



An Evaluation of Child Sexual Abuse Trial Procedure In Kenya

Dr. Scholastica Omondi (Ph.D.)

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

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ABSTRACT: Child protection is a constitutional right in Kenya. Victims of child sexual abuse (CSA) therefore have a right to be protected while testifying in court through fair procedure. This research examined the procedure applied in child sexual abuse trial in Kenya and found the process inadequate in protecting Child Victims of Sexual Abuse (CVSA) as they testify. The study recommends the enactment of procedural laws that ensure the implementation of child rights that protect victims of sexual abuse. The paper is presented in eleven parts namely; introduction, background to child protection, difficulties in protecting CVSA as they testify, research objectives, research questions, justification for the study, theoretical framework, methodology, ethical considerations, study findings, conclusions and recommendations.

Keywords:- Abuse, Child, protection, sexual, victim,

I. INTRODUCTION

CSA is a global phenomenon that, paradoxically,¹ often occurs within the context of the family, an institution that ideally should protect children.² It is a crime that occurs in private, away from the glare of the public and violates the dignity as it invades the privacy of its victims, taking away their self-esteem and childhood according to Temkin.³ The private nature⁴ of committing CSA, and the possibility that the only witnesses to the crime may be the perpetrator and the victim, presents serious difficulties to the prosecution of the offence under the adversarial legal system.⁵ Although CSA is perpetrated against both boys and girls who equally suffer serious consequences, in the case of the latter, it sometimes robs them of virginity - a most cherished status that cannot be quantified according to Temkin who further argues that when it occurs, CSA is often accompanied by other forms of abuse such as physical, emotional, psychological, mental and spiritual violence.⁶ Likewise, CSA robs boys of their innocence and may be exhibited in adulthood as a form of relational problem. CSA has been described as an experience that disrupts the normal healthy development of its victim and results into coping difficulties physically, intellectually or emotionally.⁷

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

² K Melville and G Bird, *Families in Intimate Relationships* (R R Donnelley & Sons, 1994) 436.

³ J Temkin, *Rape and the Legal Process* (Oxford University Press, 2002) 4.

⁴ Child sexual abuse, unlike other offences is committed in private, often an institution or home by people who have the duty to care for children and so are trusted by them. When the abuse occurs, the fear instilled in the child and many other factors hinder its detection and make it difficult to prosecute.

⁵ Abrams E D and Ramsey H S, *Children and the Law: Doctrine Policy and Practice* (Minn West Group, 2000) 541.

⁶ *Op. cit* 3.

⁷ G Davies and E Noon, *Evaluation of the Live Link for Child Witness* (1991) 3-6.

It is estimated that more than 1.2 million children worldwide are subjected to various forms of sexual abuse while a child is sexually abused every two minutes. According to a report by UNICEF⁸ released in 2010, India reports over 400,000 cases of CSA annually while in Taiwan, over 100,000 cases are reported every year. Thailand reports a minimum of 200,000 cases while Philippines records over 100,000 cases of CSA. The United States of America is not spared either and records a minimum of 325,000 cases yearly, while East and Central Europe, Brazil and West Africa receive a minimum of 175,000, 35,000 and 100,000 cases of CSA respectively in a year.⁹

The figures above refer to commercial sex trade involving children in a few selected parts of the world, yet child commercial sex is only one form of CSA amongst different forms such as pornography, sodomy, indecent assault. In Malaysia, 2,780 cases of CSA were reported to the police in 2010 and out of that number, 72% were cases of incest.¹⁰ In South Africa, more than 27,417 cases of child sexual abuse were reported to the police in 2008/2009 while there is a possibility that many more CSA cases remained unreported.¹¹ From the foregoing, CSA affects many children worldwide as child sexual exploitation appears to be a lucrative and thriving venture, despite the existing laws against the offence.¹² Further, it is possible that more children may suffer sexual abuse, but whose incidences are not captured in documented reports due to low reporting of CSA generally, sometimes based on the trauma that the classical adversarial court trial subjects the CVSA to.¹³

In Kenya, it is not possible to state with precision the number of children who are sexually abused due to lack of a systematized reporting of abuse cases.¹⁴ However, anecdotal data reveals that different agencies dealing with child abuse received reports independently and did not necessarily inform their counterpart departments or agencies. For example, a case reported to the police may not be reported or forwarded to the Children Department, but may be settled at the police station, or passed on to court, without it being reflected in the records of the Children Department. Likewise, a case reported to the Children Department may be finalized at the department level, reported to the police or passed on to court for protection orders.

Limited data from the Children Department in Kenya indicated that 1,718 cases of CSA were reported in the year 2010, while Kenyatta National Hospital recorded 152 CSA cases in the same year, but there was no specific category for child sexual offences although such crimes were listed under offences against morality by the Kenya Police.¹⁵ They included defilement, sodomy, incest, and indecent assault, totaling to 2554 in 2010. The discrepancy in figures on CSA from key government departments dealing with the same issue indicates that there could be more children abused, whose reports are not captured by the available statistics in Kenya. The Non-Governmental-Organizations (NGOs) handling CSA cases also had differing statistics. Child Welfare Society of Kenya received 125 cases of CSA in 2010, while CLAN recorded 522 in the same year. According to the Nairobi Women's Hospital (Gender Violence Recovery Centre), 1437 CSA cases were recorded in 2010.¹⁶

CSA is therefore a big challenge in Kenya as is the case in other parts of the world. The implication is that more children are becoming participants in the justice system as witnesses/victims in CSA related cases, hence the

⁸ UNICEF, 'A Situational Analysis of Child Sexual Abuse' <<http://unicef.org/protection/index-exploitation-html>> accessed 24 February 2012.

⁹ UNICEF, 'Forlorn and Scared: A Situational Analysis of Child Sexual Abuse and Commercial Exploitation in the Pacific region' (2010) 12 <<http://unicef.org/protection/index-exploitation-html>> accessed 24 February 2012.

¹⁰ UNICEF, 'Child Sexual Abuse in Malaysia' <<http://unicef.org/protection/index-exploitation-html>> accessed on 24 February 2012.

¹¹ South African Police Statistics on Annual Crime Report <[web.http://www-rape.co.za/index.php?option=com-content&task=views&id=875](http://www-rape.co.za/index.php?option=com-content&task=views&id=875)> accessed 24 February 2012.

¹² Human Rights Internet, *The Canadian Component of the Protection Project: A Socio-legal Analysis of International Jurisprudence on the Commercial Sexual Exploitation of Women and Children* (Ontario: Harvard University's John F. Kennedy School of Government) 5.

¹³ *Op. cit* 4.

¹⁴ UNICEF and ANNPCAN Kenya, 'A Situational Analysis of Sexual Exploitation of Children in Eastern and Southern Africa Region: The Vicious Circle of Sexual Exploitation, HIV/AIDS, Vulnerability of Children and Violation of Children's Human Rights, Nairobi' (2005) 15.

¹⁵ Kenya Police Crime Report and Data, (2010). <<http://www.kenyapolice.go.ke/resources/CRIME%20STATISTICS%202010.pdf>> accessed 30 June 2012.

¹⁶ Gender Violence Recovery Centre Report, (2010) Nairobi Women's Hospital page 5.

need to accommodate their concerns and ensure their effective participation in the court process.¹⁷The discussions in the next section trace the historical development of concerns towards child protection generally and CSA in particular.

II. BACKGROUND TO CHILD PROTECTION

Before the 19th century, world authorities and private organizations in Europe were least concerned about child protection and children were considered the property of their fathers or parents, who could do with them what they pleased.¹⁸ Gradually, laws were introduced to protect children against heavy labour, neglect, mistreatment and withholding them from school as child protection became a public concern and states felt responsible towards children who were neglected, mistreated and exploited, culminating into the first Declaration on the Rights of Children by the fifth Assembly of the League of Nations¹⁹ in 1924 which emphasized the material needs of children such as food, nursing care and shelter.

In 1959, another Declaration on the Rights of the Child was passed to further enhance the status of children in the society, based on the premise that ‘mankind’ owes to children the best it can give them. This declaration emphasized the duties humankind owed to children, such as protecting them from abuse. The Declaration was however vague and did not state whose responsibility it was to protect children from abuse. The period that followed the 1959 Declaration was marked by a growing concern and appreciation that more action was needed to protect children by vesting in them rights and correlated duties.

The year 1979 was declared the International Year of the Child and further consultations led to the 1989 United Nations Convention on the Rights of the Child (UNCRC),²⁰ the first ever single international treaty to recognize the vulnerability of children and their need for special protection. The near universal ratification of the UNCRC showed the global recognition of child rights and the need to protect them, while appreciating that children have special needs that need to be addressed in a single document. The UNCRC obligates member states to take special measures to protect children against all forms of abuse, including CSA. There are five important provisions of the UNCRC that declare the rights of CVSA which should be protected, implemented and enforced in the court process.

The first right is provided by Article 3 of the UNCRC and is referred to as the right to have their best interest considered as paramount by any individual or institution handling a matter that concerns children. In CSA trials therefore, the courts must take into account the best interest of CVSA at all stages of the trial process.

The second right to CVSA is provided by Article 2 of the UNCRC and states that no child should be discriminated against on any ground. The right to non-discriminative treatment on any ground therefore does not preclude the trial process.

The third right to CVSA is provided by Article 12 of the UNCRC and states that any child capable of forming his/her own views has the right to express those views freely in all matters affecting them and be heard and such views shall be given due weight according to the age and maturity of the child. CVSA therefore have a right to express themselves freely while testifying in CSA trials. The enforcement of this right in the adversarial system may require accommodation of special needs of CVSA as they testify.

The fourth right of CVSA under the UNCRC is provided by Article 39 which states that children must be treated with respect and their dignity upheld. In testifying before courts in CSA cases, CVSA therefore have a right to be treated fairly under court procedures that maintain, respect, protect and uphold their dignity.

¹⁷ E S Buzawa and C G Buzawa, *Domestic Violence: The Criminal Justice Response* (3rd Ed. London: Sage Publication, 2003) 25.

¹⁸ M Freeman and D A Veerman, *Lloyd’s Introduction to Jurisprudence* (London: Sweet & Maxwell, 2001) 54.

¹⁹ The League of Nations became concerned about the massive abuse and need to protect children following the affliction and devastation of children by the Great War and its aftermath.

²⁰ 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 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.

Finally, Article 32 of the UNCRC provides that children have a right to be protected from any activity that may be harmful to the child's physical, mental, spiritual, moral or social development. The court process must therefore protect CVSA from any of the above as a result of their testimony. The provisions of the UNCRC bind all nations that ratified it. Kenya ratified the UNCRC on the 30th July 1990 and is therefore duty bound to enforce the protection of CVSA as they testify in court.²¹ This calls for the incorporation of CVSA rights as identified under the UNCRC into the trial process of CSA cases so as to strike a balance between them and the rights of accused persons to a fair trial.

At the regional level, the African Charter on the Rights and Welfare of Children (ACRWC)²² was passed by the African Union in 1990 to provide for peculiar African circumstances which were not deemed adequately addressed by the UNCRC in the interest of the African child. The conception of the ACRWC was premised on the view by African states that Africa's participation in the drafting of the UNCRC was minimal as it was dominated by participating 'western' countries.²³ As such, the conception of child rights as contained in the UNCRC was viewed by the then OAU as more reflective of western ideologies of human rights, while lacking in African cultural values and civilization.

The need to have an African framework at the regional level that reflects African virtues, values, cultural heritage and historical development therefore inspired the African countries, then under the umbrella Organization of Africa Union (OAU) - later renamed Africa Union (AU), to adopt a framework on child welfare that is sympathetic to the different cultures, historical background, social systems and economic organizations in Africa.²⁴ As a result, the African Charter on the Rights and Welfare of Children came into being in 1990 and was signed by Kenya in the same year. Amongst some of its provisions is the obligation by states to protect children from sexual abuse.²⁵

At the national level, Kenya passed the Children Act 2001²⁶ to domesticate the provisions of both the UNCRC and the ACRWC. Further initiatives towards the protection of CVSA included the enactment of the Sexual Offences Act 2006²⁷ and the Witness Protection Act 2006.²⁸ Whereas the former provided substantive law on sexual offences generally with some provisions for CSA cases, the latter attempted to provide protection to witnesses who may fear giving evidence in court generally including children. A further step was the amendment of the Evidence Act²⁹ to allow courts to convict an accused person on the evidence of a child alone,³⁰ thereby removing the requirement for corroboration. The Constitution of Kenya 2010³¹ provides for the Bill of Rights³² which protects everyone including children.

Despite Kenya's achievements in substantive laws that protect children from abuse and CSA in particular,³³ there is still concern that the classical adversarial court procedure presents challenges in prosecuting CSA, thereby denying Justice to CVSA. Minimal developments have taken place in the area of procedural laws,

²¹ *Op. cit* n 14.

²² 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.

²³ T Kaime, *The African Charter on the Rights and Welfare of Children: A Socio-Legal Perspective* (Pretoria University Law Press, 2009) 16.

²⁴ *Ibid*.

²⁵ *Op cit* 22. Article xxvii obligates state parties to protect children from sexual abuse.

²⁶ The Children Act 2001.

²⁷ The Sexual Offences Act 2006.

²⁸ The Witness Protection Act 2006 .

²⁹ The Evidence Act Cap 80 Laws of Kenya.

³⁰ The Criminal Law (Miscellaneous Amendment) Act No 5/2003.

³¹ Kenya Gazette Supplement. No.55(The Constitution of Kenya) 2010 Part 2-The Bill of Rights.

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

³² *Ibid* chapter four.

³³ The achievements by Kenya in the area of Substantive laws include the ratification of the UNCRC and the ACRWC as well as the passing of the Children Act 2001, amendment of the Evidence Act to remove the corroboration requirement in the evidence of children, the passing of the Sexual Offences Act and the Witness Protection Act.

raising the concern that the court procedure protects the defence at the disadvantage of CVSA hence the need to strike a balance between the rights of accused persons and those of CVSA.

At a conference held in Nairobi in 2004 by child rights protectionists from Africa,³⁴ the participants cited court procedure as one of the challenges faced in seeking justice for CVSA. In 2007, participants at a workshop³⁵ expressed concern that the procedural difficulties continue to hinder attempts to seek redress for CVSA from the courts. In the absence of developments in the procedural laws³⁶ that protect CVSA, the implementation of the substantive laws remains anchored in the adversarial legal system which in many cases exposes CVSA to further victimization in violation of their rights due to the absence of a balance between the rights of accused persons and those of CVSA.³⁷

III. THE DIFFICULTY IN PROTECTING CVSA WHILE TESTIFYING

The development of the classical adversarial legal system's court procedure may not have envisaged the participation of children as victims in the criminal process. Subsequently, the lack of a balance between the rights of accused persons and the rights of CVSA in the prosecution of CSA under the classical adversarial legal system at times results into trauma, re-victimization and miscarriage of justice to CVSA in Kenya.

The adversarial court procedure presents challenges in the prosecution of CSA cases and sometimes hinders accessibility of justice by CVSA, despite the great efforts made in reforming the substantive laws aimed at protecting children against CSA. The procedure which CVSA have to comply with while testifying in court is technical, elaborate and centered on the guilt or innocence of the accused while exposing CVSA to re-victimization.³⁸ The court procedure disempowers CVSA (a key prosecution witness) from coherently narrating the sensitive details of CSA in court, yet assumes that CVSA as key prosecution witnesses are mature enough and have the same capacity to argue out their cases before a judicial officer who remains impartial, basing the court decision on the arguments presented by both the defence and the prosecution.³⁹ Some challenges faced by CVSA while testifying in court include their immaturity with regard to physical, cognitive and emotional development which greatly affects their ability to comply with the expectations of the legal process.⁴⁰ As an example, children typically develop their own terms for body parts and are unlikely to respond adequately to questions about sexual organs, but if allowed to use their own words or to describe the abuse using pictures or dolls, their evidence may have a lot of crucial details.⁴¹

Although Kenya has taken great steps towards child protection by signing the UNCRC,⁴² the ACRWC⁴³ and domesticated their provisions through the enactment of the Children Act 2001,⁴⁴ and the inclusion of the Bill of Rights in the Constitution of Kenya 2010,⁴⁵ CVSA's access to justice is still hampered by the imbalance between the rights of accused persons to a fair trial and the rights of CVSA due to the lack of a comprehensive law on child friendly court procedure.

The passing of both the Sexual Offences Act 2006⁴⁶ and the Witness Protection Act 2006⁴⁷ did little to improve CVSA's access to justice as both statutes inadequately provide for child friendly procedure for taking CVSA

³⁴ The conference was hosted by ANNPCAN-Regional office on the theme *CSA and the challenges of protecting the CVSA in Nairobi* in 2006.

³⁵ ANNPCAN, *Proceedings of a Workshop in Kenya on the Challenges of Implementing the Sexual Offences Act 2006* held in Nairobi in 2007.

³⁶ Procedural laws include statutes which regulate the conduct of the court process. They include the Constitution of Kenya 2010, the Evidence Act Cap 80, the Criminal Procedure Code Cap 75, some aspects of the Sexual offences Act of 2006 and the Witness protection Act of 2006.

³⁷ L Hoyano and C Keenan, *Child Abuse: Law and Policy Across Boundaries*(Oxford University Press, 2010) 598.

³⁸ *Op. cit* n 5.

³⁹ C Tapper, *Cross and Tapper on Evidence*(12thedn Oxford University Press, 2010) 176.

⁴⁰ 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.

⁴¹ R J Spencer and R Flin, *The Evidence of Children, Law and Psychology* (Blackstone Press Ltd, 1998)75.

⁴² *Op. cit* n 20.

⁴³ *Op. cit* n 22.

⁴⁴ *Op. cit* n 26.

⁴⁵ *Op. cit* n 31.

⁴⁶ *Op. cit* n 27.

testimony. Whereas the Sexual Offences Act 2006⁴⁸ expanded the definition of sexual offences and enhanced penalties thereof, the Witness Protection Act⁴⁹ provides protection to witnesses who have vital information but fear for their life in case they testify in court. The witnesses envisaged under the Witness Protection Act 2006 appear to be in respect to high level crimes such as money laundering, drug trafficking, human trafficking and crimes against humanity, but not CVSA who require special protective court procedure. This observation is based on the wording of the Act which does not focus on the special needs of children that make them require protective procedure but focuses on those who have vital information but fear giving evidence on the basis of a threat to their life. Children may not even know that they are at risk when they testify and the act fails to make this clarification that is important in operationalizing the Act to protect children. According to Myers,⁵⁰ the classical adversarial trial procedure subjects CVSA to secondary and institutionalized victimization leaving them more traumatized than before testifying in court.

IV. RESEARCH OBJECTIVES

Overall Objective

The study seeks to examine the use of the adversarial legal system's court procedures in CSA trials in Kenya, with a view to exploring how the rights/ interests of CVSA can be balanced with those of accused persons.

Specific Objectives

1. To investigate whether the adversarial trial procedure as applied by the children's courts balances the rights of accused persons to a fair trial with the rights and concerns to protect CVSA in CSA trials in Kenya.
2. To identify the inadequacies of the CSA trial process in Kenya.
3. To recommend ways of protecting CVSA while testifying in CSA trial in Kenya.

Argument

The study argues that whereas the classical adversarial legal system's court procedure upholds the rights of accused persons to a fair trial, the prosecution of CSA cases presents unique challenges to CVSA when they testify in court despite reforms in the substantive laws to protect them. The effect of the challenges experienced by CVSA while testifying in CSA cases at times result into re-victimization and miscarriage of justice to CVSA. Whereas the classical adversarial legal system of criminal trial focuses on the guilt or innocence of the accused persons,⁵¹ the trial process occasions an imbalance between the rights of CVSA and accused persons, contrary to the principle of equal protection of the law to everyone, which is the basis of procedural justice theory.⁵² When carried out in a manner that reflects the expectations, needs, concerns and rights of victims of crime, the trial process has the potential of playing a vital role in restoring the dignity of the victims while at the same time delivering justice by arriving at the innocence or guilt of the accused. Unlike before the recognition of victims as participants with stakes in the trial process, victims of crime today have rights in the trial process which are recognized globally and this call for fairness in balancing the rights of accused persons with those of victims.

V. RESEARCH QUESTIONS

- Q1. Does the adversarial trial procedure as applied by the children's courts balance the rights of accused persons to a fair trial with the rights and concerns for the protection of CVSA in Kenya?
- Q2. What are the inadequacies of the adversarial procedure in CSA trial in Kenya?
- Q3. How can CVSA be protected while testifying in CSA trials in Kenya?

Research Hypothesis

CSA trial under the adversarial system causes an imbalance between the rights of accused persons and CVSA at times resulting into miscarriage of justice.

⁴⁷ *Op. cit* n 28.

⁴⁸ *Op. cit* n 27.

⁴⁹ *Op. cit* n 27.

⁵⁰ J Myers, 'The Child Witness: Techniques for Direct Examination, Cross-Examination and Impeachment' (1987)18 Pacific Law Journal 801.

⁵¹ Nicola Lacey, 'Legal Constructions of Crime' in M Maguire, R Morgan & R Reiner (eds), *The Oxford Handbook on Criminology* (Oxford University Press, 2002) 275.

⁵² Home Office, *Speaking Up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (1998) 37.

Assumptions

The study makes the assumption that since the Children Act was enacted in 2001, it is being implemented in cases involving CSA.

V1. JUSTIFICATION FOR THE STUDY

The information generated by the study may contribute additional knowledge for academic, research and other institutions working on children issues as well as policy makers. Many NGOs, Faith Based Organizations, Governments and the public have shown concern about CSA. The research findings provide useful information and if implemented may encourage increased reporting of CSA to the police for prosecution in a set up that reduces the stress and trauma presently associated with the classical adversarial legal system's procedure.

Different courts apply the law differently in CSA cases resulting in procedures as varied as the number of court officers presiding over the cases.⁵³ The findings of this study may assist in the development of a child friendly court procedure and policy on how to handle CVSA by the criminal justice officials. Such development may enhance efficiency and effectiveness in seeking justice for the CVSA.

The study objectives are in line with Kenya's new long-term national planning strategy, officially known as *Kenya Vision 2030*.⁵⁴ Under its social-economic and political pillars, Vision 2030 identified adherence to the rule of law as the basis upon which it will "operationalize the policy, legal and institutional framework vital for promoting and sustaining fair, affordable and equitable access to justice." In this respect, the study findings may assist Vision 2030 to achieve its objective of enhancing accessibility to justice for children by recommending procedural reforms necessary in CSA trial. Such reforms, when undertaken, have the effect of enhancing public confidence in the system.

By identifying procedural barriers in the trial of CSA and recommending an appropriate framework for CSA trial, the study bridges knowledge and information gap in Kenya on how to strike a balance between safeguarding the rights of accused persons and protecting CVSA. The knowledge is important since criminal justice system is about the balancing of the rights of all parties involved amidst the search for truth.

V11. THEORETICAL FRAMEWORK

This article identifies three theories relevant to the analysis of procedural justice and CSA trial in the adversarial legal system. The three theories: Procedural Justice Theory, the Psychoanalytic Theory and the Labeling Theory. Procedural justice theory is relevant in as far as it explains that fair procedures lead to fair outcomes/ treatment. Science and experience have demonstrated that CVSA require special procedures if they are to be treated fairly/justly. The use of the scientific theory of psychoanalysis is therefore to show that children have special needs as victims of sexual abuse. The labeling theory drawn from the discipline of sociology explains the difficulties experienced by CVSA due to the labeling and stigma associated with being a child victim of sexual abuse.

Psychoanalytic Theory

This classical theory is attributed to Sigmund Freud who is regarded as the founder of psychoanalysis.⁵⁵ Psychoanalysis is a theory of personality that explains unconscious conflict, usually from childhood as a major factor in adulthood behaviour developed from a person's early psycho-sexual development and the individual's efforts to deal with the resulting anxiety.⁵⁶ Freud also applied psychoanalysis as a therapy theory, by tracing incidences in ones' past life that cause conflict in adulthood, and addressing them to change the individual's behaviour. In order to understand better Freud's psychoanalytic theory, an understanding of personality concept is important at this stage. Dodge defines personality as: "The unique and characteristic ways in which an individual reacts to his/ her surrounding".⁵⁷ Important elements in the structure of personality in the Freudian psychoanalytic theory are the *id*, *ego* and *super ego*, explains Kosslyn and Rosenberger.⁵⁸

⁵³ *Op. citn* 41.

⁵⁴ GoK, *Vision 2030* (Government Printer's Press, 2007) 176.

⁵⁵ Fernald Dodge, *Psychology* (Prentice Hall, 1997) 489.

⁵⁶ *Ibid*.

⁵⁷ *Ibid*.

⁵⁸ M S Kosslyn and S R Rosenberger, *The Brain, the Person, the World* (Pearson Education Co, 2001) 365.

Sigmund Freud was convinced that the three components of an individual's personality control one's behaviour. The *id* is the most basic part of personality and is present at the birth of every individual. It functions on pleasure principle, and so is a little animalistic and can be irrational and illogical in the absence of the other two. The *ego* functions to control and maintain the desires of the *id* by operating on reality.

As an illustration, when an individual sees a child and the *id* develops a desire for pleasure by engaging the child in a sexual act, if the person's *ego* is fully developed, it will inform the *id* it is not the right thing to do despite the pleasure that may be gained from it and the individual becomes rational, deals with the reality and decides not to go ahead with the thought aroused by the *id*'s desire for pleasure. However, in the absence of a fully developed ego in one's personality, the *id* component of the individual's personality becomes dominant and the individual is likely to sexually assault the child, hence the reference to such people as psychopaths, a term in psychology meaning a disorder in personality development.⁵⁹

The *super ego* is the conscience part of the personality. It contains the values and concerns of the society in which an individual has been socialized and operates on the ideal principle or idealism by inhibiting the desires of the *ego* and urges the individual to work towards morally acceptable behaviour than realistic ones. In the illustration discussed in the previous paragraph, the *super ego*, if fully developed, delays the desire for sexual pleasure until when the individual is married as per the society's morals. In respect to CVSA, it is easier to sexually abuse children especially before the full development of the *super ego* as their personality is not likely to be fully developed as to know about the society's disapproval of sexual acts of any kind, thus making them vulnerable and easily intimidated during CSA.

The psychoanalytic theory emphasizes five psychosexual stages of development of an individual. The first stage is known as the oral stage and it involves the first love relationship of an individual and occurs at age zero to one and a half years of an individual's development. At this stage, the infant's most erogenous zone⁶⁰ is the mouth and the psychosexual development of the infant at this stage is completed by successful weaning when most infants stop sucking any object put in their mouth.

The *relevance* of the oral stage to the study is the infant's affinity for objects in their mouth which they appear to enjoy sucking. One form of CSA⁶¹ is by placing a finger, the penis or any other object in the child's mouth to derive sexual pleasure.⁶² The oral stage therefore predisposes a child to sexual abuse, but since the child's mouth is at this stage the most erogenous zone, the child may be abused over a period of time as the involuntary sucking act by the child is viewed as a positive response to the abuser's sexual desire. The oral stage therefore makes a child vulnerable to CSA through the mouth as the abuser takes advantage of the child's vulnerability.

The second stage is the anal stage that occurs from age one and a half to three years and the most erogenous zone of the child's body is the anus. The psycho-sexual development of the child's personality is completed by successful toilet training. Children at this stage are vulnerable to CSA through the anus as the zone involuntarily responds positively to any manipulation whether by hand, penis, fingers or any other object.⁶³

The third stage is the phallic stage which occurs from age three to six years. The most erogenous zone of the child at this stage is the genitals (clitoris in case of girls and penis in the case of boys). Successful psycho-sexual personality development at this stage occurs when the child successfully identifies with same-sex parent following a period of unconscious pre-occupation with psycho-sexual feelings towards the parent of the opposite sex, sometimes referred to as the Oedipus/Electra complex.⁶⁴ The phallic stage explains the

⁵⁹ J W Santrock and S J Halonen, *Psychology* (McGraw Hill, 1999) 603.

⁶⁰ Erogenous zones are those parts of the body that, at each stage of development, according to Freud's theory, have especially strong pleasure-giving qualities.

⁶¹ *Op. citm* 27. Section 5 of the Sexual Offences Act 2006 defines sexual assault to include any unlawful penetration or manipulation of any part of a person's body by another. The interpretation is that where anyone manipulates a child's body part with a view to sexual gratification, it would amount to sexual assault on the child who may only appear to respond positively due to the underdevelopment psychologically, especially at the oral, anal or phallic stages.

⁶² D A Wolf, *Preventing Physical and Emotional Abuse of Children* (Guilford Press, 1991) 123.

⁶³ *Ibid.*

⁶⁴ The Oedipus/Electra complex, according to Freud is the physical attraction developed by a child towards the parent of the opposite sex during the phallic stage of psychosexual development, which is successfully completed when the child identifies with the parent of the same sex and ceases to be attracted to the opposite sex

vulnerability of children at this stage to CSA within the family as in the case of incest by fathers, uncles or by people known to and trusted by CVSA such as teachers and domestic workers.⁶⁵

The unconscious pre-occupation with psychosexual feelings by the child to a parent/guardian or authority figure in the child's life at the phallic stage, predisposes the child to CSA and they may unconsciously respond positively to the abuse especially if their superego is not very well developed. When the CVSA learn that they have been sexually abused by the opposite sex parent/guardian, the resulting unconscious conflict within the CVSA may hinder them from testifying in court, especially once they realize the possibility of the accused being imprisoned. In this respect therefore, Freud's phallic psychosexual stages of an individual's personality development is very relevant.

The fourth stage is the latency period which occurs from six years to puberty and the individual's sexual urge becomes fully developed, as no specific part of the body unusually becomes erogenous like happens in the oral, anal and phallic stages. The child's psychosexual personality is successfully developed by the transformation of sexual urges into socially acceptable activities as the *super ego* begins to gain dominance over the *id* and the *ego* depending on the social norms within which the child has been raised. Where the *super ego* has been properly developed, the child is able to know that sexual relations are not approved of by the society, is reserved for adults and is referred to variously in adult language.

According to Freud, during the latency stage, children learn that sexual organs and issues are not publicly discussed and that knowledge about sexuality is not easy to come by. The relevance of the latency stage to the study is the reaction of CVSA when asked to testify in court about sexual abuse. Knowing that sexual matters are secretive, reserved for adults, known as bad manners, and not openly discussed may be an obstacle to their ability to confidently testify in court.⁶⁶

The fifth and last stage of psychosexual development in an individual's personality is the genital stage which occurs from puberty to adulthood and the correct erogenous areas are the genitals (vagina/penis). The successful personality of an individual is completed at this stage by the formation of sexual love relationships and development of capacity for productive work. At adulthood, an individual therefore ordinarily has the psychosexual capacity to make conscious decisions as to sexual matters, unlike children whose psychosexual development is incomplete and therefore vulnerable, hence the need for special court procedures to protect CVSA during their testimony in CSA trials.

In one of his paper presentations⁶⁷ in 1896, Freud argued that many of his patients seeking psychiatric services were indeed sexually assaulted as children and he concluded that sexual abuse is a cause of mental illness in later life if not addressed adequately. While supporting Freud's psychoanalytic theory, Dodge argues that during the five stages of psychosexual development, children are vulnerable to sexual abuse and are easily sexually aroused, predisposing them to sexual abuses.⁶⁸ Early conflicts and frustrations which occur before adulthood may be repressed and later appear in symbolic form, often in a sexual or aggressive nature if not adequately dealt with according to Herman.⁶⁹ Both Dodge's and Herman's arguments can be interpreted to necessitate special court procedures that help the CVSA overcome the trauma caused by the abuse as opposed to re-victimizing the CVSA through their testimony.

Critics of the Freudian psychoanalytic theory argue that it overemphasizes the psycho-sexual development of an individual's personality. One such critic is Carl Gustav Jung, a Swiss psychoanalyst who rejected Freud's theory and postulated a collective consciousness which is universal among humans, containing human traits and

parent. Other psychologists like Herman confirm Freud's argument of a child's physical attraction to the opposite sex parent by stating that most father-daughter incest cases begin at around the same period referred to by Freud as the phallic stage of psychosexual development as they become vulnerable to incest.

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

⁶⁷ Freud Sigmund, *The Aetiology of Hysteria* at Vienna's Society for Psychiatry and Neurology <<http://www.pep-web.org/document.php?id=se.003.0187a>> accessed on 30 June 2012.

⁶⁸ *Op. citn* 41.

⁶⁹ *Op. citn* 55.

cultural characteristic inherited from ancestors and society.⁷⁰ He supported analytic psychology⁷¹ as opposed to psychoanalysis.

While not totally rejecting the psychoanalytic theory, some psychologists have taken a Neo-Freudian approach, not disagreeing totally with Freud, but modified his psychoanalytic theory. One of them is Karen Horney who was more concerned with the anxiety in children that caused them helplessness and insecurity, predisposing them to sexual abuse.⁷² She argued that in anxious and helpless situations such as CSA, people cope in three different ways.

The first is by *moving towards people* to seek their love and approval through being compliant and submissive. The relevance of this argument is that when children find themselves in the helpless situation as CVSA, they may seem to 'co-operate' unconsciously so as to seek the approval of the abuser especially in instances where the abuser already has some measure of responsibility over the CVSA, such as father-daughter or teacher pupil relationship.

The second coping skill in helpless situations, according to Horney is by *moving against people*, hence denying their desire for support and acceptance by behaving in a competitive and domineering style instead of compliance. The relevance of this argument to the study is that CVSA who reject sexual advances of the abuser, attract disapproval and invites the need for use of force or other coercive means to obtain their sexual desires from the CVSA. The argument appears to explain why CSA is in some cases accompanied by other forms of child abuse such as physical, psychological and emotional abuse and the consequences of CVSA giving evidence in incest cases without the approval of the family.⁷³

The third coping mechanism according to Horney is by *moving away from people* by withdrawing and establishing one's self as an independent and separate entity from the rest of the people. In respect of this study, this argument appears to explain why some CVSA may do what other people around them do not do. In cases of multiple incest within the family, it may explain why one CVSA may go against the family wish, report and testify against the abuser when the rest of the abused siblings opt to keep quiet about the abuse. Horney argued for a balance of the three coping mechanisms as over reliance on one mechanism to explain personality would cause maladjustment of individual personality.

Both the Freudian and Neo-Freudian arguments seem to complement each other. While the Freudian perspective of psychoanalysis explains the vital role of sexuality in a person's personality development and the general vulnerability of children to CSA, Horney's argument serves to explain the different reaction by CVSA to CSA. Horney's explanation also gives other factors that determine how one behaves in helpless situations such as a CVSA confronted with the intricacies of CSA, hence complementing Freud's perspective. The psychoanalytic theory is therefore relevant in explaining CVSA vulnerability to CSA and subsequent reaction, hence the need for special protective court procedures when CVSA testify in court about the abuse.

Labeling Theory

The second theory underpinning the study is the sociological theory of labeling which deals with what happens to people (CVSA) *after* they have been singled out, identified and defined as deviants in society.⁷⁴ Labeling theorists are concerned about three related issues in respect to an individual's behaviour after being labeled as a social deviant.

The first concern of the labeling theorists is the forms of behaviour that the society defines as deviant. One of the challenges faced by victims of sexual abuse generally is the tagging of sexual relations as 'bad manners', shrouded in secrecy and hardly discussed openly, especially with children. The society's labeling of both the sexual relationship and the concerned aggressor and victim as being engaged in 'bad manners' may have a negative impact on CVSA's ability and willingness to openly talk about the abuse, for fear of being

⁷⁰ *Op. cit* 59.

⁷¹ Analytic psychology analyses all socio-cultural factors surrounding the development of an individual's personality.

⁷² K Horney, *Neurotic Personality of our Time* (Norton, 1937) 213.

⁷³ *Op.cit* 59.

⁷⁴ B C Little and S H Traub, *Theories of Deviance* (F. E. Peacock Publishers, 1968) 289.

stigmatized as a bad child engaging in bad manners.⁷⁵ The associated stigma may negatively impact on the confidence and self-esteem of the CVSA amongst their peers. In order to avoid the consequences of stigmatization, a CVSA may opt not to report the abuse at all, or if reported, deny that the abuse ever took place.

The second concern amongst labeling theorists is who amongst those who engage in deviant acts are labeled as deviants while the third and final concern is with the consequences of stigmatizing certain individuals and activities as deviant.⁷⁶ The relevance of this theory lies in the tagging of sexual issues and those involved as bad manners and deviants respectively. If CVSA and their families know of the society's stigma attached to CVSA, they may opt to keep quiet about the abuse for fear of stigmatization.

Paradoxically, such labeling of a CVSA as deviant and public condemnation may thrust the CVSA into actual sexual relationship for fear of being rejected by the society and in an attempt to seek approval from a section of the same society, identify with people who have similarly been labeled as sexual deviants. When this occurs, attempts to protect the CVSA through the court system may not work as the CVSA feels accepted by the sexual deviants' community.⁷⁷ This argument explains why some CVSA retreat back to sexual activities labeled as deviant such as prostitution, despite efforts to rescue them from the abuse.⁷⁸

The resulting stigma of labeling CVSA as sexual deviants may further inhibit their ability to testify in court about the abuse, especially before family members from whom the CVSA expect to be regarded highly.⁷⁹ The labeling theory is therefore relevant in as far as it attempts to explain the behaviour of people in the presence of others when asked to talk about sexuality and the behaviour of CVSA particularly when they have to talk about the embarrassing details of the sexual abuse during cross-examination.

The labeling theory therefore helps the study to understand the experiences of CVSA as they testify in court under the adversarial procedures about CSA in a society that has tagged not only the abuse, but the victim as well.⁸⁰ It helps the study to appreciate the reaction of CVSA after the abuse, particularly why some CVSA may testify while others refuse or fail to do so whereas others retract their earlier recorded statement by the police, especially in incest cases.

Procedural Justice Theory

The Greek philosopher Aristotle identified two major applications of justice as distributive justice and corrective/rectificatory justice.⁸¹ Distributive justice is concerned with distribution of things such as rights, goods, and services among others. The principles of distributive justice specify how things such as rights, goods and well-being should be distributed among a class of people. Corrective justice concerns the rectification of injustice and includes such domains as criminal law, torts and contracts, among many others.

John Rawls⁸² perceived justice as fairness to all by granting equal opportunities and liberties while distributing resources in such a way that benefits the least advantaged in society. Rawls therefore expounded Aristotle's notion of distributive justice and introduced two fundamental principles of distributive justice. These are the equal liberty principle and the difference principle. In the first principle of equal liberty, Rawls argued that the society is just and fair when everyone has equal opportunities as to rights and liberties, hence fairness. To him, justice was fairness resulting from equal distribution of rights and liberties.

Fundamental features of the adversarial legal system, result into inequality of liberty and opportunities between the CVSA and the accused persons. According to Rawls' perception of justice as equal opportunities to

⁷⁵C McMahon, 'Due Process: Constitutional Rights and the Stigma of Sexual Abuse Allegations in Child Custody Proceedings' (1999)39 Cath Law 153, 185.

⁷⁶*Op. cit* n 59.

⁷⁷*Ibid.*

⁷⁸*Op. cit* n 55.

⁷⁹*Op. cit* n 2.

⁸⁰*Op. cit* n 75.

⁸¹Nichomachean Ethics by Aristotle, Translated by D W Ross (350 B C) 741 <<http://publish.uwo.ca/ndgault/phi/20/arpol.html>> accessed 4 March 2012.

⁸²Rawls J, *A Theory of Justice*, page 50<http://plato.stanford.edu/entries/original_position> accessed 4 March 2012.

all, it can be argued that for the court procedures to be fair and just in cases of CSA, both the CVSA and the accused must have the equality principle upheld in the process of the trial.

Rawls' second principle of justice, the difference principle states that social and economic differences that exist in the society must be distributed in such a way as to benefit the least advantaged people in society. CVSA, being children and vulnerable require that court procedures in cases of CSA be made child friendly by balancing the rights and liberties available to the accused and distributing the available resources, privileges, opportunities and protection in such a manner as to benefit the disadvantaged CVSA. This argument implies a limitation of the rights of accused persons in such a way as to benefit CVSA while ensuring equal protection of both accused persons and CVSA. Rawls' arguments on justice as fairness therefore are in support of the classical distributive theory of justice which is confirmed by Solum, who takes the argument further, and explains procedural justice as being concerned with means by which social groups such as governments, private institutions, and families institutionalize the application of requirements of corrective and distributive justice to particular cases.⁸³

Another procedural justice proponent is Galligan⁸⁴ who argues that fair procedures made known to and accepted by parties to a transaction, result into fair results, which are acceptable to all parties even if the result is not in favour of one party. In the context of the study, procedural justice by Galligan is important in as far as the court procedure in cases of CSA is not known or understood by CVSA, yet they are expected to follow them while testifying in court, according to Saywitz.⁸⁵ The explanation by Saywitz that court procedures are not understood by CVSA confirms the description of the court process by many as institutional re-victimization of victims of sexual abuse.⁸⁶

This article adopts the procedural justice theoretical perspectives. Procedural justice theory was selected because it provides a framework for analyzing how parties in a dispute experience interactions with the players in the adversarial court procedures and how the officers' behaviour affects the special needs of the CVSA.⁸⁷ Fair procedure is important in the prosecution of CSA cases since the processes used in resolving a dispute may in part underlie emerging success or failure of conflict resolution according to Watson and Angell.⁸⁸

According to Solum, procedural justice theory is characterized by three major antecedents that include participation (having a voice), dignity and trust that the authority is concerned with one's welfare.⁸⁹ Solum's argument on procedural fairness is supported by Lind and Tyler who explain that people want to be treated fairly by authorities, independent of the outcome of the interaction.⁹⁰ Basing his arguments on the identified antecedents, Solum delineates three models of procedural justice theory namely; the accuracy model, balancing model, and the participatory model.

The accuracy model assumes that the aim of civil dispute resolution is the correct application of the law to facts. This model is however incapable of explaining a variety of doctrines which do not lend themselves to perfect procedural justice such as *res judicata* and other rules that protect the finality of the judicial decisions. In addition, the model suffers from crucial ambiguity between accuracy in particular cases and the system as a whole. The accuracy model alone is thus not suitable in studying the impact of the adversarial legal procedures on CVSA.

The balancing model assumes that the aim of civil procedure is to strike a fair balance between the costs and benefits of adjudication. It is based on imperfect procedural justice. The model has two broad variants; utilitarian or consequentiality and right based. The consequentiality variant focuses on the balance between

⁸³ Ibid.

⁸⁴ J D Galligan, *Due Process and Fair Procedures* (Oxford University Press, 1996) 12.

⁸⁵ J K Saywitz et al, *Children's Knowledge of Legal Terminology in Language and Human Behaviour* (1990) 14, 523-35.

⁸⁶ *Op. citn* 3.

⁸⁷ E Gurnon and S Prather, *The Need for a Children's Bill of Courtroom Rights* (Pioneer Press, 2007) 27.

⁸⁸ A C Watson and B Angell, *Applying Procedural Justice Theory to Law Enforcement's Response to Persons with Mental Illness in Psychiatry Service* (American Psychiatric Association, 2007) 187.

⁸⁹ B L Solum, 'Procedural Justice Theory' (2004)pg 240<<http://ian.bepres.com/sandiego/wps/pllt/art 2>>.

⁹⁰ A E Lind and S M Tyler, 'A Relational Model of Authority in Groups' in M Z Anna (ed), *Advances in Experimental Social Psychology* (New York: Academic, 1992) vol.25, 115-191.

accuracy and the cost of the due process while the rights based variant assumes that procedural justice requires attention to the fair distribution of the cost imposed by the system of procedure.

The balancing model appears to overstate the case of perfection since the law of diminishing returns makes the pursuit of perfection costly beyond a certain limit; hence perfection in the strict sense is not possible. In any case, the model does not provide conditions considered to be perfect as it fails to highlight the framework for distributing cost of procedural justice. This structural and conceptual difficulty renders the model inappropriate for the CVSA under the adversarial legal procedures.

The participatory model assumes that the very idea of a correct outcome must be understood as a function of a process that guarantees fair and equal participation as argued by Rawls as well. This study therefore adopts the participatory model of procedural justice theory as it assumes that procedural justice best fits and justifies existing doctrines. The key notion is that it is the process itself and not the outcome that defines procedural justice. The model provides that procedural fairness requires that those affected by a decision have the option to participate in the process by which it is made.

The two central concerns of participatory model of procedural justice include the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogues by affected individuals in the decision making process. This makes the model suitable for the analysis of the implications of the adversarial legal procedures on CVSA while testifying in courts. This study therefore applies the participatory model of procedural justice theory.

The participation model of procedural justice as identified by Solum has four main interrelated applications. Although his discussion was based on civil litigation, there are a lot of similarities and application to the criminal justice procedures. All the four variants are based on pure procedural justice that fairness of procedure is a function not of some independent criteria, but instead of the intrinsic features of the procedure itself. Thus, the outcome of a procedure is fair, whatever it is, provided that the requirements of the procedure have been satisfied as per the following applications.

The first application is the *game interpretation* which explores the notion that litigation should be considered as fair game or contest where the winner is entitled to prevail if the game is played by the rules and the winner is therefore entitled under the rules to win. The major weakness encountered in this application is that litigants do not choose to file or defend law suits. It also overlooks the lawyers' skills while emphasizing level playing ground. Nonetheless, this approach provides a framework for considerations of what is fair. The application is relevant to this study in as far as it emphasizes the need to have fair rules of the game acceptable to all the actors, and explains the adversarial legal systems' procedures that assumes the playground in court is level and the winner takes it all.

The second application is the *dignity interpretation* which emphasizes dignity and autonomy as a function of actual participation of litigants in procedures that affect them. It thus identifies the crucial role of equity, individuality, and autonomy in procedural justice. However, participation alone is not sufficient to make a just or fair procedure. Accuracy of the procedure is also important. The application overstates the place of dignity over other values such as underlying substantive rights. However, to the extent that the application focuses on dignity and equality, it is relevant to the study as the CVSA need to have their dignity upheld and protected as they testify in court. Likewise, there is need to accord both the CVSA and the abuser equal protection by the law if a trial is to be seen as fair. The current adversarial legal system appears to protect only the abuser and not the CVSA.

The third application is the *satisfaction interpretation* which argues that participatory process is justified by the greatest level of satisfaction it provides to litigants which is considered as important in the procedural justice. Based on this argument the application is relevant to the study since dissatisfaction of CVSA with the current adversarial legal procedures is part of the justification for the research. When parties are satisfied with the process of dispute resolution, they are more likely to accept the outcome even if it is not in their favor.

Solum's measurement levels of satisfaction still remain a thorny issue and the interpretation does not seem to recognize the role of cost and accuracy in procedural justice. Despite this inadequacy, the satisfaction interpretation is relevant to the study although it cannot be applied alone, but must be supplemented by both the game and dignity applications in understanding procedural justice.

The fourth application is the *discourse interpretation* which appeals to an ideal communication situation as the criterion of what constitutes a just or correct outcome and argues that fair procedures aim at promoting this ideal. Indeed, this application forms the basis for the need to reform the current court procedures in cases of CSA so as to ensure interactive dispute resolution process aimed at getting relevant information to understand the nature of the abuse.

For procedures to be seen as fair, each party must have an equal opportunity to present their case, question the other party, and rebut any adverse evidence. In this case, there is no separation of the criteria for truth from the criteria for the argumentative settlement of disputes. This variant has been accused of laying unwarranted emphasis on the courtroom as the sole source of the truth. This interpretation may exclude crucial information and there may not be guarantees of accuracy. However, despite the criticisms, the study adopts this application, together with the previous three as they jointly complement each other and therefore offer an explanation of procedural justice that is relevant to this study.

The Linkage between the Psychoanalytic, Labeling, Procedural Justice Theories and Their Relevance to the Study.

Whereas the psychoanalytic theory is derived from the discipline of psychology, it helps the study to understand the psycho-sexual developmental stages of an individual which predisposes children to CSA. It therefore explains CVSA vulnerability to CSA, the effect of the abuse on CVSA and the special need for their protection when required to testify before court in CSA trial. The psychoanalytic theory therefore sets the stage for the labeling theory, drawn from the discipline of sociology, and explains the behaviour of CVSA within the society. It helps the study to understand why some CVSA are able to report the abuse while others do not. The societal stigma attached to CSA and CVSA helps to understand the difficulty experienced by the already vulnerable and traumatized CVSA in an attempt to convince the police, society and the court that they were sexually assaulted. Further, the labeling theory explains the action taken by family members of CVSA in some cases due to the need to protect and preserve the family name, particularly in incest cases. The labeling theory explains the difficulties experienced by CVSA and their subsequent behaviour following the sexual abuse.

The procedural justice theory, drawn from the discipline of law explains what is a fair process of dispute resolution, which ensures the outcome is acceptable to both parties in a dispute. It emphasizes equality and fairness to both parties in the distribution of resources. The theory provides a standard of examining the current children court procedures whether or not the process is fair to both the accused and CVSA in the prosecution of CSA cases. Procedural justice theory provides a theoretical framework for analyzing whether or not CVSA enjoy equal protection by the law as the accused in CSA cases.

The theory enables the study to examine whether or not CVSA have access to resources/liberties on an equal basis as the accused person according to Rawls' perception of justice already discussed. Procedural justice as a theoretical framework assists the study in assessing whether the court procedures are balanced in fairness to both CVSA and accused persons. Both the psychoanalytic and the labeling theories explain why the CVSA is disadvantaged by virtue of being vulnerable and being victims of sexual assault as well as the challenges they may face in narrating the sensitive details of the abuse in court. The multi-disciplinary approach provides a broad perspective to the study.

VIII. METHODOLOGY

This study involves both a desk review and field study. The desk work comprises the review of statutes, government reports, journals, periodicals, books and internet searches as secondary sources of data. This section presents the methodological approaches for the study. It specifically presents the details on the study site, population and sample and sampling procedures, data collection methods, data management methods and ethical considerations. The study employs both quantitative and qualitative approaches of data collection and analysis.

Research Site

The study was conducted in five purposively selected children's courts located in Nairobi, Mombasa, Kisumu, Nakuru and Eldoret in Kenya. The courts are a creation of the Children's Act 2001 and have special jurisdiction to specifically deal with cases concerning children within their territorial jurisdictions. The study assumes that the children's courts, unlike other courts have procedures that take into consideration the basic need to protect children generally.

Population, Sample and Sampling Procedure

The main population of the study is CVSA whose cases had been filed at the selected children’s courts by the time of data collection. The study sampled only cases of CVSA from both gender aged between 10 years and above but below 18 years. 10 CVSA were sampled from every station giving a total of 50 CVSA for the study. The selection of CVSA aged 10 years and above was based on their presumed ability to be articulate in expressing their experiences of sexual abuse better than those aged below 10 years. The study however did collect information about CVSA aged below 10 years through perusal of selected concluded court files.

The study also interviewed a number of key informants who were purposively selected. One prosecutor was purposively sampled from each of the courts giving a total of five; two investigating officers were also purposively sampled from each court, giving a total of 10 investigating officers, hence a total of 15 police officers. One magistrate and one judge were interviewed from each of the 5 courts. Although the study intended to interview the Chief Justice as a key informant, a request which the Chief justice accepted, he directed the researcher to interview the judge in charge of the family division of the High Court due to what the Chief Justice referred to as the ‘special nature’ of the research. The official view of the Judiciary was thus obtained through the judge and forms part of the data collected. The study also interviewed two lawyers representing the CVSA and two representing the accused persons per station, who were purposively sampled, giving a total of twenty lawyers.

A total of five social workers were purposively sampled and interviewed, representing one social worker per court station. The study conveniently sampled and interviewed two parents/ guardians per station, giving a total of ten parents/guardians of CVSA. Six children’s officers were purposively sampled and interviewed, representing one officer per court station and one officer managing the child helpline in Nairobi. Of importance is the fact that the study managed to interview the target number of 50 CVSA. The table below illustrates the category and number of respondents interviewed by the study.

Table 1: Sample and Sample Size by category of respondents

Category	Number per station	Total
CVSA	10	50
Prosecutor	1	5
Investigating Officers	2	10
Magistrate	1	5
Judge	1	5
Lawyers	4	20
Social workers from NGOs	1	5
Parents/guardians	2	10
Children’s officers	1	5
Helpline Officer	1	1
Chief Justice(represented by judge in charge of family division of the High Court Nairobi)	1	1

The Respondents

The study interviewed four different groups of respondents namely; CVSA, legal practitioners, police officers and psycho-social support providers.

CVSA

The study interviewed the target total of 50 CVSA, majority (92%) comprising of girls while the boys accounted for only 8%. This could mean that either more girls than boys fall victims of sexual abuse or that more girls than boys report CSA to the police. All the CVSA interviewed were between the ages of 10-18 years. The study observed the CVSA immediately they arrived at the court compounds and continued to do so until after they had testified when they were interviewed. Not all the CVSA interviewed were found at the court compounds as some of them were traced to the children homes that housed them after the abuse. These included both government remand homes and institutions under the management of NGOs.

Legal Practitioners

The target total of 30 legal practitioners was interviewed. They comprised of 5 magistrates, 1 from each children’s court (Nairobi Children’s Court, Nakuru Law courts, Mombasa Law courts, Eldoret Law courts and Kisumu Law courts), 5 judges comprising of the head of the family division of the High Court representing

the judiciary's official position on the issues raised by the study as directed by the Chief Justice, 1 Court of Appeal judge, the principal judge of the High Court Division, 1 judge of the Criminal Division of the High Court and one judge of the Interim Independent Constitutional Dispute Resolution Court(IICDRC).⁹¹

The magistrates presided over the trials of the accused persons and therefore took the testimony of the CVSA as they were in direct contact with them in court. Their roles included issuing summons to witnesses, listening to the evidence of both parties i.e. the accused and the prosecution witnesses including the CVSA and ensuring that the laid down court procedures were followed. In respect of this, magistrates had a duty to ensure the defence lawyers do not cross-examine the CVSA in an intimidating manner. Under the adversarial legal system, the magistrates are required to remain impartial, non-partisan and passive throughout the process. At the end of the trial, they are expected to make a decision based only on the evidence adduced before them in court.⁹² It is the magistrate's evaluation of the evidence produced before them that determines the acquittal or conviction of the accused persons. Subsequently therefore, it is the magistrates who make a determination as to whether the child should be protected or assisted in any way including making orders as to medical, counseling and psycho-social support services.

All the judges had either practiced as advocates before their appointments as judges or had served as magistrates for over 20 years before being elevated to the judges' position. As key respondents, they had a wealth of experience was a useful source of qualitative data. Unlike the magistrates who had the opportunity to see, talk to and observe the reaction of the CVSA, the judges only handled the CSA cases at the appellate/review level thereby only dealing with the files/records from the magistrates courts without the benefit of the CVSA appearing before them. However, the High Court decisions bind the Magistrates' Courts and the Court of Appeal was the final court. (The Supreme Court became the final court after the promulgation of the new constitution on the 27th of August 2010, as at the time of the study therefore the court had not been operationalized and thus no interviews were possible from that level).

The study also interviewed 20 lawyers in private practice comprising of 10 defence lawyers and 10 advocates representing the CVSA, two of each category were selected from each of the five children court stations. The lawyers came into contact with the CVSA either as defence lawyers or as the CVSA's lawyers. The defence lawyers although regarded as officers of the court have the core function of protecting the interests of their clients (accused) by subjecting the prosecution witnesses who include the CVSA to rigorous cross-examination in an attempt to create doubt in their evidence, so as to have their clients/accused set free by the court.

The CVSA's lawyers on the other hand have the primary duty of protecting the interests of the CVSA and ensuring they are not unduly intimidated, by observing that the right/laid down court procedures are observed by the defence counsel. The CVSA's counsel played a passive but very key role in court as they neither lead the CVSA in evidence like the prosecutor nor cross-examined the accused or the defence witnesses. They were mute observers who advised the prosecutors on the interests of CVSA. All the victims' lawyers happened to be employees or were engaged by NGOs working in CSA matters such as CLAN, CRADLE, WRAP, Kituo cha Sheria.

Police Officers

The study interviewed a total of 15 police officers comprising of 1 prosecutor and 2 investigating officers per court station. The analysis of police officers is more detailed than the rest of the respondents due to their crucial role in investigation and prosecution of CSA cases. 62% of the officers interviewed were female while 38% were male suggesting that more female than male police officers are assigned CSA cases. 84% of the police officers interviewed had attained high school education level, 8 % had diploma in criminology and social order while a further 8% were university graduates. Although majority of the police officers had the high school level of education, the percentage of the officers who had university degrees was notably far much lower. Of importance to this study was the fact that only a dismal 8% had specialized training (i.e. diploma in criminology and social order) in skills necessary to enable them handle CVSA and CSA matters. According to the police department, the various ranks for police officers range from the Commissioner of Police to a Constable.⁹³

⁹¹ The IICDRC was a special court set up under the Repealed Constitution to resolve disputes arising out of the then constitutional review process. Its mandate ended with the promulgation of the Constitution of Kenya 2010.

⁹² Criminal Procedure Code, section 125.

⁹³ Commissioner of police (highest), Senior deputy commissioner 1, Senior deputy commissioner 2, Deputy Commissioner, Senior assistant commissioner, Assistant commissioner, Senior superintendent, Superintendent,

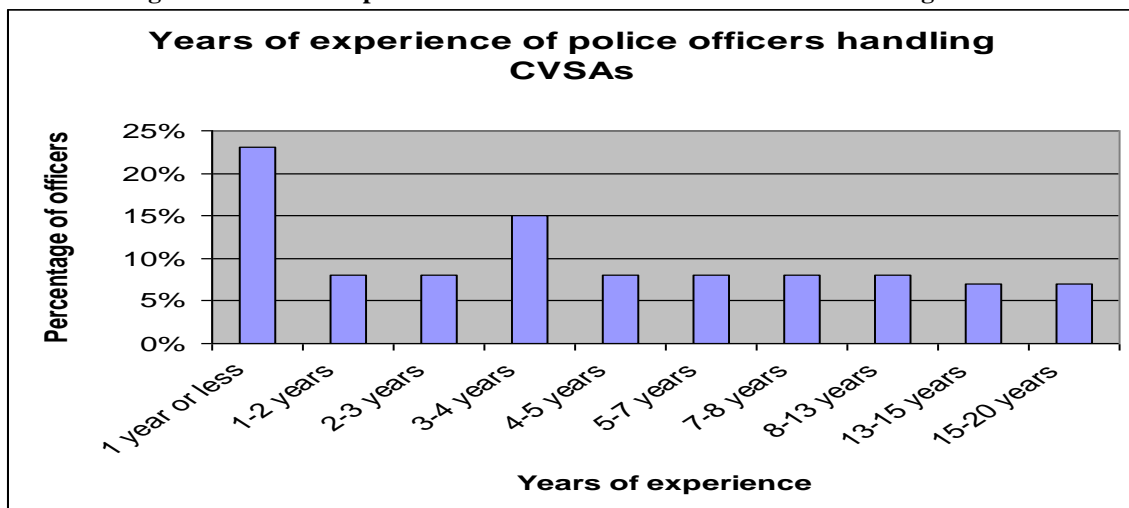
Considering the police ranking system the study found that 38% of the police officers interviewed comprised of police investigating officers and child desk officers of the ranks of constables and corporals, being the lowest and second lowest ranks respectively in the police force. This is an indication that the important, serious, sensitive task of investigating CSA matters and handling CVSA that requires skills and experience is assigned to officers of the lowest and second lowest ranks.

The prosecutors were of the rank of inspector and accounted for 31% of the police officers interviewed. Only 24% of the respondents interviewed were of the ranks of chief inspector (8%), superintendent (8%) and senior superintendent (8%), being the middle ranks in the police ranking systems. It was noted that police officers from the higher ranks of namely: assistant commissioner, senior assistant commissioner, deputy commissioner, senior deputy commissioner II, senior deputy commissioner I and the commissioner were not directly involved in either the investigation or prosecution of CSA cases.

The handling of CVSA by the police at the investigation or prosecution levels appears to be left entirely at the hands of officers of the lower ranks with little experience and skills in handling CVSA and almost no involvement of the most senior officers in the police force. This fact corroborates the response from CVSA and judicial officers that some police officers were insensitive to their needs therefore contributing to the difficulties experienced by CVSA while testifying in court. 23% of the police officers interviewed had experience of one year or less in investigation and prosecution of crime generally. This tally's with the study finding that 38% of the officers assigned to investigate CSA cases are at the level of constable and corporal as the lowest and second lowest ranks in the police ranking systems respectively.

Fewer officers with experience of over one year handled CVSA than their counterparts with less than one year experience. The most experienced officer in crime/investigation generally amongst the police officers interviewed had a 15-20 years' experience in prosecution/ investigation of crime generally representing a paltry 7% of the officers assigned to handle CVSA. Another 7% of the officers had 13-15 years of experience in crime investigation/ prosecution generally. 8% of the officers had between 8-13 years of experience of crime investigation/ prosecution generally. Another 8% had between 7-8 years of experience of crime investigation/ prosecution. Similarly a further 8% had between 5-7 years' experience of crime investigation/ prosecution generally. 15% of the officers had between 3-4 years' experience of crime investigation/prosecution, 8% had 2-3 years' experience while 23% had experience of one year or below in crime investigation/ prosecution generally.

Figure 1: Years of experience of the officers of different ranks handling CVSA.



Apart from experience in prosecution/ investigation of crime generally, the study sort to find out the experience of the police officers in investigating/ prosecuting CSA cases specifically. An overwhelming majority of 77% of the police officers had one years' experience or less in prosecution/investigating of CSA cases. This confirms the study finding that CSA cases are mostly assigned to officers of the lower ranks and less

Acting superintendent , Chief inspector, Inspector, Senior sergeant , Sergeant, Corporal, Constable (lowest)
 Source: Kenya Police Website <www.kenyapolice.go.ke> accessed on 7th July 2011.

experience such as constables and corporals. 8% of the officers interviewed had between 1-2 years' experience in prosecution/investigation of CSA cases while another 8% had between 2-3 years' experience in prosecution/investigating CSA cases. 7% of the officers had between 3-7 years' experience in prosecution/investigation of CSA cases.

The roles played by the police officers according to the study findings include; the arrest of suspects, investigation of cases, decisions on which offence to charge the accused with and the drafting of the same, serving summons to witnesses to attend court and leading witnesses to give evidence in chief.

Psycho-social Support Providers

The study interviewed 5 social workers from NGOs, 1 from each children court station, 10 parents/guardians, 2 from each station and 5 children officers, 1 from each children court station and one officer in charge of child helpline desk.⁹⁴ For ease of reference, this group will be referred to by the study as Psycho-social Service Providers (PSSPs). The PSSPs comprised of 43% male and 57% female, an indication that men play a big role in offering psycho-social support to CVSA. 46% of the PSSPs interviewed were between ages 35-45 years while 36% were in the age bracket of 26-45 years. 9% of the PSSPs interviewed were between ages 46-55 years while 5% were in the age bracket of 25 years and below. Another 5% were aged above 55 years. From the above statistics, it appears that majority of the PSSPs fall within the age bracket of between 26-45 years which reflects the seriousness with which the society views the need for psycho-social support services to the CVSA as the majority of the PSSPs are neither too young nor too old.

Most of the PSSPs had attained secondary school education as the highest level of education representing 36% of the PSSP respondents. 32% of the PSSPs had attained university education while 14% possessed post graduate degrees. Tertiary level of education accounted for 14% of the PSSPs while only 5% of the PSSPs had below secondary level of education probably representing the parents/guardians of CVSA since the rest of the PSSPs were either employees of either the government or NGO sector with minimum requirement of secondary school education.

Data Collection Instruments and Procedures

The study collected both quantitative and qualitative data using four different techniques of data collection. The first technique involved direct observation of selected CVSA as they testified in each of the five children courts. This technique enabled the observation of the interaction between the CVSA and court officers to be captured first hand as a primary source of data. The study observed and recorded the appearance, demeanor, reaction and interaction of CVSA and individual court actors i.e. the magistrates, prosecutors, the children officers, lawyers and court clerks. The interaction between CVSA and parents/guardians, social workers, and the accused was also noted. The study also observed the court layout and its effect on CVSA ability to testify.

The second data collection technique involved the review of 17 randomly selected completed CSA cases in each of the selected children's courts registries. The perusal of court records enabled the author to understand the basis for the courts' acquittal or conviction of accused persons in CSA cases. Through this technique, the study was able to analyze the court procedures and the testimony by CVSA as recorded in the files. Of special importance were the court's recordings of the appearance and demeanor and other marginal notes on the court's observation of the CVSA during testimony.

The third technique of data collection was the Focused Group Discussions involving the magistrates, lawyers, prosecutors, investigating officers, children officers, social workers/psycho-social service providers and the CVSA in each of the five court stations. This technique was employed after the interviews, observation and court reviews were completed and it gave the participants an opportunity to interrogate themselves on their responses and preliminary findings of the study. It therefore served as a validation exercise for the data collected in each court station. The fourth technique involved face to face interviews with all the respondents selected from different children courts. Different sets of questionnaires (Appendices B, C, D and E) were administered to different categories of respondents during the interviews.

⁹⁴ This is a mechanism by department of children services in the Ministry of Gender and Social Services that encourages the public to report any forms of child abuse to the ministry by telephone.

Interviews

The study conducted interviews based on an interview guide consisting of a list of open-ended questions which were flexible enough to accommodate further probing. The questions were designed to include the specific procedures at different stages of the court process. The purpose of the study was explained to each respondent before consent was sought and only those who voluntarily accepted to participate in the study were interviewed. Consent was sought from the parents or guardians of the CVSA before the administration of questionnaires. The researcher enlisted the assistance of four research assistants, who had the requisite skills in communication and research with children. One of the research assistants had skills in traumatic counseling and this proved very important in cases where CVSA initially appeared withdrawn, apprehensive and uneasy.

The interviews were conducted at private locations where confidentiality and privacy was preserved and recording of the data done through note taking. Where the parent/guardian or the CVSA declined to participate, such decision was respected, a replacement sought and the entire process repeated for any CVSA interviews.

Direct Observation

A participatory observation was preferred as this forges trust between the respondents and the researcher as it gave further insight into the procedures that the CVSA undergo while testifying in court. Throughout the observation, *field notes* (written accounts of what the researcher sees, hears, experiences and thinks about while collecting data) was taken comprehensively, covering as much aspects of the procedures as possible.

The field notes included portraits of participants, reconstruction of conversations, descriptions of the settings and accounts of particular events and activities. Particular CSA cases scheduled for hearing during the research period were purposively selected for observation by the researcher to capture the processes of the examination in chief, cross examination and re-examination of CVSA. Two cases were selected from each of the five court stations making a total of 10 cases for the study. In this respect the study also observed the court layout and the interaction between the CVSA and other court officers.

Focused Group Discussions (FGD)

FGD comprising of between 8-10 participants were conducted to obtain further information on the issues under consideration by the study. A total of two FGD were conducted with one session composed of the parents/guardians of CVSA while the second FGD consisted of court officers who included a magistrate, prosecutor, investigating officers, children's officer, and lawyers for the defendant and CVSA. It was however not possible to have any judge participate in any of the FGD.

The discussions allowed the participants to freely express their opinion, attitude, feelings, beliefs and needs, reflecting on the tentative findings of the study after the completion of the interviews. The FGD had the advantage of revealing diversity in views and opinion on various issues under study and this helped in providing in-depth understanding of the issues at hand. In addition, the respondents had a chance to re-evaluate their previous positions or statements; hence it was a validation of information collected through other means such as observation and interviews.

Secondary Data

The study reviewed two court records of finalized CSA cases per children court. The records provided insight into issues that influenced the court's decision to convict or acquit an accused in cases of CSA. This study also reviewed the evidence of CVSA under 10 years as recorded in the court files. Likewise a review of other secondary sources of data included books, journals and internet sources as well as government reports on relevant aspects of the study.

Validity and Reliability

The study dealt with concerns for *validity and reliability* of the research findings in the following manner; Validity has been defined by D Silverman as truth which is interpreted as the extent to which an account accurately represents the social phenomena to which it refers.⁹⁵ Validity was ensured through *method and data triangulation*. This is the combination of different ways of obtaining data to arrive at the same

⁹⁵ D Silverman, *Doing Qualitative Research: A Practical Handbook* (Sage Publication, 2004) 210.

findings. Reliability refers to the degree of consistency with which instances are assigned to the same category by different observers or by the same observer on different occasions.⁹⁶ Reliability was achieved through *low-inference descriptors*. Although no act of observation can be free from the underlying assumptions that guide detailed data presentations, minimal inferences (low inferences) as opposed to (high-inference) was a preferred approach of summarizing data.

Data Analysis

The entire data analysis involved the following four processes;

1. Data reduction -The process of selecting, focusing, simplifying and transforming raw data to useful information for the study.
2. Data display-organization of the data so as to permit conclusions to be drawn. This involved the use of tables and charts which clarify the main direction of the data analysis.
3. Conclusion drawing-deciding what things mean, noting irregularities, patterns explanations, possible configurations and propositions.
4. Verification- testing the provisional conclusions for their validity.

Quantitative data was analyzed using the Statistical Package for Social Sciences (SPSS) while qualitative data was analyzed and presented in a narrative format.

The qualitative data is presented in a narrative form and where necessary the use of low inference data is also applied. The quantitative data is presented using simple graphs and charts to illustrate the findings. The study sample size of respondents was representative enough as each respondent was as unique as the information they gave. Both the quantitative and qualitative data therefore supplemented and complemented each other.

IX. ETHICAL CONSIDERATIONS

The study, being a social science research involving human interactions, it was of great importance that utmost *objectivity* and *integrity* was maintained throughout the research life, managing any biases as far as possible. This was important for the credibility of the research findings. In order to achieve this, data collected through observation and interviews was supplemented with that from secondary sources such as law reports or the practice in other jurisdictions that practice the adversarial legal system. This offered an opportunity to compare and validate the research findings. However, the research relied heavily on the primary data collected from the field study.

The research was carried out with openness without any secrets and clearance was sought in advance from the Registrar of the High Court to enable the researcher collect the required data from the courts. In addition, consent was obtained from the individual respondents who voluntarily participated in the interviews.

The right to *full disclosure* of the nature and purpose of the research was observed so as to empower the respondents to make informed decision as to whether or not to take part in the research. All respondents therefore gave *informed consent* while the study respected the decisions of those who declined to take part in the study and treated such refusal as part of data. The research also observed and respected the *right to privacy* of all respondents by not revealing any of their identities.

Whereas it was necessary to obtain written consent from every respondent, the researcher ensured that details of the respondents that lead to their identity were not recorded except with their express permission. This ensured *confidentiality and anonymity* requirement especially for the CVSA. The researcher explained to the respondents that the information given by them was only to be used for the purpose of the research.

The researcher took steps to ensure that the research process and information collected did not occasion any harm whatsoever (physical, emotional, psychological or moral) to the respondents. One such unfortunate event however occurred in Kisumu and the researcher, equipped with counseling skills applied the same appropriately to mitigate the situation immediately.

Since the study had children as respondents, due to their vulnerability, the study adhered to ethical standards in research with children in addition to the ordinary ethical requirements. For example, the researcher discussed with CVSA and their parent /guardian the purpose of the research and the importance of their views, reassuring

⁹⁶ Ibid.

them of strict observation in respect to their confidentiality, privacy and anonymity. The decision taken by CVSA and guardian/ parent as to whether or not to participate in the research was appreciated, understood and respected due to the sensitive nature of the study. Parents/guardians of children who opted to take part in the interview were required to give consent and the same was recorded by the researcher. Utmost good faith was observed, taking care to avoid any situation that could harm the feelings of CVSA in any way.

Where CVSA were unable to talk to the researcher for whatever reason, an attempt was made to seek the views of the child through the parent/guardian. All names and places were changed to conceal the identity and protect the privacy and dignity of CVSA. Considering the effects of sexual abuse on children, the open ended questionnaire was used as a special tool of expression to allow CVSA write and draw their responses in some cases.

Structured questions enabled CVSA to give yes or no answers thereby reducing the interview time and maximizing on CVSA concentration during the first twenty minutes of the interview. This style enabled the collection of a lot of relevant information before CVSA lost concentration while the open ended questionnaires allowed them to state their views of what was relevant to the study. Both methods were however combined in one document to avoid interviewing the child twice. This is in line with article 12 of the UNCRC which provides for the child's right to express their views on all matters that affect them, including being facilitated to give informed consent. Article 54 provides for respect for and inclusion of children on matters that concern them.

Gender consideration was important, especially where the accused person was of the male gender while the CVSA was a girl since some CVSA would not willingly give information to a researcher of the same gender as the accused. The researcher therefore employed the assistance of either female or male qualified research assistants as appropriate to conduct the interviews.

X. STUDY FINDINGS

The study found that the trial procedure in Kenya is not suitable for CSA trial. Firstly, the pre-trial investigation procedure is inadequate and not detailed enough to collect all relevant evidence in a CSA trial. The pre-trial procedure lacks the involvement of a judicial officer to ensure thorough investigation into the case before trial. Secondly, the procedure is inadequate in balancing the rights of accused persons and the need to protect CVSA. The procedure protects the rights of accused persons at the expense of CVSA rights. Thirdly, the passive role of the trial magistrate/ judge limits the ability of the trial judge/ magistrate to balance the rights of accused persons with the need to protect CVSA. Fourthly, the pre-trial, trial and post-trial procedures are lacking in the administration of justice that is consistent with the protection of CVSA rights as provided by the UNGMCCVWC, (2005). Finally, the study found that the pre-trial, trial and post-trial procedures lack adequate mechanisms for the protection of CVSA.

The evaluation of the CSA trial procedure is carried out under pre-trial, trial and post-trial procedures. Under each section, the study identifies and discusses specific procedural inadequacies. The analysis of the inadequacies revolves around the balancing act between the rights of CVSA and those of accused persons in a fair CSA trial. Pre-trial procedure refers to the steps that are followed before the trial begins. Trial procedure refers to the steps that are followed in court in the taking of the evidence produced to prove the allegations against an accused person. It also refers to the steps that the accused person follows to challenge any evidence against him. Post-trial procedures refer to any steps taken by the court or any other person/ agency in regard to the trial after its conclusion.

(A) Inadequacies of CSA Pre-Trial Procedures in Kenya

The study found that the pre-trial procedure in Kenya is not in the best interest of CVSA, is lacking in detailed pre-trial investigation and the trial judge is not involved in the collection of evidence and the investigation of the case at this stage. The pre-trial procedure also fails to comply with the human rights approach to the administration of justice as far as children are concerned. There are no procedural mechanisms to protect CVSA or prepare them for the trial as stipulated under the (UNGMCCVWC, 2005). However, the pre-trial procedures safeguard the interest of accused persons who are presumed innocent until the contrary is proved, protected against self-incrimination and have a right to silence during the investigative phase of the trial. The CSA pre-trial procedure in Kenya is therefore inadequate and fails to balance the rights of accused persons and the needs and interests of CVSA. This is demonstrated by the following findings of the study:

Inadequate Recognition of the Effects of CSA on CVSA and the Impact on their Ability to Participate fully in the Justice Process contrary to the Principle of Harmonious Development.

The study found the court procedure lacking in adequate recognition of the nature of CSA, its nature of commission in private and its effects on the ability of CVSA to testify about the abuse. Subsequently, the trial of CSA is conducted under the adversarial criminal procedure that focuses on the guilt/innocence of the accused person with little concern about the need to protect CVSA. The finding is consistent with the traditional view of criminal trial being focused on the accused person as argued by McConville and Wilson.⁹⁷ The trial procedure falls short of accommodating the interests and protection needs of victims (CVSA) according to human rights and victim advocates such as Batra⁹⁸ and Zedner.⁹⁹ The procedure is inconsistent with the principle of human rights approach to the administration of justice according to the ideal framework for CSA trial.

Lack of Psycho-Social Support Services to CVSA which violate their Right to Effective Assistance under part IX of the UNGJMCCVWC

Consequent upon the inadequate recognition of the effect of CSA on CVSA, the study found no procedures for the provision of psycho-social support services to assist CVSA deal with the emotional, psychological and mental trauma before testifying, despite the provision of counseling to victims of sexual abuse under section 3 of the Sexual Offences Act. Only NGOs offered counseling services to few CVSA whose cases were reported to them while the government institutions, particularly the department of Children Services played minimal role in this respect.

Majority of the CVSA said that they had not received any counseling services as there was none offered at the courts as a policy or requirement before CVSA testified. The effect is that the already traumatized CVSA, lacking any counseling services is thrust into the unfamiliar and tense court environment where they come face to face with the abuser and people they had not known before such as the magistrate, the prosecutor, the lawyer; all who interrogate the CVSA about the abuse causing tension, nervousness and anxiety which would otherwise be alleviated through counseling. A CVSA who remained silent at the witness box without testifying, responded during the interview that:

‘...to ask me to narrate what happened during the abuse was like putting me through the same experience again in front of more people, it was too much for me to handle’.¹⁰⁰

Inadequate Information to CVSA which violates their Right to Information under part vii of the UNGJMCCVWC

The study found the pre-trial procedure lacking a mechanism of ensuring that CVSA receive relevant information about the trial contrary to child victims’ right to information as provided by the UNGJMCCVWC.

Although the CVSA are in the strict legal sense the complainants in a CSA trial, there was no procedure to ensure that they were kept informed of the developments in the cases, what was expected of them and what they should expect in the trial. They relied on their families to follow up the case as opposed to receiving information from the court. This was in violation of children’s right to information on matters that affect them under the best interest principle. This led to CVSA missing court on the hearing and sentencing days, a fact that discouraged many of them from reporting sexual abuse to the police.

The lack of a pre-trial court orientation for CVSA meant that CVSA found themselves in unfamiliar court grounds with many people, some in handcuffs. The resultant anxiety, nervousness and fear were evident on CVSA who stayed close to those who had accompanied them to court. Ordinarily, children would be seen playing freely in any situation, but that was not the case in all the courts visited. Many CVSA knew they were to narrate the abuse in court, but had no idea what the procedure was and what was expected of them once in court. This was a problem that was observed throughout in all the courts visited.

The CVSA in their interviews said that they had never been brought to court before the day of the testimony and for many of them it was their first time to appear in court. They did not understand most of the procedures in court, the role of the different officers, the importance of every stage of a trial and to them it was

⁹⁷J 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.

⁹⁸M Batra, *Protection of Human Rights in Criminal Justice Administration* (Devandra Printers, 1989) 88.

⁹⁹L Zedner, ‘Victims’ in M Maguire and R Morgan and R Reiner R(eds), *The Oxford Handbook of Criminology* (Oxford University Press, 2002) 419.

¹⁰⁰ A 16 year old CVSA Respondent No. 98. Interviewed at Nairobi on the 16/11/2010.

just another strange area where they were required to tell everyone in the courtroom how they were abused. In one notable incident, the unfamiliar court environment that confines movement of people could not be understood by one CVSA who just walked out and left the court proceedings going on. This showed that the pre-trial procedure does not adequately prepare CVSA to testify as required by UNGJMCCVWC.

Inadequate Investigation and Preservation of Evidence due to inadequate Training and lack of Guidelines on CSA Trial

The study found that investigation in some cases was inadequate leaving out very crucial evidence. In one such case, the accused person was never examined by a medical doctor to establish any forensic evidence linking him with the CVSA. Most CVSA, parents and guardians, investigating officers and prosecutors said in their interview that due to lack of knowledge, a lot of evidence is normally destroyed at the crime scene as the CVSA take a shower or wash the clothes or unknowingly tamper with the scene of the abuse before the matter is reported to the police. Consequently by the time of reporting to the police, the material, circumstantial and forensic evidence which may be used in court to prove the abuse is lost.

In the absence of the exhibits and medical examination of both the CVSA and the accused person(s), the prosecution finds it difficult to prove the offence as CVSA are put to task to prove the details of the abuse. However due to lack of guidelines on how to investigate CSA, a lot of crucial evidence may be lost leading to miscarriage of justice.

Inadequate Administrative Arrangements by the court to ensure a Child-Sensitive Court Environment where CVSA can express their views and give their Best Evidence about the abuse.

Apart from the Nairobi Children's court, the other children courts visited had the same set up as ordinary courts with the magistrate's sitting position raised above the rest and the air of seriousness that intimidates even adults. The unusual quietness that characterizes the court room, officers in uniform, people handcuffed, others speaking in low tones and the gloomy faces all contribute to the tense atmosphere. It was observed that adults testifying in court also appeared tense implying that court environment is generally intimidating. Court officers wore official suits emphasizing the seriousness of the nature of court business.

The court environment was generally not conducive for CVSA to express their views and opinion. It was not child-sensitive and the administrative arrangements did not take into account the needs of CVSA such as meals and the need to take the evidence of CVSA before long after the abuse. There was no arrangement in any of the courts whatsoever to feed CVSA some of whom arrived in the morning but were finally asked to give evidence at about 4 p.m. They were observed hungry yet were expected to give evidence. According to the magistrates interviewed, neither the judiciary, nor the prosecution had finance allocation to feed the children.

CSA and its Effects on CVSA

First is the difficulty in detecting CSA due to its secretive manner of commission and lack of mandatory reporting laws in Kenya. Secondly, due to social stigma attached to CSA, reporting the offence or testifying about CSA presents challenges to some CVSA. Thirdly, CSA causes great trauma that at times makes it difficult for CVSA to testify in court. CVSA therefore develop a special need for psycho-social support to help them cope with the effects of the abuse if they are to confidently and coherently narrate the intimate details of the abuse in court.

However, the study found that there is inadequate provision of psycho-social support services to CVSA, the implication being that many of the CVSA who testify in Kenyan courts in CSA cases do so without the benefit of psycho-social support services, reducing their ability to give their best evidence. The above finding is consistent with the psychoanalytic and labeling theories. The findings also confirm literature reviewed on effects of CSA on the ability of CVSA to testify effectively in court as argued by Wolf, Saywitz, Hoyano and Keenan amongst other scholars. This is further confirmed by the study observation of CVSA as they waited to testify looking dull and worried as opposed to the playful nature of children generally according to Temkin.

The Difficulty in Detecting and Reporting of CSA

All the respondents were in agreement that CSA does not occur in public making it difficult to detect and prosecute since the only witnesses to the abuse may be the accused person and the CVSA, turning the trial into a contest between the words of the accused person and those of the CVSA. This finding is consistent with the argument advanced by Abrams and Ramsey¹⁰¹ on the challenges of prosecuting CSA.

¹⁰¹*Op. cit* 5.

The study found that there is no statutory provision on mandatory reporting of CSA to the police by anyone who suspects a child has been abused. Neither the Children Act,¹⁰² nor the Sexual Offences Act¹⁰³ obligates parents, guardians or professionals handling children to report suspicions of sexual abuse. Reporting of CSA thus depends on concerned adults or CVSA themselves who may not even know they have been abused or as reported by one CVSA, they may not be believed when they report the abuse. The review of Kisumu Criminal Case No 352/ 2008 revealed that a 14 year old girl reported the abuse to her parents but they were very harsh to her highlighting the fact that some families still regard issues relating to sexual matters and especially CSA as matters which should not be discussed and that CSA would bring ridicule to the family. This is consistent with the labeling theory. The case highlights the fact that some CVSA when defiled do not know what to do. As an example, in the above case, the CVSA did not know of the need to preserve the torn clothing which she had on while the abuse took place as exhibit which is crucial to the court process in proving their allegation.

Social Stigma

The study established that in some cases as the Kisumu Criminal Case No 352/ 2008 cited above, even when CVSA report the abuse to parents, some may not believe them or seek to protect the family name due to the social stigma attached to sexual abuse in the Kenyan society. This is consistent with the labeling theory discussed under the theoretical framework. The stigma attached to sexual issues make it difficult for CVSA to report the abuse and when they do so, they encounter challenges of not being believed or labeled as engaging in bad manners confirming arguments by Abrams and Ramsey about the difficulty in prosecuting CSA cases under the adversarial system.

All the respondents were in consensus that matters regarding sex are not openly discussed in the Kenyan society especially with children and this contributes to CVSA's difficulty in narrating sexual abuse details in court. The labeling of CVSA by their peers as children engaged 'in bad manners' was found to discourage some CVSA from testifying in court. In the words of one CVSA:

...when I told my mother that the accused person did bad manners to me, she said that I should not talk about it as people would laugh at me. At school, other children refused to talk or play with me saying that I was a bad girl because I did bad manners with big people.¹⁰⁴

The above statement by the CVSA is supported by one of the judges interviewed who had practiced as a defence lawyer for accused persons in CSA cases several years back and said that CVSA are not able to express themselves in matters of sexual nature as the topic of sex is hardly discussed openly with children in the African society. To ask a CVSA to appear in court and openly narrate how the sexual abuse occurred was in the judge's opinion: '...the height of court insensitivity to African cultural values and inability of a child to describe what probably they have never been addressed on before, by their parents'.¹⁰⁵

Another CVSA expressed the stigma she suffered in the following words: '... Some children say that I am a bad child engaging in bad manners with adults and they no longer want to play with me'.¹⁰⁶

The first difficulty faced by CVSA in the justice system as validated by the Focused Group Discussion is therefore social stigma attached to CSA which impacts negatively on the reporting of CSA to the police and disempowers CVSA from articulating the abuse in court.

The Traumatic Effect of CSA on CVSA

The study found that CSA is not an ordinary offence against a child that should be treated as other crimes, but has serious short and long term effects which negatively affect the CVSA's ability to narrate the abuse in court, especially in the presence of an accused person or their lawyer who appears to blame the CVSA for the abuse. The devastating effects of CSA on CVSA identified by the respondents during the interviews and

¹⁰²*Op. cit* n 26.

¹⁰³*Op. cit* n 27.

¹⁰⁴ A 13 year old female CVSA Respondent no. 80 in Appendix K interviewed in Eldoret on the 16/11/2010.

¹⁰⁵ Respondent no. 39 in Appendix K. A Long standing legal practitioner with experience of over 40 years in private practice and at the time of the interview was a judge of the Interim Independent Constitutional Dispute Resolution Court.

¹⁰⁶ A twelve year old female CVSA Respondent No.71 in Appendix K interviewed at Nakuru Children's Court on the 13/11/2010 after giving evidence in court.

FGD¹⁰⁷ particularly by social workers includes trauma characterized by physical injuries, psychological, emotional and spiritual turbulence, fear, anxiety, shame as well as guilt feelings and self-blame, lack of concentration and reduced academic performance.

The respondents' views on effects of CSA on CVSA is consistent with the study observation of the CVSA, some of whom appeared withdrawn, a fact that was confirmed by social workers who emphasized that such withdrawal made it more difficult to get information from the affected CVSA. This type of behaviour is also consistent with the symptoms of PTSD¹⁰⁸ as a psychiatric condition that results from prolonged stress that overwhelms the CVSA as a result of the abuse. The social workers argued that CVSA who broke down in court or remained silent upon seeing the accused person were likely to have suffered PTSD as a result of CSA. This situation became more complicated in cases of CVSA below six years of age who could not express themselves making it difficult to get information from them

Another effect of CSA according to social workers is that some CVSA develop problems relating to people of the same gender as the abuser and where the police or magistrate belongs to the same gender as the abuser, then some CVSA may refuse to talk in their presence as they psychologically equate the abuser to all those who belong to the same gender as the abuser. The overall effect of CSA on the CVSA is that it makes them more vulnerable to intimidation by the accused person and his/her lawyer under the current adversarial legal system in the absence of any special protective procedures.

The findings confirm the review of literature that CSA causes trauma to CVSA according to Wolf¹⁰⁹ and that the consequence of CSA is very devastating to CVSA who react differently depending on their personality and available coping mechanisms. This is also consistent with Horney's explanation of the different reactions by children to CSA depending on different personality characteristics as discussed under the psychoanalytic theory.¹¹⁰

Inadequate Psycho-Social Support to CVSA

The study found that there was no formal psycho-social service support provision by any of the government departments to CVSA. The few CVSA who received psycho-social support were those whose cases were taken to court by NGOs. Since all CVSA do suffer trauma and its consequences, the key respondents were concerned that CVSA should receive counseling, social, psychological and emotional support immediately upon the abuse, through the court procedures and after the court testimony. The social workers were particularly concerned that CVSA's ability to testify in court about the abuse in the absence of psychosocial support was greatly reduced by the trauma resulting from the abuse.

The study therefore concluded that social stigma and traumatic effects of CSA resulted into a special need by CVSA for psycho-social support¹¹¹ to prepare them emotionally and psychologically for the court testimony. However, the study found no procedure to ensure that CVSA received psycho-social support, despite the constitutional provision¹¹² on the best interest of the child principle and echoed by the Children Act.¹¹³ The lack of procedural arrangements for CVSA to receive psycho-social services implied that CVSA generally testify in court under the effects of social stigma and trauma, against the advice of scholars¹¹⁴ in this area, that due to the apprehension and need for professional psychosocial support, CVSA should receive counseling and be accompanied to court by psychosocial service providers.

¹⁰⁷ The FGD comprised of magistrates, lawyers, prosecutors, parents, social workers and children officers.

¹⁰⁸ 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.

¹⁰⁹ D A Wolf, *Preventing Physical and Emotional Abuse of Children* (Guilford Press, 1991) 123.

¹¹⁰ K Horney, *Neurotic Personality of our Time* (Norton, 1937) 213.

¹¹¹ This is professional psychological treatment that helps to rebuild the confidence of CVSA, reassuring them that they are not to blame for the abuse and that the society will believe what they say, and are willing to help them continue with their lives while punishing the offender if found guilty.

¹¹² Constitution of Kenya 2010, Article 53(2).

¹¹³ *Op. cit* 26 section 4.

¹¹⁴ *Op. cit* 3, 5.

Only 29% of the CVSA interviewed had the benefit of psycho-social support services before and during the trial, mainly from the NGOs working with children. The children department, though tasked with the general welfare of children only provided psycho-social service to 9% of the CVSA interviewed, while 62% of all CVSA interviewed testified without any psycho-social service at all. The implication is that majority of CVSA testify in court under the negative effects of social stigma and trauma devoid of psycho-social support services to prepare them for the stress associated with testifying in court. The importance of the role of psycho-social support to CVSA can be deduced from their description of the social workers as polite, humble, friendly and good people to work with.¹¹⁵

Apart from offering psycho-social support to CVSA, the study found that people preferred to report CSA cases directly to NGOs that offered such services than to the police. Upon receiving such reports, the NGOs took the CVSA to the hospital, reported the abuse to the police and the children's department, counseled the CVSA, facilitated the admission of the CVSA into a rescue centre and took the CVSA to court to testify on the hearing day. The important role of social workers at the initial stages of reporting CSA confirms the fact that the government criminal justice agencies have no operational procedures for the provision of psycho-social support to CVSA, majority of whom ended up testifying without pre-trial counseling.

Location of the Children Courts

The study observed that all the selected children courts (Nairobi, Kisumu, Eldoret, Mombasa and Nakuru) are located at different buildings away from the main law courts building that houses all other courts in the respective stations. This is a notable administrative arrangement in keeping with the best interest of the child principle.¹¹⁶ The children courts are presided over by magistrates who are appointed through a gazette notice by the Chief Justice under the Children Act.¹¹⁷ Although the rationale for having specific magistrates appointed to handle children cases would be to ensure that those with the interest in child cases are appointed and equipped with the relevant skills for the task, in one of the stations,¹¹⁸ the magistrate presiding over the children court had not been gazzetted and had no prior training on handling CSA cases. The implication is that not all magistrates who preside over child courts are gazzetted and specially trained to handle children, defeating the purpose of creating specialized courts for cases involving children.

Administration of the Children Courts

The study found that children courts are classified as subordinate courts¹¹⁹ and are not independent court stations but fall under the management of the Chief Magistrate's Courts in whose jurisdiction they are located. Subsequently, the children's court magistrates also receive adult cases allocated by the respective Chief Magistrate's courts. The magistrates presiding over children cases therefore handle not only children matters but adult cases too. All the children courts under the study set aside one specific day in a week when they handled children matters, whereas the rest of the days were for adult matters allocated from the Chief Magistrate's Court.

The administrative arrangement, according to the FGD, is one of the factors that cause delays in the hearing of CSA cases which took between six to three years to finalize, as illustrated by the review of Mombasa Criminal Case no 3349/09¹²⁰ in which the accused faced a charge of attempted defilement of a fifteen year old girl who failed to testify in court after five adjournments leading to the acquittal of the accused person. An interview with the court prosecutor revealed that the CVSA could not be traced, she was known to the accused person raising the suspicion of possible intimidation of the CVSA by the accused person ensure she does not attend court.

¹¹⁵ CVSA's description of social workers whom they could relate with well and felt comfortable in their presence. This description of social workers was in sharp contrast to that of other court officers whom CVSA found to be harsh to them.

¹¹⁶ *Op. cit* n 20. Articles 3,9,18 and 40; n 15 Children Act Section 4.

¹¹⁷ *Op. cit* n 26, section provides for the creation of children courts to handle cases involving children. Section 73(d) (ii) empowers the Chief Justice to appoint magistrates to preside over children courts.

¹¹⁸ The Resident Magistrate presiding over the Nairobi Children's Court was only two weeks old at the court, having been transferred from another station.

¹¹⁹ *Op. cit* n 26 section 73(d) (i).

¹²⁰ The name of the accused person is not indicated so as to protect the identity of the CVSA who may easily be identified by revealing the name of the accused. However, the researcher maintains a record of the full details.

The court records revealed that on the first hearing date, the prosecutor indicated that the CVSA and other witnesses were ready to testify but that particular day was for handling civil matters and not criminal matters. The case highlights the insensitivity of the court system to the special needs of CVSA and the frustration of witnesses who travel to court but are turned away having been summoned to give evidence. The allocation of adult cases by the Chief Magistrates to the Children Courts negates the rationale of having children courts located away from the main courts to protect their privacy since they end up being mixed with the adults, a fact that Temkin found to be one of the causes of anxiety to CVSA as they wait to testify.

Waiting Rooms for CVSA

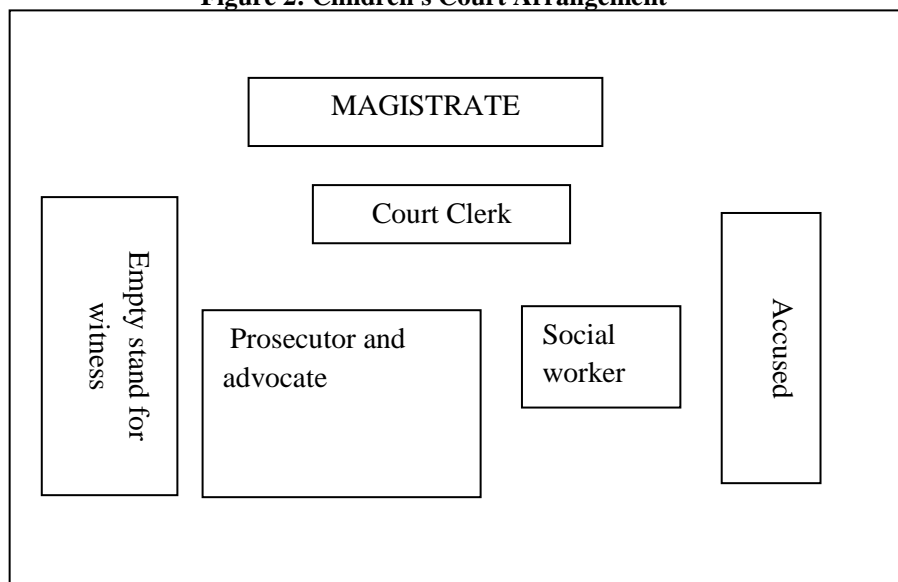
None of the children courts under the study had any waiting room for CVSA who were spotted clinging to their parents/social workers. Whereas Mombasa and Nakuru handled children matters on specified days in the morning hours, Nairobi, Kisumu and Eldoret children courts dealt with CSA cases in the afternoon. This caused some stress to some CVSA who were observed tired and complained of being kept waiting for long hours before testifying.

Apart from the long waiting period, all the children courts had no meal plans for CVSA who depended on those who accompanied them to court for anything to eat. In the absence of meal provisions the ability of CVSA to testify coherently and confidently in the afternoon hours was negatively affected contributing to their vulnerability. The decision by the courts to take CVSA's evidence in the afternoon is not in the best interest of children, but appears to be a concern about not keeping advocates and adult litigants waiting in a court meant for children issues. The administration of the children courts is therefore not sensitive to CVSA.

The Layout of the Children Courts

The study observed that the children court lay out is similar in all respects to the arrangement in cases involving adults where the magistrate sits at the front raised platform. The accused person sits on one side and witnesses on the side opposite the accused person while the prosecution and advocates as well as the court clerk sit in the middle. The layout was the same in both open court and magistrates private chambers.

Figure 2: Children's Court Arrangement



The court arrangement shown above exposes CVSA to direct face to face contact with the accused person and has the effect of disempowering CVSA from testifying, especially if the CVSA had been threatened by the accused person against revealing the abuse as argued by Spencer and Flin.

One CVSA was observed by the study seeking cover under a table in the courtroom on seeing the accused person. It subsequently became difficult for the prosecution to convince the CVSA to testify. This observation is consistent with the views of all the CVSA interviewed who said that they felt uncomfortable with the court

arrangement due to the proximity (between 2-5 meters away)¹²¹ to the accused person in court which intimidated them. They preferred not to have any contact with the accused persons at all especially during their testimony. The court arrangement and layout in the selected children courts is therefore not sensitive to the needs of CVSA and therefore does not offer a conducive environment for CVSA to participate in the proceedings and express their views effectively as per the ideal framework for CSA trial.

Information to CVSA on Various Aspects of the Court Process

The study found that only 8% of CVSA learnt from the police that they needed to testify in court while 92% received the information from family members and social workers. The implication is that CVSA's access to information about the justice process is largely the concern of family members and social workers, with little input from the police whose responsibility includes ensuring that CVSA are informed about when and where the trial takes place according to the ideal framework for CSA trial. Failure by the police to ensure CVSA become familiar with them in advance of the trial, according to magistrates interviewed, contributes to the tension CVSA experience during their testimony in court, further enhancing their vulnerability. The study found that there was no procedure or practice of giving CVSA relevant information about the justice process, what to expect and what is expected of them.

Due to the failure to inform CVSA of the requirement to testify in court, the study found that majority (71%) of CVSA felt fearful, confused and shocked, tense, shy, nervous because they did not know what to expect in court. Only 29% of CVSA, most of whom had the support of social workers felt confident as they knew what to expect in court, confirming the importance of social support services to CVSA.

Whereas CVSA generally expected to find the police/ prosecutor, the accused person, the magistrate, their parents, social workers, lawyers, children officers, their teachers and family members in court, 95% of the CVSA did not know what to expect of them and were anxious about their court appearance. This emphasizes the vulnerability of the CVSA and ease of their intimidation while testifying under the adversarial legal system procedures due to the uncertainty of what to expect in court. The court procedures therefore failed to comply with the right of CVSA to be provided with all relevant information regarding the trial.

Pre-Trial Visit/Orientation to Court by CVSA

According to the ideal framework (UNGMCCVWC) for CSA trial, CVSA should be taken on a court orientation tour before they testify. However, the study found no statutory provision or administrative procedures for a pre-trial visit to the court by CVSA to orientate and enable them familiarize themselves with the courtroom and the court officials before their testimony. This procedural gap is inconsistent with the principle of the best interest of children and contributes to CVSA's fear, anxiety, and restlessness as observed by the study, contributing to their vulnerability during their testimony.

In all the children courts visited, the study observed that CVSA appeared restless as they waited outside the courts to testify. Many of them appeared in court for the first time when summoned to testify and were confronted with an unfamiliar environment with many people who were unknown to them, adding to their anxiety about what happens in court.

The Experience by CVSA as they waited to testify

Since many CVSA found themselves in unfamiliar court environment, majority (81%) of them described their experience while waiting to testify using words such as fear, shock, nervousness, anxiousness, bad, unhappy, apprehensive, shame, and shy. This confirms the findings by Temkin in a study which observed CVSA looking anxious, apprehensive and some crying as they waited in court for their cases to be heard.¹²² It is further consistent with the views of social workers that the experience of CVSA upon learning that they were required to narrate the experience of the abuse in court was characterized by fear, shock, lack of confidence, confusion, anxiety and apprehension, yet there were no professional child counselors employed by the government to counsel the children and prepare them to testify in court.

¹²¹ The proximity between the accused and the CVSA in court was further reduced in cases where the trial was conducted in the privacy of the magistrates' chambers which are much smaller than the open courts.

¹²² Temkin observed a group of child victims in a London court waiting to give evidence. She concluded that their fear was due to fear of not knowing what to expect in court, and seeing many unfamiliar faces.

The 19% of CVSA (some of the CVSA accompanied by social workers) who looked forward to the court appearance in anticipation of relief, healing, good outcome, happiness and excitement in the hope that they would be believed by the court as opposed to being blamed and that the accused person would be punished had the benefit of psycho social support.

Most CVSA reported to court as early as 7a.m, but waited between three to eight hours in court before being called to testify as all the courts started the day's proceedings by mentioning all cases for the day then dealing with adult matters, leaving CSA cases to be heard last in all the selected children courts. One of the reasons given by the courts was that there was need to clear all cases involving adults in the open court before relocating to the private chambers for the hearing of CSA cases.

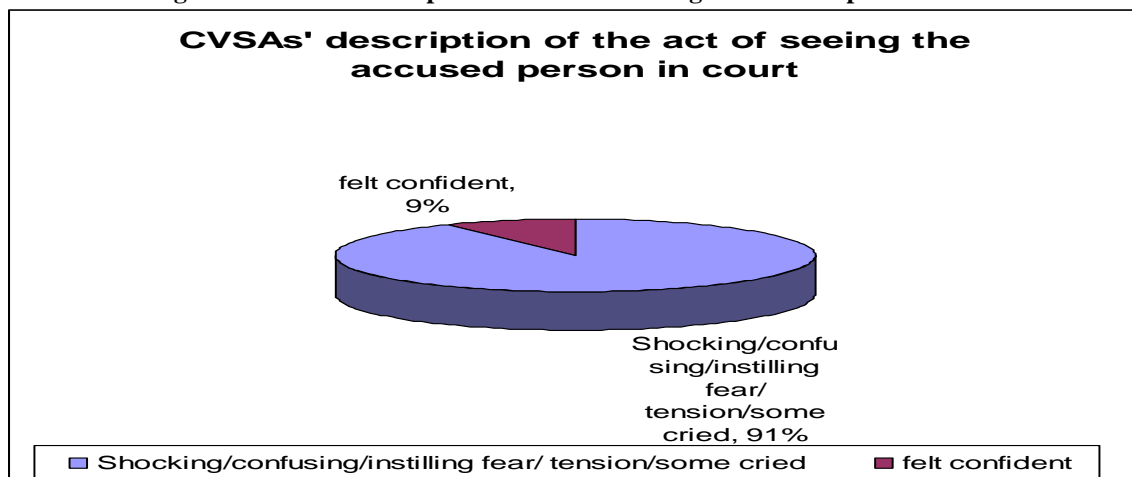
Consequently, the hearing of CSA cases depended on what time the courts finalized adult cases allocated for hearing on the same day. The administrative procedure seemed insensitive to the long waiting period that it subjected CVSA to. 74% of CVSA described the waiting period before testifying as fearful, confusing, shocking, and tense. They felt bored, hungry, tired and found the waiting period too long. Only 26% of the CVSA felt confident during this period as they were accompanied by social workers and counselors, emphasizing the importance of psycho-social support to CVSA.

The Experience by CVSA upon seeing the Accused Person in Court

In all the children courts visited, the study found that there was no procedure of shielding CVSA from possible face to face contact with the accused person in court before they testified. Many CVSA were therefore able to see the accused persons within the court, setting in the fear of talking about the abuse as some of them responded that they had been warned by the accused persons during the abuse not to talk about it to anyone.

At Nakuru Children's Court, one CVSA¹²³ was observed screaming upon seeing the accused person while another CVSA refused to talk at all when asked to take the witness stand. The CVSA looked down at the floor, clinging on the social worker who had brought her to court, prompting the adjournment of the case as she was unable to give evidence after seeing the accused person in court. During the interviews, majority (91%) of CVSA described the act of seeing the accused person in court using words such as shocking, confusing, instilling fear, tension, nervous, anger, heart-ache as some cried. One CVSA, a 13 year old girl¹²⁴ completely refused to give evidence in a Kisumu court, but during the interview revealed that she had been threatened with death by the accused person during the abuse and so she feared for her life. The incident confirms the vulnerability of CVSA during and after the abuse, the consequence of the abuse on the CVSA and how CSA disempowers and incapacitates CVSA from testifying. Only 9% of CVSA felt confident enough to testify upon seeing the accused person in court as illustrated by figure 4 below.

Figure 3: CVSA's description of the act of seeing the accused person in court.



The fact that majority of CVSA felt apprehensive about court appearance, describing their feelings upon entering court and seeing the accused person with words such as shock, tension, were already vulnerable

¹²³ A ten year old female CVSA, Respondent No.72, interviewed at Nakuru on the 13/11/2010.

¹²⁴ A thirteen year old CVSA, Respondent No.91, interviewed at Kisumu on the 15/11/2010.

and in the absence of any special protective measures to address their vulnerability, they approached the witness stand when already vulnerable and easily intimidated.

The study therefore finds that the pre-trial procedure applicable in CSA cases in Kenya is inconsistent with the ideal framework of CSA trial since it lacks a detailed pre-trial mechanism of collecting and preserving evidence, including CVSA evidence and fails to offer CVSA effective assistance in preparation for their testimony. The next section discusses the inadequacies of CSA trial procedures in Kenya.

(B) Inadequacies of CSA Trial Procedures in Kenya

The study sought to find out if the trial procedure takes into account the best interest of CVSA as provided by the UNCRC in granting bail to accused persons, allocating hearing dates as well as other decisions taken by the court. Similarly, the study sought to establish whether the procedures enabled CVSA to express their views and participate in the proceedings effectively by giving their best evidence. Likewise, the study made observations of the procedures to find out if the courts implemented any protective measures provided by the Children Act, the Sexual Offences Act, the UNGJMCCVWC and the role of the magistrates in balancing the rights of accused persons with the concerns for CVSA protection.

The study found that the trial procedure is insensitive to the needs of CVSA, violates the provisions of UNCRC as to the rights of children to participate in proceedings in which they are involved and their right to dignity. The trial procedures are contrary to the provisions of the UNGMCCVWC(2005), and do not conform to the human rights approach to the administration of justice in matters involving child victims. The trial procedure is characterized by the passive role of the trial judge in the classical adversarial system. The specific inadequacies of the trial procedure are discussed below.

Lack of Procedural Mechanisms to protect CVSA

80% of the police officers were of the view that CVSA as witnesses are afraid, have difficulty in talking and are timid and shy, hence the difficulty they face in narrating the abuse coherently and with confidence in court. Only 20% of them were of the opinion that not all CVSA find difficulties in testifying as some manage to give their evidence fluently and with confidence. This probably accounts for those children who had a strong family support or who were accompanied to court by the social workers.

The study observed that in all the five selected children courts, the procedure applied in taking the evidence of CVSA in CSA cases is characteristically the adversarial legal system, with the only departure being that some magistrates handled the cases in the privacy of their chambers while others did so in open courts. The magistrates, lawyers and judges interviewed confirmed the use of the adversarial legal system and pointed out that there is no statute on special procedure in CSA trial hence the applicable procedural law is still the Criminal Procedure Code¹²⁵ and the Evidence Act.¹²⁶ While 51% of the CSA cases were heard in the open courts as per the constitutional requirement of an open public trial,¹²⁷ only 49% of CVSA had their evidence taken in the magistrate's chambers excluding members of the public. This shows that despite the constitutional provision of the best interest of the child principle, the courts are still guided by the classical adversarial procedures in CSA cases.

a. Examination- in- chief

This is the first major procedure in any trial. The prosecution calls the CVSA to narrate the details of how the sexual abuse occurred in the presence of the accused person. The prosecution is not required to ask any leading questions to the CVSA, but may prompt them to talk about any facts not mentioned which had been recorded in the CVSA's statement by the police. All the respondents described CVSA's experience during examination in chief as traumatizing. A High Court judge interviewed by the study said that CVSA are often not able to recount what happened during the abuse. The judge described the procedure as a cruel system that exposes the delicate and vulnerable CVSA to the rigors of a cruel trial in order to extract information from the already vulnerable CVSA.¹²⁸

¹²⁵The Criminal Procedure Code Cap 75 Laws of Kenya.

¹²⁶*Op. cit* n 29.

¹²⁷*Op. cit* n 31 Article 50(1)-the right of an accused to a fair and public trial as a feature of an adversarial legal system.

¹²⁸ A High Court judge in charge of the Criminal Division of the High Court at the time of data collection. The judge had over thirty years of experience as defence counsel and High Court judge.

b. Oral, direct evidence in the presence of accused

Section 194 of the Criminal Procedure Code and section 62 of the Evidence Act require that all evidence in a trial must be oral, direct and 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.

The study observed that all CVSA gave oral direct evidence in the presence of the accused persons/counsel in compliance with the provisions of the Criminal Procedure Code and the Evidence Act despite the fact that child witnesses and victims are classified by the Sexual Offences Act as vulnerable¹²⁹ therefore being in need of special protection that takes into account their best interest in conformity with the Constitution of Kenya 2010¹³⁰ which provides the constitutional framework for protecting children generally. It also reaffirms section 4 of the Children Act¹³¹ on the best interest principle. Where CVSA appear vulnerable, the courts can declare them so and proceed to protect them in any of the following ways under section 31(4) of the Sexual Offences Act.

The first option is to allow CVSA to testify under the cover of a witness protection box which resembles a witness box in all aspects except that it is made of glass that allows CVSA to testify in court while being screened from the accused person and public glare. It enables 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 direct face to face contact with the accused person according to Spencer and Flin.

The second protective option is for CVSA to testify through intermediaries¹³² who tell the court not only what CVSA told them about the abuse, but also what they observed and their expert opinion based on professional skills and experience. The third option is for the court to direct that the proceedings take place in the privacy of the magistrate’s chamber as opposed to the open court. The fourth option is for the court to prohibit the publication of any information that may lead to the identity of CVSA and their families. The third and fourth provision echoes the concern of the Children Act¹³³ that allows the magistrate to clear the court of all members of the public except court officers while the fifth option is a wide discretion to the court to take any other measure it deems just and appropriate to protect vulnerable witnesses.

Despite the provisions of the Sexual Offences Act on protective measures in taking the evidence of vulnerable victims such as CVSA, the study observed that the courts relied more on the adversarial procedure as per the Criminal Procedure Code and the Evidence Act in disregard to the Sexual Offences Act, which 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. The study observed that no CVSA testified under the witness protection box during the data collection period. Apart from the Nairobi Children Court, all the children courts selected for the study had no witness protection box while the only available one at the Nairobi Children Court was used to store files and not for its intended purpose.

The study did not observe any use of an intermediary even in cases where the courts could have made use of the provision. One magistrate¹³⁴ who was asked why the court does not make use of intermediaries responded that no list of intermediaries is available to the court and so the courts do not know where to look for intermediaries. This point highlights the inadequacy of procedures to implement substantive laws on sexual offences.

The study observed that many of the CSA cases were conducted either in the private chambers of magistrates or in the open courts but closed to members of the public and the press. This therefore appeared to be the only protective measure applied by the courts, but was short of the fact that it retained direct face to face

¹²⁹ *Op. citm* 27 Sections 2 and 31.

¹³⁰ *Op. citm* 31 Article 53(2).

¹³¹ *Op. citm* 26.

¹³² *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.

¹³³ *Op. citm* 26 Section 74.

¹³⁴ Respondent No.26 interviewed at Nakuru on the 21/10/2010.

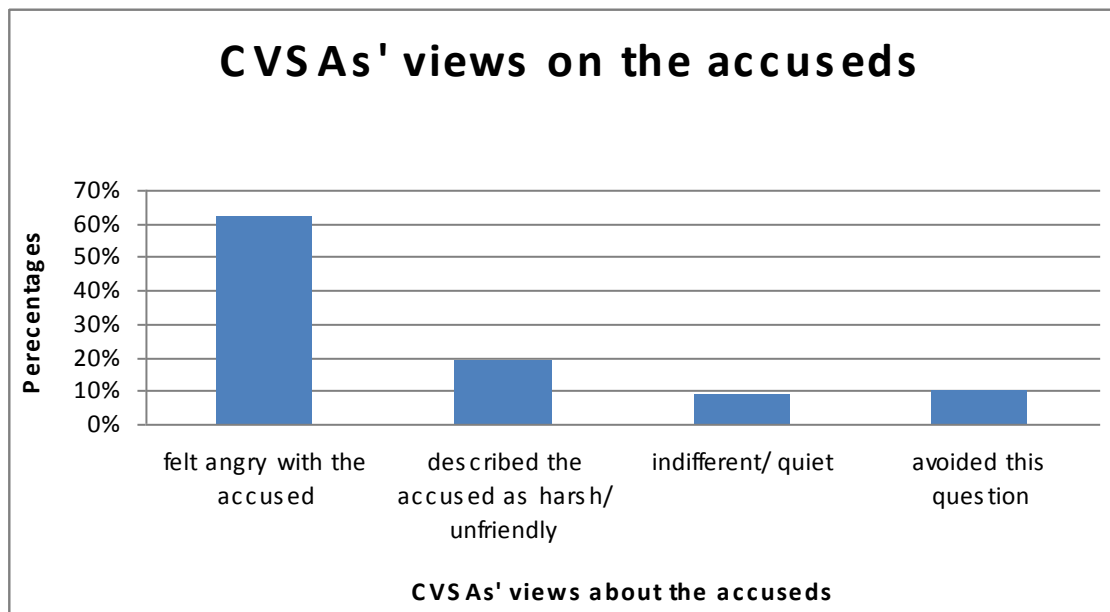
contact between the accused person and CVSA. In fact, due to the smaller space in the magistrates' chambers, the distance between the accused person and CVSA was reduced as compared to the open court, making CVSA testify near the accused persons.

The study observed that the children courts did not exercise their wide discretionary power to protect CVSA in any other appropriate way as provided by the Sexual Offences Act. In response to why the courts are not being innovative as to device ways of protecting CVSA under their discretionary powers, a magistrate¹³⁵ responded that CSA trials needed to be handled by those with an interest in children matters and special skills to do so. The judicial officer was of the opinion that appointment of magistrates to try children cases should be advertised to attract interested and qualified applicants as opposed to the current manner of random appointment of those already in the service.

CVSA therefore gave evidence orally and directly in the presence of accused persons which in some cases was intimidating to CVSA. The general court environment was therefore not sensitive to CVSA needs and did not offer an atmosphere where CVSA could freely express themselves and give their best evidence.

The presence of the accused person in court was the biggest challenge to CVSA, who said they would have preferred to testify in their absence, yet the accused persons have a right to be present at their trial to listen to the evidence adduced against them and cross examine the witnesses on the same. 62% of the CVSA said that they felt angry with the accused person, found their presence in court threatening and indicated that the threat had continued since the abuse took place. They described the accused person as the most evil person they ever met. 19% described the accused persons as being very rude, harsh, and unfriendly while 9% found them indifferent and quiet. 11% of CVSA did not give any description at all of the accused person and avoided this question. The strong views of CVSA are illustrated by figure 5 below.

Figure 4: CVSA's view on the accused



The above figure confirms Temkin's argument about the intimidating presence of the accused persons during CVSA's testimony. The fact that majority of CVSA felt angry with the accused persons means they were under stress and therefore could not coherently and confidently narrate the abuse in court. The situation was aggravated by the cruel cross-examination that the CVSA underwent. Many CVSA according to the police officers felt intimidated and vulnerable in court in the presence of the accused person and were therefore unable to testify with ease due to fear, threat and intimidation which may have occurred at the time of the abuse or after the abuse.

All the respondents were in agreement that face to face contact between the CVSA and the accused person was a major impediment in CVSA's ability to testify about the abuse. The presence of the accused person reminded

¹³⁵ Respondent No.42 Interviewed at Kisumu on the 22/10/2010.

CVSA of the abuse itself and if any threat was used before, during or after the abuse by the accused person to the CVSA, the experience is re-lived by CVSA who subsequently become either hostile or silent for fear of the threat being carried out by the accused person. This position was confirmed by the court observations and interviews with CVSA where some of them said that they had been warned not to talk about the abuse to anyone and if they did, the accused person would kill them.

c. CVSA experience on taking the witness stand

Since many CVSA appeared in court for the first time during their testimony, they found themselves in the unfamiliar court grounds in the absence of pre-trial orientation as already discussed. 60% of CVSA felt shocked, confused, fearful, nervous, and shy when asked to take the witness stand. 2% could not remember their reaction while at the witness stand while 38% felt confident that they had the opportunity to tell the court about the abuse. This shows that majority of CVSA did not have a positive attitude towards testifying in court probably due to the lack of pre-trial orientation as they did not know what to expect or what was expected of them.

Although CSA cases were mentioned in open courts but heard in the magistrates' chambers, due to close proximity with the accused person, some CVSA were observed crying upon seeing the accused person while others kept unusually quiet. For those who managed to talk, it took a very long time and patience from the prosecution to convince them to narrate their story to the court.

d. Oath/affirmation of CVSA/Interrogation by magistrates

Section 19 of the Oaths and Statutory Declarations Act 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.

The requirement of an oath was found to contribute to CVSA fear that everyone in court blames them and it appeared like not the accused persons, but CVSA on trial, contributing to their mistrust of the court as argued by Wendy and Eastwood. 66% of CVSA found the act of being required to take an oath/affirmation confusing, shocking, causing fear, tension, nervousness and shyness. This was because CVSA had learnt from their various religions that they should never swear by the name of the Almighty and so could not understand why they were being asked to act against their religious beliefs. Some CVSA felt as if they were suspects in the case and so were under inquiry to prove their innocence, but some felt that the oath/ affirmation requirement was an unnecessary procedure only meant to intimidate them further.

The first interaction between the court and CVSA is the interrogation by the magistrate to establish whether or not they can be sworn. In their view, they came to tell the court what happened, but the first thing they encounter in the court is interrogation by the magistrate. According to some CVSA, this is the first mark of a system that does not believe that a child brought before court as a victim of child sexual abuse can tell the truth, hence the need to find out whether or not they will be able to tell the court the truth, in the process making CVSA doubt the ability of the magistrate to protect them.

Whereas some CVSA said the magistrates were nice, majority of them described them as bad or indifferent to them yet when one refers to the court, ideally speaking one refers to the presiding magistrate or judge. 34% of CVSA however, felt confident upon taking the witness stand as this was an opportunity for them to prove their innocence and give facts to the court that would help in punishing/jailing the accused person. They belonged to the category of CVSA who had very strong family support and the assistance of professional counselors who accompanied and sat next to them as they took the oath/ affirmation. This point confirms that when properly handled, the court process can result into a therapeutic feeling by CVSA as argued by Herman, Spencer and Flin, McConville and Wilson amongst many scholars.

e. The burden of proof beyond any reasonable doubt

Section 107 of the Evidence Act places the burden of proof on the person who alleges facts. 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 person in court due to their vulnerability. The Evidence Act provides for the manner in which evidence is adduced in court and verified by an adverse party under a process 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 according to Tapper and Cross.

The standard of proof required of beyond reasonable doubt was found to work against CVSA since many doubts raised in CVSA evidence due to errors in minor details were interpreted in favour of accused persons, yet, children, according to Saywitz cannot always remember fine details such as time and sequences of events. In the Mombasa Criminal Case No. 2900/09, a six year old boy who did not understand the nature of an oath was allowed to give unsworn evidence. He reported the abuse to the mother who did not give evidence in court. However, the father who gave evidence said that when his son told him that he was experiencing pain in his anus, he informed his wife (CVSA's mother). The grounds upon which the accused person was acquitted was that the father's evidence contradicted that of the six year old boy who said that he reported the abuse straight to his mother. The doubt which resulted from a minor contradiction between the father and the boy created a doubt in the magistrate's mind which went to the accused person who was subsequently acquitted despite the fact that the boy's clothes had blood stains and that he had been taken to hospital two weeks after the incident. The above case highlights the difficulty of discharging the high standard of burden of proof beyond reasonable doubt in CSA cases.

The high standard of proof in CSA cases is also illustrated by Mombasa Criminal Case No 3235/09 in which an 8 year old CVSA was indecently assaulted by a neighbour who covered her mouth to stop her from screaming and attracting public attention. According to the CVSA, the abuse was actually defilement and not indecent assault as she said, 'the accused person removed my underpants and inserted his *'dudu'*¹³⁶ into mine.' This infers penetration and thus an act beyond indecent assault. The court allowed the CVSA to give unsworn evidence as she did not appear to understand the nature of an oath yet one reason for the court's acquittal of the accused person was that the child could not be believed as she gave unsworn evidence yet it was the court that decided the child would give unsworn evidence. Further, the CVSA had indicated that she slept in the accused person's house the whole night but other witnesses said when the abuse was detected, she was taken back to the family house.

The CVSA may not have had the correct sense of time, yet this contradiction was material enough for the court to dismiss her evidence. Further, the court considered the fact that the CVSA did not scream during the abuse and questioned why nobody in the plot where the abuse occurred heard the CVSA scream yet the CVSA had indicated in her evidence that the accused person covered her mouth as he abused her. The accused person's manner of cross-examining the CVSA managed to bring out contradictions which created doubts in the testimony of the CVSA who was already terrified and the benefit of the doubt was given to the accused person even though this was a case where the child testified exactly four months after the abuse with the possibility of loss of memory of finer details of the abuse.

f. CVSA Experience of narrating the details of sexual abuse in court

The study found that CVSA found difficulty narrating the details of the abuse in court because of the tense atmosphere, presence of the accused person and lack of mechanisms to protect CVSA. 76% of CVSA described their experience of narrating the sexual abuse in court as fearful, confusing, shocking, tense, shy-nervous, angry, and hurtful as some were observed crying during their testimony. 4 % of CVSA did not answer/did not remember what it felt like to talk about the abuse in court, while 13% of CVSA who were accompanied by social workers felt confident as 6% of CVSA remained silent when asked to describe their experience when narrating the sexual abuse in court. This could probably mean that the experience was so traumatizing to them that they were unable to speak as a coping mechanism of dealing with the trauma hence their silence. This is consistent with PTSD reaction as explained by Wolf and other scholars.

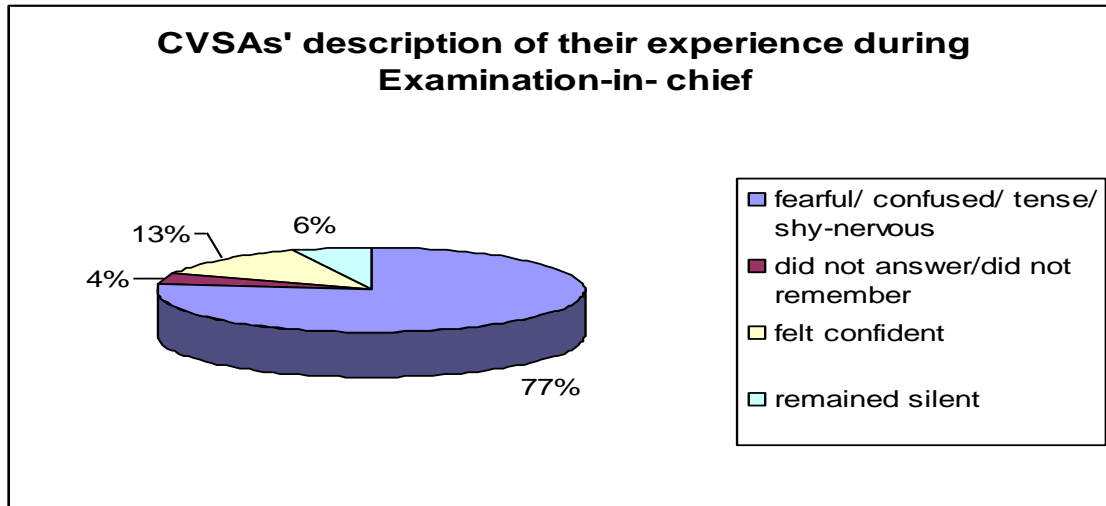
In Nakuru, a 14 year old CVSA abused by a neighbour was unable to talk and remained silent, did not answer any question at all from the magistrate or the prosecutor. This was an example of a case of CVSA suffering from PTSD due to the abuse, but the study observed that the court did not appear to understand that the behaviour of CVSA could be as a result of the sexual abuse itself. Instead, the case was adjourned and the CVSA warned by the prosecutor that she had made a commitment in her statement and was under an obligation to co-operate with the court and tell the court what happened. The incident illustrates failure by the prosecutor to understand that the CVSA's silence in court in the presence of the accused person could be as a result of PTSD and not refusal to co-operate and thus the CVSA did not need a warning and a further threat from the prosecutor which amounts to re-victimization (institutional re-victimization of CVSA through the court procedure) instead, the CVSA needed psycho-social support as well as understanding by the prosecutor as a victim of PTSD. This

¹³⁶ This is a Kiswahili word which literally means an insect used by children to refer to the male genital organ, the penis.

point confirms Temkin's, Saywitz' and Whitcomb et al arguments that the adversarial trial procedure revictimizes victims of sexual abuse.

All the respondents confirmed the study observation that the current examination in chief of the CVSA is not child sensitive, but embarrassing to CVSA. The same findings were also confirmed by the perusal of finalized cases and the FGD. Some of the difficulties experienced by CVSA during examination- in -chief are illustrated by figure 6 below.

Figure 5: CVSA's description of their experiences during examination -in -chief



Most CVSA were concerned that the examination in chief subjected them to proving their innocence as it appeared that they, not the accused persons were on trial. Although many CVSA did not find it easy testifying during examination- in- chief 55 %, nonetheless were of the opinion that it was important for them to narrate the abuse to the court so that the magistrate could know the truth and they suggested that courts develop child sensitive ways of letting CVSA tell their story in their own words. 23% felt that testifying would enable the court to punish the accused person while 16% felt testifying would lead to their protection by the court from the accused person as 2% felt it would lead to justice. 4% of the CVSA had no idea why it was vital that they testified in court.

From the above responses, it can be argued that although majority of the CVSA were apprehensive about testifying in court, they had a rough idea that if they testified in court, the outcome would be good for them. Their apprehension about court appearance is due to the uncertainty of the procedure that would be used to take their evidence. The overall picture by the CVSA is that the court process needs to be child friendly enough to enable them testify in order to get justice from the courts. An overwhelming majority (92%) of the legal practitioners were of the view that CVSA face some difficulties while testifying during examination-in-chief (This is in concurrence with the findings from the interviews with CVSA). Only 8% of the legal practitioners were of the opinion that some CVSA appeared confident during their testimony and had good memory of the facts relating to the abuse.

A High Court judge who had risen from the ranks of a magistrate to judgeship and had handled CSA matters for over thirty years both as a magistrate and at the High Court appellate level, described the experience of CVSA in court during examination in chief as: '...painful, bitter and makes the CVSA feel revengeful'.¹³⁷

Some of the difficulties experienced by CVSA included; difficulty in remembering details of the abuse, shyness in front of many unfamiliar faces, difficulty explaining how the sexual abuse occurred, fear, trauma and inability to describe the sexual organs. The study therefore concluded that the current court procedures under which CVSA give evidence in chief is not child friendly as it disempowers them from confidently and coherently testifying in CSA cases.

¹³⁷ A judge of the High Court, in charge of the Family Division of the High Court at the time of data collection.

Lack of a Balance between the Rights of Accused Persons to a Fair Trial and the need to Protect CVSA.

The study observed that from the very onset of the trial process, the focus is on the accused person who is treated as innocent until proven guilty,¹³⁸ benefiting from the privileged constitutional right to remain silent.¹³⁹ In none of the cases did the prosecution inform the court of the condition of CVSA or apply for any orders in regard to the CVSA who did not appear to be a focus of the justice system. It is indeed at the plea taking stage that if necessary; the court may issue orders to restrain the accused person from any interference with the investigation or with CVSA and the family. This observation was confirmed by 98% of CVSA who wished that the court would protect them from the accused persons and their families as they felt insecure, while 2% of CVSA felt secure and no intimidation from accused persons. Most CVSA therefore develop the need to be accompanied everywhere they go due to the fear of meeting the accused person, hence the need for protection orders from the court.

All CVSA interviewed said that they needed to be re-assured that all would be well, emphasizing the need for psycho-social support for CVSA right from the discovery of the abuse through to the trial and post-trial phase. The study observed that no psycho-social support service orders were issued by any of the courts to assist CVSA deal with the trauma of CSA. This was also confirmed by the perusal of court records of finalized cases which indicated no issuance of psycho-social support service orders to CVSA at all. This finding shows a lack of appreciation by the adversarial trial procedure of the effect of CSA on CVSA and their consequent vulnerability. CVSA are therefore treated like any other victims of crime, ignoring the possible effects of CSA on their ability to testify and assuming that they would be able to testify when called upon.

In all the pleas taken in CSA cases, none of the accused persons pleaded guilty, therefore setting the stage for the trial process to prove their guilt or innocence. While CVSA waiting to testify were observed looking anxious, fearful and timid, the accused persons appeared calm, composed and confident, confirming the argument that accused persons in CSA cases are often confident of winning the trial because they are aware that it is their word against that of CVSA as advanced by Abrams and Ramsey as well Herman and Hirschman.

Protecting the Rights of Accused Persons to a Fair Trial at the expense of The Need to Protect CVSA.

Apart from the rights to remain silent and presumption of innocence, the court records showed that all the accused persons in CSA cases were granted bail¹⁴⁰ and so were not confined to the prisons, further exposing CVSA to the possibility of intimidation. Whereas bail is a constitutional right of the accused persons, there are cases in which the courts need to take into account the best interest of the CVSA¹⁴¹ while granting bail. None of the court records showed any court order protecting CVSA from intimidation by the accused persons, or any condition on bail that the accused person should not get into contact with CVSA or their families.

In some cases, the release of accused persons on bail was not in the best interests of CVSA. This is demonstrated by the case of a sixteen year old CVSA whose testimony was interrupted as she broke down while narrating how she was sexually abused by the accused person who attacked her on her way from school, set dogs on her, threw her into an abandoned house and defiled her. When the accused person was released on bail, he kept threatening the CVSA and her family against testifying in court, but the family took a firm position and supported the CVSA to testify despite the threats and intimidation from the accused person. In the CVSA's own words:

It is difficult for me to tell the court my story as the accused person is here in court and had threatened to repeat the abuse to me and harm my family if I do not drop the case. But we decided not to drop the case, now that I have told the court the truth, I do not know what he will do to us.¹⁴²

This testimony highlights not only the need to balance the right of accused persons to bail with the concern for CVSA safety, but also the violence that accompanies CSA and the difficulty in testifying in court. However, the study noted that in cases where the prosecution objected to the release of accused persons on bail, the argument was that investigations were not yet complete and the accused persons could interfere with the investigations. Much as this is a good ground for objecting accused persons' release on bail, the prosecution needs to apply for conditions attached to bail that protect the safety of CVSA as well. According to all the judges and magistrates interviewed, bail is a constitutional right of accused persons which should be granted

¹³⁸ *Op. cit* 25 Article 50(2) (b).

¹³⁹ *Ibid* Article 49(1) (a) (ii) and b.

¹⁴⁰ *Ibid* Article 49(h).

¹⁴¹ *Ibid* Article 53(2).

¹⁴² A female CVSA respondent No.58 interviewed at Mombasa on the 8/10/2010.

unless there is good reason to deny it. Article 49(1)(h) of the Constitution of Kenya 2010 provides that an accused person has a right to bond/bail on reasonable conditions pending a trial and such bail/bond can only be denied if there are compelling reasons not to release the accused person on bail. Whereas denying bail to the accused persons in CSA cases may be not be appropriate in most cases, attaching conditions to bail such as ‘no contact with CVSA or their family’ serves the purpose of balancing the concerns of CVSA and those of accused persons to fair trial.

The Trial Procedure lacks an Approach to Administration of Justice in the Best Interests of CVSA

The study established that CSA cases are not allocated on a priority basis as is stipulated by the UNGJMCCVWC(2005), but according to the available dates according to the court diary. The earliest hearing dates were given two months after the plea. This has the effect of CVSA testifying long after the abuse when the details of the abuse may have escaped their memory according to Saywitz. It also confirms Herman’s argument that CSA trial process is insensitive to the special needs of CVSA who should otherwise be heard on a priority basis. None of the children courts had a specific diary for CSA despite the fact that the children courts are special creatures of the Children Act¹⁴³ mandated to specifically handle matters involving children. The administrative gap resulted in unnecessary delays in the trial of CSA cases defeating the purpose of setting up specialized courts for children matters.

Lack of a Human Rights Approach to Administration of Justice in CSA cases

The study found that many of the accused persons were represented as they could afford the services of lawyers while fewer CVSA had legal representation by advocates from NGOs dealing with children matters. Although in an ideal situation, the interests of CVSA are supposed to be protected by the prosecutor on behalf of the state, the advocates for accused persons are professional lawyers trained in legal matters whereas the prosecutors were all police officers of the rank of inspector and below and all of them had attained high school level of education as compared to advocates who are all university graduates in law. Only 8% of the prosecutors had additional qualification in diploma in criminology and social work. No state counsels from the office of the Director of Public Prosecutions were involved in the prosecution of CSA cases. Whereas the author does not fault the ability of the police prosecutors to effectively prosecute CSA cases, this situation resulted into an imbalance in the legal representation of the interests of accused persons and those of CVSA.

In Eldoret, the study observed a magistrate ask advocates to take up CSA cases *on pro bono*¹⁴⁴ basis but they declined. The request by the magistrate confirms the need for legal representation of CVSA interests by lawyers (in a watching brief capacity) despite their representation by the police prosecutors. One of the advocates¹⁴⁵ present in court when the request was made by the magistrate was interviewed and stated that he declined to take up the case because the court would not pay them and because CSA cases needed advocates with a passion for children. This finding highlights the difficulty faced by CVSA who cannot afford the services of a lawyer.

Whereas the defence counsels knew the rights of their clients and raised objection if those rights were threatened, the prosecutors generally appeared not so keen in protecting the rights of CVSA. As an example, the prosecution failed to make necessary applications to court in cases where there was need to have CVSA testify through intermediaries,¹⁴⁶ or object to intimidatory cross examination. Legal representation of victims has gained recognition to an extent that it is provided for by the UNGJMCCVWC(2005). Victims’ lawyers are today recognized participants in the legal process as is the case in the ICC trial procedure.¹⁴⁷ The Kenyan court procedures in CSA cases therefore does not comply with the requirement to provide legal advice and representation to crime victims as stipulated by the UNGJMCCVWC and the ideal framework for CSA trial.

Failure to recognize and provide for Special Needs of CVSA

a. Communication difficulties occasioned by technicalities in court language

The use of English and Kiswahili as the official languages of the court presented difficulties to some CVSA, particularly those coming from the rural areas as opposed to the urban centers was yet another challenge.

¹⁴³ *Op. cit* 26section 74.

¹⁴⁴ Greek word meaning without pay.

¹⁴⁵ Respondent No 55 interviewed at Eldoret on the 18/10/2010.

¹⁴⁶ *Op. cit* 16, section 32 allows courts to direct that vulnerable witnesses be protected while testifying through the use of witness protection box, intermediary, hearings closed to the public, exclusion of press or any other appropriate measures.

¹⁴⁷ Andrew Karmen, *Crime Victims: An Introduction to Victimology*(Belmont CA: Wadsworth 2010)144.

CVSA found the court language too technical to understand as it comprised of legal jargon and adult language unfamiliar to many of them. Lack of innovative communication aids such as use of dolls and diagrams¹⁴⁸ to identify the various body parts enhanced the communication problem for CVSA.

Consequently, CVSA's use of their own descriptions of sexual organs and sexual abuse subjected them to stressful cross-examination by the accused persons/ their advocates. The use of child language in reference to the body organs and sexual acts according to the prosecutors is one area where advocates have taken advantage in pinning down CVSA to tell the court in adult language exactly what they mean. Advocates were observed by the study dismissing children's language in reference to sexual organs and acts such as "*koko*,"¹⁴⁹ "*dudu*,"¹⁵⁰ "bad manners/*tabiambaya*"¹⁵¹ as not being recognized by law in evidence.

Some CVSA said that the prosecutors and magistrates used terms that they could not comprehend and asked them to explain details of the abuse in a manner that was beyond their capacity. As an example prosecutors and magistrates asked CVSA to use adult language in describing the sexual organs and activities whereas advocates dismissed CVSA's descriptions such as bad manners, *dudu*, *tabiambaya* in reference to the same. CVSA felt angry, hurt, nervous, tense and confused while some remained silent and could not answer any question in this respect. The court procedures and terminologies could not be understood by CVSA as observed during court proceedings and as discussed with the court officers during focused group discussions. The implication therefore is that although CVSA can be said to testify in court, they do this as a formality but do not deeply understand and get involved as key actors in the court scenario due to the language limitation therefore limiting their active participation in the justice process.

Technicality in court language was observed to intimidate and infuriate adults as much as it did to CVSA, especially words used to refer to the act of sexual abuse. In the Mombasa Criminal Case No.1827/2010, the CVSA's mother who gave evidence on behalf of the CVSA who was five years old, found it difficult to mention the sexual organs and in reference to the sperms she found on her five year old daughter(CVSA), she called it '*maji ya wanaume*.'¹⁵² Upon cross examination by the accused person as to what that meant, she was infuriated and irritated by the cross examination yet she had to answer the accused person's question. The accused person asked several questions some of which were irrelevant and harsh, purposely meant to confuse the witness. This case confirms that terminologies referring to sexual organs or activities present difficulties to adults as it does to children, emphasizing the challenges of CSA trial under the current court procedures without communication aids.

In Nairobi Criminal Case No. 2077/09, the evidence of the CVSA as recorded was that the accused person urinated on her thighs. The offence was defilement contrary to section 8(1) (2) of the Sexual Offences Act (3) (2006). The particulars of the charge were that the accused person caused his penis to penetrate the vagina of the CVSA (name withheld), a girl of seven years. The alternative charge was indecent assault contrary to section 11(1) of the Sexual Offences Act. The CVSA gave evidence 3 months after the offence. Her evidence was that 'the accused person urinated on her thighs using his *dudu*.' The accused person was acquitted as the court reasoned that there was a variance between the CVSA's evidence and the particulars of the charge as it appeared in the charge sheet. Medical evidence which was produced in the court showing the CVSA was examined two weeks after the abuse did not show any damage to the CVSA's private parts. According to the magistrate therefore, there was a doubt raised in the prosecution case, the charge was not proved and the accused person was acquitted.

The above case emphasizes a situation where a seven year old girl having been defiled by the accused person while wielding a knife (as per the court records), was expected to give evidence in court three months after the abuse. The CVSA failed to remember the exact details of the abuse and lacked the adult words to

¹⁴⁸ A prosecutor in Mombasa was exceptionally innovative enough to draw a sketch diagram of a human body to aid a CVSA in pointing the anus where the accused was alleged to have inserted his penis.

¹⁴⁹ This is a word in Luo-(a local language) that literally means a bad insect that bites children, but is used to refer to the male sexual organ when speaking to children to warn them that it is not a play object.

¹⁵⁰ This is a Kiswahili word which literally means an insect used by children to refer to the male genital organ, the penis.

¹⁵¹ *Tabiambaya* is a Kiswahili word which means bad manners, emphasizing the fact that sexual activities are not good for children.

¹⁵² The phrase literally means a man's water in Kiswahili language, but refers to the semen ejaculated by a man during a sexual encounter.

describe the act of defilement. In her words, urinating on her meant penetration and subsequent ejaculation on her but the use of her thigh and not vagina appeared to have been the reason that the court acquitted the accused person evidently showing the difficulty CVSA find in narrating the abuse in words that are ordinarily accepted by the lawyers and the court.

In Kisumu Criminal Case No. 923/2010, the CVSA was a twelve year old boy who had been sodomized by a close relative. The child seemed very uneasy narrating the abuse before court throughout his testimony. It was observed that he completely avoided eye contact with the accused person and only looked at him at the identification stage when he was asked to show the court who had sexually abused him. That was the only time he raised his head up, pointed at the accused person and continued to look down. Ironically, the CVSA gave evidence very confidently as he was accompanied by his father and a lawyer watching brief from Kituo cha Sheria. The presence of both the father and the lawyer seemed to give confidence to the CVSA. The phrase used by the child to refer to the sexual abuse was 'nyuma yangu.'¹⁵³ This invoked rigorous cross examination by the accused person and the prosecutor had to step in aid of the CVSA by quickly drafting a sketch of a human body diagram for the boy's use to show what he meant by 'nyuma yangu.'

Some officers, particularly magistrates confessed they handled the cases because it was a duty, given a chance, they would opt out due to the trauma they are subjected to as they try the accused persons in child sexual offences. The trauma, according to the officers is caused by lack of specialized training of staff on how to handle CSA and inadequate procedures. The process of examination in chief was therefore found to be stressful, not only to CVSA, but to court officers as well.

b. Cross-examination

This is the second major procedure in a trial where the accused person/counsel asks the witness (CVSA) questions to test the truth of the evidence. Described by lawyers as the greatest engine ever invented for the discovery of truth in a trial process according to Spencer and Flin,¹⁵⁴ many scholars are of the opinion that in CSA cases, cross examination defeats the truth seeking process of a criminal trial while causing more unnecessary trauma to CVSA. All the respondents were in agreement that cross examination of CVSA is the most traumatizing, cruel, insensitive and intimidating part of the court procedures that often lead children to tears as it makes the CVSA appear to be the one on the trial as opposed to the accused person. Cross examination by the accused in person in the opinion of the legal practitioners was an intimidation and re-victimization of the CVSA as the defence lawyers attempt to discredit the evidence of CVSA.

According to some legal practitioners, some CVSA found difficulty in describing sexual acts and organs in adult/legal language as demanded by the defence counsels or the accused persons. The fear and trauma experienced by the CVSA during cross-examination confuses the CVSA who become more vulnerable, others end up giving contradictory information to what they had said earlier in evidence in chief. Some remained silent as others broke down to tears and were unable to coherently describe the sequences of the abuse.

A High Court judge interviewed by the study had this to say of the trial of CSA in Kenya. Although the rules of evidence are meant to protect innocent people from the consequences of imprisonment, in the cases of CSA, the cross-examination of CVSA often traumatizes not only the CVSA, but even the trial judge/magistrate, who is otherwise required to remain passive throughout the trial.¹⁵⁵

The judge's remarks confirm Saywitz's¹⁵⁶ description of the effect of the court process on CVSA in CSA trial in Britain. The study observed that cross-examination confused and intimidated even CVSA who were accompanied by social workers and initially appeared confident during examination in chief. This could be attributed to the harassment of the CVSA by the accused person/ defence lawyer resulting in the CVSA breaking down, crying or even refusing to talk while at times contradicting what they had initially said in evidence in chief.

¹⁵³Nyuma is a Kiswahili word meaning behind, while yangu means mine, together referring to the CVSA's anus in reference to sodomy.

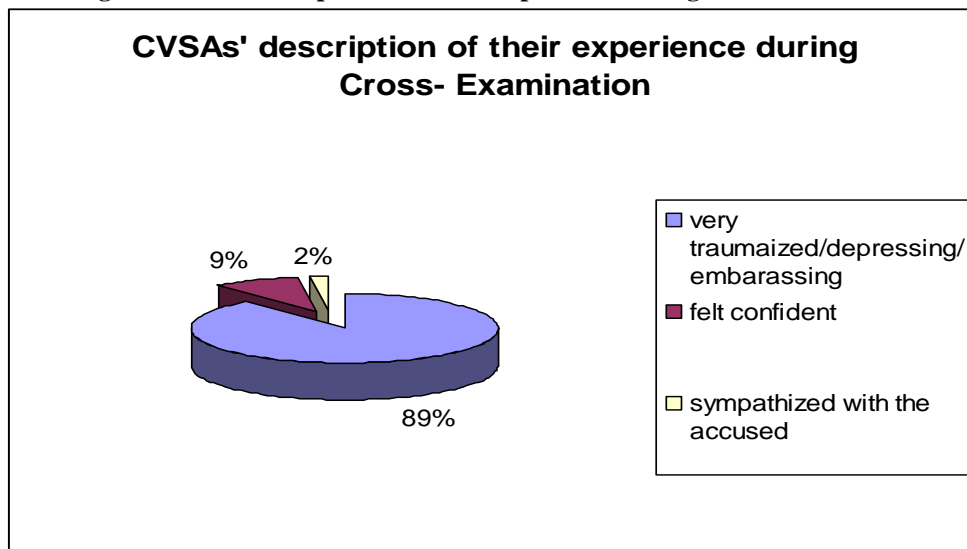
¹⁵⁴Op. citm 41.

¹⁵⁵ Respondent No 36 interviewed at Nairobi High Court on the 8/11/2010.

¹⁵⁶J K Saywitz et al, *Children's Knowledge of Legal Terminology in Language and Human Behaviour* (1990) 14, 523-35.

An overwhelming majority (89%) of CVSA described cross-examination by the accused person or his/her lawyer as very traumatizing, depressing, embarrassing and the most painful experience that was like being sexually abused by the accused person for the second time in the open glare of the court. Many CVSA could not understand why the accused person/ lawyer asked them questions which they were obliged to respond to. Only 9% felt confident answering questions during cross-examination while 2% sympathized with the accused person.¹⁵⁷

Figure 6: CVSA's responses on their experience during cross-examination



Upon interviewing the CVSA who sympathized with the accused persons, it turned out that the accused persons had special relationships with the CVSA. The first incident was in Nakuru Children's Court where the accused was a father to the victim who feared that her testimony would lead to the imprisonment of the accused person. She did not want to be the cause of her father's imprisonment and subsequent suffering for the family in his absence.

The second incident was in the same court where the CVSA, a 14 year old girl sympathized with the accused person whom she claimed to be her boyfriend and in her opinion did not sexually abuse her as she 'agreed' to the alleged sexual activity.¹⁵⁸ In this latter case, the law on CSA appeared to be unfair not only to CVSA, but to the accused person too who was only 17 years old when the offence occurred. Both CVSA and the accused person were therefore below 18 years and are children who believed that they were in a loving relationship, but the boy is treated as an accused person and faces up to life imprisonment if found guilty. In this respect, the law (section 8 of the Sexual Offences Act which provides for mandatory sentence of 20 years imprisonment) is unfair to the accused person who should, together with the CVSA be treated as children in need of care and protection under section 119(n) and (q) of the Children Act. Although the Sexual Offences Act supersedes the Children Act in matters of sexual offences, the provision of the Sexual Offences Act as regards punishment in cases where boys under 18 are found in sexual relations with girls about their age where both believe to be in a loving relationship need to be reviewed to ensure fairness to both accused persons and CVSA.

The two cases above confirm Herman and Hirschman's explanation as to why at times CVSA are divided between their need for protection from abuse and their wish that the accused persons should not be punished and the subsequent difficulty in testifying against accused persons in such cases. These were some of the incidences where CVSA gave evidence- in- chief, but on cross examination, they began to cry when they realized that their evidence may be used to jail the accused persons.

¹⁵⁷ The accused person was the CVSA's father hence the guilt and fear of betraying the family, a clash between CVSA wish to protect the family and quest for justice for herself.

¹⁵⁸ The details of the two cases such as names and criminal case numbers cannot be divulged for purposes of protecting the identity of the CVSA as per Section 3 of the Children Act and Section 19 which provide for the best interests of the child and right to privacy respectively.

Although all the judges, magistrates, lawyers and police were in agreement that cross examination of CVSA was traumatic to them, they also agreed that it is a fundamental right of the accused person that cannot be done away with. They expressed concern about the need to balance the right of accused persons to cross examination with concern for CVSA protection in order for the process to be fair to both.

A Court of Appeal judge¹⁵⁹ emphasized that cross-examination of CVSA under the current evidentiary rules of the adversarial system is traumatizing not only to CVSA but all court officers involved in the trial. He added that quite often CVSA are not able to narrate the abuse in court due to their vulnerability. The judge expressed the view that the current standard of cross-examination of CVSA is the same standard used when cross-examining adults therefore causing more stress to the children than it would to an adult due to lack of a guideline on how to interrogate children generally and CVSA in particular.

According to the Court of Appeal judge, the current style of cross-examining CVSA is not only traumatizing to the CVSA but to the lawyers and the magistrates as well. The judge recalled a cross examination of a 14 year old girl by himself about thirty years ago when he represented the accused person who had been charged with sexual assault. As the judge (then a defence lawyer) cross-examined the girl, she broke down and cried and the judge was equally traumatized. Several years after that incident, the judge could not forget the scene of the trauma that the cross-examination subjected the CVSA to as she tried to prove the guilt of the accused person. The judge regretted having to put the CVSA through such an interrogation, but he had a duty to his client. In his own words, the Judge said: 'Up to now I still remember vividly the scene of the 15 year old girl crying in court as I cross-examined her to set my client free. It was a cruel process that needs to be reformed and today I would not do that again to any child'.¹⁶⁰

Describing the experience of CVSA during cross-examination, 92% of the respondents were of the view that cross examination was the most difficult part of the court procedure, presented the greatest difficulty to CVSA and appeared to confuse and intimidate even CVSA who were accompanied by social workers and initially appeared confident during examination in chief. They attributed this to harassment of the CVSA by the accused person/ defence lawyer resulting in the CVSA breaking down, crying or even refusing to talk while at times contradicting what they had initially said in evidence in chief. Only 8% of the respondents formed the opinion that not all CVSA experience difficulties during cross examination and that some CVSA are able to withstand cross-examination and answer questions confidently without intimidation from the accused person or his/her lawyer. The majority view of the officers about cross-examination confirms the study findings by the CVSA and the judicial officers that cross- examination and direct face to face contact with the accused person are largely the most difficult parts of the court procedures that present the greatest challenge to CSA. The finding is consistent with Temkin's criticism of the adversarial procedures in the trial of sexual offences.

Lawyers appearing for the accused persons cross-examined the CVSA with such zeal aimed at punching holes/discrediting the CVSA evidence. This they did meticulously as they managed to have the CVSA get confused over the answers they gave in response to the questions and some ended up crying. Two of the advocates interviewed said that while they acted as defense lawyers for those accused of child sexual abuse, they did so in order to set the accused persons (their clients) free knowing that the only way they would achieve this was by interrogating the CVSA in a harsh manner contrary to the best interest of children principle. Both of them admitted that the court procedures permitting such interrogation is cruel to the CVSA and needs reform. They however considered it their duty to set their client free by confusing the CVSA during interrogation in cross examination.

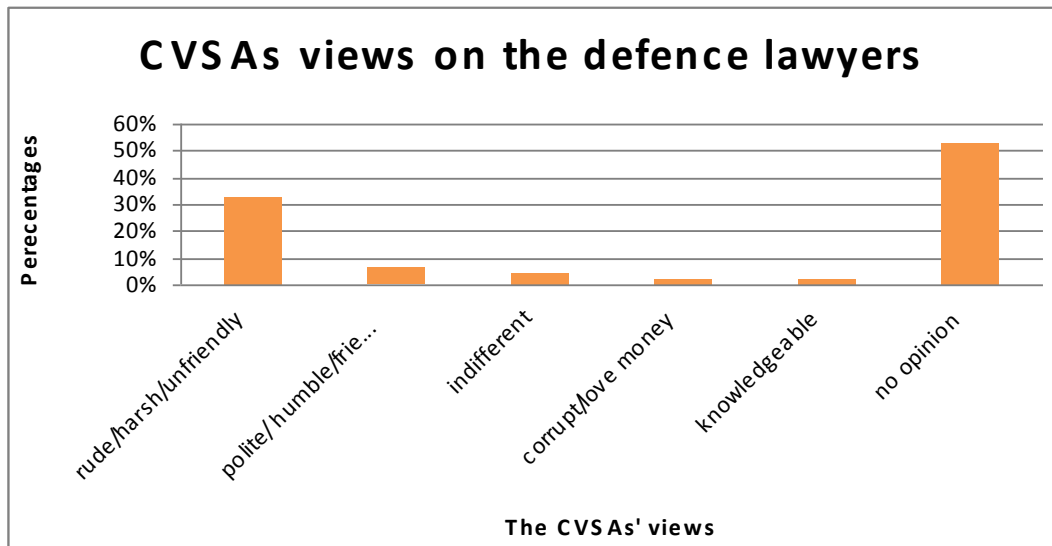
Some accused persons/ lawyers insisted on details which the CVSA could not remember such as dates and the sequence of events which most CVSA could not recall with ease. This particularly appeared very intimidating to CVSA some of whom gave evidence several months after the abuse had occurred. The lawyers representing the accused persons seemed to know exactly the weakest points of CVSA that would drive them to tears and they concluded that the children were lying, could not be believed, had given conflicting testimony and asked the courts to acquit the accused persons. To most CVSA, this was a painful experience as they had come to court to tell how the abuse happened but the lawyers made them look like liars in court who had to prove their innocence.

¹⁵⁹ The senior judge said that unless the laws are changed, it is unfortunate that the law has to be applied, and in so doing, the process subjects CVSA to unnecessary trauma.

¹⁶⁰ A Judge of the High Court when acting as a defence counsel in a child sexual abuse case several years before becoming a judge.

As concerns the accused person’s lawyer, 32% of the CVSA described them as very rude, harsh and unfriendly while 6% found them to be polite, humble, and friendly and good. 4% found them to be indifferent and quiet as 2% described them as knowledgeable in their work. 2% of CVSA said that the advocates are corrupt, love money and consequently work together with the prosecutor, accused persons and the magistrates so as to release the accused persons and punish CVSA. 53% of CVSA said that they had no opinion about the lawyers whom they said were worse than the accused persons and made them feel like the ones on the wrong. CVSA view about the lawyers is illustrated by figure 8 below;

Figure 7: CVSA's views on the defence lawyers



Court record perusals also revealed that there were certain instances when the evidence of the CVSA and that of adult witnesses was inconsistent but nonetheless revealed material facts to the case as the inconsistencies were not on material facts. However, the defence counsels/ accused persons emphasized the inconsistencies as proof of the evidence of the witnesses not being credible and asked the courts to disregard their evidence and give the accused person the benefit of doubt due to such inconsistencies. Interestingly, the court records revealed that the magistrates, in majority of the cases agreed with the accused persons/ defence counsels and found that the inconsistencies (though not of material importance) created a doubt in the prosecution case and gave the accused persons the benefit of doubt thereby acquitting them. The study therefore finds that the standard of proof required beyond any reasonable doubt in some cases causes miscarriage of justice due to lack of guidelines on how to cross examine CVSA.

Inadequate Role of the Trial Magistrate/ Judge in Protecting CVSA and Taking Control in Balancing the Rights of Accused Persons and CVSA

The passive role of the trial judge is yet another key feature of the adversarial legal system in which the presiding judge is confined to an umpire to the contest who ensures that the parties observe the rules of the game according to Damaska. The judge’s role in initiating or directing evidence is strictly limited and the main focus is on weighing the evidence presented by the parties and making a decision based on the concept of the burden of proof. The role of the trial judge is expressed in the Criminal Procedure Code section 89 which stipulates plea taking, sections 210 and 211 which provide for a ruling on whether the accused person has a case to answer or not, and section 215 and 216 which provide for judgment pronouncement and sentence as the main functions of the trial court

The impartial role of the judge may be justified in ordinary cases between adults who have the capacity to battle out the case before the judge so that the winner takes it all. However, in cases of CVSA, the accused person and the CVSA are not on an equal level in terms of the resources and ability to collect evidence and present it before court, notwithstanding the fact that the interests of CVSA are to be represented by the prosecution since the court’s decision is based on the evidence of both CVSA and accused persons as the main sources of information. The argument that the prosecution represents the interest of the CVSA is not adequate, especially where the prosecutor is a police officer with basic knowledge of law whereas the defence counsel is a

professional lawyer. The task of discharging the burden of proof by the prosecution through CVSA therefore tilts the scales of justice in favour of accused persons.

Although the magistrate is expected to play a passive role in an adversarial legal system, the non-intervention in certain circumstances in the trial of CSA was found to be against the best interest of the child principle, and contrary to the provisions of the Sexual Offences Act¹⁶¹ which allows the courts to take any necessary measures to protect victims of sexual offence. In Eldoret Criminal Case No. 3614/2010, the court record showed that a 15 year old CVSA became shy upon cross-examination when asked to state exactly what happened when she was defiled. She did not have an idea what a P3 form is and when asked details about it by the accused person's lawyer, she said she knew nothing about it. The record showed the advocate asked her about her previous sexual relations with other parties apart from the accused person and the magistrate failed to protect her from such interrogation contrary to the provision of section 34 of the Sexual Offences Act. She answered that she had actually had sex with somebody else two weeks before she was allegedly defiled by the accused person. The court records showed that the prosecution did not re-examine the CVSA so as to address issues which were inordinately brought out by the accused person's lawyer in cross examination nor did the court intervene to protect CVSA from such cross examination.

The CVSA was left at the mercy of the accused person and his lawyer as her adversaries in court while the prosecution and the magistrate appeared 'impartial' as demanded by the adversarial legal system. In such circumstances, the court is literally turned into a battlefield where CVSA and the accused person are seen as adversaries and the playground assumed to be level while the referee (magistrate) watches the game and waits to make a decision based on the actions of the actors (CVSA and accused persons). In this case however, the CVSA is obviously at a disadvantaged position as illustrated in the analytical framework.

In Kisumu Children's Court, the study observed a lawyer representing the accused person interrogating a CVSA in so cruel a manner that the magistrate had to intervene to protect the child from further harassment. The lawyer however insisted that the CVSA had a duty to answer his questions. This showed that there are no guidelines on how CVSA are supposed to be cross-examined, a situation that resulted into a heated argument between the magistrate and the lawyer who insisted that the magistrate had a duty to remain impartial throughout the proceedings and not appear to lean on the side of the CVSA. When interviewed after the court session, the magistrate said that there were no guidelines on how CVSA are supposed to be cross-examined leaving the entire cross-examination to the lawyers. Due to their vulnerability and the privileges enjoyed by the accused persons, the strict observance of the non-passive role of the magistrate in a CSA trial results into a miscarriage of justice to the CVSA as demonstrated above.

CVSA had varied responses about the magistrates: 53% thought they were polite, humble, friendly, an indication that the judicial officers have a positive attitude and are sensitive to CVSA needs. 6% of CVSA found the magistrates to be very harsh, unfriendly and rude. 9% of CVSA thought that the magistrates were indifferent to them as they were quiet and did not assist them much. A further 9 % saw the magistrates as very knowledgeable people who were able to assist them and depended on them to punish the accused persons. 13% were of the view that the magistrates wore a very stern face, were very serious and felt intimidated throughout the court process as they gave evidence, this was as a result of the demeanor of the magistrates. 2% thought that the magistrates were corrupt, love money and because they did not have money, they felt they were not likely to receive any justice from the courts as they believed the magistrates do receive money from the accused persons and set them free. 9% had no views about the magistrates.

The views of CVSA about magistrates who recorded their evidence reflect the perception of the larger society about the justice system where the aggrieved go for redress. Since majority of CVSA thought that the magistrates are polite and humble, if they played an active role in the procedure, CVSA would probably have more confidence in the courts. The views of the 13% of CVSA who felt that the magistrates were unconcerned and serious may be as a result of the adversarial legal system's requirement that the judicial officers remain impartial, which is inconsistent with the best interest of the child principle.

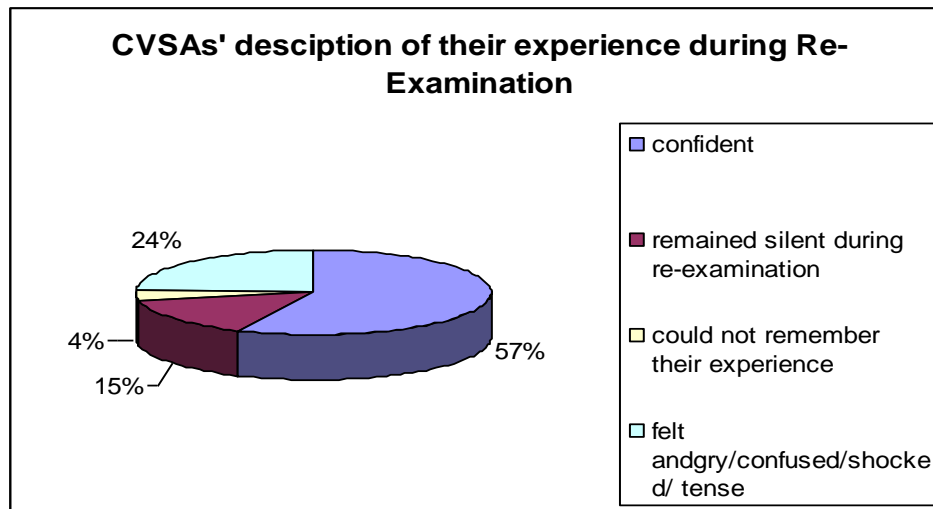
Re-Examination Perceived as an Unnecessary Procedure in CSA trial

During re-examination, the prosecution asks CVSA to clarify issues raised in cross-examination that may conflict their evidence in chief according to McConville and Wilson. While 57% of CVSA felt confident during re-examination, and indicated that some of the prosecutors especially in Nakuru were fatherly, patient and gave them time to respond to their questions, 15% of CVSA remained silent during re-examination because

¹⁶¹*Op. cit* 27, section 31.

they did not understand why they had to answer so many questions and repeat the same story many times to different people in the court room. 4% could not remember their experience during re-examination while 24% said that they felt angry, hurt, confused, shocked, tense, nervous, during re-examination. Re-examination is therefore not as intimidating as cross examination, but nevertheless, unnecessary according to majority of CVSA as shown by figure 9 below.

Figure 8: CVSA description of their experience during re-examination

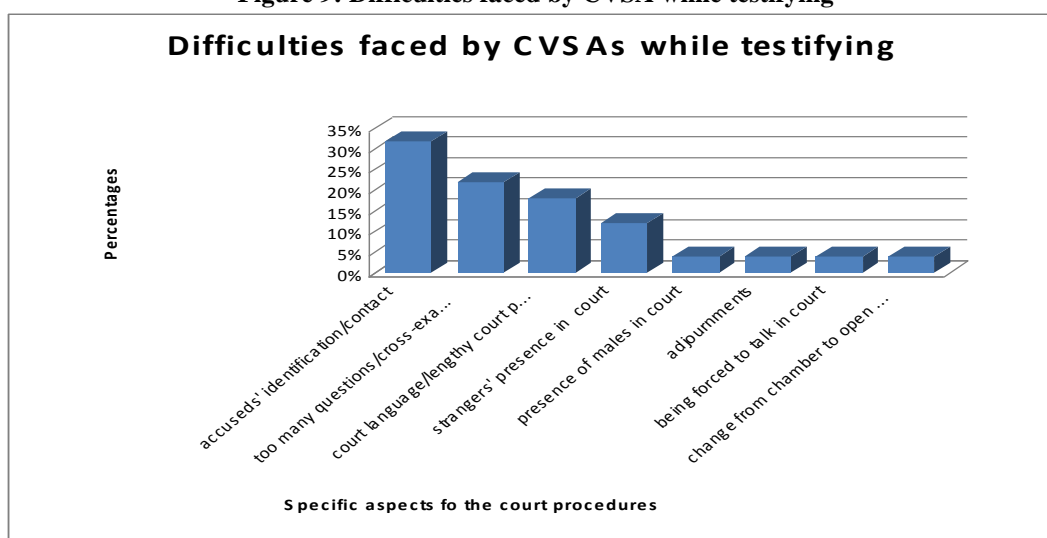


The views of CVSA were confirmed by 68% of the legal practitioners who were of the view that re-examination resulted into a further confusion of the child and unnecessarily asking the child to repeat details of the abuse to the prosecutor having narrated the same details to the magistrate during examination-in-chief and to the defence lawyers/accused persons during cross-examination. In their opinion, CVSA are fatigued at the stage of re-examination and those who kept quiet did so as a coping mechanism to avoid a repeat of the painful experience associated with cross-examination.

Many respondents felt that re-examination further leads to contradictions between what the CVSA had said earlier in examination-in-chief and cross-examination thus strengthening the case for the accused person and therefore in the opinion of 68% of the legal practitioners, the process is unnecessary. However, 32% of the legal practitioners found the process necessary in order to clarify any doubts raised during cross-examination.

The study observed that re-examination was not taken as seriously by the prosecution as examination-in-chief, yet in most cases, cross examination of CVSA brought them to tears and there was need for the prosecution to put things right before CVSA leave the witness box. However, this was not the case and some CVSA interviewed said they left the court feeling worse than they felt before they testified. It was observed that the defence lawyers and the accused persons had one aim which was to make the CVSA contradict their evidence in chief so that their testimony appears not credible. Such inconsistencies were noted to be the reasons used by the court to acquit the accused persons. Unfortunately, the prosecutors did not seem keen on dealing with the alleged contradictions intentionally created by the accused person or the lawyer. The challenges faced by CVSA in the trial process are summarized in figure 10 below.

Figure 9: Difficulties faced by CVSA while testifying



The figure above shows the views of CVSA on the challenges they encountered while testifying in CSA cases. According to the police officers, the challenges faced by CVSA while testifying were as follows: 53% of the difficulties faced by the CVSA were as result of the face to face encounter with the accused person. This was followed by harassment by lawyers during cross-examination resulting into CVSA being traumatized and accounting for 20% of the difficulties experienced by CVSA. Lack of understanding by CVSA as to why they have to go through the court process was in the opinion of the police officers a contributor to the difficulties the CVSA face and accounted for 14%. Interference with CVSA and their families while the case was pending before court took the form of threats and intimidation of the CVSA making it difficult for them to testify in court and accounted for 13% of the challenges.

The study finds that the trial procedure is inconsistent with the ideal framework for CSA trial due to the following reasons;

The procedure safeguards the rights of accused persons to a fair trial, but fails to protect CVSA due to lack of special procedural protective mechanism and the passive role of the trial magistrate despite the provision of substantive laws. The procedure therefore violates CVSA's right to be treated with dignity and compassion, protection against discrimination by the witness competency requirement and the hearsay rule, exposing CVSA to hardships in the trial process. The trial procedure therefore fails to balance the safeguards of accused persons' right to fair trial with the protection of CVSA rights and concerns. The next section examines the inadequacies of post-trial procedures in Kenya.

(C) Inadequacy of CSA Post Trial Procedure in Kenya

The study found that the post-trial procedure is not in the best interest of CVSA and contrary to the guidelines of (UNGMCCVWC, 2005) as there are no protective orders or follow up procedures to ensure the welfare of CVSA after they testify in court. In this respect, the study made the following findings:

The study observed CVSA both before and during the court appearance. Most of the CVSA looked nervous and anxious before the trial but some looked more traumatized after the court testimony than they were before they entered court. This was an indication that the procedures they went through while testifying re-victimized them or made them re-live the experience as argued by Temkin, Eastwood and Patton as well as Herman amongst many other scholars.

From the interviews, FGD, court record perusals and observations, the study established that the children courts do not make any protective or follow-up orders at all to find out the welfare of CVSA after they testified. The courts seemed to be more interested on the evidence of the CVSA, after which the focus shifts back to the accused person. The constitutional provision of the best interest of the child principle¹⁶² did not appear to guide the courts in matters concerning children. This point was well illustrated by a case in Nakuru where a 12 year old CVSA was observed testifying with difficulty against the father in an incest case. She appeared nervous, terrified and hesitant to give evidence. However, it was observed that at the end of the

¹⁶²*Op. cit* 31 Article 53(2).

testimony, the court never gave any order at all as to where the child would stay or any protective orders. Since the accused person was on bail and the CVSA had been brought to testify in court by the mother and the children officer, the CVSA was left exposed to possible revenge attack by the accused person whom she had already testified against.

The court records further revealed that even after the acquittal or conviction of the accused persons, no further orders were made by the courts in respect of CVSA. The interviews revealed that one of the factors that discouraged CVSA and their families from testifying in court is that a conviction predisposed CVSA to a repeat of the abuse as a form of revenge by the accused person (once out of jail) or of his family. An acquittal had the same effect, yet CVSA is never compensated or provided with other special needs such as psychological support through courts orders.

The study noted that the courts did not take into account the wishes of CVSA at all in their decisions, contrary to the provisions of the Children Act.¹⁶³ The CVSA however had their own wishes which they would want the courts to grant if given an opportunity to be heard on the sentencing of accused persons in CSA. Asked what they would have wanted the court to do with the accused person, 40% of CVSA said that the accused person should face justice and a harsh sentence should be passed on them. 34% said that the accused persons should be given life imprisonment. 6% said that the accused persons should be subjected to corporal punishment, 6% suggested that the accused persons if convicted should be sentenced to death. 4% felt that the accused persons should be forgiven if they pleaded guilty to the charge but should be jailed if they pleaded not guilty to the charge but are found to have committed the offence for having subjected the CVSA to the trauma of proving their guilt by testifying in court. In this respect the CVSA appeared to be asking for plea bargaining, restorative justice and punitive sentence only as a last resort. 2% of the respondents accounting for incest victims felt that the accused persons should be released for fear of having given evidence that leads to the accused person's imprisonment, hence the dilemma of CVSA in incest related cases. 6% could not say what they wanted to be done to the accused person but hoped that the courts would fairly decide on the sentence.

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

Immediately after their testimony, CVSA as actors in the justice process disappear from the stage and the curtains fall behind them, leaving the accused person, the magistrate, prosecutor and the lawyers as the key actors in the trial of child sexual abuse. Eventually, the court decision lacks input by CVSA who may not even know the outcome of the case unless they take deliberate measures to find out the court's decision as their right to information was not properly respected due to lack of procedures to that effect. In a nutshell, the trial procedure was more concerned about establishing the guilt or otherwise of the accused person as opposed to mitigating the trauma occasioned to CVSA and concerns about justice in a balanced trial within the context of procedural justice. This explains why no protective or any other orders regarding the welfare of CVSA were made by the children courts either in observations, court records or from the interviews.

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

A Case Illustration of the Inadequacy of the Trial Procedure in CSA cases

The difficulties in prosecuting CSA cases are demonstrated by Nairobi Criminal Case No. 4740/2007 in which the accused person, a cook at a children's institution was charged with seven counts of indecently assaulting children (between the ages of five and fifteen) under his care at the institution in the year 2005. The accused person was prosecuted about two years after the offences were alleged to have occurred. This case highlights peculiarities of CSA. The accused person had worked and lived at the institution for about eighteen years cooking and serving the children. At times he did the children's laundry and distributed new clothes to the children when the institution received any from donors. All the CVSA testified that they trusted him and would do what he asked them to.

¹⁶³*Op. cit* 26 which provides that children's views should be heard and considered in matters affecting them.

The accused person therefore took advantage of the CVSA's trust in him and their vulnerability to sexually abuse them, warning them not to talk about the abuse or risk missing food and clothes when he distributed them. To ensure the CVSA remained silent and cooperated with him, he rewarded his victims with sweets and jeans trousers while denying the same to those children who refused to be abused by him. The accused person allegedly used his fingers and assaulted the young CVSA as he 'played' with them at the stairs, lifting them to the sinks and inviting them to his house within the institution's compound. His victims included both boys and girls at the institution. He touched the breasts and buttocks of the girls and pulled the penis of the boys. The institutional set up and his relationship with the CVSA provided him with the opportunity to sexually abuse the CVSA within the confines of the institution away from the public eye.

The court record showed that CVSA made reports to the officer in charge of the institution who admonished them and failed to take any action so as to save the reputation of the institution and avoid the social stigma that such report would attract from the public. The failure by the officer in charge to report the abuse to the police is consistent with the labeling theory. The matter was only reported to the police when the institution's donors insisted so, two years after the offences were committed. A 15 year old CVSA who recorded a statement with the police allegedly died while another 11 year old CVSA disappeared from the institution before testifying in court. The possibility of interference with investigation and intimidation of the potential witnesses cannot be ruled out.

One CVSA feared to testify in court because of threats from the accused person not to do so and because of the concern that if found guilty, the accused person could be jailed, confirming Herman's argument on the difficulty of prosecuting CSA when the CVSA is in a special relationship to the accused person such as teacher-pupil, father daughter, house help-child relationships. Some CVSA testified that the abuse went on for long and they got used to it, thinking it was a game, not knowing it was wrong since nobody had talked to them about sexual matters. Seven CVSA testified how the accused person had repeatedly sexually abused them by touching their private parts. The accused person was however found not guilty and acquitted by the court on three grounds. The first ground was that the evidence of CVSA contradicted each other and therefore created a doubt, the benefit of which was given to the accused person. Such contradictions included use of words by CVSA such as the 'accused slapped my buttocks' and 'he touched my buttocks.' This ground of acquittal highlights the difficulty in communicating sexual abuse by CVSA to court which argued that the CVSA was not sure as to the action of the accused person, slapping or touching.

The second ground for the accused person's acquittal was the fact that when the CVSA's were taken for medical examination, no injuries were noted consistent with sexual abuse. Despite the amendment of the Evidence Act¹⁶⁴ that did away with corroboration requirement, the court did not believe the evidence of the seven CVSA, and looked for corroboration in the medical report, failure which the accused person was acquitted. The accused person had been prosecuted two years after the abuse and so in case there were injuries they would have healed by the time of the reporting of the abuse. Besides, the offence was not one of penetrating the genitals of the CVSA but indecent assault, therefore one would not necessarily expect injuries on the CVSA. All the CVSA were not represented while the accused person had legal representation hence the procedure was not fairly balanced. One of the CVSA was blind, yet there was no communication aid at all to assist the witnesses testify. All CVSA testified in the presence of the accused person without any protection measure at all despite the provisions of the Sexual Offences Act.¹⁶⁵

The third reason given by the court was that nobody reported the alleged crime at the time it was alleged to have occurred. The reasoning by the court demonstrates the lack of understanding of the nature of commission of CSA and the inability of children to report directly to the police, being dependent upon adults who make the decision whether to report to the police or not and when. The court also failed to appreciate the social stigma that characterizes CSA which may have delayed the reporting of the case to the police.

All (100%) of the respondents were in agreement that the current court procedures present serious difficulty to CVSA when they testify in court and they gave the following reasons: 56% of the legal practitioners were of the opinion that the current court procedures are not child friendly, 12% were of the opinion that the procedures are intimidating to the CVSA leading to them breaking down and thus unable to testify with ease as there are no government employed children counselors stationed in courts to provide the

¹⁶⁴ Criminal Law Amendment Act No.5 of 2003 which repealed section 124 of the Evidence Act on corroboration of children's evidence.

¹⁶⁵ *Op. citm* 27, section 31.

much needed psycho-social support for CVSA. 8% were of the opinion that although some CVSA cases were held 'in camera' and the magistrates were child friendly, there was still a lot that needed to be done to make the entire system a conducive environment for CVSA to testify. A further 8% were of the view that the current children court set up and structures lack adequate and modern facilities. 4% were of the opinion that the trial procedures favoured the accused person. A further 12% were of the opinion that the court process is hurried; there is no adequate time to patiently listen and accommodate the CVSA. The study therefore found all the three stages of trial namely pre-trial, trial and post-trial procedures not to fit into the ideal framework for CSA. CSA trial procedure in Kenya is therefore largely inadequate and not child friendly. However, the study recognizes that there are some positive aspects of the trial procedure despite the many inadequacies already discussed. In the next section, the study examines the strengths of CSA trial procedure in Kenya.

Some Strengths of CSA Trial Procedure in Kenya

This paper would be incomplete without an analysis of the existing strengths of CSA trial procedure in Kenya. The study noted some positive aspects of the children court procedures that enhance CVSA's ability to testify. These were found to be friendly to CVSA and in their best interest. They included the following measures;

a. Enactment of substantive laws that provide for the protection of children.

The study found that Kenya has enacted laws aimed at protecting children from abuse and enhancing their participation in the justice process. These include the Constitution 2010,¹⁶⁶ the Children Act,¹⁶⁷ Sexual Offences Act,¹⁶⁸ Witness Protection Act¹⁶⁹ and the amendment to the Evidence Act¹⁷⁰ that did away with corroboration. Therefore, there are good substantive laws in place aimed at protecting children from abuse, but their implementation is hindered by lack of a comprehensive procedural law on CSA trial.

b. The establishment of special children courts and appointment of magistrates to preside over children matters.

As per the requirement of the Children Act,¹⁷¹ the judiciary had set up specialized courts to handle children cases known as children courts, some of which were the subject of this study. Generally, magistrates were friendly to CVSA although they lacked specific skills required in handling children such as child psychology and counseling.

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

Magistrates and judges had undertaken basic training on the Children's Act conducted by the judiciary, but they considered the training too basic to equip them with the full capacity to handle CVSA. The study observed that a Nakuru based magistrate in charge of the children's court was quite helpful to CVSA and appeared to be concerned about their needs. The magistrate conducted the hearing in the chambers as opposed to the open court and was patient with CVSA and allowed them time to play as they testified. This action by the magistrate relaxed the court atmosphere and some young CVSA were able to testify without realizing that the focus of attention was on them, thereby distracting them from the effects of face to face contact with the accused person and the formal tense court atmosphere.

¹⁶⁶*Op. cit* 31.

¹⁶⁷*Op. cit* 26.

¹⁶⁸*Op. cit* 27.

¹⁶⁹The Witness Protection Act 2006.

¹⁷⁰*Op. cit* 29.

¹⁷¹*Op. cit* 26, section 73.

c. Use of an intermediary to take evidence of a CVSA

In Mombasa Criminal Case number 1827/2010, the trial magistrate applied the provisions of the Sexual Offences Act¹⁷² to enable the evidence of a five year old CVSA be adduced in court by the CVSA's mother. This measure enabled the court to admit the evidence as opposed to acquitting the accused person for lack of evidence. However the practice was not uniform in all courts as other magistrates did not apply this provision showing a lack of uniform approach in CSA trial which the magistrates attributed to lack of guidelines and a comprehensive law on CSA trial.

d. Conference like court set up and witness protection box at Nairobi Children Court.

Whereas all the other courts still used the ordinary court set up with the magistrates' position raised above the ground to form a platform, probably to emphasize the power and authority of the court, the Nairobi Children's Court had a conference table set up where the magistrate shared the same table with all actors in the case in a conference like set up. This arrangement had the effect of reducing the tension associated with court environment, therefore more child friendly. It was the only court which was near child friendliness in its set up while in the other courts the set up was more like the ordinary courts, very intimidating to CVSA. Nairobi Children's Court was also the only court that had a witness protection box¹⁷³ in compliance with section 31(4)(a) of the Sexual Offences Act¹⁷⁴ to shield CVSA from direct face to face contact with the accused person during their testimony. However, the witness box was not being used for its intended purpose, but as a storage area for court files and exhibits, hence unnecessarily subjecting the CVSA to intimidation by the accused person.

e. Use of magistrates' private chambers to take evidence of CVSA

Majority of the CSA cases were mentioned in the open courts but later moved to the private chambers of the magistrates for hearings. Whereas this kept away members of the public from the proceedings and balanced accused persons' right to a public trial with the CVSA right to protection, it retained the direct face to face contact between CVSA and the accused person in a more reduced proximity between them as a result of the smaller office space compared to the open court.

f. The role of NGOs in CSA trial

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

g. Amendment of the Evidence Act to do away with corroboration

Kenya amended the Evidence Act¹⁷⁵ to do away with corroboration making it possible for courts to convict an accused person based on the evidence of a child alone. The amendment therefore enhanced access to justice by CVSA.

XI. CONCLUSION AND RECOMMENDATIONS

Conclusion

Kenya has undertaken great steps in the area of substantive laws in keeping with the world trends on child protection generally. The reforms include the enactment of the Children Act 2001¹⁷⁶ to domesticate the UNCRC and ACRWC, the passing of the Sexual Offences Act 2006,¹⁷⁷ the Witness Protection Act 2006,¹⁷⁸ the amendment of the Evidence Act¹⁷⁹ and the promulgation of a new Constitution.¹⁸⁰

¹⁷²*Op. citm* 27, section 31(4) (b).

¹⁷³ The witness box was reportedly an innovation by a magistrate who presided over the court up to the year 2003 long before the Sexual Offences Act 2006 was passed. Section 31(4) (a) provides for a witness box to enable vulnerable witnesses testify in court.

¹⁷⁴*Op. citm* 27.

¹⁷⁵*Op. citm* 29.

¹⁷⁶*Op. citm* 26.

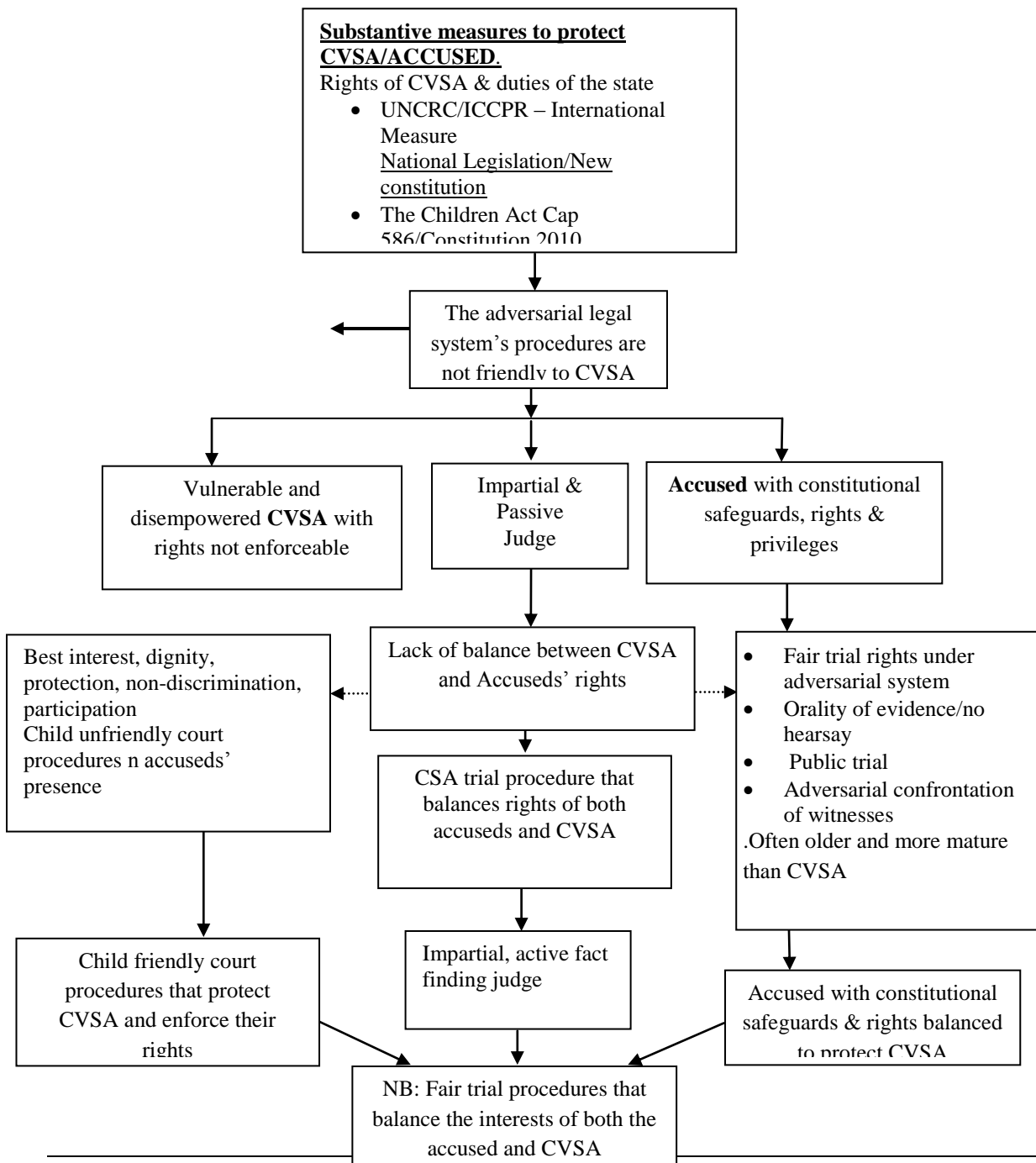
¹⁷⁷*Op. citm* 27.

¹⁷⁸*Op. citm* 28.

¹⁷⁹*Op. citm* 30. The Criminal Law (Miscellaneous Amendment) Act 2003 which did away with the requirement of corroborating the evidence of a child.

However, as argued by procedural justice theorists such as Rawls, Galligan, Solum and others, the goals of substantive laws can only be realized through fair procedures which ensure equality of liberties, opportunities and resources to all parties in a dispute.

The function of procedural laws as the engine for implementation of substantive laws therefore implies that the realization of the goal to protect CVSA from CSA under the already mentioned reforms undertaken in the area of substantive laws depends on fair procedural laws to both CVSA and accused persons. While assigning responsibilities to the CVSA as prosecution witnesses and privileges to the accused, the evidentiary rules of procedure under the adversarial system occasion inequality of resources and opportunities which according to all procedural justice theorists, should be equally distributed by balancing the rights of the accused persons and CVSA in CSA prosecution to benefit the disadvantaged(read CVSA). This is illustrated by Figure 1 below.



¹⁸⁰ *op. citn* 31.

GAPS IN PROCEDURES

Figure 10: A graphic Illustration by the author of the imbalance in the protection of the rights of the accused and CVSA in a CSA trial under the adversarial court procedures.

Kenya is a signatory to the UNCRC and has domesticated its provisions by enacting the Children Act and further passed the Sexual Offences Act to deal with sexual offences. Further, the Constitution of Kenya 2010 recognizes the vulnerability of children generally and the need to protect them in the course of justice administration.

However, CSA abuse is still tried under the classical adversarial procedures which protect the rights of accused persons without the balance required by procedural justice in a fair trial. Despite the protective provisions by the Sexual Offences Act, children courts are still guided by the Criminal Procedure Code and the Evidence Act both of which are adversarial in principle. The study attributes this practice to the lack of procedural laws in CSA trial. The gains made by the Children Act and the Sexual Offences Act cannot therefore be fully realized due to the lack of procedural laws as a vehicle for their implementation. The study concludes that the current CSA trial procedure in Kenya is inadequate in as far as it does not balance the rights of accused persons with the need to protect CVSA. The classical adversarial criminal procedure as applied by children courts in Kenya is unsuitable for CSA trial. The adversarial procedure as applied by the children courts in Kenya is inadequate as it fails to take into account the special needs and vulnerability of CVSA.

The adversarial trial procedure applied by the children courts in Kenya adequately protects the accused person rights but does not take into account the need to balance the same with the rights of CVSA. That failure to balance the rights of accused persons with the need to protect CVSA sometimes leads to a miscarriage of justice in CSA trials in Kenya. There is need for special procedures in CSA abuse trials which balance the rights of accused persons with the need to protect CVSA so as to ensure justice to both parties. The study therefore concludes that the current adversarial procedure applied by children courts in Kenya is unsuitable for CSA trial and in need of reforms.

Recommendations

In order to reform the current adversarial court system applicable in CSA cases and allow for child friendly procedures, the study makes legislative, policy, administrative and research recommendations as follows;

Legislative Reforms

1. The study recommends the enactment of a specific procedure in law to regulate the trial of CSA. This could be known as 'Child Sexual Abuse Trial Procedure Act'. The agencies to be involved in implementing this recommendation include The Office of the Attorney General – Drafting Department, The Kenya Law Reform Commission, Ministry of Justice, National Cohesion and Constitutional Affairs, the Judiciary, the Children Services Department under the Ministry of Home Affairs and Parliament.
2. There is need to amend the Evidence Act¹⁸¹ so as to incorporate best practices in the trial of child abuse cases such as video recording, television link and others. Likewise the amendment should include as an exception to the hearsay rule evidence by any person of what a CVSA may have told him or her about the abuse in cases where the CVSA is unable to testify in court. The Evidence Act should be amended to exclude the requirement of competence of witnesses which was found to lock out some CVSA from testifying. In Britain the law has been amended¹⁸² and all witnesses including children are competent to give evidence so long as they understand questions asked by the court.

In addition hearsay evidence is admissible¹⁸³ in Britain where the court finds that it is in the interest of justice to admit such evidence since failure to do so would occasion injustice. In the case of *Sparks vs. R*¹⁸⁴ the Court of Appeal in England allowed the admission of statements by CVSA as to the colour of her attacker and an out of court confession by a third party to the crime which the accused person was charged

¹⁸¹ *Op. cit* 29.

¹⁸² Criminal Justice Act 2003.

¹⁸³ *Ibid* section 114 (1) (d).

¹⁸⁴ *Sparks vs R* (1964) A CA 964.

with.¹⁸⁵ Kenya needs to amend the Criminal Procedure Code and the Evidence Act so as to include similar provisions to safeguard the interests of CVSA.

3. There is need to amend the Criminal Procedure Code so as to limit cross examination of CVSA in cases where such cross examination may cause trauma to CVSA or to have such cross examination conducted under the direction of the trial court. Similarly the study proposes that instead of direct cross examination of CVSA by the accused persons/advocates, in all CSA trials, the court should appoint intermediaries as provided by the Sexual Offences Act. This does not in any way violate the right of the accused persons to cross examination.
4. The study recommends a shift away from the strict adversarial legal system towards an improved adversarial legal system that blends positive features that protect the accused persons with positive aspects of the inquisitorial system that protect CVSA such as the fact finding role of a judicial officer. In such a system, the judicial officer (Magistrate/Judge) plays a fact finding role in the case as opposed to a passive role in the current children court procedures under the adversarial legal system. This proposal will help to build confidence of CVSA in the court system. Further it has the ability to enable the magistrates play an active role in protecting CVSA from adversarial cross examination by accused persons/advocates.
5. In order to ensure that CSA trial is fair to both accused persons and CVSA, there is need to ammend Article 25(c) of the Constitution by providing an exception in cases of CSA.

The study recommends a balancing of the accused person's right to a fair trial and the CVSA's right to equal protection by the law, protection from discrimination, preservation of their dignity, privacy, access to justice and upholding of the paramount principle of the best interest of children in matters affecting them.

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¹⁸⁵ Such a confession was in admissible at common law as held in Cooper (1969) 1 Q.B 267; Turner (1975) 61 Cr. App. R 67; Blastland (1986) AC 41.

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