IMPLICATIONS OF THE ADVERSARIAL LEGAL SYSTEM’S PROCEDURES TO THE SPECIAL NEEDS OF CHILD VICTIMS OF SEXUAL ABUSE: BALANCING THE RIGHTS OF ACCUSED PERSONS AND CHILD VICTIMS OF SEXUAL ABUSE IN KENYA

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ABSTRACT

In accessing justice from the courts under the adversarial criminal procedure trial, Child Victims of Sexual Abuse (CVSA) need to testify in the presence of the accused person who has a right to cross examine them under the fair trial rights as internationally recognized and stipulated in the International Covenant on Civil and Political Rights (ICCPR) and many countries’ constitutions. The adversarial criminal procedure rules of evidence may not have anticipated the participation of children in the court process hence their intensity to the physical, emotional and psychological needs of CVSA and a violation of their right to participation and protection in Child Sexual Abuse (CSA) trial process as stipulated in the United Nations Convention on the Rights of the Child (UNCRC), The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (DBPJVCAP, 1985) and the United Nations Guidelines on Justice in Matters Concerning Child Victims and Witnesses of Crime (UNGJMCCVWC, 2005).

The imbalance between the rights of accused persons and CVSA in CSA trial in some cases results into a miscarriage of justice in Kenya. Limited studies to this effect make it difficult to design an appropriate intervention it improve access to justice by CVSA. Using both quantitative and qualitative approaches of data collection, this study collected data in five purposively sampled children courts in Kenya, namely Nairobi, Kisumu, Nakuru, Mombasa and Eldoret Children’s Courts. Fifty CVSA and key informants who included judges, magistrates, lawyers, and parents/guardians of CVSA, Police officers (investigators and prosecutors), children officers and social workers were purposively sampled and data collected using interviews, focus group discussion, observation and records review methods. Statistical Package for Social Sciences (SPSS) and thematic analysis were used to analyze quantitative and qualitative data respectively. The adversarial and inquisitorial trial procedures from different jurisdictions were compared and a procedural justice framework for CSA trial identified trial. Using the procedural justice framework identified for CSA trial as the reference point, the study examined CSA trial in Kenya and found the pre-trial, trial and post-trial procedures to be inadequate in addressing the special needs of CVSA therefore unsuitable for CSA trial. The study makes policy, administrative, research and legislative recommendations and provides a draft of a special hybrid model of child sexual abuse trial procedure that balances the rights of accused persons and those of CVSA to be known as the Child Sexual Abuse Procedure Act.