

Assessing the Effects of Kenya Legal Provisions on Investigations of Child Sexual Abuse Cases within Kwale County

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Abstract

the paper is extracted from a study that sought to analyze the barriers to investigating child sexual abuse cases by police officers in Kwale County, Kenya. The study was informed by Scientific Management Theory and Structural Functionalism Theory. The study utilized descriptive research design. A sample size of 120 officers was drawn from a target population of 361 within Kwale County. The study utilized purposive sampling then simple random sampling from each cluster. The study used the questionnaire method as an instrument to collect data which consisted of questions items formed from the research objectives, questions, and hypotheses. The study used qualitative and quantitative data analysis technique. T-test was conducted to determine the significance levels of variables. A majority (70.6%) of the respondents agreed that legal provisions affect investigation of Child Sexual Abuse within the County with the Children's Act, Sexual Offences Act, Constitution of Kenya, and law on enforceability of children's rights indicating very significant levels($t=2.775, p=0.005$, $t=3.118, p=0.003$, $t=2.903, p=0.006$, $t=3.663, p=0.002$). The study recommends that lawmakers should come up with laws not only in papers but effective and updated enough to curb the vice.

Key words: legal provisions, investigations, child sexual abuse

Introduction

Child sexual abuse is defined by the World Health Organization as involving a child in sexual activity that he or she does not fully comprehend, is unable to give informed consent to, or for which the child is not developmentally prepared and cannot give consent, or that violates societal laws or social taboos. Child sexual abuse is indicated as sexual contact between a child and an adult or another child who, due to age or development, is in a partnership of obligation, rapport, or authority, with the activity deliberately designed to satisfy human other individual needs (World Health Organization, 2012). Sexual assaults, particularly those against young children, are of particular concern to law enforcement and the general public. Barriers to investigation of sexual abuse are the impediments or obstacles police officers come across during investigation of child sexual abuse.

Globally, investigating child sexual abuse cases have never been a walk in the park. Different factors have been hindering the process; from poor investigations by police officers, lack of proper procedures on handling of victims, ineffective laws, lack of resources, poor relationship among stakeholders, uncooperative victims, ongoing custody dispute, aspect of the child's testimony, cultural beliefs among many reasons. A study by Block and Williams carried on 2019 on the prosecution of child sexual abuse in the US confirmed child sexual abuse cases to be notoriously difficult to prosecute. Out of 500 cases 89 cases that represents 17.8% moved forward for prosecution. Despite the formation of American children's Advocacy Centre where all stakeholders necessary in investigating child sexual abuse are found under one roof, still police face obstacles during investigations of the cases.

According to Uganda's 2017 annual crime report, defilement is the most common cause of sex-related felonies. In 2016, there was a 25.8 percent increment in perversion case scenarios, with 12,077 incidents reported and assessed, especially in contrast to 9,598 cases in 2013.

The Kenya National Bureau of Statistics shows that defilement increased to 6,801 in 2020 from 5,397 in 2019, a 26% increase. Out of the cases only 2043 are pending before court. One may ask whose failure is it. Whom do we blame? Is it the police or victim failure?

According to Medical and Public Health Ministry (2016) within Kwale County there have been various instances of reported cases on child sexual abuse (about 60% of the sexual offences reported). However, very few of these cases are prosecuted in court. Between 2018-2019 Kwale County recorded 39 cases of child sexual abuse (Kwale County Police Data Records). Only 17 are actively in court, the rest are still dragging. There is no follow-up on majority of the cases by the victim's family members. Sometimes they don't appear in court leaving the investigating officer and the courts with no option other than closing the case and setting the victim free.

In Kwale County there are several challenges hindering police officers in investigation of child sexual abuse. Officer commanding police station Kwale blamed the Kenyan constitution of having some sections that promotes miscarriage of justice. For instance the section 49(1)(f) stipulates the right of accused persons including the right to be arraigned before court not more than 24hrs after his arrest. This limitation of time sometimes causes a setback to the investigation. For instance Kinango police station lost 9 cases in 2019 where perpetrators were arrested but victims never returned on time for statement recording forcing the police to release the victims because of the 24hr rule. He also argued that the lawmakers focused much on the rights of accused persons and forgot the rights of the victims. An officer from Msambweni police station gender desk confirmed to have lost a maximum of 8 cases in 2019 due to lack of proper procedures in handling of the victims. Victims of child sexual abuse end up placed in the same cells with other criminal since there is no place allocated to the victims. Victims from dysfunctional families are sometimes left exposed to more risk since there are no resources to cater for their welfare. That is why this study sought to analyse the barriers to investigation of child sexual abuse cases by police officers in Kwale County, Kenya.

Statement of the Problem

According to County Children and Gender department there are increasing reports within Kwale County about children being sexually abused. The challenge of proving sexual abuse is also a serious hindrance to child protection and investigations from abuse in Kwale County. There have been challenges of evidentiary issues when it comes to prosecution of child sexual abuse cases in courts within the area of study. This has been attributed to lack of cooperation by the victims due to unclear procedures, and legal provisions that mostly favor the suspect. In addition to the legal challenges, many children within are also not empowered to report sexual abuse. Other enabling factors such as poverty, low self-esteem among children, or a history of abuse limit the success rates of child protection efforts.

Reviewed literature studies that focused on investigation of child sexual abuse indicate that there are knowledge gaps. Researchers have failed to discuss role of the law during investigations aimed at curbing CSA, which makes this study important since it addresses this aspect.

The Constitution of Kenya (2010) also dwelled so much on the rights of accused persons forgetting that sometimes these rights, when fully given to the accused may interfere with investigation. For instance right to bail, right to appear before court not more that 24hrs from the time of arrest among others. It is because of such gaps that the study sought to assess the effects of Kenya legal provisions on investigations of child sexual abuse cases within Kwale County.

Literature Review on Legal Provisions on Investigations of Child Sexual Abuse Cases

Ngugi (2018) study on the investigation and prosecution of sexual and gender based violence Kenya that targeted the victims, police officers, medical officers and the prosecution revealed that the practice by participants in the investigation and prosecution of sexual offenders is not effective as required by laws and policies thus creating gaps in the investigation and subsequently the prosecution of the Sexual offences.

Du mont J. and White D.(2107) on the uses and impacts of medico-legal evidence in sexual assault cases: A global review, stated that the low charge-filling and conviction rates are as a result of the manner at which the victims have been treated by health services, the police, the judiciary and in law. Mont stated that conviction of sexual offenders largely rely on medico-legal evidence which means in the absence of such evidence in the corridors of power, the perpetrator is likely to go scot-free.

The Children's Act stipulates that the children courts should be child-friendly but there are no guidelines on how to do it. Sec 49(1) (f) outlines the rights of an arrested person which states that an accused persons should be presented before court within 24hrs after his arrest. This sometimes affects investigation since all sexual offences requires medical examination before presenting them to court. This might be difficult in getting all the necessary documents especially in rural areas due to unavailability of hospitals/the distance involved. The constitution also stipulates that all offences are bailable including sexual offences. Although there are some limitations to the bail, the presence of this clause gives advantage to the accused person since he/she can maneuver him/herself out hence interfering with investigations.

Sec 62 of the Evidence Act requires that evidence that proves an alleged fact be adduced orally and must be direct making it inevitable that the vulnerable child will face the perpetrator in court proceedings (Republic of Kenya, 2014).

Theoretical Framework

The study was guided by Scientific Management Theory and the Structural Functionalism Theory. Scientific Management Theory states that production and profits can be maximised by selecting and training management to enforce production quotas, analysing how to do the job and providing training, planning and management oversight, selecting the right person for the job and paying them 'a fair wage for a fair day's work' and encouraging employees to develop their own best way to perform a given job. Legislative responsibility lies with the parliament. Parliament should have mechanisms/procedures in place to ensure the legislative functions are well executed.

Structural Functionalism theory on the other hand holds that society is a complex system of interrelated and interdependent systems with different functions all geared towards attaining biological and social needs of individuals in the society, and that society is held together by shared values, languages and symbol. All the social institutions such as the parliament/legislature, law enforcement agencies, courts and prosecution must work towards achievement of a common goal. Therefore if all the institutions were to perform their roles as required, the challenges could be addressed, failure to which investigation of CSA will just be a nightmare to the police.

Research Methodology

The study was conducted in Kwale County which is an inland County within the Kenya coastal region with a coastline south of Mombasa. The County has a population of 649,931. A descriptive survey research design was used in this investigation because it was less time consuming and subjects are monitored in a realistic, unaltered setting.

The target population comprised of police officers of all ranks both senior officers and junior officers drawn from Kwale County comprising of four police divisions making a total of 361 officers (Quarterly Nominal roll Report, Kwale Police County, 2018). The study utilized Mugenda and Mugenda (2003) formula on calculating the sample which resulted to 120 respondents by adopting 30% of the target population of the study.

The respondents were randomly selected from the research sites purposively identified. The researcher was interested with the following areas; Kwale Police Station, Kinango Police Station, Msambweni Police Station and Lunga Lunga Police Station.

The study utilized both probability and non-probability sampling design in selecting the sample. Stratified sampling method was used in probability design to sample junior officers consisting of Senior Sergeants,

Sergeants, Corporals and Police Constables. Sample size of 108 junior officers was selected. In non-probability design purposive sampling was used to sample the senior officers involved in conducting criminal investigations especially those related to sexual offenses. A sample size of 12 was selected. The primary consideration in purposive sampling is deliberating who can best provide information to achieve the objectives of the study (Mugenda & Mugenda, 2003).

Interviews and questionnaires were used to obtain important data from the field. Secondary data, on the other hand, was gathered by studying various research papers, journals, and case reports. The selected respondents were visited and the questionnaires administered: respondents were given about one week to fill in the questionnaires after which the filled-in questionnaires were collected.

Research Findings and Discussions

This study sought to provide an analysis of Kenya legal provisions on investigations of child sexual abuse cases. The objective was operationalized through; laws and criminal justice procedures. The thematic analysis is represented below.

Response on influence of Legal Provisions on CSA Investigations

This study sought to determine the effect of legal provisions on investigations of CSA cases. A majority (70.6%) of the respondents agreed that legal provisions affect CSA investigations within Kwale County while (29.4%) of the respondents cited contrary. The findings are reflected in the table below.

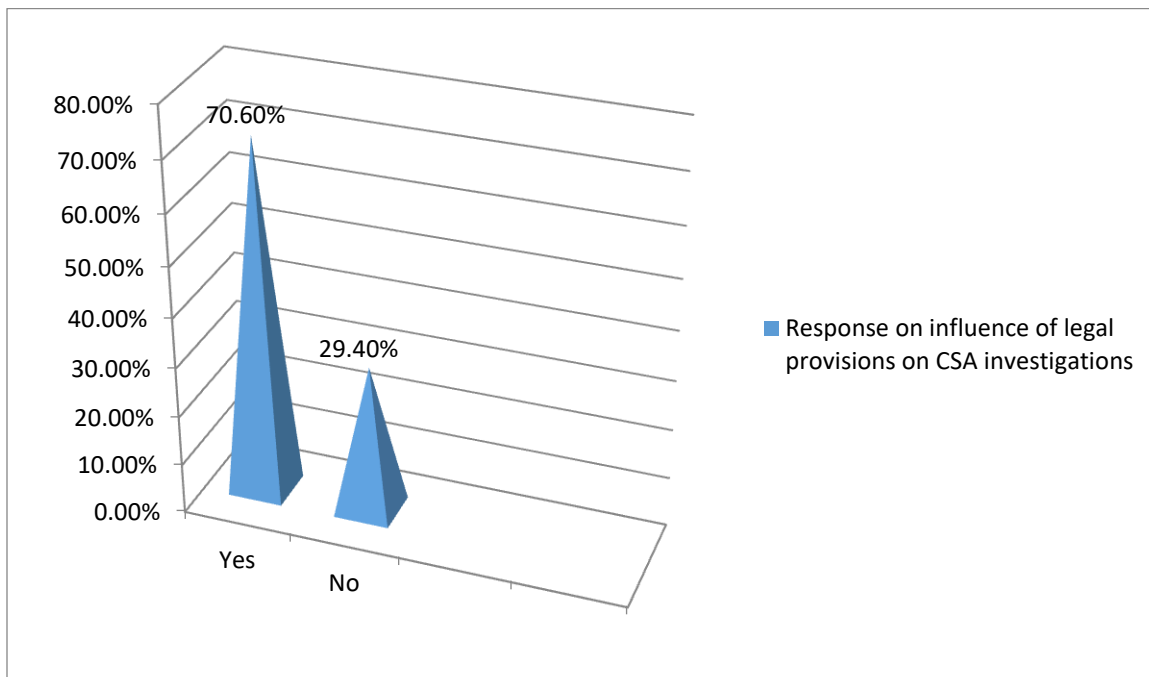


Figure 1. Response on influence of Legal Provisions on CSA investigations

Source: Author, 2019

Level of Agreement regarding how Legal Provisions influence Investigations of CSA

This study sought to determine various aspects of legal provisions on how they significantly influence CSA investigations. According to the response, majority of the response cited that they disagree that law on protection of rights of children is in effective in Kenya. This was cited by (35.3%) of the respondents. A significant percentage also cited that Children rights are not recognized and protected in Kenya under the Children Act. This was cited by (41.2%) who indicated that they agree. This study also noted that there no special procedure in the justice system in Kenya which safeguards the rights of children against sexual

exploitation. This was cited by (28.2%) of the respondents who agreed. This study had also key interest in determining the enforceability of the rights of children within Kwale County.

The study noted that a majority (47.1%) of the respondents agreed that there is prompt enforceability of the rights of children within Kwale County. This study sought to determine as well whether the formal legal procedures affect Child sexual abuse investigations within Kwale County. The study noted that majority of the respondents strongly agreed. This was cited by (28.2%) of the respondents. Among the areas was also observing of children rights within Kwale County. Majority of the respondents agreed that there were collaborative and holistic approach in dealing with violations of children rights within the County. This was cited (32.9%) of the respondents.

However, a significant portion (24.7%) was also not sure. In regard to Children's Act (2001), the study noted that majority of the respondents cited that The Children's Act (2001) has deficiency on the rights of a Child protection. This was cited by (38.8%). Moreover, (36.5%) of the respondents cited that they strongly agree that Sexual Offences Act (2006) has been frequently utilized in addressing Child Sexual abuse within Kwale County. Additionally, 26(30.6%) of the respondents noted that they agree. Finally, the study had an interest in understanding whether the new constitution 2010 should be clear on forms of abuse and neglect. The study reported that majority of the respondents strongly agreed that the new constitution 2010 should be clear on forms of abuse and neglect. This was cited by 37(43.5%) of the respondents. The summary of the findings is reflected in table 4.8.

Table 1. Level of Agreement regarding how legal Provisions influence Investigations of CSA

Kenya Legal Provisions	SD	D	NS	A	SA	T	P
The law on protection of rights of children is ineffective in Kenya	3(3.5%)	30(35.3%)	25(29.4%)	19(22.4%)	8(9.4%)	-2.821	0.006
Children rights are not recognized and protected in Kenya under the Children Act	4(4.7%)	22(25.9%)	14(16.5%)	35(41.2%)	10(11.8%)	0.873	0.712
There is no special procedure in the justice system in Kenya	5(5.9%)	16(18.8%)	17(20%)	24(28.2%)	23(27.1%)	2.873	0.004
There is poor enforceability of the rights of children within Kwale County	5(5.9%)	13(15.3%)	9(10.6%)	18(21.2%)	40(47.1%)	3.663	0.002
There are no formal legal procedures in Child sexual abuse investigations within Kwale County	5(5.9%)	17(20%)	16(18.8%)	23(27.1%)	24(28.2%)	2.871	0.004
Implementation of the rights of child victims has not been realized within Kwale County	3(3.5%)	18(21.2%)	21(24.7%)	28(32.9%)	15(17.6%)	2.329	0.014
The Children's Act (2001) has deficiency	3(3.5%)	12(14.1%)	18(21.2%)	33(38.8%)	19(22.4%)	2.775	0.005

on the rights of a Child							
The Sexual Offences Act (2006) has been frequently utilized in addressing Child Sexual abuse within Kwale County	7(8.2%)	14(16.5%)	7(8.2%)	26(30.6%)	31(36.5%)	3.118	0.003
The new constitution 2010 should be clear on forms of abuse and neglect	11(12.9%)	8(9.4%)	11(12.9%)	18(21.2%)	37(43.5%)	2.903	0.006

Source: Author, 2019

The t test results in Table 4.8 show that most of the statements had significant t values since the p values were below 0.05. This hence indicates that relating to the law on protection of rights of children in Kenya, the respondents disagreed that it was ineffective ($t = -2.821, p = 0.006$). The challenges relating to policy that were identified through the t test included lack of special procedures in the justice system in Kenya ($t = 2.873, p = 0.004$), and deficiency in the Children’s Act (2001) relating to the rights of a Child ($t = 2.775, p = 0.005$).

Discussions

The findings indicate that a majority (70.6%) of the respondents agreed that legal provisions affect CSA investigations within Kwale County. The results agree with Ngugi (2016) study which indicated that improper guidelines on child sexual abuse hinder investigation. The study noted that under Kenyan law, there is no need for corroborating material evidence as long as the court finds the child credible. This might cause conviction of innocent victims especially where the offence was interfamilial. A case of *Julius Wambua Musyoki Vs R* confirmed this loophole in law when his daughter Dorcas Mwendu whom he was accused of defiling, and which led to his life sentence, came almost a decade later and confirmed that she lied to the courts.

The law on protection of rights of children in Kenya was found to be effective ($t=-2.821,p=0.006$). Kenya is a signatory to the United Nations Convention on the Rights of the Child (UNCRC). The country also ratified the African Charter on the Rights and Welfare of the Child (ACRWC). The two instruments have been domesticated by the enactment of the Children Act Cap 586 of the laws of Kenya (Morrison, 2014). The effects of domesticating the instruments makes their provisions part of the applicable laws that protect the rights of children in Kenya. The Act is however only declaratory as it declares the rights of children.

The study also noted that there are no special procedures in the justice system regarding to investigation of CSA. This was supported by a majority (28.2%) of the respondents with $p=0.004$. Ndungu (2015) agreed on his study that gaps in the law easily create a room for sexual offenders to evade justice. This includes lack of legal aid support from the courts, insufficient attention to restorative justice and reparations that is only limited to civil proceedings leaving. The release of suspects on bail gives them a chance to interfere with the cases. The Criminal Procedure Code (CPC) is the main statute that provides for the procedure to be followed in criminal cases including sexual offences under the Sexual Offences Act. Together with the Constitution of Kenya 2010, the CPC greatly provides safeguards to suspects, but with no commensurate responsibility to victims of crime generally. A 2018 policy on management of sexual violence designed to set up proper procedures places a lot of weight on forensic physical examination and little emphasis on forensic interviews. The guidelines lack comprehensive forensic interview protocols and instructions on sexual abuse screening.

A majority (47.1%) of the respondents strongly agreed that there is poor enforceability of the rights of children within Kwale County. Despite the domestication of the convention on the rights of children including the

passing of the Children's Act in Kenya, children continue to face various forms of abuse including sexual abuse. Critics still charge that the children's act is far from perfect its design and its enforcement (National Report on Periodic Review on Children's Rights 2010). Mwangi (2016) study agreed that despite all the legislative efforts, there is evidence that the rights so legislated are not observed due to diverse reasons.

The study also noted that the new constitution 2010 is not clear on forms of abuse and neglect. A majority (43.5%) strongly agreed that the constitution need to be clear on the same. This could be true in that Section 53(1) (d) talks only of protection of children from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour. It does not outline the exact forms of children abuse that children should be protected from.

Conclusions

The study identified several legal hurdles; such as instances where prosecution cannot withdraw under the section 87(a) of Criminal Procedure Code as section 40 of the Sexual Offences Act highlights that it is only the DPP who can end any case submitted to court under SOA locking public prosecutors from making withdrawal. Prosecution officers noted that the issue of balancing the prosecution evidence and defense was the hardest part to deal with and also victims with special problem such as dumb, imbecile challenged mentally victims had difficulty in offering their testimony. There is also the issue of reporting of the findings to the court. The officer in charge of prosecution noted that majority of the medical investigations regarding sexual offences; the medical practitioner who carries out the preliminary examination and writes up the report is not the same individual who presents evidence before a court of law. This means the reported evidence integrity is diminished since it is not a first individual account of the medical findings. Legal pre-requisites concerning collection of medico-legal evidence can restrict which medical expertise may testify in court, impose reporting to be mandatory of particular categories of allegations, hence medical personnel who are not versed well with the legal procedures may get disoriented and confused within the process.

Recommendation

The study recommends that some of the laws like Article 49 of the Constitution protecting the suspects should be reviewed to ensure justice prevails. The severity of the offence should be legally considered and not be left to the discretion of the court.

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