



**THE CHILD-FRIENDLY COURT AND THE CHILD-VICTIM IN THE
KINGDOM OF SWAZILAND**

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DECLARATION

I, **Sibusiso Magagula**, hereby declare that this research paper is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

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DEFINITIONS

Child: Any person below 18 years (CPWA 2012 and UN Convention on the Rights of the Child).

Child abuse: Any form of harm or ill-treatment deliberately inflicted on a child, includes: assaulting a child or inflicting any other form of deliberate injury or harm on a child; sexually abusing a child; committing an exploitative labour practice in relation to a child; exposing or subjecting a child to behaviour that may socially, emotionally, physically or psychologically harm the child; exposing a child to physical or mental neglect; and abandoning or leaving a child without visible means of support.

Child exploitation: Sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. (Article 3 of the ‘Palermo Protocol’, adopted in 2000, entered into force in 2003.)

Child protection: The prevention and response to violence, exploitation, and abuse against children.

Child protection system: The set of coordinated elements, both formal and non-formal, that enable the prevention of, and response to, abuse (physical, sexual, emotional, stigma), exploitation, violence and neglect against boys and girls. (Based on international summaries¹)

Child sensitive: An approach that balances the child’s right to protection and that considers a child's individual needs and views (UN Guidelines on Justice in matters involving child victims and witnesses of crime, 2005).

Child victims and witnesses: Children and adolescents under the age of 18 who are victims of crime or witnesses to crime, regardless of their role in the offence or in the prosecution of the alleged offender or groups of offenders. (UN Guidelines on Justice in matters involving child victims and witnesses of crime, 2005)

Children without parental care: All children not living in the overnight care of at least one of their parents, for whatever reason and under whatever circumstances. Children without parental care who are outside their country of habitual residence or victims of emergency situations may be designated as unaccompanied or separated. (UN Guidelines for the Alternative Care of Children)

Civil society organisation: Non-governmental organisations, faith-based organisations, community-based organisations, trusts, foundations, charitable organisations, support groups, and similar organisations or groups that operate in the child protection arena.

Perpetrator: A perpetrator is a person, group, or institution that directly inflicts, supports and condones violence or other abuse against a person or a group of persons. Perpetrators are in a position of real or perceived power, decision-making and/or authority and can thus exert control over their victims.

Social welfare system: The system of interventions, programmes and benefits which are provided by government, civil society and community actors to ensure the well-being and protection of socially or economically disadvantaged individuals and families, including children. A vital safety net for children and families made vulnerable by challenging circumstances. When a system functions effectively, families and children have access to an array of quality services to promote wellbeing and protect them from harm. (DSW, 2012, Strengthening Social Welfare Systems)

Vulnerable child: A child with or without parents who lacks the basic needs for survival and living in circumstances with high risk or whose prospects for health, growth and development are seriously impaired. (CPWA 2012).

LIST OF ABBREVIATIONS

ABT Associates	American Consulting Company Registered under the laws of Eswatini in 2013
ACRWC	African Charter on the Rights and Welfare of the Child
AHRLJ	African Human Rights Law Journal
BCLR	Butterworths Constitutional Law Reports
CCPC	Community Child Protection Committees
CCPV	Community Child Protection Volunteers
CFC	Child Friendly Courts
CPWA	Children Protection and Welfare Act
CRIN	Child Rights International Network
DPP	Director of Public Prosecutions
DSW	Department of Social Welfare
HFG	Health Finance and Governance
GBV	Gender Based Violence
LAWSA	The Law of South Africa
NCP	Neighborhood Care Point
NGO	Non-Governmental Organization
MATTSO	Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters
OSC	One Stop Centre
OVC	Orphan and Vulnerable Child
PEPFAR	President Emergency Plan For Aids Relief
PELJ	Potchefstroom Electronic Law Journal
SACR	South African Criminal Law Reports
SAJHR	South African Journal on Human Rights
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child

UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Education Fund
VACS	Violence Against Children and Young Women Study
VCT	Voluntary Counselling and Testing

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CHAPTER ONE

1.1 INTRODUCTION

*“....no violence against children is justifiable; all violence against children is preventable...
The Member States must act now with urgency to fulfil their human rights obligations and
other commitments to ensure protection from all forms of violence, keywords taken from the
UN Study on Violence against children.”¹*

The issue concerning child victims is always a two-way cycle that may not be broken. On the face of it, the child victim appears to be distinct from other aspects of the judicial procedure in which he/she gets involved in the judicial proceedings. A child can be a party to proceedings through being a witness, victim, complainant or perpetrator. This consideration is of particular importance when a child is either involved in administrative, criminal and/or civil judicial proceedings. However, child participation in administrative, criminal and/or civil judicial proceedings varies considerably in dispensing justice for the child victim.²

This study focuses on the criminal aspect of the child as both victim and complainant. It is always a necessity for the complainant to articulate what actually befell him/her. However, this is distinguishable from just being a mere witness who only attests on how an offence occurred. As it requires the most profound attention to detail by the officials that eventually form a party to the judicial proceedings, so give precise accounts of the offence in evidence.

Sadly, violence against children is a daily occurrence in Swaziland, one of the UN member state, and a growing concern in sub-Saharan Africa.³ Violence against children can be expressed in the form of physical or sexual assault, psychological or emotional abuse and deprivation or neglect. These events occur in many different settings, including in the home, family, schools, healthcare systems, justice systems, workplaces and in communities.

Approximately, 1 in 3 women report experiencing sexual violence as a child, nearly 1 in 4 was exposed to physical violence and 3 in 10 experience some form of emotional abuse.⁴ Noticeably, sexual violence perpetrators are known to the victims since most of these violent

¹ UN Paulo Sergio Pinheiro *Study on Violence Against Children*, Independent Expert, (2006) 5.

² European Union Agency for the Fundamental Rights (2015) Perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU Member States. 56-73.

³ UNICEF Report *A National Study on Violence Against Children and Young Women in Swaziland*, (2007) 6.

⁴ supra note 3.

acts are committed by people who are a part of their immediate environment, such as parents, extended family members, spouses, boyfriends or girlfriends, teachers, priests and many more.⁵

The increase in cases of child abuse has a negative impact on the country as well as in the legal fraternity. It adds to the problematic issue of backlog of cases.⁶ The government of the Kingdom of Swaziland in conjunction with development partners, engaged in consultative meetings with different stakeholders including prosecutors, magistrates, court clerks, court interpreters, police, nurses, doctors, chiefs, health motivators, community child protection volunteers (CCPV), and social workers in order to reduce abuse cases while ensuring comprehensive access to justice for child victims is achieved.⁷ The outcome of these meetings pointed out the need for capacity building and infrastructure improvement on the child justice machinery.

The main drive for CFCs is to assist children to testify against perpetrators without physically facing them. Such mechanisms provide space for children to speak more easily about the traumatic events that happen to them without intimidation.⁸ Whether children encounter the law as victims, witnesses, offenders or complainants, it is equally important that they are supported by a system that understands and respects both their rights and their unique vulnerability.

The United Nations Children Education Fund (UNICEF) assisted in the construction of a children's court at the High Court of Swaziland in 2005.⁹ This court has served for a long time as the only child-friendly court (CFC) in the country. This particular court has been affectionately known as Court "D". However, Court D alone does not have the capacity to manage the volume of cases that are reported on a daily basis. It is also not child-friendly as

⁵ RAINN statistics *Perpetrators of Sexual Violence: Statistic* <https://www.rainn.org/statistics/perpetrators-sexual-violence>; United States Department of Health and Human Services (2013) *Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau*. Child Maltreatment Survey, 2012 – 2013 (Accessed: 15 January 2014).

⁶ US Department. *The Swaziland 2013 Human Rights Report*, 16; Afri Map (2013) *The Justice Sector and the Rule of Law*, A review, 55.

⁷ UNICEF *Advancing Prevention and Response to Violence Against Children* https://www.unicef.org/protection/files/Swaziland_Global_VAC_Meeting_Report.pdf. (Accessed: 12 May 2014).

⁸ US Embassy in Swaziland press statement 7th May 2014 <https://Swaziland.usembassy.gov>; Long, S (2014) *Protecting Swaziland's Children Strengthening Swaziland's Child Protection System: a mapping and assessment study*. (Accessed: 23 May 2014).

⁹ US Department of State (2006) *Swaziland*, 1 <https://www.state.gov/j/drl/rls/hrrpt/2005/61595.html>; Concluding Observations of the Committee on the Rights of the Child <https://hrlibrary.umn.edu/crc/swaziland2006.html>; OHCHR (2006) *Citizenship of Children* <https://docstore.ohchr.org/SelfServices/FilesHandler> (Accessed: 30 May 2014).

the environment is intimidating to children. The first case to be tried by the Court was that of *Rex V Makwakwa*¹⁰ where the accused, aged 65 years, had been convicted of the rape of a four-year-old girl where the Court found that the Crown had proved to aggravating circumstances, namely; (a) accused being an adult male of about 65 years old, stood in a *locus parentis* relationship to the complainant, (b) accused raped the child whilst she was discharging duties under the accused person's instructions and thus, abuse society's *mores* that children should obey adults, (c) complainant was of a tender age, (d) accused had not used any protective measures thus exposing complainant to contracting venereal diseases including HIV/AIDS. The accused person was sentenced to ten years imprisonment without an option of a fine.

Prior to the establishment of this Court, children's matters were held at the magistrates' courts where they appear as victims of offences or perpetrators of other crimes. Only custody issues were held at the high court.¹¹ Such an arrangement provided for by the Magistrates Court Act ensures that matters are heard and finalised expediently.¹² Even though magistrates have a continuous roll, preference is given to cases involving children over ordinary cases. This ensures that children's cases are concluded quickly while their memory is still fresh. Even reporting is problematic as role players such as police officers, social workers, prosecutors, doctors/ nurses, magistrates and judges are not all trained in dealing with children's issues. It then became apparent that the justice system failed to deal effectively with cases involving children and especially, when they are victims of abuse. Structurally, abuse cases at the community level are received through the Community Child Protection Committees (CCPC), reported to social workers and the police.

Both social workers and police refer the victims of sexual abuse to the doctors for examination within a period of 48 hours.¹³ Once the doctor has certified that the victim has been sexually assaulted then the police transmit the docket to the prosecutors.¹⁴

The HIV and AIDS epidemic in Swaziland has made children vulnerable as they are exposed to abuse either by relatives and strangers.¹⁵ Orphans and Vulnerable Children (OVC) are

¹⁰ (SZHC) No. 117/2003.

¹¹ Act 20 of 1954; Rule 43 (1) (c).

¹² Act No. 66 of 1938; s 70 & 71.

¹³ Act No.6 of 2012; s 26.

¹⁴ Population Council Regional Sexual and Gender-Based Violence Network (2012). *Risk Factors in Sexually Abused Children Reporting to the One Stop* <https://www.intechopen.com/download/pdf/33660>. (Accessed 20 June 2013).

¹⁵ UNICEF (2007) *A National Study on Violence Against Children and Young Women in Swaziland*, https://www.unicef.org/swaziland/violence_study_report.pdf; National Study on drivers of violence against children in Swaziland, 21. (Accessed: 25 June 2013).

subject to an increased risk of abuse and exploitation, and there has been an increase in the number of reported sexual abuse and rape cases as a result of the HIV and AIDS epidemic in recent times.¹⁶ In a study conducted by the Swaziland Ministry of Health, 9% of OVC girls below the age of 15 years have engaged in sexual intercourse as compared to non-OVC girls which are at 6.45%. This is a significant issue in a country in which 1 in 4 children is an orphan and a lot more are classified as vulnerable because of a family member's death, poverty or abuse.¹⁷

To curb the problems encountered by the courts, the Chief Justice from time to time issues "Practice Directives" giving instructions to solve issues pertaining to cases involving children. In addition, the office of the Director of Public Prosecutions (DPP) will also issue its own practice directives relating to the handling of the same cases and they create confusion. The effect of these practice directives means that some cases are directed to the high court for trial and others to the magistrate's courts or vice versa. This leads to children's cases being undetermined and thus, struck off or withdrawn from the court roll in terms of the provisions of the penal code.¹⁸

1.2 Historical background

Prior to 2007, reporting abuse or any infringement of the rights of the child depended on the family set up and awareness of the repercussions thereof, either from the child involved or the legal guardian under his or her custody at the time.¹⁹ For instance, physical abuse was considered by some community members as taboo and never to be made public. It had to remain within the precincts of the family unit or that particular community. However, a few enlightened community members reported any kind of abuse that befell a child.

It has been through a great deal of work conducted by Non-Governmental Organizations (NGOs) that abuse has been exposed to the public, and effective reporting paved the way in all corners society. It started by awareness campaigns that ran in all spheres of life; at schools, churches, on the streets, public parks and at workplaces.²⁰ These covered urban and rural areas

¹⁶ UNICEF (2007) *Humanitarian Action in Swaziland*, 95. /<https://www.unicef.org/har07files/HAR>. (Accessed: 30 June 2013).

¹⁷ VAC Study (see note 15).

¹⁸ Act No. 67, 1938 (As amended); s 6.

¹⁹ UNICEF *Implementing Child Rights in Early Childhood*, vii https://www.unicef.org/earlychildhood/files/Guide_to_GC7.pdf, (Accessed: 14 July 2017).

²⁰ CANGO Swaziland (2017) Co-ordinating Assembly of Non-Governmental Organisations <https://cangoswaziland.wordpress.com/page/2> (Accessed: 4 September 2017).

of the country. Nonetheless, these efforts did not prove enough to stop abuse. It, therefore, meant more resources had to be diverted towards seeing to creating awareness of abuse, reporting it and making sure perpetrators or offenders are punished.

Stakeholders who realised they were not winning the battle against abuse decided to come together and devised more appealing ways to curb the widespread occurrence of child abuse.²¹ It became apparent that accessing child-friendly justice in Swaziland was a myth, very difficult or almost impossible to achieve. This, therefore, presented the need for strengthening both the institutional and human capacity of the frontline service providers. It became necessary that the quality of services needed to be improved. Survivors of abuse need to obtain the expected assistance from the state and other stakeholders.

Since Swazi society initially were not willing to report incidents of child abuse, it became obvious that the issue of reporting is addressed first. Stakeholders addressed this issue by rendering training to Community Child Protection Volunteers (CCPV).²² Most of the abuse took place at the family level and often was not reported in a free atmosphere that would enable communities to take over the role of reporting.

CCPV were the first to be trained on how to handle child victims and report the abuse either together with the child or a child's relative at the police station. They were trained on how to detect signs of abuse and to speak to the child victim in a manner that created a safe environment for the child to disclose the abuse without having to risk their safety at home. The compromise on the child's safety is the trend if the child has been abused by the close family member. Such first instance reporting proved effective as more cases of abuse started to be reported outside the family institution.

However, it did not help to just report incidents of abuse to CCPVs and the matter would end there. The police must be notified so that a docket can be opened, investigations are carried out and a physical examination of the victim conducted at a clinic, health centre or hospital. At the police station, the situation was very difficult for the child victim and for the adults. In the process, it became paramount that the police officers be trained in the handling of abuse

²¹ UNICEF *Advancing Prevention and Response to Violence Against Children*, 1 https://www.unicef.org/protection/files/Swaziland_Global_VAC_Meeting_Report.pdf (Accessed: 12 September 2017).

²² International Federation of Red Cross and Red Crescent Societies (2011) *Swaziland Annual report*; UNICEF *Child Protection Resource Pack*, 15 <https://www.unicef.org/protection/files/CPR-WEB.pdf> (Accessed: 24 September 2017).

victims. Strides were made in training selected police officers on how to handle child victims, take statements from child witnesses and compile dockets for children's matters.²³

As the training gained momentum it became obvious to all that even the technical staff at the courts need to undergo specialized training in handling and dealing with children's issues brought before the court for adjudication. Consequently, clerks, teachers, intermediaries, prosecutors, social workers, magistrates, nurses, doctors, interpreters and psychologists were trained at different intervals.²⁴ However, judges of the High Court and Supreme Court of Appeal had not received any training, hence the cases involving child- victims are not properly handled. This leads to injustice on the part of the victims. In the case of *Rex v Madolo* the court indicated in its judgment a lack of understanding of its role in the adjudication of the matter. As a result the accused who had raped his daughter was acquitted of the offence on the ground that identity was not proved. What is clear in this case is that the victim was molested by her own father. There is no mistake as to identity since there was a candle light and no child could just concoct such damning evidence against her own father. The court was just confused as a result of ignorance coming from lack of training on the part of the judicial officer on this sensitive aspect.²⁵

1.3. Child-friendly courts in Swaziland

Charrow and Charrow²⁶ argue that children experience major problems with the language used during giving evidence in court. According to Karren Muller²⁷, in the courtroom, questions are asked and children must answer questions that are strictly controlled by established procedures, leaving no room for the child to negotiate these boundaries. Changes in the court environment and innovative measures curtail the psychological syndromes that face children in court.

In 2005 an evaluation of a pilot specialist study on child sexual assault in Sydney, Australia found that most children still had difficulty with questions asked as they felt didn't get the chance to say what they wanted to say or tell what happened in a coherent story.²⁸

²³ KJB Keregero. UNICEF Swaziland Evaluation of *lihlombelekukhalela* community- based child protection initiative (community child protection committees), May 2014.

²⁴ The Child Witness Institute *Child Witness*<http://childwitness.net/the-child-witness-institute/the-work-we-do/training-stakeholders>. (Accessed: 19 July 2017).

²⁵ (SZHC) No. 431/ 2015 188.

²⁶ PR Charrow and VR Charrow "Making a Legal Language Understandable." *Columbia Law Review* (1979) Vol. 79. 1306-1374. <http://doi.org/10.2307/1121842>. (Accessed: 4 February 2013)

²⁷ K Muller *The Judicial Officer and the Child Witness*. (2011) 81-94.

²⁸ J Cashmore and L Trimboli *An Evaluation of the New South Wales Child Sexual Assault Specialist Jurisdiction Pilot*, (2005) 41- 58. (Accessed: 11 February 2013).

Morgan, M²⁹ says that children who have been sexually abused by a person of the same sex may fear the embarrassment of being labelled a homosexual. A further difficulty may be that the child may also find it too embarrassing to identify the sexual body parts of his own body to describe what happened. The use of anatomically detailed dolls may assist in overcoming these barriers to some degree.

In all cases involving children, the core guidelines are centred on the best interests of the child. The Bill of Rights Handbook³⁰ emphasises the interaction between children, parents, other family members and the state to consider children's constitutional rights, and not to be simply viewed as mere extensions or possessions of their parents, but independently as they are also bearers. This suggests that in all cases involving the child, the best interests of the child should be the overriding factor in determining child-friendly justice.

PQR Boberg³¹ refers to certain provisions of the South African penal code setting out the procedures for handling children's cases. These also include procedures relating to the detention of minors as highlighted by Hunt in the South African Criminal Law and Procedure³². This suggests that not all children should be taken into custody; some should be diverted away from the criminal justice system. Likewise, the Kingdom of Swaziland enacted legislation that seeks to manifest the best interests of the child victim once an offence has been reported to the authorities.³³ These legislations go hand in hand with human rights conventions the country has sworn to uphold.³⁴

Section 7 (2) and (3) of the Magistrates Court Act,³⁵ emphasises that proceedings involving children should be held in camera, whilst section 232 *bis* of the Criminal Procedure and Evidence Act³⁶ states that when the court has a witness who is less than 18 years of age, it should in the best interest of the child witness to appoint a competent person as an intermediary in order to enable such witness to give the evidence through that intermediary, without any form of examination by court officials or the defence.

²⁹ M Morgan (1995) *How to interview sexual abuse victims: including the use of Anatomical Dolls*, (2005) chap 2,9; <http://dx.doi.org/10.4135/9781483326849.n2>. (Accessed 11 February 2013).

³⁰ I Currie & J De Waal *The Bill of Rights Handbook 5th ed.* (2005) 617-20.

³¹ PQR Boberg *The Law of Persons and the Family*, 1977, 658 -660.

³² P M A Hunt *The South African Criminal Law and Procedure*, (1977) Vol 2: 460.

³³ Supra note 13; s 29(2) & 29 (7) (a) & (d).

³⁴ Act, No.1, 2005; s 61.

³⁵ supra note 12; s 7(2) & (3).

³⁶ Act No.67 of 1938; s 223(1) & (2) bis.

In terms of Article 14 of the Beijing Rules,³⁷ the administration of juvenile proceedings should be conducted in a conducive atmosphere to allow the child to participate and express himself/herself freely. These sentiments are corroborated by the African Charter on the Rights and Welfare of the Child³⁸ which highlights that access to justice is fundamentally important for the advancement of children's rights and their legitimate interest. Children need to be protected from acts that threaten or violate their rights. It falls on the government to devise initiatives that will safeguard and protect these children. The Optional Protocol³⁹ of the United Nations Convention on the rights of the child places an obligation on member countries to follow the principles of child-friendly justice as envisaged by all human rights conventions on the involvement of children in armed conflict and in the sale of children, child prostitution and child pornography.

Based on the four principles of the UNCRC, namely, the best interest of the child, child participation, non-discrimination and survival and development, the government of Swaziland deemed it critical and extensively necessary to enact the Children's Protection and Welfare Act.⁴⁰ The provisions of the Act form an extension of the Supreme law of the land, and further encompass the provisions of the international instruments, protocols, standards and rules on the protection of children as discussed above with the view of ensuring that children interest and protection are catered to the fullest extent of the law.

1.4 Child-friendly justice

Child-Friendly Justice (CFJ) seeks to provide a range of strategies that can be used to conduct legal proceedings to the particular circumstances of the child or children involved.⁴¹

Child-friendly justice, therefore, should be:

- Accessible;

³⁷ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ("The Beijing Rules") Adopted by General Assembly resolution 40/33 of 29 November 1985, 206.

³⁸ African Charter on the Rights and Welfare of the Child (ACRWC) (1990).

³⁹ United Nations Treaty Collection (2010) *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*. Second Optional Protocol prohibits the sale of children, child prostitution and child pornography. Both protocols have been ratified by more than 160 states. The Optional Protocol was adopted by resolution A/RES/54/263 of 25 May 2000 at the fifty-fourth session of the General Assembly of the United Nations.

⁴⁰ *supra* note 13; s 12.

⁴¹ CRIN Child-Friendly Justice and Children's Rights. <http://crin.org/resources/infodetail.asp?id=24828>. (Accessed: 18 October 2016)

- Age appropriate;
- Speedy;
- Diligent;
- Adapted to and focused on the needs of the child;
- Respecting the right to due process;
- Respecting the right to participate in and to understand the proceedings;
- Respecting the right to privacy and family life and
- Respecting the right to integrity and dignity⁴².

According to the Child Rights International Network (CRIN), CFJ involves taking special care of children whose lives have become entwined in the legal system. It embraces the idea that courts could be a powerful tool to positively shape children's lives.⁴³ It asks us to appreciate and minimize the challenges that children face in legal proceedings. Therefore, respecting child friendly principles will eliminate the traumatic experiences children face in the legal systems and foster greater respect for their rights by providing full access to justice required to address violations of their rights.⁴⁴

From the description of child friendly justice, first, the emphasis is on the court as a useful instrument by which to achieve the goal of attaining child friendly justice. It goes without saying then that child friendly justice should be administered at the appropriate forum which is a child friendly court. Secondly, a child friendly court must have the attributes to qualify for the task that it has been designed to carry out. All the personnel working at the child friendly court must be specially trained to deal with children's cases. They must also apply the principles of child friendly justice when handling children's issues.⁴⁵ Thirdly, the environment must be conducive for child friendly justice to prevail. The set up or building housing the child friendly court must be easily accessible to children with its decor relevant to children and protective towards children. A Child Friendly Court is the forum where the child can adduce evidence without fear or intimidation. This thesis seeks to find out the whole reason why the sudden establishment of a child friendly court in the Kingdom of Swaziland. The main objective of CFCs is to provide space for children to easily speak about the traumatic events

⁴² Council of Europe (2016) [http:// www.coe.int/en/web/children/child-friendly-justice](http://www.coe.int/en/web/children/child-friendly-justice) (Accessed: 18 October 2016).

⁴³ supra note 42.

⁴⁴ CRIN, (see note 41).

⁴⁵ supra note 41.

that have happened to them and to further be able to identify the perpetrator via video footage and not in person. The basis for the establishment of the CFCs originates from different international and regional legislative frameworks which Swaziland is party to.

When compared to ordinary courts, a CFC has a separate room which is connected by the video linked to the courtroom wherein the child is supported by a court intermediary who helps the child to understand and respond to the questions posed by the magistrate, the prosecutor and the defence lawyer. The room is designed in such a manner that it is comfortable for the child in that there is no need to be exposed to the court gallery and they will be able to identify the perpetrator by video link. The importance of the establishment of CFCs cannot be overemphasized as they help to assist children to testify against perpetrators without having to be physically present in the court or face the accused.

1.5 Crimes targeting children

The transgressions that should be tackled in a CFC are those crimes targeting children. These include corporal punishment against children either at school or at home. Other forms wherein children become subjects of criminal behaviour is adoption, particularly in cases where the adoption has not been properly administered or adhered to the principles relating to adoption. Moreover, the omission of parents to register their children upon birth has a direct impact on the child and it is criminal conduct in terms of the provisions of the Children's Protection and Welfare Act.⁴⁶ Intertwined offences, such as concealments of birth and abortion, have also proved to affect children. In recent times we have seen another form of criminal behaviour directed towards children in the form of neglect when it comes to the rights of children to education and health. Generally, children, both girls and boys, are prone to be physically abused, economically disempowered and their property rights infringed by close relatives or even members of the community at times.⁴⁷

Children are also involved in theft and robbery offences, human trafficking and kidnapping. One offence that has a serious impact on the lives of children is the abuse of drugs.⁴⁸ The

⁴⁶ Supra note 13.

⁴⁷ *Bhe v. Magistrate Khayelitsha & Ors.* 2005 (1) BCLR 1 (CC).

⁴⁸ Pharmacy Act No. 38 of 1929.

influence of social media on children has further put children at risk of offending. There has been a noted increase in cybercrimes.⁴⁹

1.6 Children and the justice system machinery

Children may be involved in the Justice System Machinery in several ways, not limited to the following; as witnesses, complainants, victims and perpetrators. When appearing as witnesses, they either must give evidence on something that affects them or adduce evidence in respect of something that is either directly or not related to them. For example, in a maintenance case, a child could come in to confirm that he or she does not receive maintenance from a legal guardian who is legally bound to maintain that particular child.

Again, a child might have witnessed the occurrence of a criminal activity, be it theft or robbery or any other offence, and he may come and adduce evidence, if he or she satisfied the rules pertaining to an evidential burden. According to the Child Rights International Network (CRIN), where children appear as witnesses' great care should be observed. Among other things, the personnel involved must be specially trained in handling them.⁵⁰ Measures should be taken to keep the child witness at ease. Children should not be forced to mix with suspects and a child-friendly language should be used during proceedings.⁵¹

As complainants, children are legally expected to testify in issues revolving around their property rights. When they are complainants, they should have access to free legal advice to discuss their rights and the options available for pursuing violations of these rights. They should also be able to initiate legal proceedings directly, through a parent or guardian, and through a chosen or appointed a legal representative.

Children may also be involved in the justice system as child victims. The procedures relating to interviewing children, the possible use of video recording, preparation for court, special protective measures for giving evidence in court and laws relating to the evaluation of their evidence by the court need to be put in place. In addition to these general measures, child victims will require a full range of services including mechanisms for reporting the offence, access to information, psycho-social support, appropriate medical examinations, sensitive

⁴⁹ Electronic Records (Evidence) Act, No. 6 of 2009.

⁵⁰ Supra note 41.

⁵¹ Supra note 41.

management by trained officials. Privacy and confidentiality are important, including closed courts and non-disclosure of identifying information.

This research is specifically concerned with the plight of the child victim. The other categories are mentioned in passing and maybe viewed some other time in the future. Thus, the focus will be on how child-friendly justice is attainable for child victims using the child-friendly court as a conduit in Swaziland.

In recent times, children have been brought into court as perpetrators of crimes which may include robbery, assault, murder and many more. Any child apprehended by the police on suspicion of wrongdoing is given an immediate opportunity to contact a parent, guardian or trusted person who is then both advised to engage a legal representative at the child's own cost.⁵² An exception is afforded to indigent children who are then provided with legal representation by the State or Court.⁵³

1.7 Research process

It is paramount that before the exploration of the concept of the child- friendly court is done, the research process is outlined.

1.7.1 Statement of purpose

This study critically analyses the CFCs concept in Swaziland to explore the extent to which it offers comprehensive access to child justice. In addition, the study critically reflects on the operations of similar courts in The Republic of South Africa.

1.7.2 Rationale of the study

As alluded to earlier, a Child-Friendly Court (CFC) has a vital role to play in the promotion of justice, particularly in cases involving children. The rationale for this study is premised upon different issues which will include the effectiveness and efficiency of CFCs, its impact in promoting access to child-friendly justice, and its functionality when compared to other similar jurisdictions. An exploration will be undertaken to ascertain whether the establishment of CFCs

⁵² supra note 13; s 87 (3) (b) (v).

⁵³ supra note 13; s 87 (3) (b) (vi).

is a strategy to respond to the bottleneck of cases relating to children or structures established to pursue donor interests or just white elephants.

The Kingdom of Swaziland has limited expertise on legal issues relating to children and there are also few attorneys who have ventured into the field of child-friendly justice. Therefore, there is a need to develop the jurisprudence on this facet of family law or law of persons in the context of the Kingdom of Swaziland. The Republic of South Africa has been chosen for obvious reasons. For decades, the Supreme Court of Appeal Judges who constituted the highest court in the Kingdom of Swaziland were South Africans. The Republic of South Africa is the powerhouse in terms of infrastructure, expertise, and material relevant to this study. Most interesting is that the Republic of South Africa and the Kingdom of Swaziland share Roman-Dutch Common Law. The difference is the system of governance for each. Such similarities were further alluded to by Justice Schreiner P. in *Annah Lokundzinga Mathenjwa V Rex*⁵⁴, whereby he pointed out that there were similarities that are indistinguishable in the provisions of the South African Criminal Procedure and Evidence Act, 31 of 1917 and the Swaziland Criminal procedure and Evidence Proclamation Cap 35.

In *Bongani Munyamunya Maziya*⁵⁵ Masuku J, unpacking the principles of self-defence cited with approval *S V Jackson*.⁵⁶ Though these were not cases involving children, the South African position remains highly persuasive and regarded as authoritative in the Kingdom of Swaziland jurisprudence and legal context.

1.7.3 Research question

This paper, therefore, seeks to consider the following questions:

1. What are CFCs?
2. To what extent do CFCs and the Chief Justices practice directives bring justice to child victims in the Kingdom of Swaziland?
3. How do CFCs operate in The Republic of South Africa?
4. What lesson can be learned by Swaziland from The Republic of South Africa in this regard?

⁵⁴ 1970- 1976 SLR 25 at 27, Para B- D.

⁵⁵ (SZHC) No. 192/2009.

⁵⁶ 1963 (2) SA 626 (A).

1.7.4 Research methodology

This is a desktop study. It is based largely on primary and secondary materials that will be relied on to give a detailed assessment of the CFCs transformative role in promoting justice to child victims. These materials include statutes, peer-reviewed articles, textbooks, reports, internet websites and a literature review.

The study utilises a literature survey method⁵⁷ wherein various sources such as legal textbooks, research reports, journal articles, official annual reports, policy documents, statutes and bills will be consulted. Current information gathered from the internet, which includes electronic journals and websites was further used.

1.7.5 Theoretical framework

The topic arouses a sense of interest amongst legal practitioners in the country, more so because it has not been previously explored in our jurisdiction. There is a high possibility that thereafter it will spark legal thinking on the issue of children's rights. In that way, the jurisprudence on Child Protection and Care Law is developed and improved so that future generations benefit from this thesis.

As persistent forms of violence have been revealed in this chapter, the important issue as we transcend to the other chapters includes defining the child-friendly court in line with the best interests of the child victim.⁵⁸ A child's best interests can be realised and promoted through the creation of CFCs and by using trained personnel including intermediaries, police, nurses, doctors, prosecutors and judicial officers.⁵⁹ The introduction of the CFCs in Swaziland was a clear indication of improved access to services for child victims whose needs and wellbeing

⁵⁷ Detailed information on a comparative study is available in the following sources- Anfra V.A and Metrtz N.T. "Theoretical frameworks in qualitative research" (2006), Mashall C and Rossman G.B. *Designing a qualitative research* (2011), Punch K.F. "Developing effective research proposal" (2005), Yang, Y, and Jan O. P. "A comparative study on feature selection in text categorization." (1997) and (www.uj.ac.za/EN/Research/Post%20Graduate%20Centre/Pages.Aspix), Clasen J. *Defining comparative social policy*". (2004). *A Handbook of Comparative Social Policy* and Ragin, C. C. *The Comparative Method: Moving Beyond Qualitative and Quantitative Strategies* (1987) University of California Press. Further detailed discussion of the literature survey method is available - see, Moser, C. A. and Graham K. "Survey methods in social investigation." (1971), Berg, B.L, and Howard L. "Qualitative research methods for the social sciences" (2004), Patton, M. Q. *Qualitative research*. (2005), Hill, W. J., and William G. H. "A review of response surface methodology: a literature survey." (1966) at 571, Settles, B. *Active learning literature survey*. (2010) at 55 and Bryman, A. "Social research methods. (2012).

⁵⁸ Child best interest <http://dictionary.law/Default.aspx?selected=186>. (Accessed: 31 October 2018)

⁵⁹ *supra* note 13; s 132.

have been neglected by the justice system for a very long time. There are also detailed legislative provisions that protect the child victim and witnesses from undue stress or suffering that might result from being present in court and recounting their ordeals.

Chapter One has revealed the magnitude of violence against children in the Kingdom of Swaziland context. The VAC studies⁶⁰ of 2007 and 2016 respectively, have been used as ⁶¹literature to support the magnitude of the problem. Both these studies exposed family secrets as being one of the main drivers of violence and abuse against children. The following chapter will expose the definition of the child- friendly courts and the various instruments that regulate the operations of child- friendly courts.

⁶⁰ VAC Study (see note 15; 74- 82).

⁶¹ *supra* note 15.

CHAPTER TWO

DEFINITION OF CHILD-FRIENDLY COURTS AND INTERVENTIONS IN THE OPERATION OF THE CHILD-FRIENDLY COURTS IN THE KINGDOM OF SWAZILAND

2.1 Introduction

*“Our children are our greatest treasure. They are our future. Those who abuse them tear at the fabric of our society and weaken our nation.”*⁶²

The above-quoted statement indicates that children should be protected and their best interests should be prioritised always. In giving effect to these words, Swaziland has also made various improvements towards influencing the judicial system with regards to child-friendly services and adjudication. Chapter Two addresses the question of what CFCs are. Like many other terms and phrases, it is difficult to explain the new phenomenon, nonetheless, it is anticipated that this chapter will come out with a definite and decisive definition befitting CFCs in the ambit of its surrounding circumstances.

2.2 Definition of child-friendly courts

Child-Friendly Justice seeks to provide a range of strategies that can be used to adapt legal proceedings to the particular circumstances of the child or children involved. The basic principle is that in all cases affecting children, paramount consideration should be given to the best interests of the child.

According to Child Rights International Network (CRIN), child-friendly justice involves taking special care of children whose lives have become entwined in the legal system. It embraces the idea that courts could be powerful tools to positively shape children’s lives⁶³. It asks us to appreciate and minimize the challenges that children face in legal proceedings. Therefore, respecting child-friendly principles will eliminate the traumatic experiences

⁶² Quote from Speech by President Nelson Mandela at the Education Africa, presidential and Premier Education Awards Pretoria, 22 November 1997, <http://www.sahistory.org.za/archive/speech-president-nelson-mandela-education-africa-presidential-and-premier-education-awards-p>. (Accessed: 23 July 2013)

⁶³ CRIN (see note 50).

children face in the legal systems and foster greater respect for their rights by providing the full access to justice required to address violations of their rights.⁶⁴

From this description of child-friendly justice, emphasis is on the courts as useful instruments by which to achieve the goal of attaining child-friendly justice. *A child-friendly court, therefore, can be described as a facility that allows children who have endured any violation of their rights to testify without having to face the alleged perpetrator.* It goes without saying then, that child-friendly justice should be administered at the appropriate forum which is the CFC. Consequently, the CFC must have the attributes to qualify for the task that it has been designed to carry out. All the personnel working at the child-friendly court must be specially trained to deal with children's cases. They must also apply child-friendly justice principles when handling children's issues.

For much of human history, children have been treated as objects and at best as 'mini' human beings with 'mini' rights, but the Convention on the Rights of the Child⁶⁵ brought about a paradigm shift in how we think about and treat children i.e. it recognizes the child as a full human being and promotes/fulfils all the associated rights he/she holds.

The studies conducted in 2006 and 2007 by the Independent Expert for the Secretary-General and the Study on Violence against children and young women in Swaziland,⁶⁶ respectively, exposed the scourge of violence against children, and they pledged to promote, protect and fulfil children's rights across the globe and in the country. The findings from the Swaziland study have portrayed the country negatively, as approximately one in three females reported experiencing sexual violence as a child, nearly one in four were exposed to physical violence, and three in ten experienced some form of emotional abuse.⁶⁷ Furthermore, 75 percent of abusers are people the children know and most abuse take place at home.

Through ratification of the Convention on the Rights of the Child, the country has committed itself to respect the rights of the child and to undertake all legislative measures aimed at the

⁶⁴ CRIN (see note 50).

⁶⁵ UN Convention on the Rights of the Child (CRC), General Assembly resolution 44/25 adopted on 20 November 1989.

⁶⁶ United Nations Study on Violence Against Children (2006), The National Study on Violence against Children and Young Women in Swaziland, UNICEF SWAZILAND (2007).

⁶⁷ VAC Study (see note 15; 6).

realisation of the rights provided by the Convention. This goes to the extent of establishing efficient legal tools in cases of any violation of these rights. The increased cases of child abuse have not only reflected poorly on Swazi society, but also in the legal fraternity where there has been an influx of cases involving children.

Various reports have commented on the backlog of cases in the court system and delays during trials in courts.⁶⁸ An issue which emerged clearly from the experience of supporting child victims of abuse through court proceedings, was the lack of CFCs. The country therefore, saw a need to embark on a drive to ensure that the justice system is friendly for all children whether appearing as witnesses, victims (aggrieved party) or criminal offenders.

Hence, the establishment of the CFCs was to assist children to testify against perpetrators without having to physically face them. Such mechanisms provide space for children to easily tell the traumatic events that happened to them without intimidation.⁶⁹ Whether children encounter the law as victims, witnesses, offenders or complainants, it is equally important that they are met with a system that understands and respects both their rights and their unique vulnerability.

By far, the most common type offence for which children are arrested for in Swaziland is theft and other minor property offences, including simple theft, pick-pocketing and being in possession of stolen goods — addressing the fact that children are also perpetrators of violence. On Average, 50 juveniles are committed to the correctional institution in Swaziland at any point in time.⁷⁰ Sadly though, Swaziland still does not have a juvenile facility for children.

Juvenile boys above the ages of 14 years are kept in a Juvenile Industrial School, which is specifically designed for male juvenile offenders only, whilst female juvenile offenders are kept with adult women at Mawelawela Women's Correctional Housing.

The study acknowledges the different terminologies that have been used related to child justice across the globe, however, for the purposes of conformity, this study uses the term “child friendly courts” to refer to all aspects where children might be involved in both criminal and civil justice systems, including administrative or informal justice mechanisms. The following instruments will be discussed at length; these being the Beijing Rules, the United Nations

⁶⁸ The Swaziland Human Rights Report, US State Department, (2013) 16; The Justice Sector and the Rule of Law: A review by AfriMap and the Open Society for Southern Africa, (2013) 55.

⁶⁹ US Embassy in Swaziland press statement 7th May 2014-[https:// Swaziland.usembassy.gov/](https://Swaziland.usembassy.gov/). (Accessed: 14 May 2014).

⁷⁰ Swaziland Department of Correctional Services, Routine Statistics, 2008. (Accessed: 20 May 2014).

Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, and national legislative instruments such as the Constitution of the Kingdom of Swaziland, the Magistrates Court Act, the Children's Protection and Welfare Act, and the Criminal Procedure and Evidence Act.

2.3 Instruments that regulate the operations of the child-friendly courts in the Kingdom of Swaziland

Comprehensive child protection mechanisms or systems, prevention, reporting and response are not enough if they lack the element of acceptance that due to physical and mental immaturity, children need special safeguards and care. This kind of acceptance is guaranteed in different international and regional conventions, other UN rules and guidelines, and different countries' national laws.⁷¹

As cases of violence by and against children have increased, apart from the local and national child protection systems established, a drive for CFCs also became imperative. According to the Study on Violence against Children and Young Women,⁷² it became apparent that accessing child-friendly justice was a myth, very difficult and almost impossible to achieve in Swaziland. Therefore, a need to strengthen both the institutional and human capacity of the frontline service providers is required, so that the quality of services is improved.

Every child should be treated as a capable witness, subject to examination, and his or her testimony should not be presumed invalid or untrustworthy by reason of the child's age alone, as long as his/her age and maturity allow the giving of intelligible and credible testimony, with or without communication aids and other assistance.⁷³ The best interests of the child shall be the primary consideration in the implementation of actions and decisions concerning children in the justice system, unless, exceptionally, the dictates of the communal good and public policy require otherwise. It must be recognised that the best interests of the child is best determined through a multidisciplinary approach in which the physical, social, psychological and emotional wellbeing of the child can be fully explored.

⁷¹ Mainly the NCRC, ARCW, The Swaziland Constitution and the Children's Protection and Welfare Act.

⁷² VAC Study (see note 15).

⁷³ United Nations Guidelines on Juvenile Justice Resolution No 40/33 of 29 November 1985.

2.3.1 Legislative frameworks supporting the establishment of child-friendly courts

Several countries took massive steps to establish CFCs after realising that children needed special treatment within both the justice and welfare systems of the state. These amongst others include the Republic of South Africa, India and the United States of America. This idea emanates from seeing that children's lives become entangled in the legal system as victims, witnesses or offenders. This then created a need to change the way the justice system interacted with children. The only way to attain such system was the introduction of CFCs, with the idea that they would better understand and respect children's rights.⁷⁴

The complexity of court cases with children triggered the establishment of CFCs in our jurisdiction to ensure that children are treated with special care. Section 25 of the Children's Protection and Welfare Act establishes CFCs in the Kingdom of Swaziland.⁷⁵ This special court promises to enhance access to justice and bring a speedy resolution to cases involving children. These courts are designed with the best interests of the child and attempt to ensure that they operate in a way which considers the needs and sensitivities of the children concerned.

Swaziland is party to international and regional legislative frameworks. These include the Convention on the Rights of the Child (CRC) and its Optional Protocol (OP) on the sale of children, child prostitution and child pornography, as well as the African Charter on the Rights and Welfare of the Child (ACRWC). Both the CRC⁷⁶ and the Optional Protocol place obligations on states to follow the principles of child-friendly justice. Although the requirements of access to child justice under the CRC tend to be general, the requirements under the OP1 are more explicit.

The Committee on the Rights of the Child has also clarified the CRC provisions on access to child-friendly justice through General Comments that clarify and elaborate on children's rights to special protection in the legal system, in that child-friendly justice principles should be applied, before, during and after legal proceedings. As such, this should also be applicable to children in conflict with the law. The African Charter on the Rights and Welfare of the Child (ACRWC)⁷⁷ is a comprehensive legislative framework which also recognizes the need for special safeguards and care for children. Access to justice for children in conflict with the law

⁷⁴ CRIN (see note 50).

⁷⁵ *supra* (see note 13).

⁷⁶ Art; 12 of the United Nations Convention on the Rights of the Child 1989.

⁷⁷ African Charter on the Rights and Welfare of the Child (ACRWC) (1990) OAU Doc CAB/LEG/24.9/49 (1990).

requires abiding by the dictates of Article 17 of the African Charter on the Rights and Welfare of the Child including providing alternative measures to prisons where detention is deemed necessary.⁷⁸

2.3.1.1 The United Nations Convention on the Rights of the Child (CRC)

Swaziland ratified the CRC in September 1995. It has also acceded to the Optional Protocols⁷⁹ to the CRC on children in armed conflict and the sale of children. Being one of the countries to ratify the convention is telling evidence of the country's commitment to the cause of the rights and welfare of the child. The CRC did not automatically come into force in Swaziland. Section 238(4) of the Constitution of Swaziland⁸⁰ provides that unless it is self-executing, an international agreement becomes law only when enacted into law by Parliament. As such, the provisions of the CRC must generally be implemented in further legislation to be invoked before the courts.

Article 12 of the United Nations Convention on the Rights of the Child (CRC)⁸¹ provides for the creation of an enabling environment for children to express their views freely in all matters affecting them and be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

2.3.1.2 The Beijing Rules

Prior to the adoption of the CRC, the administration of juvenile justice came into existence through the Beijing Rules⁸² which underpin juvenile justice as an integral part of the national development process of each country, within a comprehensive framework of social justice for

⁷⁸ Art; 17: Every child accused or found guilty of having broken the law should receive special treatment, and no child who is imprisoned or should be tortured or otherwise mistreated. UNICEF *African Charter on the Rights and Welfare of the Child*.

⁷⁹ Supra see note 13; 157(1), 159(2) & 161(3).

⁸⁰ supra note 34.

⁸¹ UNICEF *Rights under the Convention on the Rights of the Child*.
https://www.unicef.org/crc/files/Rights_overview.pdf. (Accessed: 12 July 2014).

⁸² *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ("The Beijing Rules") Adopted by General Assembly resolution 40/33 of 29 November 1985.

all juveniles, thus, at the same time, contributing to the protection of the young and the maintenance of a peaceful order in society.

Article 14 of the Beijing Rules provides that the proceedings should be conducted in an atmosphere of understanding to allow the child to participate and to express himself/herself freely. Besides the CRC, the Beijing Rules are also corroborated by the UN General Comment Number 10⁸³ and the African Charter on the Rights and Welfare of the Child.⁸⁴ These instruments provide the chance for all children to participate fully in the justice processes whether as witnesses, victims or accused and have their views heard and considered.

In a nutshell, the rules, amongst other things, encourage countries to set a minimum age of criminal capacity, at an age that is not too low, considering the emotional and mental capacity of children, encourage a high degree of discretion being granted to officials at all stages to allow for alternative measures, but discretion to be used in an accountable and judicious manner, specialization in the police, diversion and appropriate sentencing which will ensure that detention is a last resort, and the prohibition of corporal punishment as a sentence.

2.3.1.3 The African Charter on the Rights and Welfare of the Child (ACRWC)

Giving effect to African perspective and realities in terms of children's rights, the African Union adopted the ACRWC⁸⁵ as a regional instrument. The ACRWC is a comprehensive legislative framework which also recognises the need for special safeguards and care for children. The Committee⁸⁶ emphasises access to justice as fundamentally important for the advancement of children's rights and for defending the legitimate interests of children, particularly children in conflict with the law and children who need protection against acts that threaten or effectively violate their rights.

States must put in place concrete safeguards to protect these children and ensure that they are given a fair opportunity to navigate the (child) criminal justice system without impairing their dignity, particularly in those formative years. This is important for psychological and psychosocial development so that they are enabled to grow and develop into adulthood, free of fear and unintended irreversible consequences.

⁸³ UNCRC General Comment No.10 on Children's Rights in Juvenile Justice, 2007.

⁸⁴ African Charter on the Rights and Welfare of the Child (ACRWC) (1990) OAU Doc CAB/LEG/24.9/49 (1990).

⁸⁵ UNCRC (see note 84).

⁸⁶ The Committee of Experts.

Access to justice for children in conflict with the law requires abiding by the dictates of Article 17 of the Charter, including providing alternative measures to prisons where detention is deemed necessary. What can be drawn from the Committee's emphasis is that imprisonment should only be used as a measure of last resort when other measures are deemed ineffective and that States should put in place child-friendly legal and judicial mechanisms, including the infrastructure, procedures, processes and standards to enhance access to justice for children.

In other words, child-specific needs must inform the processes, including means and measures allowing for children to express themselves and have their voices heard when engaging with the applicable justice system. Priority should be given to ensuring rehabilitation and reintegration, including teaching the children appropriate ways of conducting themselves in society.

2.3.1.4 The Constitution of the Kingdom of Swaziland

At the national level, there have been improvements in the policy and legal framework for child protection. The Constitution⁸⁷ contains a bill of rights which enshrines children's basic rights to care, support and protection from abuse, torture, cruel, inhumane and degrading treatment, and contains important provisions for the protection of people with disabilities from discrimination.⁸⁸

2.3.1.5 Criminal Procedure & Evidence Act 67 of 1938 as amended

Section 223(1) *bis* of the Criminal Procedure and Evidence Act⁸⁹ states that whenever criminal proceedings are pending before any court and it appears to such a court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if such person testifies at such proceedings, the court may appoint a competent person as an intermediary to enable such a witness to give evidence through that intermediary.

⁸⁷ supra note 34.

⁸⁸ supra note 88; s 29.

⁸⁹ supra note 36.

2.3.1.6 Magistrate Court Act No.66 of 1938

Section 7(2) of the Magistrates Court Act No.66 of 1938 states as follows; the trial of any child who is, in the opinion of the court, less than sixteen years of age may be held in camera and in some other place than an ordinary courtroom, provided that in such case, the parent or guardian of such child shall have the right to be present.

Subsection 3 additionally pronounces that a court may in any case, in the interest of good order or public morals, direct that a trial shall be held with closed doors, or that (with such exceptions as the court may direct) the general public shall not be permitted to be present.

2.3.1.7 The Children's Protection and Welfare Act

Based on the four principles of the CRC, namely, the best interests of the child, child participation, non-discrimination and survival and development, the Children's Protection and Welfare Act,⁹⁰ was enacted to extend the provisions of Section 29 of the Constitution and other international instruments, protocols, standards and rules on the protection of children. The Act further provides procedure and representation in both civil and criminal matters. Part XVI of the Children's Act sets up jurisdiction of a Children's Court in the magistrates' courts: every magistrate court also functions as a Children's Court and has jurisdiction to hear and determine matters in accordance with the provisions of the Act. Such matters include not only proceedings against child offenders, but also proceedings to protect children's rights, i.e. in cases where the victim is a child, and in maintenance cases.

The CPWA is grounded in the rights of the child and the responsibilities and process for age determination spells out police and court powers and duties, and provides for restorative justice and diversion, which were not formerly mandated by law. The Act establishes institutions to promote child protection and ensure the safety of children, especially the Department of Social Welfare (DSW).⁹¹ It also addresses some issues not previously covered by the legal framework, including parentage, custody and guardianship, maintenance, and the employment and

⁹⁰ Osall Swaziland – Children's Protection and Welfare Act 6 of 2012 ... - osall <https://www.osall.org.za/.../Swaziland-Childrens-Protection-and-Welfare-Act-6-of-2012>. (Accessed: 10 June 2013).

⁹¹ The DSW was established upon seeing that there was a severe strain in increased demand for welfare, especially for OVC's.

protection of children regarding matters of health. (Long, Swaziland's Child Protection System Mapping and Assessment: Report of Key Findings based on mapping findings conducted by Sakhile Dlamini and Thinie Dlamini-Mutyaba).⁹²

Section 12 of the CPWA provides that a child has the right to express his or her opinion freely and to have his or her opinion considered in any matter affecting the child. The opinion of the child must be given due weight in accordance with the age and maturity of the child. What is exciting about this Act is the conformity of its provisions to international standards particularly, the Beijing Rules as they emphasises that the formal justice system should only deal with a few numbers of children who have committed very serious crimes, represent a threat to their society, and that detention of children should always be a last resort.⁹³

The Children's Protection and Welfare Act has realized and accepted the importance of a separate legal regime for children who are in conflict with the law. Not only has the CPWA provided for a formal justice system, but it also emphasises the need to divert children away from judicial proceedings whenever possible, and to redirect them to community-based support services.⁹⁴ The Beijing Rules have also increased the age of criminal responsibility from ten to twelve years.⁹⁵

Many children have come before courts as first-hand witnesses to render compelling evidence. However, they have faced numerous challenges in an antagonistic adult-oriented judicial system.⁹⁶ In most situations, children frequently go through the testimony process more than once, as they still need to testify in pre-trial hearings and or when there are several trials. This has adverse and long-lasting effects on children's pre-dispositions⁹⁷ to stress. Over time, these issues have come to be dealt with in the Kingdom, through the enforcement of the Magistrates

⁹² UNICEF (Long, Swaziland's Child Protection System Mapping and Assessment: Report of Key Findings (based on mapping findings conducted by Sakhile Dlamini and Thinie Dlamini-Mutyaba). UNICEF (2013) *update of the situation of Children and Women in Swaziland*.

⁹³ CPWA Act 6 of 2012, section 103 (1). See Osall Swaziland – Children's Protection and Welfare Act 6 of 2012 www.osall.org.za/.../Swaziland-Childrens-Protection-and-Welfare-Act-6-of-2012-Part, (Accessed: 14 June 2017).

⁹⁴ *supra* note 13; s 126.

⁹⁵ *supra* note 13; s 79 and 126.

⁹⁶ Sexual Offences Training Manual Multi Sectorial Approach, UNICEF SWAZILAND (2016) 186.

⁹⁷ Spencer and Flin, *op cit* n 1; JA Quas *et al*, *Childhood Sexual Assault Victims: Long-term Outcomes after Testifying in Criminal Court*, Monographs of the Society for Research in Child Development, 2005, Blackwell Publishing.

Court Act No 66 of 1938, the Criminal Procedure and Evidence Act No.67 of 1938 and, evidently the Constitution Act 01 of 2005.

However, several concerns still exist in the facilitation of a smooth transition in which child victims can better testify in courts without fear or favour. Changes to the court environment and innovative measures curtail the psychological trauma that face children in court. Empowering children by preparing them for the court experience is no longer the only viable procedure that should be implemented in isolation, as the child still faces his/her perpetrator in court.

2.4 Establishment of child-friendly courts in the Kingdom of Swaziland

Child-friendly court facilities allow children who have endured rape and/or other serious abuse to testify in court without fear of having to face their perpetrators, instead of being questioned in front of the abuser. The child victim is led to a separate private room, which connects the court by video surveillance, where such a child through the assistance of a court intermediary testifies, poses questions and answers questions posed by a magistrate, prosecutor, and or defence lawyer within the proceedings

In 2005, Swaziland embarked on a journey that would change the justice system for child victims.⁹⁸ To help these young victims, the government established CFCs within various regions in the kingdom to specifically deal with and administer children's issues and concerns; these courts have made it easier for child victims and or complainants to testify against their attackers in court.

In the opening of the CFCs, the USA ambassador to Swaziland stated that "Whilst a nice building and furniture can help make a child feel a little bit comfortable in aggravating difficult circumstances, what they really need at the end of the day is justice. The best way to dispense this is through well trained compassionate advocates, attorneys, prosecutors and magistrates, court intermediaries, police and social workers."⁹⁹

The first court, Court D located at the high court, was launched in 2005 to cater for child survivors of abuse and violent crimes. Court D alone was not enough to consume the volume

⁹⁸ Health Finance & Governance Project; [https://www.hfgproject.org/child-friendly-courtroom-opens Swaziland/](https://www.hfgproject.org/child-friendly-courtroom-opens-Swaziland/). (Accessed: 2 June 2014).

⁹⁹ *Siteki Child-Friendly court officially Opened*, (2014), Times of Swaziland, 19 June, p. 13.

of cases were reported on a daily basis. It was also found not to be conducive to children who are witnesses due to the intimidating nature of the court proceedings. Prior to the establishment of this court, children's matters were heard by the magistrates' courts where they appear as victims or perpetrators of crimes. Only custody issues were heard by the high court.¹⁰⁰ Such an arrangement as provided for by the Magistrates Courts Act, 1938 ensured that the matters were heard and finalized expediently. Even though magistrates have a continuous roll, preference was given to cases involving children over ordinary cases. This ensured that children's cases were concluded expediently while their memory is still fresh.

The second court was established in Nhlangano. The United Nations Children's Education Fund was instrumental in the establishment of a CFC in Nhlangano in 2009.¹⁰¹ In 2011, the United States of America President's Emergency Plan for Aids Relief through its agencies supported the construction and conversion of the Siteki CFC.¹⁰² This was launched in 2014 as one of the ideal CFCs in the country, and was the project for rolling out same throughout the four regions of the country. This research is much more concerned about the last intervention that has been tabled above.

These separate courtrooms are linked to another room through a CCTV system. This enables child victims to give their evidence in a separate room whilst the judges and other court officials can follow the proceedings in the courtroom. The child witness can testify freely without being face to face with the alleged perpetrator. This allows the children to feel safer and less frightened when delivering their testimonies. Additionally, the child can identify the suspect through video footage and not having to point out the perpetrator in court.¹⁰³

Later in 2012, all Magistrates Courts were designated as Children's Courts and tasked to handle all matters involving children.¹⁰⁴ The Children's Protection and Welfare Act also supports alternatives to judicial proceedings such as mediation, diversion (of judicial mechanisms) and alternative dispute resolutions whenever may best serve the child's best interests.¹⁰⁵ This means

¹⁰⁰ supra note 11.

¹⁰¹ CRIN SWAZILAND (2011) Ministry of justice to set up child-friendly courts <https://www.crin.org/en/library/.../swaziland-ministry-justice-set-child-friendly-courts>. (Accessed: 18 October 2016).

¹⁰² NERCHA (2014) Siteki child-friendly court officially opened <https://www.infocenter.nercha.org.sz/node/5346>. (Accessed: 20 October 2016).

¹⁰³ <https://www.Borgenmagazine.com/child-friendly-courts-Africa>. (Accessed: 27 October 2016).

¹⁰⁴ supra note 13; s 132.

¹⁰⁵ supra note 13; s 120- 129.

that the formal justice system should only deal with a few numbers of children who have committed serious offences, such as murder, rape and armed robbery.

The establishment of CFCs came as an emergency requirement on granting children expedient justice so that they too could enjoy a life free of trauma and fear of those who hurt them. Thus, through restricting trial timelines, speeding up a child's case proceeding, separate courts for children or ordinary courts with specialised panels or judges can all contribute to faster and more efficient proceedings. In Finland, criminal courts have developed a practice called 'Jouko-days' during which children's cases are prioritised and are automatically moved forward in the queue. Swaziland has still not adopted such a practise, but it can be ascertained that most court staff are trained and adequately resolve children's issues diligently.

2.5 Key stakeholders who deal with children's issues

The growing concerns of violence by and against children has ensured the recognition of children's needs in the justice system. Separating child offenders from adults was one step forward for the protection of children. In Swaziland, the process has created child-friendly corners within police stations, the establishment of the one-stop centre, the conferment of the magistrates' courts to be Children's Courts and gradual capacity building initiatives for relevant service providers. Apart from the dictates of the UNCRC, ARCWC, and the Beijing Rules amongst other conventions, there is a need for countries to establish their own child justice systems.

2.5.1 Ministry of justice

The Ministry of Justice is one of the most instrumental cabinets in government that leads the way in the enactment of legislation that changes and shapes the country. Within its department, the Ministry includes the Human Rights Commission, which assesses human rights issues including children.

The Ministry of Justice and Constitutional Affairs has lead oversight in justice for children. The Ministry played a pivotal role in the enactment of the CPWA in 2013. However, much of the success attributed to the ministry is due to collaboration with other major stakeholders that play a critical role in promoting children's rights in the country. Below some of these stakeholders are discussed at length.

2.5.2 National Children's Coordination Unit

At a national level, several key stakeholders have responsibility for the protection of children. Under the Deputy Prime Minister's office, a new National Children's Coordination Unit is responsible for promoting, coordinating and monitoring all children's initiatives across the country, whilst the Health, Finance and Governance facilitates and trains social workers in forensic specialities in and when dealing with the child victim or similar cases involving children.

2.5.3 Royal Swaziland Police

Police officers are often a child victim's first point of contact once a crime has occurred or has been perpetrated to the child reporting the matter. Police officers play a vital role in both investigating and in interacting closely with the child victims or witnesses. Swaziland has quite many officers trained by key private stakeholders through collaboration with government. Numerous NGOs such as HFG,¹⁰⁶ SWAGAA,¹⁰⁷ CCPC¹⁰⁸ and UNICEF,¹⁰⁹ have played an important role in ensuring that police officers are well skilled and equipped to handle child-friendly cases. In 2017, HFG projects¹¹⁰ trained 35 police officers and 35 social workers in forensic child witnesses, whilst a total of 65 social workers have been trained in case management.

The Domestic Violence Child Protection and Sexual Offences Unit under the Royal Swaziland Police (RSP) has the responsibility of enforcing the law through prevention and response to all child protection issues. Sadly, there is very little state support for children who come into conflict with the law. A child who is accused has the right to his or her own legal counsel.

There is still no forensic training programme for such officers to be in a better position to understand and know how to evaluate the status of the child violated when they give a compelling statement, evidence or description of a crime. Swaziland police stations are supposed to have well-trained child specialists, but this is not the case as such training take at

¹⁰⁶ Health Finance & Governance Projects (HFGP).

¹⁰⁷ Swaziland Action Group Against Abuse (SWAGAA).

¹⁰⁸ Community Child Protection Committees (CCPC).

¹⁰⁹ UNICEF, Swaziland.

¹¹⁰ See discussions on the HFG project below, Swaziland training statistics.

most a week, whereby fewer police officers participate in such training. This results in the officers not being well equipped to consider the child's best interests when taking statements or interviewing the child. Further to these police stations in Swaziland, there is still a lack of child-friendly spaces¹¹¹ equipped to cater for their best interests and being sensitive to their trauma and distress when reporting crimes or when giving statements.

2.5.4 One-Stop Centre

Sexual and gender-based violence is widespread in Swaziland, hence, a national study on violence against young women and children was conducted in 2007, whereby it revealed that 1 (one) in 3 (three) females had experienced some form of sexual abuse as a child, whilst 1 (one) in 4 (four) females had experienced some form of physical abuse as a child.

Alongside the training programs that have been developed to improve the professional capacity and the legislative framework put into place, the infrastructure has also been developed. In each of the 24 police stations in the country, child-friendly corners and interviewing rooms have been established.¹¹² Furthermore, in 2007, the United Nations Children's Education Fund (UNICEF)¹¹³ supported the establishment of the One Stop Centre in Mbabane for the prosecution department.¹¹⁴ It is manned by well-trained specialist prosecutors who form the abuse unit within the Directorate of Public Prosecutions chambers.

A one-stop centre is the initiative of the Ministry of Justice and Constitutional Affairs in conjunction with other key stakeholders including UNICEF and The USA President's Emergency Plan for AIDS Relief (PEPFAR). The one-stop centre was established in 2013. It is recognised in the National Children's Policy as one strategy to guarantee children's protection and welfare.

Swaziland presently has a single one-stop centre situated in the Capital City of Mbabane, at the magistrate's courts building. The centre aims to improve the process of managing and prosecuting rape and violent offenders to reduce the cycle time for finalizing court cases and to restore a victim's 'optimal state of health'. Since 2013, the one-stop centre has counselled

¹¹¹ Police station with child friendly spaces, are spaces furnished with children's toys, anatomical dolls for collecting evidence and video recording, encompassed with specially trained plain clothed police, who conduct these interviews.

¹¹² VAC Study (see note 15; 6 & 27).

¹¹³ UNICEF – Education <https://www.unicef.org/education>. (Accessed: 26 July 2015).

¹¹⁴ UNICEF Annual Report (2015) Swaziland.

and assisted over 220 victims of sexual and gender-based violence and clients in need of help. It is the Swazi government's anticipation that more centres will be established throughout the country, scaling region by region.¹¹⁵

Apart from the CFCs, the establishment of the One Stop Centre (OSC) aides the provision of comprehensive services for victims of sexual and physical violence, particularly, children and women. The OSC which is a facility that offers free medical care, psychological counselling, legal support and social welfare services to women and children who are victims of sexual and gender-based violence, has also improved the process of managing and prosecuting rape and physical violence offences, to reduce the cycle time for finalising court cases and to restore victims' optimal state of health.

Though its main function is to offer free medical care, psychological counselling, legal support and social welfare services to women and children who are victims of sexual and gender-based abuse, the centre is misplaced as the premises in which it offers these services is the wrong place. For obvious reasons, court premises are not child-friendly and it is for that reason that the facility is not well located, thereby not considering the best interests of each child victim.

2.5.5 Swaziland Action Group Against Abuse (SWAGAA)

SWAGAA is a NGO which has been working tirelessly for over 20 years to eradicate gender-based violence (GBV) and human trafficking in Swaziland. The prevalence of gender-based violence and child sexual abuse cases in the country, especially girls, is drastically high, thus SWAGAA has introduced the Girl's Empowerment Club Program in an effort to conscientise the public of the rights of the girl child. These clubs are primarily formed in school whereby the girl child is taught to be self-aware and to know her rights. This helps the child to report any issues or violations faced at home or within her community. This program further strengthens the monitoring and evaluation of the rights and interests of the girl child in line with the Children's Welfare Act.

SWAGAA has trained over 200 mentors to assist over 50 schools with the girl's empowerment program, touched the lives of more than 2040 girl children and offered child counselling on

¹¹⁵ UNICEF in Swaziland, Sept 2012.

issues of sexual abuse to over 500 child victims during the past 9 years.¹¹⁶ In 2016, SWAGAA had 912 child abuse cases reported and counselled these victims.¹¹⁷

2.5.6 Health Finance & Governance Projects (HFG)

HFG project works with the Department of Social Welfare (DSW) within the Lubombo region to capacitate court staff on how to process abuse cases. HFG¹¹⁸ was launched as the brainchild of USAID's Global Health Bureau with the aim of strengthening health systems that deliver lifesaving services. In January 2014, HFG conducted a seven-day intensive Forensic Social Work training for 14 individuals, which included all the social workers within the country and their supervisors.

The training focused on the assessment of cases, technical writing of forensic reports, and techniques for working with child witnesses. Thus, all social workers trained were trained in forensic social work and the CPWA.¹¹⁹ Sadly though, only 7 out of 14 social workers trained had a degree in social work. The study emphasized the need for employed staff in the DSW to be capacitated with basic training in social work. HFG has also trained 19 court intermediaries to work with child witnesses as well as the other court "role players, with whom prosecutors were also oriented on legislation to use court intermediaries."¹²⁰

Within the Lubombo region all judicial officers, prosecutors, court intermediaries as well as representatives from other regions have been trained. The trained court intermediaries included nurses, social workers and prosecutors. By June 2015, 60 individuals had been trained. Most training involving intermediaries was on the effects of children testifying, cognitive development, socio-emotional development, impact of childhood trauma, disclosing abuse, communicating with children, body parts and sexual terminology, the competency examination of child witnesses, use of anatomical dolls, sex offenders and preparing a child for court. Since the commencement of new infrastructure and training, 135 children have had to use the courtroom for sexual offences cases in Swaziland, thanks to HFG and other stakeholders that

¹¹⁶ Unpublished statistics from the year 2008-2017, SWAGAA, ERF LOT 126, ESSER STREET, Manzini, Swaziland: <https://swagaa@africaonline.co.sz>. (Accessed: 12 December 2017).

¹¹⁷ SWAGAA child abuse and counselling statistics, 2016.

¹¹⁸ HFG, Swaziland 2012-16 statistics on trainings conducted.

¹¹⁹ Capacity Gap Assessment of the Social Welfare Sector (2010).

¹²⁰ HFG, child friendly court trainees, June 2015. Lubombo region.

have played a vital role in the training of relevant stakeholders that encounter child victims and necessitate the best interests of the child.

2.6 Community Level Responses

Since everyone comes from the community, it is crucial to also look at the roots for everyone in the society. In Swaziland the communities are mainly rural villages controlled by chiefs in terms of Swazi Law and Custom.

2.6.1 Community child protection committees (also known as *Lihlombe Lekukhalela*) (CCPC)

At community levels, the CCPC¹²¹ is an initiative of a child protection programme selected to train child protectors across the country. It began in 2002 and has trained more than 11 000 child protectors within Swaziland. Its main aim is to promote non-violence and child-friendly practises within households and in communities. It detects and reports cases of abuse and further offers psycho-social support.

CCPC is implemented by trained community volunteers, coordinated by Save the Children with the support from the Domestic Violence, Child Protection and Sexual Offences Unit of the Royal Swaziland Police, the Ministry of Regional Development and Youth Affairs and the Ministry of Education.¹²² The trained child protectors have reached an estimated 170 000 homesteads. Through their training programmes, child protectors are urged and encouraged to establish child protection committees within villages, this is to engage community members on issues of child abuse. Currently, Swaziland has well over 60 percent of communities with such committees in place.¹²³

2.6.2 Schools as centres of care and support (SCCS)

SCCS was piloted in 2007 and began its implementation in 360 schools in 2008, to ensure that kindergarten, primary and high schools provide a safe and protected environment for children.

¹²¹ UNICEF Routine Statistics, 2008.

¹²² Children and Women in Swaziland, *Situation Analysis*, 2008.

¹²³ UNICEF Routine statistics, 2013.

This was established due to the numerous calls made by pupils in reporting cases of abuse¹²⁴ It offers several pillars of support in schools, including support in the detection and reporting of child abuse, and psycho-social support for survivors of abuse.

2.6.3 Training of key professionals in handling children's issues

With the establishment of CFCs, training of officials who work with children became a key component of an effective child-friendly system in Swaziland. Several pieces of training were conducted for different professionals including prosecutors on how to handle victims, prosecuting offenders using the Children's Protection and Welfare Act and setting up CFCs.¹²⁵ Moreover, there was training targeting police officials and social workers across the four regions of the country. The training for social workers mainly focused on assessment of cases, technical writing of forensic reports, and techniques for working with child victims and witnesses. Furthermore, there was training for court intermediaries to work with child witnesses and other court 'role players' who needed to learn how to effectively operate a CFC.¹²⁶

Even though such training has been conducted, it has been for a very short period of time and it has not been consistently undertaken to ensure that trained professionals acquire new information, insights, and methods and techniques in handling children's cases. Again, there has not been any strategic plan for follow-ups on training to ensure translation of training into practice. The current practice in the country is that all judges and officials involved in the administration of juvenile justice, including prosecutors, work in criminal and civil cases at the same time. There is no specially trained judge, prosecutor or attorneys in children's matters.

To put it in a nutshell, there is a need for both the judiciary and officials involved in the administration of juvenile justice to be specially trained in matters involving children for fair and speedy trials involving child victims.¹²⁷ The professionals that deal with child cases should

¹²⁴ Between the years 2006 to 2008 over 3000 calls were made to report some form of abuse by pupils. Children and Women situation analysis, 2008.

¹²⁵ <http://www.hfgproject.org/child-friendly-courtroom-opens-swaziland/> 1. (Accessed: 10 January 2017).

¹²⁶ The Institute for Child Witness Research and Training, 2015 (unpublished training report).

¹²⁷ *supra* note 126.

be adequately equipped to hear them, enabling them to freely express themselves, either through spoken word or through statements that can be used as evidence.

2.6.3.1 Court Intermediaries

A 9-day training course for court intermediaries¹²⁸ on working with child witnesses was presented in Swaziland from the 1st to the 9th June 2015. It was attended by 23 designated professionals from various regions in Swaziland. These professionals are designated by the Children's Protection and Welfare Act to act as court intermediaries. The purpose of the training course was to help provide intermediary services to child witnesses in criminal courts. To achieve this outcome, the training focused on several issues that are essential when working with children in the criminal justice system, specifically, child victims of sexual violence. They tried to understand the criminal justice system, relevant legislation, child development, the impact of abuse, the process of disclosure, communicating with the child in court and preparing a child for court.

The Institute for Child Witness Research and Training Institute was contracted by ABT Associates to present training for intermediaries. Intermediaries are required, by law, to convey a general resolution of questions to a child witness if it is determined by the court that such a child will experience undue mental stress and suffering if he or she were to testify in the main courtroom, and without the services of an intermediary. The aim of this training, therefore, was to provide intermediaries with specialised knowledge and skills to understand and work with child victims of sexual offences, which includes identifying undue mental stress and suffering and conveying the general purpose of the questions posed by the court role-players.

During the training, most of the trainees were quite surprised by the difficulties experienced by children who interface with the criminal justice system. Trainees who work in the courts on a daily basis, namely the court clerks and interpreters, realised that their attitude towards child witnesses needs to be more sensitive to reduce the negative impact of the criminal justice system on the child. The trainees reported understanding the importance of explaining the criminal justice system to the child so that the latter is less stressed by the unfamiliarity of the justice process. Furthermore, the training emphasised the importance of intermediary services

¹²⁸ supra note 126; 1.

for child witnesses. This was the first course ever been presented timeously in Swaziland for court intermediaries.

2.6.3.2 Prosecutors

A 5-day training course for prosecutors on working with child witnesses was conducted in 2015 whereupon, 15 crown Prosecutors¹²⁹ from four regions (Hhohho, Lubombo, Manzini and Shiselweni) in Swaziland were trained on how to consult with and lead the evidence of a child witness in a criminal court. To achieve this outcome, the training focused on several issues such as sexual violence amongst children, child development, communicating with children, the impact of abuse, the process of disclosure, leading the evidence of a child. and the use of court intermediaries.

Leading the evidence of a child witness is a specialised skill that requires an in-depth knowledge of child sexual abuse and child development to ensure that the questions posed are developmentally appropriate and sensitive to ensure that accurate evidence is elicited without causing the witness/victim further trauma. The conclusions and recommendations of the training were that most of the prosecutors still required further advanced training on several of the introductory topics presented, to ensure adequate development of specialist skills and knowledge.

There has been a growing emphasis on the importance of a special prosecutor in cases involving victims of sexual violence. This has arisen as a result of the high rate of acquittals in cases of this nature. The argument is that the more specialised the prosecutor, the better his/her knowledge will be to deal with these cases, and this in turn, will result in a higher rate of convictions. It is the function of the prosecutor to present a case in court. To this end, a prosecutor is required to prepare beforehand, to conduct an in-depth consultation with the child victim, to allay any fears the victim may have, to familiarise the victim with the court environment and procedures, and to use available facilities such as closed-circuit television or intermediaries as fully as possible. In addition, prosecutors are encouraged to address the court on the shortcomings and advantages of alternative sentencing options.

¹²⁹ supra note 126.

It is the prerogative of the relevant prosecutor to effectively present a compelling case for sentencing over and above the commission of the offence. Evidence pertaining to aggravating circumstances must be placed on record during the trial or before conviction. Prosecutors are also encouraged to make use of expert witnesses in cases of this nature. For instance, if a prosecutor is not able to build rapport or communicate with the child, the child may not be an effective witness and may not even be willing to share his/her experiences with the prosecutor.¹³⁰

To understand symptomologies, it is essential that prosecutors have an in-depth understanding of child development, language, growth and communication skills. The child victim may have made several disclosures or even recanted. Knowledge of language development and communication will empower prosecutors to object to certain questions posed during cross-examination and thus, enable them to play a greater role in this part of the proceedings.

2.6.3.3 Magistrates

A 4-day training course for magistrates¹³¹ on working with child witnesses was presented in Swaziland in 2015. It was attended by 12 magistrates from various regions in Swaziland. The purpose of the training course was to provide the magistrates with the skills necessary to understand and evaluate the evidence of a child witness in a criminal court.

In order to achieve this outcome, the training focused on the following critical issues: sexual violence on the child victim, child development, communicating with children, the impact of abuse, the process of disclosure, evaluating the evidence of children, and judicial management. During the training, magistrates realised that there was a need for specialisation in the field of child witnesses and that all magistrates should undergo this introductory training and further advanced training on various topics presented in the week.

Specific mention was made of the need for advanced training on sex offenders, including treatment programmes and evaluating the evidence of children. It is also important to note that, Presiding Officers should attend such training, UNICEF Swaziland is supporting a further

¹³⁰ The Sexual Offences Training Manual Multi- Sectorial Approach, UNICEF Swaziland (2016) 186.

¹³¹ *supra* note 126.

training course for those magistrates who were not able to attend this training. Presiding officers are required to listen to the evidence of victims of sexual violence and then evaluate this evidence. They are also required, where a conviction has ensued, to determine an appropriate sentence in cases of this nature.

The need for judicial officers to receive training to deal with child witnesses has been voiced by several stakeholders and certain government departments. This is mainly due to the central role played by judicial officers in controlling trial proceedings. It is especially important that they are sufficiently educated regarding the special issues on working with children as legal witnesses. Judicial officers need to be encouraged to take a more proactive role in the management of cases.

The course content focused on all aspects that affect the child witness. In this sense, topics include information about the psychological and social development of a child, the effects of sexual abuse on a child's thinking, the specialised and legal behaviour, and measures that have been created to ensure the child provides effective evidence without experiencing secondary trauma.

All the afore mentioned instruments and policy enactments show that the Kingdom of Swaziland is making strides in combating child abuse and giving protection to the child victim. This study highlights an in-depth of commitment showed by many stakeholders at all levels to actually deliver concrete and constructive results towards the attainment of the best interest of the child victim.

Chapter 3 deals with the impact and relevance of the child-friendly courts in the Kingdom of Swaziland. The legislation, training of key stakeholders and the general national responses are reviewed.

CHAPTER THREE

IMPACT AND RELEVANCE OF THE CHILD-FRIENDLY COURTS IN THE KINGDOM OF SWAZILAND

3.1 Introduction

In 1995, UNICEF devised a protective environment framework in which countries could best protect children's rights.¹³² In Swaziland, this framework focused on the roles played by children in both households and communities since it had been noted that they are insufficiently protected from violence, exploitation and abuse consequent to cultural barriers that did not align with the UN Convention on the Rights of the Child.

Violence against children is prevalent in Swaziland; this was emphasized by a 2007 survey which investigated violence against girls titled VACS.¹³³ This survey is the first of its kind focused on issues of sexual, physical and emotional violence against the girl child.¹³⁴ Sexual violence in Swaziland was associated with the significantly increased probability of depression, thoughts of suicide, unintended pregnancy, pregnancy complications or miscarriages, and sexually transmitted diseases including HIV/AIDS.

The survey found that twenty-three percent of children under the age of 18 (123 000) were orphans in the country with one or both parents deceased. As a result of HIV, the prevalence of orphans increases with age with 7% of children under the age of 5 are orphans compared to 37% of 15-17 year-olds.¹³⁵ Most of these children are victims of abuse and often times, have to fend for their lives. From nationally representative data, one of the most prevalent forms of violence against children includes discipline, which accounts for 88% of the physical and the psychological aspects of the violence.¹³⁶ Bullying is attributed to 32% of physical violence from either an adult or carer of the child victim. In terms of Section 23 of the CPWA, orphaned children fall within the category of children who are in need of care and protection.

¹³² Lydia Marshall, Department of Sociology, University of Warwick.

¹³³ <https://www.togetherforgirls.org/country-partners/swaziland/>. (Accessed: 24 August 2017).

¹³⁴ The statistics were mentioned in length in chapter 1 para 5 and 6 of this study.

¹³⁵ World Bank, Swaziland Using Public Transfers to Reduce Extreme Poverty (2012) 20.

¹³⁶ Deputy Prime Ministers *Office a National Study on the Drivers of Violence Against children in Swaziland* (2016).

Swaziland has over the last decade since the survey was last conducted, begun developing and expanding on promoting the rights of the child, through introducing and enacting the Children's Protection and Welfare Bill and the Sexual Offences and Domestic Violence Bill in 2009. It has improved several services including post-rape care services through One Stop Centre (OSC), the establishment of the Domestic Violence Child Protection and Sexual Offences Unit (DCS) within the Swaziland police, Child-Friendly Corners in all 24 police stations, training of the justice sector on prosecuting offenders, setting up CFCs, launching database to track reported cases of violence, and engaging religious leaders from eight major faith groups to address violence against children.

These are the crucial steps Swaziland has taken to end the scourge of abuse and maltreatment against the child victim. This chapter seeks to deal with the impact and relevance of CFCs in as far as dealing with issues faced and experienced by the child victim and steps or measures that have been taken to put the interests of the child as paramount in dispensing justice.

3.2 Issues that have previously affected the impact and relevance of the child victim protection and welfare system

In 1992, Swaziland signed its first convention on the rights of children under the ambit of the African Charter on the Rights and Welfare of the Child which was a convention established in the 1990s. The delay to this signing was as a result of Swaziland's inability to deal with the commitments under the Convention; as such it lagged behind in most rights for children, more so, because the country ascribes to a dualistic legal system. Adherence to cultural practices at times are seen as a violation of internationally accepted norms and values. It was only in 1993 that Swaziland became a signatory to the CRC and also ascribed to the Optional Protocols of the Convention. The country found itself having to enact this legislation from criticism of not considering the rights of the child.

However, in 2006¹³⁷, the CRC made recommendations that Swaziland ought to and should ratify the Optional Protocols to the Convention, and encouraged it to expedite its ratification of the 1993 Hague Convention on the Protection of Children and Cooperation in respect of Intercountry Adoption. It was after the enactment of the CPWA in 2012, that the country

¹³⁷ CRC/C/SWZ/CO/1, 29 September 2006 15.

acceded to two protocols, these being the protection of children from sale and protection from armed conflicts.

Sadly though, Swaziland has not presently signed the third Optional Protocol on the Communications Procedure which came into force in 2014. As per connotations of both the Constitution of the Kingdom of Swaziland and the CPWA, Swaziland is required to sign this third optional protocol as it allows individual children to submit complaints regarding specific violations of their rights under the Convention and its first two Optional Protocols. The need to consult children is important in the light of the move in Swaziland towards reforming laws and policies relating to children, and particularly, because of the potential for giving effect to the CRC relating to child participation.

In 2006, the CRC Committee remained concerned at the lack of a systematic and comprehensive legislative review regarding the compatibility of domestic legislation, policy and practice with the Convention, and recommended that Swaziland seek the assistance of UNICEF to have an advisor in Parliament.¹³⁸ This was mainly because the institutions that had been put in place to deal with children's issues did not practise due diligence in giving the children the best service. There was a lack of confidentiality for the child victim, a lack of awareness of where the abuse may be reported too, and there was a huge failure by those in power to report abuse to appropriate authorities, and even when the abuse was reported, there was a lack of follow up of the abuse.

Thus in 2006, the CRC committee recommended that Swaziland establish an independent body for monitoring the implementation of the Convention of the Rights of the Child in accordance with the principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles). Such a body should be provided with adequate human and financial resources, be easily accessible to children, and deal with complaints from children in a child-sensitive manner.

In 2006, the CRC who welcomed the establishment of a Domestic Violence, Child Protection and Sexual Offences Unit, remained concerned at the lack of a comprehensive policy for the prevention and combat of child abuse and neglect in the family. It was also concerned that

¹³⁸ Unedited Version, Committee on the Rights of the Child, www2.ohchr.org/english/bodies/crc/docs/.../CRC_C_SWZ_CO_1.pdf. (Accessed: 3 July 2017).

many child victims had only limited access to justice owing to the prohibitive costs associated with the services of legal counsel.¹³⁹

In 2009, the Complementary Country Analysis stated that gender-based violence was a major problem and that some cultural practices such as wife inheritance, forced marriages, early marriage and intergenerational sex compounded the increasing incidence of gender-based violence and, in particular, sexual abuse of girls and young women.

Evidently, at the end of the issues posed above, CRC was deeply concerned that corporal punishment was legal, traditionally accepted and widely practised in the family, schools and other settings. It was further concerned that the new Constitution allowed the use of ‘moderate chastisement’ of children. It recommended inter alia, that Swaziland consider, as a matter of priority, explicitly prohibit by law, corporal punishment in all settings and conduct awareness-raising and educational campaigns to ensure that alternative forms of discipline were used, in a manner consistent with the child's human dignity.

3.3 Protecting the child victims environment

Gender inequality in Swaziland has over the years been exacerbated by strong patriarchal traditions, values and norms. Other factors contributing to gender inequality include unsupportive legislation, poor access to means of production, education and health, and gender discrimination of different forms leading to increased vulnerability to abuse and disease. General factors that have contributed to the increase of child victims in Swaziland are vulnerability based violence, intergenerational sex, early sexual debut and limited employment and economic opportunities within the family circle. All these factors have the effect of compromising decisions in matters affecting children's lives and those of their families.

Whilst interpersonal risk factors for violence within the home were among the most talked about risk factors by respondents,¹⁴⁰ they include domestic violence, family context, family structure, family financial stress, the keeping of family secrets and the quality of relationships between the parents and children. Interpersonal level risk factors have been the most frequently cited risk factor for violence and abuse in the home.

¹³⁹ Unedited Version (see note 139; 9).

¹⁴⁰ *supra* note 138.

Within schools, the interpersonal risk factors for abuse included previous experiences of violence, quality of peer relationships, and the quality of the relationship between the child and the teacher. Further, within the community segment, it was attributed to the normative attitudes towards children, a community code of silence around the issue of abuse and violence towards children, peer pressure amongst adolescents, and harmful community myths about abuse and violence.

The 2010 Multiple Indicator Cluster Survey¹⁴¹ estimated that at the time, about 10 percent of households are child-headed households.¹⁴² This survey noted that teenage pregnancies accounted for 27% of all deliveries in health facilities and 23% of mothers between the ages of 15 and 19 years were HIV/ AIDS positive.¹⁴³ The report further highlighted that 66% of children under the age of 18 years lived below the poverty line.¹⁴⁴ This showed how children were particularly vulnerable and needed protection. There was an evident need for protective mechanisms for the girl child most especially, within the family circle as is evidenced by the case below.

In the case of *Rex v Leonard Silindza*¹⁴⁵ the accused was charged with raping his daughter for over 6 years from the time she was 8 years old till she fell pregnant at 14 years old, because of there were no instruments to curb such abuse from continuing. Furthermore, because she was afraid of her father, she could not report the abuse till she was pregnant in 2015, where school authorities informed the police who dealt swiftly with the matter and the accused was convicted of rape.

In the *Mngometulu & Another*¹⁴⁶ and *Rex V Makhosi Dlamini*¹⁴⁷ cases, the court in both instances referred to the CRC provision to which the country was a signatory. These cases dealt with juvenile boys who were charged, tried, convicted and sent to prison by a magistrate's court of the crime of rape without the option of a fine. The charged and convicted perpetrators were 14 years old when the offences occurred.

¹⁴¹ (1997) Census, 9-10.

¹⁴² (2002) 'Child Headed Household Survey' UNICEF/ Deputy Prime Minister's Office.

¹⁴³ (2003) *Draft National Policy on Children Including Orphans and Vulnerable Children in Swaziland* Government of the Kingdom of Swaziland, pp6-7 (hereinafter *Draft National Policy on Children*).

¹⁴⁴ *Draft National Policy on Children*, 1.

¹⁴⁵ (SZHC). No. 139/ 2016.

¹⁴⁶ Unreported High Court Review case No.57/2009.

¹⁴⁷ Unreported High Court Review case No. 5/2010.

On review, the high court observed that Swaziland was a signatory to the CRC and that “the principles enshrined in the convention therein may, therefore, matter before it.”¹² In the case of *Makhosi*, the court pointed out that it ought to be guided by the principles set out in the CRC, which include the principle of proportionality, the best interests of the child and the possible *res detention*, if appropriate, must be a last resort and, even then, for the shortest appropriate period of time.

Section 103 of the CPWA provides that detention of a child in police custody shall be used as a measure of last resort and for the shortest possible period of time. The Children’s Protection and Welfare Act¹⁴⁸ is based on the child justice system and diversion provisions that is in line with article 40 of the CRC and Section 29 of the Constitution, which is principal to ensure that the child is reintegrated into society and is able to assume a constructive role in society. Prior to Swaziland being a signatory to the children’s rights convention and before the establishment of the CFC’s and training of judicial officers, the country would have violated one of the worlds treasured principles; that of the dignity and rehabilitation of the child offender.

Today the country boasts being an ambassador to children’s rights and further promotes the child’s sense of dignity and worth, which rein for the fundamental freedoms of others, and which is against a system which is solely punitive or retributive as required by international and regional instruments. This was shown in the case of *Rex v Bhekinkhosi Matibuko* in 2012¹⁴⁹ where a male from Nyakatfo in the Hhohho region unlawfully and intentionally had unprotected sexual intercourse with three minor girls aged 9, 6 and 4 years old. The Chief Justice reiterated the country’s judicial system stance in fighting against this heinous crime against the girl child victim in line with the newly drafted laws and passed international conventions that protect the best interests of the child.

It is true that the country has positioned itself to fight child abuse and promote the best interests of the child, however, the reality on the ground is still pointing to the negative move to rehabilitate the child offender. There is still a growing trend of incarcerating children who are not in trouble with the law but are sent to the Correctional Juvenile facility at the instance of their parents or guardians to be in these arrangements about their lives remains unheard.

This is a concern that can be better addressed through training of personnel dealing with children on the provisions of the CRC and the ACRWC. The government must be supported by

¹⁴⁸ Supra note 13.

¹⁴⁹ (SZHC) No. 91/ 2013.

training and capacity building of professionals dealing with children in the criminal justice sector. This can be undertaken through the development of training programmes and publications targeting the relevant specialists. Such efforts should be focused, consistent and institutionalised.

In terms of the Criminal Procedure and Evidence Act¹⁵⁰ it allows children to be heard in criminal proceedings when the child is a victim or witness of crime, but requires the court to apply the cautionary rule when it is confronted with a child witness. All these provisions limit participation either on the grounds of age or in particular contexts and so, do not follow the principle of allowing children to participate in accordance with their evolving capacity. Whilst the Children's Act in Section 3(2) (h) states that if a child can form and express an opinion about his care, the views shall be given consideration considering the child's age capacity and ability to understand.

3.3.1 Community level

Prior to the establishment of the CPWA, communities didn't have a clear mandate set for the protection and welfare of children in the country. There was a lot of reliance on common law and traditional practises, as the Constitution of the Kingdom of Swaziland, the Girls and Women's Protection Act, 1920, the Magistrate Courts Act and the Criminal Procedure and Evidence Act¹⁵¹ did, and still do not clearly permeate roles and responsibilities of community leadership structures, on the legal aspect of child protection within communities, especially in relation to child justice issues.

The enactment of the CPWA has initiated a formal link between Inner Council (*Bandlancane*) (IC) and the Ministry of Tinkhundla Administration and Development at the national level. Since the promulgation of the CPWA, the IC has played a key role in ensuring accountability of child protection mechanisms at the community level as enshrined in the Act. Community child protection committees report to community leadership, as reported in community discussions.

There is no formal way that decisions are made, but the chieftdom court is involved in applying informal justice mechanisms, even in situations where it is clear that the formal justice sector should lead, such as in cases of child rape. There has also been an increase of community police

¹⁵⁰ supra note 36.

¹⁵¹ supra note 36.

and patrols at night in hot-spot areas. Section 3 (3) of the CPWA states that nothing in the Act is intended to discourage or displace the application of informal and traditional regimes that are more promotive or protective of the rights of the child, except to where such regimes are contrary to the best interests of the child.

3.3.2 Schools

The enactment of the CPWA, has seen most schools today in the country forming youth empowerment programs all thanks to the initiative taken by several NGOs in the country, such as the Swaziland Action Group Against Abuse (SWAGAA), who have initiated and established both the girls' and boys' empowerment programs at schools. SWAGAA had advocated for the training of professional guidance counsellors in dealing with issues of violence and abuse within and around schools, as both are perpetrated by classmates or teachers.¹⁵²

3.3.3 Private and home responses

Both the government and numerous NGO's have begun implementing initiatives that extend to the home, such as skill-building initiatives for positive parenting, the raising of awareness on signs of child abuse.

3.3.4 National responses

The government has implemented initiatives through the establishment of CFCs in the four regions of the country, to help fight abuse against children, most of all child-friendly conventions and treaties have been signed by the country.¹⁵³ Moreover, the establishment of the CPWA has resuscitated the country's child policy on the best interests of the child. The Deputy Prime Minister's office has been put in charge to monitor and evaluate issues faced by children in the country; as such, a one-stop centre has also been established to deal with all issues pertaining the child. Case management within government and NGO's has been strengthened through the donation of resources by the United Nations, the United States of America and other stakeholders working closely in realising the rights of the child.

¹⁵² See above note 138.

¹⁵³ *supra* note 36.

Although much progress has been made, there is much work that still has to be done by government and all its partners in the fight against abuse. At the end of 2016, SWAGAA¹⁵⁴ cautioned that there were still numerous children being sexually abused within communities and households. Precisely, 694 abuse cases were reported to the organisation in 2016, of which 510 comprised of girl child abuses and 184 of the boy child. Clearly, sexual abuse was on the rise. This is a high figure for this small landlocked country. The child's best interests should and ought to be paramount in all matters and as such, resources and skills should be developed to fight any abuse reported either formally or informally.

3.4 Impact and Relevance of Legislation and Conventions

Even after the enactment of the 2005 Constitution in Swaziland, little was achieved in promoting and protecting the rights of the child. The only thing that ensued was the establishment of two CFCs, which needed resources and child-friendly legislation to function entirely in the best interests of children. In 2009, Swaziland's government published the Swaziland National Policy,¹⁵⁵ in which the report highlighted that little had been achieved in terms of child protection and legal support of children in Swaziland.¹⁵⁶

At that time, Swaziland was in complete violation of its Constitutional Mandate in terms of Section 29 and all the treaties the country was a signatory to, as the provision of child protection services and a supportive legal environment were crucial and still are to date, for the fulfilment and protection of children's rights. At the time, the country was only reliant on the Constitution which needed specific child legislation to help guide its interpretation of Section 29 on promoting and adhering to child protection and welfare, and to further validate the various conventions the country had acceded to. The Women and Girls Protection Act¹⁵⁷ did and still does not shed light on issues of welfare and child protection, moreover, it is biased as it only focuses on the girl child.

The UNCRC, the African Charter and its Protocols provide for the manner in which a child-friendly justice system should be administered. By virtue of Swaziland being a signatory to both these instruments, the country is bound to ensure that children are met with a justice

¹⁵⁴ Unpublished report on child abuse statistics (2016).

¹⁵⁵ SNCP (2009) *Bantfwana bangumliba Loya Embili*.

¹⁵⁶ Supra note 155; 52.

¹⁵⁷ Act 39 of 1920.

system that understands and safeguards their rights. Once Parliament passed child legislation, it immediately thereafter passed the UNCRC convention to work side by side with CPWA. The CPWA gives effect to the provisions of the Constitution and the country's obligations under the CRC and the African Charter on the Rights and Welfare of the Child (ACRWC).

3.5 Impact and Relevance of the Child-Friendly Courts

In *Sikhumbuzo Masinga v Director of Public Prosecutions*¹⁵⁸ concerned the constitutionality of minimum sentence legislation in so far as it applied to children. The court held that the legislation in so far as it applied to children who were below the age of 18 at the time of commission of the offence, was inconsistent with the child's freedom from cruel, inhumane or degrading treatment or punishment protected by section 29(2) read with Sections 18(2) and 38(e) of the 2005 Constitution.

The CPWA works in symbiosis with other conventions and treaties on the rights of the child specifically, for the protection of children from various forms of harm and abuse that are interconnected to several vulnerabilities ranging from sexual abuse, exploitation, trafficking, child labour, violence, a lack of access to justice, and unnecessary institutionalization.

The impact on the operations of the CFCs was brought into play through the Magistrates Courts Act.¹⁵⁹ Section 7 (2) gives the court power and jurisdiction to hear all matters involving children, an exception is in custody issues which in terms of Rule 45 of the High Court, should be heard and determined by the high court. During this epoch children's matters are prioritised by judicial officers and would be heard and finalised immediately.

Matters involving children were heard in camera; only the child's legal guardians/parents and close relatives of the accused persons would remain in court and attend the proceedings. If the matter has aggravating circumstances, soon after its finalisation at the verdict stage, if the accused person had been found guilty as per the sentencing procedure, it would be remitted to the high court. Such a procedure is provided for in Section 292 and 293 of the Criminal Procedure and Evidence, Act No. 67 of 1938 as Amended. During the period 1938 up to 2005 that is how Children's Court operated. During this time, fewer cases were reported, however, they were handled in an expedient manner.

¹⁵⁸ (SZHC) No. 21/2007.

¹⁵⁹ supra note 12.

However, despite all this, child justice did not provide for diversion and rehabilitation child programs, to train magistrates, prosecutors and attorneys on how to deal or handle children in court. Cases of children in conflict with the law were not given much priority, and as a result, some child offenders were remanded to prison for extended periods before their actual trials.

In terms of the Magistrates Act and the Criminal Procedure and Evidence Act that sighted children as minors and as such had no *locus standi* before the courts, up until the enactment of the CPWA. This meant that orphans in most cases had to get a guardian before the matters were heard in court, and this was in direct violation with Article 12 of the CRC which specifically provides rights for children to express their views and to be heard. Sadly though, since the passing of the third optional protocol in 2014 on these same rights, Swaziland has not signed them.

After 2012 two more CFCs were established to help scale up its services and commitments to children's rights.¹⁶⁰ The Kingdom of Swaziland is gradually heading in the right direction but at a snail's pace. Even though it is commended that children involved in criminal cases need legal aid as most of them come from poverty-stricken backgrounds, thus if no proper representation is given to such a child, then such child is treated without dignity as the best interests of that child are not considered, whereas Section 29 of the Constitution states that a child has a fair right to a hearing. A supportive legal environment is crucial even though some lawyers have been trained in children's rights and representation in court. Unfortunately, a large sum has not had some training and therefore, lobbying still needs to be made to advocate for expediency in the promulgation of legal aid.

After the promulgation of children's legislation and training of various judicial officers and prosecutors, children's cases are now given even more priority than they were previously. This comes with more understanding of the role that must be played by the judiciary in protecting the child's best interests and ending child abuse once and for all. More and more resources are today given out to fight child abuse and cases expediently tried without traumatising the child victim further, as was shown in the case of *The King v Michael Sibindi Manana*.¹⁶¹ An elderly stepfather (69) raped her stepdaughter of 14 years in August of 2015. It only took seven months for the matter to be finalised instead of several years as was the case before the CPWA and where child training had occurred. This shows that more child rape cases are now held

¹⁶⁰ supra note 12.

¹⁶¹ (SZHC) No. 418/2015.

expediently by well-trained professionals who know how to deal with and handle children's cases. Further, this also goes to show that the child's best interests are paramount as the 69-year-old stepfather was sentenced to 15 years without an option of a fine or parole.

With the increasing crimes against children, there is a dire need for a systemic reform in strengthening the evidence gathering process. Child-friendly corners should be used with utmost sensitivity in gathering information; this also includes the judicial officers both in the magistrates and high courts to act selflessly in pursuing justice for the child victim at all costs. This in essence, means that all the courts should have facilities that permit the witness/victim to have direct interaction with the judge.

3.6 Impact and Relevance of Training

The CPWA refers to the police, social workers and forensic specialists to pay attention to the needs of any child either in conflict with the law or as a victim of abuse prescribed by the law. As such, the CPWA has put into perspective that all children are to be treated with dignity and much adherence should be given to them despite what they may have done.

It has taken the country decades to prepare and develop skilled professionals with various sectors who will deal with children's issues in their entirety. After the passing of the CPWA, a survey was conducted to see and assess how many social workers had been trained on children. Out of 100 social workers, it was found that only 4 were qualified.¹⁶²

Within the police force in 2013, the Child Protection and Sexual Offences unit had 87 police officers who were not trained to deal with issues of the child particularly, those of the child victim simply because there was no funding to train such officers. The outcome was that police officers could not assist nor counsel child victims when they reported cases of abuse to them. The police environment was demeaning and torment for the child victim. As a result, it took time for the child to open up as forensic social workers had to be hired to assist in the interviewing of the child.¹⁶³ Most of the policemen in the department were faced with large cases loads and they had no skill in dealing with the child or investigating the alleged offence. Worst of all, once a child offender was incarcerated, there was no protection or counselling given to the offender as per the requirements of the CPWA and other child conventions.

¹⁶² supra note 8; 21

¹⁶³ supra note 8, 23.

Magistrates could not thoroughly apply their minds nor law or conventions in issues dealing or affecting the child. Nor did lawyers and prosecutors know how to question such a child, and as a result children's cases took too long to prosecute. Furthermore, harsh sentences would be given to child offenders without any consultation of the supreme law of the land, or any convention to which the country is a treaty too. Training was required to end this menace against child justice.

It has been through the initiatives, as discussed in this chapter, of HFG,¹⁶⁴ PEPFAR¹⁶⁵, SWAGAA, UNICEF and CCPV (*Lihlombe Lekukhalela*), that relevant stakeholders have been trained on children's issues and on how to handle both the child victim and offender.¹⁶⁶ CCPV which is a community-based volunteer group has had over 10 000 of its volunteers trained on how to support children with various kinds of issues. They offer assistance by visiting homes of vulnerable families and children, and serve as an informal referral mechanism for cases of abuse.¹⁶⁷

Neighbourhood Care Points (NCP) are service delivery points at the community level. At NCP children come daily to receive care and psychosocial support, a meal, basic health care, educational and recreational activities. Currently, there are 48 248 children less than 5 years old registered in 1 495 NCPs located countrywide. Training is provided to caregivers to improve their skills in catering for the children's needs.

For the period of 2017, only 35 police officers were trained and equipped with skills where they could better handle the reporting of cases and the counselling of children, as there are now police officers trained in forensic psychology of the child. Most police stations have developed and designed rooms that will serve as child-friendly corners for child victims.

More than 300 social workers have been trained from 2013 to date on forensic administration in dealing with issues of the child victim. Most of them have been dispensed into courts to work closely with magistrates, judges, lawyers and prosecutors in issues affecting or dealing with the children.

Magistrates, prosecutors and some lawyers (not a majority) have been trained by HFG in matters affecting the child and how to handle children's issues in courts, from the line of

¹⁶⁴ Health Finance and Governance 2012-2017 Project.

¹⁶⁵ President's Emergency Plan for AIDS Relief.

¹⁶⁶ See chapter two on training.

¹⁶⁷ *supra* note 138.

questioning to the reasoning of a child when giving evidence or testimony in court. Whilst all these mechanisms have and are implemented to serve children, the reality of the matter is that much more work still needs to be done has recommended extensive training in the judiciary and enforcement of children's issues.

The kingdom of Eswatini is the 9th most- friendliest state in Africa.¹⁶⁸ Though the margin might seem narrow, however Eswatini has over the last 10yers improved its services when it comes to the child's best interest. In 2008 the Kingdom of Swaziland ranked 45th. This goes to show that the various initiatives discussed above have gone a long way to change the country's status quo in issues relating to children particularly the girl child.

¹⁶⁸ Eswatini is the 9th most child- friendly state (2018) Times of Swaziland 5 November, p. 17.

CHAPTER FOUR

A REFLECTION ON THE OPERATIONS OF CFCS IN SWAZILAND AND SOUTH AFRICA

4.1. Introduction

This chapter focuses on the establishment, impact and lessons learned from CFCs and sexual offences courts¹⁶⁹ in the Republic of South Africa. From such a stand point, a reflective comparison will then be made to that of the Kingdom of Swaziland. The aim of the study's reflective comparison is to give rise to a comprehensive and cohesive study which will provide recommendations tailored for CFCs within the Swaziland judiciary system.

The 2007 National Study on Violence against Women and Children in Swaziland gave a clear picture on how high the levels of violence were in the Kingdom. Sadly, nine years later, the issue of violence still depicts a high margin of abuse for child victims, as such escalating numbers are confirmed by the 2016 National Study on the drivers of violence against children in Swaziland. "It is saddening and heart-breaking to learn that after so much noise has been made about child sexual abuse, particularly the girl child; we continue to read shocking stories about minors who are being sexually abused. Just a few months ago we learnt from the newspapers that a thirteen-year-old girl was raped in a public toilet at the national stadium and given E10 by the abuser to keep her mouth shut".¹⁷⁰

It has been through the forged relationship with South Africa that Swaziland was able to conduct a pilot project on strengthening social welfare systems. The project began in 2007 and lapsed two years back. The project saw the Siteki CFC being established. Initially the project began with a bench mark study tour to Palm Ridge and Protea Courts in South Africa.¹⁷¹ Using the lessons learned from the Republic of South Africa, the Swazi government together with the assistance of PEPFAR designed the Siteki CFC as an innovative measure to improve the

¹⁶⁹ A Sexual Offences Court is defined as a regional court that deals exclusively with cases of sexual offences, they are mainly intended to address the victim's special needs, reduce and eliminate secondary traumatization of the victims and their families as they engage with the court system, as well as improve the case cycle times and the outcomes of the case, MATTSO (2013) Report, p 10 & 14.

¹⁷⁰ Girl Child Sexual Abuse, (2017) Swazi Observer 11 October, p. 17

¹⁷¹ Palm Ridge Department of Justice, <http://www.justice.gov.za/maps/gp/map-gp-01-palmridge.html>. Justice/Courts/Soweto Magistrate's Court Civil Section, <https://www.justice.gov.za/mc/sw/mc-sw.html>. (Accessed: 10 July 2017).

prosecution and adjudication of sexual offences both nationally and regionally. This aimed at reducing secondary trauma and responding to the escalating numbers of rape cases in both the rural and suburban communities.

As previously mentioned, the position in our country is usually translated from the South African situation. This is mainly due to the fact that the Republic of South Africa is a powerhouse in terms of the economy, infrastructure, democratic institutions, development of the law and expertise.¹⁷² The Republic of South Africa and the Kingdom of Swaziland from time immemorial share and practice Roman-Dutch Common Law.¹⁷³ For decades prior to the Constitution of 2005, Swaziland had all of its Supreme Court of Appeal judges coming from South Africa.¹⁷⁴ This has led to the compatibility and transferability of their legal systems over the years.

However, in as much as the two legal systems may resemble each other, there are differences in the way child justice is dispensed. The Kingdom of Swaziland is still practising a dual legal system; customary and common law. There are still a lot of gaps in terms of specialised courts and judicial officers particularly for children who are witnesses, victims or perpetrators. The chapter will attempt to compare and contrast the glaring features of the two jurisdictions in as far as child-friendly justice is dispensed, beginning from its inception to the adoption of new ideologies that define a much-matured preservation to the rights of the child. This will take shape in form of all operational components of the child-friendly court model.

4.2. History of Child-Friendly Court Models in South Africa

Child victims of sexual abuse are vulnerable witnesses who experience trauma and secondary victimisation when they testify in sexual abuse cases. Sexual Offences Courts aim to alleviate this problem in various ways.¹⁷⁵ In the previous chapters, the study referred to the different interventions that have been made by various service providers which are aimed at aiding

¹⁷² Stratfor (2017) *Southern Africa, A Sputtering Powerhouse*, <https://worldview.stratfor.com/article/southern-africa-sputtering-powerhouse.html>. (Accessed: 15 July 2017)

¹⁷³ Which countries in Africa share a common legal heritage with South Africa? FLS1501 https://lawblogs.files.wordpress.com/2014/10/fls1501_questions_answers.pdf. (Accessed: 20 July 2017)

¹⁷⁴ See the Judgement on the case of the Attorney General v Mary Joyce Doo Aphane 12/2010- appeal case, where the Appeal court relied on the case of the President of South Africa and another v Hugo 1997 (4) SA (1) (CC).

¹⁷⁵ JM Reyneke & HB Kruger, "Sexual Offences Courts: Better justice for children?" (2006) 31 (2) *Journal for Juridical Science* p. 1.

victims of sexual violence and to an extent, the reduction of secondary victimisation. The renewed interest in children's rights, child justice and penal reform can be directly linked to the desire to infuse criminal justice reform with a child-rights approach.

Derived from the need to ensure the implementation of the Convention on the Rights of the Child at the domestic level, the starting point for Swaziland was the provision of child protection services by both government and NGOs. Such interventions were broad child protection and they did not comprehensively feed into the adjudication of sexual offences cases in courts, and the absence of a separate legal system to deal with the special needs of children in conflict with the law was easily seen. The adjudication of offences involving children, whether as victims, perpetrators or witnesses, requires a particular approach which includes a safe and friendly environment, special programmes, and trained personnel.

The first Sexual Offences Court was introduced in South Africa as an innovative measure to improve the adjudication of sexual offences.¹⁷⁶ In 1993, the then Attorney-General of the Western Cape initiated the establishment of the Sexual Offences Courts (SOCs) at the Wynberg Regional Court in Cape Town. This was a pilot project aimed at responding to and preventing the soaring figures of rape cases that were reported in the area at the time. It was also seen as an intervention mechanism against the secondary victimization experienced by victims when they engaged with the criminal justice system.¹⁷⁷

The Wynberg Sexual Offences Court Project,¹⁷⁸ as it became known, had three objectives: a) to reduce the insensitive treatment of victims in the criminal justice system by following a victim-centred approach; b) to adopt a coordinated and integrated approach among the various role-players who deal with sexual offences; and c) to improve the investigation and prosecution, as well as the reporting and conviction rates in sexual offence cases. The Wynberg court differed from the general regional courts in several ways. In this court, a victim-centred approach was adopted even before the commencement of the trial. A multi-disciplinary team rendered assistance from the moment the victim reported a sexual offence. A social worker from the former Department of Welfare was appointed as a full-time support services

¹⁷⁶ S P Walker "The court for sexual offences: perceptions of the parties involved." (2002) Unpublished PhD. Department of Psychology, University of the Free State.

¹⁷⁷ MATTSO (see note 172; 18)

¹⁷⁸ S Stanton, M Lochrenber and V Mukasa *Improved justice for survivors of sexual violence? Adult survivors' experiences of the Wynberg Sexual Offences Court and associated services.* (1997) 148.

coordinator and was tasked with the coordination and provision of intermediary, counselling and other appropriate services to victims.¹⁷⁹

The Sexual Offences Court was moved to a more appropriate floor of the magistrates' court building to prevent the victim from encountering the accused and other members of the public. Private, colourful and victim-friendly waiting rooms were available and two prosecutors were allocated per court.¹⁸⁰ This was to enable one prosecutor to consult, guide investigations and do trial preparation while the other was in court. Magistrates assigned to this Sexual Offences Court worked on a rotational system by presiding in this court for one week every six weeks.¹⁸¹

An evaluation of the Wynberg Court project was conducted and was found to be partially successful in establishing integration and teamwork among different role-players dealing with sexual offences, in reducing victim trauma, and in improving reporting and conviction rates.¹⁸² This was regarded as a laudable achievement after only four years of operation.¹⁸³ The pilot study of the Wynberg Court project proved to be a huge success as it maintained the conviction rate of up to 80% over a period of a year and a decrease in turnaround time from the date of the report to the police to the finalisation of the case.¹⁸⁴ This became a strong motivation for the National Prosecuting Authority (NPA) to establish further Sexual Offences Courts around the country with the aim of targeting first areas which had a high prevalence of sexual violence.¹⁸⁵

By March 2003, 20 Sexual Offences Courts had been established, and in March 2004 this number rose to 47 courts.¹⁸⁶ By 2005, 54 Sexual Offences Courts were established countrywide and official statistics indicate that these courts are very successful. However, despite numerous commitments by government to establish more of these courts, a moratorium on the establishment of new courts was announced. This was caused by the fact that the Sexual

¹⁷⁹ South African Human Rights Commission Report on the enquiry into sexual violence against children. Does the criminal justice system protect children? (2002) 29; MATTSO (see note 172; 18).

¹⁸⁰ Supra note 172.

¹⁸¹ S Vivier "Wynberg Sexual Offences Court: impressions after a year in operation" (1994) *De Rebus* August 320:569; MATTSO (see note 172; 19).

¹⁸² supra note 172.

¹⁸³ supra note 172;16.

¹⁸⁴ supra note 172.

¹⁸⁵ KD Müller and IA Van der Merwe "The sexual offences prosecutor: a new specialisation" (2004) *Journal for Juridical Science* 29 (1):135-151; MATTSO (see note 172;19).

¹⁸⁶ MATTSO (see note 172; 23).

Offences Courts were better resourced than other courts and it was viewed as a serious violation of the constitutional right of other victims of crimes to equal protection and benefit of the law. Furthermore, the regional courts dedicated to sexual offences were mainly placed at large centres in urban areas, and specially trained prosecutors were usually only located at these centres. Some victims would have to travel long distances to have their matters heard in a Sexual Offences Court rather than a normal Regional Court.¹⁸⁷ These are some of the challenges that led to the shutting down of the Sexual Offences Courts in South Africa.

However, there were concerns over the proliferation of specialised courts that were better resourced than the mainstream courts. This was stimulated by a serious concern arising from the inequitable distribution of services to all victims of crime.

4.3 The Re-establishment of Child-Friendly and Sexual Offences Courts

The scourge of violence against woman and children has always been at the heart of the South African judiciary system. In the winter of June 2012, the Minister of Justice and Constitutional Development (the Minister) established the Ministerial Advisory Task Team on the Adjudication of Sexual Offences Matters (MATTSO)¹⁸⁸ to investigate the viability of the re-establishment of Sexual Offences Courts in South Africa.¹⁸⁹

A seven (7) member task team comprising of the judiciary (represented by the Regional Court Presidents Forum, the National Prosecuting Authority (represented by SOCA Unit),¹⁹⁰ Legal Aid of South Africa, Justice Sector Strengthening Programme (JSSP),¹⁹¹ and the Foundation for Human Rights. In the same month, the Inter-sectorial Consultative Reference Group constituted by the various stakeholders in the sexual offences sector was further established to give technical support to MATTSO, where necessary. This team was called the Ministerial Advisory Task Team on the Adjudication of Sexual Offences Matters (MATTSO). Prior to the closing down of the Sexual Offences Courts, South Africa had made a trend-setting mark in

¹⁸⁷ MATTSO (see note 172; 16 & 24).

¹⁸⁸ This was a pilot project aimed at responding to child sexual abuse and preventing the soaring figures of rape cases as well as acting as an intervention mechanism against the secondary victimisation experienced by victims when they engage with the criminal justice system.

¹⁸⁹ MATTSO (see note 172; 52- 53).

¹⁹⁰ MATTSO see note 172; 23.

¹⁹¹ A Blueprint for Sexual Offences Courts was developed by the Sexual Offences and Community Affairs Unit SOCA Unit within NPA; MATTSO (see note 172; 20 & 21).

this area and subsequently placed the country amid global leadership in the intervention against sexual crimes.¹⁹²

The results from the investigation were merged with the empirical research conducted by MATTSO with the purpose of obtaining information about the historical and current functionality, and the successes and limitations of the operations of dedicated Sexual Offences Courts from certain identified court personnel, who included the regional magistrates, prosecutors, and intermediaries.¹⁹³ Using these results a sexual offences court model was developed.¹⁹⁴

The establishment of the various task teams on sexual violence was due to the numerous cases of both violence and abuse that had been reported over the years with little or no remedies available for victims. The country (Swaziland) was under the international spot light due to the frequent media reports of rape cases perpetrated, particularly against vulnerable children and the elderly. Thus, a task team had to be established to investigate the viability of the re-establishment of Sexual Offences Courts in South Africa.

4.4 Challenges Faced by the Establishment of the First Sexual Offences Courts

The demise of the first sexual offences court in South Africa was caused by numerous barriers that derailed the implementation process. Below is a list of some of the barriers that caused its demise and that still persist in most judicial systems. The research into the establishment of a sexual offences court unearthed several challenges that ultimately led to the demise of Sexual Offences Courts.

The field study was conducted by a government task team and showed that most of the systemic challenges that led to the demise dismantling of the Sexual Offences Courts are still prevailing in the court system. For instance, the issue of a lack of adequate space to accommodate the basic features of this court model has in fact become an insurmountable barrier in many courts.

¹⁹² Foreword by the **Ministerial** Advisory Task Team on the Adjudication of Sexual Offences Matters. MATTSO (see note 172 i –ii).

¹⁹³ MATTSO(see note 172; 27).

¹⁹⁴ MATTSO (see note 172; 7 &52).

There are remote courts like Springbok where no infrastructural changes can be made to the court building since the building is proclaimed as a monument.¹⁹⁵

It is at this court where the Task Team also found the lack of vacant land in the court premises as a further hindrance to the establishment of basic infrastructural needs like witness waiting areas, private consultation rooms and toilet facilities where victims of sexual offences wait outside in an open corridor together with the accused persons and the general public. Five prosecutors share an office, and therefore cannot hold private consultations with the witnesses. Below is a list of other challenges faced by the establishment of the first sexual offence courts:

- i. The lack of a specific legal framework to establish these courts;
- ii. The lack of buy-in from other stakeholders due to inadequate consultation;
- iii. The lack of a dedicated budget, which resulted in inadequate resourcing of these courts. The NPA primarily depended on donor funding and as a result, the shortage of prosecutors, intermediaries and court preparation officers was identified as the fundamental cause that ultimately made the sustainability of optimal performance of these courts impossible;
- iv. The lower visibility of these courts in remote areas was construed as a violation of the Constitution;
- v. The restricted space capacity in courts that often hindered full compliance with the blueprint. In other courts, waiting and consultation areas could not be established due to lack of space in court buildings;
- vi. Inadequate and inconsistent provision of skills training and debriefing programmes for the court personnel. This led to many court personnel experiencing vicarious trauma from dealing with these cases; and
- vii. The lack of a monitoring and evaluation mechanism developed specifically for the management of these courts.

¹⁹⁵ MATTSO (see note 172; 10).

4.5 Report Findings on the Re-establishment of Child Friendly/ Sexual Offences Courts

4.5.1 Findings from the office of the State Advisor

The team tasked with the assessment of the viability of sexual offences court conducted the assessment as per the MATTSO report. It ought to be noted that it was quite crucial for such a team before concluding the study to have approached the Office of the Chief State Law Advisor for an urgent opinion on whether Sexual Offences Courts could be established by the Minister of Justice and Constitutional Affairs in terms of s 2(1)(g) of the Magistrates' Courts Act 32 of 1944. This was to ensure that the rule of law allowed this and that in making their accession, they were not ultra vires. It was whilst at the Office of the Chief State Law Advisor that caution was given to use of the above stated provision for this purpose, as this will be a dangerous interpretation of this provision that might open a gateway to numerous legal adversities in their pursuit of re-establishing sexual offences courts in the country.¹⁹⁶

In the end, the Office of the Chief State Law Advisor advised the establishment of sexual offences court should be authorised through the formation of new legislation which would ensure that these courts preside specifically over matters that they are prescribed to deal with. The office further advised that a starting place would be the amendment of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 to include an enabling provision that addresses this issue.

Once the issue of the re-establishment of the sexual offences court was dealt with, it became apparent that courts offering specialised services should be equipped with certain features, thus the adoption of the MATTSO report envisaged these features.¹⁹⁷ The features are as follows:

- a) a screening process to identify cases that fall within the sexual offences category and direct them to the Sexual Offences Courts;
- b) a designated courtroom equipped with closed-circuit television and sound equipment and/or one-way glass facilities;
- c) a special room from which the victim will testify, which must have minimal furniture and decoration;
- d) a private waiting room and/or play area for victims and their families which must be informally arranged and the availability of intermediaries and a core group of specialist

¹⁹⁶ MATTSO (see note 172; 10).

¹⁹⁷ MATTSO (see note 172; 52-53).

presiding officers who have experience in criminal matters, and who have undergone specified trainings on child development, working with mental disabilities, and the dynamics of sexual offences.

4.5.2 Findings on the role out of a new sexual offences model¹⁹⁸

Other findings from the MATTSO report where unequivocal findings were made to the effect that South Africa still needed sexual offences courts, as a matter of urgency to improve the performance of our courts in managing cases of sexual offences. The truth is victims of sexual offences have special needs that often require specialized skills that can only be offered by dedicated court personnel operating at a specialized court, fitted with specialized equipment that responds to such special needs.

Having uncovered numerous challenges that posed a threat to the re-establishment of sexual offences courts, the task team decided to cultivate a new sexual offences court model which would seek to address certain flaws of the past. As per the MATTSO findings, the new sexual offences court model would promote the equal distribution of the services of these courts beyond geographical lines.

In conclusion, there were sufficient grounds that surfaced from a captivating need for the re-establishment of sexual offences courts. An amendment was made by legislation to afford complainants of sexual offences the maximum and least traumatising protection. Sexual offences courts were to be rolled out together with hybrid sexual offences courts.¹⁹⁹ This was designed to afford victims with the standard features of the model. The use of the term ‘hybrid’ is mainly drawn from the fact that, whilst giving priority to sexual offences cases, these courts will operate on a mixed or hybrid court roll to ensure the continued operation of the court after the finalization of the sexual offences cases.

The new model as will be discussed at a later stage had to be implemented through an audit report which assessed the viability and sustainability of the proposed re-establishment. Thus in

¹⁹⁸ The sexual offences model is discussed in length in chapter bellow. The report on the re-establishment of sexual offences courts. <https://www.justice.gov.za/vg/sxo/2013-sxo-courts-report-aug2013.pdf>. (Accessed: 25 August 2016).

¹⁹⁹ A Hybrid Sexual Offences Court is defined as a regional court dedicated for the adjudication of sexual offences cases in any specified area. It is a court that is established to give priority to sexual offences cases, whilst permitted to deal with other cases. However, it must be noted that the concept of the Hybrid Sexual Offences Courts is considered as an interim measure to ensure access to justice to all witnesses where the local court building cannot accommodate all the features of the Sexual Offences Court Model or the number of sexual offences do not justify an exclusive court roll of sexual offences.

conclusion, the project mandated to the task team was worth engaging in as it has allowed countries like Swaziland to explore new frontiers pertaining these findings in dealing with and deliberating on the best interests of the child. The report concluded by giving the Minister of Justice and Constitutional Affairs a preliminary zero-based costing of sexual offences courts, as per the new court model. This ensured that the government did not have to over spend in upgrading these 57 courts, thus making it and its stake holders accountable for every dollar spent. Thus, in the final analysis, the report makes a clear finding that there is a need for the re-establishment of sexual offences courts in South Africa.

4.6 The Way Child-Friendly Court Should Operate Between the Two Jurisdictions (Sexual offences/Child -Friendly Model)

4.6.1 Swaziland's Foresight on Mandate

Swaziland's national legal and policy framework for children is guided by two overarching documents – the Children's Policy of 2009 and Children's Protection and Welfare Act of 2012. The Children's Policy and CPWA are grounded in the rights of the child and the responsibilities of parents and the state. They spell out family and state responsibilities towards children in need of care and protection, and children in need of rehabilitation and urgent protection. The Act further emphasises offences in relation to the health and welfare of children, and makes provision for the legal consequences of the adoption, sale, harbouring, and abduction of children.

The CPWA brings together all legislation relating to the protection and welfare of children. It determines the age of criminal responsibility including processes for age assessment. It further spells out police and court powers and duties throughout the justice process, and provides for restorative justice and diversion, which were not formerly included in any piece of legislation. The Act establishes institutions which will promote child protection and ensure the safety of children, especially the role of the Department of Social Welfare (DSW). The Act addresses some issues that were previously not included in laws, including parentage, custody and guardianship, maintenance, employment, and protection of children regarding matters of health.

All children's policies and legislation are coordinated by the National Children's Coordination

Unit, a unit within the Office of the Deputy Prime Minister, which has the mandate of coordinating all government ministries and civil society on all issues affecting children.

4.6.1.1 Child friendly court design

Chapter One²⁰⁰ of the Study explicitly discloses sexual violence against children as a multifaceted and challenging problem in Swaziland. Besides Court D, a further attempt to address the dilemma was the introduction of the Siteki Child-Friendly Court which was launched in 2014 to resemble an ideal model for the adjudication of sexual offences cases. The establishment of this court served as a pilot project for rolling out the same model throughout the four regions of the country. A group of local experts on children's issues from relevant ministries and NGOs, conducted a study tour of the Protea and Palm Ridge Magistrates Courts, South Africa, with the aim of using lessons learnt to advocate for the establishment of a CFC model. Upon return, the team of experts made recommendations to the government of Swaziland wherein financial support was received from PEPFAR and other donors to renovate and construct a child-friendly court at Siteki. Stakeholders including the Ministry of Public Works began the process of designing the court with the following features:

- a) *Court Room:* the courtroom was renovated to allow digital connection with a testifying room. A two-way closed-circuit television system which enables the child victim to identify the perpetrator from the testifying room. A separate monitor is available in the court and in the testifying room to ensure visibility of the victim and identification of the perpetrator respectively.
- b) *Testifying Room:* a separate room, with a different entrance containing a waiting room, a bathroom, kitchen and a testifying room, within the premises of the court was established. The child victim sits there with the intermediary. The outside walls are painted in child-friendly colours and the room is air-conditioned with appropriate lighting. Inside the testifying room, there is a child-friendly couch with anatomically correct dolls. It is presumed that very young children generally have very limited verbal skills and this can compromise their ability to describe their experiences completely and coherently. They often do not have the specific vocabulary to name body parts or describe sexual actions. It is therefore assumed that the child might be able to demonstrate with the dolls what he is unable to say in words. The dolls are also useful

²⁰⁰ Page 1 of this thesis.

when interviewing children who have the verbal skills, but who are unwilling or unable to describe what happened to them during the abuse. The child may be too embarrassed and shy to talk about the painful, frightening and humiliating experience. The child can be allowed to demonstrate on the dolls what he has difficulty putting into words, as the child may feel more comfortable enacting the abusive event.

- c) *Closed-Circuit Television Systems*: The general principle is that criminal trials should be conducted in open court in the presence of the accused. However, to face the perpetrator in open court is a terrifying and humiliating experience for many victims of sexual abuse. Witnesses in sexual offences cases therefore often require the use of closed-circuit television (CCTV) facilities, where the witness testifies in a separate room but can still be seen and heard by everyone.²⁰¹ The use of CCTV has become standard practice in several countries and legislation has been enacted to make this practice admissible.²⁰² In Swaziland, this is permitted by Section 7 (2) and (3) of the Magistrates Court Act,²⁰³ which emphasises that proceedings involving children should be held in camera. Within the Siteki Court, there are two cameras, one at the testifying room and the other within the main courtroom. The CCTV's have LCD screens that are almost the same size as computer screens.

4.6.1.2 Court D

The Child-Friendly Court Model began with the conversion of 'Court D' within the high court of Swaziland to have almost similar features of the ideal child-friendly court. It has a secluded room built inside the courtroom which houses the child victim when giving evidence. There is a solo screen within the main courtroom which only enables the judicial officer and those in the courtroom to see the child victim. There is a one-way camera transmitting pictures from the testifying room to the main courtroom. There is the availability of a sound-sensitive system, and the room is air-conditioned. The child witness box is decorated in bright colours which convey the feeling of a child-friendly environment. It also has tools such as anatomic dolls, balls, papers and paints which then allows the child to give his/her evidence in a relaxed manner.

²⁰¹ supra note 178; 15.

²⁰² MATTSO (see note 172; 54).

²⁰³ supra note 12; s 7(2) & (3).

The high court by its very nature is a crowded place; the child victim together with his/her parents or guardians have to navigate the crowd to gain entrance to the court. Some of the children and parents come to the court for their first time and the Court does not have signage as such. Furthermore, the manner in which the Court is established allows for one entry of the victim, his / her parents or guardians and the perpetrator. Due to the nature in which this Court is built, some of the victims feel overwhelmed as they have never been in a busy or crowded place, and they feel uncomfortable as they are exposed to the perpetrator before court begins. The trauma the child victim is exposed to reduces the chances of the child giving sufficient evidence. Due to the nature of the cases held at “Court D” and the increasingly high dockets coupled with a limited number of specialised court officials, trials in “Court D” could not be finalised in a speedy manner.

4.6.1.3 The child's best interests

Given the foregoing physical setting of the actual courts that house the child-friendly courts, the focus is now channelled to the processes that take place. The absence of a functional separate court for children in the other regions of the country²⁰⁴ further results in child victims being exposed to police officers, accused persons in handcuffs and so forth, which create an intimidating court atmosphere for children and their families. The use of inappropriate language during the reporting and investigation stage by police officers under the general duty department is rampant. The reception at the police station where the child abuse case is reported may not be victim friendly. The police station is a place for criminals and numerous persons who had come to seek assistance from the police on other issues not related to child abuse or child rights violation offences.

In most instances, the child victim is sent from pillar to post trying to find the relevant police officer to handle his/her complaint. Police tend to mock the child victim such that she feels intimidated and starts to feel responsible for reporting the incident. This behaviour by untrained police works against the disclosure of the incident by the child, and may lead to a case not being forwarded to the prosecution department by the police. More often than not, most police officers do not have sufficient time to investigate child abuse cases because of various reasons which include multiple tasks to handle other cases, ignorance of what should be done in each investigation, and transfers to other departments within the police service.

²⁰⁴ Manzini and Shiselweni Regions.

Another practise common in The Kingdom of Swaziland is that transport provided by the police to take the victim to the hospital is the same as the one used by the police to arrest the suspects. Sometimes, a child victim would be transported to hospital or court together with suspects for other cases due to a lack of resources. This practise is grossly wrong and cannot be distanced from child abuse at its worst. There is also no facility to accommodate distant victims the night before trial. Therefore, they have to be fetched or walk a long distance to the police station before they take a long journey to court or board the police van which is uncomfortable, and generally on a bumpy road.

Furthermore, the court environment is not conducive to a child victim. For a witness to give evidence in court usually means being subjected to intense scrutiny. Therefore, to testify in court is an intimidating experience for most witnesses, and especially for vulnerable groups such as children. In addition, the court experience is even more intimidating when the child must testify in open court about traumatic events that occurred during the sexual abuse.²⁰⁵ The trauma of the court environment is not only relevant to the child victims but to everyone involved, even to those who work in court on a daily basis.

As courts are instruments meant to protect children, victim assistant services are important. These services can include the preparation of victims for court in accordance with standardised practices; the provision of support and assistance for victims during the court process; as well as the referral of victims to appropriate support services rendered outside of court. Lack of court preparation before trial on the assumption that the child will automatically cope with all the challenges and mental stress of a court environment is common.

Swaziland does not have a single court preparation officer employed to do this task. Instead it is the duty of the prosecutor handling the case to make sure that the child victim copes under the circumstances. In the absence of a sufficient number of support persons, preparation of a child witness by prosecutors is necessary and would entail familiarizing the child with the courtroom structure; people present in the courtroom, where the parent or trusted person and accused may be seated, the sequence of events, and the procedure that will be followed during deposition. Prior interaction with the child would also help the prosecutor understand the

²⁰⁵ supra note 172; 74.

vocabulary and cognitive skills of the child, and could enable framing of questions that are age and developmentally appropriate.²⁰⁶

Furthermore, the prosecution office which is usually housed within all magistrates' courts in Swaziland, is mostly overcrowded with crown counsels sharing the same office, police officers who come to consult on other matters, and witnesses who had been called for interviews. The child victim is expected to recount his or her story in front of all these people present in the prosecutor's office. This situation hinders confidential consultations with victims. As opposed to using an office full of files, a ringing telephone and other interruptions, the ideal remains a private, victim friendly room which is specifically designated for consulting confidentially with witnesses.

As there are no waiting rooms for child victims at the court houses except in the Siteki child-friendly court, the child victim waits along the corridors of the court and watches criminals and the suspects come in shackles and cuffs; this is not child friendly at all. The child victim when introduced into court is called in a manner that is not child-friendly. His or her name is shouted loudly three times by an untrained court orderly who has been instructed to just call the next witness in the proceedings. In other instances, once the assigned crown prosecutor absconds from court, the matter would be postponed at the detriment of the child victim who will have no one to tell her/him what was happening in the court and why the matter could not proceed. A few dedicated prosecutors are not enough to handle all the matters.

Private attorneys usually have a field day in asking for postponements of child abuse cases. This is due to various reasons amongst which could be lack of training in the field, employing delaying tactics to buy time, and no reasonable and probable defence to rebut the crown case. At the end, a defence attorney may label and treat the child victim as a liar due to forgetfulness on her/his part attributed to the time factor. In most instances, delays in finalizing the matter are caused by the search for the services of an intermediary. The child victim as a witness forgets due to the prolonged process. Müller and Holley highlight the child's diminished ability to recall facts over time and perceived suggestibility as some of the problems experienced by children due to court delays. A further problem is the question of the child's credibility in giving evidence after therapy, and the need for a speedy intervention to help the child to cope.

²⁰⁶ Report of Study on the working of Special Courts under the POCSO Act, 2012 in Delhi, Centre for the Child and the Law, National Law School of India, University (2016) 38.

Putting a stop to unnecessary court delays helps to prevent or minimise recall problems and enables the child to receive the necessary therapy sooner without jeopardising the credibility of their evidence.²⁰⁷

A further observation within the child friendly justice system is the disjointed nature of services. The essential services which are part and parcel of the criminal justice machinery such as the police, social workers, intermediaries, doctors, interpreters, prosecutors, and presiding officers are not housed under one roof. The one stop centre is only found in Mbabane. The other courts within the country do not have one stop centre nearby. This means services are accessed only by travelling to the one stop centre.

There are very few individuals who are qualified; at the most, these services are likely administered by untrained personnel such as police officers. There are no halfway houses when there is urgent need for the removal of the child victim to avoid interference by the perpetrator. Therefore, the child victim finds herself/himself without a proper place of safety. In extreme cases he/she would be housed at the police station where the perpetrator is locked up. The protection houses only exist on paper in Swaziland as no one has been hired by the government to do the job.

There is also the issue of correctional services department. This department serves as a double barrel. Its responsibility is not clearly cut. The correctional services officers are sometimes tasked to serve as social workers of the child. Even the industrial juvenile school no longer serves its rehabilitation purpose. Admission procedures are hijacked. Children with no criminal conduct are enrolled, once in the facility there are not discriminated against juvenile delinquency.

In addition, there is no juvenile centre for females. Young girls are mixed with old women at the Mawelawela Women's Correctional Centre. The social services unit within the correctional service department does not warn the child victim about the eminent release of the convict responsible for the abuse. Thus, the child victim and his/her family is exposed to the convict without being able to avoid the trauma to the child.

Since there are no one stop centres with facilities that cater for the examination of child victims, they are carried out in hospital. The hospital environment is traumatic for the child victim. If

²⁰⁷ Müller and Hollely 2000: p. 83-87.

no prior arrangements have been made with the hospital, the child victim might be made to wait in patient waiting areas for hours without being attended to. Just like court houses, the hospital is also scary place. If an appointment was made for the examination of the child victim there is always the likelihood they will be attended to by a doctor of the opposite sex. After the physical exam, the child victim waits at the patient waiting area for hours before being taken back to the place of safety.

Patient flow within the hospital's corridor is not child-friendly because services are skirted all over the hospital building. Once the doctor has finished the exam of the child victim, he or she must take the samples to the laboratory, Voluntary Counselling and Testing (VCT) are given and so on. No psychological needs or counselling are offered even though is very critical for therapy. The police staff that brings the child victim for examination at the hospital usually does not wait for the child as it attends to other crime scenes as soon as they drop off the child victim.

The provision of the colposcopy at the one stop centre where the trained doctor is always available to attend to victims of child abuse could cure the anomaly. Therefore, a child victim should not be sent to the hospital for examination. Most of the child abuse cases are not processed to finality as a result of these issues raised above. All these points have, in one way or the other, a bearing on the number of reported child abuse cases. Since it is an open secret that people talk to each other and discuss their experiences in life, it is known that the criminal justice system with the above-mentioned factors do not encourage reporting of child abuse incidents. Other people therefore never report incidents but opt for other avenues outside the criminal justice system.

In Swaziland, the admonition is the most commonly used competency test administered to child victims who are witnesses in court. Usually very few other questions are directed to the child witness at this stage of the trial. It is enough that she/he has been admonished to tell the truth. This is illustrated in *Rex Vs Varam Absalom Skhosana*.²⁰⁸

²⁰⁸ (SZHC) No. 444/2016 3. The accused person was charged with the offence of rape that whilst at St Philips area in the Lubombo District, intentionally had sexual intercourse with a female minor of 6 years without her consent or who in law could not consent to sexual intercourse and that he thus committed the offence of rape.

4.7.1 South Africa's blueprint model for sexual offences

In 2002, a Blueprint for Sexual Offences Courts was developed by the Sexual Offences and Community Affairs Unit (SOCA Unit) within the South African National Prosecuting Authority (NPA). In February 2003, the National Strategy for the Rollout of Specialised Sexual Offences Courts was announced. This document introduced the concept of two categories of courts, which subsequently gave rise to much of the confusion relating to the terminology.²⁰⁹ The differences in these two categories of courts is that the first category includes all courts that are dedicated to hearing sexual offences even though they do not yet comply with the blueprint. These courts should not be classified as a sexual offences courts, but should rather be referred to as dedicated courts dealing with sexual offences.²¹⁰ It is argued that blueprint compliant sexual offences courts provide better justice for children and therefore, more of these courts should be established at a much faster rate.²¹¹

In terms of the above terminology, sexual offences courts were blueprint compliant whereas dedicated courts were courts that dealt with sexual offences, but not blueprint compliant.²¹² Since the establishment of Sexual Offences Courts was a process that often took several months to achieve, it was not always possible to immediately provide all the facilities required for a blueprint compliant court. The blueprint compliant courts were found to be costlier and more demanding. As a result, the roll-out process produced more dedicated sexual offences courts than the desired blueprint compliant Sexual Offences Courts. The blueprint specified that Sexual Offences Courts are regional courts dedicated exclusively to sexual offences and they are aimed at enhancing the efficient prosecution and adjudication of sexual offences and to respond to victims' needs.²¹³

4.7.1.1 Better resourced sexual offences model

This resulted in more cases being finalised, an improved handling of victims, improved cycle times and improved conviction rates. The fact that the Sexual Offences Courts were better resourced than other courts was viewed as a serious violation of the constitutional right of other victims of crimes to equal protection and benefit of the law. It was further seen as a serious

²⁰⁹ MATTSO (see note 172; 20).

²¹⁰ MATTSO (see note 172; 9 & 20).

²¹¹ *supra* note 178; 1.

²¹² *supra* note 182.

²¹³ MATTSO (see note 172; 21).

impediment to the realization of the goals of the Service Charter for Victims of Crime in South Africa, which primarily strive for the equitable and victim-centred criminal justice system. In some areas, it was alleged that some of the sexual offences courts were extremely under-resourced.²¹⁴

Dedicated sexual offences courts consists of a main courtroom and a testifying room and are equipped with closed-circuit television systems. The courts have access to a separate waiting room for adults and children, who have to testify. It is an important principle of a sexual offences court that direct contact between a child victim or witness and the accused be avoided at any point in the justice process.²¹⁵

For instance, to test the implementability of the proposed court model and its features, the MATTSO Task Team selected 3 court sites where the sexual offences court model will be piloted to determine whether the model can be implemented. The sites that were chosen included Wynberg Court, Western Cape; Springbok Court, Northern Cape and Palm Ridge Court, Gauteng. The Wynberg court has been selected to determine if the court model would apply in a court that previously operated as a Sexual Offences Court, where the old infrastructure still exists. Springbok Court represents courts that are remote, rural and seriously challenged in terms of space. This is to determine if the proposed model can be implemented in such instances. The Palm Ridge Court is an example of a newly constructed court, which has never operated as a Sexual Offences Court, and which has more than enough space. The model will be established in this court to determine the feasibility of its success in an environment where no restrictions are envisaged.²¹⁶

4.7.1.2 Functions of the court model

The current study pointed out the functionality of the Palm Ridge Court as it is the same model which provided the basis for the establishment of a similar model in Swaziland. The Palm Ridge Court is an example of a newly constructed court, which has never operated as a Sexual Offences Court and which has more than enough space. The model was established in this court to determine the feasibility of its success in an environment where no restrictions are envisaged.

²¹⁴ MATTSO (see note 172; 9).

²¹⁵ MATTSO (see note 172;76).

²¹⁶ MATTSO (see note 172; 74).

This court facility boasts of excellent facilities consisting of thirty-three court rooms for adjudication of criminal, civil, family and small claims cases; three large cash halls for the payment of maintenance, twenty five separate holding cells which will cater for males, females and juvenile detainees; adequate offices for judicial officers and prosecutors with direct and secure access to the parking lot; adequate offices for administrative and legal aid personnel; and adequate consulting rooms for legal practitioners to consult with their prisoner-clients.²¹⁷

The Palm Ridge Magistrates' Courts are housed in relatively new buildings and the facilities available to child victims and witnesses are quite remarkable.²¹⁸ The court is well equipped to accommodate child witnesses and victims. The court has four CCTV systems, four one-way mirrors, four separate testifying rooms, and four separate waiting rooms.²¹⁹ The courts housed in new buildings such as those at Pretoria North and Palm Ridge do have excellent facilities and also cater for the special needs of child victims and witnesses.

4.7.1.3 Change within the justice system

There is a lack of trust in the judicial system's ability to deal effectively with cases involving children. Distrust emanates from both the participants in the trial; the complainant and his family as well as the general public. Thus, people dislike laying complaints of such a nature and prefer to circumvent the legal process. That is what makes people seek psychological assistance for their abused children as opposed to going the legal route. It is essential that the child victim trusts the role players in the legal system.²²⁰

The disclosure process amongst professionals in the criminal justice system is not understood. The child victim is usually approached, a statement is recorded, and immediately a report is made whilst the child may not be ready to make full disclosure at that time. The statement recorded at that stage will differ from that adduced in court. Therefore, presiding officers will find the child victim's testimony contradictory.²²¹

²¹⁷ MATTSO (see note 172; 74).

²¹⁸ Making room: Facilitating the testimony of child witnesses and victims Commissioned by the Centre for Child Law, University of Pretoria February 2015, p. 37.

²¹⁹ MATTSO (see note 172; 33).

²²⁰ *supra* note 27; 23.

²²¹ MATTSO (see note 172; 24).

Investigation of child abuse cases adds to the plight of the child victim. Generally, the investigation of child abuse incidents is poorly conducted. This is caused by the lack of specialized training and lack of resources. Police investigators do not know how to effectively communicate with children. The incompetent recording of statements from children has in many cases, resulted in the acquittal of an alleged perpetrator.

Delays and remands are some of the obstacles encountered during the processing of the child victim's case in court. Such results in delaying the conclusion of the trial and these affect the quality of the child's evidence. Postponements create a distrust of the criminal process with the belief that they are only being made in the interest of the accused.²²²

The use of interpreters during proceedings adds salt to the wound. About eleven (11) official languages are spoken in the country. Interpreters do not receive any special training and therefore do not have knowledge of language development or techniques involved in questioning young children. When an intermediary and an interpreter are both used simultaneously in the proceedings, one question would be rephrased several times. This would result in the loss of crucial evidence and consequently, the credibility of the child is negatively affected.²²³

A further issue is the rotation of prosecutors. Children frequently encounter more than one prosecutor during the trial. That means the child victim must tell his/her story to more than one person. Such a practice is not good for child-victim because he/she might feel uncomfortable to tell her story to every stranger he/she comes across. That may, at the conclusion of trial, jeopardise chances of meting out a conviction in the best interest of the child. In most instances prosecutors meet the victim for the first time on the date of the trial. This is due to the fact that prosecutors generally do not have the time as they must get through as many cases as possible due to monthly evaluation procedures on their part.²²⁴

Competency examinations are the test currently employed by the courts to assess the child is sufficiently competent in giving evidence. These are not standardised questions to assist the court. It varies from one judicial officer to another. The absence of a standardised test for

²²² MATTSO (see note 172; 25).

²²³ MATTSO (see note 172; 26).

²²⁴ MATTSO (see note 172. 17).

competency causes confusion and indifference. The competency assessment presently used to determine a child witness's ability to tell the truth is not currently fair to child victims or witnesses because it subjects them to questioning before they even give evidence. This does not happen to adult victims or witnesses in the same position.

There is need for all role-players to receive training to deal with children's issues. Then the concepts of bias and stereotyping amongst presiding officers and legal practitioners will not misguide professionals in handling child-victim cases.²²⁵ Furthermore, a multi-discipline approach is necessary when dealing with children in court. Role-players do not work as interdisciplinary teams in court which is against the best interests of the child. Waiting is the established norm in criminal proceedings. Witnesses, complainants and interested parties should come early and wait on the premises /corridors of the courthouse until they are called into court to testify. This has a negative effect on the child victim who is exposed to the presence of the accused. After spending hours waiting, the child victim would likely be tired, tearful and not cooperative when she/he is finally called into court to testify.

There are inadequate support service for victims with disabilities. Their vulnerability is increased by the fact that most persons with disabilities are very often dependent on others for their basic needs and are isolated both physically and socially. These include those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various other barriers, may hinder their full and effective participation in society on an equal basis with others. Court personnel must also be trained on how to deal with cases involving persons with disabilities. Swaziland like many other countries, has ratified the Convention on the Rights of Persons with Disabilities.²²⁶ Article 16 of the Convention, requires state parties to take all appropriate measures to protect persons with disabilities from all forms of exploitation, violence and abuse. It further requires the development of women and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and where appropriate, prosecuted.

The proceedings and the official participation in the trial are all controlled by the presiding officers who are judges or magistrates. In order to make meaningful decisions, presiding

²²⁵ MATTSO (see note 172; 28).

²²⁶ Convention on the Rights of Persons with Disabilities (2006).

officers need intensive training on the dynamics of child abuse. Therefore, knowledge of child communication is paramount to judicial officers who preside in sexual offences courts where children are involved. For instance, it is the duty of the judicial officer handling the child abuse case to ensure that the questions put to the child are appropriate to the developmental stage of that child.²²⁷

Medical examination is also a problem for children going through the criminal justice system. It is one of the prerequisites in court during trial that scientific proof is required. If medical reports are inappropriately compiled, acquittals will likely ensue. Children should be prepared first before they are sent for a medical examination. It is, likewise, for the doctor to develop some rapport with the child to obtain relevant information which he/she may require when compiling the medical report to present in court as expert evidence in the child abuse case.

Victim support is necessary for the child as he/she goes through the criminal justice system. The child's physical needs should be considered. A support person is necessary to provide comfort and clarify any fears the child may have before the trial resumes, during the trial and after the child has testified.²²⁸

There is reluctance among some court officials to use the intermediary system. In other instances, application to use intermediaries during the trial proceeding were refused on extreme interpretation of the legislation. Intermediaries are not given enough time to develop rapport with the child before resumption of trial. As such, a rule of practice was developed which disallowed intermediaries to have any previous contact with the child. This approach seems defective and invalidates the whole purpose of introducing the intermediary in the proceedings if he/she is going to see the child for the first time when proceedings in court are already ongoing. There are insufficiently well-trained intermediaries available for court proceedings, and as such, cases involving children are postponed or stalled due to the non-availability of court intermediaries.²²⁹

²²⁷ S Waterhouse "The impact of changing criminal justice responses to child victims of sexual abuse: Good intentions, questionable outcomes" (2008) 22 *Open Society Foundation for South Africa*; MATTSO 172; 29.

²²⁸ Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, Resolution 2005/20. The Economic and Social Council (UN Guidelines). Para 10 -14.

²²⁹ MATTSO (see note 172; 16, 22, 31 & 69); .supra note 178; 94.

Children need to be debriefed both after they have testified, after judgement has been delivered, and a sentence passed. The usual procedure is that the child is dismissed from the witness stand without any explanation after she/he has finished testifying. It is vital that communication with the child takes place throughout the process so that the child is empowered as powerlessness can repeat the trauma. Children do not receive any preparation before they are required to testify. Information makes the child an effective person in the proceedings. If the child understands what is happening to him, a lot of stress and uncertainty is removed. Reporting is the key to these obstacles that may hinder a child to fully participate in the proceedings and thereafter be content with the outcome.²³⁰

For example, when bail is granted to an alleged perpetrator, and the child has not been properly prepared and lacks this information concerning his/her complaint, then he/she will feel that the matter has been finalized or she is to blame for the release of the accused since the accused would be free without her/him telling the side of the story. Such an occurrence will have a negative impact on the child before or after the trial resumes.

4.7.1.4 The child's best interests

In addition, the nature of the proceedings is adversarial. This feature of the criminal justice system is detrimental to a child's effectiveness as a witness as well as to the emotional well-being of the child. The system situates the child into opposition with the perpetrator. This becomes a problem where the abuse took place among family members.

Child-victims as witnesses are subjected to the competency test. Before they adduce evidence in court, the presiding officer is expected to ask some questions to determine if the child understands and appreciates the truth, can distinguish between telling a lie and telling the truth, and the repercussions thereof. The questions under the competency test are not standardised and depend on the presiding officers handling the case before him/her at that time. These questions may differ even with the same presiding officer depending on each individual child victim as a witness.

In other scenarios, depending on the presiding officer who is appointed to deal with each child-victim, the admonition would be sufficient, and no other enquiry would be conducted to

²³⁰ MATTSO (see note 172; 32).

determine if the child understands the difference between telling a lie and telling the truth. The competency test is discriminatory in that it is tailored for child-witnesses only. In cases involving adults there is no competency test. Adults are only advised to either take the oath or affirmation. In short, adults are given a choice but children are subjected to questioning before the stage of cross-examination is reached in the proceedings.

It is therefore a discriminatory practice that children's competency is viewed with suspicion before they even begin to give evidence. There are various ways to determine credibility of evidence whether it is given by children or adults therefore, the criteria should be the same. Amongst these is cross-examination. The answers from questions posed under cross-examination will usually determine if someone is telling the truth or not. Furthermore, corroboration, though not a rule of thumb, may assist in determining if a witness has adduced a truthful and coherent story. It is generally accepted that children tell the truth and it is adults who are prone to telling lies and denying wrongful acts against the child victim. Although cross examination is used to ascertain factual information from the witness, it can also present an opportunity where an accused person can attack the credibility of the witness. Children are questioned in a hostile environment, often about very intimate and emotionally loaded events.

4.7.1.5 Conclusion

In conclusion, Swaziland can learn from the MATTSO report and the blueprint of the sexual offences court model about how an ideal CFC should be. It is acknowledged that both countries jurisdictions do not have the best CFCs, however, South Africa is quickly developing and changing this philosophy.

In addition, South Africa has advanced various specialized/dedicated victim support services and one-stop centres, like the NPA's Thuthuzela Care Centres, the DSD's Khuseleka One Stop Centres, and SAPS's Family Violence, Child Protection and Sexual Offences Units (FCS), which are established and managed by different government department/institutions, to mainly reduce secondary victimisation and improve the services within the criminal justice system. These are some of the commendable initiatives undertaken in South Africa to address the scourge of gender-based violence. However, these centres operate without a common guiding policy to ensure the coordination and sustainability of services and resources. There is a need for a policy framework that will determine how these centres should optimally function in the sexual offences courts. Nevertheless, these services form part of the criminal justice process.

Unfortunately, Swaziland does not have a single dedicated sexual offences court and it is far from achieving a child-friendly court. There is only one, One Stop Centre which is situated in the capital city which needs to be decentralised to other regions. Even the Siteki court model has some of the features but lacks service provision, and it is not used consistently for the sole purpose of determining child issues.

From the research studies, these courts were found to be successful in the establishment of a victim-centred criminal justice system, reduction of secondary victimisation, improved skills of court personnel, a reduction of the cycle time in the finalization of sexual offences cases, and the courts have generally contributed to the efficient prosecution and adjudication of these cases. Internationally, South Africa is at the forefront in the development of specialized sexual offences courts that adopt a victim-centred approach. It has been identified that most of the specifications of the blueprint for the sexual offences courts are still recognised as an international best practice model, and therefore ought to be retained.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

Violence against children continues to be a challenge, particularly within the family environment, and is prevalent in all forms of abuse including physical, sexual and emotional abuse. Negative social norms that contribute to violence against women and children include but are not limited to intergenerational sex, gender inequality (preference for boys over girls), gender based violence which largely remains hidden and kept within families, and persons with disabilities hidden from society. Even though the country's legislative frame work is commensurate to international human rights standards, the requisite adjustments to the allocations of resources, standards for services delivery, and accountability mechanisms are all lagging behind.

However, certain strides have been taken to limit the scourge of abuse in Swaziland. Numerous stakeholders have shown in-depth commitments to developing a stable environment for the child. It is through the country's national policy and legal framework that the child victims' rights are protected and realised. The Constitution and the Children's Protection and Welfare Act of 2012 have brought about an acceptance of fragmented and sometimes conflicting laws into one overarching framework. However, there is still much work that needs to be undertaken to create a safe and harmonious environment for children either as victims, witnesses of in conflict with the law.

5.2 Challenges

From this study, it is apparent that there is need to holistically look into the cause of victims of sexual offences in our jurisdiction as it seems the courts do not fully address the plight of the child victim, neither do they have facilities conducive for the child victim to be properly accommodated in order to attain child-friendly justice. To some extent there are still not well-trained professionals across the board so that victims are handled in the most appropriate way in order to achieve and protect their best interest; from reporting up until the matter is finalised by the courts and the victim is re integrated back into society. It is also clear that child sexual abuse is a serious issue that can ruin the life of a child. Children are the world's most valuable resource and are the best hope for the future; there is seriously no excuse for

sexually abusing them. That said, child abuse to be treated like other obvious very serious offences like; murder, treason, sedition etc.

5.2.1 Regulations

Currently, there are no clear regulations on how child abuse matters should be handled so it calls for Swaziland to formulate them. Practice directives depend on the chief justice at the time. Therefore, reliance on them does not guarantee continuous dispensation of child-friendly justice. For instance, during the era of Chief Justice Michael Ramodibedi, through practice directives, all magistrates' courts were designated as CFCs.²³¹ This practice directive was in line with the provisions of the CPWA which also gives magistrate's court's jurisdiction to hear and determine matters wherein children are involved. These practice directives had a limitation in that issues of capacity, infrastructure and service provision were not considered.

Currently, there is very little state support for children who come into conflict with the law. A child who is accused has the right to his or her own legal counsel, but this is not provided by the government other than in cases of murder and treason. Children are held separately from adults. Boys go to Malkerns Industrial School and girls go to a children's section at Mawelawela Correctional Facility.²³² Once found guilty, support during detention and reintegration appear to largely rely on NGOs. The detention facilities provide a care plan and can involve social workers were deemed necessary. In terms of the CPWA, children should be protected and cared for, however, since the regulations have not been developed, this leaves a wide range of fragmented child protection services.

However, subsequent practice directives issued by Chief Justice Bheki Maphalala, have not tried to address the problems, but instead, they removed all child abuse cases to be heard and determined by the high court.²³³ This has added to the pile of backlog cases as the roll at the high court is controlled by the registrar. Each judge is allocated several matters to handle per session. It has not happened that a judge could only handle child abuse matters per roll and session and very few go through. Unlike the high court, the magistrate's court has a continuous roll. It goes without saying that it is best suited to handle child abuse cases. More so, because

²³¹ Practice Directive No.4/2014 (Issued: 16 May 2014).

²³² See chap 2; 18 & 19.

²³³ Practice Directive (Issued: 19 October 2015).

most magistrates control the roll themselves, however, the issue of capacity, infrastructure and service provisions are still lagging behind.

For unexplained reasons, a new practice directive has emerged ordering that child abuse cases that had previously been brought to the high court for determination are taken back to the magistrate's courts to be presided over only by principal magistrates.²³⁴ Again the issue of capacity, infrastructure and service provision has not been addressed. This has created a situation in which, principal magistrates, prosecutors, clerks, police, social workers and other stakeholders must work on weekends and holidays. Although this creates an unhealthy situation, it is commendable as a step forward in the right direction in that it reduces the backlog of child abuse cases in the magistrates' courts.

5.2.2 Monitoring and Evaluation

Monitoring and evaluation remain a challenge. The court system and its operations need to be constantly checked. As time goes by, the need will arise for the evaluation of infrastructure, human capacity and service provision to determine whether it continues to best serve the best interests of the child and to address gaps and challenges when the need arises. To that end, there should be personnel strictly focusing on monitoring and evaluation of the systems engaged in dispensing child-friendly justice.²³⁵

To attain child-friendly justice and serve the best interests of the child, it is important that extensive campaigns be conducted to bring the child abuse scourge awareness to the fore. Since children are our future community, it is recommended that an introduction to abuse as a subject to be taught at schools, especially primary level as it will enable children to know that abuse is a crime, a violation of human rights and has negative effects on people.

Currently, the country (Swaziland) has an inadequate court infrastructure, few specialised and trained personnel resulting in poor service provision. There must be child-friendly courts that deal only with children's cases. Mixing children's cases with other cases on the roll does not serve the child victim and is not in the best interest of the child. As reflected in the MATTSO

²³⁴ Practice Directive (Issued: 29 June 2017)

²³⁵ The role of monitoring mechanisms. Monitoring mechanisms are an important part of the vigilance and activism of organisations dealing with substantive improvements for children. Without concrete steps being taken to collect reliable information, to take up grievances and complaints, to oversee legislative developments and to provide reliable indicators of progress, legal rights may remain symbolic.

Both within the government machinery- (in the absence of an independent ombudsman, a separate commission for children), youth ministry and even the Human Rights Commission-and through the efforts of children's rights ensure that the rights for children as stated in the Constitution translate into actual improvements in their daily lives.

report, specialising is the best way to go about achieving and protecting the child victim. In special courts, time limits are shortened and the conviction rate is high with a total output that is significant in numbers. Specialisation is therefore a tool to address the backlog and at the same time, achieve tangible child-friendly justice.

5.3 Recommendations

The situation of child victims is largely dealt with in the context of crime reduction and juvenile justice both in policy design and in practice. However, the situation of child victims should also be recognised as a separate issue that deserves special attention. The study has some conclusions that there is still need for more issues to be addressed in order to provide holistic support for child victims. Improving the circumstances of child victims in the justice system requires regional level coordination, review of the penal codes schedule, rolling out of the siteki CFC model as well as support from the UN agencies.

5.3.1 Regional level coordination

Regional-level coordination is a priority. Whilst one of Swaziland's strengths is a clear set of coordination responsibilities for all areas of child protection, there is a lack of regulatory powers for the coordination mechanisms which weakens the ability to work collectively together and hold all actors accountable.

5.3.2 Penal code schedule

The penal code schedule for serious offences should include grooming on the list of child abuse offences. This will make abuse a priority and serve as a deterrence since the offences on the Fourth and Fifth schedule of Swaziland's penal code, which is the amended Criminal Procedure and Evidence Act, carry even the highest penalties such as life imprisonment and the death penalty. Such could be fair in the circumstances because abusing a child in any manner is degrading and inhumane behaviour. The loss of dignity is tantamount to loss of life since there is no life without dignity.²³⁶

²³⁶ *Carmichele v Minister of Safety and Security* 2003 (2) SA 656 (CC).

In *Carmichele's* case the victim was sexually molested by a well-known man who had been reported to the police and had previously appeared in court on similar charges. The South African Constitutional Court held that the state was duty bound to protect the victim's rights to dignity and privacy and the violation of these rights is tantamount to the degradation of the right to life.

5.3.3 Rolling out of the Siteki Court model

It is high time that Siteki Court model is rolled out to all the four regions of Swaziland because it is closest to the ideal court model appropriate for dispensing child-friendly justice. Having judicial officers trained on how to handle child matters serves no purpose if the infrastructure wherein such matters are heard is not conducive to serve such a purpose. Therefore training, infrastructure and service provision should go together to serve the best interests of the child.

- a. The lack of guiding procurement specifications and maintenance framework for court equipment and resources for the testifying rooms, waiting areas and other facilities;
- b. The lack of a specialization framework for the prosecution and adjudication of sexual offences cases. Victims of sexual offences have special needs that require special services that can only be rendered by specialists in this field. Thus, there is a need to consider the creation of specialist posts for sexual offences.
- c. The existing case flow management can add tremendous value to the management of sexual offences cases in our courts if its operational gaps are addressed. For instance, the early collapse of sexual offences court rolls often leads to low court hours, which works against the expected court performance standards;
- d. The rotation of presiding officers poses a significant challenge in that some presiding officers do not remain in these courts for any length of time. This creates enormous delays in the finalization of cases, particularly, the partially heard cases of sexual offences;
- e. Due to lack of debriefing programmes, many court officials suffer from vicarious trauma;
- f. Limited training programmes and the lack of a dedicated budget for multi-disciplinary training initiatives contribute to the reduced performance in these courts;

- g. There are inherent interdependencies in the criminal justice system that often cause serious delays in the finalization of these cases.
- h. The lack of a feeding scheme for child witnesses often contributes to children not performing optimally and can sometimes lead to the postponement of cases. To circumvent this scenario, many court officials provide food for children out of their own earnings.

5.3.4 United Nations system in Swaziland

The UN system in Swaziland should focus on a few areas where UN entities can jointly maximise their impact and help shift the development trajectory onto a higher path. This required the UN system to work differently, focusing on supporting the Swazi government to develop integrated approaches to policy-making, planning and programming, and strengthening institutional capacities. Shifting emphasis to upstream advisory work informed by catalytic downstream projects, the UN system would need to become a reputable source of technical advice, and draw extensively on its global knowledge networks.

5.3.5 The need to consult children

The need to consult children is important in light of the move in Swaziland towards the reform of laws and policies relating to children and particularly, because of the potential of giving effect to the CRC relating to child participation. The CRC contains provisions which reflect elements of participation in all ²³⁷ children's rights such as the freedom of expression and the evolving capacities of children as a legitimate ground for parental guidance.²³⁸

The right to participation in general and child participation in particular presupposes the individual and collective articulation of a response to law reform and development policies. In their proactive forms, child participation rights demand that children be consulted at the initial stages in the creation of laws and policies impacting them, as well as after the drafting of the laws and policies have been finalised.

Moreover, the children's area for social democratization because it represents the extension of some democratic rights to a disenfranchised group. Another reason child participation is important is that it gives us access to essential information that we could not obtain from any

²³⁷ Ang et al. *Participation Rights of Children* Antwerp.

²³⁸ See Art 5,12, 13 and 15 of the Convention on the Rights of the Child, 1989.

other source. The Swazi government should take specific measures to make fiscal data and information easily accessible to the general public, and to facilitate public participation in discussion and debate over the formulation and implementation of fiscal policies.

5.3.6 The control of lower courts

The control of the subordinate courts by way of practice directives when it comes to children's cases, should come to an end. Besides the fact that it creates a constitutional quagmire as the Chief Justice influences how and where matters should be adjudicated. This should not be so, because it is the prerogative of the DPP in terms of the constitution. Injustice in some situations, arises when the matters are moved from one court to another. For example, it takes years for a matter to be determined at the high court, unless it is specifically enrolled. Furthermore, some cases get lost in the process of transmission from one court to the other. This could be detrimental to the child victim who might have to wait for years for his/her case to be finalised.

5.3.7 One Stop Centres

The Siteki CFC does not have a One Stop Centre (OSC) in the vicinity. The only OSC is at Mbabane Magistrates Court. This OSC is physically misplaced and its location is contrary to what was copied from South Africa's study tour. It being in the magistrates' court is just not child-friendly as it will be discussed below. The OSC should have been erected either at the Mbabane Government Hospital, Mahwalala Clinic or the Salvation Army Health Centre.

Court structures by their nature are hostile buildings and if someone is seen going to court, he/she is perceived to have committed a criminal offence. This perception goes far beyond the mind of a child victim who needs a friendly environment to communicate what befell them and obtain the necessary help. The OSC by its very nature, is a process towards ensuring that child victims are provided with comprehensive help in preparation for court. The abovementioned OSC due to its location, might be considered as a catalyst for secondary trauma to a child victim who needs delicate care and attention.

It is recommended that only the OSC should be relocated to a suitable site. The other 3 regions in the country should also have OSCs to cater for victims within a short distance. Otherwise, travelling long distances is again another way in which the child victim would experience discomfort and secondary trauma.

5.3.8 Assistance for the child

Furthermore, NGOs need to be encouraged to play a leading role in the provision of services to victims before and after care. They should be able to supply food, shelter, and counselling services to victims until they are no longer traumatised and are able to function normally in society again.

Legal aid is a necessity for our country. In most instances, matters are not processed because legal practitioners are not available to render services *pro deo* as they are busy with earning money for their businesses. As previously mentioned, most victims are destitute OVCs; therefore, no legal fees would be forthcoming from them. Thus, it is important to cater for them by providing legal aid services.

5.3.9 Court preparation officers

Amongst resources not seen in our jurisdiction, is the cadre of court preparation officers. Court preparation of witnesses is an essential component of achieving child-friendly justice. It becomes very difficult to deal with a witness either young or old, in court if not properly prepared prior to adducing evidence. To achieve a high conviction rate and attain child-friendly justice, there is a need for court preparatory officers in all CFCs.

5.3.10 Blueprint court model

Having indicated what an ideal infrastructure should look like, there should be a court manager employed to look after the machines, audio system, cameras, monitors and the general upkeep of the whole facility so that these are always serviced and functional. This would assist in ensuring that cases are not lost and evidence is safeguarded throughout.

There should be a playground so that whilst awaiting court, the children should be able to play and forget what happened to them.

In 2002, a blueprint for sexual offences courts was developed by National Prosecutions Authority and its attributes are listed below;

- Victim assistance services – which include court preparation, counselling, providing meals and information to the victim.²³⁹

²³⁹ National Prosecuting Authority. 2003. Annual Report 2002/03. MATTSO (see note 172; 21).

- Regional magistrates specifically assigned to Sexual Offences Courts for fixed periods of time ranging from six months to eighteen months.
- Specialised courts and intermediaries (these give effect to Section 170 A of the Criminal Procedure Act No.51 of 1977).
- Counselling services provided by dedicated social workers and NGOs
- Legal Aid attorneys in each of the Sexual Offences Courts
- Local Project Oversight Committee – is the formal integrated national structure established to deliberate and make decisions on strategic issues relating to dedicated courts and the mainstreaming process.²⁴⁰

From Swaziland, a Prosecutor's Guide on the Children's Protection and Welfare Act was formulated in 2015. It is a document developed by prosecutors to serve as a guide to capacitate them on how to best apply the provisions of the Children's Protection and Welfare Act No.6 of 2012 to the benefit of the child victims and child offenders.

It is recommended that the guide should have the above listed facets of the Blueprint to effectively serve the best interests of the child in the context of Swaziland.

5.3.11 The child's best interests

Section 132 (3) of the Children's Protection and Welfare Act provides that a children's court may be any place that is found to be suitable as long as there is a trained judicial officer presiding over the proceedings. This is in sharp contrast to the principles of child-friendly justice. Amongst others, child-friendly justice principles require that the place where children's cases are tried should be a child-friendly environment. Any place cannot be said to be well equipped to accommodate children's cases. Therefore, these provisions of the Act should be better structured to accommodate serving the best interests of the child.

Most importantly, the relevant stakeholders should give effect to the provisions of Section 162 of the Constitution Act No.01 of 2005. Child abuse cases and any other child rights violations, should be treated and processed using the powers vested in the DPP. Practice directives should not be used to channel the flow of the cases within the courts system. Instead it is recommended that the office of the DPP takes full responsibility on where and when child abuse cases should be heard.

²⁴⁰ MATTSO (see note 172; 22-23).

Trust in the judicial system's ability to deal effectively with cases involving children must be developed. The child victim and their family must know and see to it that they are treated with dignity and fairness when they have reported child abuse to the justice machinery. This should occur from inception to the end of the matter when the child victim is re-integrated back into society. The infrastructure and the role players should address this important aspect of dispensing child-friendly justice. The initial stage of reporting the incident is critical as it determines whether the case will go through the subsequent stages until its conclusion. Child abuse cases should not be reported at the police front desk since there is no privacy. Trained specialist police officers should always be available at the police front desk to usher away any child victim into a child friendly interviewing room where there is privacy. This would further enable the correct recording of a statement from the child victim.

Once the first stage of reporting has been completed in a child friendly manner, the issue of investigation that follows the dockets and files for child abuse cases should be handled and processed by well-trained police officers who are specialists in the field. This will eradicate the problem of improper language usage and paraphrasing which results in acquittals of alleged offenders. It is therefore important, police officers who are trained specialists in these two initial stages of the child abuse case should not be redeployed to other departments. The domestic violence unit within the police organisation should maintain trained specialist police officers in the field. When these trained specialist police officers are promoted, they should not be tasked with completely different duties. The structure within police services should be made to accommodate upwards mobility of officers within the unit and retention should be stressed and encouraged.

Emphasis should be made to the disclosure process which is the crux of the child abuse case. If attention is not given to these processes, the child victim's statement would be poorly recorded and the investigation would be a mess. It would result in there being no case to stand on during trial.

Thus, it is equally important that the child victim shall undergo special counselling from trained psychologists. This exercise acts as a catalyst in the disclosure process. Once the process is undertaken it would be easier to record a good statement and then carry out further investigations. As an integral part of the investigation, child victims are transported to hospital for purposes of examination. It is recommended that prior arrangements should be made with

the hospital and a trained doctor of the same gender as the child be made available to conduct the physical examination.

At the hospital, there must be a child-friendly examination room with a child-friendly waiting area to avoid queuing with general patients as the environment is uncomfortable for the victims. Seating and waiting on the patient chairs or benches is a gruelling experience, even to old people. At the same venue, child victims should not be left to wait for hours either to be examined or to be transported back to the place of safety. Transporting child-victims therefore, is one other obstacle that needs to be addressed. Vehicles transporting child-victims should not be used for other purposes.

There should be well furnished motor vehicles best suited to transport child-victims to and from the places wherein services would be provided. The practice of using vehicles that arrest suspects and attend to other crime scenes should come to an end, as it is not appropriate at all. Thus, motor vehicles used to transport the child-victim to hospital should wait for the child-victim within the hospital vicinity until examination by the doctor is complete. Even if other emergencies occur, the child-victim should not be left alone to wonder in the hospital corridors just because there is no transport to take them back to a place of safety.

Within the hospital environment, services relating to examination of the child-victim should be centralised. For instance, a laboratory, examination room, pharmacy, VCT and other services like counselling should be housed under one roof in proximate distance. Psychologists are needed and or counselling must be offered to the child-victim as a matter of necessity because at this point it is critical they receive therapy.

After finalizing the investigation, including examination by a doctor, the child victim is expected to appear in court and give evidence in the case. The subpoena, should inform the child and their family what will actually happen to the child victim upon arrival in court. This should be addressed related to the time of arrival and the time the child will give evidence in the case. Adherence should be prioritized to the actual time of arrival and the time of giving evidence in court. There should be no prolonged periods of time before giving evidence in court. The subpoena should be framed in such a way that the child-victim only has to wait a reasonable amount of time before being called to adduce evidence in court. Waiting several hours before going into court and giving evidence is not child-friendly and is one way of destroying the crown's case as the child victim would be impatient and restless after having to wait several hours before he or she is called in to testify in court.

During the waiting period the child victim should be served with drinks and snacks to feel welcomed and appreciated for attending the case. At the court house, the child victim is first called by the prosecutor handling the case for an interview before adducing evidence inside the court room. The interview takes place inside the prosecutor's office. It should be recommended that crown prosecutors and crown counsels handling the abuse case should be given special offices that are child-friendly. There should be no other crown prosecutor/crown counsel present during the interview and no police officers or other crown counsel in the vicinity during the interview.

The prosecutor trained in handling child abuse cases should not be rotated nor replaced by an untrained prosecutor in the field. At least two to three trained prosecutors should be assigned for one child abuse case so that if something happens to one of them, the others remain on standby to take over the case without asking for postponement to acquaint himself with the case facts. Furthermore, the prosecutors of the case should try and develop rapport with the child victim. It is necessary to train court orderlies specifically for the purpose of ushering the child victim into court. Shouting a child victim's name a few times is traumatic for the child. The child victim should be addressed in a polite manner despite the circumstances in the proceedings involved.

Since the judicial officer who is the presiding officer in the case and controls the proceedings, he/she must be proactive and exercise judicial activities in the best interests of the child and be able to administer child-friendly principles in the case to the best of his/her ability. Presiding officers should therefore exert judicial control of the proceedings from the outset. Faced with a case involving children/child victims, the presiding officer should prioritise the case and call it first before attending to any other matters where children are not involved. They should make sure that delays and continuous remands are not entertained. Postponements and delaying tactics employed by the defence counsel should not be allowed. It should be the duty of the presiding officer to make sure a trained intermediary and interpreter is always available in court so that the postponements are not granted due to non-availability of these crucial court officials that are an essential part of child-friendly court operations.

To assist the presiding officer to carry out his/her tasks efficiently, the provision of the Child Protection and Welfare Act should provide a time limit for the completion of a child abuse case. Should the time limit not be adhered to, such a provision should carry a penalty to the presiding officer concerned. Furthermore, the Child Protection and Welfare Act should have a

provision that stipulates that only trained defence attorneys can represent child abuse suspects. That would go a long way in controlling the proceedings and adherence to the time limit because defence attorneys are mostly concerned about money from clients whereas child abuse legislation is not about money. However, child-friendly justice is vital for future generations in any given society as it is clear that the adversarial system of criminal proceedings is inappropriate for cases involving children, and it is recommended that the inquisitorial system should be introduced when the case involves children. To achieve most of the above recommendations, a multi-sectorial approach is advisable. All individuals and stakeholders should come together and work as one team to achieve one goal of advancing the best interests of the child. Otherwise one sector cannot unilaterally succeed in advancing the best interests of the child.

It is recommended that the competency test be removed. If the presiding officer feels the child cannot distinguish between the truth and lies then the admonition should be applicable and administered to the child before he/she testifies. However, if the presiding officer feels the child can differentiate between telling a lie and telling the truth, then the oath or affirmation is recommended. As to how the child will adduce evidence either under oath or affirmation will depend on the age of that particular child. Children below the age of 7 may fall under the first category and children between 7 and 14 are deemed to understand the difference between a lie and the truth. In addition, teenagers between the age of 14 and 18 understand the difference between the truth and a lie, even if they come from rural areas. This age group of teenagers should be able to take the oath or affirmation without any difficulty.

5.4 Conclusion

Courts make a variety of decisions that affect children, including placement and custody determinations, safety and permanency planning, and proceedings for termination of parental rights. Whenever a court makes such a determination, it must decide whether its decision will be in the 'best interests' of the child. It is a mammoth task to handle children and great care and passion should be exhibited throughout the process. To avoid a miscarriage of justice, counselling is necessary for the personnel so that even if they are best qualified for the job, they do not bring their personal issues related to child abuse cases.

From an in-depth analysis of the study, it is apparent that there is a need to holistically consider the cause of sexual offences in Swaziland's jurisdiction, as it seems the courts do not fully address the plight of the child victim nor do they have facilities for the child victim to be

properly accommodated to attain child-friendly justice. To some extent there are still not well-trained professionals across the board so that victims are handled appropriately to protect their best interests; from reporting until the matter is finalised by the courts, and the victim is re-integrated back into society.

It is also clear that child sexual abuse is a serious issue that can ruin the life of a child. Children are the world's most valuable resource and are the best hope for the future and there is definitely no excuse for incidents of sexual abuse.²⁴¹ That said, child abuse must be treated like other very serious offences such as murder, treason and sedition while considering the appropriate sentence to be meted to the offender.

CFCs in the Kingdom ought to be in line with Section 29 of the *Constitution* in ensuring that the child victim has their best interests attended to in all matters. This in turn highlights the need for a child-centred approach in all matters pertaining to children.²⁴² The best interests of the child standard are applicable to the implementation of all legislation applicable to a child, children, a specific group of children or children in general, as well as to any proceedings, actions and decisions instituted or taken by an organ of state concerning children.²⁴³

²⁴¹ Girl Child Sexual Abuse (2017) Swazi Observer 11 October, p. 17.

²⁴² See also *S v M* 2008 (3) SA 232 (CC). The Constitutional Court found that the best-interests-of-the-child standard constitutes both a constitutional right and a principle.

²⁴³ Couzens 2010 *THRHR* 274, 281; Visser 2007 *THRHR* 460; Reyneke *Best Interests of the Child* 220-224. Ss 6 and 7 of the *Children's Act* 38 of 2005. S 6 refers to the application of the general principals to children. S 7 refers only to individual children and not to groups of children or to children in general. The *Child Justice Act* 75 of 2008 refers to the best interests of children in the preamble, but the sections refer to the best interests of the child. Also see ss 35 (i) and 65(2) of the *Child Justice Act* 75 of 2008. Ss 39 (1) and (5) of the latter Act refer to the simultaneous assessment of a group of children if that is in the best interests of all the (individual) children concerned.

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