in cases of CVSA.

VI. THE SEXUAL OFFENCES ACT NO 3 OF 2006

This is an Act of Parliament that provides for a wider definition of sexual offences, types of sexual offences, preventive and protective measures in cases of sexual assault and other connected purposes. Prior to its enactment, sexual offences were prosecuted under the Penal Code⁴³ and in the case of children, under the Children Act.

Key highlights of the Act include bringing all sexual offences under it, expanded definition of sexual offences, provision of minimum and maximum sentences and the taking away of the courts discretion in this respect to create a near uniform guide on sentencing in respect of sexual offences. The Act supersedes all other Acts in relation to sexual offences.

Provisions of the Act that is relevant to CSA

The definition of sexual assault includes full or partial penetration or manipulation of the genital organs or any other part of the body of a person by another person's body part or object.⁴⁴ The definition is an improvement on definition of defilement under the Penal Code and the Children Act which left out partial penetration and manipulation, as well as an object as a means of penetration. CVSA may now find it less difficult to describe the abuse.

Minimum punishment for defilement

The Act sets minimum sentence for all offences including those against children. Defilement of a child aged 11 years and below attracts a mandatory life sentence, while defilement of a child between 12 and 15 years carries a minimum sentence of 20 years. Defilement of a child between the ages of 16 and 18 years attract a minimum sentence of 15 years.⁴⁵ Attempted defilement⁴⁶ attracts a minimum sentence of 10 years while gang defilement⁴⁷ is punishable by a minimum sentence of 15 years which may be enhanced to life imprisonment. An indecent act with a child is punishable by a minimum sentence of 10, years while incest with a child attracts mandatory life imprisonment and attempted incest with a child is punishable by minimum of 10 years.⁴⁸ The fact that the law has minimum sentences has the effect of enhancing CVSA's trust in the punishment the accused is

⁴³ Chapter 63 of the Laws of Kenya.

⁴⁴ Section 5 of the Sexual Offences Act No 3 of 2006.

⁴⁵ Ibid Section 8.(2)(3)(4)

⁴⁶ Ibid Section 9(2)

⁴⁷ Ibid Section 10

⁴⁸ Ibid Section 11(1) for indecent act and Sections 20 and 21 for incest by males and incest by females respectively.

likely to face if convicted and subsequently may encourage them to report CSA and testify against the accused persons despite other challenges.

Provision for an intermediary

The provision for an intermediary⁴⁹ by the Act is a big measure towards special protective procedures in cases of CSA where the CVSA may be unable to testify. Of particular importance to this study is the recognition of experts in children issues as intermediaries. They are able to tell the court not only what the CVSA told them about the abuse, but what they observed and their expert opinion based on professional skills and experience. This has the effect of adding value to their evidence which assists the court in making decisions based on the best interest of children.

Classification of child witnesses/victims as vulnerable

Child witnesses and victims are classified by the Act as vulnerable⁵⁰ therefore being in need of special protection that takes into account their best interest. This is consistent with the Constitution of Kenya 2010⁵¹ which provides the constitutional framework for protecting children. It also reaffirms section 4 of the Children Act on the best interest principle.

Admission of evidence of surrounding circumstances

The inclusion of circumstances surrounding the offence, in cases of CSA and the impact of the abuse on CVSA as part of evidence serves to strengthen the CVSA's case as it is likely to reveal their vulnerability and power exercised by the accused over them, especially in cases of incest or teacher pupil relationship. This may assist the court to understand why in some cases the CVSA may contradict the statements earlier recorded by the police, refusal to testify, or some unexplained behaviour by CVSA.

Exclusion of evidence of previous sexual experience and character

The fact that the Act⁵² excludes evidence of character and previous sexual history of the victims is a milestone in the protection of CVSA from intimidating and annoying method of interrogation, meant to ensure that they give contradictory statement. This, according to Flin and Spencer, is an art perfected by advocates in order to have their clients (accused) acquitted on the basis of inconsistent evidence.⁵³

The court's power to order DNA

This is one of the most important provisions of the Act that may protect CVSA from the anguish of proving that they were sexually abused by the accused.⁵⁴ By ordering a DNA and forensic tests to be carried out on the accused and CVSA, the CVSA is saved unnecessary emotional and psychological anguish which amounts to re-living the abuse again in court. This may serve to encourage CVSA to appear in court and testify.

Recognition of children's inability to appreciate the nature of sexual relations

The Act recognizes children's inability to appreciate the nature of sexual relations. This provision strengthens children's vulnerability since they can only be engaged in sexual activities by threats, intimidation or coercion.⁵⁵ The implication therefore is that CVSA need further special protection as witnesses if they are to testify in court.

Recognition of children's incapacity to give consent in sexual matters

The Act generally provides that a person consents if he/she agrees by choice and has the freedom and capacity to make that choice.⁵⁶ Read together with section 43(4) (f), children are deemed not to have capacity to consent to sexual advances and therefore a strict interpretation of the law should hold the accused guilty until they prove to the court otherwise, contrary to the constitutional presumption of innocence until proved guilty.⁵⁷

⁴⁹ Ibid Section 31(4)(b). An intermediary is defined by section 2 of the Act as a person authorized by the court on account of his/her expertise/experience to testify on behalf of a vulnerable witness. They may include a parent, relative, psychologist, counselor, guardian children's officer or social worker.

⁵⁰ Ibid Sections 2 and 3.1

⁵¹ Article 53(2) of the Constitution of Kenya 2010.

⁵² Section 34 of the Sexual Offences Act no 3 of 2006.

⁵³ *Supra* n 30 pg 250.

⁵⁴ Section 36 of the Sexual Offences Act no 3 of 2006.

⁵⁵ Ibid. Section 43(4)(f).

⁵⁶ Ibid Section 42.

⁵⁷ Article 50 (2)(a) of the Constitution of Kenya 2010.

Declaration of sexual offence convicts as dangerous

The Act is very specific that anyone convicted of a sexual offence against a child may be declared dangerous.⁵⁸ Such declaration has the effect of assuring CVSA that they are not the ones to be blamed for the abuse, but the accused whom the court further declares to be a dangerous sexual offender. This assurance is important for the psychological development and satisfaction of CVSA.

Inclusion of Medical treatment records as part of evidence

This provision of the Act⁵⁹ further strengthens the case of CVSA in CSA cases where the CVSA may not be able to tell the court much or where the abuse is reported to the police after the CVSA had been treated.

Incest by males and females involving children

The Act⁶⁰ provides that in cases of incest with a child, if the accused is convicted, the court can declare the CVSA to be a child in need of care and protection and issue protective orders under section 114 of the Children Act.⁶¹ In addition the court can divest the accused of all authority over the CVSA, remove the CVSA from the custody or guardianship of the accused and appoint a guardian for the remainder of the CVSA's minority period.

Provision that the Act supersedes any existing provisions of any other law

The Act provides under the first schedule that it supersedes any existing provisions of other laws with respect to sexual offences. Therefore in matters of sexual offences if there is a conflict between the provisions of any other existing law and the Sexual Offences Act, the latter prevails. This is generally a good provision, but in terms of this study, it does little to improve the court procedures, since most of the provisions of the Act address substantive as opposed to procedural issues that relate to sexual offences.

Specific provision of protective measures to vulnerable witnesses

The final and most important provision of the Act that protects CVSA is the specific provision for ways of protecting a child witness or any other witness declared by the court as vulnerable.⁶² The courts can therefore declare CVSA as vulnerable witnesses and proceed to protect them in any of the five ways discussed below.

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 and public glare. It works in a way that enable the CVSA to be seen by everyone in court including the accused 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 facial contacts with the accused.

The second protective option is for the court to direct that CVSA shall 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. 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.⁶³ The fifth provision is a wide discretion to the court to take any other measure it deems just and appropriate to protect vulnerable witnesses. This wide unlimited power by the court, if properly used can protect CVSA in many ways as they testify in court.

⁵⁸ Section 39 of the Sexual Offences Act.

⁵⁹ Ibid Section 36.

⁶⁰ Ibid. Sections 20 and 21.

⁶¹ Section 114 of the Children Act 2001. The orders under this section are known as 'section 114 orders' which include access order, residence order exclusion order child assessment order family assistance order, wardship order and production order. The orders are all meant to protect the child and ensure his/her survival and development, while maintaining family ties with the accused if necessary.

⁶² Section 31(4) of the Sexual Offences Act no 3 of 2006.

⁶³ Section 74 of the Children Act 2001.

Provisions of the Act adverse to CVSA

There are a few provisions of the Act that appear to negate the protection of CVSA. Although section 34(1) of the Act excludes evidence of character and previous sexual history of sexual offence victims from being admitted, subsection (3) of the same section provides that the court can admit such evidence if it relates to a specific instance of sexual activity relevant to the fact in issues, or if it can rebut prosecution evidence, or explain source of semen, pregnancy or disease or injury suffered by the victim, or does not substantially ought weigh prejudice to victim's personal dignity and right to privacy. This provision in effect takes away the protection given by subsection (1) since it is possible to prove all the grounds for admitting such character and sexual history evidence.

Section 8 (5) of the Act provides that it is a defence to a charge of defilement if it is proved that the CVSA deceived the accused into believing that the CVSA was above eighteen years at the time of the alleged commission of the offence and that the accused reasonably believed the same to be true. Children do not have the capacity to give consent and are vulnerable, easily intimidated and manipulated into sexual relations. To state that the accused believed the CVSA was of age is to indirectly make the child responsible for the accused's action which negates the whole argument of protecting children because they are children. This is a case of giving CVSA protection with one hand and taking it away by the other

Status of the implementation of the Act

The report of a task force⁶⁴ set up to look into challenges of implementing the Act documented major hindrances to victims of sexual abuse generally. Victims of sexual violence were found to have difficulty in following the legal process in pursuit of court protection since mechanisms had not been put in place to operationalize the provisions of the Act that provide various ways of protecting victims of sexual abuse.

Sexual violence victims were not aware of their expectations and safeguards as regards evidence and felt that the investigation and prosecution process did not handle them well as it failed to take their feelings into account. There was lack of regulations to aid the implementation of the Act and the court system was found to be slow and frustrating to the victims, while the traditional dispute resolution mechanisms were preferred and seen as strong and working better than the courts. The use of intermediaries as provided by the Act in cases of child abuse was found to be controversial as legal practitioners argued that it would go against the aims of cross examination which is to test the truth of the evidence of any witness. The Director of Public Prosecution (DPP), while launching the Reference Manual of Sexual Offences noted that although the Sexual Offences Act was operationalized in July 2006, some of its concept had not been well understood and applied.⁶⁵

The office of the Attorney General has taken measures some of which are relevant towards the implementation of the Act. These include the appointment of 300 police prosecutors and 63 prosecuting counsels as special prosecutors of sexual offences and the development of a Reference Manual on the Sexual Offences Act, 2006, a Training Needs Assessment, Curriculum and Training Manual for Public Prosecutors, and a National Prosecution Policy as required by section 46 of the Act as well as the Code of Conduct and Ethics for Public Prosecution. An analysis of the above four documents revealed that some good steps have been taken by the state towards the prosecution of sexual offenders generally. However, although the documents recognize CVSA as being vulnerable, they are not given special attention by all the four documents.

All the four documents provide that the prosecutors should inform the victims (children included) of their rights, which are however not spelt out. There is need for the rights of CVSA to be particularly spelt out and a specific code of ethics developed to deal with CSA cases.

The Code of Conduct and Ethics for Public Prosecutors is the first of its kind in the Kenyan criminal justice system, providing for the concerns of the victims of crime, but nevertheless no special consideration to CSA. It however obligates prosecutors to inform victims in general of their rights which are however not mentioned specifically in the code while there is completely no mention of ethical standards to be observed when dealing with CVSA.

The National Prosecution Policy (2007) provides that prosecutors should treat all victims with respect and sensitivity and in deciding whether or not to prosecute, to consider the interests of the victims. Public interest must be weighed against the interest of the victim, especially if the victim is a child. This does not

⁶⁴ Gazette Notice Number 2155 of 16th March 2007.

⁶⁵ Daily Nation Newspaper, 18th December 2007.

however, elaborate on what exactly to consider in children cases. This appears to be the only mention of the CVSA by the National Prosecution Policy (2007). An important provision by the policy is that Victim's Personal Statement should be brought to the courts' attention at the time of sentencing. An assessment of the Training Needs document revealed a mention child abuse but a lack of the special needs of CVSA.

The Reference Manual on the Sexual Offences Act, 2006 for Prosecutors, the only manual so far developed in the CJS on the prosecution of sexual offences, aimed at ensuring effective and efficient prosecution of sexual offences. Whereas the manual is a good step in the information area on sexual offences, a chapter by chapter reading revealed a gap on how to handle the CVSA. The Sexual Offences Act is a good substantive law on sexual offences which provides wider definition, minimum sentences amongst other benefits. It however contains minimal procedural concerns and therefore its implementation is still pegged on the adversarial court procedures with a few protective provisions as already discussed.

VII. THE PENAL CODE

The Penal Code⁶⁶ is an Act of Parliament to establish a code of criminal law. Prior to the enactment of the Children Act and the Sexual Offences Act, the Penal Code defined all offences relating to children and sexual assault, and provided the penalty too. Although the Sexual Offences Act⁶⁷ supersedes all other existing laws including the Penal code on matters relating to sexual offences, courts still apply sections of the Penal Code⁶⁸ which negate the protection of CVSA. In Criminal Case No. 319/2011 reported in one of the daily newspapers⁶⁹ where three boys aged below 12 years were charged with the offence of defiling and indecently assaulting a 7 year old girl before the Oyugis Principal Magistrate who set them free on the ground that under section 14(3) of the Penal Code, any male person under the age of 12 years is presumed to be incapable of having carnal knowledge, and in any event, is presumed as being incapable of committing the offence of defilement. The victim and the guardian were reportedly not satisfied with the ruling and termed it a miscarriage of justice. This case shows the disregard by the Penal Code of the special needs of CVSA, while protecting child sexual suspects against the interest of CVSA.

VIII. CONCLUSION

In concluding the discussion, the review of the statutory frameworks revealed that Kenya has an obligation to take necessary steps to provide child friendly court procedures that ensure the respect of children's rights as enshrined in the UNCRC, ACRWC and the ACHPR. Kenya has taken steps to pass substantive laws such as the Children Act 2001, the Sexual Offences Act 2006, the Witness Protection Act 2006, and the Constitution of Kenya 2010, while amending procedural laws such as the Criminal Procedure Code and the Evidence Act in their response to the needs of the CVSA. However, there is no special procedural law that specifically addresses the needs of CVSA when they testify in court. This gap can only be addressed by passing a specific child sensitive procedural law.

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⁶⁶ Chapter 63 of the Laws of Kenya. It came into operation on 1st August 1930 and has since undergone several amendments.

⁶⁷ Provision in the First Schedule of the Sexual Offences Act.

⁶⁸ Ibid Section 14(3).

⁶⁹ The Standard Newspaper.23rd April, 2011. www.standardmedia.co.ke –special report on pages 10 and 11. The case number and the names of the parties, both accuseds and victim are withheld to protect their identities as required by Section 19 of the Children Act on the right to privacy.