



Research Paper

An Analysis of the International, Regional and National Instruments On Child Sexual Abuse in Kenya

Dr. Scholastica Omondi (PhD)

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

Received 26 May, 2014; Accepted 30 June, 2014 © The author(s) 2014. Published with open access at www.questjournals.org

ABSTRACT:- This article reviews international conventions, regional instruments and national legislation relevant to child sexual abuse (CSA), with a view to examining the obligations of the state towards child victims of sexual abuse (CVSA), particularly when they testify in court in Kenya. The article identifies the rights of CVSA as provided by various instruments. The review aims at identifying provisions that advance the cause of CVSA and those that negate their protection. In reviewing national legislation, emphasis is placed on the identification of the strengths and weaknesses of the frameworks and their implications to CVSA. The article also analyzes the extent to which the national laws reflect the provisions of the international and regional frameworks. The article concludes that although Kenya has passed the Children Act which domesticates the provisions of the United Nations Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of Children (ACRWC), the lack of a child friendly procedural statute remains a hindrance to effective protection of CVSA.

Keywords:- International, Regional, National, Instruments, Protection.

I. INTRODUCTION

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

In 1920, nations came together to form the League of Nations with the main task being the development of an international legal framework for the protection of minorities and the vulnerable. In 1924, the fifth Assembly of the League of Nations adopted the first declaration on the need to protect children. This declaration, known as the Geneva Declaration of 1924 emphasized the material needs¹ of children devastated by the First World War. Apart from the minorities and the vulnerable, protection of all human beings became a central issue of focus for the international community. This led to the establishment of the current international system of binding human rights protection, under the United Nations, formed in 1948. Its core function is to promote and encourage respect for all human rights and fundamental freedoms for all.

In 1948, the range of fundamental human rights that belonged to all individuals by virtue of their status as human beings were codified into the first single document known as the Universal Declaration of Human Rights (UDHR).² The declaration set out a wide range of rights in all aspects of life and provides that all human beings are born free and equal in dignity and rights³.

¹ Needs requisite for normal development such as food, nursing care, assistance to the disabled and orphans, shelter and clothing.

² The UDHR adopted by the United Nations General Assembly Resolution 217A(III) of 10 December 1948.

³ Ibid. Article I.

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

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

Relevance to this study is the recognition by the UDHR that due to their physical and mental immaturity, children generally need special safeguards and care including appropriate legal protection.⁴ This provision is an affirmation of the international community's concern and recognition of the fact that children are vulnerable, hence the need for special safeguards. It highlights the role of the state in taking appropriate deliberate measures that recognize the vulnerability of children (CVSA included).

The UDHR was followed by the 1959 Declaration on the Rights of the Child, which declared several rights⁵ to children based on the premise that humanity owed to children the best it could offer them. This declaration is the origin of the principle of best interest of a child. The 1959 Declaration however, failed to provide for children's freedoms, liberties or autonomy, although it gave children a little more than just declaration of their rights.

The United Nations declared 1979 the International Year of the Child, focusing on the plight of children worldwide. It was followed by the Convention of 1989 and the World Summit of 1990 leading to the adoption of the United Nations Convention on the Rights of the Child (UNCRC)⁶ which drew mixed reaction by African countries under the Organization of African Union (now African Union -AU). Subsequently, the African nations developed the African Charter on the Rights and Welfare of Children (ACRWC)⁷ to provide for peculiar socio-cultural situation of the African child in terms of protection.

II. THE INTERNATIONAL FRAMEWORK ON CHILD SEXUAL ABUSE

The United Nations Convention on the Rights of the Child (UNCRC)⁸ was adopted by the United Nations General Assembly Resolution-44/25 of 20th November 1989 and entered into force on the 2nd September 1990. It has been ratified by all member states of the United Nations except the United States of America and Somalia (Cohen and Davidson 34). It was ratified by Kenya on the 30th, July 1990 and is the single international Convention that specifically provides for the rights of children and their protection, in recognition of their physical and mental immaturity, hence their vulnerability which is emphasized in the Convention's preamble that echoes the provision for children as contained in the UDHR.⁹ The UNCRC¹⁰ consists of 54 articles which spell out basic rights of all children which can generally be divided into four core principles.

The principle of Non-Discrimination

The first group of rights deals with the principle of non-discrimination of children on any ground.¹¹ According to this principle, children are generally protected from any form of discrimination such as race, ethnicity, colour, sex, language, religion or other opinion, disability, birth or other status. The Convention however does not specifically provide for non-discrimination of CVSA in the course of their testimony in court.

⁴ Preamble 8 of the UDHR which was adopted by the United Nations General Assembly Resolution 217A(III) of 10 December 1948.

⁵ The 1959 Declaration provided some rights such as respect and freedoms to children, laying emphasis on duties to children, without stating on whom the obligations to protect children lay.

⁶ The UNCRC. United Nations General Assembly Resolution-44/25 of 20th November 1989 which entered into force on the 2nd September 1990 and ratified by Kenya on the 30th, July 1990.

⁷ The ACRWC. OAU DOC.CAB/LEG/24.9 (1990) which entered into force on November 1999 and was ratified by Kenya on the 25th July 2000.

⁸ The UNCRC. United Nations General Assembly Resolution-44/25 of 20th November 1989 which entered into force on the 2nd September 1990 and ratified by Kenya on the 30th, July 1990.

⁹ Supra n 4 Article 1.

¹⁰ Supra n 9.

¹¹ Ibid, Articles 2 and 30.

This principle cannot therefore be applied to protect CVSA against discriminatory cross examination by accused persons or their advocates.

The principle of right to life, survival and development

The second category of rights concerns the principle of the right to life, survival and development¹². Under this group of rights, the state has an obligation to take appropriate measures to promote physical, psychological recovery and social integration of child victims of any form of abuse and exploitation generally. This principle indirectly implies that CVSAs need to be protected from the mental and emotional violence that they undergo while testifying in court, in particular during cross examination, by setting up child friendly court procedures through which CVSAs can testify. In later parts of this article, a review of Kenya's national laws on CSA reveals the extent to which Kenya, as a signatory of the UNCRC¹³ has complied with this obligation, specifically in respect to CVSA.

The principle of the right to express one's self in matters concerning them.

The third category of rights under the UNCRC¹⁴ recognizes children's right to express themselves in matters affecting them, and the need by any institution or body dealing with children to accord them such opportunity and take their views into consideration in making decisions that affect them¹⁵. The relevance of this provision is that it indirectly obligates the state to ensure that CVSA are provided with the opportunity to be heard during their testimony in court through child friendly procedures. The procedures should enable them to articulate their views, which need to be considered in deciding CSA cases. This provision also indirectly gives CVSA a chance to express themselves through an intermediary/ representative. The provision appears to contradict the rule against hearsay evidence under the Kenyan Evidence Act.¹⁶ A reading of both the Evidence Act¹⁷ and the UNCRC¹⁸ demonstrates that there is no contradiction, but simply an appreciation of the fact that children develop special needs, when they encounter the justice system, hence the importance of special protective measures such as provided by the UNCRC.¹⁹

The principle of the Best Interest of the Child

The fourth group of rights under the UNCRC falls under the principle of the best interest of children.²⁰ Article 3 provides that in all actions concerning children, whether undertaken by public or private, social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.

Part I of the Article states that in all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration. Part II of the Article provides that in all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.

According to this principle, in any case where an individual or an institution has to make a decision concerning a child; the paramount consideration is the best interest of the child. The decision made should therefore be in the best interest of the child considering all other factors. This is the most protective article to children in respect of any decision that has to be taken by anybody or authority affecting them. It particularly mentions the courts amongst other institutions, therefore obligating the courts when making decisions concerning children to have their best interests safeguarded and to give them an opportunity to present their views.

¹² Ibid. Articles 6 –right to life,23-rights of disabled child,24-right to health services,25-right to care, protection and treatment,26-right to social security benefits,27-right to adequate standard of living,39-right to physical, psychological recovery measures from abuse and neglect and social integration.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid. Article 12.

¹⁶ Section 124 of Cap 80 Laws of Kenya which provides that a court cannot admit evidence or testimony whose author is not present in court for the purpose of cross examination to test its truth.

¹⁷ Ibid.

¹⁸ Supra 9.

¹⁹ Ibid.

²⁰ Ibid. Articles 3,9,18 and 40.

The article further provides for children to speak through intermediaries, a relevant provision for CSA cases although indirectly. However, like the other rights already discussed under the three preceding groups of rights provide by the UNCRC²¹, the best interest principle is general to all children, with no specific reference to CVSA.

Specific provisions of UNCRC on CSA

The UNCRC does recognize the need to protect children from sexual abuse by obligating states to take appropriate measures to protect children from any form of exploitation, including sexual abuse.²² The only provision by the UNCRC that appears closer to being specific to CSA is the stipulation that children have a right to be protected by the state from all forms of sexual exploitation and sexual abuse.²³ This provision however concerns the measures that states should take so as to shield children from sexual abuse and exploitation. It does not address the court procedures under which CVSA testify in court once they are sexually abused.

At the international level therefore, the UNCRC²⁴ has declared general rights to children and obligations to states to take appropriate measures to protect them from any forms of abuse, but there exists a gap in the area of court procedures that children who are sexually abused testify under, leaving them exposed to the rigours of the adversarial court procedures. This is unlike children who are accused of having committed offences whose concerns are specifically addressed by the UNCRC.²⁵

III. REGIONAL FRAMEWORK ON CHILD SEXUAL ABUSE

At the regional level, there are two frameworks that protect children from abuse generally namely the African Charter on Human and Peoples Rights (ACHPR)²⁶, also known as the Banjul Charter and the African Charter on the Rights and Welfare of Children (ACRWC).²⁷ Both charters are specific to the situation of African children and the need to protect them while recognizing their peculiar socio-cultural and economic circumstances.

The African (Banjul) Charter on Human and People's Rights (ACHPR).

The ACHPR²⁸ was adopted by the African States of the Organization of African Union(now AU) on the 27th June, 1981 as OAU DOC. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), which entered into force on October 21, 1986. The main focus of the Charter is the achievement of better life for the people of Africa, by eradicating colonialism, all forms of discrimination and promoting freedom, equality, justice and dignity of Africans. The Banjul Charter was adopted by Kenya in 1981 and although it was concerned with better life for the people of Africa generally, it did not fail to recognize the vulnerability of children and the need to protect them.

Provisions relevant to CSA

The AU member states have an obligation under the ACHPR²⁹ to protect children as vulnerable members of African communities. This Charter provides for the promotion and protection of all people's rights in Africa including children, and therefore indirectly includes CVSA. It provides for equality and equal treatment before the law, upholding the essentials of justice and dignity for all people in Africa.³⁰ The relevant provisions of the Banjul Charter to CSA are discussed under the following themes:

The principle of Non-Discrimination

The Banjul Charter obligates states to ensure everyone is protected from discrimination of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social

²¹ Ibid

²² Ibid. Article 32.

²³ Ibid. Article 34.

²⁴ Ibid

²⁵ Ibid. Articles 37 and 40.

²⁶ OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force on October. 21, 1986.

²⁷ The ACRWC. OAU DOC.CAB/LEG/24.9 (1990) which entered into force on November 1999 and was ratified by Kenya on the 25th July 2000.

²⁸ OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force on October. 21, 1986.

²⁹ Ibid. Article 18.

³⁰ Ibid. Preamble.

origin, birth or other status³¹. CVSA are therefore indirectly protected from laws that discriminate against them by virtue of the fact that they are children. Subjecting children to cross examination and evidence- in- chief as well as re-examination in the same manner as adults discriminates against them since it fails to recognize their immaturity to respond to the criminal justice demands in the same way as adults. Under this article therefore, CVSA indirectly have a right to be protected from this form of discrimination, and obligates the state parties, Kenya included to protect CVSA by ensuring fair child friendly procedures when they testify in court.

The Banjul Charter further provides that every individual has a right to equal protection before the law.³² The expression every individual does not exclude children and so it can be indirectly argued that CVSA are entitled to equality in reference to procedures in court. Just like the accused person has safeguards under the right to a fair hearing, CVSA are equally entitled to fair court procedures which recognize their limitations and are therefore entitled to the same protection of the law as the accused persons.

The principle of right to life, survival and development

The Banjul Charter provides for the respect for life and the integrity of all peoples of Africa.³³ It further declares the right to respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment are prohibited.³⁴ The Banjul Charter goes on further to stipulate that every individual shall have the right to enjoy the best attainable state of physical and mental health and obligates the governments to take necessary steps in this respect.³⁵ Although the Banjul Charter's provisions are general to all humans, children are people and hence their right to respect and dignity while testifying in court in CSA cases can be implied. Further, the legal status of children generally can be interpreted in terms of the need for special protective procedures, in cases of CSA to ensure they attain the best physical and mental status as they testify about the abuse.

Principle of Right to be heard

While declaring and protecting accused's' right to a fair hearing, which includes the right to be presumed innocent until proved guilty by a competent court or tribunal, the right to defence, including the right to be defended by counsel of his choice and the right to be tried within a reasonable time by an impartial court or tribunal³⁶, the Banjul Charter reaffirms the constitutional safeguards³⁷ to accused persons, which leads to unequal protection of the law in cases of CSA.

Although these provisions safeguard the interests of accused persons, fairness and justice, according to justice theorists such as Rawl, Solm and Galligan, equal protection of the law demands that CVSA equally benefit from such safeguards if the law is to protect both the accused persons and the CVSA.

Principle of best interest of the child

This principle is not reflected in the provisions of the Banjul Charter, which however forms the basis of the ACRWC.³⁸

African Charter on the Rights and Welfare of Children (ACRWC).

This charter was adopted by the Organization of African Union Resolution known as OAU DOC.CAB/LEG/24.9 (1990) and entered into force on November 1999. Its aim was to give effect to the Banjul charter/ ACHPR³⁹ in respect of the welfare of children and it recognized the fact that although the UNCRC⁴⁰ provided for the rights and protection of children generally, there was need to specifically provide for the African child who lives under unique socio- economic, social or political circumstances.⁴¹ It was ratified by Kenya on the 25th July 2000.

³¹ Ibid. Article 2.

³² Ibid .Article 3 and 19.

³³ Ibid. Article 4.

³⁴ Ibid. Article 5.

³⁵ Ibid. Article 16.

³⁶ Ibid. Article 7

³⁷ Articles 48 and 50 of the Constitution of Kenya 2010.

³⁸ Supra n 7.

³⁹ Ibid.

⁴⁰ Supra n 9.

⁴¹ Ibid.

Specific articles of the ACRWC⁴² relevant to the study are discussed under the following principles:

Non-Discrimination

The ACRWC⁴³ protects all children generally from any form of discrimination. It particularly specifies the following discriminatory grounds; the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status. It is notable that the court procedures are neither mentioned nor is there a mention of CVSA in any way.

Right to life, survival and development

Apart from reinstating children's inherent right to life, survival and development, the ACRWC⁴⁴ obligates African states to protect these rights to the maximum extent. This provision is general and does not directly protect CVSA as they testify in court. However it can be argued that it indirectly protects CVSA from incidences that threaten their life, survival and development.

Right to express one's views and be heard

Freedom of expression as contained in the ACRWC⁴⁵ is general on children's need to air their views on matters affecting them, but is silent on court procedures and CVSA. However, it can be argued that the provision indirectly applies to CVSA as they testify in court.

The best interest of the child

The ACRWC⁴⁶ reaffirms the provision of the UNCRC⁴⁷ on the best interest of children.

Specific provisions of the ACRWC on CSA

States parties to the ACRWC⁴⁸ have an obligation to take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse. This article is concerned with preventive measures that protect children generally from abuse, including CSA.

Part 2 of the provision spells out the protective measures to be undertaken by the states to include effective procedures for the establishment of special monitoring units to provide necessary support for the child, and for those who have the care of the child, as well as other forms of prevention and for identification, reporting referral investigation, treatment, and follow-up of instances of child abuse and neglect. The article falls short of providing for friendly court procedures in CSA cases.

The ACRWC⁴⁹ obligates states parties to undertake to protect children from all forms of sexual exploitation and sexual abuse. Although this article talks about protection of children from engagement in **sexual activities** it does leave out those who have already been sexually abused and have gone to court to seek legal redress. It therefore does not directly obligate Kenya to ensure child friendly procedures in court. In concluding the discussion on both the international and regional frameworks on CVSA, the study finds that both the frameworks provide for substantive rights of children, but fail to provide procedural mechanisms for implementation.

IV. NATIONAL FRAMEWORK FOR CHILD SEXUAL ABUSE

Kenya not only ratified both the UNCRC⁵⁰ and the ACRWC,⁵¹ but domesticated them through the enactment of an enabling legislation, the Children Act.⁵² Further, the provisions of all the international convention have now generally been accepted, through practice, by states, as rules of customary international

⁴² Supra n 7.

⁴³ Ibid. Article 3.

⁴⁴ Ibid. Article 5.

⁴⁵ Ibid. Article 7

⁴⁶ Ibid. Article 4

⁴⁷ Supra n 6. Article 3.

⁴⁸ Supra n 7. Article 16.

⁴⁹ Ibid. Article 27

⁵⁰ Supra n 6.

⁵¹ Supra n 7.

⁵² Act No.8 of 2001.

law that are of persuasive authority. Kenya took another step by reaffirming this position and provides that the general rules of international law shall form part of Kenyan law.⁵³

This section analyses the domestic legislations relevant to CSA with a view to finding out the extent to which the domestic statutes measure up to the international and regional frameworks as regards CSA. The section begins with an analysis comparison of the provisions of the Constitution of Kenya 2010 on CSA. This is followed by a discussion of the Children Act.

The Constitution of Kenya

Whereas both the Repealed Constitution⁵⁴ and the Constitution of Kenya 2010 provides for the rights of accused persons to a fair trial, bail, presumption of innocence amongst other safeguards,⁵⁵ the Repealed Constitution failed to provide for the rights of children generally and subsequently, fair treatment of CVSA or any safeguards to that effect. The rights of the children generally were not entrenched in the constitution.⁵⁶ This was the first major gap in the failure by the criminal justice system (CJS) to respond adequately to the special needs of CVSA. The enactment of the Children Act without the necessary amendment to the Constitution did little to protect the rights of children generally, as held by the High Court in Civil Case No. 1351/02⁵⁷ where the court ruled that Sec. 24 (3) of the Children Act which provided for parental responsibility for children then within wedlock could not be interpreted as discriminating children born out of wedlock under the Repealed Constitution. The Constitution of Kenya 2010⁵⁸ recognizes the vulnerability of children generally and provides for their special protection by law, as well as reaffirming the best interest of children's principle⁵⁹ already discussed under both the international and regional frameworks.

Both the Repealed Constitution⁶⁰ and the Constitution of Kenya 2010⁶¹ protects everyone from discrimination on any ground including age. The three main components of this protection are the equal protection of the law to everyone, equality before the law and equal enjoyment of all rights and freedoms by everyone. Important as this constitutional protection is, it applies to everyone generally and does not specifically address the discriminatory adversarial court procedures in cases of CSA.

The Repealed Constitution was silent on the status of international law and its application in Kenya and any ratified convention had to be domesticated by an Act of Parliament to form part of Kenyan laws. However, the Constitution of Kenya 2010⁶² expressly provides that the general rules of international law shall form part of Kenyan law. My argument is that there are two interpretations to this provision. The first is what I call a strict interpretation which implies that any international law that is ratified by Kenya automatically becomes part of the Kenyan law and thus binds the state in its implementation and obligates it to apply its provisions. It is worth noting that the section uses the word **SHALL**. By implication therefore it can be argued that all the international laws that have been signed by Kenya are part of the laws of Kenya.

My second interpretation is a conservative approach/interpretation which means that although the ratified international law forms part of the laws of Kenya, there is need to domesticate the provisions of the international laws by passing an enabling legislation that conforms to the country's situation as far as the particular issues addressed by a particular international law are concerned. This study takes the first interpretation and therefore treats the international conventions pertaining to the rights of the child as part of the laws of Kenya with effect from the 27th of August 2010, the date of promulgation when the Constitution of Kenya 2010 took effect.

⁵³ Article 2(5) (6) of the Constitution of Kenya 2010.

⁵⁴ The Constitution of Kenya repealed through a referendum on the 4th August 2010 and subsequent Promulgation of the current Constitution of Kenya 2010 on the 27th August 2010.

⁵⁵ Section 77 of the Repealed Constitution and Article 50 of the Constitution of Kenya 2010.

⁵⁶ Ibid . Chapter V which provided for the Fundamental Rights and Freedoms of the Individual did not reflect children rights as contained in the UNCRC, the ACRWC, the ACHPR and the Children Act.

⁵⁷ R.M. (Suing thro' Next friend) J. K. CRADLE (The Children fund) Millie and Gao vs. The Attorney General.

⁵⁸ Chapter four-the Bill of Rights, Article 53 recognizes children as vulnerable members of society who require special protection by the law.

⁵⁹ Ibid. Article 53(2).

⁶⁰ Section 70 of the Repealed Constitution.

⁶¹ Article 27 of the Constitution of Kenya 2010.

⁶² Article 2(5) (6) of the Constitution of Kenya 2010.

The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. Whereas the Repealed Constitution addressed fundamental freedoms and rights under chapter V, it failed to provide for social justice and preservation of one's dignity,⁶³ which are addressed by the Constitution of Kenya 2010. This is specifically relevant to the study since the Bill of Rights indirectly recognize the need to protect CVSA and preserve their dignity as individuals and to promote social justice so as to enable them realize their full potential.

The process of testifying in court is meant to establish the guilt or otherwise of the accused person but it also has a component of making the CVSA feel that there is an institution where one can file a complaint if aggrieved, testify and feel that justice has been done to the victim of the crime, bringing back their lost dignity taken away as a result of the offence. In this respect therefore it would not be too much of an extrapolation to argue that the constitutional provision appears to provide for a situation where the court procedures with regard to CSA would not emphasize re-victimization of the CVSA but restoration of their dignity, hence promotion of social justice in the process, while enabling the CVSA to realize their full potential after the court testimony.

The Bill of Rights⁶⁴ provides that a court shall (a) develop the law to the extent that it does not give effect to a right or fundamental freedom and (b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom. The implication here for this study is that in situations that a right provided for under the Bill of Rights is not reflected in a piece of legislation then the court will interpret the law so as to give effect to that particular right or fundamental freedom.

The court is obliged to interpret the law in a way that advances the enforcement of a particular right or fundamental freedom. In this respect therefore, the study argues that the court should hold and preserve the dignity of the CVSA and conduct the court proceedings in a way that the CVSA receive justice and are assisted in the realization of their potential by not being re-victimized through the court procedures. By implication therefore, the children courts in observing article 20(3) of this constitution are obliged to ensure that the fundamental rights of the CVSA are upheld and in particular the CVSAs are protected from any discrimination while being accorded equal protection of the law as the accused person.⁶⁵

In the interpretation of the Bill of Rights, a court, tribunal or other authority shall promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom.⁶⁶ In this respect the children courts have a duty to conduct trials of CSA cases in a manner that upholds the African societal values that protect children and respect their dignity and privacy. Likewise, the courts are obliged to ensure that CVSAs are treated with dignity, equality and equity as they testify in CSA cases before the court.

All state organs and all public officers have the duty to address the needs of vulnerable groups within society including children as provided by the Bill of Rights.⁶⁷ The CVSA thus being vulnerable have a right, the duty of which is of the state to ensure that their needs are addressed. This study focuses on the special needs of the CVSAs as they testify in court.

The state is obligated to enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms.⁶⁸ To this extent, Kenya enacted the Children Act 2001 which domesticated the provisions of the United Nations Convention on the Rights of the Child and the ACRWC as per the requirements of this provision.

The Constitution of Kenya 2010⁶⁹ provides that everyone has a right not to be subjected to any form of violence from either public or private sources whether psychological or physical. The adversarial court procedures are traumatizing and cause psychological violence on the CVSA. The state thus has a duty to ensure that necessary legislative, policy and administrative reforms are undertaken to address the issue. The

⁶³ Articles 19(2) and Article 28 of the Constitution of Kenya 2010.

⁶⁴ Ibid. Article 20(3).

⁶⁵ Ibid.

⁶⁶ Ibid. Article 20(4).

⁶⁷ Ibid. Article 21(3).

⁶⁸ Ibid. Article 21(4).

⁶⁹ Article 29(d) of the Constitution of Kenya 2010.

Constitution of Kenya 2010⁷⁰ provides for the right to access to information held by another person and required for the exercise or protection of any right or fundamental freedom. This should be interpreted to mean that the CVSA is entitled to know their rights in a CSA trial.

The accused person has a right to remain silent throughout the trial and it is a duty of the prosecution and the complainant to present to court all material evidence that may assist in arriving at the truth.⁷¹ Granted that the law assumes the accused person to be innocent until proven guilty,⁷² in matters of CSA the burden of proof beyond reasonable doubt appears to be too high considering the fact that CSA abuse occurs within the confines of private place or institution or by somebody who has power and authority over the CVSA. In cases of CSA therefore, at the crime scene are more often than not only the accused and the CVSA. To require the CVSA to prove the facts of that case beyond reasonable doubt and allow the accused person to remain silent throughout the case defeats the whole purpose of protecting the CVSA as a vulnerable group as per article 21(3) and article 27 of the Constitution of Kenya that provides for equal protection of the law to everybody.

Probably in cases of CSA, because of the peculiar circumstances, the accused person being in possession of material facts of the abuse should be made responsible for ensuring that the court is informed of such information for the purposes of the trial. Further, in cases where the children are 14 years or below, the accused person should be held accountable to the court for information about his/her conduct as at the time of the offence. The accused person's right to silence should be qualified in cases of CSA if the law is to protect both CVSA and accused.

The Constitution of Kenya 2010⁷³ provides for the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The emphasis is procedural fairness which is vital in cases of CSA.

The Constitution of Kenya 2010⁷⁴ provides for access to justice for all persons and if any fee is required, it shall be reasonable and shall not impeded access to justice. CVSA's access to justice from the courts has been hindered by many factors such as lack of legal representation, court language and many others. The state is under an obligation to ensure all such barriers are removed so as to allow the CVSAs access justice. Justice here may be seen as an elusive concept but should be interpreted to benefit both the CVSA and the accused.

In concluding the comparison between the Repealed Constitution and the Constitution of Kenya 2010, it is clear that the former never provided for child rights and protection while the latter has included the Bill of Rights which protects everyone including children who are categorized as vulnerable and in need of special protection.⁷⁵ It has further incorporated the principle of the best interest of children⁷⁶ and obligated the state to take administrative, policy and legislative measures to implement the rights and freedoms therein including addressing the needs of the vulnerable.⁷⁷ In this respect, the Constitution of Kenya 2010 provides the constitutional framework for protecting CVSA while they testify in CSA cases.

The Children Act cap 586 of the laws of Kenya

This is an Act of Parliament that provides for the rights and protection of children, while giving effect to the provisions of both the international and regional frameworks. Highlights of the Act include provision for parental responsibility, foster care, adoption, custody, maintenance, guardianship, care and protection of children, administration of children's institutions including the children courts and state responsibilities towards the implementation of children rights.

Prior to the year 2001, there existed many statutes on different aspects of children issues and this presented difficulties in attempts to protect children generally. Enacted in 2001, the Children Act is a domestication of both the UNCRC and the ACRWC. It specifically provides for the rights and safeguards of all

⁷⁰ Ibid. Article 35(1).

⁷¹ Ibid. Articles 50(2)(i) and 49(1)(a)(ii).

⁷² Ibid.

⁷³ Ibid. Article 47(1).

⁷⁴ Ibid. Article 48.

⁷⁵ Ibid Article 21(3).

⁷⁶ Ibid Article 53(2).

⁷⁷ Ibid. Article 21(3).

children and echoes the provisions of the UNCRC, the ACRWC and the Constitution of Kenya 2010 on the four principles of best interest of children,⁷⁸ non-discrimination⁷⁹ and right of a child to express their views and be heard and the right to life,⁸⁰ survival and development.⁸¹ Section 4 of the Children Act is therefore the statutory framework for passing child friendly procedures to protect CVSA as they testify in court.

The state owes children a duty to take steps towards the full realization of the children's rights.⁸² The courts are obligated to consider the best interest of the children, give them an opportunity to express their views and take the same into consideration in making decisions, and to have the interest of children as the first and paramount consideration.

The government has a duty to protect all children from sexual exploitation⁸³ and CVSA are categorized as children in need of special care and protection (CNSCP).⁸⁴

The Children Act further establishes children courts to be presided over by magistrates specially appointed by gazetement to handle children cases.⁸⁵ It further stipulates that the children courts' sittings are to be in a different building or conducted at different times from other ordinary courts and gives the court power to clear the court of any person without a direct interest in the case.⁸⁶ This provision protects the dignity and privacy of the children as they appear in court. In this respect, children court proceedings can be held in the privacy of the magistrate's chamber, and where the court thinks appropriate, **may** order that a child be provided with legal representation at the expense of the government.⁸⁷ The Children Act⁸⁸ contains child friendly provisions that can be used to protect CVSA as they testify, although it fails to provide for specific/special procedures in CSA cases leaving the prosecution of CSA cases to be bound by the Criminal Procedure Code.

VI. CONCLUSION

The article concludes that Kenya has achieved a lot in the substantive rights that protect children by domesticating the UNCRC and the ACRWC. However, the protection of CVSA is hindered by the lack of procedural laws that are child victim friendly. This article recommends the enactment of child friendly procedural laws to protect CVSA.

REFERENCES

- [1]. The Constitution of Kenya 2010.
- [2]. The Repealed Constitution of Kenya.
- [3]. Preamble 8 of the UDHR which was adopted by the United Nations General Assembly Resolution 217A(III) of 10 December 1948.
- [4]. The UNCRC. United Nations General Assembly Resolution-44/25 of 20th November 1989 which entered into force on the 2nd September 1990 and ratified by Kenya on the 30th, July 1990.
- [5]. The ACRWC. OAU DOC.CAB/LEG/24.9 (1990) which entered into force on November 1999 and was ratified by Kenya on the 25th July 2000.
- [6]. The UNCRC. United Nations General Assembly Resolution-44/25 of 20th November 1989 which entered into force on the 2nd September 1990 and ratified by Kenya on the 30th, July 1990.
- [7]. OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force on October. 21, 1986.
- [8]. The ACRWC. OAU DOC.CAB/LEG/24.9 (1990) which entered into force on November 1999 and was ratified by Kenya on the 25th July 2000.

⁷⁸ *Supra* n 52 Section 4(2).

⁷⁹ *Ibid*, Section 5.

⁸⁰ *Ibid*, Section 4 (4).

⁸¹ *Ibid* .Section 4(1).

⁸² *Ibid*. Section 3.

⁸³ *Ibid* ,Section 15.

⁸⁴ *Ibid* Section 119.

⁸⁵ *Ibid*.Section 73.

⁸⁶ *Ibid* Section 74

⁸⁷ *Ibid*. Section 77.

⁸⁸ *Ibid*.