Witness Protection Socio Cultural Dilemmas

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ABSTRACT

This paper focuses mainly on key socio-cultural dilemmas critical to any Witness Protection Program, a study on Kenyan Witness Protection Program is used to bring forward the issues that need to be observed when reviewing or developing a Witness Protection Program. The study aimed to examine the socio-cultural factors influencing protection of witnesses. Data was collected from Kenya’s criminal Justice agencies concerned with the implementation of the Witness Protection program; two methods of data collection were used. They include: in-depth interviewing and document analysis. The number of participants was determined by those who were likely to yield information being sought. Top five informants were selected from each eight selected agencies since they are better placed to give the relevant information. The study revealed that cultural diversity influence the appearance and testifying of witnesses within the court process.

Key words: Witness Protection Socio Cultural Dilemmas

1.0 Introduction

The term “witness” may vary depending on the context being discussed. For protection purposes a witness is any person in possession of information vital to the judicial or criminal proceedings – that is relevant rather than his or her status or the form of testimony. With regard to the procedural moment at which a person is considered to be a witness, the judge or prosecutor does not need to formally declare such status in order for protection measures to apply. Witnesses can be classified into three main categories: justice collaborators; victim-witnesses; and other types of witnesses (innocent bystanders, expert witnesses and others) (UNODC, 2008) which this study explored also in line with the Witness Protection Program in Kenya.

Recognizing the need to provide for the well-being of victim-witnesses and aware that the admission criteria of witness protection programmes are overly rigid, a number of countries have introduced special witness assistance or support schemes that are distinct from witness protection. Implemented in close cooperation with law enforcement, judiciary and immigration authorities and civil society, such schemes aim to create the conditions that would allow vulnerable witnesses not only to testify in physical security but to avoid re-victimization as well. They include: police protection, temporary relocation to safe areas, evidentiary rules of protection measures when testifying in court (anonymity, shielding, videoconferencing), and moderate financial assistance. This study explores the trend in Kenya and the issues the Witness Protection program has in terms of supporting witnesses’ with socio cultural Challenges.
1.1 Problem analysis and objectives

Examination and cross-examination is of necessity and demanding but can leave witnesses feeling bruised and vulnerable, especially when judges do not intervene to prevent harassment of witnesses (Ellison, 1998). Yet it is also clear from studies on giving evidence at all stages of the criminal process, but more particularly in court, that witnesses who are relaxed and who feel secure are more likely to recall key events accurately and to give their evidence in a lucid and consistent way (Memon et al., 1998). This study identifies the state of a witness where he/she doesn’t feel socio-culturally harassed during the proceedings as a way of getting the reliable information form the witness.

2.0 Witnessing in Criminal Justice Systems

Witnesses’ accounts in court can be a decisive factor in determining the outcome of a case. Increasingly, inquisitorial systems are also relying on oral evidence from witnesses (as is clear from the line of cases regarding witnesses that have been referred to the European Court of Human Rights) The role of the witness can be a demanding and stressful one. Research in a variety of jurisdictions has demonstrated that witnesses seldom find witnessing a positive experience (Rock 1993; Stafford & Asquith 1992; Goodman et al. 1992b). They may not know what is expected of them and most are unlikely to find the laws of evidence and procedure easy to understand. Some may complain of aggressive and intensive cross-examination. They may have to wait for long periods in unfamiliar environments and they may have little guidance about what is likely to happen or explanations for the decisions and outcome in their case. Reluctant witnesses, who may have genuine reasons for fearing retaliation or cultural harassment if they give evidence, are not infrequently treated as disobedient and penalized accordingly (Fyfe and McKay, 2000). This study explores witness protection programme which helps witnesses who have fear of intimidation especially from people in power and those who are culturally connected to them.

2.1 Witness Rights and Responsibilities

In spite of these difficulties, the position of witnesses in most jurisdictions revolves around responsibilities rather than rights (Mackarel et al., 2001). For instance, in Scotland at the present time, witnesses must give statements to the police when asked to do so. In serious cases they must agree to be interviewed by the prosecutor and in all cases they must allow the defence to interview them. They must give their names and addresses even in circumstances where they would prefer to remain anonymous because of fear of intimidation. In addition, they must make themselves available to be examined and cross-examined in court, regardless of whether the date, location and mode of giving evidence are suitable for them. The requirement to comply with a witness citation to appear in court in a serious case has been strengthened in various countries by certain provisions, where witness’s arrests are to be issued in special cases, for example, as it is the case in Scotland. Some recognition however, has been given to the problems faced by certain witnesses in giving evidence. For example, the Council of Europe has acknowledged the needs of intimidated witnesses, particularly in cases of organized crime or crime against the family, in a wide-ranging Recommendation on the Intimidation of Witnesses and the Rights of the Defence (Moody, 2005). This study looks at the position of the witness whether it is right or responsibility as it is the case in Scotland paying attention to Witness Protection Program and also socio-cultural aspects are significant from the witness’s point of view.
2.2 Scotland’s’ Context

In Scotland, alternative ways of giving evidence (using what are called “special measures”) have been available to children since 1990. Children (defined on those aged less than 16 years old) may in any criminal case, give their evidence from behind a screen, by CCTV, or by means of a commissioner, subject to judicial approval. In 1997, this legislation was extended to include a limited range of vulnerable adults, namely those with certifiable mental illnesses or with severe learning disabilities. A complete revision of this area took place between 1998 and 2003, involving an extensive consultation exercise with interested parties (Scottish Office, 1998; Scottish Office, 2002) and culminating in the Vulnerable Witnesses (Scotland) Act 2004. This study examines problem faced by witnesses especially the vulnerable group women and children who need more of protection.

2.3 Witnessing and Justice

The crucial part played by witnesses in bringing offenders to justice is central to any modern criminal justice system, since the successful conclusion of each stage in criminal proceedings, from the initial reporting of the crime to the trial itself, usually depends on the cooperation of witnesses. Their role at the trial is particularly important in adversarial systems, where the prosecution must prove its case by leading evidence, often in the form of oral examination of witnesses, which can then be challenged by the defence, at a public hearing. Psychological studies of evidence-giving (Memon et al., 1998; Dent and Flin, 1992) suggest that court appearances can be highly stressful for witnesses, even in comparatively minor cases. The layout of the courtroom designed to be imposing and even intimidating, can be a source of fear but even more daunting is the nature of the proceedings, which may be incomprehensible to lay witnesses (Rock, 1991). This study scrutinizes this and appreciates the need to have a new layout of our courtrooms to encourage the witnesses who feel intimidated to testify since they form a crucial part of any criminal proceedings.

2.4 Kenya’s Witness Protection Program Focus

The major goals of Kenya’s Witness Protection Program focuses in the preparation of Witnesses for court, facilitate truthful testimony and help protect the witnesses’ self-esteem, personal integrity and promote sense of self-worth and confidence during witnessing process. This study looks at how women and children are treated due to their vulnerability and social-cultural factors which make them feel threatened. Witnesses make a vital contribution to many criminal cases. Their role is particularly significant in Kenya’s legal systems where the focus of trial proceedings is on oral evidence (Egglestone, 1978).

2.5 Vulnerable witness before court

Jurors have a reasonably accurate perspective about many areas of eyewitness research, but jurors, Magistrates and judges, have misconceptions about a number of witness issues, including misconceptions about vulnerable witnesses such as Child witness. In an ideal Child Witness Program, every child called upon to testify should: Be treated with respect during his or her involvement in the criminal justice system, feel safe and protected in a courtroom, have court preparation tailored to his or her individual needs have easy access to testimonial aids, be questioned by adults who adapt their communication to his or her developmental age and linguistic ability and have his or her special needs met and vulnerabilities addressed. In Kenya the Witness protection program has not fully factor handling of vulnerable witness particularly the minors, people with disabilities and gender minority groups. (Gay, lesbian and transgender). This study explores the capacity gaps with courts when dealing with children and other vulnerable witnesses with specific social-cultural needs.
2.6 Theoretical Framework
This study is premised on the structural functionalism theory. Structural functionalism, or simply functionalism, is a framework for building theory that sees society as a complex system whose parts work together to promote solidarity and stability (Macionis, 2010). This approach looks at society through a macro-level orientation, which is a broad focus on the social structures that shape society as a whole, and believes that society has evolved like organisms (DeRosso, 2003). This approach looks at both social structure and social functions. Functionalism addresses society as a whole in terms of the function of its constituent elements; namely norms, customs, traditions, and institutions. Regarding to Witness Protection structural fundamentalism ensures that all societal factors such socio cultural elements are considered during the development and implementation of Witness Program for it to be effective.

3.0 Methodology and Scope
This study was carried out at the judicial and legal institutions within Nairobi county. The key departments targeted were: the Attorney General office, the Law Society of Kenya, The Directorate of Public Prosecution, the Kenya Police, The Ministry of Gender (Children’s Department), Directorate of Witness Protection Agency, the Children’s Court, and the representatives from the National Assembly. Secondary data was collected from case related legislative provisions and reports from national and international agencies advocating for human rights within Nairobi County.

Figure 1.0 below shows the map of the study area.

3.1 Study Sampling

The sample for the study was drawn through purposive sampling. According to Kothari (2008), purposive sampling is ideal when the researcher intends to pick up subjects for the study that meet a defined criterion. The researcher applied this approach to select key informants from the Attorney General office, the Law Society of Kenya, The Directorate of Public Prosecution, the Kenya Police, The Ministry of Gender (Children’s Department), Directorate of Witness Protection Agency, the Children’s Court, and the representatives from the National Assembly. Being a non-probabilistic and subjective approach, the researcher intended to reach out to at most 40 key informants.

3.2 Study Design

The study adopted a case study design. A case study approach was necessary considering the nature of the target respondents. The research utilized a case study design and qualitative mode of inquiry.

4.1 Results and discussions

4.1.1 Introduction

The broad objective of this study was to examine the socio cultural factors critical to the implementation of Witness Protection Program in Kenya. Specifically, this study sought to examine the socio-cultural dilemmas influencing protection of witnesses.

4.1.2. General Information of the Sample

Data for this study was collected from 40 key informants who directly handle witness protection issues. The sample was largely male-dominated with 85% of the sampled respondents being male respondents and the remainder of 15% being female. The gender distribution is shown in Table 4.1.

<table>
<thead>
<tr>
<th>Gender Category</th>
<th>Number of Respondents</th>
<th>% of the Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>34</td>
<td>85.0%</td>
</tr>
<tr>
<td>Female</td>
<td>6</td>
<td>15.0%</td>
</tr>
<tr>
<td>Total</td>
<td>40</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

The respondents were drawn from the Attorney General’s office, the Law Society of Kenya, The Directorate of Public Prosecution, the Kenya Police, The Ministry of Gender (Children’s Department), Directorate of Witness Protection Agency, the Children’s Court, and the representatives from the National Assembly. The researcher spent considerable time at offices identifying key informants (especially key strategists) who were involved with the formulation of the witness protection programmes, reading the current and past correspondence dealing with the formulation of policies leading to the programme, and having extensive discussions with key informants. Table 4.2 indicates the distribution of the respondents by the source institutions from where they were sampled from.
A majority of the sample respondents had extensive experience in civil and criminal litigation issues, public policy formulation, and legislative procedures. All respondents had over 3 years working experience in each of these three core areas under review, with a majority of the respondents (60%) being in the 6-10 years’ experience bracket. These results are tabulated in Table 4.3 below.

### Table 4.3: Distribution of Sample Respondents by Level of Experience

<table>
<thead>
<tr>
<th>Years of Experience</th>
<th>Number of Respondents</th>
<th>% of the Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 – 2 years</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>3 – 5 years</td>
<td>6</td>
<td>15.0%</td>
</tr>
<tr>
<td>6 – 10 years</td>
<td>24</td>
<td>60.0%</td>
</tr>
<tr>
<td>Over 10 years</td>
<td>10</td>
<td>25.0%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>40</strong></td>
<td><strong>100.0%</strong></td>
</tr>
</tbody>
</table>

4.1.3. Socio-Cultural Barriers Influencing Protection of Witnesses

Witnesses cannot be separated from their family members forever. In the early year of witness protection, little attention was given to the maintenance of relations between witnesses and the persons close to them. As a result, participants would often walk out of the programme or compromise security by trying to contact relatives or partners. Witness protection programmes have adapted to meet that need by extending protection to the witness’s family members, cohabitants and other persons close to him or her. The number of persons that may accompany a witness in the programme depends, in part, on factors such as family traditions and social culture. Witnesses with strong social and family links pose a range of additional difficulties that must be considered during the assessment process. Ultimately, other measures may have to be taken to ensure protection. Alternatively, the decision may be taken to exclude that person as a witness. One key group that must be considered when relocating persons close to the witness is young children, who may compromise the programme by revealing confidential details to outsiders. Witnesses cannot be separated from their family members forever. In the early years of witness protection, little attention was given to the maintenance of relations between witnesses and the persons close to them. As a result, participants would often walk out of the programme or compromise security by trying to contact relatives or partners.
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Table 4.4: Socio-Cultural Barriers Influencing Protection of Witnesses

<table>
<thead>
<tr>
<th>Cited Barriers</th>
<th>Number of Respondents</th>
<th>% of the Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strong cultural bonds among kinsmen</td>
<td>13</td>
<td>32.5%</td>
</tr>
<tr>
<td>Fear of possible identity change</td>
<td>7</td>
<td>17.5%</td>
</tr>
<tr>
<td>Victims/ witnesses may not be cooperative</td>
<td>12</td>
<td>30.0%</td>
</tr>
<tr>
<td>Prohibited cultural topics of discussion</td>
<td>8</td>
<td>20.0%</td>
</tr>
<tr>
<td>Perceived prohibition for women to testify</td>
<td>4</td>
<td>10.0%</td>
</tr>
<tr>
<td>Curse threat on testifying against practices</td>
<td>2</td>
<td>5.0%</td>
</tr>
</tbody>
</table>

* Each row is based on multiple responses (out of 40 sampled informants)

Today, in organized crime cases, witness intimidation is becoming so widespread that if there are not several witnesses to the crime, prosecutors do not pursue a court case. Persuading witnesses to testify on behalf of the prosecution sometimes becomes one of the most important obstacles prosecutors encounter in court cases when the defendant has an association with an organized crime group. Organized crime groups have effectively paralyzed the criminal justice system by threatening retribution toward anyone who attempts to testify against them. This study also sought to identify ways in which cultural diversity influence the appearance and testifying of witnesses within the court process. The findings are tabulated in Table 4.5 below.

Table 4.5: Ways in Which Cultural Diversity Influences Witness Participation

<table>
<thead>
<tr>
<th>Cited Barriers</th>
<th>Number of Respondents</th>
<th>% of the Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cultures prohibit open courts testifying</td>
<td>16</td>
<td>40.0%</td>
</tr>
<tr>
<td>Cultures prohibit women to testify</td>
<td>7</td>
<td>17.5%</td>
</tr>
<tr>
<td>Young men do not testify against old men</td>
<td>7</td>
<td>17.5%</td>
</tr>
<tr>
<td>Co-operation with law enforcers a taboo</td>
<td>7</td>
<td>17.5%</td>
</tr>
<tr>
<td>Tribalism: perceived tribal rivalry</td>
<td>12</td>
<td>30.0%</td>
</tr>
</tbody>
</table>

* Each row is based on multiple responses (out of 40 sampled informants)
5.0 Conclusion and Recommendations

Issues to be addressed in this regard include: expanding natural adhesion to fight tribalism; inculcate moral values among Kenyans; let them recognize that a crime is a crime even when perpetrated by tribesmen; trained translators to invest in equipment for example, audio and video recorders; ensure confidentiality and privacy of witnesses and victims of crime. Civic education and awareness campaign was also a major recommendation, as suggested by 62% of the respondents. The following are key recommendations made:

1. Sensitizing Kenyans on the advantages of witness protection and the need to give evidence as required. Kenyans should work hand in hand with security organs, and their attitude towards the programme should be targeted. Negative feelings about the law enforcement should be discouraged. Education on elimination of negative cultural practices should be paramount.

2. Police and other law agencies must be friendly with the general public to encourage community policy in the fight against crime. Agencies should take advantage on the many vernacular radio and television stations and sensitize people on witness protection Programme, and decentralize to the smallest unit i.e. sub-locations and ensures the local understand their mandates.

3. Witness to be informed on cultural change in case of relocation. Also, proper explanation to the witness of the court process after recording a statement. It was also suggested that negative cultural activities that impede justice to be discouraged.

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