

**ARTICLE 50 OF THE CONSTITUTION OF KENYA, A DREAM OR A FALLACY: AN  
ANALYSIS OF THE WITNESS PROTECTION ACT IN KENYA**

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**Declaration**

I, LUKMAN MALIK declare that “ARTICLE 50 OF THE CONSTITUTION OF KENYA, A DREAM OR A FALLACY: AN ANALYSIS OF THE WITNESS PROTECTION ACT IN KENYA” is my own work, that it has not been submitted for any degree or examination in any other university or institution, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

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## **Abstract**

The initial excitement generated by the enactment of the Witness Protection Act in 2006 and the inclusion of Article 50 in the 2010 Constitution; marked a new era for clear framework for protection of witnesses. Alas in the backdrop of various scandals plaguing the Kenyan government, one question comes to mind. Whether witnesses with evidence against government officials are adequately protected? This remains a difficult question to answer. Certain provisions of the Witness Protection Act (WPA) and other ratified treaties do not envision a scenario where both organs are on opposing ends. For instance, section 3P of the Act mention the composition of the Witness Protection Advisory Board comprising of several government officials. Thus to remove influence of the government, the composition of the board would need to be reconstituted to remove state agents from it.

Therefore, the research investigates how such provisions strengthen the influence of the government over the programme. It also provides recommendations on how to reduce it by adopting relevant models from the United States and South Africa. The research methodology consists of a doctrinal and the comparative research analysis. The doctrinal method analyses certain sections of the W.P.A that demonstrates influence wielded by the Kenyan government. Whilst the comparative method, examines the benefits of adopting the South African and American witness protection programme. Overall to enhance protection of witnesses, certain provisions of the W.P.A need to be amended to create an independent witness programme. This shall ultimately allow a credible non biased programme to exist in Kenya.

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## **Table of Abbreviations**

AG-Attorney General

COK-Constitution of Kenya

DPP- Director of Public Prosecutions

ICC-International Criminal Court

ICJ- International Court of Justice

ICCPR- International Convention on Cultural and Political Rights

KNHRC- Kenya National Human Right Commission

NIS-National Intelligence service

NWPP- National Witness Protection Programme

WITSEC- United States Federal Witness Protection Programme

WPA-Witness Protection Act

## **Table of Cases**

Judicial Commission of Inquiry into Goldenburg Affair v Job Kilach (2003) eKLR

The Prosecutor v Uhuru Muigai Kenyatta (2012) eKLR

The Prosecutor v William Samoei Ruto and Joshua Arap Sang (2012) eKLR

## **Table of Legal instruments**

The Constitution of Kenya 2010

International Convention on Cultural and Political Rights

The Penal Code Chapter 63

Rome Statute of International Criminal Court

The Witness Protection Act Chapter 79

## 1.1 Background to the Study

This study comes in the backdrop of various corruption scandals that have rocked the nation. As concerns continue to increase on the safety of witnesses. This research adopts a different view of looking at the witness protection by calling for amendments to be made to the Witness Protection Act (WPA) and propose the adoption of a South African witness protection programme model. Most of the literature on this topic, focuses on highlighting the issues affecting the Witness Protection Act of Kenya and the resulting Witness Protection Agency. This study therefore adopts a more assertive approach by providing solutions to the problems that exist.

Most notably, the study attempts to examine the impact of a special category of witnesses the whistleblowers. . This largely remains silent topic regarding this matter. Whistleblowers in the last few years have gained the limelight in the media most notably the late Jacob Juma.<sup>1</sup> <sup>2</sup>Majority of them exposed various political scandals such as the Langata land grabbing, Weston hotel saga together with the NYS scandal and the Eurobond fiasco. In a country where witnesses can play a pivotal role in the fight against impunity they remain virtually ignored.

The ICJ critique was another valuable tool in this background research. It provided a comprehensive review of the three core shortcomings of the current Witness Protection Act that need to be altered for it to be more beneficial.<sup>3</sup> The first being the strong influence of the government over the entire process, the lack of proper provisions concerning the funding of the programme and the need of harmonization with other ratified treaties relating to witness protection. The writers elaborate on the definition of witness saying that it does not include the definition of a person who has evidence against the state. This has adverse effects since leaders who are in political positions may use state machinery to propagate violence and interfere with witnesses and

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<sup>1</sup> Georgette Kogo, 'Framework for Whistleblower Protection in Kenya' (2017) < <https://su-plus.strathmore.edu/handle/11071/5233> > accessed 24 August 2019.

<sup>2</sup> 'Chapter 2, פסיו עושייו' .

<sup>3</sup> Robert Komen, 'The ICJ critique of Kenya amendment Bill' (2009) 1(6) <[http://www.iccnw.org/documents/Critique\\_of\\_the\\_WitnessProtection\\_Act\\_and\\_Amendment\\_Bill.pdf](http://www.iccnw.org/documents/Critique_of_the_WitnessProtection_Act_and_Amendment_Bill.pdf)> accessed 20 August 2019.

they are not mentioned. Coincidentally, in the Kenyan cases at the ICC some of the cases involved leaders in powerful political positions with powerful posts in the government. Thus, victims and other potential victims did not come forward since the fear of reprisals and repercussions was too great.

The work by authors like Minaar discusses some of the most successful witness protection measures currently in place in South Africa, and how they can be adopted by other African for their programmes.<sup>4</sup> Minaar mentions the common difficulties faced by every witnesses protection programmes and has related to how the prosecution of powerful government officials in South Africa was achieved. Minaar gives examples of the trial of De Kock who was a police chief and how witnesses were protected in such high profile cases. These measures are also applicable in Kenya with some application. The adoption of protection of witness is also discourages politicians from illegal activities since they are afraid of getting exposed.

Furthermore, mentions related to this argument was the shortcomings of the definition meant that there was no framework in place to cater for witnesses with evidence against the state or political leaders ICC cases revealed the extent of difficulties witnesses faced. Also highlight the composition of the Witness Advisory Board which advises on best practice for protection of witnesses. It is made up of Director General of National security, Commissioner of Police and the DPP. These very compositions can lead to witness security being compromised since some of these individuals are responsible that have occurred against the victims. They argue that majority of cases at ICC involve the collusion between leaders and security forces so it is imprudent to have them on board to safeguard people of whom they are accused of attacking

Prior to that, John Githongo's escape to London once again revealed the threat high profile witnesses faced while residing in Kenya. as major corruption scandals that rocked the country revealed the fundamental weaknesses in the Act. The ICC cases against the President and the Deputy President also revealed the dire situation of witnesses with information against high-ranking government officials. During their trial there were widespread reports of witness

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<sup>4</sup> Anthony Minnaar , 'Witness Protection Programmes- Some Lessons from the South African Experience'(2002) < <https://journals.co.za/content/crim/15/3/EJC28740> > accessed 25 August 2019.

interference and lack of cooperation by the Kenyan government and reports of witnesses recanting their testimonies.

This just remains some of the examples in the way in which the current witness issues was discussed and have continued to plague Kenya. This research thus adopts a two-pronged approach. Therefore; an attempt shall be made to adopt a framework from there to bring an end to this. Witnesses are not only accorded protection due to the fact of their status under the witness protection Act but also due to chapter 4 of the Bill of Rights which every state organ has duty to uphold by virtue of Article 21(4).<sup>5</sup>This Article mentions that the state shall implement legislation that fulfill its obligation in relation to human rights. In this case, Kenya's treaties related to witness protection need to be implemented successfully. Therefore, this research approaches the issue of witness protection from not only a national but also an international context by examining ways of foreign countries model on their witness systems.

Most of the core information in this field is based on the work of authors like Minaar who extensively discuss the current status of witness protection programmes in Africa and the critiques of ICJ on Kenya's witness programs. They form the crux of the research providing an avenue for analysing the weaknesses in the current Kenyan witness programme. However, they fail to give an approach on which Kenya can adopt.

Therefore, this research takes a different approach from the ones presented by other writers in this matter since it clearly calls for adopting a hybrid of the South African and American model which. Most reports in Kenya in witnesses discuss the current problems faced by witnesses such as the lack of funding but no solution is provided on how to combat them. This research provides the context under which most of the research was undertaken to give conclusive answers on the South African model that should be accepted.

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<sup>5</sup> Kenya Constitution 2010.

## 1.2 Literature Review

Minaar discusses some of the most successful witness protection measures currently in place in South Africa, for example witness identity change and establishment of safe locations. These measures he argues, can also be adopted by other African countries for their fledging programmes. He elaborates on the common difficulties faced by every witness protection programme; and how they can be resolved through the setting up of a uniform agency that deals with issues of funding and establishment of a screening process.<sup>6</sup> At several points, there is mention of the vital role played by the national security agencies in protecting witnesses. This in itself, may compromise safety of witnesses who have evidence against members of the police. Thus, further protection measures need to be introduced if members of the police are parties to the case so that intimidation does not occur.

Furthermore, Minaar suggests that the influence of the executive needs to be reduced in order to maintain independence of the witness protection programme. He states that currently the board running witness affairs in South Africa comprise of the minister of Justice and the Director of the Intelligence services. Overall, the current complexities surrounding the witness protection programme are exacerbated by the strong influence of the government over the entire programme. Minnar warns that, if African countries fail to get rid of governmental interference then victims and witnesses might never access justice.

Domfeh discusses the current whistleblowing laws that exist in African countries using Ghana and South Africa as prime examples. He particularly highlights the programme implemented by Ghana which came into force in 2001 and how it has aided in the fight against corruption.<sup>7</sup> He argues that whistleblowers should exist in both the private and public sectors of the economy, citing their effectiveness in establishing transparency and accountability within the private and public sector. It points out the duty of the state to establish procedure and checks in place that will prevent

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<sup>6</sup> Anthony Minnaar , ‘Witness Protection Programmes- Some Lessons from the South African Experience’ (2002) < <https://journals.co.za/content/crim/15/3/EJC28740> > accessed 25 August 2019.

<sup>7</sup> Kwame Domfeh, ‘Muting the Whistleblower through Retaliation in Selected African Countries’ (2011) < [https://s3.amazonaws.com/academia.edu.documents/36035205/MUTING\\_THE\\_WHISTLEBLOWER](https://s3.amazonaws.com/academia.edu.documents/36035205/MUTING_THE_WHISTLEBLOWER)> accessed on 23 August 2019.

government officials from meddling with the security of whistleblowers who reveal names of high ranking government officials. This ends up forming the backbone of his research as he gives various examples of government officials in South Africa who have been implicated for committing such offences. Overall, he reveals the dichotomy that exists between government officials overwhelming influence in matters of justice and how this has adversely affected whistleblowers.

Mahony provides a comprehensive analysis on the dire situation of witnesses in many conflicts ridden African countries. The writer specifically singles out the cases in DRC and in Kenya as well. This is extremely relevant in this context, since unlike other cases where leaders are tried after the end of conflict. In many cases, the conflict is still ongoing and the witnesses are still stranded in conflict prone areas. Mahony provides an example of the Kivu region in DRC Congo. Witnesses in such areas are under a constant threat of displacement. In certain communities, instead of the proceedings help to bring peace they end up flaring tension .Mahony emphasises that African countries need to invest in their witness protection systems if they are really to gain justice for victims.<sup>8</sup> South Africa remains the only country in Africa with a credible witness programme that is relatively independent from interference by the executive arm of the government. The rest of the African countries continue to suffer from this problem.

Komen provides us with a clear picture on the current status of the witness protection programme in Kenya. He analyses the two core shortcomings of the current Witness Protection Act that need to be altered. First, he mentions that the definition of witness in the interpretation section does not encompass a person who has evidence against the state.<sup>9</sup> This has adverse effects since leaders in political positions; may use state machinery to propagate violence and interfere with witnesses and they are not mentioned. Coincidentally, in the Kenyan cases at the ICC some of the cases involved

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<sup>8</sup> Chris Mahony 'The Justice Sector Afterthought: Witness Protection in Africa' (2010) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2781181](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2781181) > accessed on 20 August 2019.

<sup>9</sup> ICJ Kenya's Critique of The Witness Protection Bill (2010) <<https://docplayer.net/15809235-Icj-kenya-s-critique-of-the-witness-protection-amendment-bill.html>> accessed on 20 July 2019.

leaders in powerful political positions forming part of the president's cabinet. Thus, victims and other potential witnesses did not come forward since the fear of reprisals and repercussions was too great.

Secondly, Komen mentions that the limited definition resulted in creation of a feeble framework for witnesses with evidence against government officials. This was evident during the Kenyan cases, where most of the witnesses recanted their testimonies citing lack of cooperation from the authorities and intermeddling by other arms of the government. He highlights the composition of the Witness Advisory Board which advises on best practice for protection of witnesses. It consists of Director General of National security, Commissioner of Police and the Director of Public Prosecutions (DPP). Such appointments can lead to witnesses' security being compromised since some of these government officials are implicated in scandals. Overall, there is a need to remove the influence wielded by the Kenyan government on the witness programme.

Kramer provides an overview of the recommendations that should be implemented when a country intends to establish a comprehensive witness protection programme. The author discusses the aspect of relocation and identity change to witnesses after they have given testimonies. The intricacies of such a procedure, involve the funds that are required and how they can be obtained.<sup>10</sup> An integral aspect of this Kramer's work includes identifying the best practices for witness protection in particular target hardening. This involves teaching witnesses how to conduct themselves during proceedings and how to be emotionally and mentally secure. This remains relevant, since in many countries many witnesses were unable to give evidence as they were shamed for betraying their communities by testifying. Thus, the report analyses the psychological impacts on witnesses and what measures to deal with them. Costa utilises case studies in countries such as Colombia and Mexico where prosecutions against drug lords and other members of cartels who have been extradited to US have involved high number of witnesses whose lives are under a

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<sup>10</sup> Karen Kramer 'Witness Protection as a Serious Tool in Addressing Serious and Organised Crime'(2010) <[https://www.unafei.or.jp/publications/pdf/GG4/Fourth\\_GGSeminar\\_P3-19.pdf](https://www.unafei.or.jp/publications/pdf/GG4/Fourth_GGSeminar_P3-19.pdf) > accessed on 15 July 2019.

constant threat. It talks about frameworks that need to be put in place to ensure their identity and protection is not compromised.

Finally, Githinji provides us with an in-depth examination of the workings of the Kenya's Witness Protection Agency. He mentions the amendments introduced in 2010 were meant to be beneficial; but outlived their usefulness due to the subsequent scandals engulfing the country. The Weston Hotel Saga and the Langata primary school land grabbing case highlighted this. He argues that the various stakeholders of the Witness Protection Agency are government officials who compromise the independence of the entire process. For instance, the Attorney General is the chairperson of the Witness Advisory Board. In addition to that, the director of the National Intelligence Service sits on the board of the W.P.A and the Director General is the chairperson.

### **1.3 Problem Statement**

The protection of witnesses remains an integral part of Kenyan law, the Witness Protection Act of 2006 in the preamble calls for the establishment of Witness Protection Agency. This is further supplemented by the inclusion of Article 2(6) and 50(8) of the 2010 Constitution that caters for adoption of international conventions and protection of vulnerable persons including witnesses respectively. However, despite such provisions, considerable gaps continue to exist concerning the lack of protection accorded to Kenyan witnesses and particularly whistleblowers with evidence against state officials. This is evident through the enforced disappearances of witnesses in both the Goldenburg and ICC cases painting a harsh reality of the situation.

Moreover, the composition of the Witness Advisory Board under the Act made up of several high-profile government officials complicates the matter further. As a consequence, the sheer number of political scandals involving leaders continue to rise. None of the culprits are held accountable before the law. The protection of witnesses therefore remains a major priority if meaningful reforms are required.

## 1.4 Theoretical Framework

### 1.4.1 Natural Law Theory

The Natural law theory states that certain rights to human beings are inherent by their very nature as they derive from within. The most famous proponent of this theory was Thomas Aquinas laid out these principles in his book *Summa Theologica*. This law stems from human reason and is based on good morals and values that are instilled in us by God.<sup>11</sup> These principles are regarded as being divine and eternal since they are taken to emanate from a divine personality God. They will remain unchanged since natural law is the rational creature's participation in eternal law. These laws were revealed to us through scriptures and tell the certain way in which humans should conduct their lives. These very principles also govern victims of crimes and witnesses to it. God created all of us equal and these rights are available to everyone. Someone who violates these principles such as perpetrators of crimes deserves to be punished since they have gone against God's eternal law.

The Natural law theory can be closely related to the issue of witness protection. For instance, Natural Law theory talks about every human to be punished for the crimes that have committed. Similarly, the research question is trying to put measures in place to give justice to victims who have suffered at the hands of the others. The Natural Law theory asserts that one who has been wronged by another deserves to atone for his wrongful deeds. Therefore, having witnesses who can attest to the crimes of the individuals provides the course of justice for victims to get closure and punish individuals who have strayed from the core moral values.

Additionally, the research focuses on how witnesses should be protected, it aligns with the natural law theory in the sense that, human beings have a certain set of inalienable rights that is within them from the very beginning no state no individual grants it to them. These rights include right

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<sup>11</sup> Susan Dimock , ' The Natural Law Theory of Tomas Aquinas ' (2000) <[https://www.researchgate.net/publication/251342294\\_The\\_Natural\\_Law\\_Theory\\_of\\_St\\_Thomas\\_Aquinas](https://www.researchgate.net/publication/251342294_The_Natural_Law_Theory_of_St_Thomas_Aquinas)> accessed on 28 August 2019.

to security, freedom, association and dignity to be protected. Anyone who has infringed on the rights of the victims deserves to be held accountable. Witnesses also require that they are protected from the threats to their life and security which often happens when they testify against powerful individuals. No one has the right to intimidate or kill someone.

#### **1.4.2 Social Contract Theory**

The Social Contract theory states that people live together in a society in accordance with an agreement that sets out the moral and political rules of behaviour. These are evidenced in a contract which people in the society enter with the sovereign and agree to give up their rights to him in order for his protection. The research question relates to this theory since at the heart it envisages how citizens should be protected.<sup>12</sup> Therefore, victims of crime and witnesses by virtue of being citizens of a particular country are in a social contract with the government to be protected against all harm. In this instance, for Kenyan witnesses who testified at the ICC, they were under the Social Contract Theory entitled to be protected by the government and under the chapter 4 Bill of Rights chapter of 2010 Constitution. This clearly did not happen with many witnesses who had previously agreed to give testimonies recanting their evidence. This raises the question that have the victims of the 2007 post-election violence and the witnesses to the atrocities have their rights infringed under the social contract theory did the sovereign not full fill his part of the deal?

Perhaps most importantly, Natural law and Social Contract teaches that everyone is equal before God. No one is superior in the eyes of God no matter what position he holds in the society. Similarly, if you consider the role of the International Criminal Court it seeks to prosecute those powerful individuals who have committed horrific crimes against mankind. It advocates the view that no man is above God's law and will suffer consequences should he breach it.

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<sup>12</sup> Manzoor Elahi, 'What is Social Contract Theory'(2008)< [http://www.sophia-project.org/uploads/1/3/9/5/13955288/elahi\\_socialcontract.pdf](http://www.sophia-project.org/uploads/1/3/9/5/13955288/elahi_socialcontract.pdf)> accessed on 28 August 2019

Another aspect of the theory is the problems that accompany it, for instance when members enter the society it is argued that the sovereign becomes too powerful. This is evidently true, since in most of the cases involving Kenyan politicians is involve powerful those with alot of power and influence. This enables them to commit crimes against individuals for their own self-interest. Thus, one of the disadvantages of the Social contract theory in this case individuals in government become too powerful and are prone to abuse their power. This requires accountability and can only be done by the courts.

Finally, another aspect states that if the citizens are not happy with the terms of the contract, say for instance the legislation they can get out of the contract and enter a new one. This has powerful connotations with the Witness Protection Act in Kenya has been criticized for not giving enough protections to witnesses who have evidence against the state. Therefore, they can be calls for reform in this area or victims or witnesses can call for a change of the sovereign.

### **1.4.3 Sociological School of Jurisprudence**

The Sociological school of jurisprudence advocated that the law is the product of the society. What the law as and what it is today reflecting the changes experienced in the society. Therefore, law is taken to be a social phenomenon which evolves due to events that have taken place in society.<sup>13</sup> This relates to the aspect of witness and victim protection because the threat these people are exposed to requires that they are accorded adequate protection by the state. The 2010 Constitution the supreme law of the land was also promulgated due to changes in the Kenyan society that called for more human rights. The Constitution therefore, guarantees the protection of citizens based on Article 21 of the Constitution.

Similarly, current legislation such as the Witness Protection Act were amended to enable better security for witnesses and to prevent interference from the executive arm of the government. This

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<sup>13</sup> Manmeet Singh, ‘ Sociological Jurisprudence’ (2015)  
<<http://www.legalservicesindia.com/article/2190/Sociological-Jurisprudence.html>> accessed on 28 August 2019.

was as result of the mishaps experienced during the Goldenburg and Anglo leasing scandals. Therefore, events in the society lead to changes and greater protection for witnesses. However, with the conclusion of the Kenyan cases at the Hague the Witness Protection Act has again came under attack for not being progressive enough to cater for witnesses who had information against state officials. Therefore, in this vein my research attempts to use the experiences of the Kenyan scandals to further strengthen out witness programmes. Currently, some changes have been made but underlying problems exist .

Finally, the frameworks and good practices that we are discussing to be adopted are being adopted from countries who experienced violence which forms part of another social event. Experiences in countries like Colombia and Mexico helped them to setup witness protection programmes and boards that would protect witnesses. This could as well be adopted in Kenya considering the weaknesses of the current framework. Overall, the social experiences in other countries helped them to come up with laws that could help victims and witnesses in the Kenya if the government adopts it.

### **1.5 Research Questions**

1. What is the current state of Witness Protection in Kenya?
2. Why is the Witness Protection Act of Kenya inadequate?
3. Why does Kenya need to adopt a witness programme similar to that of South Africa and the United States?
4. How can Kenya adopt such a framework?
5. How will such amendments to the Witness Protection Act enhance protection of witnesses?

### **1.6 Research Objectives**

1. To determine the extent of danger faced by witnesses in cases involving government officials.

2. To consider the shortcomings of the Witness Protection Act of Kenya.
3. To propose a suitable framework for protection of witnesses in Kenya.
4. To discuss the process of implementation of such a framework.
5. To recommend the benefits of an overhaul of the Witness Protection Act of Kenya.

### **1.7 Justification of the Study**

The justification for this research is based on the premise that the current Witness Protection Act of Kenya is inadequate. Witnesses particularly whistleblowers with evidence against government officials require more protection. An amendment of certain sections will help to propel the transformation. This requires a close investigation since such provisions have contributed to the worsening economic situation with the national debt running into trillions of shillings. Additionally, many of the public sector corporations in complete disarray this has led to impunity to thrive in such difficult times.

Therefore, the contribution this investigation will make is to propose a feasible framework from South Africa that can provide adequate protection to these witnesses. This will ultimately reduce the number of hostile witnesses in high profile cases and the number of mysterious disappearances of witnesses. By having an adequate framework in place, Kenya could make meaningful strides in fighting corruption and other host of issues that plague the country's leadership. The method envisioned in this study is original in the sense that it remains a novelty in Kenya but is already well established in South Africa.

This research is worth pursuing due to the fact that the current situation of witnesses and whistleblowers is alarming. The number of disappearances, the lack of protection they are afforded is damaging the war on graft and justice for victims of politically motivated violence. In order for Kenya to thrive economically and socially, perpetrators of crimes should be brought to justice. This research identifies the problem by first mentioning the current state of witnesses under Kenyan Law it shall then adopt the South African method. The relevant political scandals of Goldenburg and ICC cases shall reveal the extent of troubles that exist.

## **1.8 Research Hypothesis**

The research carried out proceeds on three fundamental presumptions, they include:

1. The current witness protection measures that exist in Kenya are inadequate.
2. Composition of the Witness Advisory Board catered for under the WPA has worsened the situation.
3. Witnesses are willing to give evidence against government officials provided they can be accorded adequate protection.

## **1.9 Research Methodology**

In carrying out this research, the methods that have been adopted include the doctrinal research method. For instance, extensive attention has been paid to certain sections of the Witness Protection Act such as Section 17 and the composition of the Witness Advisory Board. Notably, the decisions adopted in the Anglo leasing and ICC cases.

Comparative research method is also part of this research since the South African and American model is being compared as the ideal witness protection programme. South Africa has a similar legal system to that of Kenya, and the US was one of the first countries with a fully functional witness programme. Therefore, the model adopted can easily be applicable to Kenya. Similarly, South Africa and the US in the past have been plagued with similar issues of witness protection due to interference from political circles.

All this information has been obtained through the desktop research method. Most of the information retrieved has been taken through existing legal online journals. This was after an extensive search carried out in the library. A great deal of the information obtained, was used to critique the current Witness Protection Act and analyse the best practices adopted by foreign witness protection programmes. It is on this basis that it is decided that a new framework needs to be adopted.

## **1.10 Limitations of the Study**

The challenges encountered in carrying out this research were of a multifaceted nature, in the sense that some of the information was extremely sensitive and thus difficult to find. For instance, the research intended to focus on specific political events such as the Goldenburg and the ICC cases. However, most of the materials obtained were written in a political context making it difficult to accurately judge around the experiences of witnesses involved in it. Furthermore, some of these events remain extremely sensitive matters whose information has not been declassified as of the time the research was being written. Majority of the sources obtained were through excerpts or reports from foreign journalists or other international oversight bodies.

Another challenge presented, was regarding the age of the literature accessed. For instance, several of the information received regarding the South African and American witness programme are based on the model that was implemented over two decades ago. In this digital age many modifications may be required for it to apply well in Kenya's context. This causes one to proceed with caution due to everchanging nature of crimes against witnesses.

Most of the literature that exists is either from newspaper articles whose contents are sometimes unverified making it difficult to assess their validity. Finally, there is a need for a sense of reports prepared by legal scholars to assess the situation from all perspectives. The research obtained was written with the aim of achieving political end but to ensure protection of witnesses such bias in literary work should be eliminated.

## **1.11 Chapter Breakdown**

This study will be divided in five chapters.

The first chapter entails the research proposal.

The second chapter shall discuss the legal framework governing the Witness Protection and the deficiencies in the Witness Protection Act.

The third chapter shall discuss the setting up of an ideal witness programme using the south African and American programme as an ideal model.

The fourth chapter shall the lessons and the recommendation learnt from the Goldenberg saga and ICC Cases

Finally, the fifth chapter shall entail the conclusion of the study and the way forward for the Kenyan Witness programme. Specific recommendations are directed to various bodies that need to play a vital role restructuring the Kenyan witness programme.

## **CHAPTER 2: THE LEGAL FRAMEWORK GOVERNING WITNESS PROTECTION AND THE DEFICIENCIES IN THE WITNESS PROTECTION ACT**

The Witness Protection Act of 2006 defines a witness as a

“ [A]s a person who needs protection from a threat or a risk which exists on account of his/her being a crucial witness.”<sup>14</sup> This definition encapsulates subsection d that states such witnesses may be required to give evidence in a prosecution or inquiry held before a court, commission or tribunal outside Kenya—

- (i) for the purposes of any treaty or agreement to which Kenya is a party; or
- (ii) in circumstances prescribed by regulations made under this Act.

The reference made to in subsection 3d (i) is vital since it appreciates the fact that witnesses who are expected to testify in courts outside Kenya fall under the purview of the witness protection Act. Hence, the issue of witness protection who may give evidence in national or international courts is clearly discussed in the Act. However, the application of such provisions in actual circumstances is quite uncertain. The experiences from the ICC cases and Goldenburg have shown that the various laws are often ignored in witness protection matters and relegated to mere legalese that is used to fill up legal documents and gloss over the reality. The ignorance stems from the fact that there is a lack of effective administrative structures in place to give effect to these provisions.

There are other legislative documents that form the crux of jurisprudence on this matter in addition to the Witness Protection Act. This includes the 2010 Constitution, Rome Statute and the International Convention on Civil and Political Rights (ICCPR) amongst others have made noble attempts as well to protect witnesses in Kenya.

Therefore, the various laws need to be examined to understand the problems facing the Kenyan witness programme. This becomes the focal point of this research paper. To understand the problem we need to examine the current laws in place and make meaningful recommendations that

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<sup>14</sup> Section 3 of witness Protection Act Cap 79 Laws of Kenya 2006

will in turn change the programme. As noted by Neela Ghoshal in her paper “*Turning Pebbles*” *Evading Accountability for Post-Election Violence in Kenya* <sup>15</sup> the problem of witness protection cannot be solely attributed to weaknesses in the criminal justice system and the lack of effective enforcement mechanisms. The shortcomings in the legislation also play a role in accentuating the weaknesses that currently exist; acting as a domino effect.” Therefore, in order to enhance protection of witnesses with evidence against government officials. A thorough examination of weaknesses of the existing legislation is necessary.

## **2.1 Legal Framework**

The search for witness protection issues should ideally begin with the document touted as the supreme law of the land. The constitution, a review of the document does not yield any clear-cut provisions on witness protection. However, the constitution is a document that is subject to different interpretation which is decided by courts. Therefore, certain provisions can be applied to witness protection matters.

### **2.1.1 Constitution of Kenya**

The 2010 Constitution remains discusses certain aspects of witness protection matters. An interesting thing to note is that the issue of witness protection has not been expressly mentioned in the Constitution So most of the articles can apply to witness matters.

Several of them imply witness protection, notably Article 50(8) which provides for the protection of witnesses or vulnerable persons in a free and democratic society.<sup>16</sup> This provision infers that witnesses and other vulnerable individuals for example whistleblowers are to be accorded protection. The nature of protection is not clearly discussed but can be inferred to include measures that ensure their safety. The provision is supplemented by the Witness protection Act thus the importance of witness protection cannot be undermined. One thing to note is that that all state

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<sup>15</sup> Neela Ghoshal, ‘Turning Pebbles’ Evading Accountability for Post-Election Violence in Kenya’ (2011) Human Right Watch Report PL335

<sup>16</sup> Constitution of Kenya 2010

organs are bound by its provisions through article 2 of it described as supremacy of the Constitution.

Article 29 (d) considers another vital yet aspect of witness protection that concerns protection of persons from physical or psychological harm. This directly applicable to witnesses testimonies during the trial process . The process of oral testimonies can be very risky for witness and their families due to the threats and intimidation that arise from preventing the accused to be present in court. Protection measures routinely used to maintain the witness physical and mental composure include relocation from home, identity change to dispel the constant fear of being getting killed or your family coming under harm.

A common occurrence during the ICC proceedings was when most of the witnesses reported that they were subjected to threats over phone call threats or intimidation to recant their testimony.<sup>17</sup> Giving evidence against members of your community had you labelled as a traitor making the situation for the witness and their families worse. This had the effect of breaking witnesses down psychologically due to the intense fear they experienced

Article 48 guarantees the right to access justice, this confers the right upon any individual who comes to court with evidence to receive the due assistance of the court and have his right to be heard. In the Goldenburg scandal many of the major culprits were unable to face the full force of the law since prime witnesses with vital evidence were often left frustrated when trying to present their evidence<sup>18</sup>. The countless adjournments and delays coupled with lack of a proper witness programme meant that their attempts at getting justice were compromised.

Finally, Article 50(9) discusses the need for parliament to enact legislation that will provide for the protection rights and welfare of victims of offences. This can apply to victims of violence that have turned into witnesses as part of the prosecution's case. This article places responsibility upon legislators to enact additional laws to protect victims of offences and the witnesses as well. A common theme consistent in both the ICC process and the Goldenburg scandal was noted that there should be more laws to better cater for witness protectio . Alas, was not the case, there were

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<sup>17</sup> Natalie Variante, 'German Review on the United Nations'(2014) UN report on Kenya PL15

<sup>18</sup> Rawlings Otieno ' Goldenburg Scandal still a mystery decades later' (2012) <

<https://www.standardmedia.co.ke/article/2000065911/goldenberg-scandal-still-a-mystery-decades-late>>accessed 3rd March 2020

no additional subsidiary legislation been introduced neither have there any bills introducing more amendments to the Acts apart from the one introduced in 2010.<sup>19</sup> However, those have not succeeded in changing the situation since the same problems were at the core when ICC prosecutor Moreno Ocampo questioned the effectiveness of Kenya's witness protection programme.

### **2.1.2 Witness Protection Act**

#### **Specific provisions under spotlight**

##### **Background**

The Witness Protection Act which was enacted in 2006, generated much euphoria in Kenya over how investigations involving Kenya's elite would be dealt with. In the backdrop of the Goldenburg and Anglo leasing many legal practitioners felt that it was high time that Kenya could establish its own witness protection agency cases that would bring czars of corruption to justice. Indeed, a new leaf had been turned as in August 2006 Kenya was among the first African countries to have a Witness Protection Act. However, the enactment of the Act remained applicable theoretically but in practice it encountered several obstacles. The precarious situation was further highlighted in the aftermath of 2008 post-election violence and the subsequent ICC cases that demystified and brought the optimism crashing to ground once the role of the Agency came in. However, as examined later fundamental weaknesses did and do continue to exist in the Act that needs to be addressed.

The Witness Protection Act of 2006 has undergone amendments most notably in 2010 however fundamental weaknesses still remain. This begins with the narrow definition of witness in the Act, the lack of independence from the government in the form of composition of various organs involved in witness protection, conflict amongst these various organs and the criteria set in hiring workers for the Agency. These matters raise serious questions about the transparency of the entire process.

Beginning with the first, the definition of witness is limited to its strictest sense. The definition used in the Witness Protection Act states '*a witness is a person who needs protection from a threat*

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<sup>19</sup> Mark Muitai 'ICJ Critique on Kenya Witness Protection Act (2010) < <https://www.icj.org/press-releases/2010/03/20100301-kenya-witness-protection-act/> > accessed 2<sup>nd</sup> March 2020

*or risk which exists on his account of his being a crucial witness who has agreed to give witness on behalf of the state or an proceedings offence.*<sup>20</sup> The Act does not envision a scenario where the witness has incriminating evidence against high ranking government officials. This lack of concise definition has contributed significantly to the weakness of the Act , since we do not consider the possibility of a witness who could have information against high ranking government officials. Perhaps most importantly, a definition of a whistleblower is also missing from the Act. Most of the corruption cases that were revealed to the public were due to action of whistleblowers such as John Githongo that revealed the extent of rot that exists within the corridors of power.<sup>21</sup> Thus, a definition of a whistleblower and the protection afforded to him especially if he has vital evidence against officials is necessary.

Secondly, another weakness noted is the composition of various witness agencies that denote a lack of independence from the executive.<sup>22</sup> For instance, the director of the Witness Protection Agency is mentioned under Section 3E of the Act stating that they shall be appointed by the board on terms and conditions set by the minister and in consultation with the committee. The terms and conditions which are partially set by the minister can compromise the integrity of the process of election especially if several high-ranking government officials are involved in particular scandals. It is imprudent to suggest that relevant ministers shall go ahead and elect a director who does not conform to their wishes and demands. Additionally, the staff of the Agency may be appointed by the minister and committee on terms and conditions set by them which is another worrying trend. Furthermore, the criteria of how staff is hired has not been addressed. Matters of political allegiances and past employment records are necessary questions that need to be asked and mentioned in the Act. It is possible that the staffs are members who have close connections with the executive arm of the government and thus they will be able to disclose vital information that will undermine the confidentiality process of witnesses and expose them to danger.

Perhaps, most worrying of all, is the composition of the Witness Advisory Board Section 3P(2) says that the board shall consist of minister as the chairman , minister responsible for Justice,

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<sup>20</sup> Witness Protection Act (2006)

<sup>21</sup> Rawlings Otieno ‘ Goldenburg Scandal still a mystery decades later’ (2012) < <https://www.standardmedia.co.ke/article/2000065911/goldenberg-scandal-still-a-mystery-decades-late>>accessed 3rd March 2020

<sup>22</sup> Eric Wanjohi, ‘Witness Protection In Kenya: A Comparative Analysis With the United States Of America’.(2015)

Director General of National Security Intelligence Service, Commissioner of Police, prisons and the DPP. The very composition again raises the legitimacy of the board. In the post-election violence of 2008, the National Police Service had been discussed extensively as playing a role in the brutality on crackdown of protestors. In addition, fingers were also raised over the questionable conduct of the Director General of the National Intelligence Service, arguing that they were complacent in curtailing government response in days leading up to the violence and the chaos that ensued.

Finally, the two organs involved in Witness protection are the Witness Protection Agency and the Witness Advisory Board.<sup>23</sup> Although their functions are clearly demarcated in the Act their functions in practice still tend to overlap creating issues for a potential witness being admitted to the programme. First of all, the witness advisory board plays a strong role over the appointment of the director general of the WPA. There needs to be a separability mechanism, since the advisory board composition consists strongly of government officials and this eventually compromises the electing process of the Director General

## **2.3 Foreign Treaties**

Article 2(5)(6) have a wide application through recognition of international law treaties that discuss witness protection matters. Additionally, certain provisions of the CoK can be widely construed and can apply to certain witness issues. The monist approach of laws relates to Kenya as well and since Kenya has ratified certain witness related treaties then they form part of witness protection laws as well. The following treaties apply to Kenya's witness programme. Moreover, several other provisions can be given an interpretation to

### **(i) Rome Statute of the International Criminal Court**

This treaty was ratified by Kenya on 15<sup>th</sup> March 2005, and entered in force of 1<sup>st</sup> June of that year. In the aftermath of the post-election violence of 2008, it garnered relevant attention in Kenyan media. The prosecution which pressed charges against three Kenyan based on the four core crimes of genocide, crimes against humanity, war crimes and crimes of aggression. The cases against Uhuru Kenyatta and William Ruto in particular raised questions of witness protection as the

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<sup>23</sup> Witness Protection Act (2006)

prosecutor argued that witnesses in Kenya were not being protected and the state was providing halfhearted support towards investigations conducted by the Office of the Prosecutor (OTP).<sup>24</sup> The violation of Article 43(6) of the statute which provided for creation of the Victims and Witnesses unit to work in collaboration with the Kenyan authorities was not followed. This was particularly evident in the Kenyan cases against the two government officials as attempts to create a partnership between two never materialized.

However, the fundamental weaknesses lay with the lack of cooperation that was required to give effect to the provisions of the Rome statute. The Act envisions a collaborative approach between the prosecution and the local authorities in building cases. The expected liaison never took place and in fact reports of witnesses identities being compromised were rife. A great number of witnesses who turned hostile or who went missing may have had their identities revealed once the local authorities were informed of them.<sup>25</sup> Suspicion remains rife on who was involved in disclosing the identities. There remains a general understanding that witness protection agency was under some kind of undue influence.

### **(ii) International Convention on Civil and Political Rights and the United Nations Convention against Corrupt States**

The ICCPR is one of the treaties that Kenya has subscribed to, it discusses that no one shall be subjected to arbitrary or unlawful interference with his privacy, family or correspondence or to unlawful attacks on his honour or reputation.<sup>26</sup> This can relate well to witnesses who face attacks from perpetrators of violence on several occasions. This can be noted for witnesses especially who have information against state officials.

Furthermore, the United Nations convention against corruption state that parties to the treaty shall take measures in accordance with their legal systems. To ensure effective protection from potential retaliation or intimidation of witnesses and experts who give testimony concerning abuse of functions and bribery of public officials amongst others. This phrase explicitly discloses the

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<sup>24</sup> Neela Ghoshal, 'Turning Pebbles" Evading Accountable for Post-Election Violence in Kenya' (2011) Human Right Watch Report PL335

<sup>25</sup> Emmanuel Igunza, 'Witness protection fears in Kenya' (2012) < <https://reliefweb.int/report/kenya/witness-protection-fears-kenya> > accessed on 10 Feb 2020

<sup>26</sup> ICCPR Convention Article 14

obligation to hold public officials of wrongdoing to court of justice. In the Goldenburg cases. Many of the public officials were let go due to poor investigations bought about by lack of proper witnesses who recanted testimonies gave evidence that was not admissible despite their being overwhelming evidence available. Many of the witnesses failed to turn up and others were disappeared. This showed that the witness protection measures such as training of witnesses was not properly carried out as expected

Overall, many of the proceedings were not able to achieve fruitful outcomes since witness protection had been compromised. The laws currently in place for witness protection have always been there but have not been implemented properly this has been exacerbated by the various scandals that have rocked the country. Therefore, more comprehensive reforms are needed to bring them back to justice.

#### **2.4 The Drawbacks of Foreign Treaties**

However, one need to note that the application of international treaties brings the aspect of monism or dualism. In Kenya's aspect a strict monist interpretation meaning that the laws automatically become part of the country's laws upon being ratified does not necessarily imply usage and application of such laws. Often enough, such treaties although organized by countries have still been affected as secondary laws. A common example is that despite Kenya being a signatory to Rome statute the witness protection unit was not offered help in procuring witnesses by the Kenyan government. Moreover, several provisions of ICCPR are rarely enforced most witness protection matters still rely on the witness protection act for primary guidance.

Overall to resolve the problems faced by the Witness programme , the provisions of the WPA need to be amended together with a complete restructuring of the witness programme . The former has been discussed at some length in the beginning of the chapter whilst the latter is discussed in the following chapter.

### **CHAPTER 3: SETTING UP A WITNESS PROTECTION PROGRAMME USING UNITED STATES FEDERAL WITNESS PROTECTION PROGRAMME (WITSEC) AND NATIONAL WITNESS PROTECTION PROGRAMME (NWPP) AS A MODEL**

For the Witness Protection Agency (WPA) to implement a successful protection programme, it needs to adopt the practices of countries that have successfully setup and operationalized their programmes. The first step in this process involves selecting countries that have such units in existence for a long time, whose criteria is applicable to the Kenyan situation. Ideally, the United States Witness protection programme (WITSEC) and the South African National Witness Protection Programme (NWPP) are the best examples to emulate from.<sup>27</sup> WITSEC<sup>28</sup>, was the first unit of its kind specializing in elaborate witness protection methods. Whilst the latter, was the first formal witness programme of its kind in Africa. According to the US department of Justice 89% of its witnesses were enrolled under WITSEC and account for majority of the state's witnesses.<sup>29</sup> Similarly, the South African police credits the NWPP as the major source of state witnesses who have helped secure conviction of criminal bosses operating in Soweto township.<sup>30</sup> Therefore, the success experienced by these programmes highlights the need for the WPA to adopt and where necessary modify their practices to suit its witnesses. In Kenya's case, a programme is required that can provide protection to witnesses testifying in national or international courts.

The WITSEC and NWPP programme can be used as a blueprint since its success rate has been notably high and this exhibited by the prosecution of high-ranking individuals both in local and foreign jurisdictions. By adopting the legislative and the administrative practices of these countries Kenya shall hopefully be able to create a better witness programme. An analysis of the history of both programmes provides a valuable insight of why Kenya should follow their route.

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<sup>27</sup> The National Witness Programme (NWPP) is a South African witness programme catered under the

<sup>28</sup> The United States Federal Witness Protection Program (WITSEC) is a Witness Programme codified through Code 18 and 3521 administered by the United States department of Justice

<sup>29</sup> United Nations, ' Good Practices of Protecting Witnesses'

[https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime.pdf](https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/Good_Practices_for_the_Protection_of_Witnesses_in_Criminal_Proceedings_Involving_Organized_Crime.pdf)  
f> Accessed on 29<sup>th</sup> December 2020

<sup>30</sup> Chris Mahony, 'The Justice Sector Afterthought: Witness protection in Africa' (2010)

### **3.1 History of WITSEC and NWPP**

Both the US and South Africa have combated the problem of officials in political circles being involved in criminal activities. In the case of the US, the WITSEC programme arose out of the government's attempts to cleanse out the influence of the Italian mafia that had penetrated the political arena and attracted the support of senior American politicians whose campaigns were funded by members of the mafias through their money laundering and drug trade.<sup>31</sup>

In the latter's case, their witness programme developed out from the creation of the Goldstone commission created after the apartheid era,<sup>32</sup> whose main aim was to investigate the clashes that occurred in the Kwa Natal Zulu region in the events leading up to the 1994 general elections. Consequently, the D'Oliviera Unit (the first witness protection programme of its kind) was setup in South Africa to investigate high ranking government officials that included the trial of Eugene De Kock (a commander of one of the South African Police ).<sup>33</sup> This programme laid the basis for the current NWPP and has given rise to several more programmes over the following years.

Interestingly, a common thread that existed amongst all these witness programmes were the uniform criteria they used in establishing a secure programme. This criteria will form the prerequisites for an ideal witness programme in Kenya.

### **3.2 Prerequisites of an Ideal Witness Programme**

An ideal witness programme requires one to protect the witnesses and all the other relevant parties involved such as protectors, programme coordinators. The ideal programme's structure should be catered for in existing legislation. Karen Kramer in her paper Protection of Witnesses and Whistleblowers.<sup>34</sup> she lists these requirements clearly stating

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<sup>31</sup> Eric Wanjohi, 'Witness Protection In Kenya: A Comparative Analysis With the United States Of America'.(2015)

<sup>32</sup> Anthony Minnaar, 'Witness Protection Programmes- Some Lessons from the South African Experience ', (2002)

<sup>33</sup> Jenny Irish, Wilson Magadhla and Wilson Magadhla, 'Testifying Without Fear : A Report on Witness Management and the National Witness Protection Programme in South Africa' (2000) .  
<<http://www.csvr.org.za/docs/policing/testifyingwithoutfear.pdf#:~:text=Testifying%20Without%20Fear%3A%20A%20Report%20on%20Witness%20Management,the%20Study%20of%20Violence%20and%20Reconciliation%2C%20October%202000.>>Accessed 20<sup>th</sup> July 2020.

<sup>34</sup> Karen Kramer, ' Protection of Witnesses and Whistle-blowers: How To Encourage People To Come Forward To Provide Testimony and Important Information. (2013)

“[a]t minimum a legislation should have. Application and admission procedures (which may set out duties of other authorities, such as the prosecuting authority); the rights and obligations of the parties and types of protection measures”<sup>35</sup> and particulars of cessation of programme

Although the Witness Protection Act lays out the particular of all these requirements. The enforcement of these is yet to be realized. This situation is aptly described by Chris Mahony’s book Justice Sector Afterthought. He mentions a statement made by UN rapporteur Phillip Alston in 2008<sup>36</sup>

*“[T]here is no real witness protection program in Kenya. This is a key cause of impunity. Witnesses to crimes by police, politicians and other powerful actors receive death threats. Some are forced to go into hiding in Kenya, or to seek safety in another country. Some are “disappeared”. Some are gunned down in the streets. Witnesses know that speaking out poses a very real threat to their safety. Even high-profile members of civil society are not safe. An effective witness protection program, one that is trusted by witnesses and is independent from the very officials against whom the witness is testifying, is essential in the fight against impunity. In the absence of such a program, no accountability measures – whether they be with respect to investigations in Mt Elgon or the setting up of a Special Tribunal – will be effective.”*<sup>37</sup>

### **3.2.1 Establishing the Purpose**

This remains the fundamental starting point for any witness programme. In the ideal sense, any programme should not go ahead without the it’s coordinators being clear on the purpose for which it was created for. It allocates costs, time, resources and manpower required for smooth operations. A common mistake noted in many witness programmes is the application of a uniform criteria to cases of varying nature. This often ends up leads to witnesses leaving the programme since the adequate resources are not available. As mentioned by Prashant Rahangdale in his paper titled “Witness Protection: An Important Measure For The Effective Functioning Of Criminal Justice Administration”<sup>38</sup> . The purpose of the programme is vital due to the complexities of each case.

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<sup>35</sup> *ibid*

<sup>36</sup>Chris Mahony, ‘The Justice Sector Afterthought: Witness protection in Africa’ (2010)

<sup>37</sup> Phillip Alston Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston : addendum (2009)

<sup>38</sup> Prashant Rahangdale, ‘Witness Protection: An Important Measure For The Effective Functioning Of Criminal Justice Administration’ (2019)

The witnesses in particular case may require basic provisions which they cannot afford whilst in other cases, other witnesses may not require such provisions and need other guarantees to ensure they remain part of the programme. Consequently, such needs shape the nature of each witness. All in all, the main aim is to ensure that witnesses needs are being catered for.

A prime example of this was seen in NWPP programme where investigations were being carried out on violence that occurred during apartheid era. The purpose of the programme was to investigate the role of police death squads in suppressing demonstrations in the run-up to the 1994 elections. This meant that the names of several high-profile public officials would be brought to attention as well<sup>39</sup> The witnesses in this case required heavy protection and some of them were relocated to other countries during and after the trial. This made the programme extremely expensive with extensive operations which led to the finance ministry investing heavily in the programme – in the region of 20 million Rands. Similarly, the Kwa Zulu Natal unit which was created to protect witnesses who gave evidence against warlords in the Durban region was estimated to be at half the cost of the original programme<sup>40</sup> Therefore, each protection agency slightly tends to differ its programme depending on its purpose.

In the Kenyan context, the programme be classified as sensitive especially if it involves public officials. Such programme require extra measures to be put in place.<sup>41</sup> This means that factors such as relocation of witnesses to safe houses, identity changes, monetary benefits in absence of employment and psychological counseling are some of the matters that need to be dealt with. Kenya's war on graft and the resulting ICC cases failed to materialise was because the programme put in place was ill equipped to serve the needs of the witnesses in such areas. The statements issued by ICC prosecutor Fatou Bensouda confirmed this stating that the Witness Agency did not fully cooperate on protecting crucial witnesses. The subsequent reply by the director that the

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<sup>39</sup> Anthony Minaar, 'Some lessons from the South African Witness Programme (2002)

<sup>40</sup> Jenny Irish, Wilson Magadhla and Wilson Magadhla, 'Testifying Without Fear : A Report on Witness Management and the National Witness Protection Programme in South Africa' (2000) .  
<<http://www.csvr.org.za/docs/policing/testiyingwithoutfear.pdf#:~:text=Testifying%20Without%20Fear%3A%20A%20Report%20on%20Witness%20Management,the%20Study%20of%20Violence%20and%20Reconciliation%2C%20October%202000.>> Accessed 20th July 2020.

<sup>41</sup>Jemima Njeri, 'Witness protection: The Missing Cornerstone in Africa's Criminal Justice Systems (2014)  
<<https://issafrica.org/iss-today/witness-protection-the-missing-cornerstone-in-africas-criminal-justice-systems>>  
accessed on 15<sup>th</sup> March 2020

agency did not have funds to protect them provides a clear example of why the purpose remains so important.

### **3.2.2 Institutional Autonomy**

The autonomy of the witness programme becomes vital if one is required to secure successful convictions. In many jurisdictions, certain appointments of the witness agencies are done through the executive arm of the government. With this in mind, it is inevitable that influence from the state machinery becomes necessary in deciding who gets to be prosecuted. In Kenya, state organs related to witnesses such as the Witness Advisory Board advise the Director General on essentially how the programme should run.<sup>42</sup> The composition of the Witness advisory board mentioned in Section 3P as including the Minister as chairman, responsible for matters relating to Justice, Finance, Director-General, National Security Intelligence Service; Commissioner of Police the Director of Public Prosecutions etc. This composition itself reveals that the entire process has a strong government presence in it In the paper by Protection of witnesses and whistleblowers by Karen Kramer she mentioned that witness agencies should strive to have a sense of autonomy of other law enforcement agencies in order to operate successfully.<sup>43</sup>

Whatever the leanings, it must have a sense of autonomy so that it can exercise its function effectively without interference of any political officials. Therefore, in Kenya's context more needs to be done to prevent it from having the executive interfering in witness Agency. In USA, certain matters of the witness programme are under the control of the United States Marshal Service (USMS) that is enforcement agency within the US department of Justice and exists independently of WITSEC. It primarily associates itself with providing employment to prospective witnesses.<sup>44</sup> In Kenya's case, the weakness lies in the composition of the Witness Advisory Board which had several government officials that decide who can become part of the programme.<sup>45</sup> Therefore, in Kenyan context it becomes vital that in order to have an adequate Kenyan programme the influence of government officials needs to be removed. This could be done by shifting the

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<sup>42</sup> The Witness Advisory Board created under Section 3P of Witness Protection Act through amendments

<sup>43</sup> Karen Kramer, 'Protection of Witnesses and Whistle-blowers: How To Encourage People To Come Forward To Provide Testimony and Important Information. (2013)

<sup>44</sup> Mack Raneta 'The Federal Witness Protection Programme Revisited and Compared: Reshaping an Old Weapon to Meet New Challenges in the Global Crime Fighting Effort' (2014).

<sup>45</sup> Section 3 of Witness Protection Act (2010)

position of the witness protection agency to another administrative body perhaps under the Kenya Human Rights Commission (KNHRC).<sup>46</sup> This will be an administrative reshuffle which will create more independence.

### 3.2.3 Process of Recruitment

Recruitment of members of the agency remains yet another integral aspect in designing adequate witness programme. In the current Witness Protection Act, section 3F mentions the staff of the Witness protection Agency,<sup>47</sup> and by virtue of subsection 1 states that it may appoint professional and technical staff and other staff upon such terms and conditions as the minister in consultation with the committee may approve. This provision confers powers upon the minister to make appointments within the agency. This becomes a matter of concern especially if the relevant minister and his counterparts are parties to the judicial proceedings. Their involvement in the recruitment process comprises the independence of the entire programme. It is apparent that with such powers the minister may fill the vacant position with his sympathizers who in return may disclose the identity of the witnesses and the evidence they intend to present to the court.

A similar situation arose during the termination of the ICC trials. Prosecutor Fatou Bensouda alleged that Kenyan officials in the witness protection programme had not assisted the ICC in protecting witnesses.<sup>48</sup> As a response, the agency said that the ICC witnesses were not responsibility of the local agency but that of the ICC witness unit.<sup>49</sup> However, as later seen in the ICC trial, judges mentioned that the state organs should have played a stronger role in protecting the identity of witnesses.

On the other hand, recruitment is not solely restricted to witness being free from any interference but also includes aspects on lack of experience and protectors giving up identity of witnesses.

Lack of experience, many of the officials staffing the programme have been appointed by the minister tend to lack practical skills in protecting witnesses. Some of these

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<sup>46</sup> Kenya Human Rights Commission, The KNCHR is a watchdog body. It monitors Government institutions, carries out investigations on alleged **human rights** violations, and in appropriate cases

<sup>47</sup> Section 3F of Witness Protection Act (2006)

<sup>48</sup> Fatou Bensouda ICC OTP Kenya Cases: Review and Recommendations (2019) <<https://www.icc-cpi.int/itemsDocuments/261119-otp-statement-kenya-eng.pdf>> accessed on 5<sup>th</sup> July 2020

<sup>49</sup> Wanja Gathu, Big Questions about Witness Protection in Kenya <<https://iwpr.net/global-voices/big-questions-about-witness-protection-kenya>> Accessed on 28<sup>th</sup> December 2020

officers may not have had any prior experience in the field of witness protection and this can be problematic.<sup>50</sup> Many of the witnesses suffer from stress and need counseling sessions plus they need to be debriefed on the protection measures. This requires hours of practice in which protectors need to train them. Inexperience in dealing with such witnesses has led to tensions between witnesses and their protectors, which has sometimes resulted in witnesses quitting the programme and has ultimately led to testimony being recanted. To ensure for the programme to be a success, individuals trained adequately in witness protection matters need to be recruited. This should involve training sessions and seminars to ensure that the staff are adequately prepared to cater for witnesses.

Abuse of authority, Witness Protection Programme entails person giving up his freedom. As a result, the protector has numerous power over the witnesses general security. During this time, protectors are likely to monitor movements of each of the witnesses accompany them to trials and even guard their premises.<sup>51</sup> As much as this is beneficial this authority is prone to abuse as well. The most serious cases involve protectors giving up information about the witnesses they are protecting. In the Kenyan case, it was alleged that members of witness protection agency gave up identities of the main witnesses to the defence teams in the ICC cases.<sup>52</sup>

### **3.2.4 Mode of Funding**

A success of the protection of the witness agency relies a greater extent on the funds available for the programme. Starting up a witness programme can be extremely costly and although operational cost decrease over time, the startup costs can invariably hinder the programme from taking off in the first place. The costs estimated by the UNODC adviser that presented it's report to the Attorney General's office estimated a cost of upwards of 6.5 million dollars per year.<sup>53</sup> Of this total sum only 600,000 dollars has been contributed towards the agency.<sup>54</sup>

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<sup>50</sup> Eric Wanjohi, 'Witness Protection In Kenya: A Comparative Analysis With the United States Of America'.(2015)

<sup>51</sup> Anthony Minaar , 'Witness Protection Programmes- Some Lessons From South African Experience' (2002)

<sup>52</sup> Mark Koech , Kenya's witness protection agency distances itself from ICC witnesses (2014)  
<<https://www.standardmedia.co.ke/article/2000136546/kenya-s-witness-protection-agency-snubs-icc-witnesses>>  
Accessed on 15 March 2020.

<sup>53</sup> Chris Mahony, 'The Justice Sector Afterthought: Witness protection in Africa' (2010)

<sup>54</sup> *ibid*

These costly processes are seen during stages of Witness relocation, identity change in grave circumstances, training of witnesses on how to give evidence requires resources and relocating families.<sup>55</sup>

These factors all require continuous funding for the entire programme. Costs are likely to differ depending on the types of proceedings taking place. However, proceedings involving public officials are most certainly higher than other criminal or civil proceedings.

In this vein, funding from private donors remains an alternative option. However, Kenya continues to have a tricky relationship in this matter. For instance, the Justice, Law, Order and security fund (GLOS) from countries like Sweden, Finland and Netherlands have continuously frozen aid after they felt the funds were not used in implementing the witness programme. Apart from that, European Union and the US (who remain Kenya other largest donors) have also cited their concerns over the delayed implementation of the programme.

Perhaps the best approach to such a situation would be “give and take approach” now commonly adopted by most major donors where funds are only provided in return for legislative amendments that have already been made. So foreign donors should only provide money once concrete changes in legislation are in place. This shall force Kenyan authorities implement change in place to ensure they receive continuous stream of money.

Alternatively, the witness agency could follow the practice of the WITSEC programme. In the US for example, private bodies are free to fund the witness programme reducing the burden of cost on state treasury. These private donors apart from funding the programme may also provide aid witnesses in looking for alternative employment opportunities. The United States Marshal Service<sup>56</sup>(USMS), is delegated with the responsibility to provide funding for six months before they assist witnesses in looking for alternative employment methods.<sup>57</sup>

In Kenya, a similar option is plausible the witness agency is currently funded from the consolidated fund and private donors. The WPA can help witnesses look for alternative

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<sup>55</sup> Anthony Minaar , ‘Witness Protection Programmes- Some Lessons From South African Experience’ (2002)

<sup>56</sup> The USMS is a federal law agency in the United States

<sup>57</sup> Mack Raneta ‘The Federal Witness Protection Programme Revisited and Compared: Reshaping an Old Weapon to Meet New Challenges in the Global Crime Fighting Effort (2014).

employment methods in order to sustain their living and reduce their operationalizing costs. Providing witness with employment reduces strain on the scarce resources available and allows witnesses to retain an aspect of normality in their lives. This remains an objective that the agency should actively pursue said it could not meet the high cost.

Kenya's approach at the moment should involve maintaining and establishing partnerships with new donors that can provide funding to them. They could also undertake partnerships with other state organs such as Banking Fraud Investigation Unit (BFIU) and the administrative civilian support (an organ of the National Police Service) that can help to provide specialized knowledge during investigations. All in all, the Kenyan government needs to fund more if it wants to increase the influence of the WPA.

### **3.3 Changes to Admission Process**

The next stage after the prerequisites have established there needs to be changes in the admission process. This process will help to select the right type of witnesses for the programme It is has been routinely observed that in Kenya witnesses tend to turn hostile during the proceedings.<sup>58</sup> A hostile witness is one who appears unwilling to tell the truth after being sworn in to give evidence in court<sup>59</sup>. It can also refer to witnesses who recant their earlier testimonies when on trial. This renders the entire process invalid.<sup>60</sup>. Reasons for turning hostile often include being threatened by the other party, lack of agency sufficient cooperation and general lack of cooperation from judicial authorities. The method to turn WPA's fortunes around rests on its ability to maintain it's witnesses. The best method involves bringing changes in the admission process to reduce the chance of witnesses turning hostile. Such modifications will ensure that only committed witnesses enter the programme and that the prosecution can rely on them to secure convictions and win the war on graft.

This approach shall be described in three steps as follows:

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<sup>58</sup> Open Society Justice Initiative <https://www.justiceinitiative.org/uploads/8a5f5b90-7b75-44b6-ac31-2108a264fe97/factsheet-icc-witness-interference-20161116.pdf> Accessed on 26th April 2020

<sup>59</sup> Legal Dictionary Investopedia <<https://legal-dictionary.thefreedictionary.com/hostile+witness> Accessed on 15<sup>th</sup> January 2021

<sup>60</sup> <[https://www.citizensinformation.ie/en/justice/witnesses/hostile\\_witness.html](https://www.citizensinformation.ie/en/justice/witnesses/hostile_witness.html) Accessed on 1st January 2021

### 3.3.1 Application and Admission

The admission process needs to speed up the time taken to place witnesses under protection. In carrying out their investigations for a suitable witness, the agency needs to consider the time management of the process. Protection should begin immediately when a witness expresses desires that he/she be placed under protection.<sup>61</sup> It is often observed that protection of witnesses is delayed due to extended bureaucracy and logistical issues. This means that vital witnesses are often left out of the programme or are admitted late and end up disappearing.

Another area requiring change is the authority of the Director to admit witnesses to the programme. The Witness Protection Act mentions in section 5 that admission to the programme is the responsibility of the director.<sup>62</sup> This confers a lot of powers on the director since they can admit them witnesses can apply for protection. Additionally, where a person has not been offered protection, they need to apply for it in writing to the Director General this may be done by a prospective witness himself, law enforcement agency, public prosecutor or another intermediary. A decision is then made by the director.<sup>63</sup> This unfettered power means that the director is the only one with the authority to admit witnesses. A better scenario would be where the authority of admission lies with another office holder as well. This could be the director of KNHRC or the DPP. Clearly, both offices are closely involved in witness matters as well and thus need to have a say in which witness is admitted and prevent the power from being concentrated in the director General's hands.

In South Africa for instance, the NWPP is obliged to provide information on potential witness to be admitted to the DPP'S office. The decision is then made by the DPP's office after reviewing the applications. A brief overview of the process includes:<sup>64</sup>

The person applying for protection fills out a prescribed form and hands it over to:

- the police investigating officer of the case

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<sup>61</sup> Pyali Chatterjee , 'A Critical study on Hostile Witnesses: Problems and Solutions (2018)

<sup>62</sup> Section 5 of the Witness Protection Act (2006)

<sup>63</sup> *ibid*

<sup>64</sup> Pyali Chatterjee , 'A Critical study on Hostile Witnesses: Problems and Solutions (2018)

a provincial coordinator of the Witness Protection Programme.

This form is immediately submitted to the Witness Protection Programme Head Office (in Kenya's case the witness Protection Agency).

Arrangements are then coordinated by staff members of the programme to place the witness in a safe house. The Director of Public Prosecutions is then involved in deciding on whether person should be kept on the programme.<sup>65</sup> The Director of Public Prosecution's decision is then communicated to an office of the Witness Protection Programme.

In this aspect, we can clearly note that the liaison between the NWPP and the Office of the DPP exists in South Africa regarding Witness protection matters. This arrangement succeeded in removing the unlimited authority of the individual heading the witness authority and placed certain powers in the hands of the DPP as well. This is a well-found practice that can be essentially implemented in Kenya as well. Since, the DPP has an obligation to institute legal proceedings against official accused of committing crimes thus their involvement in Kenya's witness protection agency becomes envisable. The operation of two offices in witness protection matters are likely to make the selection of witnesses more impartial since the DPP might exercise a higher level of independence from the director of the Witness Protection Agency.

### **3.3.2 Alteration to Memorandum of Understanding (MOU)**

Ideally, the MOU operates as a legally binding object that outlines the duties and obligation of each party to the programme. When a witness enters the programme, a memorandum of understanding (MOU) is signed between the witness and the members heading the programme. The level of protection accorded to a witness might vary depending on the nature of cases. In recent times (as seen during the ICC cases,) one startling reality came to light-That current MOU is inadequate to address witness protection matters The current MOU is based on the one discussed in Section 7 of the Witness Protection Act. It discusses matters such as:<sup>66</sup>

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<sup>65</sup> Jenny Irish, Wilson and Wilson Magadhla, 'Testifying Without Fear : A Report on Witness Management and the National Witness Protection Programme in South Africa' (2000) .  
<<http://www.csvr.org.za/docs/policing/testiyingwithoutfear.pdf#:~:text=Testifying%20Without%20Fear%3A%20A%20>>Accessed 20<sup>th</sup> July 2020

<sup>66</sup> Sc 7 Witness Protection Act (2006)

which participant should be included in the programme?

conditions on termination of MOU

Consequences of failure to abide by the MOU

It however glosses over other important issues like where witness relocation, where they will they receive their sustenance.<sup>67</sup> Therefore, such provision needs to be discussed in facilitating the understanding between the programme coordinators and the witnesses in the MOU. The particulars currently set out in the Act are inadequate and need to be altered especially if the agency want more witnesses to come forward in the future. Witnesses such as Phillip Muniyakei (former director of Central Bank of Kenya) and James Githongo, have complained in the past on the lack of effective MOU in place that have prevented them from becoming witnesses for prosecution's case.<sup>68</sup> Therefore, in order to prosecute government officials there needs to be a special MOU for witnesses detailing additional requirements of protection this could include details such as: number of security guards provided, for what duration and resources and relocation methods.

As Kwame Domfeh elaborated in his paper Muting the whistleblower,<sup>69</sup> that whistleblowers /witnesses remain an integral aspect in uncovering scandals existing in both public and private sector and their relocation during and after hearing remains vital. The new MOU needs to be altered by introducing additional clauses by including clauses on relocation and means of providing employment to witnesses.

### **3.3.3 Conclusion of the programme**

Section 10 of the Act describes the conclusion of a witness programme under the title of cessation and protection of assistance. It states that a witness may be discharged from the programme in several ways this include: participants breaching an MOU, or actions of participants that

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<sup>67</sup> Jenny Irish, Wilson and Wilson Magadhla, 'Testifying Without Fear : A Report on Witness Management and the National Witness Protection Programme in South Africa' (2000) .

<sup>68</sup> Structure of MOU in Memorandum of Understanding

<sup>69</sup> Kwame Domfeh, ' Muting the whistleblower through retaliation in Selected African countries' (2011) Volume11, Issue 4

compromise integrity or security of the entire programme and when circumstances in which they required protection have ceased to exist.<sup>70</sup>

Interestingly, a notable point is there hasn't been any mention of what happens to witnesses after cessation of the programme. It is vital for witnesses to be assisted after the programme has ended as well since the threat of harm does not disappear. The next step to this process is to relocate the witness to a new area. This can be difficult especially in African tradition with a strong link to its culture, language, custom and tradition all this become foreign concepts when one moves to a new area. This can mean that witnesses often refuse to cooperate to prevent from being relocated. It is important in such cases that programme coordinators help the witness settle in to their new lives and sensitize them and help them to adjust to new environment. Also, they need to be informed about maintaining their safety and not give their current locations and whereabouts as that can put them at risk at a later time. Therefore, the agency needs to consider all this factors when relocating the witnesses to a new place. They need to look for areas where witnesses can live in comfort and can receive warm welcome and help them to adjust to their new life. This will strengthen the belief of witnesses that they are in the right hands.

As noted by Karen Kramer that witness protection continues long after the witness has given evidence especially if evidence is give against high profile individuals the threat of retaliation always remains since the witnesses can also be called upon to give evidence in future proceedings.<sup>71</sup> This becomes applicable together with the witness relocation belief and WPA needs to ensure that it's witnesses are well looked after.

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<sup>70</sup> Section 10 Witness Protection Act (2006)

<sup>71</sup> Karen Kramer, ' Witness Protection as a serious tool in Addressing Serious and Organized Crime' (2010)

## **CHAPTER 4: RECOMMENDATIONS AND LESSONS LEARNT FROM THE GOLDENBURG SAGA AND ICC CASES**

In this chapter, recommendations are given to the Witness protection programme to ensure that the lessons from the Goldenburg and the ICC cases are well applied for better protection of witnesses. The recommendations proposed involve increasing cooperation between government bodies, cross border cooperation between witness agencies to facilitate better transfer of data and communication between government sectors that shall protect witnesses amongst others.

The experiences of the post-election violence of 2008 and the Goldenburg scandal left a bitter taste in the mouth of many and reflected the weakness in the Witness Protection Act of Kenya. Therefore, the recommendations aim to eliminate or reduce the weaknesses. —However, these reforms are likely to encounter problems considering that there are certain challenges that stop it from operating optimally, knowledge of the possible challenges together with the recommendations can alleviate the problems.

### **4.1 Challenges in Amending the Witness Protection Act**

#### **4.1.1 Amending Witness Protection Act**

It is without a doubt that the WPA will require certain amendments if it requires to have a meaningful impact. The first and foremost objective is to expand the definition of witnesses to include those that have evidence against state officials.<sup>72</sup> This remains particularly a troublesome aspect to digest since most legislators are reluctant to have amendments that are likely to increase protection of witnesses who may have evidence against their wrongdoings. As discussed extensively by widening the scope of witness definition politicians are more susceptible to be held liable and investigations conducted against them. This issue shall stifle the amendments that are required in the Witness Protection Act and end the cycle of impunity that currently exists.

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<sup>72</sup> Marion Akoth ‘Witness Protection in Kenya’ (Thesis, University of Nairobi 2014)

Currently, as noted the definition of witness remain a major reform that needs to be instituted. Additionally, amendments such as changing the composition of the Witness Advisory Board<sup>73</sup> to reduce the government's influence is likely to lead to some strong debates over who should replace these individuals. This will lead to a reduction of government influence since the activities of the WPA will then not under the scrutiny of government officials and there are chances of witnesses and whistleblowers may be able to testify against certain officials without any threats of sort. This shall lead to damaging of political image of politicians involved in scandals and could further attract criminal and civil sanctions if they are convicted by the courts. Therefore, these amendments remain a hot topic of debate.

#### **4.1.2 Creating Faith in the Agency**

A major obstacle for the Agency lies in creating faith with the people that the witness protection programme is there to protect them and not a government proxy to cater for the interests of politicians. This remains more of social issue that cannot be addressed at one time but over a period of years. The experience from the Goldenburg cases remains firmly in the memory of many other witnesses where the chief whistleblower Philip Munyakei was ostracized and fired from his position following his revelations about the scandal.<sup>74</sup> The bitter experience led to other whistleblowers retracting their statements in fear. Moreover, in the early 2000s John Githongo's escape to London confirmed the inner fear of many witnesses that Kenya was not a safe haven for witnesses under the witness protection Agency. As mentioned by Christopher Gitari, director of the International Centre for Transitional Justice (ICTJ) in Nairobi, told IWPR that many people were reluctant to approach the agency because it was under the umbrella of government.<sup>75</sup> The disappearance of prime ICC witnesses in early 2012 once again served a termly reminder of these inadequacies. Therefore, creating a trust between citizens who are potential witnesses and the

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<sup>73</sup> Witness Protection Act Sc 3

<sup>74</sup> Angelina Gacheru, 'Battle Against Corruption: Significance Of Effective Whistleblowers' Protection Law In Kenya (Thesis, Strathmore University 2016)

<sup>75</sup> Wanja Gathu ' Big Questions About Witness Protection in Kenya' (2014) <<https://iwpr.net/global-voices/big-questions-about-witness-protection-kenya>> accessed on 21<sup>st</sup> April 2020

WPA is vital for there to be success. This could be through forums and consultation between the agency and members of the public.

#### **4.1.3 Economic Viability**

A major success of the reforms in the Witness protection programme rests on the financing of the economic project that shall reshape the programme. Over the years the witness programme in Kenya has been continuously underfunded economically and not given enough chance to expand it's scope.<sup>76</sup> According to Ondiek, in a press brief for this financial year, the agency received only 196 million Kenyan shillings (2.2 million US dollars) of the 500 million (six million dollars) that it asked for.<sup>77</sup> In the last year, the agency has received more than 300 applications from witnesses seeking protection, and it does not have the funds to cater for them all. It is not just witnesses who need protection, but also their families, meaning that the total figures for individuals needing help are far much higher.<sup>78</sup>

The highest costs come from relocating witnesses and providing them with compensation during their period in the programme. They also receive an allowance for daily expenses. "The law requires that a witness's lifestyle be maintained same as to prior them joining the programme. Therefore, it is perfectly normal to assume that making vital changes to such a programme will require higher expenses to be incurred."<sup>79</sup> Estimates are difficult to obtain from other countries since they are reluctant to give budgetary figures due to confidentiality matters but approximate figures obtained from Australia's witness agency revealed around 1.6 million dollar being paid annually to NWPP.<sup>80</sup> This cannot be the realistic figure considering the size of the Kenyan economy but lays out the foundations for serious estimate of the costs. However, it needs to be noted that the

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<sup>76</sup> Justice in Conflict < <https://justiceinconflict.org/tag/witness-intimidation-kenya/> > Accessed 27<sup>th</sup> April 2021

<sup>77</sup> Ibid

<sup>78</sup> Angelina Gacheru, 'Battle Against Corruption: Significance Of Effective Whistleblowers' Protection Law In Kenya (Thesis, Strathmore University 2016)

<sup>79</sup> Julia Longman, [https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/Good\\_Practices\\_for\\_the\\_Protection\\_of\\_Witnesses\\_in\\_Criminal\\_Proceedings](https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/Good_Practices_for_the_Protection_of_Witnesses_in_Criminal_Proceedings) Accessed 24<sup>th</sup> April 2021

<sup>80</sup> Yvon Dandurand 'A Review of Selected Witness Protection Programs' (2010)

government's spending on the witness protection programme does not need to remain constant. In the aftermath of the Goldenburg scandal and the ICC cases it is expected that the costs of funding will be lower since such scandals are not always recurring.

A source of funding could be getting grants from Western countries already with established witness programme The US witness programme and the World Bank. The US treasury has helped to setup many Witness programmes in many countries and since the remodeling of the Kenyan version rests on certain aspect of the WITSEC programme there is a greater likelihood of support.<sup>81</sup> America is Kenya's second biggest source of economic aid and it is right to assume that funds received could be geared towards the witness programme. The World Bank could also aid in providing funds for the Kenyan government as it has provided foreign aid to most this remains theoretical in application.

Additionally, partnerships can be created between various law enforcement agencies and the Kenya Witness protection programme , some examples remain are Interpol , UN and the ICC witness protection programme.<sup>82</sup> Costs of training workers teaching skills and getting advanced technology the costs can be mitigated through partnerships with such organisations. The ICC process in Kenya involved the collaboration of the Witness Protection Unit and the WPA of Kenya and although the relationship was marred by various difficulties such as lack of cooperation from Kenyan authorities and refusal to hand over vital documents relating to ethnic clashes. It remains an attractive option nonetheless. Overall, creation of partnerships and getting alternative sources of funding can help mitigate the costs of reshaping the witness protection programme.

## **4.2 RECOMMENDATIONS**

### **4.2.1 Cooperation with Government Sectors such as National Police Service and the Office of the DPP**

In order for the Witness Protection Agency to fulfill it's mandate it needs to secure the cooperation of other government sectors, to ensure protection of witnesses. The government sectors such as

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<sup>81</sup> Alexa Koenig, 'After Kenya Lessons for Witness Protection' (2015) < <https://www.international-criminal-justice-today.org/arguendo/after-kenya-lessons-for-witness-protection/>> accessed 21<sup>st</sup> April 2020.

<sup>82</sup> Thomas Hansen 'Complementarity in Kenya: An analysis of the Domestic Framework for International Crimes'(2016).

the National Police Service, the treasury and legislative assemblies are perhaps the three main areas that can directly impact the influence upon witness programmes.

Beginning with the police service, Kenya needs to institute reform in police procedural protection measures relating to witnesses. For instance, members of law enforcement provide protection to witnesses when they are testifying in court, when they are residing in designated safe houses and upon termination of the program through continuous checkups. A reading of the provisions of both the Police Act makes no mention on such methods adopted by the police in protecting witnesses apart from the authority to summon a witness in Section 33.<sup>83</sup> Thus, these matters need to be addressed in detail so that the Police Service can make rules for it. These measures when applied appropriately by trained officers can provide adequate protection for the vast majority of witnesses in need, considering that protection measures are an important tool that must be effectively applied.

Furthermore, reforms should be directed toward other police oversight mechanisms such as building the capacity of the Independent Police Oversight Authority (IPOA), make appointments to the Police Service Commission who have expertise on witness protection matters and enable the Kenya Police Force's detectives to have sweeping powers to detain and question government officials during ongoing investigations.<sup>84</sup> The IPOA should establish a credible and independent complaints and investigation process into the actions of state security agents during the post-elections violence. Ensure the removal from office of all state security agents suspected of or charged with crimes relating to the post-elections violence.

Research by independent bodies into the ICC process highlighted extensively the need of the Kenya Police Force to conduct both forensic and testimonial criminal investigations in the aftermath of the 2007 elections. It was recommended that police force should investigate and prosecute all suspected financiers, instigators, planners and perpetrators of the postelections violence and capacitate state prosecutors to prosecute cases relating to the post-elections violence.<sup>85</sup> Additionally, the office of the DPP was involved in this process through

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<sup>83</sup> Police Act Sc 33

<sup>84</sup>The Economist < <https://www.economist.com/middle-east-and-africa/2018/08/18/efforts-to-tackle-official-abuses-in-kenya-are-failing> > Accessed on 23<sup>rd</sup> April 2020

<sup>85</sup> Phillip Waki 'Commission of Inquiry – CIPEV Report Waki Report' (2008)

recommendations of a task force into the prosecution of ‘ordinary’ crimes arising from the post-elections violence.<sup>86</sup> This would have served as a timely reminder to all perpetrators that all people participating in violence would not be spared. Ensure such prosecutions are conducted within a well-thought out strategy to investigate and prosecute not just perpetrators of incidents but also financiers, instigators and planners of the post-elections violence. Finally, the capacity (financially and in terms of human resources) of the Witness Protection Agency needs to be expanded to ensure the safety of all victims, intermediaries (human rights defenders) and potential witnesses through an alternative mechanism acceptable to all parties.<sup>87</sup>

#### 4.2.2 Cross Border Cooperation

Many witness protection programmes have increasingly shifted their attention over the last decade on the transnational nature of witness protection. States have recognized the need to engage with each other in a number of exercises to harmonize their legislation and criminal justice practices and to enhance their capacity to cooperate with each other in protecting witnesses.<sup>88</sup> Chris Mahony in his book the Justice Sector Afterthought recommended that cross border cooperations between witness programmes is vital for witnesses with sensitive information to be relocated elsewhere. A leaf can be taken out of the trial of Henry Omktah where witnesses were relocated for their safety to another area for the trial.<sup>89</sup> In Kenya’s case, most of the ICC witness who disappeared were residing in Kenya leaving them free to be intimidated by agents of the accused. Moreover, their families also continued to reside placing them at even a greater threat. Therefore, there is a need for Conventions and bi-lateral treaties to exist between African countries allowing witnesses to move around and reside over there pending the conclusion of the trial. International cooperation initiatives with respect to the identification and use of informants and witnesses, the sharing of intelligence and evidence, and the protection of witnesses, are part of this. The importance of operational cooperation across borders among law enforcement agencies investigating and

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<sup>86</sup> Yvon Dandurand ‘A Review of Selected Witness Protection Programs’ (2010)

<sup>87</sup> Joseph Muraya , ‘The role of Kenya’s Witness Protection Agency explained (2016) <<https://www.capitalfm.co.ke/news/2016/10/the-role-of-kenyas-witness-protection-agency-explained/>> Accessed on 20<sup>th</sup> April 2020

<sup>88</sup> Yvon Dandurand ‘A Review of Selected Witness Protection Programs’ (2010)

<sup>89</sup> Jenny Irish, Wilson Magadhla and Wilson Magadhla, ‘Testifying Without Fear : A Report on Witness Management and the National Witness Protection Programme in South Africa’ (2000) . <<http://www.csvr.org.za/docs/policing/testiyingwithoutfear.pdf#:~:text=Testifying%20Without%20Fear%3A%20A%20Report%20on%20Witness%20Management,the%20Study%20of%20Violence%20and%20Reconciliation%2C%20October%202000.>>Accessed 20th July 2020.

prosecuting crimes needs to be adopted. This will lead to an increase in protection for witnesses as seen from previous examples.

Because many criminal organizations operate quite efficiently across national borders, the threat they represent to witnesses and collaborators of justice is not confined within national borders. Physical and psychological intimidation of witnesses and their relatives can take place in a variety of contexts. Furthermore, witnesses may need to move to another country or return to their own country during lengthy criminal proceedings. Finally, there are cases where a State, because of its size, means may not be able to ensure the safety of witnesses by itself.

For all these reasons, cooperation in the protection of witnesses and their family members is vital.

Various articles of the treaties is Article 19, of the United Nations Convention against Transnational Organized Crime requires States Parties,<sup>90</sup> to consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies.

#### **4.2.3 Protection afforded to other relevant individuals**

Furthermore, international cooperation may also be required at times in order to protect interpreters, the prosecutors themselves, and/or other judicial and correctional personnel.

Developing a capacity to protect witnesses and even relocate them across borders must often be considered. Article 24 of the UN Convention against Transnational Organized Crime and article 32 of the UN Convention against Corruption require States parties to consider entering into agreements or arrangements with other States for the relocation of witnesses<sup>91</sup>

To ensure greater international cooperation in offering effective witness protection at home or across borders, law enforcement and prosecution agencies often need to develop arrangements with other jurisdictions for the safe examination of witnesses at risk of intimidation or retaliation.<sup>92</sup> Another type of interagency collaboration exists where formalized efforts are made from to secure

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<sup>90</sup> United Nations Convention against Transnational Organized Crime [2000]

<sup>91</sup> Julia Longman, [https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/Good\\_Practices\\_for\\_the\\_Protection\\_of\\_Witnesses\\_in\\_Criminal\\_Proceedings](https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/Good_Practices_for_the_Protection_of_Witnesses_in_Criminal_Proceedings) Accessed 24<sup>th</sup> April 2021

<sup>92</sup> Yvon Dandurand 'A Review of Selected Witness Protection Programs' (2010)

interpreters, additional staff security measures. In some cases, where a witness may have to move from a country to another, the responsibility for providing protection may be transferred accordingly. International cooperation is particularly important in protection cases where witnesses must be relocated to another country. In order for Kenya to prosecute government officials in political scandals a growing number of countries are therefore recognizing the importance of enabling the inclusion of foreign nationals into their programs.

#### **4.2.4 Enactment of Whistleblower Protection**

There is a great need for Whistle-blower Protection Legislations to be enacted in Kenya since the majority of the political scandals were revealed through the acts of whistleblowers like Phillip Munyeki who revealed the workings of the Goldenburg scandal. Despite, their vital role up to this date exists no specific legislation addressing the issue of whistleblowers<sup>93</sup>

The implementation of Whistle-blower Protection Legislation requires independent judiciary that shall admit the evidence provided by them and also make orders for their protection This requires a complete reshaping body that deals solely exclusive protection of whistleblowers.

African countries, like in many third world countries, the system is not geared towards protecting such witnesses. Kenya has faced it's own set of challenges To ensure that witnesses are effectively protected in these countries, one needs to set comprehensive criteria to admit them. Perhaps the only legislation that specifically discusses the protection of whistleblowers is the Anti-Corruption and Economic Crimes Act was enacted in 2003 to provide for the prevention, investigation and punishment of corruption, economic crime and related offences.<sup>94</sup>This Act, under sec 65 provides for the protection of informers from any liability arising from disclosure and concealing of the person's identity during proceedings. It states:

No action or proceeding, including a disciplinary action, may be instituted or maintained against a person in respect of

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<sup>93</sup> Wilson Kiprono

<library.egerton.ac.ke/jspui/bitstream/123456789/2044/1/Challenges%20facing%20implementation%20of%20witness%20protection.pdf> Accessed on 17<sup>th</sup> April 2021

<sup>94</sup> Angelina Gacheru, 'Battle Against Corruption: Significance Of Effective Whistleblowers' Protection Law In Kenya (Thesis, Strathmore University 2016)

assistance given by the person to the Commission or an investigator; or

a disclosure of information made by the person to the Commission or an investigator

Subsection (1) does not apply with respect to a statement made by a person who did not believe it to be true.<sup>95</sup>

In a prosecution for corruption or economic crime or a proceeding under this Act, no witness shall be required to identify, or provide information that might lead to the identification of, a person who assisted or disclosed information to the Commission or an investigator.

In a prosecution for corruption or economic crime or a proceeding under this Act, the Court shall ensure that information that identifies or might lead to the identification of a person who assisted or disclosed information to the Commission or an investigator is removed or concealed from any documents to be produced or inspected in connection with the case.<sup>96</sup>

Additionally, as mentioned earlier a more independent agency should be created for the protection of whistle-blowers; an agency in which potential whistle-blowers will be protected and the threat of reprisals will not be there. Creation of a regulatory body of the whistleblowing Act could go a long way to reduce negative attitude of whistle-blowers in society who may be seen as traitors in particular community. In the aftermath of the Goldenburg and Anglo leasing scandal many of the whistleblowers were persecuted as being traitors to certain communities thus most people were hostile to the information imparted by them. In countries emerging from civil war, conflicts or authoritarian regimes such as South Africa, there is often a stigma attached to reporting others' actions and so was the case in Kenya after any major political scandal as ethnic rivalries were always heated up in favour of obtaining justice.

The threat to whistle-blowers in Kenya who are involved in high level cases of corruption cannot simply be reduced by adopting protective measures. A certain amount of efficiency is required in the judicial process to ensure that prosecution is not undermined at the investigative, prosecutorial or judicial stages of the criminal justice process. In Kenya, the capacity of the National Police Service, the office of the Inspector General of police and the office of the DPP, needs to be

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<sup>95</sup> Anti Corruption and Economic Crimes Act (2003) Chapter 65 laws of Kenya

<sup>96</sup> *ibid*

enhanced to ensure that it specifically protects whistleblowers. In this instance, an envisionable scenario remains enactment of certain rules and regulations pertaining to protection of whistleblowers.

### **4.3 Development of Evaluatory Mechanisms**

Evaluations of a witness programme become necessary in order to see successful running of the programme. In order for the witness protection programme to thrive the WPA needs to have an evaluation mechanism in place to ensure that progress is made. When dealing with cases involving high ranking government officials, methods and practices need to be clearly monitored regularly to ensure they are up to date and delivering the required results.<sup>97</sup> Existing evaluation methods help the protected witnesses and avoid the pitfalls of that fact that some of the methods employed are outdated. Some of the evaluation methods shall entail processes such as interviewing witnesses who were previously in the programme and asking them for recommendations and adopting best practices from other countries. The evaluation process is a constant and ever changing one, various evaluation programmes have been run in many jurisdictions.

A vivid example remains is the Strathclyde Police witness protection program conducted in England with 14 witnesses protected. It is the only police force in the U.K. to have a formal witness protection program.<sup>98</sup> The evaluation process revealed that witnesses during their time in the programme complained of mental distress and there was evidence that their experience had seriously affected their mental health this contributed to more concentration on the psychological aspect of witness protection leading to counseling and therapy sessions being offered to witnesses during their time in programme.<sup>99</sup>

Witness relocation remains yet another aspect in that has remained constant in evaluation reports of witness programmes, Argued in the Goldenburg cases that witnesses had not been adequately protected meant that a majority of the witnesses had not been placed in safe houses and other places during the trial process, the courts argued that in this process it was vital for necessary changes to

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<sup>97</sup> Yvon Dandurand 'A Review of Selected Witness Protection Programs' (2010)

<sup>98</sup> Nicholas R. Fyfe 'Police protection of intimidated witnesses: A study of the strathclyde police witness protection' (2010) <https://www.tandfonline.com/doi/abs/10.1080/10439463.2000.9964844> Accessed 10th June 2010

<sup>99</sup> Angelina Gacheru, 'Battle Against Corruption: Significance Of Effective Whistleblowers' Protection Law In Kenya (Thesis, Strathmore University 2016)

be made. As mentioned in the article in assessing the witness programme, The few attempts made to assess the effectiveness of existing witness protection programs have assessed the outcomes of the programs mainly rests on terms of physical security of witnesses. and their participation in the legal process. However, evaluations of witness protection programs should not only consider physical security of the witness but at other aspects of the programs such as training of officers.

#### **4.4 Additional Matters**

The commission of enquiry in the Goldenburg affair produced vital suggestions on the matter of protection of witnesses, although the scandal took place well over two decades ago, the recommendations can still be implemented to ensure can make improvements to the witness protection agency.

##### **4.4.1 Conflicts with laws and legislations**

Under Section 41 of the Public Office Ethics Act, 2003 states that" A person who, without lawful excuse, divulges information acquired in the course of acting under the Act is guilty of an offence and is liable ,on conviction ,to affine not exceeding five million shillings or to imprisonment." Ironically, this section outlaws whistleblowing, while at the same time the rest of aims to maintain the ethics of public officials This is a prime example of the law contradicting itself.<sup>100</sup>

Another challenge that may face the implementation of whistle-blower protection legislation in Kenya is the fact that other laws are still contradicting it. The Official Secrets Act criminalises disclosure of government documents and requires civil service employees to sign an oath of secrecy. Civil service careers can thus be used on their own or to accompany physical threats when deterring civil service whistle-blowers. It was noted through treatment of Philip Munyakei that whistleblowers are treated unfairly in Kenya. This experience acts as a deterrent for anyone willing to give information against public officials.

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<sup>100</sup> Public Office Ethics Act, (2003) cap 183 laws of Kenya

Overall, to have an efficient witness programme the conflict of laws pertaining to witness protection as mentioned above need to be resolved quickly and need to be harmonized to seek the interest of witnesses.

## **CHAPTER 5: CONCLUSION AND WAY FORWARD**

Kenya Witness protection Agency as of now remains an empty vessel filled with limitless potential. The preamble mentioned in the Act characterizes this aptly, with its vagueness mentioning that it was created for protecting witnesses in criminal proceedings and any other proceedings. Such phrases ignore the entire purpose for which the Agency was created for, the protection of witnesses with evidence against government officials. An innocent but a vital error has resulted in various political scandals in which a single public official has not been tried and ultimately has come crashing down with the botched ICC witness protection methods. The underlying factor however has remained constant; politics; the fight for competent leadership in Kenya will not be won every five years through a mere ticking of names on the ballot paper ;but through the restructuring of current institutions in place such as the witness protection Agency that aid in determining whether an individual is fit to have his name on the ballot paper.

The reforms therefore proposed need to be instituted against the WPA need to be considered in light of the two major events, the Goldenburg and the ICC cases. The main lesson learnt from such experiences is that the Witness Agency has fundamental flaws and weaknesses that prevent it from providing adequate protection to high level witnesses.

### **5.1 ICC EXPERIENCE**

The ICC experience revealed that various steps need to be implemented

#### **5.1.1 To the Parliament of Kenya**

Establish Special Tribunal within the WPA to handle witnesses with evidence against state officials

Create a special tribunal within the WPA to investigate and compile evidence against state officials

Appoint international and Kenyan judges to the special tribunal

. Ensure that high-value witnesses benefit from this

Provide full funding through special partnerships like Interpol and UNODC

### **5.1.2 Inclusion of International Donors in the Justice Sector, US including Canada, Denmark, Finland, Germany, The Netherlands, Sweden and United Kingdom,**

Play a role in establishing the special tribunal by offering support, including training, human resources support, and financing and appointing international rapporteurs to investigate the efficiency of the process.

### **5.1.3 To the Office of the Director of Public Prosecutions**

Closely monitor the steps for the special tribunal, consider sharing evidence and offering support, including training, on the condition that the mechanism is credible, independent, and capable of protecting witnesses.

### **To the National Police Service**

Publicly release the results of any internal inquiries conducted into police conduct of such scandals and if such investigations have not been conducted, commence internal investigations against police officers and units suspected of violations. Furthermore, Suspend police who are found to be guilty of misconduct, and prosecute them Ensure that the planned police vetting process provide civilians the chance to bring complaints against individuals.

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Penal Code Chapter 63

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