

Gaps Influencing Implementation of the Witness Protection System in Kenya

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ABSTRACT: The objective of the paper was to establish the gaps influencing implementation of the Kenyan Witness Protection system. The study sought to achieve the following specific objectives: To establish the staffing capacity in the within protection program in Kenya; to examine the level of financial investment by the National government to the witness protection program; and to investigate the level of technological investment in witness protection program in Kenya. Data was collected from select key informants drawn from the Attorney General office, the Law Society of Kenya, The Director of Public Prosecution (DPP), the Kenya Police, The Ministry of Gender (Children's Department), Directorate of Witness Protection Agency, the Children's Court, and the representatives from the National Assembly. The findings of the study were expected to manifest how implementation of the witness protection programme in Kenya is influenced by both human and infrastructural capacity aspects. The findings of the study showed that there is lack of training resources such as facilities, training institutions and trainers. There are also limited financial resources to support the program attributed to poor funding and high cost of the program. The study found that there are poor infrastructural facilities to reach the witnesses.

KEYWORDS: Witness protection, Infrastructure.

INTRODUCTION

The paper focused on the gaps that surround the implementation and enforcement of witness protection measures in Kenya. The protection of witnesses and decline of their testimony because of their fear to be threatened is a new challenge to Kenya especially after the post election violence of 2007/2008. The ability of a witness to give testimony in a judicial setting or to cooperate with law enforcement investigations without fear of intimidation or reprisal is essential to maintaining the rule of law. Increasingly, countries are enacting legislation or adopting policies to protect witnesses whose cooperation with law enforcement authorities or testimony in a court of law would endanger their lives or those of their families.

Witness protection may be as simple as providing a police escort to the courtroom, offering temporary residence in a safe house or using modern communications technology (such as videoconferencing) for testimony. There are other cases, though, where cooperation by a witness is critical to successful prosecution but the reach and strength of the threatening criminal group is so powerful that extraordinary measures are required to ensure the witness's safety. In such cases, resettlement of the witness under a new identity in a new, undisclosed place of residence in the same country or even abroad may be the only viable alternative (United Nations Office on Drugs and Crime, 2008).

Initially, the primary objective of witness protection was to protect the physical security of witnesses for the purpose of securing their testimony in a criminal justice process. However, as protective practice has developed, improving witness-related conduct throughout the justice system has become important because of the need to achieve witness cooperation at each phase of the justice process. Psychological, health and socioeconomic considerations have taken on a more prominent role in the engagement and protection of witnesses prior to, during and after testimony (Lyon, 2007).

PROBLEM ANALYSIS AND OBJECTIVES

People who witness crime, corruption and human rights abuses play a crucial role in law enforcement efforts to bring the perpetrators to justice. Often, however, challenges such as capacity gaps affects effective use of witnesses. The broad objective of the study was to investigate the capacity gaps in the implementation of witness protection program in Kenya and the underlying causes. The study sought to establish the staffing and infrastructural capacity in the witness protection program in Kenya; to examine the level of financial investment by the National government to the witness protection program and to investigate the level of technological capacity in witness protection program in Kenya.

OVERVIEW OF THE CONCEPT OF WITNESSING IN CRIMINAL JUSTICE SYSTEMS

The definition of “witness” may differ according to the legal system under review. For protection purposes, it is the function of the witness – as a person in possession of information important to the judicial or criminal proceedings – that is relevant rather than his or her status or the form of testimony. With regard to the procedural moment at which a person is considered to be a witness, the judge or prosecutor does not need to formally declare such status in order for protection measures to apply. Witnesses can be classified into three main categories: justice collaborators; victim-witnesses; and other types of witness (innocent bystanders, expert witnesses and others) (UNODC, 2008).

A justice collaborator is a person who has taken part in an offence connected with a criminal organization possesses important knowledge about the organization’s structure, method of operation, activities and links with other local or foreign groups. An increasing number of countries have introduced legislation or policies to facilitate cooperation by such people in the investigation of cases involving organized crime. These individuals are known by a variety of names, including cooperating witnesses, crown witnesses, witness collaborators, justice collaborators, state witnesses, “supergrass” and *pentiti* (Italian for “those who have repented”). There is no moral element involved in their motivation to cooperate. Many of them cooperate with the expectation of receiving immunity or at least a reduced prison sentence and physical protection for themselves and their families. They are among the main participants in witness protection programmes. The combination of lenience in (or even immunity from) prosecution with witness protection is considered a powerful tool in the successful prosecution of organized crime cases (United States Department of Justice, 2006). However, the practice can raise ethical issues as it may be perceived as rewarding criminals with impunity for their crimes. To address those concerns, a growing number of legal systems provide that the “benefit” to collaborators is not complete immunity for their involvement in criminal activities but rather a sentence reduction that may be granted only at the end of their full cooperation in the trial process (Fyfe and Sheptycki, 2006).

METHODOLOGY

The study was carried out at the judicial and legal institutions within Nairobi region. The study was focusing on the following institutions or departments: the Attorney General office, the Law Society of Kenya, The Directorate of Public Prosecution, the Kenya Police, The Ministry of Gender (Children’s Department), Directorate of Witness Protection Agency, the Children’s Court, and the representatives from the National Assembly. Secondary data was collected from case related legislative provisions and reports from national and international agencies advocating for human rights. The study considered this scope to be sufficient because most of these institutions have their headquarters within the Nairobi region, the offices in the region handle are highly influential on matters of policy formulations and implementation, and they handle the highest number of cases relating to participation of children in criminal proceedings. The Nairobi region includes the city of Nairobi (Nairobi central), Athi-River municipality, Ngong municipality, Thika municipality, Kikuyu municipality, Limuru municipality, Kiambu municipality and Ruiru municipality. This was arrived at based on the assumption that the research findings in Nairobi and surroundings easily be related to those of other areas of Kenya. Figure 3.1 below shows the map of the study area.

The study adopted a case study design. A case study approach was necessary considering the nature of the target respondents. The research utilized a case study design and qualitative mode of inquiry. In qualitative research different types of interpretative techniques are involved, which attempt to describe and facilitate an understanding of an event in the social world. Qualitative research encompasses several types of inquiry that explain the meaning of social phenomena without disrupting the natural environment. “Case study” is a term that may be used interchangeably with qualitative research; however, there are distinct features for case studies. In a case study the investigator has less control over events. This approach is usually recommended especially when questions of “how” or “why” come up. The purpose of the research was to provide strategic implementation profiles that use descriptive, historical and interpretive methods to document the

organization's experiences. The focus of the research was on the processes and challenges occurring in the implementation of the witness protection programme: its early development, its growth and changes, and the current status of the organization. In case studies the focus of the study is not necessarily to test a hypothesis, but to gather information in order to present a description of what was going on in a study environment (Ceci, et al., 1995). The required data was obtained through self-report methods, namely, in-depth interviewing and document analysis.

The study focused on 40 key informants drawn from the following: the Attorney General office, the Law Society of Kenya, The Directorate of Public Prosecution, the Kenya Police, The Ministry of Gender (Children's Department), Directorate of Witness Protection Agency, the Children's Court, and the representatives from the National Assembly. Five informants were obtained from each of the above areas.

According to Schutt (1996:593), unit of analysis is "the level of social life on which the research question is focused". The unit of analysis is thus the category across which the study's variables vary. The major units of analysis for the study were the gaps in implementation of witness protection programme in Kenya. The units of observation were the informants drawn from across various governmental agencies tasked with pursuit of justice as well as witness protection.

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

The primary data for the study was collected from the key informants drawn from the Attorney General office, the Law Society of Kenya, The Directorate of Public Prosecution, the Kenya Police, The Ministry of Gender (Children's Department), Directorate of Witness Protection Agency, the Children's Court, and the representatives from the National Assembly. The researcher would spend considerable time at offices identifying key informants (including key strategists) who were involved with the formulation of the witness protection programmes, reading the current and past correspondence dealing with the formulation of policies leading to the programme, and having extensive discussions with the select key informants.

Two methods of data collection were applied. They include: in-depth interviewing and document analysis. In qualitative research, the technique of in-depth interviewing is extensively used, as it facilitates an interaction with the interviewer and the interviewee with a defined objective of gathering valid and reliable data. In general, qualitative in-depth interviews are informal and less structured interviews. During the interviews, the researcher attempts to gain the participant's meaning and perspective of relevant topics. While collecting data, the researcher provides opportunities for the participants to describe their experiences and simultaneously to discuss their opinions regarding the level of success of the activities. The process of interviewing allowed the participant to describe and reconstruct details. Open-ended questions would enable the interviewee to elaborate and to recall additional information. Further, the researcher was able to lead the participant to providing more in-depth insights through these loosely structured interviews.

In the second approach of document analysis, the researcher was able to extract pertinent information from the research reports and policy papers. Historical perspectives assisted in the study of the appropriate period for the understanding of some events or processes. This time perspective was important in determining the linkages of events that created an important issue and the consequences of events. The researcher was also to use the two sources commonly cited in the data gathering literature: primary, which provide firsthand account of events; and secondary, which are reports concerning some event from third party sources.

After the fieldwork, qualitative data was analyzed through content analysis. According to Hancock (2002:17), content analysis involves coding and classifying data through categorizing or indexing. The basic idea was to identify from the transcripts the extracts of data that were informative in some way and to sort out the important messages hidden in the mass of each interview.

Ethical considerations like ensuring confidentiality of responses were assured before the data collection commences. This was necessary because it encouraged the respondents to be honest. No respondent was forced to take part in this study. The authority to visit the respective offices was sought from the respective Directorates. A research permit was also sought from the National Council for Science and technology.

RESULTS AND DISCUSSIONS

The objective of this paper was to examine the challenges facing the implementation of witness protection program in Kenya. Specifically, the study sought to achieve the following objectives: to investigate the capacity gaps in the Witness Protection Program and the underlying causes.

The data for the study was collected from key informants drawn from the Attorney General office, the Law Society of Kenya, The Directorate of Public Prosecution, the Kenya Police, The Ministry of Gender (Children's Department), Directorate of Witness Protection Agency, the Children's Court, and the representatives from the National Assembly. The researcher spent considerable time at offices identifying key informants (especially key strategists) who were involved with the formulation of the witness protection programmes, reading the current and past correspondence dealing with the formulation of policies leading to the programme, and having extensive discussions with the select key informants. The respondents had extensive experience in civil and criminal litigation issues, public policy formulation, and legislative procedures. All the target respondents had attained more than 10 years of experience in each of these three core areas.

The study sought to establish the gaps in the Witness Protection Programme in regard to availability of staffs. A majority of the interviewed informants revealed that one of the major challenges facing the roll out of the witness protection programme in Kenya is inadequate staffing capacity. It was notable that there are few experts available in the field of Witness Protection in Kenya. From those who were interviewed 27% of the respondents had that there are no professionally trained staffs to man the programs. Various factors were attributed to have affected availability of staffs. One respondent mentioned that the staffs available were drained from or seconded by various governmental departments with no clue on the program and they are mostly civil servants and/or government employees; inadequate fund to engage technical skilled persons; lack of training institutions for learning; inaccessibility of the staffs; the number of experts and staffs isn't known while one claimed that awareness has not been widely done to the public. The findings underscore that the capacity of the WPA to fully undertake its mandate is constrained by lack of adequate financial and human resource expertise base. Other issues cited include shortage of technical staff; lack of staff with specific witness protection advisory skills; few experts available; and lack of professionally trained staffs to man the programme since it's a new concept in Kenya.

In establishing the capacity gaps in the Witness Protection Program in Kenya and the underlying cause, the study found that there is a shortage of technical staffs and those present are not professionally trained to man the program. Indeed they are drained from or seconded from various governmental departments with no or little clue about the program. In terms of technological support, the staffs lack technological knowledge or are ignorant of the existing technology. There are also insufficient technological facilities, while some areas are remote for the technology to be recognized. Existing capacity gaps in regard to training of personnel are that officers of the program have undergone no or little training and most are self-proclaimed having undergone self-learning. There is also lack of training resources such as facilities, training institutions and trainers. There are also limited financial resources to support the program attributed to poor funding and high cost of the program. In terms of law enforcement approaches, law enforcement agency is not aware of the program and there legal provisions covering witness protection is not clear and not well implemented.

CONCLUSION

From the findings of the study, it can be concluded that there exist capacity gaps in terms of inadequate technical staff that are not adequately trained, lack of training facilities and training relevant personnel. Furthermore the study revealed that there exist capacity gaps in terms of inadequate technical staff that are not adequately trained, lack of training facilities and training staff, limited technological support, limited funding and limited knowledge of the Witness protection program. It can also be concluded that there are also inadequate infrastructural facilities in protecting the witness with non conducive court environment which are inaccessible for many witnesses.

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