

Challenges Facing Criminal Justice System in Relation to Witness Protection in Kenya

Wilson Kiprono¹, Kibet Ngetich², Wokabi Mwangi³

^{1,2,3}Department of Peace, Security and Social Studies, Egerton University, Kenya

Abstract: Criminal activities that have a profound impact on human security and development, such as corruption, drug trafficking, serious and organized crime, human rights violations and terrorism. Consequently, the ability the criminal justice systems to investigate and prosecute such forms of serious crimes are often very limited. One of the challenges for many is in obtaining the cooperation of victims and witnesses and witness protection in order to obtain important information and evidence about such criminal matters. This paper examines the critical challenges facing the criminal justice system, particularly socio-cultural and legal challenges in relation to witness protection in Kenya. It further examines witness Assistance and Support, Witness Security and analysis of existing legal framework. The study recommends the development of appropriate measures including training of police on procedural protection measures, strengthening legislative framework to enhance witness assistance, support and security and guaranteeing of human rights, increasing of financial support to the witness protection programme and establishment of community of witness protection authorities as a close group and provision of expertise and other support.

Keywords: Witness protection, criminal justice system, socio-cultural and economic challenges.

I. Background

In Kenya it's common that hundreds of other perpetrators of serious crimes continue to evade accountability. A few have been convicted for serious crimes. A report prepared by the Department of Public Prosecutions in March 2011 claimed that 94 post-election cases had resulted in convictions. But he study found that only a small percentage of those convictions were for serious crimes that were actually related to the election violence, including two for murder, three for "robbery with violence" (one of the most serious crimes under Kenya's penal code, which can encompass robberies resulting in the death of the victim), one for assault, and one for grievous harm. The limited success of cases in the ordinary courts shows that Kenyan authorities have been unwilling or unable to effectively prosecute post-election violence. Lack of political will to address witness protection has seen crime and violence increase. This is further demonstrated by government failure to adequately compensate victims. When courts awarded them compensation, the government failed to pay up Kenya's police and judicial sectors should also learn from the past and make necessary reforms. Numerous nongovernmental organizations (NGOs) and independent commissions have recommended reforms that are now commonly agreed upon as necessary. Among those that appear most urgent in light of failed witness protection and prosecution of crime perpetrators. The study concludes by recommending need to address social and legal challenges in witness protection, improving police investigations capacity; replacing police prosecutors with legal professionals and vetting police which are both ongoing among other legal bottlenecks essential for addressing witness protection in the current judicial system. Witness protection may be as simple as providing a police escort to the courtroom, offering temporary residence in a safe house or using modern communications technology (such as videoconferencing) for testimony. There are other cases, though, where cooperation by a witness is critical to successful prosecution but the reach and strength of the threatening criminal group is so powerful that extraordinary measures are required to ensure the witness's safety. In such cases, resettlement of the witness under a new identity in a new, undisclosed place of residence in the same country or even abroad may be the only viable alternative (United Nations Office on Drugs and Crime, 2008).

Initially, the primary objective of witness protection was to protect the physical security of witnesses for the purpose of securing their testimony in a criminal justice process. However, as protective practice has developed, improving witness-related conduct throughout the justice system has become important because of the need to achieve witness cooperation at each phase of the justice process. Psychological, health and socioeconomic considerations have taken on a more prominent role in the engagement and protection of witnesses prior to, during and after testimony (Lyon, 2007).

II. Problem

People who witness crime, corruption and human rights abuses play a crucial role in law enforcement efforts to bring the perpetrators to justice. Often, however, challenges such as capacity gaps affects effective use

of witnesses. The broad objective of the study was to investigate the capacity gaps in the implementation of witness protection program in Kenya and the underlying causes. The study sought to establish socio-cultural and economic challenges facing in the witness protection program in Kenya; to examine the level of financial investment by the National government to the witness protection program and to investigate the level of technological capacity in witness protection program in Kenya. The definition of “witness” may differ according to the legal system under review. For protection purposes, it is the function of the witness – as a person in possession of information important to the judicial or criminal proceedings – that is relevant rather than his or her status or the form of testimony. With regard to the procedural moment at which a person is considered to be a witness, the judge or prosecutor does not need to formally declare such status in order for protection measures to apply. Witnesses can be classified into three main categories: justice collaborators; victim-witnesses; and other types of witness (innocent bystanders, expert witnesses and others) (UNODC, 2008).

III. Methodology

The study was carried out at the judicial and legal institutions within in Kenya. The study focussed on the following institutions or departments: the Attorney General office, the Law Society of Kenya, The Directorate of Public Prosecution, the Kenya Police, The Ministry of Gender (Children’s Department), Directorate of Witness Protection Agency, the Children’s Court, and the representatives from the National Assembly. Secondary data was collected from case related legislative provisions and reports from national and international agencies advocating for human rights. The study considered this scope to be sufficient because most of these institutions have their headquarters within the Nairobi region, the offices in the region handle are highly influential on matters of policy formulations and implementation, and they handle the highest number of cases relating to participation of children in criminal proceedings.

IV. Discussion

The protection of witnesses is based on three building blocks complimenting and supporting each other with the most complete system being a mixture of all three disciplines Witness protection thus refers to a range of methods and measures that can be applied at all stages of the criminal proceedings to ensure the safety and security of witnesses in order to ensure their cooperation and testimony. The measures taken should be proportional to the threat and of limited duration. It should be noted that protection of any form should never provide a motivation to testify but merely remove or counter the witness’ view that he or she is in danger if he/she cooperates. Moreover, no person should ever be forced to accept protection measures. Consent should always be given by a witness. As a practical matter, unless you have a willing witness, witness security will in any case be a waste of resources.

The process of investigating and prosecuting offenses, grave or not, depends largely on the information and testimony of witnesses. In this regard, witnesses are the cornerstones of successful national criminal justice systems. Prosecutors depend upon witnesses who are reliable- whose testimony can be accepted as truthful, accurate and complete. The recall of witnesses and their ability to relate relevant information may be affected by many factors, including age (such as for both child and elderly witnesses), intellectual or physical impairment, language, by their relation with the offender or involvement in the case or offence or due to trauma they have suffered as a victim. In addition, the needs and rights, where appropriate, of victims should always be addressed to ensure that they are treated with care and respect and are not further victimized. Therefore it is good practice for criminal justice systems to provide assistance and support measures to victims and other witnesses in order to facilitate their ability to participate in the criminal justice system and to give the kind testimony that is required for the maintenance of the rule of law.

V. Recent Amendments to the Penal Code

Article 19 is deeply concerned by the security laws (Amendment) Bill 2014 and contains 90m pages, 109 provisions and amends no less than 21 Acts of Parliament.

Section 42 of the National Intelligence Services Act would effectively give carte blanche to the Director General to order mass surveillance of online communications for the purpose of National security. This is all the more concerning given that there are no safeguards against indiscriminate surveillance. In the absence of any procedural safeguards, the authorities are effectively granted an unfettered power in breach of the legality requirement under International Law. This has already been effected in the recent charging of a middle-aged man who posted abusive messages directed at the president on the social platform of Facebook and was handed a 2 years jail term. Another recent case involves a member of parliament who was charged for sending sexually suggestive messages to a colleague.

Section 72 introduces a new section 9A in the Prevention and Terrorism Act, which criminalizes anyone who ‘advocates, glorifies, advises, indicates or facilitates’ the commission of a terrorist act and the

offence is punishable by a term not exceeding 20 years. It is equally unclear what 'advice' regarding terrorists act may entail. Other amendments include radicalization, publication of offending material, prohibition from broadcasting, insulting modesty by intruding privacy or stripping, public order etc.

VI. The Criminal Procedure Code

The criminal procedure code states that suspects should be arraigned in court within 24 hours from the time of their arrest. This has been a major hindrance to the police because there is insufficient time available to conduct proper investigations that can secure a conviction.

The right of bail has offered a leeway to serious offenders to jump bail and disappear thereby denying the afflicted parties justice as arrest warrants issued by the court after an accused jumps bail are rarely effected. The right on acquisition of search and arrest warrants has on the other hand enabled flight and loss of valuable evidence since acquisition of the same cannot be procured without a considerable amount of delay.

The Evidence Act No.5 of 2003

The Evidence act changed the laws on admissibility of confession by inserting section 25 where it is stipulated that a confession or admission of a fact tending to the proof of a guilt made by an accused person is not admissible unless it is made in court.

Requirement that confessions may be made before magistrates does not seem to have been properly thought as various issues may arise.

Section 65 of the Evidence Act is not very clear. Moreover, it is silent on evidence of video/CCTV recording. Confession or admission has to be made in court otherwise it will be inadmissible. This becomes a challenge when accused persons deny having committed to a fact.

The Children Act of 2001

Although death is a mandatory sentence for the offence of Murder, Section 109(2) prohibits death penalty for persons less than 18 years. For other offences, it must be proved to the court that the offender is under the age of 18 years so that the court can pass appropriate sentence. This is hampered as the court will only rely on the evidence tabled before it in regard to the offender's age, which can be easily subjected to manipulation.

Where there is no birth certificate to prove the age of the offender, the offender will be produced before a dentist for examination where age will be determined through examination of the teeth and this is an inaccurate method of determining age bearing to the fact that it's the age that will determine the kind of sentence that court will pass.

Also Rule 12(3) stipulates 6 months as the maximum period of remanding a child after which the child shall be released on bail. The provision creates a legal challenge in view of section 72(5) of the constitution, which forbids bail to persons charged with offences punishable by death.

VII. The Anti-Corruption and Economic Crimes Act No.3 Of 2003

The Act has created a category of magistrates called Special Magistrates and they have three unique powers, which other magistrates don't have. They are considered as a person and not an institution as envisaged by section 65(1) and 77(1) of the constitution.

They are a creation of an Act of Parliament and are empowered to try cases under the Act besides powers to pardon any person with a view of obtaining a "Full and True" disclosure of circumstances within his knowledge relating to an offence. This can be seen to relegate the court to the post of investigation.

Social Challenges

Long custody of offenders itself is a social problem, more so when the offenders are women and also children as the law stipulates that they should not be remanded for more than 6 months. It is even worse when the offenders appear to be refugees and have to be repatriated back to their country of origin.

Other challenges include the prosecution of persons with a high status in the society. Though they are not above the law, they are most likely to make the law work in their favour. This has been exhibited in the recent number of cases that have been withdrawn concerning corruption and abuse of office involving senators, governors, members of parliament, and cabinet secretaries among others. Not even one of the previously aforementioned persons in the list has 'successfully' undergone the whole criminal justice procedure.

VIII. Appraisal of Witness Protection in Kenya

The successful prosecution of crimes largely depends on securing reliable evidence, including the testimony of witnesses. When witnesses withdraw from proceedings due to intimidation or actual harm,

securing convictions often becomes impossible. For this reason, the protection of witnesses remains a cornerstone to an effective criminal justice system.

In Kenya, witness protection is often sorely lacking, and progress towards formalised and functioning witness protection services has been slow. Challenges include statutory frameworks and policies that are weak or non-existent, under-investment in witness protection services, and the scarcity of relevant knowledge and skills among policymakers and law enforcement agencies. Among citizens, awareness of these issues also remains limited. These circumstances make it difficult to envisage how the rule of law may become a reality for African citizens.

Witness protection refers to a range of measures, which can be applied at any stage of criminal proceedings, to ensure the safety of witnesses to gain their cooperation in providing testimony. This includes concealing the identity of witnesses through the use of image and voice distortion, video-conferencing and pseudonyms while giving testimony, and anonymous testimony.

Other measures relate to the physical protection of witnesses or members of their families. This may include their temporary or permanent relocation, changing their identity, and – in extreme circumstances – cosmetic surgery to alter their physical appearance. The covert nature of witness protection is paramount in encouraging witnesses to come forward.

Complex crimes are constantly evolving, presenting new and varied challenges to criminal justice systems. These crimes include organised crime, money laundering, terrorism, international crimes (genocide, crimes against humanity and war crimes) and cybercrime. Guaranteeing the protection of crucial witnesses in such crimes gives courts the opportunity to listen to their testimony and evaluate the evidence. This is especially true in cases involving powerful individuals with links to influential networks and institutions.

Witnesses face many risks. Recently, potential witnesses to international crimes committed in Kenya during the 2007/8 post-election violence were reportedly threatened. This development led to some witnesses allegedly disappearing or withdrawing their statements.

Witness protection services can be central to the conviction of serious offenders. For example in 2013, the leader of the Movement for the Emancipation of the Niger Delta (MEND), Henry Okah, was convicted of terrorism-related offences committed in Nigeria and sentenced to a 24-year prison term. This was based on the testimony of witnesses from Nigeria. The South African Witness Protection Programme accorded protection for the witnesses from Nigeria, who were able to travel to South Africa and testified in a South African court without interference.

The importance of witness protection is recognised through various legal regimes, policies and declarations. For example, both the United Nations (UN) Convention against Corruption, and the UN Convention against Transnational Organized Crime (UNTOC) and its protocols call upon states parties to provide protection and support of witnesses and victims. The UNTOC also calls upon each state party to provide ‘effective protection from potential retaliation or intimidation for witnesses and experts who give testimony.’

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the UN General Assembly in 1985, and the UN Economic and Social Council Resolution 2005/20, also include provisions for witness protection. Similarly, international criminal tribunals and special courts also have provisions geared towards the protection of witnesses. These include the ICC, the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Courts of Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC).

In Africa, the importance of effective witness protection in the prosecution of international crimes has also been asserted through the recently amended Statute of the African Court of Justice and Human Rights, and the African Union (AU) Draft Model National Law on Universal Jurisdiction over International Crimes. The Africa Prosecutors’ Association, through its various declarations, also seeks to promote effective witness protection in Africa.

At the national level, however, formalised witness protection in Africa is not well developed. In 1998, South Africa became the first African country to promulgate a comprehensive witness protection law. Kenya also took this important step and amended the Witness Protection Act of 2006, and now has an amended Witness Protection Act, 2010, thereby enacting witness protection legislation that, among other things, establishes a dedicated and independent witness protection agency. Ethiopia, Rwanda, Morocco and Mozambique also have witness protection laws. Other countries such as Namibia, Nigeria and Uganda have developed draft laws.

There is little research on witness protection in Africa. In 2010, the Institute for Security Studies published a book entitled *The Justice Sector Afterthought: Witness Protection in Africa*. This publication captured developments on witness protection and recognised the need to develop these services further. The UN Office on Drugs and Crime (UNODC) has also published important comprehensive materials to support witness protection. The UNODC recommends minimum requirements for protection of witnesses including legislation,

protection measures to be used, application and admission criteria and procedures, termination criteria, confidentiality of its operations and penalties for disclosure.

Witness protection is administratively complex and expensive. It needs to include physical protection, provision for daily living requirements of witnesses (and, in many cases, their families), ensuring that witnesses abide by the set rules to protect their safety, guarding against interference by authorities and others, and ensuring that the custodians of the operations are trustworthy.

New challenges emerge daily; including the possible exposure of witnesses based on the Internet and new information communication systems. It has become easier to establish locality of any person through various new technologies, and social media sites such as Facebook can be an extensive source of personal information.

Much still has to be done to advance research, training and legislation to inform and support the protection of witnesses. Once witnesses are afforded effective protection, their testimony could lead to the proper carriage of justice and the conviction of individuals – even those who are high profile. In this way, effective witness protection will promote the administration of justice, strengthen the rule of law and build the credibility of criminal justice systems. At the end of the day, if there is no witness, there is no case.

IX. Recommendations

From the foregoing, the study makes the following recommendations;

There is need to address the inherent socio-cultural issues affecting witness protection, assistance and security which has been characterized by ethnic undertones, nepotism and blatant absence of security for the witnesses. The programme requires enhancement of protection measures and even establish dedicated witness protection trajectories.

Kenya can begin to gain experience by using police and procedural protection measures. These measures when applied appropriately by trained personnel can provide adequate protection for the vast majority of witnesses in need, keeping in mind that protection measures are just one of other important tools that must be collectively and effectively applied.

The legislative framework should be enhanced and be alive to strengthening of measures, establish an interagency task force that can educate itself on what is wrong and what could be improved. This should ideally embrace officials of relevant law enforcement and judicial authorities, including prison authorities, other governmental agencies, persons responsible for legislative drafting and policymaking, authorities, and NGOs, academics institutions or civil society institutions in order that they will understand and support any required changes.

The study further suggests the serious need to prioritize the kind of cases the protection programme be used for as well as to properly and effectively use threat assessments. All actors involved in this process should be clear about what a witness protection programme is intended to provide and why.

With respect to funding, it is difficult in the beginning to predict costs as there is a cumulative effect for each witness; moreover extended families will quickly drain resources. A safe rule to go by is to expect the unexpected by ensuring there is some reserve funding in case of emergencies. At the same time, protection programmes need to progressively build cooperation with other counties. This too takes time because cooperation in this area requires the trust and confidence of potential partners for the relocation of witnesses. Finally, due to its nature, the community of witness protection authorities is a close group and most are willing to provide expertise and other support to developing programmes, this should be tapped to alleviate challenges in witness protection in Kenya.

References

- [1]. Ceci, S. J., & Bruck, M. (1995). *Jeopardy in the courtroom: A scientific analysis of children's testimony*. Washington, DC: American Psychological Association
- [2]. Fyfe N., & Sheptycki J., (2006) "International trends in the facilitation of witness co-operation in organized crime cases", *European Journal of Criminology*, vol. 3, No. 3, pp. 347–349.
- [3]. Hancock, B., (2002) *Trent Focus for Research and Development in Primary Health Care: An Introduction to Qualitative Research*. University of Nottingham Division of General Practice: Trent Focus.
- [4]. Kothari, C.R., (2008) *Research Methodology. Methods and Techniques*. Second Revised Edition. New Age International Press Limited, New Delhi, India
- [5]. Lyon, T. D. (2007). "False denials: Overcoming methodological biases in abuse disclosure research". In M. E. Pipe, M. E. Lamb, Y. Orbach, & A. C. Cederborg (Eds.), *Child sexual abuse: Disclosure, delay and denial* (pp. 41–62). Mahwah, New Jersey: Lawrence Erlbaum Associates.
- [6]. Schutt, R., (1996) *Investigating the Social World*; Thousand Oaks, CA: Pine Forge.
- [7]. United Nations Office on Drugs and Crime [UNODC] (2008) *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime*; UN: Vienna
- [8]. United States Department of Justice (2006) "U.S. Marshals Service talks WitSec to the world", *America's Star: FYi*, vol. 1, No. 1 (August 2006), available at http://www.usdoj.gov/marshals/witsec/americas_star.pdf.
- [9]. Wilson Kiprono, Wokabi Mwangi, and Kibet Ngetich, "Gaps Influencing Implementation of the Witness Protection System in Kenya," *International Journal of Innovation and Scientific Research*, vol. 17, no. 1, pp. 8–13, August 2015.