

**Children in Need of Protection: Vulnerability and Utilization of Available Justice System in
Addressing Sexual and Physical Abuse of Children**

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Abstract

Kenya has made great strides in establishing mechanisms to protect children from violence. However, research reveals that there is still widespread abuse of children at different levels in the society regardless of the systems and structures that have been put in place. Although some cases of intra-familial child sexual and physical abuse are reported, many go unreported because the majority of the perpetrators provide economic stability and leadership to the victims. These situations create dilemma of missing support as well as fear of intimidation coupled with stigmatization of the victims and the abusers as well. This paper points out that there has been relatively low sensitization on the available legal structures and recommends that a multi-disciplinary approach should be initiated and used where all stakeholders participate in addressing child abuse. Such a process should be respectful, sustainable and less stigmatizing.

Key words: Children, Vulnerability, abuse, Justice System

Introduction and Background

Kenya has made great strides in establishing mechanisms to protect children and young people against abuse, nationally and internally, through active involvement in the following legal instruments: The United Nations Conventions on the Right of the Child (UNCRC, 1989) ratified in 1990; the African Charter was adopted in July 1990 at the 6th Ordinary Session of the Assembly of Heads of State and Government of the African Union (AU) ratified in 2000. In 1996, a conference was held on Declaration and Agenda for Action arising from the World Congress against Commercial Sexual Exploitation of Children (CSEC) which aimed at combating commercial sexual exploitation of children and young people of which Kenya has adopted. Further, Kenya recognizes Commercial Sexual Exploitation of Children (CSEC) as a Worst Form of Child Labor (WFCL) as defined in ILO Convention 182. Kenya ratified ILO Convention 182 in 2001 and in the same year enacted the Children Act and the Sexual Offences Act in 2006. In 2009, National Guidelines on the Management of Sexual Violence in Kenya were adopted. While in 2010, National Children Policy was adopted by the Kenyan government. All these legal instruments show Kenya's commitment in protecting and ending children abuse.

Although the governments have invested a lot in adoption and ratification of the legal instruments, research reveals that there is widespread abuse nationally and internationally of children at different levels in the society. This situation necessitates investigation of the complexities of child abuse and better strategies of mitigating the problem. With this regard, this paper explores the physical and sexual malpractices on children by care givers in Nairobi County, Kenya. The paper investigates the justice system that is available to the affected children, how it is utilized to address the problem, as well as, the challenges hindering its full

exploitation in protection of the children. Three main objectives guide the research, namely: assessing the legal provisions on sexual and physical abuse against children in Kenya, exploring the consequences of child abuse by parents and care givers and finally, analyze disclosure and give recommendation on a multi-disciplinary approach to child sexual and physical abuse cases in Nairobi County, Kenya.

Methodology

The research adopts a qualitative research method. The method provides an opportunity to develop a descriptive, rich understanding and insight into individuals' attitudes, beliefs, concerns, motivations, aspirations, lifestyles, cultures, behaviors and preferences as argued by Marimba (2014), which are key areas in analyzing intra-familial sexual and physical abuse. In addition, it enables a balanced approach where results are integrated which strengthens findings and avoids any overlapping weaknesses. The research used non-probability sampling method which was purposive in nature to carry out a survey that drew 55 respondents within Nairobi County. Additional data for in depth analysis was through focused group discussions. Relevant literature in the research area was also consulted.

Literature Review

According to World Health Organization (WHO), child abuse or maltreatment constitutes all forms of physical and emotional mistreatment, sexual abuse, neglect or negligent treatment or commercial exploitation resulting in actual or potential harm to the child's health, survival, development or dignity in the context of a relationship of responsibility, trust or power. In Kenya, the Laws have standardized the definition of child abuse for uniform application and avoidance of contradictions. The Children Act 2001 (Cap 586, Laws of Kenya) defines child

abuse as anything that causes physical, sexual, psychological and mental injury to a child. Different cultures and communities may have varied definition of abuse, others placing emphasis on the nature while others, mode or behavior. Nonetheless, there is a general agreement globally that child abuse of whatever form is unacceptable and should be punished (Facchin P, at el., 1998; National Research Council, 1993; World Perspectives On Child Abuse, 2000).

Child abuse is not a new phenomenon in today's society, but has been in the literature, art and science in many parts of the world. Furthermore, reports of infanticide, mutilation, abandonment and other forms of violence against children date back to ancient civilizations (Helfer et al., 1997). Historical record is also filled with reports of unkempt, weak and malnourished children cast out by families to fend for themselves and of children who have been sexually abused. For a long time, there have existed charitable groups and others concerned with children's wellbeing who have advocated for the protection of children. Nevertheless, the issue did not receive widespread attention by the medical profession or the general public until 1962, with the publication of a seminal work, *The Battered Child Syndrome*, by Kempe et al., (1962). The term "battered child syndrome" was coined to characterize the clinical manifestations of serious physical abuse in young children (Kempe et al., 1962). Until the 21st century, child abuse, and in particular sexual and physical abuse has continued to be a global problem. It occurs in various forms which are deeply rooted in the cultural, social and economic standing of individuals in the society. Many cases go unreported, while majority of the reported ones faces cultural interference that hamper legal processes put in place. Such global problem therefore requires a much better understanding of its occurrence in a range of settings, as well as of its causes and consequences in the settings. According to the Kenya's Children Department Annual Report (2000), there are over 600,000 children in Kenya who have no proper access to basic human

rights, needs and services and are in need of special protection and care. These children have been subjected to this kind of life due to orphanage; change in family structures (declined status of the extended family); sexual/physical abuse; negligence; abandonment; poverty; marital/family conflicts; early and irresponsible pregnancy; war; and diseases, among others. More than 45,000 of these children are in need of institutionalized rehabilitation and care (Children Department Annual Report, 2000). These are considered in more detail below.

Legal and Policy Framework

The Convention on the Rights of the Child recognizes and urges respect for the human rights of children. In particular, Article 19 calls for legislative, administrative, social and educational actions to protect children from all forms of violence, including neglect, physical and sexual abuse. However, research reveal that only a few countries have legal provisions covering all forms of violence against children. Furthermore, lack of coordination between different government departments and between authorities at the national and local level, as well as other factors, have resulted in the often fragmented implementation of those measures that have been ratified. For example, in Ghana, the legal reforms have had only a limited effect as funds to disseminate information and provide the necessary training are lacking (WHO, 2014). While in Kenya which is a signatory, the content of the convention is not known by the majority of its citizens due to lack of education and public sensitization of the instrument. Non-governmental organizations have expended considerable efforts on behalf of the rights of children and have campaigned for the Convention to be strongly supported, in Kenya such organizations includes, Save the Children, UNICEF, Child Fund Kenya, Plan International, World Vision, The Cradle among others. In countries such as Gambia, Pakistan and Peru child protection bodies have used

the convention to justify calls for greater state investment in child protection and for increased governmental and non-governmental involvement in preventing child abuse (WHO, 2014).

In Kenya, another important instrument was enacted after the Children's Acts 2001. The Sexual Offence Act was enacted in 2006, which harmonized sexual violence legislations into a single law and provided a comprehensive definition of rape, minimum sentences, it criminalized sexual harassment and expanded sexual offences to include gang rape, aiding rape, deliberate infection with sexually transmitted diseases and child pornography (The National Plan of Action Against Sexual Exploitation of Children in Kenya, 2013-2017). The Government of Kenya also developed the 2008-2012 National Plan of Action for Children, which provided a wide variety of activities that aims at safe guarding the rights of children while providing a conducive environment for learning, development, protection and participation. The African Charter on the Rights and Welfare of the Child (ACRWC) which Kenya is a signatory is an umbrella Charter that safe guards the rights of the child. Despite all these legal provisions to protect and safeguard the child from abuse including physical and sexual abuse, child intra-familial abuse is still wide spread, and perpetrators are hidden within the home, which acts as a protection cover for them.

The Bill of Rights also provided in the Constitution of Kenya is an instrumental legal tool, it gives rights to access justice to all and the right to fair trial, provided within article 48 of the Kenyan constitution (Ndeche, 2013). However, the Constitution does not lay open the rights of the victims, which creates a gap within the instrument as a tool to offer legal direction.

Intra-Familial Child Sexual Abuse

Intra-familial child sexual abuse has been defined as the use of a child for sexual satisfaction by family members, that is, blood relatives that are too close to marry (Deche, 2013). Usually,

sexual abuse occurs when adults use their power, authority or position on children to gratify their own needs. This might affect children of all gender and ages. Most of the acts of sexual abuse occur in private and the abuser struggle to prevent discovery. The child is often threatened to keep silent and many children feel such a strong sense of guilt and shame that they are reluctant to speak about what has happened to them. Examples of sexual abuse activities include enticing or forcing a child to engage in fondling, masturbation, oral or anal intercourse or full sexual intercourse; making a child observe inappropriate sexual behavior; and showing a child pornographic books, videos or photographs or engaging them in inappropriate discussion about sexual matters (CLAN, 2003).

When child sexual abuse occurs within the home, it has the effect of breaching the child's legally recognized safety net from within and creates a complex state of affairs. First, the perpetrator is often a male relative in a position of trust and vested with a duty to protect the child as a caregiver or benefactor. Any action taken against them has implications for the victim's livelihood and that of the family at large. Secondly, the other family members too, often have to play a role when the criminal justice process is set in motion. They may be called upon as witnesses either for the prosecution or for the accused, this situation creates a dilemma. The family also has to deal with breach of their privacy and negative public exposure which most often results to a feeling of stigmatization from the society (Mbugua, 2006; Deche, 2013). Follow up on legal actions against such cases most often leads to family breakups and loss of relationships.

A particularly egregious incident of intra-familial child sex abuse, was the rape of 9 month old baby Tshepang raped by a group of relatives including her great grandfather and other relatives

in South Africa (Bowman and Brandige, 2014). This incident drew a lot of media attention which led to the establishment of a parliamentary task group on Sexual Abuse of Children and a wide spread sensitization of children's rights. While in Ethiopia, a national study carried out on high school based students revealed that 68.7 % of female students were sexually abused but surprisingly, 16.7 % of the perpetrators were family members (UNICEF et al., 2010).

In Kenya, statistics indicate that 43% of sexual abuse takes place at home and is perpetrated by family members (Committee on the Rights of the Child 2006). Furthermore, the World Health Organization (WHO) estimated that 150 million girls and 73 million boys under the age of 18 have experienced sexual abuse by people known to them including family members (UN Secretary General's Report on Violence against Children 2006). With these facts on intra-familial child sexual abuse, it qualifies the abuse to be considered as a complex global health and human rights concern that requires a concerted effort in addressing it.

Child Physical Abuse by Caregivers

Physical abuse by caregivers on children is mostly in the form of hitting the child with an object, other than on the buttocks; kicking the child; beating the child; and threatening the child with a knife or gun (WHO, 2014).

In a cross-sectional survey of children in Egypt, 37% reported being beaten or tied up by their parents and 26% reported physical injuries such as fractures, loss of consciousness or permanent disability as a result of being beaten or tied up (Yousse 1998). Further, studies in the Republic of Korea, parents were questioned about their behavior towards their children. Two-thirds of the parents reported whipping their children and 45% confirmed that they had hit, kicked or beaten

them (Hahm, 2001). Also in Ethiopia, 21% of urban school children and 64% of rural school children reported bruises or swellings on their bodies resulting from parental punishment (Ketsela, 1997). The prevalence of physical abuse including corporal punishment in the East African region is reducing as indicated by a research carried out in Ethiopia, Kenya, South Sudan, Rwanda, Tanzania and Uganda (Save the children, 2012). Ethiopia, which in 2006 showed a prevalence of 84%, registered a prevalence of 84% in 2010 (Save the children, 2012). In Kenya, the prevalence in 2006 was 99% (Stavropoulos, 2006) while in 2012, was 61% for girls and 62% for boys (Save the children, 2012). Uganda registered 98.3% prevalence in 2005 (Naker, 2005), 94.2% in 2006 for girls and 85.8% for boys, while in 2010, the prevalence stood at 81% for girls and 87% for boys (Anppcan Uganda Chapter, 2011). This indicates that, corporal and physical punishment is widely carried out in homes as a form of instilling morals; countries such as Sweden have outlawed such punishment (Save the Children, 2012) and have enforced laws that criminalize the activities.

Although Kenya and South Sudan have achieved a legal ban on corporal punishment on children, there are still many instances of non-compliance with the ban, for example, in Kenya; a primary school teacher beat a student to death in January 2012 (The Standard March, 2012). Existing gaps in the effort to end individual and corporal punishment include: conceptual problems, absence of clear positive discipline guidelines, unclear benefits of alternative punishment and legal barriers (Save the Children, 2012). This gaps play a big role in creating an environment that challenges total ban on Individual and corporal punishment on children. There is also notable gap of lack of reporting of physical and intra-sexual abuse as indicated in figure 1 below.



Figure 1: Shows the cycle of low level of reporting of children physical abuse, adapted from Save the Children handbook 2012.

Risk Factors for Child Sex Abuse Within the Family

A. Socio-Economic Risk Factors

With globalization, there has been rapid urbanization especially in developing countries, where population growth has continued to grow more rapidly in urban areas but also steadily in rural areas as a result of better lifestyles. However, economic strain has led to negative impacts that results to perpetual sexual abuse within households. In addition, there has been increased number of dysfunctional families due to high unemployment, violence, poverty, lack of physical and social infrastructure (Bowman and Brundige, 2014). It becomes more complicated in cases where because of poverty, victims are unable to seek for help or their mother's to offer protection because the perpetrator is a person responsible for economic survival for the

household. Further, living conditions may be overcrowded forcing adults to share the same room with children. In other cases, the house is too small leaving no privacy for or from sex (Ndeche, 2013; Bowman and Brundige, 2014).

A. Sex Inequality

The discussion of sex and incest especially in an African context always reflects an integral connection in the disparity of power between men and women (AnnLevett, 1991). There is an assumption that men have to sexually take advantage of women and children which is a patriarchal myth. Thus violence becomes a strategy used by men to forcefully exert control over women and children to have sexual intercourse (Bowman and Brundige, 2014). In Kilgoris Kenya, a man was alleged to have slept with his daughter who was in class six and fathered a child, during the same time his wife, the mother to the child fell pregnant, although Samson Momposh, the perpetrator denied the allegation until a DNA test was carried out that confirmed the allegation (Ndeche, 2013). Spousal battering exacerbated the situation as mothers who are physically and sexually abused are not able to protect their daughters, yet if they leave their marriage, their daughters would be further exposed to the abuse. Such situation leaves no choice to the mothers other than persevering with the condition.

A. Status and Socialization of the African Children

Looking at the African context, women and children are regarded as property and such cultural values that allow women to be treated as possession give way for easy sexual assaults to women and children in the family by the men (Bowen and Brundige, 2014). Socialization of children also demands utmost respect to older individuals and parents in the society. With such relationships, children are required to be obedient and not question their elders, perpetrators take

advantage of their position and power to sexually abuse children under the cover of being elders in the family, and furthermore a father requires passivity and acquaintance rather than resistance.

Bowman and Brundige through their research in South Africa noted that,

The African girl is born into a culture of male supremacy. . . . Daughters, in particular, dare not disobey the fathers' wishes Disobedience, which is very rare, results in physical reprisal, denial of material support, and ostracism by the family or visitation of an unseen evil force because such disobedience is regarded as a taboo.

Perpetrators reinforcing their unaccepted acts using socialization parameters instill fear on the sexually abused children thus making reporting and seeking legal help difficult.

Findings and Discussion

The study carried out in Nairobi County in July 2016, to explore the prevalent causes and consequences of child abuse by parents and care givers, justice system available to the victim and challenges hindering its full exploitation, showed that the prevalence of children sexual and physical abuse within the family is high yet majority of the cases go un-noticed or either unreported.

In the study, 27% of the respondents acknowledged that children are physically abused in the family, while 23% were of the opinion that children are sexually abused within the family. Despite this figures, 43% of the respondents admitted that parents do their best to protect their children from sexual and physical abuse. Although the research also revealed that among the respondents, 83% of the parents have delegated their children's care giving services to house helps.

As argued earlier by Ndeche (2013) and Bowman and Brundige (2014), privacy in the home is a major contributor to child sexual and physical abuse at the family level. Among the correspondence 20% and 40% strongly agreed and agreed respectfully that family space is a major contributor to sexual and physical abuse. 72% of the respondents admitted that majority of physical and sexual abuse within the family are perpetrated by relatives within the household. The research further revealed a poor response on issue of reported cases. Only 8% of the respondents reported that cases of sexual and physical abuse are reported to legal authorities for action while 37% of the respondents were of the opinion that physical and sexual child intra-familial cases go unreported. Reasons for poor reporting of such abuse included; victims being threatened, denied basic needs and victimized, fear of being punished and abandoned, other victims lack knowledge on available reporting procedures and institutions and fear of family exposure and shame. Bribery, was also indicated as a contributing factor, as perpetrators bribe their way out of the case. The issue of fear played itself when respondents were asked if they had ever been physically or sexually abused, as only 16% (8% female and 8% male) acknowledged that they had been abused previously. Such low response reflected the fear of victims reporting their ordeal to legal institutions. It was however evident, that legal institutions that handle children's rights issues face challenges that slow their progress in resolving cases reported to them. Some of the challenges include; victim's laxity in pressing charges while others are not willing to testify in a court of law, eventually the case is withdrawn and the perpetrators go scot free. Such circumstances reflect intimidation through threats, bribery, and fear of humiliation and the shame the family will suffer in the society. Victims also fail to report on time which most often leads to loss of evidence that weakens the case. Due to economic conditions of the victims who are usually minors, with no sufficient support from relevant legal institutions, there is no

conclusive follow up of the perpetrators. Other victims fail to report about the abuse, while some cases taken to authorities such as the police are not followed up because the police are bribed not to press for charges. In other circumstances, the community becomes a hindrance as they frustrate the justice system by not cooperating. Other reported challenges included, laxity in legal structures to ensure that perpetrators are punished, while at the same time legal procedures always take time to be concluded coupled by change of those entrusted to rule over the case. Such reasons discourage the victims and they end up dropping the case.

Ignorance by victims about the institutions to report to and the help they can receive in case of such abuse, may be contributed by the poor campaigns and sensitization by local leaders in the community about intra-familial children's sexual and physical abuse. 40% of the respondents were of the opinion that frequent sensitization and education on children's sexual and physical abuse is not carried out in their community, yet in other families talking about issues relating to sex is a taboo. Cultural practices that encourage continued perpetuation of intra-familial child sexual abuse included; watching pornographic movies, indecent dress codes, abusive relationships, early circumcision in boy-child, media, polygamy, gender based violence and early girl child marriage.

Disclosure Experiences

Disclosure of intra-familial child sexual abuse is hard and a sensitive issue for the victims. From the research, 55% of the responded reported that sexual and physical abuse within the family go unreported. This is attributed, among others, to; fear of exposing close family members, being punished, losing assistance and relationships or fear of ridicule that come with such abuse. This corroborates the findings of a study conducted by wager (2015) which indicated that 75% of the

respondents did not disclose their ordeal, while 14% reported to their mothers and only 7% reported to their fathers. Intra-familial child sexual abuse is the hardest to report compared to sexual or physical abuse by a stranger and the possibility of continued abuse once abused is high (Ndeche, 2013; Bowman and Brundige, 2014). This again is because of the relationships involved and the care and assistance provided by the perpetrators. Some of the reasons for poor disclosure and reporting by the victims hindering utilization of existing legal systems included:

a) Lack of Opportunity

This is where the victims feel reporting the abuse is inappropriate as a result of shame and lack of knowledge of how to go about the issues. They are also naive as to who to report the sensitive issue as sex topic within the family is not an openly discussed topic. This also reveals lack of education and sensitization about children's intra-familial abuse that has kept the topic private and confidential.

b) Relationships Concerns

The fear of peer rejection is particularly evident for those in middle childhood since relationships with peers become an increasing preoccupation and are developmentally important at this stage (Buhrmester and Furman, 1986). Other relationship includes concern for family and perpetrators. Victims fear about the welfare of the perpetrators as they are also close family relations, and yet they may be the ones depended upon economically within the households.

c) Embarrassment

Embarrassment flows together with the sub-themes of self-pity, self-blame and it strongly delays or prevents disclosure. The victims fear being stigmatized within the family, by peer group and

in the society, they therefore feel physically spoiled, the sense of shame goes hand in hand with perception of self-blame:

I WAS TOO EMBARRASSED to tell anybody (emphasis in the original) (Wager, 2015).

Self-blame and self-peaty are also deliberate tactics used by perpetrators to silence the victims.

d) Hopelessness

Respondents had the notion that their state of powerlessness that ultimately resulted to hopelessness hindered them from disclosing. Such hopelessness is fueled by the thoughts that by disclosing no one might believe them:

I did not honestly feel that I could do anything about it, every day was the same and with hindsight I only had the strength to get through each day as best as I could.

Feared no one could believe me [...].

It has also been found that intra as opposed to extra-familial offenders are more likely to engage in grooming strategies that instill a sense of powerlessness and hopelessness among their victims (LeClerc et al., 2009).

Conclusion

Kenya has made tremendous strides in addressing child intra-familial sexual and physical abuse cases through formal legal instruments that are operational and are used by victims to seek justice. These include, the Children's Act 2001, Sexual Offence Act 2006, and the Constitution of Kenya among others. In Kenya, corporal punishment was banned in 2002 by the Ministry of

Education. Despite these legal instruments child intra-familial sexual and physical abuse is still rampant in many families.

However, intra-familial child sexual abuse are sensitive cases to be handle as the perpetrators are trusted respected individuals within the family and in many cases they are individuals who provide financial stability and are looked upon in providing guidance within the family. Reporting of such cases through the formal justice system does not always bear fruits because of threats, shame, fear of stigmatization, intimidation, preservation of relationships and benefits from the perpetrator, among other reasons. Some families decide to settle these cases through the informal justice system, but the cases end up being swept under the carpet and the victims do not get any justice, abuse continues as a norm with threats used against the victims. It is worse when the victims are minors and are silenced not to speak about the issues. This research has revealed that there is limited sensitization on the happenings as well as the instruments available to settle intra-familial child sexual and physical abuse. There should be more sensitization campaigns by relevant bodies against such abuse within the family. Considering the complexity, sensitivity being a private issue and that touches the family, a multidisciplinary approach, which is a grass root based should be initiated and reinforced among communities to ensure that the perpetrators of intra-familial and physical abuse among children are efficiently and effectively punished and justice restored.

Recommendations

a) Multidisciplinary Approach

Arising from the research, the most effective way of addressing intra-familial child sexual and abuse cases is to have an interagency collaborative planning and coordinated strategy where all

stakeholders involved in child protections such as social workers, therapists, prosecutors, judges, doctors and police officers have a joint forum to actively participate, with mutual respect, a common goal and well stipulated mechanism to be followed. The ultimate aim should be to help the victim get justice in an economical way, and within the shortest timeframe and privacy possible.

Placing a Child in Emergency Protective Custody

A decision should be made to move the affected child to an emergency protective custody if the protective officer feels that the child may suffer further physical or emotional harm or trauma or be hidden or abducted before a court order is obtained. The affected child should stay at placement homes until a final determination regarding custody is made by the courts. In such situations, the responsible officers should be clear of the law and be clear of their mandated roles and responsibilities.

b) Specialized Courts

Children's courts should be strengthened and judges and magistrates in the courts be continuously empowered to handle all forms and emerging tactics of children abusers especially the intra-familial sexual abuse that always presents complexity in its nature and ways of solving them. Selected Judges and magistrates should be trained on handling children's issues and their offices be opened in every county. The courts should be empowered financially and materially to adequately handle the cases. More research in the area and reporting should also be encouraged.

c) Empowerment

Empowerment of women as well as men is key in addressing intra-familial sexual and physical abuse. This is because gender in equality and power relation is linked to such abuse. Men should be sensitized on their roles and boundaries within the family, for until when male sexuality and women autonomy is transformed especially in the African context such abuse will continue.

Areas for Further Research

More research should be carried out on how to incorporate a multidisciplinary approach to the current legal system in addressing intra-familial sexual and physical abuse in the society. In addition, a research on training modalities of all the stakeholders should be carried out geared on improving mutual performance. Further, a research should be carried out on how a selected team of qualified lawyers and magistrates should be selected and be empowered to work with families in addressing children's sexual and physical abuse.

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