

**A CRITIQUE OF THE VICTIM PROTECTION ACT, 2014 FROM THE POINT OF VIEW
OF WOMEN AS VICTIMS OF CRIME**

**Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School**

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DECLARATION

I, **CHEROTICH VIOLA ANNE**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: *Cherotich*

Date: *14th. May. 2017.*

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: *David Sperling* *14/05/17*

Professor David Sperling

DEDICATION

To God for His unwavering grace and to my father who has facilitated my progress thus far at the Law School. Also to all the women out there who are unaware that according to modern legal norms, theirs is a 'victim of crime' status waiting to be redressed.

ACKNOWLEDGMENT

It is with utmost humility that I express my gratitude to my supervisor, Prof. David Sperling, who has been instrumental in guiding me throughout the research period and for sharing his wisdom with me.

Many thanks to my family for believing in me not only in this project period but all through my life.

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CHAPTER ONE: INTRODUCTION

1.1 Background to the Study

Women in African societies have always been “victims” of their own societies with lower status and fewer rights than their male counterparts. They have been considered inferior to men, with the consequence that power, prestige and property are unequally distributed on the basis of gender. Regarding crimes and abuses against women in more modern times, accessing justice has often been futile owing to ridicule, discrimination, victimization and fear. All this is as a result of discriminatory laws as well as customary beliefs and practices.

With the adoption of the new Kenya Constitution (2010) recognition of women’s rights and legal status are as good as they have ever been. On paper the Constitution emancipates the women of Kenya from much of the bias of a traditionally patriarchal society. For example, Article 2(5) states: “The general rules of international law shall form part of the law of Kenya” and Article 2(6) states, “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.” This Article is a great legal step forward as it means that international statutes such as the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), the United Nations Declaration on the Elimination of Violence against Women and the Victims Declaration now form part of the laws of Kenya.

In this vein, we should note that the legal protection of women victims in Kenya can also be viewed within the context of international concern for the enforcement of the rights of all victims of crime, not just women victims. Recently, victims of crime protection schemes have been receiving attention with emphasis on allowing victims to participate actively in the justice system as opposed to just testifying as witnesses in court. As the Redress Trust has pointed out there has been a shift from most common jurisdictions whose stand was *that the addition of a third ‘party’ would disrupt the balance of the criminal process, which is traditionally a contest between prosecution and defence, and that it would considerably delay proceedings, thereby jeopardising the right of the accused to a fair trial.*¹ Previously, according to the International Federation for Human Rights, victims usually had no legal status because they were not considered parties to legal proceedings.²

Couillard (2007) points out that we need to acknowledge the rights of victims of human rights violations, especially women victims of the 2007 post-election violence in Kenya. He argues that women ought to participate in the reparation process in a way that respects their dignity and privacy.³

¹ The Redress Trust, *Victims rights before the ICC*, London, 2008, 10.

² The Redress Trust, *Victims rights before the ICC*, London, 2008, 10.

³ Couillard V, ‘The Nairobi Declaration: Redefining reparations for women victims of sexual violence’ *The International Journal of Transitional Justice*, (2007), 7.

O'Connell (2015) notes that international charters and conventions are intended to minimise secondary victimisation and address victims' rights.⁴

Article 30 of the *Protocol to the African Charter on Human and Peoples' Rights* illustrates how international courts can play a vital role in strengthening and enforcing victims' rights; an example of such a court is the African Human Rights Court (AHRC) whose decisions are legally binding on matters referred to it by individuals or Non-Governmental Organisations (NGOs).⁵

On the same note, the Rules of Procedure (RPE) of both the International Criminal Tribunals of Rwanda and the Former Yugoslavia allow judges to receive witness statements, or at least a summary of their evidence, which enables them to intervene more effectively to seek the views of victims.⁶

Moreover, the Kenya Constitution embodies the rights of women in Chapter 4, The Bill of Rights. Article 21 (3) states: "All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women...." Article 25(c) makes "the right to a fair trial" an absolute right that cannot be limited by law. Additionally, article 27(1) provides that "Every person is equal before the law and has the right to equal protection and equal benefit before the law" and Article 27(4) provides that "The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status etc."

In addition, women victims now have recourse to the Victim Protection Act 2014 to seek redress. This Act was established following Article 50(9) of the Constitution which states, "Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences." The Victim Protection Act 2014 aims to recognize the rights of victims of crime, to protect their dignity by taking measures such as provision of better information, to support services, reparations and compensation from the offender, to establish programs to assist vulnerable victims, to prevent victimisation at all levels of government and to promote cooperation between all government departments and other organisations and agencies involved in working with victims of crime.

⁴ O'Connell M, 'Victims Rights: Integrating victims in criminal proceedings', *Commissioner for Victims' Rights*, (2015), 3.

⁵ Article 5 (3), *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights*.

⁶ Zappala S, *Human Rights in International Criminal Proceedings*, Oxford University Press, 2005, 222.

1.2 Statement of the Problem

With all these legal and constitutional guarantees protecting the woman, why does the scourge of discrimination and unfair treatment of women still persist in Kenya? Women seeking redress in the criminal justice system continue to be subjected to discriminatory laws and treatment. Psychological intimidation prevents women from enjoying their fundamental rights. Their access to justice is often blocked by lack of financial resources, fear, corruption, language barrier and the discriminatory practices of police and/or judicial personnel.⁷ Culture seems to supersede legislation and legal rights, thus making the women who are victims of crime unable to access justice. It is not clear whether the Victim Protection Act 2014 has begun to make a difference and whether it can become a strong legal instrument of the criminal justice system for the protection of women in Kenya.

1.3 Research Objectives

- i. To investigate the effectiveness of the Victim Protection Act 2014 in guaranteeing access to justice for women victims of crime;
- ii. To find out whether women are aware of their legal rights under the Victim Protection Act 2014 and, if not, what is preventing this;
- iii. To recommend possible amendments to the Victim Protection Act 2014 that could improve legal redress for women victims of crime.

1.4 Research Questions

- i. Has the Victim Protection Act 2014 made a positive difference to the administration of justice for women who are crime victims in Kenya? If so, exactly what difference has the Act made? And what are the obstacles and constraints that are preventing the Victim Protection Act from being more effective?
- ii. Are women in Kenya fully aware of their rights as victims of crime under the Victim Protection Act 2014? If not, how can they be made more aware of these rights?
- iii. In what ways might the Victim Protection Act 2014 be amended so as to be more effective in guaranteeing justice for women who are victims of crime?

1.5 Justification of the Study

The enactment of the Victim Protection Act 2014 follows a long history of injustice. There are indications, however, that the Act may not be having its intended purpose of mitigating the situation faced by women victims of crime.

⁷ United Nations Office on Drugs and Crime. *Gender in the criminal Justice system: criminal justice assessment toolkit*, 2010, 2.

The fact that some crimes continue to go unreported by women 'victims' owing to the prevailing culture is a setback to justice. The very unawareness of a woman of her status as a victim compounds what is already a bad situation. The government and other legal organizations do not seem to be taking steps towards ensuring justice, reparation and compensation for women victims of crime without favor or bias. The various causes of these circumstances are not clear. A study of the ways in which the Victim Protection Act 2014 has, or has not, impacted the legal status of women victims of crime will help to identify avenues for improving its implementation and possibly even reforming certain parts of the Act.

1.6 Hypotheses

- i. That the Victim Protection Act 2014 is being implemented adequately and effectively in such a way as to ensure access to justice for women victims of crime;
- ii. That the Victim Protection Act 2014 conforms to and incorporates many aspects of international victim protection law;
- iii. That women in Kenya are quite ignorant of the Victim Protection Act 2014 and of the procedures of the criminal justice system in general;
- iv. That the Victim Protection Act 2014 can be amended to provide women victims of crime with stronger legal guarantees of justice.

1.7 Limitations

The cultural (patriarchal) mentality of Kenyans inhibited the process of acquiring information on the subject matter. Working on the assumption that crimes against women by men is intentional and the resistance to change, which makes women be tolerant to violence, might make potential interviewees unwilling to respond.

1.8 Chapter Summary

This chapter introduces the subject matter of the research citing the objectives, hypotheses and justifications of the study. It gives a background intended to show the status of women victim of crimes' protection by laws in the criminal justice process.

CHAPTER TWO: THEORETICAL AND CONCEPTUAL FRAMEWORK AND RESEARCH METHODOLOGY

Introduction

This chapter outlines the theoretical and conceptual framework and research methodology employed in the research.

2.1 Theoretical Framework

The core of my theoretical framework is based on cross-cultural comparative law studies in the field of legal anthropology and evidence that the legal codes and norms of societies are influenced by the social and cultural norms of that society. According to this theory, the Western perception of universal “human rights” as an objective reality applicable to all persons may be quite different from the customary laws of a traditional African society that are based on the cultural norms of that society. My study is therefore a case study of the application of the Western norm of “universal human rights” in a traditionally African society where women did not have the same rights as men, with particular reference to the Victim Protection Act 2014 in Kenya.

Sally Falk Moore (2001), a leading pioneer scholar in the field of legal anthropology, notes that law and culture are closely linked and that those parties and people who possess more political power in a society are able to use law to their own advantage.⁸ Legal anthropologists generally agree that law occurs within a cultural context and that legal norms, and their application, that is, the ordering of society, takes place within that context.⁹

Moore observes that “*social reality is a peculiar mix of action congruent with rules and other action that is choice-making, discretionary, and manipulative. What also matters is that the choices and manipulations are not only made by litigants in dispute situations, they are also made by authorities who decide what the outcome shall be, and who make reference to norms and normative ideologies in other contexts*”.¹⁰ In other words, the customs and practices of a people dictate what is considered the law as decided by senior men in the community who have a wide and vast understanding of the said customs and practices. In most cases, the women are left out of such indigenous communal law-making processes.

⁸ Moore, Sally Falk, ‘Certainties undone: Fifty years of legal anthropology, 1949-1999,’ *Journal of the Royal Anthropological Institute*, (2001) 17.

⁹ ‘William Nixon, Legal Anthropology,’ *Indiana University*, 1998 http://www.indiana.edu/~wanthro/theory_pages/LEGAL.htm on 21 June 2016.

¹⁰ Moore, Sally Falk, ‘Certainties undone: Fifty years of legal anthropology, 1949-1999’, 8.

Nader,¹¹ passionately public-interest minded, contends that the courts themselves should be made more accessible to the poor. She asserts that the legitimacy of a legal system in a democracy depends on providing access to the courts for all.

Some theories have been formulated to try and explain incidence of violence against women by men. Linked to studies in legal anthropology is the notion of violence as an intrinsic and endemic part of social structure. Hereunder, it has been reported that poverty, unemployment, isolation, homelessness, sport, loss of male social status and tension have been referred to as causal factors in domestic abuse. Most incidence and prevalence studies indicate that domestic abuse transcends any social, geographical, socio-economic and cultural circumstances.¹²

2.2 Conceptual Framework

The right to a fair trial cannot be limited by law pursuant to Article 25 (c) of the Constitution of Kenya 2010. The right to a fair trial cannot be jeopardised under any circumstances following the decision of India's Supreme Court in *Natasha Singh v CB*¹³:

“Fair Trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trials entail the interests of the accused, the victims and of the society and therefore, fair trials include the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional as well as a human right...”

The right to a fair trial, though absolute, is limited by a myriad of factors which sees crimes against women go unprosecuted, especially those in urban informal settlements and those unaware of their constitutional rights. Further, the rape culture sees the toleration of rape and sexual violence as a way of life. On a lesser scale, non-prosecution of crimes against women is effected by the lack of a strong feminine voice, inadequate criminal procedures, cultural bias against women and male dominance in the legislative process.

Crimes against women are a manifestation of an attack on the female gender. Sexual and domestic violence is a consequence of gender discrimination which needs to be located within a gender equality framework. The Council of Europe Convention against Women emphasises the gender perspective on violence and states that violence against women cannot be addressed without looking at gender

¹¹ Nader, Laura. 'Pushing the limits: eclecticism on purpose', *Political and Legal Anthropology Review* (1999), 22, 1, 106-109 cited in Moore, Sally Falk, 'Certainties undone: Fifty years of legal anthropology, 1949-1999,' 9.

¹² Scottish Women's Aid, *Theories used to explain male violence against women partners and ex-partners*, 2008, 7.

¹³ [2013] 5 SCC 741.

equality issues. It highlights domestic violence as affecting women disproportionately and frames the eradication of violence against women in the context of achieving equality for women and recognises the structural nature of violence, which is both a cause and consequence of unequal power relations that limits women's advancement.¹⁴

2.2 Practices constituting a good system of Victims' rights and guarantees

A good system of practices that constitute an essential system of Victims' rights and guarantees, including the right to a fair trial, must take the following factors into account:

2.2.1 Access to justice

This right is the condition *sine qua non* of the enforcement of other substantial rights and interests of the victim. Further, it is a human right and an integral aspect of the rule of law.¹⁵ Its ingredients include the performance of justice and a remedy is obtained where rights have been violated, guarantees that range of due process rights is done uniformly, non-discrimination and the victim's right to sufficient and detailed information that corresponds to her needs.¹⁶

2.2.2 Protection

Protection refers to the guarantees that aim at preventing any further harm or intimidation on the victim's side either as a consequence of a repeat or secondary victimisation (means any act or omission that renders a person or community a victim¹⁷). A key element hereunder is the identification of vulnerable victims¹⁸- one who, due to age, gender, disability or other special characteristics as may be prescribed by regulations under the Victim Protection Act (2014), may require the provision of special guarantees and support.¹⁹

2.2.3 Support

Support includes appropriate and timely access to emotional, practical, administrative and legal support. For it to be effective, it must meet the following criteria: availability before, during and after criminal proceedings, availability from the earliest possible time irrespective of whether the crime has been reported or not, easy access without excessive procedures and formalities and

¹⁴ Irish Observatory on Violence against women, *Violence against Women An issue of gender: Highlighting the role of gender in analysis and response*, 2013, 3.

¹⁵ <http://eige.europa.eu/gender-mainstreaming/sectoral-areas/justice> on 27 November 2016.

¹⁶ Centre for European Policy Studies, *Local and regional good practices on victims' rights*, 2011, 18.

¹⁷ Section 2, Victim Protection Act (No. 17 of 2014).

¹⁸ Centre for European Policy Studies, *Local and regional good practices on victims' rights*, 2011, 20.

¹⁹ Section 2, Victim Protection Act (No. 17 of 2014).

assistance by well-trained professionals capable of providing prompt and well-targeted assistance. Further, support should take account of special needs of the victims.²⁰

2.2.4 Compensation

Compensation refers to an award granted by a court to a victim who has suffered economic or emotional loss, damage of property, or physical injury or harm as a result of an offence after he is found to qualify for the same.²¹ It can be met either through state compensation programmes or restitution from the offender. The former is relatively faster than the latter as it remains a big headache in the formal criminal justice process.²²

2.3 Research Methodology

2.3.1 Research Design

This is a descriptive study that seeks to understand the present circumstances of women victims of crime in Kenya. The goal of this design method is to understand the cultural and contextual dimensions of crimes against women in order to be able to propose recommendations to improve access to justice by women victims of crime in Kenya. Donald Kisilu and Delno Tromp note that a descriptive research design can be used when collecting information about people's attitudes, opinions, habits or any of the variety of education or social issues.²³

The research began by consulting and assessing all secondary sources related to the topic such as books, journal articles, working and discussion papers, research findings of others, post-graduate dissertations. An important component of the study was gathering information through the use of questionnaires and interviews of women who have in the recent past been victims of crime and been subjected, consequently, to the Kenyan criminal justice process. Information derived from such primary sources availed basic on-the-ground evidence and enabled assessment of the impact and effectiveness of the Victim Protection Act 2014.

2.3.2 Research site and population

The study was restricted to the Kibera informal settlement in Nairobi, within Nairobi County, Kenya. A purposive sampling was used to make this determination because Nairobi is home to one of the largest and other informal settlements in which the number of women victims of crime is higher compared to formal settlements (including sub-urban areas). Further, there are a number of support

²⁰ Centre for European Policy Studies, *Local and regional good practices on victims' rights*, 2011, 24.

²¹ Section 2, Victim Protection Act (No. 17 of 2014).

²² Centre for European Policy Studies, *Local and regional good practices on victims' rights*, 2011, 27.

²³ Kisilu D, Tromp D, *Proposal and Thesis Writing: An Introduction*, Paulines Publications Africa, 2006, 71.

centres for such women established by victims, local and international organisations. This sampling allowed the researcher to purposely target a group of people she believed to be reliable for the study.²⁴

A population is defined as a group of individuals, objects or items from which samples are taken for measurement. It also refers to an entire group of persons or elements that have at least one thing in common. A population can also be the larger group from which the sample is taken.²⁵ Hence, for purposes of this study, the target population was limited to women victims of crime within the Kibera informal settlement.

2.3.3 Sampling Techniques

Sampling has been defined as the process of selecting a number of individuals or objects from a population such that the selected group contains elements representative of the characteristics found in the entire group.²⁶ Subsequently, a sample has been defined as a finite part of a statistical population whose properties are studied to gain information about the whole.²⁷

A sampling design is a definite plan for obtaining a sample from the sampling frame. It refers to the technique or procedure adopted in selecting some sampling units from which inferences about the population is drawn.²⁸ It is categorised into probability and non- probability sampling. The latter aims to be theoretically representative of the study population by maximizing the scope of variation of the study and is mainly applied to determine how a small group or its representative is doing for purposes of illustration or explanation.²⁹

The probability sampling was herein undertaken. This sampling encompasses a randomisation approach, that is, random selection of people, places or things. Each unit in the population has an equal chance of being selected and allows for each member of the population to be included in the study. Further, probability sampling enables the researcher to generalise to the larger population and make inferences therefrom. The advantage of this is that one is able to draw conclusions or make predictions affecting the population as a whole.³⁰

²⁴ Kisilu D, Tromp D, *Proposal and Thesis Writing: An Introduction*, 82.

²⁵ Kisilu D, Tromp D, *Proposal and Thesis Writing: An Introduction*, 76.

²⁶ Kisilu D, Tromp D, *Proposal and Thesis Writing: An Introduction*, 77.

²⁷ Kisilu D, Tromp D, *Proposal and Thesis Writing: An Introduction*, 77.

²⁸ Kothari CR, *Research Methodology: Methods and Techniques*, New Age International (P) Limited Publishers, 2013, 153.

²⁹ Kisilu D, Tromp D, *Proposal and Thesis Writing: An Introduction*, 81.

³⁰ Kisilu D, Tromp D, *Proposal and Thesis Writing: An Introduction*, 78.

Therefore, a group of women victims from the Kibera slums and survivors were interviewed, under the sub-genre of simple random sampling for which the relatively small, clearly defined population chosen proved sufficient.

2.3.4 Data Collection Procedure

The study collected primary data through issuance of questionnaires through a drop and pick basis where some members of the group chose not to be interviewed orally. The questionnaires offered privacy for the respondents and afforded them a non-recollection of the past. Further, this method was not costly and it allowed respondents enough time to fill them out. It also ensured confidentiality as the respondents did not have to offer up their identities. Contrary to wide practice, the respondents were able to ask for clarifications in the questionnaires where there were any misunderstandings. The questionnaires were designed to be open-ended to allow for complete responses.

Oral interviews were also conducted which took the form of one-on-one in-depth conversations with various groups of women victims of crime. This proved better than the questionnaires because the women were able to comfortably open up, contribute and suggest relevant improvements that would be instrumental in increasing their chances of access to justice as guided by the Victim Protection Act (2014). This method allowed the researcher to educate the women on their rights and on the criminal justice process, with respect to the nature of the crime. Additionally, it allowed the women to ask any questions that they had and seek any clarification on the law. The respondents stated that the Victim Protection Act (2014), which is still a very new legislation, would hopefully ease their burdens if implemented well and its provisions followed to the letter.

2.3.5 Data Analysis and Presentation

Completed questionnaires were subsequently analysed to determine a recurrent theme, if any, and if the responses matched with the responses in the oral interview. The data was analysed thematically which allowed for categorisation of related topics. In this study, data presentation took the form of major generalisation with respect to the general population and no means, percentages, graphs or pie-charts were employed.

CHAPTER THREE: VICTIMS RIGHTS IN THE JURISDICTIONS OF THE UNITED KINGDOM AND SOUTH AFRICA.

Introduction

This chapter examines the way practices of other jurisdictions have ensured the protection of the rights of women victims of crime and possible lessons Kenya can draw therefrom. The United Kingdom (England, Wales and Northern Ireland) and South Africa are examined.

3.1 The United Kingdom

The UK's Ministry of Justice is responsible for the running and reform of the justice system and provides access to justice through courts, tribunals and the provision of legal aid. The Government, additionally, is committed to providing effective access to justice for all those who require it, without discrimination. Legal aid plays a major role in this regard and is effected, as set out, in the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) Act of 2013. One of LASPO's objectives is to target legal aid to those who need it most, who very often are women.³¹ The obstacles and barriers that prevent women from getting access to justice can be categorised into socio-economic and cultural³², legal³³ and procedural.³⁴

On support for victims, the Ministry of Justice's Code of Practice for Victims of Crime (Victims Code) outlines the information and services to be provided to victims by criminal justice agencies, including victims of sexual violence and GBV; who are entitled to an enhanced services level. Further, they are entitled to make Victim Personal Statements (VPS) detailing how the crime has personally affected them.³⁵ The Code also prescribes minimum requirements of service which include the right to information about the crime within a pre-determined timescale, a dedicated family-liaison police officer assigned to relatives, and information about the National Charity Victim Support (a merger of local support charities providing a community service of support for victims of crime across England and Wales, a national telephone support line, specialist service for those bereaved by homicide and a witness service offering witness information about court and legal processes, emotional support in

³¹<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhslldCrOIUTvLRFDjh6%2FxlPWC4otWeJkyXz2%2B24RpZHbxeGyCdvWKCDgZgW3PtFpC4Pm5wGcNmVPqHSfRctByqfWfz3T9V4NnKI2Vsr876AjKqvYQCCUsTH384GkmIXk0KGw%3D%3D> on 27 November 2016.

³² Includes fear and shame, little knowledge on official procedures and available assistance, economic dependence and concern for children and gendered impact of austerity measures.

³³ Emphasis on using out-of-court settlement procedures to ensure a swift end to a legal dispute that often leaves women at a disadvantage, discriminatory practices and negative gender stereotypes in courts among law-enforcement officials.

³⁴ Council of Europe, *Guaranteeing equal access of women to justice*, 2015, 3.

³⁵<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhslldCrOIUTvLRFDjh6%2FxlPWC4otWeJkyXz2%2B24RpZHbxeGyCdvWKCDgZgW3PtFpC4Pm5wGcNmVPqHSfRctByqfWfz3T9V4NnKI2Vsr876AjKqvYQCCUsTH384GkmIXk0KGw%3D%3D> on 27 November 2016.

dealing with the effects and experience of appearing in court and practical support.).³⁶ On its part, the Ministry of Justice allocates funds to various female rape support centres to provide direct services such as counselling.³⁷

Further, the criminal justice system in the UK prescribes compensation for the victims' passive role in the proceedings. Victims also have a right to damages. The judge may order financial compensation for the personal injury suffered. Additionally, irrespective of whether the offender is convicted in the criminal process, a victim may institute civil proceedings against the offender for recovery of losses.³⁸ The Criminal Injustice Compensation Authority is mandated to deal with compensation claims from people who have been physically or mentally injured because they were the blameless victim of a violent crime.³⁹

The Code of Practice for Victims of Crime entitles one to an enhanced entitlement where (s)he is considered an intimidated victim upon determination by the service provider that the quality of evidence will be affected because of the person's fear or distress about testifying in court. Subsequently, in such a case, the service provider must take account of the conduct of the accused or any other person towards the victim, the nature and alleged circumstance of the offence and the victim's age, social and cultural background, religious beliefs, political opinions, ethnic origin, domestic and employment circumstances.⁴⁰

3.2 South Africa

"It is therefore very pleasing to note that the rights of the Victims Charter are being translated into reality within the criminal justice system as a whole" President Jacob Zuma, 10 December 2009.⁴¹

South Africa's emphasis, in response to crime, shifted from investigation, prosecution, and conviction of offenders to the provision of services for victims of crime. Towards this end, the Service Charter for Victims in South Africa (hereinafter the 'Victims Charter') and the Minimum Standards on Services for Victims of Crime under the integrated Victim Empowerment Policy were passed by Parliament and signed into law in 2004. The Charter provides the policy objectives and philosophical framework for victims of crime and establishes the country's compliance with international instruments on victims' rights while the Minimum Standards on Services for victims of Crime, which

³⁶ Centre for European Policy Studies, *Local and regional good practices on victims' rights*, 2011, 14.

³⁷ <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhslidCrOIUTvLRFDjh6%2Fxl1pWC4otWeJkyXz2%2B24RpZHbxeGyCdvWKCDEZgW3PtFpC4Pm5wGcNmVPqHSlRctByqfWfz3T9V4NnKI2Vsr876AjKqyYQCCUsTH384GkmIXk0KGw%3D%3D> on 27 November 2016.

³⁸ Centre for European Policy Studies, *Local and regional good practices on victims' rights*, 2011, 15.

³⁹ <https://www.gov.uk/government/organisations/criminal-injuries-compensation-authority> on 27 November 2017.

⁴⁰ Section 1.12, Code of Practice for Victims of Crime (2015).

⁴¹ <http://www.justice.gov.za/VC/vcindex.html> on 2 December 2016.

complements the former, details the practical implementation of these rights and their implications for individuals.⁴²

The Victims Charter was adopted by the Government of South Africa generally and agencies involved in the criminal justice process⁴³ to provide for the consolidation of the South African legal framework relating to the rights of and services provided to victims of crime and to eliminate secondary victimisation and ensuring that they remain central to the criminal justice process. Additionally, the Victims Charter clarifies the service standards that can be expected by and are to be accorded to victims whenever they come in contact with the justice process and make provision for their recourse when standards are not met.⁴⁴ It identifies key rights which may be demanded by victims in their interactions with the criminal justice process and related service providers: the right to be treated with fairness and respect for dignity and privacy, right to offer and receive information, the right to protection, assistance, compensation and restitution.⁴⁵

On the right to protection, one of the practices constituting a good system of victims' rights and guarantees, the Victims Charter provides that the "right to protection" comprises "being free from intimidation, harassment, fear, tampering, bribery, corruption and abuse"; where complacent with certain requirements, the police "can apply for a victim to be placed in a witness protection programme" wherefrom, "one shall be protected, as far as possible from all forms of harassment, undue influence or intimidation". Third, such protection will "ensure one's safety as a witness and the availability of his testimony, and prevent withdrawal of the same as a result of undue influence. The right to protection also includes that, in certain circumstances, the court may prohibit the publication of any information (including identity), or it may order that the trial be held behind closed doors". Lastly, "the victims can request the Department of Correctional Services⁴⁶ to inform them if the offender has escaped or has been transferred".⁴⁷

With respect to compensation, the Victims Charter provides that every victim has a right to compensation for loss of or damage to property suffered as a result of crime being committed against

⁴² 'ISS Today: South Africa's Victims' Charter of Rights- realistic or aspirational?' *Institute for Security Studies*, 4 October 2007 <https://www.issafrica.org/iss-today/south-africas-victims-charter-of-rights-realistic-or-aspirational> on 2 December 2016.

⁴³ Justice and Constitutional Development, *Service Charter for Victims of Crime in South Africa*, 2004, Preamble.

⁴⁴ Justice and Constitutional Development, *Service Charter for Victims of Crime in South Africa*, 2004, 5.

⁴⁵ 'ISS Today: South Africa's Victims' Charter of Rights- realistic or aspirational?' *Institute for Security Studies*, 4 October 2007 <https://www.issafrica.org/iss-today/south-africas-victims-charter-of-rights-realistic-or-aspirational> on 2 December 2016.

⁴⁶ The Department ensures that the sentences of imprisonment are served in accordance with the law. Where the accused's release is being considered, it will carefully consider his supervision released on parole.

⁴⁷ Justice and Constitutional Development, *Service Charter for Victims of Crime in South Africa*, 2004, 7.

him and that he can request to be present in court on the sentencing date and request the prosecutor to apply to court for a compensation order. Compensation is defined therein as *an amount of money that a criminal court awards a victim who has suffered loss or damage to property, including money, as a result of a criminal act or omission by the person convicted of committing the crime*. The prosecutor will inform the victim of whether such order has been granted, explain its contents and how to enforce it. A clerk will help in the enforcement of a compensation order. Subsequently, a civic action can be instituted against the accused where the criminal court does not grant an order. This option is common where the damages are not quantifiable in financial terms such as psychological damages, pain or suffering.⁴⁸

In relation to compensation is the right to restitution in cases where one has been unlawfully disposed of goods or property, or where the goods have been damaged unlawfully. The Victims Charter defines restitution as *referring to cases where the court, after conviction, orders the accused to return the accused's property or goods that have been taken from one unlawfully, or to repair the property or goods that have been unlawfully damaged, in order to restore one to the position he was in prior to the offence's commission*. It is the prosecutor's duty to inform the victim of what restitution involves and the clerk will assist in enforcement of the same.⁴⁹

On access to justice, the Victims Charter has as one of its objectives to ensure that victims remain central to the criminal justice process and to eliminate 'secondary victimisation' from this process.

The South Africa Police Service (SAPS) in its role of victim support has as its basic principle as 'Victim Support' in rendering its services thereto. The National Policy Guidelines for Victims of Sexual Offences dictate that it is the right of any person to know that if they lay a complaint with the police, he can expect professional service. The police must attempt to meet the expectations that people have. The police must treat every victim with the necessary respect, empathy and professionalism.⁵⁰

The South Africa Police Service Report "Victim Empowerment Service in the South African Police Service" recognizes the police as the initial point in the criminal justice system in the majority of cases. The police are therefore responsible for ensuring that the victims of crime, especially sexual offences and other violent crimes, are provided with a victim-friendly service that protects the dignity and rights

⁴⁸ Justice and Constitutional Development, *Service Charter for Victims of Crime in South Africa*, 2004, 8.

⁴⁹ Justice and Constitutional Development, *Service Charter for Victims of Crime in South Africa*, 2004, 9.

⁵⁰ Ministry of Justice, *National Policy Guidelines for Victims of Sexual Offences*, 1998, 5.

of victims, empowers and does not subject them to secondary victimisation by the inefficiency of the members of the criminal justice system.⁵¹

The South African position is quite contrary to the Kenyan situation. For instance, the Human Rights Watch, Kenya Branch, in its 2016 report, notes that Kenyan authorities have displayed a lack of will to thoroughly investigate and prosecute sexual-based crimes witnessed in the 2007-2008 post-election violence and have not developed a comprehensive policy and strategy to secure justice for survivors: - rather they have excluded them from initiatives to compensate other victims (of crimes of a different nature) of the violence.⁵²

On the right to assistance as in the Victims Charter, a victim has a right to request assistance and, where relevant, “have access to social, health and counselling services as well as legal assistance”. Further, the prosecutor will “ensure that special measures are taken in the case of sexual offences, domestic violence and child support or maintenance matters and where available, such cases are heard in specialised courts. Where a victim has special needs, all service providers will, within the scope of their functions, take all reasonable steps to accommodate him and ensure that he is treated in a sensitive manner.”⁵³

3.3 Chapter Summary

This Chapter set out to outline the measures the jurisdictions of South Africa and the UK have taken to protect a victim of crime and ensure her participation fully in the criminal justice process. The analysis shows that the two jurisdictions have done reasonably well to ensure the rights and guarantees of the victims proportional to those of the accused person. Legal practice therein seems to implement statutes, as mentioned, towards support, compensation, protection and access to justice for the victims of crime.

⁵¹ South Africa Police Service, *Victim Empowerment in the South African Police Service*, 2014, 3.

⁵² Human Rights Watch, *I just sit and wait to die: Reparations for survivors of Kenya's 2007-2008 post-election sexual violence*, 2016, 66.

⁵³ Justice and Constitutional Development. *Service Charter for Victims of Crime in South Africa*. 2004, 7.

CHAPTER FOUR: DATA PRESENTATION AND FINDINGS

Introduction

This chapter presents data analysis and a discussion of the results of the questionnaires administered and oral interviews conducted, with the goal of critiquing the Victim Protection Act (2014). The analysis was solely based on the set research's objectives and questions.

4.1 Response Rate and demographic characteristics of respondents

The study targeted only female respondents who have been victims of crime and are from the Kibera informal settlement within Nairobi County. There were in total 20 respondents.

Their ages ranged between the ages of 21-45 whose source of living is in menial jobs that do not pay very well, approximately earning between Ksh. 200 and Ksh. 500 per day. 50% of them were married, 20% single mothers and 30% single and childless. All of them had schooled up to secondary school level.

The researcher issued out questionnaires to 5 respondents and had a sit down with 15 respondents for an in-depth interview taking the form of a discussion based on the questionnaire. The respondents filled the questionnaire and the discussion responses were transparent and complete. It is the researcher's view that the responses were substantive in that they were premised around what the researcher exactly asked and did not go beyond the same.

4.1.2 Questionnaire Responses

Respondents	Victim 1	Victim 2	Victim 3	Victim 4	Victim 5
Familiarity with the VPA	Unaware of neither the Act nor its guarantees	Unaware of neither the Act nor its guarantees	Unaware of neither the Act nor its guarantees	Unaware of neither the Act nor its guarantees	Unaware of neither the Act nor its guarantees
Access to Justice	The responses on this were similar to those from the in-depth interview discussed below.	The responses on this were similar to those from the in-depth interview discussed below.	The responses on this were similar to those from the in-depth interview discussed below.	The responses on this were similar to those from the in-depth interview discussed below.	The responses on this were similar to those from the in-depth interview discussed below.
Compensation	Aware of her right to compensation but was not compensated by the offender because of his	Aware of her right to compensation even though she was not adequately compensated by	Aware of her right to compensation but was not compensated at all because she did not report	Aware of her right to compensation but was not compensated because the matter was	Aware of her right to compensation but suffered the same fate as Victim 1.

	<p>financial incapacity. Would have preferred civil proceeding route because this is guaranteed unlike the criminal justice process. Finds states' inability to compensate in place of the offender unfair considering it has an interest in criminal offences.</p>	<p>the offender owing to his being a casual labourer. Would prefer the civil proceeding route if it guarantees a higher compensation. The state ought to compensate where the offender is unable to because it always will have an interest in criminal offences.</p>	<p>the matter to the police. Would have preferred a civil proceeding route because compensation is guaranteed but could not afford the process. State inability to compensate in place of the offender is unfair to the poor because it should exercise the same power hereunder as it does in the trial process.</p>	<p>settled out of court and compensation so issued was to her family instead. A civil proceeding is preferable except that the process is expensive and thus unaffordable. The state should compensate because such would go a long way in restoring our economic status.</p>	<p>Would prefer a civil proceeding route because compensation is guaranteed except that it is expensive thus unaffordable. The state should compensate the victim in the same manner as its having an interest in criminal matters.</p>
Protection	<p>Here in Kibera, law is only on paper but not in practice. I was harassed, threatened and intimidated by the offender and I could not report the matter to the police because they were already bribed by him. In effect, the relationship between he and I is further strained.</p>	<p>Section 10 does not guarantee our protection here in the slum. I did not feel protected, by the police or otherwise in my case because the offender bribed the police hence comfortably harassed me and threatened my family. Inability to report these events made me fear for my life and my family's welfare.</p>	<p>This section is ineffective. I was 'raped' when a teenager and threatened with death if I reported the matter to anyone. I did not report and I never protected at all. Even after choosing not to report, the offender continued harassing and threatening me and this made me fear him more.</p>	<p>This section is ineffective because here in the slum, the law on paper does not operate but the order determined by circumstances, ignorant of the law. Victim suffered same fate as Victim 1 and she feared the offender.</p>	<p>This section is ineffective because of its inapplicability in the Slum. I reported my case to the police but was chased away because mine was a domestic matter thus should be settled at home. My brother-in-law had threatened to kick me and my children out of our house and when the police failed to act, it made me fear for my welfare and of my children.</p>
Support	<p>I only received support from my lady friends and a certain NGO</p>	<p>I got support from one support centre and I became a</p>	<p>Having not reported my issue to the police, I only</p>	<p>Is of a similar opinion as Victim 1.</p>	<p>I got initial support from my lady friends and the Grace</p>

<p>that visited the slum. I was counselled and advised on the way forward. The support centres here in Kibera have been very helpful, I have seen some victims become survivors with such centres' help and they become more active in their cases.</p>	<p>survivor, I was counselled and given anti-depressants. The centre also advocated for my course because I had chosen not to report the domestic abuse. Its services are gender-specific but most victims are women.</p>	<p>got support from my lady friends until I went to the Grace Agenda. I was counselled and advised on what to do. The centres are very helpful in the recovery journey but could be more helpful if trained on advocacy and outreach.</p>	<p>She received help from the Grace Agenda.</p>	<p>Agenda. My case was already in court and through this support, I participated actively in the trial process. Some of the centres I have seen here in Kibera are not gender specific but offer special services. They would be more effective if their personnel were trained in advocacy and legal aid.</p>
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4.2 Thematic Discussions

The themes under discussion relate to the topics in the questionnaire and complement the 5 women victim respondents' responses.

4.2.1 Familiarity with the Victim Protection Act

The Victim Protection Act is still a very young law whose popularity has not spread far and wide to the general population. The women victims of crime of Kibera who I interviewed were neither aware of the Act nor its rights and guarantees.

4.2.2 Access to Justice (Articles 35, 48 Constitution, Sections 2, 12, 13, 15, 20 VPA)

A general understanding of the term and concept of access to justice is premised on wide interaction by the respondents with the police force with respect to a matter in question, from the point of reporting the perpetrator throughout the court process and an introduction to the prosecutor for whom there will be communication as regards the expectation and needs of the victims. The police require the victims to cooperate on matters collecting and analysing evidence for the prosecution. In as much as Article 48 of the Constitution is in force, access to justice for this particular group of victims is not always an easy task as the same is inhibited by secondary victimisation by the perpetrators released on bail or bond, collusion between the accused and prosecutor to ensure that the case does not progress, non-availability of information by the police and/or prosecutor (on matters court dates and court progress to ensure the victim's information is up-to-date) and non-affordability of the court process by the

victims. In this case, Article 35 of the Constitution has largely been disregarded and/or ignored by the police and prosecutor.

Further, with respect to the right to information, it is a wide practice that the information voluntarily offered by the victims is ignored by the police and the prosecutors fail to adequately present the same in court. In most cases, the victims' inability to afford their own legal representation puts them at a loss because section 9(3) of the Victim Protection Act provides *inter alia* "the victim's views and concerns...may be presented by the legal representative acting on their behalf." As for their testimony, the women victim respondents reiterated "*testimonies zetu hukuwa ignored na police and prosecutor halafu unapata stori yako haitasemwa kwa court,*" (the information we give is often ignored by the police and the prosecutors and not adequately presented in court). Since they could not afford legal representation, they were unable to take advantage of Section 9 (3) of the Victim Protection Act.

To the extent that the criminal trial process is fair and effective, a Victim Impact Statement (VIS) has been produced in court. A VIS is intended to evoke the emotions of the court in favour of the victim. One victim stated "*VIS hutusaidia kutokumbuka na kusema kila wakati kwa court ile mambo ilitufanyikia*" (A VIS would eliminate the opportunity to relive the crime every time in court).

The victims interviewed were not always aware that they had the right to write a Victim Impact Statement (VIS) that could be produced in court. In many instances, the police or prosecutors did not mention this to them or give them an opportunity to write a VIS. In their ignorance many victims did not enquire about such a possibility and even in cases where they had heard about this possibility they were afraid to enquire about it.

The concept of a victim officer is foreign to the respondents who formed the opinion that were they aware of the same, it would have/will help with cases a great deal. It is their view that a victim officer would go the extra mile to understand their situation and do everything in their power to see that justice is served accordingly. Further, a victim officer would be the intermediary between the victim and the police and prosecutor thus ensuring that the former is adequately informed of the progress of her case.

The possibility of an alternative justice process is not always welcome owing to the risk of secondary victimisation and intimidation of the victims by the perpetrators. Additionally, the women victim respondents pointed out the fact that were the matter to be resolved through the administrative chiefs, the victim would neither be adequately compensated because the chief would be bribed by the perpetrator nor get access to justice. This is because male chauvinism is still very much alive and in practice within the settlement. Male chauvinism refers to the beliefs, attitudes or behaviour of male chauvinists (men who patronise, disparage, or otherwise denigrate females in the belief that they are

inferior to males and thus deserving of less than equal treatment or benefit).⁵⁴ On restorative justice, they jointly averred “*tukiamua kusolve issue through hii restorative justice unasema, huyo offender atarudi kuishi na sisi hapa na itakuwa reminder kila siku ya maneno walitufanyia kwa hivyo afadhali kuishia kortini*” (If we pursue this restorative justice that you are talking about, the re-integration of the offender in the society would serve as an everyday reminder of what happened to us hence the court process is the better option).

Following the aforementioned, a victim’s role in the criminal justice process is limited to producing evidence in court and giving oral evidence or a written submission. While embracing this avenue totally, the victim women respondents stated that their participation in the court process is just limited to giving oral evidence but if their evidence is not supplemented by a “victim officer” they are at a huge disadvantage, especially when they are cross-examined by an experienced lawyer. Most respondents gave oral evidence in court, recounting the ordeal as it happened, from which they were cross-examined by the adverse party. It is the victims’ view that should this scope be widened, it ought to adequately allow for the victims to intimate to the court their interests where a victim officer is not made available. Further, where the victim officer fails to adequately present the same, the victim should be allowed to present her interests and where this chance is denied, it be considered a violation of victim guarantees as in the Victim Protection Act.

4.2.3. Compensation (Section 23)

The women victims interviewed understood the idea of compensation but, usually, only being monetary. They stated “*kupata pesa za compensation, in most cases, ni ngumu sana kwa sababu sisi wote hapa ni maskini na huyo mtu akiwekwa jela, compensation yenyewe imeenda tu hivyo. Saa zingine pia, hata hizo pesa za compensation zenye korti imeorder hazitoshi.*” (Monetary compensation is usually difficult to get because we, the victims and the perpetrators, are poor and such possibility of compensation is negated by prosecution and subsequent imprisonment. Furthermore, where compensation is so ordered by the court, it always is not enough.)

In the alternative, a civil proceeding is mostly preferred if there are guarantees of fast compensation, in light of the Civil Procedure Act’s overriding objective- “*The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by this Act.*”⁵⁵ Conversely, such guarantees are not always absolute

⁵⁴ <http://www.dictionary.com/browse/male-chauvinism> on 4 January 2017.

⁵⁵ Section 1A (a), *Civil Procedure Act* (Cap 21 Laws of Kenya).

because a suit may fail where the victim (in this case, the plaintiff) lacks capacity to bear the cost of the proceedings.

The women victim respondents opined “*ingekuwa afadhali kama serikali ingetucompensate penye defendant ameshindwa*” (It would be better if the state were to compensate us where the perpetrator fails to.) This is borrowed from the fact that in a criminal case, it is the state that prosecutes a crime and allows for partial participation of the victim in such a case. In the same breath, therefore, the state ought to compensate.

4.2.4 Protection (Section 10)

It is the women victim respondents’ view that in as much victim protection is provided for in both the Constitution and the Victim Protection Act, this is more theory than practice. “*Protection iko tu kwa sheria but huku ni kusumbuana na mkosaji mwenye, in most cases, hubribe police na prosecutor na huzushia kutuchapa ama kutuua before case iishe*” (Protection exists only in law but here, the norm is frequent confrontation with the offender who mostly bribes the police and the prosecutor, and threatens to either harm or kill us before the case is concluded). The threats and confrontations are extended to family members too.

Secondly, the police are not quick to act when a matter is reported, especially, where such a matter involves domestic violence advising that the matter is of a personal nature thus should be solved within family confines. In other cases, the police ask for ‘payment’ before they can take action.

Owing to high levels of insecurity and poverty within the informal settlement and other areas, where an offence involves family member(s), protection is not afforded to victims who choose not to report a crime where they face the risk of losing their source of livelihood thus subjecting selves to constant abuse and secondary victimisation. The victims averred, “*Saa zingine si vizuri kureport matter yenye inainvolve breadwinner wa familia juu kesho huwezi jua penye unga itatoka so inabidi tuvumilie.*” (It is not advisable to report a matter involving the breadwinner because you are not assured of tomorrow’s livelihood hence we choose to tolerate it.)

Consequently, where the victims do not feel protected, they live in constant fear of the perpetrator and in uncertainty of what he might do next to either them or their family members.

4.2.5 Support

The general understanding of the idea of support is premised on the idea of being able to talk to someone about their experience and being able to get support therefrom. The victims stated, “*Hii system ya kujisaidia wenyewe kwa wenyewe, kama wanawake, ni mzuri sana kwa sababu inatufanya*

tuweze kufungua roho kuhusu experiences zetu na kuharakisha kurecover. Kuwa survivor inatufanya tuwe willing kusaidia wamama na wasichana wengine wenye wamemekua na experiences kama zetu.” (Our own support system is good because we are able to share our experiences and become a survivor consequently making us willing to help other women and girls who become victims in similar circumstances.) Most victims formed the opinion that most support is derived from other women victims, their family and friends.

On the other hand, men’s perception that they ought to be in control all the time denies the women support from their husbands and other intimate partners who consequently abandon them following commission of the crime against the women. *“Wanaume wetu hawatusupport juu wao pia ndio hutuumiza na hutake advantage kwa sababu wao ndio breadwinners”* (Our husbands (and boyfriends) cannot support us because they are the offenders sometimes and the breadwinners too.)

In other cases, the women choose to tolerate the abuse, in place of support, where they face the risk of losing a source of livelihood. Subsequently, the police and local administration, as a primary source of support for the women, fail to perform this task adequately because they opt to take bribes from the perpetrator to aid in tampering with the case and deny women relevant forms to their cases. Secondly, medical practitioners fail in this task, *“ukienda hospitali, unapata hao attendants wanakucheka ama wanakataa kukuhudumia,”* (when you go to the hospital, medical practitioners either make fun of or refuse to attend to you.)

Support within the settlement is diminished by the fact that some victims choose not to report crimes against them, whether once or otherwise, because they fear such reporting may not bear fruit or they cannot afford the already anticipated cost of the trial process, for which most do not have the capacity to pay for.

In place of these difficulties are certain support centres within Kibera such as the Grace Agenda whose mission is to lobby, advocate for and raise awareness, on policies and practices regarding the rights of survivors of sexual and gender based violence and persons with disabilities. Its vision is to be a centre of excellence for recovery and empowerment for sexual and gender based violence survivors and person with disabilities. The centre offers such services as group therapy, and counselling with the aim of helping survivors achieve emotional healing and restore their self-esteem.⁵⁶

⁵⁶ <http://www.graceagenda.co.ke/aboutus.html> On 5 January 2016.

“Kupata support from Grace Agenda imetusaidia sana kurecover na imetuwezesha kuwa active tukifuata cases zetu kortini” (Getting support from the Grace Agenda has really helped us in our recovery and has made us participate actively in pursuing our cases in court.)

4.3 Lessons to be learnt from the Comparative Study

The examination from the United Kingdom and South Africa reveal that those jurisdictions are progressive in matters rights and guarantees of victims of crime. This is not to say, however, that Kenya hasn't made progress in a significant way.

The jurisdictions studied reveal an effort towards protecting the rights of women victims of crime. South Africa's Victims Charter is quite a progressive tool in addressing the needs, rights and guarantees of women victims under the law. On the other hand, the UK legal aid under LASPO serves the same purpose.

In as much as most accused persons are unable to adequately compensate the victims of their omission or commission of offence, the laws of both the UK and South Africa provide for this. In this regard, the former's efforts are better than of South Africa. Back home, Kenya provides for compensation both in the Constitution and the Victim Protection Act, which is not so much utilised because of accused persons' financial inabilities. Further, even if one were to institute a civic action against the accused, there is no guarantee that she would be compensated.

Kenya's support of women victims of crime is left to non-governmental organisations and hospitals which are not funded well and are under-staffed, contrary to practice in South Africa, which trains its police officers to treat victims of sexual violence and GBV with utmost respect and dignity. The practice in UK is almost similar with having a police contact for the victim in the criminal justice process.

A study of the guarantees and procedures of the jurisdictions of the UK and South Africa show that Kenya still has a long way to go, even in light of the Victim Protection Act, besides the Prevention of Domestic Violence Act and others and should borrow a leaf from the examined jurisdictions. The Kenyan criminal justice system can emulate South Africa's system of training its police on ways of handling crimes of a sexual nature. Kenya can also, like in the UK, establish a code of practice for victims of crime which will guarantee an enhanced entitlement for vulnerable victims who might be distressed thus unable to participate actively and effectively in the criminal process. If Kenya adopts the above practices (not exhaustive list) women victims of crime will cease playing a passive role in the criminal justice system and have their constitutional rights respected.

CHAPTER FIVE: DISCUSSION OF THE FINDINGS

Introduction

This chapter presents a detailed discussion of the findings while comparing the state of affairs in Kibera Slums, with regard to the Victim Protection Act, with the legal structures for protecting women victims of crime in South Africa and the United Kingdom. The chapter also provides a summary of the findings in relation to the study's objectives and questions.

5.1 Discussion – the Victim Protection Act (2014)

The Victim Protection Act (2014) is a timely legislation whose objective is to address the needs and rights of victims of crime, who have for the longest time been neglected by the law, in favour of the accused person. The Parliamentary Act was established pursuant to Article 50(9) of the Constitution which provides "*Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences.*" The Act adds to the long list of statutes that protect women, though indirectly, at the expense of men. The others include the Sexual Offences Act (2006), Prohibition of Female Genital Mutilation Act (2011) and the Protection against Domestic Violence Act (2015). However, this addition has not yet gained traction amongst women victims of crime as it is yet to be implemented effectively and adequately. Further, Kenya's legal justice environment is yet to pick a leaf or two from other jurisdictions whose laws and stakeholders in the criminal justice system have the best interests of the victim at heart, especially women victims of crime.

Access to justice, as a fundamental right under Article 48 of the Constitution has its attainment propagated by the Act in the sense that its establishment is a manifestation of Article 50(9). The respondents' understanding of the concept of access to justice is limited to only the process of attaining the same but not the whole concept. This understanding cannot be said to be an assurance of access to justice. Because of this limited understanding, most cases collapse before they even start. Access to justice, as a vital ingredient in a good system of victim protection, encompasses the right to information, participate in the criminal justice process, producing the victim impact statement and the right to seek alternative dispute resolution measures. On its part, the Victim Protection Act plays a role in access to justice in the sense that various sections inform victims' actions.

Specific to women victims of crime and in pursuit of Article 35, section 20 of the Act guarantees the right to information. In this case, the right includes the right to receive and give information which is honoured where a victim ought to receive information from the prosecutor and police on the progress of their case as well as have access to the defence's evidence. However, the Act falls short in this regard where a victim can give as much information to aid in her case in a victim impact statement, if this option is made available to her and limit such delivery to only an oral evidence in court and further

in section 9 where a victim's concerns and views MAY be presented in court by a legal representative on his behalf. Similarly, any information issued to either the prosecution or the police must be ascertained, verified, recorded and signed by the victim. This option is open to possibilities of coercion which consequently leads to false information or self-incriminating information by the victim.

5.2 Discussion – Comparison with UK and South African Legislation

On the contrary, the legal aid system in the UK is largely responsible for access to justice alongside the courts and tribunals, and which is fully funded by the government. The aid is targeted towards those who need it most, including women. In Africa, South Africa had its focus shift from prosecution, investigation, and conviction of offenders to the provision of services for victims of crime, effected through the Victims Charter which ensures that victims remain central to the criminal justice process and for that they be treated with fairness and respect for their dignity and privacy. Back home, the Victim Protection Act prescribes is as good a piece of law on paper but not in practice, which evidences the miscarriages of justice for which it can curb. For instance, it establishes a Victim Protection Board (Part VI) whose functions include coming up with a victim charter, an integrated and comprehensive program to protect victims of crime; both of which have not been accomplished yet thus not on the same level as the UK and South Africa.

With respect to support, protection and compensation, the Act is a good statute to provide for these victim guarantees. On support, the Act prescribes access to the same for victims without discrimination. However, the appropriate support avenues fail terribly to provide these services thus in the alternative, relatives and friends fill the gap. This, compared to the UK and South Africa, puts the latter on a higher scale. For instance, in the UK, the Ministry of Justice allocates funds to various female rape support centres to provide direct services to victims. In South Africa, the Victims Charter adequately caters for the rights to support, protection and compensation. It went further to prescribe training for police officers on best practices of receiving and treating victims of abuse with dignity and respect for their privacy.

5.2 Summary of Findings

This study has investigated the effectiveness of the Victim Protection Act (2014) with a focus on women as victims of crime. The women who formed the subject matter were all resident in the Kibera informal settlement within Nairobi County. In particular, the study focused on specific provisions of the Act that address the rights to compensation, support, protection and access to justice for women victims of crime.

Understanding the prescriptions of the Victim Protection Act, with regard to the aforementioned rights, provides an opportunity to apply the rights to real-life circumstances and predict whether implementing the rights effectively will ease the women's burden in their journey to recovery and getting justice. Having a clear demarcation as to the subjects of the study allows for proving that culture, male chauvinism and injustice will always prevail over written law, if not kept in check. Further, women's economic vulnerability, the settlement's poor urban planning and illiteracy exacerbate their inability to enjoy the perks and their full rights to the criminal justice process. This state of affairs persists even though the women victims of crime are aware of their rights in the criminal justice process. Conversely, this awareness is limited to their role as witnesses in court and not as a victim of crime. This is because the Victim Protection Board established by the Act has not yet been put in place.

With regards to making the women aware of their rights as victims, the Board should, amongst other functions, develop a charter for victims, undertake victims' rehabilitation measures including education, disseminate information relating to victim concerned agencies and organisations, engage in consultation and advocacy with government departments and non-governmental organisations, to advance the Act's purposes and monitor and evaluate the country's progress as regards protection of victims of crime.

CHAPTER SIX: CONCLUSION AND RECOMMENDATIONS

Introduction

This chapter provides the conclusion to the study and specific recommendations regarding the Victim Protection Act, 2014 and its implementation.

6.1 Conclusion

The study found that the Victim Protection Act (2014) is a very timely legislation whose effective application, now and in the future, will ensure that women victims of crime gain access to justice and their persons and definition move from being a ‘victim’ to a ‘survivor.’ The concept of access to justice will be understood more than just as a process but also as an avenue to feel protected by relevant authorities, gain compensation for loss or injury suffered and benefit from a support system that eases a victim’s burden. This is not to say, however, that a victim is guaranteed total restitution after accessing justice. Alternative dispute resolution mechanisms will also be embraced as a means of access to justice by women victims of crime.

This, in turn, will have a positive impact in society in the sense that survivors will be able to educate, mentor and be part of the change in society towards a crime-against-women-free environment.

6.2 Recommendations

1. The Victim Protection Act be amended to allow women victims of crime to present their views and concerns where they lack capacity to afford a legal representation. This will ensure that their rights are not prejudiced and that they are not subjected to an unfair and impartial trial.
2. The Victim Protection Act physically establish the Victim Protection Board to effect the Board’s performance of its functions listed in the Act. The absence of the Board facilitates abuse, violation and ignorance of the rights and guarantees of women victims of crime. Further, the Board will mitigate the existence of male chauvinism, the harsh culture against women, harassment, secondary victimisation and bribery of relevant authorities in the criminal justice process.
3. The Victim Protection Act be amended to prescribe compensation by the State where the offender fails to or lacks capacity to compensate the victim. This is in light of the fact that most offenders and women victims of crime alike live in abject poverty. State compensation will likely restore the victim’s economic status.
4. The Victim Protection Act effectively prescribe training for police officers and other relevant authorities who are the first point of contact for women victims of crime. This is aimed at making the police understand the victim’s circumstances and treat them with dignity and respect for their privacy.

Also, the possibility of sending back the victim citing 'a domestic matter to be solved at home' is diminished. If the police are made to understand the magnitude of sexual and gender-based violence, they will not take any form of bribe in pursuit of justice.

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Code of Practice for Victims of Crime (2015).

APPENDICES

Appendix 1: Questionnaire

SECTION A: GENERAL INFORMATION

Name (Optional): _____

Age: _____

Residence: _____

Occupation: _____

SECTION B: FAMILIARITY WITH VICTIM PROTECTION ACT (2014)

The Victim Protection Act is an Act of Parliament to give effect to Article 50(9) of the Constitution; to provide for the protection of victims of crime and abuse of power, and to provide them with better information and support services to provide for reparation and compensation to victims; to provide special protection for vulnerable victims, and for connected purposes.

1. Do you know of the Victim Protection Act?

2. What do you think are some of the guarantees in the Act?

(For the sections below, please answer to the best of your knowledge and ability)

SECTION C: THEMES UNDER STUDY

C1: ACCESS TO JUSTICE

1. What do you understand by the term ‘access to justice’?

2. In your opinion, is access to justice enabled by the Constitution in practice?

3. Article 48 of the Constitution guarantees the right to access to justice. Please explain what you think it entails/includes.

4. I) The same article provides that "...if any fee is required, it shall be reasonable and shall not impede (slow, delay, stop, block) access to justice. In your interaction with the law, how true is this statement?

II) If not, has it contributed to inability to access justice?

5. Article 35 of the Constitution and Section 20 of the Act guarantee the right to information. In your interaction with the law, was this upheld, disregarded or ignored? Explain

6. Section 20 goes further to provide that a victim can submit any information to the prosecution, the police or the court. Additionally, such information "shall not delay proceedings relating to the offence complained of.

a) Was this opportunity made available in your case?

b) If so, did that opportunity delay or hasten the proceedings?

7. (Section 12 VPA) A victim impact statement is a statement written by the victim or his representative on the psychological, emotional, physical, economic or social impact of the offence committed; and is useful in determining the result of a case in court.

a. Are you aware of this?

b. If yes, was the statement you made useful in/for your case?

c. If no, what enabled the non-availability in your opinion?

8. (Section 2 VPA) A victim officer is a person who assists a victim through the various stages of a case.

a. Were you aware of this, and if so, did you get access to a victim officer?

b. If not, in your opinion, would it have helped your case if you knew of this and got access to a victim officer?

9. (Section 15 VPA) Another option to access justice, apart from the criminal justice process, is the pursuit of restorative justice. Restorative justice focuses on the rehabilitation of offenders through reconciliation with the victim and community at large. It brings the offender and the victim into communication, enabling them to play a part in repairing the harm and finding a positive way forward. It can also prevent further conflicts and restore the relationship between the offender and the victim.

a. In your opinion, is this a better option than the court process and would you pursue it? Explain.

b. Would you pursue this option if it proved cheaper than the court process? Explain.

10. (Section 13 VPA) A victim's right to participate in the criminal justice process is limited to producing evidence in court and giving oral evidence or a written submission.

a. In your case, were you given this chance in the process? What exactly did you do?

b. In your opinion, should the extent of this provision be extended? If so, to what extent? Explain.

C2: COMPENSATION

Compensation refers to an award granted by a court to a victim who has suffered economic or social loss, damage of property and physical injury as a result of an offence. It is supposed to be met either by the state or the offender.

(Section 23 VPA) A victim has a right to be compensated by the offender for economic loss, damage to or loss of property, personal injury, medical costs and transportation and accommodation costs incurred as a result of the offence.

a. Were you made aware of this? Explain

b. Were you adequately compensated by the offender? Explain

c. Would you have preferred compensation through a civil proceeding by the offender instead of seeking the criminal justice process? Explain

d. The state cannot compensate a victim where the offender is unable to. What is your on this?

C3: PROTECTION

(Section 10 VPA) A victim has a right to be free from intimidation, harassment, fear, tampering, bribery, corruption and abuse, have their safety guaranteed and that of their family considered in determining the conditions of bail and release of the offender and have their property protected.

a. In your opinion, is this provision effective? (Apply this to your situation)

b. Was this provision adopted in your situation? If so, did it absolutely prevent the offender from trying to harass or tamper with you?

c. In (b) above, if no, were you able to report the matter to the police or any other relevant authority where the offender tried to harass or tamper with you? What did the police do?

d. Where you do not report the matter, how does this affect the relations and interactions between you and the offender?

C4: SUPPORT

Victim support services refer to all services offered to the victim of offence to secure restoration of their emotional, mental, physical, legal or economic status from any harm occasioned by the offence committed.

(Section 11 VPA) Security of the victim includes securing the victim from further harm before action is taken in addition to securing urgent medical treatment, immediate psychological support and police protection where appropriate. Support also includes placing the victim with a relative where appropriate.

a. Was this form of support made available to you? Explain

b. Are there sufficient victim support centres within your locality? Explain

c. Which kind of services do they offer and are they gender specific?

d. In your opinion, are these centres very helpful in your journey to recovery? If so, does this recovery have a positive effect on the case?

e. If the answer to (d) above is no, what in your opinion, should be done to improve their services?

D: CONCLUSION

1. In your opinion, what should be done to the law in general and the Victim Protection Act (as quoted in the previous sections) specifically in order to improve access to justice, ensure compensation is paid, increase the scope of protection and improve support for women victims of crime?

2. Do you think that the Victim Protection Act (2104) is a timely legislation that will improve protection of women victims of crime and ensure that their rights and guarantees in the Act are neither violated nor denied? Explain

Thank you for your participation

Appendix 2: LGBTQI Women (Lesbian, Gay, Bi-sexual, Transgender, Queer and Intersex)

Term definitions⁵⁷

Lesbian- Sexual orientation of a woman whose primary sexual and romantic attraction is toward other women.

Gay- Synonym in many parts of the world for homosexual; used to refer to the sexual orientation of a man whose primary sexual and romantic attraction is towards other men.

Bi-sexual- Sexual orientation of a person who is sexually and romantically attracted to both women and men.

Transgender- The gender identity of people whose birth gender does not conform to their lived gender. One usually adopts, or would prefer to adopt, a gender expression in consonance with their preferred gender, but may or may not desire to permanently alter their bodily features to conform to their preference.

Intersex- A person born with sexual anatomy that does not seem to fit the typical definitions of 'female' or 'male'.

Queer- anyone who does not identify under rigid binaries of either straight/gay or male/female; an umbrella term for sexual and gender minorities.⁵⁸

For this group, they largely suffer human rights abuses in silence on the basis of their sexual orientation because under the Kenyan Penal Code, same sex sexual activity, termed "carnal knowledge of a person against the order of nature" is characterised as an "unnatural offence" and is a felony punishable by up to 14 years imprisonment.⁵⁹ The offence herein referred is anal sex which means that there is no provision that forbids people to be lesbian, gay or transgender or to associate in pursuit of common interests.⁶⁰ Nonetheless, abuse is met on the LGBTQI by ordinary citizens and law enforcement officials, most of them believing that "they have no recourse, and that the police are just as likely to persecute them as to protect them."⁶¹ Subsequently, as of 2014, 88% of Kenyans felt that homosexuality was "morally unacceptable."

On the other hand, Article 27 of the Constitution provides for equality and freedom from discrimination. It articulates *that everybody is equal before the law and has the right to equal protection and equal benefit of the law*. Further, *the state (including a person) shall not discriminate directly or indirectly against any person on any ground, including race sex pregnancy...* Sub-article 2 provides *equality includes the full and equal enjoyment of all rights and fundamental freedoms*. Hence, the Penal Code provision might be in contravention of the Constitution as it facilitates, as observed by the Human Rights Watch, discrimination as evidenced in non-provision of health care services and abuse of the rights to privacy, equality and human dignity.⁶²

⁵⁷ Human Rights Watch, *The issue is violence: Attacks on LGBT people on Kenya's Coast*, 2015, 6.

⁵⁸ <https://www.pilag.org/blog/about-q> on 11 November 2016.

⁵⁹ Section 162, *Penal Code*, (2009)

⁶⁰ <https://www.hrw.org/news/2015/04/28/kenya-high-court-orders-lgbt-group-registration> on 11 November 2016.

⁶¹ Human Rights Watch, *The issue is violence: Attacks on LGBT people on Kenya's Coast*, 2015, 11.

⁶² Human Rights Watch, *The issue is violence: Attacks on LGBT people on Kenya's Coast*, 2015, 12.

The African Commission on Human and Peoples Rights adopted Resolution 275 on protection against Violence and other human rights violations against persons on the basis of their imputed sexual or gender identity in 2014 following the African Charter's Articles 2, 3, 4 and 5 and violations of human rights targeting persons on the basis of their imputed or real sexual orientation or gender identity. The Resolution condemns systemic attacks by states and non-state actors against such persons and encourages states to end all acts of violence and abuse, conducted by the state or non-state actors. In light of this, Kenya is bound to protect and preserve the rights of LGBTQI community by virtue of Article 2(5) and (6)⁶³ of the Constitution.

The Gay and Lesbian Coalition of Kenya (GALCK) in its 2016 report, "Research on the Lived Experiences of LBQ women in Kenya" provides an insight into the scopes and experiences of structural and everyday violence lesbian, bi-sexual and queer women face.⁶⁴ Secondly, it attempts to build a better knowledge base on and contextualization of the lived experiences of the LBQ women. The general attitude is that "anti-lesbian' sentiments maintain that romantic relationships and sexual practices among women are deviant, unnatural and abhorrent to moralities." Further, parliament referred to lesbianism as a 'cult' that seeks to recruit young bright girls and named a few of the more visible lesbian activists as the 'high priestesses' of the alleged cult.⁶⁵ This further labels and discriminates against the LGBTQI women.

The report notes that LBT have fallen victim to rape, some with their parents' approval, in order to be 'cured' of their malady. Take for example a woman in Siaya who committed suicide in 2012 after her parents had held her hostage and had organised an older male family member of the family to rape her. In another issue, women expressed their helplessness and incapacity to pursue justice once raped. Additionally, there also is a lack of information on what to do to prevent rape, access support and how to assist rape survivors. A Ugandan refugee told of how she was raped and only reported to the UNHCR who only referred her to hospital and the case never went further because, "*I am a woman first, then a lesbian then a refugee...*"⁶⁶

Following the formation of a parliamentary 'anti-gay' caucus in 2014 that called for the arrest by citizens of 'gays and lesbians', there was an increase in violence against LBT women. Subsequently, the 2014 Kenya Anti-Homosexuality Draft Bill called for the public stoning of 'foreign gays', life imprisonment for repeating offenders and the specific criminalisation of lesbian sexual acts which also sparked violence. In Nairobi, Leila, a Butch woman, was undressed by *boda boda* riders who kept asking her whether she was a boy or a girl because she always dressed in a masculine way.⁶⁷

On insecurity, most LBT women, especially the studs- lesbians who present themselves in a masculine manner⁶⁸ - claim an attack on them by both citizens and police. Studs are more visible and are more likely to be perceived to be 'lesbian' or non-conforming in the public domain thus are at a higher risk of encountering higher risks of violence than their counterparts. Though frequently attacked, these

⁶³ "The general rules of international law shall form part of the law of Kenya", "Any treaty or convention ratified by Kenya shall form part of the law of Kenya of under this Constitution."

⁶⁴ 'Neela Ghoshal: Lesbian, Bisexual and Queer woman speak out in Kenya' *The Huffington Post* 11 March 2016 http://www.huffingtonpost.com/neela-ghoshal/lesbian-bisexual-and-queer_b_9280166.html on 11 November 2016.

⁶⁵ Gay and Lesbian Coalition of Kenya, *Research on the lived experiences of LBQ women in Kenya*, 2016, 16.

⁶⁶ Gay and Lesbian Coalition of Kenya, *Research on the lived experiences of LBQ women in Kenya*, 2016, 26-27.

⁶⁷ Gay and Lesbian Coalition of Kenya, *Research on the lived experiences of LBQ women in Kenya*, 2016, 17.

⁶⁸ <https://answers.yahoo.com/question/index?qid=20110629163206AApU5J> on 11 November 2016.

victims hardly report such incidences to the police as indicated by the National Gay and Lesbian Human Rights Commission (NGLHRC) 2014 report that out of 22 reported cases of attacks on them, only 6 were to the police.⁶⁹

⁶⁹ Gay and Lesbian Coalition of Kenya, *Research on the lived experiences of LBQ women in Kenya*, 2016, 23-24.