



UNIVERSITY OF CAPE TOWN
IYUNIVESITHI YASEKAPA • UNIVERSITEIT VAN KAAPSTAD

**The Effects of Language on The Informativeness and Accuracy of Child Witnesses in
Kenya**

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by

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Dissertation Approval

Declaration

The content of this thesis is an outcome of my research. To the best of my knowledge, this thesis does not contain unacknowledged materials that have been presented for examination at UCT or in any other university.

Abstract

This report describes the first prospective study that we are aware of specifically designed to assess the effects of language on children's informativeness and accuracy for a staged memory event one week after it occurred. The study took place in a school which is located in rural Central Kenya where Kikuyu is the dominant home language for the locals. Hence, all seventy-six 9-15-year-old Grade five pupils who took part in the study spoke Kikuyu as their home language. They also learnt English as a subject and used it as a language of instruction and examination for all the other subjects. However, Kiswahili is taught and examined as a standalone subject. The language of the memory event was Kiswahili. Half of the participants were interviewed about the memory event in their home language (Kikuyu) while the rest were interviewed in English, an official language of the court. The children who were interviewed in Kikuyu were significantly more informative and accurate about the event than those who were interviewed in English. The findings from this study are presented together with (and supported by) reports of four studies. First, through an analysis of the legal framework supporting child witnesses in Kenya, I found that children are supported by an impressive and progressive wide-ranging legal framework, recognising both home-grown and international instruments to which Kenya is a signatory. However, there is need for studies to establish whether these special measures are well implemented, and that they achieve what they are meant to achieve. Also, from a review of case law, it emerged that important language-related concerns exist. In addition, magistrates and prosecutors reported through a survey that a significant number of child witnesses in Kenyan courts either have some challenges communicating adequately in the language of the court, or are totally unable to communicate in the language of the court. Finally, an analysis of actual court transcript of a child witnesses under examination-in chief and cross-examination presents some evidence that child witnesses in Kenya could be enduring poor interviewing practices. This thesis

provides some credible evidence that child witnesses' home language should always take precedence when questioned in court or during investigations by police interlocutors. These findings have important empirical and applied implication in the field of forensic interviewing.

Key words: forensic interviewing, child witnesses, language, informativeness, accuracy

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CHAPTER ONE

The Effects of Language on the Informativeness and Accuracy of Child Witnesses in Kenya

Today, a lot is known about forensic interviewing of child witnesses – factors that may enhance or negatively affect their effectiveness as witnesses and the reliability of their testimony (e.g., Brown & Lamb, 2022; Brown, Lewis et al., 2012; Brown, Pipe et al., 2012; Bull, 2010; Ceci & Bruck, 1995; Huang et al., 2021; Jack et al., 2012; Lamb et al., 2018; Orbach & Lamb, 2001; Poole, 2016; Pipe et al., 2007; Righarts et al., 2013; Thoresen et al., 2006; Zajac & Hayne, 2003, 2006).

Evidence from decades of research indicates a high degree of agreement among researchers and experts that children can be useful witnesses on things they have experienced, seen, or heard. However, interviewers need to be aware that children have “a special set of constraints involving basic developmental competencies, including cognitive, social, and emotional, that may constrain their effective participation” (Bruck et al., 2006, p. 777). Thus, a child witness must not be treated as “just another witness” (Brennan, 1995, p. 72). For this reason, and as knowledge on children’s capabilities and limitations in forensic contexts advanced, researchers and experts saw the need to develop interviewing guidelines to help child interlocutors make maximum use of good questioning techniques while avoiding/minimizing the use of contaminating questions (e.g., Home Office, 1992, 2001, 2011; Lamb, 1994).

Unfortunately, however, studies still showed that although useful research-informed guidelines now existed, interviewers failed to translate empirical research findings on appropriate interviewing into good practice – subjecting children to potentially contaminating interviews (e.g., Davies et al., 2000; Cederborg et al., 2000; Sternberg et al., 2001; Korkman

et al., 2006; Lamb et al., 2006; Thoresen et al., 2006). For example, Korkman and colleagues utilized interview transcripts of CSA reports in Finland between 1990 and 1998. The researchers found that 57% of interviewer utterances were inappropriate, and perhaps potentially contaminating: 31% were option-posing and 26% were suggestive utterances. Only two percent of their utterances were invitations (as will be discussed later in this thesis, invitations are open-ended prompts and have been shown to elicit more reliable information for forensic purposes, for example, see Lamb et al., 2007, for more).

This concern was also found in the study by Thoresen and colleagues which was conducted in Norway using transcripts of police interviews with children reporting sexual abuse between 1985-2002. Although the results showed a general improvement in interviewer strategies, of concern was that the use of open prompts did not improve in the period under review. However, interviewers increased their use of cued recall utterances and relied less on yes/no and option-posing utterances. A detailed discussion on interviewer utterances is available in the literature review section.

This failure by well-trained forensic interviewers to follow evidence-based guidelines caused “distress” to forensic interviewing researchers and experts (Lamb, et al., 2007, p. 1204). A lot more work, it would appear, was needed to deal with the continuing problem of poor questioning of child witnesses in legal settings. For example, a team from the National Institute of Child Health and Human Development (NICHD) in United States of America embarked on an attempt to help “translate [existing] professional recommendations into operational guidelines” (Lamb, et al., 2007, p. 1204). From their work, the NICHD Investigative Interviewing Protocol was developed (Orbach et al., 2000; Hershkowitz et al., 2014). The protocol remains the most widely researched and tested protocol and has been translated into several languages for use, for example, in Poland, Germany, Norway, Japan, Portugal, Israel, Finland, Korea, and Canada among other countries and its effectiveness

affirmed (e.g., Bull, 2010; Cyr & Lamb, 2009; La Rooy et al., 2015; Lamb et al., 2009; Noeker & Franke, 2018; Yi et al., 2016; Żurek & Szostak, 2022; see also Hershkowitz & Lamb, 2020; Ahern et al., 2014; Hershkowitz et al., 2014, for a comparison of the standard and revised protocols.). Notably, by translating the protocol into many languages, child witnesses of different nationalities, cultures, and languages benefit twice: from the use of such a professional tool, and in their home languages.

The language question in forensic interviewing is important especially in a world defined by extraordinarily advanced technological connectivity and increased global migration. Increased global migration, for example, leads to more linguistically diverse children (and adults) in the legal systems of the hosting countries. For example, there was a rise in ethnic and racial diversity in the USA from 54.9% to 61.1% between 2010 and 2020 (Jensen et al., 2021).

It is well known that cultural and linguistic diversity has long been a feature of many nations. For example, in India there are 22 official and numerous ethnic languages (e.g., Groff, 2017; Ministry of Education of India, n.d.). In my own country of Kenya, there are 42 ethnic communities, each speaking their own language (Kenya National Bureau of Statistics, 2019). In view of the foregoing, what then is the place of home languages in forensic interviewing in a multicultural, multi-ethnic setting – where the official language of the court is not the home language of the majority? Unfortunately, this question remains largely unaddressed. As Aydin and Ceci (2013) pointed out, “the cultural and linguistic influences on testimony have been largely ignored or, at best, treated implicitly” (p. 559). Does questioning children in legal settings using a dominant language that is different from their home language disadvantage them in any way? Would interviewing children in their home language improve their informativeness and accuracy? Would it enhance disclosure? So far, researchers have mainly focused on the other equally important language question: age-

appropriateness of language when interviewing child witnesses, both during the investigative stage and in the courtroom (e.g., Brennan & Brennan, 1988; Flin et al., 1989; Brennan, 1995; Davies & Seymour, 1998; Saywitz et al., 1990; Zajac, Gross, & Hayne, 2003).

My interest in the language question when interviewing children developed from my work with the Kenyan Judiciary as an instructor in a Continuing Judicial Education (CJE) course for Magistrates named “*Children and the law: nuts and bolts*” which was offered by the then Judiciary Training Institute (now Kenya Judiciary Academy). The language question emerged frequently as a weighty matter of concern in our deliberations. Magistrates reported having to deal with many cases of child witnesses who had difficulties communicating well in either English or Kiswahili. This problem, they said, was exacerbated by the reality of Kenya being a multi-ethnic, multilingual nation thus it would be commonplace to have court proceedings with court officers and child witnesses all coming from different ethnic groups. In this scenario, for example, if the child had difficulties speaking the language of the court, the testimony of the child would have to wait until a suitable interpreter was found. This occasioned delay in the hearing and determination of cases.

Equally, magistrates expressed their concerns that interpreted interviews in the Kenyan courts could be marred by errors. For instance, some narrated instances of having had to intervene in cases where they could understand the child’s mother tongue, but there was an outright misinterpretation of questions directed to the child or answers provided by the child. Unfortunately, if not corrected, errors in interpretation become the official court records. Concerns on the use and effectiveness of interpreter-mediated interviews have been raised before (e.g., Ernberg et al., 2022; Powell et al., 2016; see also Huang et al., 2021 and Koponen et al., 2024, for more).

To the best of my knowledge the language concerns raised by Kenyan magistrates remain unaddressed. I have not come across studies in Kenya that have empirically addressed the language question in our courts. Is it a major problem? How extensive is the problem? How many child witnesses are having difficulties expressing themselves effectively in the languages of the court? Would these children become better witnesses if they were to testify in their home language? What is the quality of interpreter-mediated interviews in our courts? Answers to these and many more questions are not known.

Statement of the Problem

Experts have advised that interviewers must take into consideration children's limitations and capacities when interviewing them (e.g., Bruck et al., 2006). As such, caution must be taken on, among other things, the age-appropriateness of the language used (e.g., Flin et al., 1989; Brennan, 1995; Brennan & Brennan, 1988; Davies & Seymour, 1998; Saywitz et al., 1990; Zajac, Gross, & Hayne, 2003). But there is a knowledge gap on the equally critical language question, on whether interviewing children in their home language enhances their effectiveness as witnesses and the accuracy of their testimony. As such, the effect of interviewing children in their home language versus an official (dominant) language in legal settings is largely unknown.

This knowledge gap could be leading to injustices, and since we do not know much about it, we would not be able to recognise the injustices being done. The current study, therefore, sought to establish whether asking children questions in their first language about an event they have experienced increases their informativeness and accuracy, in comparison to interviewing them in a second language. The overarching goal of my PhD research was to examine the effect of language on the content and accuracy of child witnesses accounts.

Research Questions

The following were the research questions:

1. What is the prevalence and practice of interviewing child witnesses in Kenya in their home language versus the language used in court?
2. Do child witnesses provide more details when interviewed in their home language in comparison to when they are questioned in a language of the court?
3. Are child witnesses more accurate when interviewed in their home language compared to when they are questioned in a language of the court?
4. What interviewing strategies do prosecutors and defence lawyers use when questioning child witnesses in a Kenyan court?

Summary of the Studies

In support of the overarching study goals, I conducted three studies. The first study answers question one above. Here, I sought to establish the prevalence and practice in Kenyan courts of questioning children in their first language as opposed to the use of Kiswahili or English (official languages of the court). The study was necessitated by lack of data on these trends. As previously indicated, only anecdotal evidence from magistrates exists about this practice, often considered a challenge in the Kenyan courts. This study was divided into three sections: Section one lays a foundation for the study by examining the Kenyan legal framework for special measures put in place to support child witnesses. Section two reports an analysis of case files to establish language-related concerns in child sexual abuse (CSA) cases. Finally, section three reports results from a survey of Kenyan magistrates and prosecutors on the prevalence and practice when dealing with children who have difficulties speaking or do not speak the language of the court.

Study two, answering questions two and three of the research questions, was an experimental study. Pupils from the same cultural and linguistic group experienced a memory event in a neutral language. A week later, half of them were interviewed about the memory event in their mother tongue, while the other half were interviewed in one of the languages used in Kenyan court, but which is not the primary language of the child. A comparison on 1) how much they could remember, and 2) the accuracy of what they remembered was done.

Study 3, answering question four of the research questions, is a case study investigating whether a Kenyan prosecutor and defence lawyer relied on appropriate strategies and developmentally appropriate questions in an actual court case of a child witness testifying about sexual abuse. The methods for each study are described in their respective sections, as different approaches were employed for each one.

In summary, the empirical portion of this research included research based on legal analysis of statutes, judicial precedents, and survey findings from prosecutors and magistrates. It also involved experimental interviews with children under controlled conditions, as well as an analysis of transcripts of an actual court case.

Understanding the Term “Details”

The term “*details*” is central to the current study. As used in forensic interviewing, *details* are “words or phrases identifying or describing individuals, objects, actions or events related to the investigated incident” For example, “He has been mean to me” has three details (Hershkowitz, et al., 2012, p. 614). Details are central when they are critical in helping us understand the incident under focus (memory event). They are “about the actions and events themselves” (Lamb et al., 2003, p. 1021). That is, their absence will make the narration of the memory event lose meaning. Peripheral details are related to the incident, but they are not very important in helping us understand the plot. Their omission will have no

effect on the plot (e.g., Cyr & Lamb, 2009). Peripheral details include, for example, “appearance, dress, and personal characteristics” (Lamb et al., 2003, p. 1022). However, both central and peripheral details are of forensic relevance. A child reporting sexual abuse might say, “He was wearing a green jacket and had a long beard. He pushed me on the bed and put his finger in my vagina.” “He” represents the perpetrator, and the act of inserting a finger in the vagina are details describing sexual abuse. These details are central in defining sexual abuse. Without them, it is not easy to identify who the abuser is and what it is that he allegedly did. On the other hand, his green jacket and long beard are important identifying details but on their own, they do not help us understand what really happened and who did it. As such, they are peripheral details.

Notably, details provided by the child during the investigation stage form a major portion of the charges drawn by investigators for prosecution, especially in CSA cases where there may be no witnesses or corroborating physical evidence. Equally important, is that details provided by the child in court can contribute significantly to the final decision arrived at by the magistrate or the judge.

In the next section, literature relevant to child witnesses and the use of language in forensic contexts is reviewed. Efforts are made to contextualize available research findings to the Kenyan situation.

CHAPTER TWO

Literature Review

Language use in Forensic Interviewing

The language question in forensic interviewing is important, and yet complex. As indicated in the previous chapter, researchers in this area mainly focus on the age-appropriateness of interviewers' strategies when dealing with child witnesses. As such, not much is known about the use of home language versus other dominant languages in linguistically diverse legal settings (e.g., Aydin & Ceci, 2013). Nonetheless, the debate on the use of a dominant language by minorities in a multilingual culture, especially in relation to children's success in education, is not new. Although not directly related to the field of forensic interviewing, interviewers working in multilingual settings can benefit from these debates. Examples of some of the questions that have been asked by language, education, and developmental specialists include: Is there a relationship between proficiency in the first language (L1) and success in acquiring a second language (L2)? Does being able to speak L2 mean a sufficient degree of proficiency in it (for example, to understand proceedings in a forensic interview or for academic success?). Is there an age threshold for successfully acquiring L2? What duration of time is needed for minority children to master L2 to adequately benefit from education in school? Is there a level of proficiency required in both L1 and L2 for the minority students to succeed academically? (e.g., Chang & Sakai, 1993; Collier, 1989; Cummins, 1981; California Office of Bilingual Bicultural Education, 1981; Mclaughlin, 1992).

Parallels can be drawn and lessons shared between the outcomes of these debates and the language debate in forensic interviewing of child witnesses. Indeed, over the years, researchers have continued to offer more practical recommendations on the question of language and academic success. For instance, the use of first language in primary school

education has been associated with higher literacy rates and better learning (UNESCO, 2007), because children who receive instruction in their first language are more likely to enrol and succeed in school (Kosonen, 2005). Also, children in rural areas who are not exposed much to a dominant language are likely to stay in school longer and not to repeat classes as often as their counterparts (Hovens, 2002; UNESCO, 2005). Advantages attributable to the use of home language in academic success have been demonstrated in more recent studies. For example, it has been said that both acquiring and subsequent retrieval of information in a language different from one's home language comes with a "cognitive cost", resulting in a 9.5% loss in grade points in school examinations (Bernhofer & Tonin, 2022, p. 2). Similarly, in a study in India on education language policies, researchers demonstrated that students from linguistically mismatched districts – where the official language of instruction was different from the local people's mother tongue – returned low literacy rates and reduced college graduation rates (Jain, 2017). Also, in Latvia, evidence pointed to a significant decline in exam performance of children in publicly funded minority schools after the 2004 policy change in language of instruction use from only Russian (home language) to the 60/40 Latvian/Russian rule (Ivlevs & King, 2014). In support of the pivotal role played by home languages in children's academic success, the National Association for the Education of Young Children (NAEYC) (1995) made the following declaration on language use in multilingual settings:

For the optimal development and learning of all children, educators must accept the legitimacy of children's home language, respect (hold in high regard) and value (esteem, appreciate) the home culture, and promote and encourage the active involvement and support of all families, including extended and non-traditional family units (NAEYC, 1995, p. 2).

With this kind of knowledge in mind, some researchers and experts in forensic interviewing have recommended that child (and adult) witnesses in linguistically diverse situations should be questioned in a language of their preference, because “culture stands prominently as a factor in all cases in which children are considering disclosing or being asked to disclose” (Fontes & Plummer, 2010, P. 513). Indeed, “children are emotionally, cognitively and linguistically connected to the language and culture of their home” (NAEYC, 1995, p. 3), hence we should consider the consequences of having them communicate in some language other than the one they learned at home (Pérez, 2004). Culture has been defined as “that complex whole which includes knowledge, belief, art, morality, law, customs, and any other capabilities and habits acquired by ...a member of society” (Tylor, 1889, p. 13). Indeed, Maugham (1984) described the significance of culture in great detail as follows:

Men and women are not only themselves; they are also the region in which they were born, the city apartment or the farm in which learnt to walk, the games they played as children, the old wives’ tales they overheard, the food they ate, the schools they attended, the sports they followed, the poets they read, and the God they believed in. It is all these things that have made them what they are, and these are the things that you can’t come to know by hearsay” (Maugham, 1984, pp. 8-9).

What is clear is that language is a key enabler of human interactions, without which “cultures would not be possible” (Chalfant & Labeff, 1988, p. 35).

In line with this observation, the arguments above, that a child should be given an opportunity to testify in their language of preference, are supported by observations by practitioners in forensic interviewing. For example, Fontes and Tishelman (2016) carried out a qualitative study, where child forensic interviewers and directors from child advocacy centres in the United States of America narrated their experiences from interviews with children and families whose English is not their mother tongue. There was an agreement, for

instance, that it is important for children reporting sexual abuse to testify in their mother tongue. In their own words, the practitioners observed:

“I think a child needs to communicate in the language where the child feels the most comfortable. . . There’s nothing like the genuine words out of a child’s mouth.”

“Once they get to the traumatic part or the part that’s hard to say, they want to revert to their native language.”

“You have a lot of kids who speak Spanish in the home, and they come to school, and they speak Spanish and English and so when it comes to an interview, I need to find out what that child feels most comfortable speaking. . . because they’re going to resort back to what they feel most comfortable in... especially when you start going into a traumatic experience” (Fontes & Tishelman, 2016, p. 54).

Acts of child sexual abuse (CSA) are often carried out in secret, have no eye witnesses, or corroborative evidence to support the claims. This complicates their investigation and prosecution since the child may be the only source of information to start and hopefully sustain the criminal case (e.g., Malloy, et al., 2011).

In addition, in the study by Fontes and Tishelman above, one of the practitioners recalled a case of a Spanish-speaking child (and family) who could not speak the English language hence was mistakenly labelled as “uncooperative” by law enforcement and prosecution officers:

Law enforcement and prosecution were saying that this family was being completely non-cooperative and child protection was saying, “No, they aren’t. They’re very cooperative but they’re not understanding what you’re saying to them even if they’re nodding their heads and saying, ‘yes.’ The outcome of that conversation was that the child protective worker. . .served as the interpreter and then the case moved along

beautifully...That was another one of those ones where there were some real assumptions made (Fontes & Tishelman, 2016, p. 54).

The above reports indicate that the performance (e.g., informativeness and accuracy) of children (and adults) in forensic contexts may be linked to the use of first language. As such, apart from targeted studies in this area, there is need for increased structured conversations among experts and researchers in the fields of developmental science, forensic interviewing, and language studies. Like educators, forensic interviewers need to “accept the legitimacy of children’s home language” in forensic contexts (NAEYC, 1995, p. 2).

Age Appropriateness of Language in Court

All languages boast of syntactical and semantical complexity, a capacity which children may not have achieved depending on their age. Hence, the question of age-appropriateness applies to both primary and dominant languages in any setting. Child witnesses should be shielded from all manner “of punitive linguistic strategies” by interlocutors, prosecutors, and defence lawyers (Brennan, 1995, p. 71). Using actual court transcripts, researchers have investigated strategies employed by interviewers when questioning children in court, especially by defence lawyers (e.g., Zajac et al., 2003; Davies & Seymour, 1998; Zajac & Hayne, 2003, 2006; see also Brennan, 1995; Brennan & Brennan, 1988, for more).

Other researchers have used laboratory experiments to assess children’s linguistic capacities as evidenced in their knowledge of legal terminology and language used in court proceedings (e.g., Saywitz et al., 1990; Flin et al., 1989). Saywitz and colleagues found age-related trends in children’s ability to accurately define some of the commonly used words with child witnesses in court. For example, none of the child in the kindergarteners (K) category (mean age was 5 years, 10 months), understood words like “witness”, “jury”, “case”, “sworn”, “date” and “deny” among others. Again, none of the Grade three pupils

(mean age was 8 years, 8 months) understood words like “oath” and few of them correctly defined “deny”, “attorney”, and “jury” while many demonstrated an understanding of words like “difference”, “duty” and “testify”, words which the kindergarteners found difficult to understand (Saywitz et al., 1990).

Another study examined the knowledge of legal terms in children aged six, eight and 10 years. There was a main effect for age, and a post hoc test showed a strong developmental trend in children’s performance. Some words like “policeman,” “rule,” “truth,” and “promise” were well-known even to the youngest. However, an age-related trend in children’s understanding of common words and phrases like “court,” “law,” “break the law,” “prosecute,” “going to court,” “guilty,” “trial,” “evidence,” “witness,” and “jury” was evident (Flin et al., 1989).

Evidently, the language concern is not limited to just about what language is being used (primary or otherwise), but also about whether it is child-friendly – avoiding complex vocabulary and grammatically confusing elements. This is evident from the results of the studies mentioned above, which were conducted with children of European and American descent who use English as their home language. Therefore, when interviewing children in court, Myers (1987, p. 805) recommends that:

Questions must be phrased in language the child understands. Use of legal terminology and other big words should be assiduously avoided. This is not to say that the examiner resorts to childlike language. Rather, a conscious effort is made to propound questions in language that is familiar to the child. Eschewing lawyer talk, however, is easier said than done. Words which are completely foreign to a child and to many adults are second nature to the attorney, and it strikes many lawyers as odd when a witness fails to understand such “simple” terms as “alleged,” “document,” “case,” or “on or about.”

Until counsel gains experience examining children, conscious effort is needed to avoid legalese.

Study three (case study) in this thesis is an analysis of the strategy and language used by lawyers when questioning a child witness in a Kenyan court.

Language of Instruction and Education Policies in Kenya

Kenya is a multilingual society, with a population of over 47 million persons, and a total of 42 ethnic communities (Kenya National Bureau of Statistics, 2019). Each of these ethnic communities speaks their own native language (including the Swahili people who live predominantly along the Kenyan Indian ocean coast and speak Kiswahili as their mother tongue). Kiswahili is also the lingua franca in Kenya. The World Bank estimated that in 2021, 72% of Kenyans were living in rural areas (World Bank, n.d.). This means that the majority of Kenyan children grow up in rural areas speaking the languages of their people – their mother tongues. Is this fact reflected in the Kenyan education policies in reference to language(s) used to teach and examine students?

Language of instruction is stipulated in the Basic Education Curriculum Framework (2017). The policy requires that a child should join school at the pre-primary level at the age of 4 years (for 2 years), and “the medium of instruction is the language of the catchment area” (p. 32). At the age of 6, the child joins the lower primary school level in Grade 1. Here, home languages are officially dropped in favour of English and Kiswahili. Learners who are deaf can be taught the Kenyan sign language as an alternative to Kiswahili. At 9 years of age, the child joins upper primary in the fourth grade. At this level, indigenous languages are re-introduced but as an optional course, a trend that is maintained in junior school (from Grade 7). English and Kiswahili are taught and examined as the subject. However, all the other

subjects are taught and examined using English. The policy elevates English over Kiswahili and indigenous languages, thus:

English is the main language of education, information, trade, diplomacy and social networking. It is an official language in Kenya but most importantly, the medium of instruction in schools from Grade Four. English is the key to the realisation of the National Goals of Education, the link to the global community and the door to the worldwide information network (Basic Education Curriculum Framework, 2019, p. 41).

Attributing this kind of “ability” to a single language in a society like Kenya where tens of languages are spoken by her people is utterly mistaken, and a “long-standing fallacy” (Benson & Kosonen, 2013, p. 2). Based on this *fallacy*, Benson and colleague argued that millions of people around the world have been alienated and disadvantaged by being forced to acquire an education or even made to teach using a language in which they are not proficient.

Sadly, about 40% of the world’s population are victims of this fallacy (UNESCO, 2022). According to Article 53(1)(b) of the Constitution of Kenya (2010), “every child has the right to free and compulsory basic education” (p. 62). Kenya has a total net primary education enrolment rate of 81.23% and a completion rate of 71.4% for both sexes (United States Agency for International Development (USAID) (n.d.)). The question that follows is whether these Kenyan learners are achieving levels of competence that one would consider acceptable. A study was recently carried out in Kenya that involved progressive testing of children’s ability to read letters, words, paragraphs, stories, and finally testing if the child would correctly answer a question from the story they have successfully read. Grading was done at each level, and the child would only proceed to the next level if they successfully undertook the task at hand. The researchers found out that only two in five learners in Grade

4 could successfully read a Grade 3 appropriate English text. Girls performed better with 43 in a 100 while 38 in a 100 boys at least met those expectations. Equally, five in 10 learners at least met expectations in solving a Grade 3 appropriate numeracy problem, with girls enjoying a marginal advantage (Uwezo, 2021). These results continue to confirm what other experts in education have said before – that most Kenyan pupils have not been attaining adequate proficiency in English by the time they are transitioning to the next class (e.g., Bunyi, 2008; Gathumbi, 2008; Sure & Ogechi, 2009). This is concerning. If only 40% of learners in Grade 4 can read a Grade 3 appropriate English text, then there are genuine concerns about the level of learning in all the other subjects that are taught using English. Thus, the question of the effect of using the English language as the official language of instruction on access to education by Kenyan children is valid. This concern can be extended from outside of the classroom to other settings that use English as the main language of communication. For example, are child complainants disadvantaged in any way when English is the predominant language in court proceedings?

Legislation and Language use in Forensic Contexts

Interviewing children in their first language is a subject of legislation in some countries. For example, in Scotland, when the child's first language is not English, the Guidance on Joint Investigative Interviewing of Child Witnesses in Scotland (2011) s. 169 states:

A child should, whenever possible, be *interviewed in their first language* (or, if bilingual, the one of their preference). *Only in special circumstances*, i.e., where an interpreter is not available and there is an immediate need to talk to the child, should an exception be made.... Interviewers should be aware that some children who use English every day, for example at school, *may revert to using their native language for certain terms, e.g., parts of the body* – emphasis added.

This kind of express legal allowance has not been legislated for in Kenya. However, the law in s. 222(4) of the Children Act (2022) provides for an interpreter for an accused child, if needed. S. 235(e) guarantees “free assistance of an interpreter if the child cannot understand or speak the language in which the proceedings are conducted” (p. 589). In addition, s. 233 requires a child offender to be told of their rights “in a language that the child understands” (p. 588). It is worth noting that there are no similar express provisions and guarantees for child complainants and witnesses, but the above provisions are assumed.

Informativeness and Accuracy of Children’s Testimony

Assessing the accuracy of allegations made by a witness in the absence of independent evidence is impractical. That is why field studies which use actual interview transcripts from court proceedings or police investigations do not directly focus on the accuracy concern. But accuracy can be tested in controlled studies. Nevertheless, researchers have looked at some of the factors that could negatively affect child witnesses’ accounts. These factors are discussed next.

Questioning Strategy

Researchers and experts in forensic interviewing agree that the questioning strategies used by interviewers could affect both the informativeness and reliability of the testimony given by child (and adult) witnesses. Reliability has to do with “the accuracy of the report” while credibility is about “the believability that one assigns to a witness's testimony” (Bruck et al., 1998, p. 143). For example, open-ended prompts are likely to elicit more detailed, longer, and more accurate responses than closed questions (e.g., Goodman et al., 1991; Oates & Shrimpton, 1991; Lamb et al., 1996; Orbach & Lamb, 2001; Lamb & Fauchier, 2001; Lamb et al., 2002). In addition, cued invitations help to elicit more information if free recall fails to capture enough details for forensic use (e.g., Lamb et al., 2007). Hence, there is a general agreement among experts that child interviewers should rely more on invitations (free recall)

(e.g., ‘Tell me everything that happened’) before turning to directive utterances. Directive utterances use aspects of the information already given by a child about the alleged incident to try and obtain more details using focused questions. For example, if the child mentioned a jacket, the interviewer may ask, ‘What colour was his shirt?’ (Sternberg et al., 2001a, p. 999), or “Where did he touch you?” (When the child has described been touched by a male) (Lamb et al., 2007, p. 1206). Option-posing questions (mostly yes-no questions) should be used sparingly and only if necessary. Option-posing questions “focuses the child’s attention on aspects or details not previously mentioned, requiring confirmation, negation, or selection of an interviewer-given option.” For example, “Did it hurt?” “Were your clothes on when that happened?” “Did he touch you over or under your clothes?” (Lamb et al., 2007, p. 1206). The use of suggestive questions, interviewer prompts “that assumes information not disclosed by the child or implies that a particular response is expected” for example, “Did it hurt when he put his finger in you?” (When the child has not mentioned digital penetration), or “He wanted you to kiss him, didn’t he?” (Lamb et al., 2007, p. 1206), is highly discouraged.

Unfortunately, as earlier indicated, several studies have reported that interviewers engage in potentially contaminating interviews with child witnesses (e.g., Davies et al., 2000; Cederborg et al., 2000; Korkman et al., 2006).

The concern of questioning strategies is not limited to interviews carried out during the investigation phase but extends to interviews done in court (both direct and cross-examinations). For this reason, researchers, while utilising actual court transcripts (e.g., Brennan & Brennan, 1988; Davies & Seymour, 1998; Zajac et al., 2003; Zajac & Cannan, 2009) or laboratory analogue studies (e.g., Righarts et al., 2013; Righarts et al., 2014; Zajac & Hayne, 2003, 2006) have especially focused on the questioning strategies employed by defence lawyers. In the above field studies, overall, defence lawyers relied more on leading and credibility-challenging questions, and complex vocabulary and syntax during cross-

examinations, all of which are considered inappropriate. Also, the response of children to defence lawyers' questions concerned the researchers too. Zajac et al. (2003) reported that over 75% of the children responded to defence lawyers' complex, leading, and grammatically confusing questions by changing at least one part of their initial testimony. The children also complied with leading questions and did not ask for clarification despite being asked complex and grammatically confusing questions.

Similar studies are needed in Kenya. This is because the Evidence Act (2012), which guides examination of witnesses in court, expressly permits the use of interviewing strategies during cross-examination that have long been considered contaminating. First, s. 151(1) allows the use of leading questions, which are defined by s. 149 as "any question suggesting the answer which the person putting it wishes or expects to receive or suggesting a disputed fact as to which the witness is to testify". In fact, the Act does not entirely condemn the use of leading questions during examination-in-chief. S. 150(1) states that "Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief or in a re-examination, except with the permission of the Court". Does this imply that leading questions can be used by prosecutors if no objections are raised by the defence? Second, s. 154 allows for the use of credibility-challenging questions on a witness. It states in part that the aim of cross-examining the credibility of the witness is "to test his accuracy, veracity or credibility...to shake his credit, by injuring his character" (p. 49). For example, "I don't think that's what really happened." (Zajac et al., 2003, p.202). These utterances might only serve in "distort[ing] children's testimony rather than facilitat[ing] it" (Zajac & Hayne, 2006, p.4). Nevertheless, the extent to which some of these interviewing strategies (anchored in the Kenyan law) are utilised and their possible effects on the child witnesses are fertile grounds for research.

Delay

Delay between the time the event under focus took place and when children are interviewed not only reduces children's informativeness (e.g., Salmon & Pipe, 2000; Lamb et al., 2000; Baker-Ward et al., 1993; Brown, Lewis et al., 2012; Poole & White, 1993), but it also increases the likelihood of error (e.g., Salmon & Pipe, 2000; Hudson & Fivush., 1991; Poole & White, 1993). In addition, delay causes children to be more prone to suggestion (e.g., Ceci & Bruck, 1995; Marche, 1999). The negative effects of delay apply to all children, whether normally developing or otherwise (e.g., Agnew & Powell, 2004; Brown, Lewis et al., 2012). In the comparative study by Brown and others (2012), all children (Children with Moderate Intellectual (or learning) Disorders (CWID), Mild CWID, Mental Age-matched, and Chronological Age-matched) remembered less after a longer delay. Children were 86% accurate after a shorter delay of one week and 74% accurate after a longer delay of six months. Children in the Chronological Age-match group (CA) were generally more accurate than those in the other categories. Children in the Moderate CWID category scored the least on accuracy. But all children were found to be informative when their limitations were considered, and appropriate interviewing strategies used.

In view of these findings, researchers and experts argue that children should be interviewed at the earliest opportunity after they report abuse (e.g., Lamb et al., 1994). However, there are a few challenges which could lead to delays. For example, is the child able to report abuse when it occurs (e.g., considering factors like age, threats, and disability)? If the child does not report abuse for whatever reasons, are there signs to prompt a parent or caregiver suspect that the child could be a victim of abuse? Are matters involving child witnesses expedited? In Kenya, s. 235 (c) of The Children Act (2022) requires matters involving a child accused of an offence to be determined without delay. However, this act does not extend the same provision to child complainants.

There are reasons known to cause delay in CSA cases in Kenya, including 1) delays in reporting abuse, 2) the time taken to investigate, arrest, and arraign in court, 3) lengthy preliminary court processes, including requests for adjournment by the defendant to be able to acquire prosecution witness statements, 4) a busy court diary – although in principle CSA cases are required to be prioritised, 5) cases of lack of financial resources by the parents/guardians of the complainant to pay for their travel and that of their witnesses; sometimes prompting the court to intervene by providing witness expenses in extreme cases, 6) out-of-court settlement attempts by families of both the defendant and complainant – a matter which is unlawful in Kenya, 7) shortage of prosecutors, as witnessed in study 3 of this thesis, and 8) adjournments sought by lawyers and granted by courts.

Repeated Interviews in Legal Settings

The third concern in the accuracy and informativeness question is what happens when a child witness is subjected to multiple interviews in legal contexts. A number of informative field studies addressing this question exist (Hershkowitz & Turner, 2007; Orbach et al., 2012; Hershkowitz et al., 1998; Cederborg et al., 2008; La Rooy & Lamb, 2011). Researchers have often differentiated between when children remember new details across interviews (reminiscence) and when they remember more details across interviews (hypermnnesia). For example, Orbach and colleagues (2012) examined for new, consistent, and contradictory details in a case study where a child aged 9 years had undergone six investigative interviews after witnessing her sister's abduction. The interviews had been conducted over a duration of about four months. There was a notable increase in the child's informativeness (especially in the first three interviews). For example, of the total number of details obtained from the child, an increase from 15% to 23% to 30% from the first to the third interviews respectively was noted. With regard to new details, from the total of 26% provided in the first interview, an

increase to 28% and 31% in the second and third interviews respectively was reported. Also, concerning central details, an increase from 15% to 23% to 27% from the first to third interviews respectively was recorded. Thirty-five percent of the total central details were obtained from the first interview. The child gave 27% more new central details in the second and another 27% in the third interview. Did the child contradict himself across interviews? Interviews 2-6 yielded 809 new details, of which only 4 (0.2%) were considered contradicting and only one of these details was central. Still in yet another study, children provided many new details in the repeat interview (24%), with central details being more (14.10%) than peripheral details (9.45%) (Hershkowitz & Turner, 2007).

It is worth noting that even though multiple interviews may be helpful in legal contexts, there are other factors that call for close attention. First, is the timing of the initial interview after the child reports abuse. As earlier said, this should be done soonest after a report is made to reduce the possibility of error, shield the child from suggestion, and increase the chance that they will provide more useful information (e.g., Lamb et al., 2000; Salmon & Pipe, 2000; Brown, Lewis et al., 2012; Ceci & Bruck, 1995). Second, lengthy delays between the first and subsequent interviews should also be avoided because errors are likely to increase and effects of forgetting felt (e.g., Peterson et al., 2001).

Equally important, is that interviewers need to be consistent in the quality of the interviewing strategy they employ across these interviews. By significantly relying on open-ended utterances, they increase the possibility of children's accuracy and informativeness (e.g., Orbach & Lamb, 2001; Lamb et al., 2007; Hershkowitz et al., 2012). Evidence from field studies indicate that when open prompts are initially used to interview children, they do not contradict themselves in subsequent interviews on the same topic (e.g., Orbach & Lamb, 2001; Lamb & Fauchier, 2001). In the study by Lamb and Fauchier (2001), open-ended

prompts did not elicit any contradictions while suggestive prompts elicited the highest number of contradictions, emerging as the “most problematic eliciting utterance” (p. 488).

The findings by Orbach and Lamb (2001) could easily be termed as “distressing”. The child reporting sexual abuse was aged 5 years. She was interviewed by a psychologist who was investigating reports of CSA in a family day care home. The psychologist significantly relied on contaminating questions – 30.89% suggestive and 43.98% option-posing prompts. In return, these prompts yielded 73.61% of the total details provided by the child. These researchers also revealed that 94% of the contradicting details had been obtained using suggestive and option-posing prompts. Unfortunately, nearly all of these details (98%) were central. Notably, open-ended invitations did not yield any contradictory details.

The Language of the Court in Kenya

Kenya is an ethnically and linguistically diverse country. However, Cap 2(7)(1) of the Constitution designates Kiswahili to be the national language, and both English and Kiswahili to be the official languages. It is worth noting that the two languages are spoken and taught as second languages in Kenya (Roy-Campbell, 2015; Amidu, 1995). English and Kiswahili are the languages of the court according to s. 34 of the High Court (Organization and Administration) Act (2015) and s. 33 of the Court of Appeal (Organization and Administration) Act (2015). The Magistrates’ Courts Act (2015) is silent on the language(s) to be used in Court. Nevertheless, this (language of subordinate courts) is provided for as either English or Kiswahili in s. 198(4) of the Criminal Procedure Code (CPC) (1989). There is no mention of language in the Supreme Court Act (2011). Charges in Kenyan courts are drawn and records kept in English. If a child witness does not speak either Kiswahili or English, the court appoints an interpreter – most likely a court assistant familiar with the language. Part of the court assistant’s duties and responsibilities is “interpreting court

proceedings”, hence court assistants are required to possess a “good command in (sic) English and Kiswahili” (Judicial Service Commission, 2021).

Summary of Literature

Evidence show that the use of age-inappropriate language when dealing with child witnesses is commonplace, especially during cross-examination. These strategies include the use of complex legal and non-legal terminology, sentences containing grammatically confusing elements, and the use of credibility-challenging language among others. The effect of undesirable strategies such as these has been studied in empirical research. For example, children may simply comply with bad questions (e.g., Zajac & Cannan, 2009), lowering the usefulness of their answers.

On the other hand, however, we do not know much about the other equally crucial language concern in legal settings: the use of dominant languages versus home languages with child witnesses living in multiracial, multi-ethnic, multilingual settings. Would children become better witnesses if questioned in their home languages? To the best of my knowledge, no comparison for performance (e.g., for accuracy, informativeness, disclosure etc.) has been made between dominant versus home languages either in laboratory or field studies. Nevertheless, a few qualitative reports from forensic interviewers exist. For example, forensic interviewers in the United States of America acknowledged facing language-related challenges when interviewing minority children, who often revert to their native languages when reporting traumatic events (Fontes & Tishelman, 2016). This means that such children prefer providing central details about the cases under investigation in their mother tongues.

It is for such reasons that some countries have identified the use of dominant languages in legal settings with minority children as a potentially problematic area (e.g., in Scotland, as contained in s. 169 of the Guidance on Joint Investigative Interviewing of Child

Witnesses in Scotland, 2011). As a result, they have put in place express laws requiring that a child's home language, whenever possible, be given priority. This legal support is assumed in Kenya, with the provision of an interpreter expressly provided for.

Importantly, findings from studies in the field of education have clearly shown that there is a *cognitive cost* to bear for children who study using a dominant language that is not their home language (e.g., Jain, 2017; Ivlevs & King, 2014). This could have an implication on the interviewing of children in legal settings where important topics such as mental processes (e.g., memory, recall, language use etc.) are central in the science of forensic interviewing. To be effective witnesses, children are expected to remember and clearly narrate their experiences in a language that they are most comfortable.

CHAPTER THREE

Methods and Results

As previously indicated, the current thesis reports several studies utilizing different methods. In this chapter, these methods are described in the corresponding sections. Also, to ensure that the work flows logically, methods, results and discussion for each study are presented together. The following is a brief restatement of the studies as they appear in the current chapter.

Study one is the foundation upon which this work sits, and answers question one of the research questions: what is the prevalence and practice of interviewing child witnesses in Kenya in their home language versus the language used in court? The study comprises three parts: 1) analysis of the Kenyan legal framework for special measures put in place to support child witnesses, 2) analysis of case files for language-related concerns, and 3) survey of magistrates and prosecutors on their experience, practice and opinion on the language issue.

Study two is an experimental study. It answers questions two and three of the research questions: 1) do child witnesses provide more details when interviewed in their home language in comparison to when they are questioned in a language of the court? and, 2) are child witnesses more accurate when interviewed in their home language compared to when they are questioned in a language of the court?

Study three is a case study and answers question four of the research questions: what interviewing strategies do state counsels and defence lawyers use when questioning child witnesses in a Kenyan court?

Study one: Prevalence and Practice

What is the prevalence and practice when interviewing child witnesses in Kenya in their home language versus a language of the court? This question is answered in three parts guided by the questions below:

1. What kind of legal facilitation is available for child witnesses in Kenya when giving their evidence in court?
2. Are there language-related concerns in CSA case files in Kenya?
3. What is the experience, practice and opinion of magistrates and prosecutors regarding interviews with child witnesses who do not speak/have difficulties speaking the language of the court?

Section one: Legal Framework

What kind of legal facilitation is available for child witnesses in Kenya when giving their evidence in court?

Evidentiary Rules

Here, I interrogate specific express Kenyan laws that spell out the safeguards meant to protect the dignity of child witnesses and to enhance fairness in the process of obtaining evidence. Some of these measures are discussed below as part of the attempt to discuss the legal framework under which child witnesses operate in Kenya.

Examination

S. 145 of the Evidence Act (2012) defines three levels of examination for witnesses in court: examination-in-chief, cross-examination, and re-examination. In view of this, a child witness gets their share of what Spencer (2012, p. 9) refers to as an “adversarial package”: appear in court in the presence of the defendant, witness-in-chief, and be cross-examined. Although the right to cross-examine is fundamental in an adversarial system, it has long been labelled an “adversarial combat” (Brennan, 1995, p. 88) and “a mental duel between the counsel and the witness” (Wellman, 1903, p. 25). But how fair would a mental contest between a lawyer and a child witness be? Brennan argued that it is at cross-examination “where the interests and rights of the child are most likely to be ignored and sacrificed” (1995, p.73). He described it as a game of “control of narrative” (p. 88), where words are the “major currency” (p. 73). Hence, whomever succeeds in validating their story by discrediting the story of the opponent wins. Unfortunately, in this battle of words between the defence counsel and a child, the child stands disadvantaged.

Even though the defence has the right to cross-examine, the witness too has the right to testify without being intimidated or disadvantaged in any way. To achieve this equilibrium,

it is argued here that the extensive and growing knowledge on child development – the capacities and limitations of children, should form an integral part of training and practice of legal practitioners (both bar and bench) working with children in the justice system. This would, perhaps, inculcate a culture of deliberate restraint on defence lawyers from using “language as an instrument of confusion and power” (Brennan, 1995, p. 73). It would also guarantee the child of the much-needed court’s intervention when lawyers use inappropriate questioning strategies.

As earlier indicated, there is a need to establish the quality of examinations that the child witnesses are subjected to by both the prosecution and defence lawyers in Kenyan courts. This will only be possible once the courts are fully digitised to enable audio and video recording of the proceedings. In one such endeavour, nevertheless, study three of this thesis presents an analysis of an audio recording of a real court case involving a child witness reporting sexual abuse. On being recorded for the purpose of this study, the case became the only one we know about in Kenya.

Corroboration Requirement

S. 124 of the Evidence Act (2012) specifically addresses the evidence of children in court. It categorically requires that all evidence from children in criminal matters be corroborated without which “the accused shall not be liable to be convicted on such evidence” (p. 44). However, the proviso to the same section abolishes the corroboration requirement for children reporting sexual abuse, where the only witness is the victim, thus:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court

is satisfied that the alleged victim is telling the truth (Evidence Act 2012, s.124, p. 44).

Here, by declaring that corroborative evidence is not a compulsory consideration in CSA cases, the law gives presiding magistrates a “blank slate” to make a determination based primarily on the strength of the testimony of the child reporting abuse. This is a very important piece of legislation because in sexual abuse cases it is typical for forensic evidence and reliable witnesses to be absent (e.g., Goodman et al., 1999; Howe & Knott, 2015). With this measure in place, however, the focus must shift to the strategies employed by interviewers to obtain information from children. We know, as earlier stated, that interviewing strategies can affect the credibility of the testimony obtained from child witnesses. What is disconcerting though is that child witnesses, especially those reporting abuse, face multiple interviews (by parents/family, medical officer, police, social worker, prosecutor; and defence lawyer/unrepresented defendant). Experts have long cautioned against the “baleful effects” associated with repeated questioning (e.g., Ceci & Bruck, 1995, p. 108). However, as discussed in a different section in this thesis (on the factors that could interfere with the informativeness and accuracy of child witnesses), where multiple interviews are necessary, interviewers are advised to inform the child beforehand and to strictly observe best interviewing strategies.

Competence to Testify

S. 125 (1) of the Evidence Act (2012) states that “all persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years” (p. 44). This makes it a right for all competent child witnesses to testify in court. However, the phrase “unless the court considers” introduces a potential threat to this right. How? The stipulations of both s. 125(1) of the Evidence Act (2012) and s.19(1) of the Oaths and Statutory

Declarations Act (2012) together create *voir dire*. *Voir dire* is “the preliminary examination which the court may make of one presented as a witness or juror, where his competency, interest, etc., is objected to” (“*Voir dire*”, n.d.). However, there is lack of clarity and/or outright disregard of the law by the courts on the purpose of *voir dire*, to whom it is to be subjected, and its content.

What is the Purpose of Voir Dire? As applied in Kenya, *voir dire* test is to be conducted at two levels. S. 125 (1) of the Evidence Act (2012) introduces a competency to testify test – check if the child can understand the questions asked or give useful answers during criminal proceedings. Then, s. 19(1) of Oaths and Statutory Declarations Act (2012) introduces the competency to take the oath test – check if the child appreciates solemnity of oath. This means that if the child “fails” the competency test, then they must be deemed to have automatically “failed” the solemnity of oath test. The reverse is not true. If a “witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath” (Oaths and Statutory Declarations Act, s.19(1), p. 7). Thus, there is room for unsworn evidence. However, the purpose of *voir dire* appears not to be universally held in the Kenyan courts, with emphasis being laid only on either of the two of its objectives (e.g., Alfred Kibet Korir v Republic [2014] eKLR; John Wanjohi Kabau v Republic [2015] eKLR).

Upon Whom is Voir Dire to be Subjected? The two pieces of legislation cited earlier (S. 125 (1) of the Evidence Act and s. 19(1) of Oaths and Statutory Declarations Act) refer to a “child of tender years”, described as “a child under the age of ten years” in the repealed Children Act (2001, p. 10). This is missing in the Children Act (2022). What we have now is a general description of a child as “an individual who has not attained the age of eighteen years” (p. 430). Removal of the term “child of tender years” could further complicate matters. Why? This is because, even with an express definition in the now repealed Children Act,

inconsistencies in the provisions of the law and its practice regarding this definition were rife. For example, in *Gamaldene Abdi Abdirahman & Another v Republic* [2013] eKLR, the appeal was successful since the history court did not, among other reasons, administer a *voir dire* examination to a witness aged 13 years. Even after the State Counsel argued on the clarity of the definition of “child of tender years” in the Children Act, the court still referred to a judicial precedent in *Kibangeny Arap Kolil v Republic* [1959] EA 92 that set “tender age” at 14 years. Similarly, in appeal case *J G K v Republic* [2015] eKLR, a 17-year-old child had testified without taking a *voir dire* examination. The High Court faulted the subordinate court for it arguing that “so long as the witness was below 18 years as in the present case, she was a child and a *voir dire* examination was necessary” (p. 4). In a sharp contrast, in *M K v Republic* [2015] eKLR, the Court contended that a 15-year-old witness did not require a *voir dire* examination.

These inconsistencies emanating from superior courts could have been a source of injustices to child witnesses. Without an empirical interrogation into the extent of these glaring discrepancies in the provisions of the law as expressly provided for and pronouncements in judicial precedents, the problem remains largely unknown.

In some jurisdictions in the Commonwealth, there seems to be more clarity on the age question. Kenya, and some other members of the commonwealth (nations who share a common history of being subjects of the British Empire), share similarities in their legal systems. Section 53(1) of the Youth Justice and Criminal Evidence Act (1999) in the United Kingdom grants that “at every stage in criminal proceedings all persons are (whatever their age) competent to give evidence” (p. 43). But if doubts arise about the competency of the witness, *voir dire* examination is to be carried out. However, the Act defines the age at which a witness must take oath as 14 years and grants for further examinations if doubt arises about the witness’s capacity to appreciate the solemnity of oath. In New Zealand. S. 77(1) the

Evidence Act (2006) requires that witnesses “over the age of 12 years must take an oath or make an affirmation before giving evidence” (p. 60). The judge is only required by s. 77(2)(a) to inform witnesses aged below 12 years “of the importance of telling the truth and not telling lies” after which 2(b) says that the child shall “make a promise to tell the truth” (p. 60).

What is the Content of Voir Dire? An important concern in the application of *voir dire* is the issue of uniformity of content. Are there clear guidelines (structured or not) for the administration of *voir dire* examination in Kenya? Is a child witness in Court A likely to benefit from a similar set of questions as a child witness in Court B? The answer to these questions is no. As it is today, the content of a *voir dire* examination is entirely for a presiding judicial officer to determine. In fact, this has become an issue of contestation in court. For example, the following had been presented as *voir dire* by a history court:

Child: “Am M M. I learn at K M. Am in nursery. I do not know my age”.

Court: “I observe that the child is tender and direct that she give (sic) unsworn evidence” (*N N v Republic [2013] eKLR*, p. 4).

Although the questions asked by the trial court are not recorded (at least not in the appeal court’s judgement), the appeal court observed that “the examination did not serve and neither did it achieve the purpose of *voir dire* interview” (p. 4). In view of this, it is important to have a clear understanding of what measures should be relied upon by courts to establish the suitability of child witnesses in court.

Express Constitutional and Statutory Support for the Child Witness

The Principle of “Best Interest”

According to Article 53(2) of the Kenyan Constitution, “a child’s best interests are of paramount importance in every matter concerning the child” (p. 62). This is echoed in the Children Act (2022) s.8(1)(a) thus: “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration” (p. 441). Even for the accused children, Article 25(c) of the constitution guarantees them of “the right to a fair trial” (p. 39). For instance, s.198 of the Criminal Procedure Code (1989), s.235(e) of the Children Act (2022), and Article 50(2)(m) of the Constitution provide for an interpreter, free of charge, as may be required during a trial.

In some jurisdictions, there are clear provisions that guide the process of receiving evidence from children. For example, in New Zealand, s.107 of Evidence Act (2006) requires that the prosecution applies beforehand to the court for directions on how examination-in-chief and cross-examination will be conducted. Second, before any decision is arrived at concerning the application, the court offers all parties a chance to be heard in chambers. In fact, the judge entertains reports from persons the court deems qualified to offer advice on the merits or demerits of testifying in “the ordinary way”, for example, testifying orally in a court in the presence of relevant parties involved in the proceedings (s. 83, p. 63) or “alternative way”, for example, through a video recorded testimony, one-way glass, or video link (s. 105, p. 74).

The Principle of “Non-discrimination”

Article 27(1) of the Constitution of Kenya pronounces itself on the doctrine of equality thus: “every person is equal before the law and has the right to equal protection and equal benefit of the law” (p. 40). All forms of discrimination by the State on grounds such as

language are forbidden by s.4 of this Article. The issue of language is amplified in Article 44(1) that “every person has the right to use the language of the person’s choice”. For children, specifically, “no person shall discriminate against a child on the grounds of age, origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, health status, pregnancy, social, political, economic or other status, race, disability, tribe, [...] or any other status” (Children Act, 2022, s.9 (1), p. 442). In addition, Kenya is a signatory to major international instruments. In the United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime – ECOSOC Resolution 2005/20 (2005), s.8 (b) includes language among factors that no child should be discriminated against. In fact, s. 14 directs that all kinds of proceedings involving child witnesses should “take place in a language that the child uses and understands” (p. 6).

As earlier stated, the language question is complex. Non-discrimination based on language is not limited to the use of home versus other dominant languages in a society. Discrimination based on language can wear many faces. For example, this concern is well captured in the New Zealand’s Evidence Act (2006), in what s.85(1) refers to as “unacceptable questions” (p. 64). A judge is invited to intervene and disallow a witness from answering questions the judge deems “improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand” (p. 64). In arriving at this decision, s.85(2) invites the judge to take into consideration factors such (2a) “the age or maturity” and (2c) “the linguistic or cultural background” of the witness (p. 64). It would be important to have this level of preciseness in our Kenyan laws.

Victims of CSA as Vulnerable Witnesses

S. 31(1) of the Sexual Offences Act (2006) stipulates the grounds for declaring a witness vulnerable: if the witness is “(a) the alleged victim in the proceedings pending before the court; (b) a child; (c) a person with mental disabilities” (p. 19). This list is expanded by

s.31(2) to include factors such as “trauma, cultural differences, the possibility of intimidation, race, religion, language, the relationship of the witness to any party to the proceedings, and the nature of the subject matter of the evidence” (p. 19). Guided by s.31(3), the court can rely on an intermediary to determine the vulnerability of a child. The Act defines an intermediary as “a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counsellor, guardian, children’s officer or social worker” (p. 6). The phrase “to give evidence on behalf” as contained in this definition is a source of contention in courts as will be discussed later in this thesis. Upon a witness being declared vulnerable, the benefits outlined in s. 31(4) of the Sexual Offences Act (2006) and s. 94 of the Children Act (2022) must come into full play. For example, the court could receive the child’s evidence through an intermediary, have the witness testify from a witness protection box, or in a closed court – commonly referred to as receiving evidence in camera. The child is also protected from any form of publication that might reveal their identity. In addition, s. 94 (e) gives the court powers to use any other legal method that “the Court deems just and appropriate” (p. 499).

Two concerns emerge from this special measure, however. First, although testifying in camera keeps the child away from the glare of the public, they still have to face the defendant in court. In fact, the child is even required to personally identify the alleged abuser in a face-to-face encounter. This can be a traumatic experience for the child. The situation can be remedied by exploring other feasible options like testifying through a live link, by way of video-recorded interviews, or in a room with a one-way glass window.

The second concern is that the Sexual Offences Act (2006) in s.31(7) allocates critical duties to an intermediary: a) “convey the general purport of any question to the relevant witness, b) inform the court at any time that the witness is fatigued or stressed, and c) request the court for a recess” (p.20). However, there is no clarity on a number of areas. To begin

with, the Sexual Offences Act (2006) does not offer guidelines on the recruitment, training, and qualifying of intermediaries. Their admissibility is left to the presiding magistrate and/or judge to determine. In addition, on the roles assigned to intermediaries, what does the phrase “convey the general purport of any question” really mean? For example, can an intermediary rephrase a question to make it more accessible to the witness? Can they rephrase the witnesses’ answers? (e.g., Plotnikoff & Woolfson, 2012, 2015). If they were to rephrase, do they possess “a comprehensive knowledge of child development, memory, linguistics, and the evidential process”? (Zajac, O’Neill, & Hayne, 2012, p.195).

Indeed, the role of intermediaries in court is an issue of contestation in Kenyan courts (e.g., Shadrack Mutie Ndaka v Republic [2017] eKLR; N M v Republic [2017] eKLR; John Kinyua Nathan v Republic [2017] eKLR). In the John Kinyua Nathan v Republic (2017) case, there was a confusion of roles. This was a case involving a three and a half-year-old CSA victim who was deemed too young to testify. Even though, the trial court termed the mother an intermediary, she is said to have *testified on the child’s behalf*. Perhaps the court had relied on the definition in the Sexual Offences Act (2006) that an intermediary can “*give evidence on behalf* of a vulnerable witness” (p. 6) – emphasis added. The High Court disagreed with that position and observed that an intermediary cannot testify on behalf of a witness, thus:

The intermediary’s role is to communicate to the witness the questions put to the witness and to communicate to the court the answers from the victim to the person asking the questions, and to explain such questions or answers, so far as necessary for them to be understood by the witness or person asking questions in a manner understandable to the victim, while at the same time according the victim protection from unfamiliar environment and hostile cross- examination; to monitor the witness’ emotional and

psychological state and concentration, and to alert the trial court of any difficulties (John Kinyua Nathan v Republic, 2017, p. 5).

Notably, the court in this case introduced a new role for an intermediary that is not expressly provided for in the law – protection from hostile cross-examination. In practice, this would be of much assistance to child witnesses since cross-examinations are known to be problematic to children, as illustrated in the following example:

Defence attorney: I am going to call the policeman to come and testify whether you told him that and he wrote it down and you read it yourself before you signed it.

Intermediary: Can you put the question a little more clearly. That wasn't a question.

Defence attorney: I am going to put it to you, I am going to prove that you must have spoken to your friends about this matter. Because in the first instance, Jenny, I want to state, to tell His Worship why you left out important things when you spoke to the police.

Intermediary: Can you just ask little bit by little bit?

Defence attorney: God. I just want you to tell this to His worship.

Intermediary: Can you just stop there please (Chiroro & Muller, 2005, p. 244).

Direct Questioning of CSA Victims by Unrepresented Defendants Forbidden.

S. 31(13) of the Sexual Offences Act (2006) forbids unrepresented defendants from directly questioning vulnerable witnesses, instead requiring them to ask their questions through the court which should in return “repeat the question accurately to the witness” (p.

21). Although there is no data on the levels of compliance with this law, anecdotal evidence shows noncompliance – with the accused asking the complainant questions directly in court in a face-to-face encounter. And just like argued earlier that child complainants in Kenya are required to identify the defendant in a face-to-face encounter, having the defendant directly question the child witness is also double jeopardy.

The need to protect child witnesses from not only having to face their alleged abuser but also being questioned directly by the accused is recognized in other jurisdictions too. For example, in New Zealand, the Evidence Act (2006), s. 95(1)(a)(b) protects both adults and children complaints of sexual abuse and domestic violence and harassment from being directly cross-examined by unrepresented defendants (this protection is extended to child witnesses, unless with an express permission from the judge).

Unsworn Evidence from a Child Witness

As previously noted, s. 19(1) of the Oaths and Statutory Declarations Act (2012) makes a provision for the reception of unsworn evidence from witnesses of “tender years” who do not “understand the nature of an oath” (p. 7). This is another special measure aimed at ensuring that the right of every child to testify is not taken away based on a technicality.

Conclusion

In Kenya, there exists an impressive framework of constitutional and legal provisions to protect and safeguard the welfare of child witnesses. This is critical in an adversarial system like Kenya, where after the child makes allegations of hurt or injury and seeks relief from the defendant, they are expected to testify in a court of law and be cross-examined. This process is often characterised by a fierce competition between the prosecution and the defence, and is known to be antagonistic to the witnesses. It is for this reason that Kenya, like

many countries, has put in place special measures to protect children (both offenders as well as witnesses) who come in contact with the process.

Nevertheless, despite the existence of this robust legal framework, its effectiveness remains largely untested. Examples used in this thesis to demonstrate the existing gap between legal provisions and their practical application raises important questions about the actual impact of these safeguards. As we know it, the deductive nature of the law means that it relies (almost rigidly) on established principles, statutes, precedents and legal reasoning to arrive at decisions. Although this “tradition” appears to serve the legal profession well, the extent to which it is influenced by empirical evidence is a subject of debate. For example, what is the place of empirical evidence in informing the creation of (and influencing/shaping existing) legal rules, procedures, and recommendations? How does the knowledge on children’s capacities and limitations influence the sensitivity of legal professionals when dealing with child witnesses? How can this knowledge inform the seemingly “cast in stone” legal procedures when children are involved? These and many other questions demand for increased collaborative research and conversations between legal experts and researchers in human development including developmental scientists and psychologists among others.

Section two: The Language Question as Contained in Case law

This study was a review of case law on child sexual abuse cases in Kenyan courts. The question under review was, are there language-related concerns in CSA case files in Kenya? Here, selected language-related concerns that emerged in the study are discussed. Case law refers to “the aggregate of reported cases as forming a body of jurisprudence; or for the law of a particular subject as evidenced or formed by the adjudged cases; in distinction to statutes and other sources of law” (“Case Law”, n.d.). The Kenya Law Reporting publishes cases emanating from the superior courts.

The questions that I will consider from a close reading of these cases are: What precedents have been set in Kenya on child witnesses who must testify in a different language from the language of the court? Are there discrepancies between express law and precedent laws? What should prevail, an express law or a judicial precedent, and how are such discrepancies solved? What language-related concerns do exist in case law? As a part of the current study, a review of published legal opinions on child witnesses who cannot speak the language of the court in Kenya had been intended. However, a systematic search in the following databases: Kenya Law Review Journal, Law Society of Kenya Journal, an assisted search at both the University of Nairobi library and bookstore and google-web search (www.google.com) for grey literature did not yield any such publication.

In Kenya, matters involving child witnesses (as complainants e.g., in sexual abuse cases) are first heard in subordinate courts and only proceed to superior courts in the event of an appeal. Even at appeal, the child does not get to re-testify and the court reviews the judgement by the trial court and submissions by counsel.

Methods

Sample

This study started with the recruitment of an independent reviewer, a graduate student in education. We had previously worked together as research assistants in a literacy study in Kenyan primary schools. I took her through training on the goals and methodology of the study. After this, we started by searching the Kenya Law Reporting website for “child witness”, “language” and “interpreter”. The search yielded 95 cases. We reviewed each of the 95 cases to determine their suitability for inclusion in this study. Cases were selected for inclusion based on the following criteria: 1) the complainant was a child aged 10 years and below, 2) the appeal was made in the last 5 years, and 3) the child testified in a language other than English or Kiswahili. A total of 6 CSA cases ($n = 6$; age range of child 4.5 -9 years; median = 7.42 years, sex: 5 females, 1 male) met the threshold for inclusion in the study. The cases are presented in Table 1.

Table 1*List of Cases Selected for the Review of Case law*

Case title	Year
Joseph Makau Katana v Republic	2018 eKLR
N N M v Republic	2018 eKLR
J M M v Republic	2015 eKLR
John Mugo Thiaka v Republic	2018 eKLR
Joseph Lemerdete v Republic	2017 eKLR
H A K & another v Republic	2016 eKLR.

The search did not return a single case where the child complainant was the appellant. The review also noted two frequently emerging language-related concerns in cases which partly fitted in the inclusion criteria stated above because either 1) the child was exempted from testifying or 2) the language of trial was not recorded. These two concerns were adjudged to be of relevance to the current debate and the four cases listed in Table 2 were thus adopted for a brief discussion specifically on the two issues of concern.

Table 2

Cases Where Child was Exempted from Testifying and Trial Language was not Recorded

Case Title	Year
William Odhiambo Owiti v Republic	2016 eKLR
Shadrack Mutie Ndaka v Republic	2017 eKLR
N M v Republic	2017 eKLR
J M C v Republic	2018 eKLR

Procedure

These were all appeal cases. Hence, we first read through the listed grounds for appeal for each case to establish if concerns were raised about language used at the trial. Where this was the case, we then read through the judgement, paying more attention to the submissions of the appellants on why they felt alienated on account of language used at trial, and the reasoning of the courts on these submissions. The results of this exercise are discussed next.

Results

In this section, four language-related topics that emerged from the review are discussed. Three grounds were listed as appeal grounds: 1) language used at trial not indicated, 2) child complainants exempted from testifying, and 3) defendants claim that they did not understand the witness' language at trial. The fourth topic was not listed as a ground for appeal in any of the cases but it emerged as a common theme in the review. This was when child witnesses refused or lacked the appropriate vocabulary to describe sexual abuse,

Language Used at Trial not Indicated

Of the 95 cases reviewed in the current study, the language used at trial is not recorded in ten. However, records read that there was interpretation involved in the proceedings. Why is this a concern for the current study? This is because such a seemingly mundane omission by trial/history courts later became a ground for appeal in several cases, and it was adjudged a solid ground for setting aside convictions in some of the cases (e.g., *N M v Republic* [2017] eKLR; *Joshua Njiri v Republic* [2017] eKLR; *Jackson Mutunga Matheka vs Republic* [2015] eKLR; *Peter Irungu Nyambura v Republic* [2017] eKLR; *J K S v Republic* [2018] eKLR). In court records, an omission of the language used when reading the charges to the accused can “render the proceedings defective” (*Muthama Munguti v Republic* [2016] eKLR, p. 3) and consequently lead to the trial being “declared a nullity” (*Kivevelo Mboloi v Republic* [2013] eKLR, p. 3). Indeed, a nullity was declared in *Peter Irungu Nyambura v Republic* (2017) where the appellant had been sentenced to life imprisonment, after he pleaded guilty to a charge of defiling a 7-year-old girl. A retrial was ordered because there were no records of the language used during plea taking. The court observed that “...it is not possible to tell whether the plea which the appellant took was unequivocal” (p. 3).

Plea taking is anchored in s.207 of the Criminal Procedure Code (1989). It is expected that the accused can only plead if they understand the charges proffered against them. This is supported by s. 137(a)(ii) that “the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms” and (iii) “particulars of the offence shall be set out in ordinary language” (pp. 49-50). Also, there are clear judicial precedents on language use during plea taking. For instance, “when a person is charged, the charge and the particulars should be read out to him, so far as possible

in his own language, but if that is not possible, then in a language which he can speak and understand” (Adan v Republic [1973] EA 445, p. 446).

The need to record the language used is not limited to plea taking. The language in which witnesses testify should be recorded too. This was (almost harshly) emphasised in an earlier judgement by the Court of Appeal thus:

It is fitting for us in this appeal to comment first on the state of the trial record and the record of appeal presented before us. The record of the trial is most unsatisfactory. It exhibits glaring omissions as regards the most basic and elementary procedure as to what is expected of a criminal trial record. For example, it is not shown in which language the plea was taken and whether there was an interpreter. Further, the language in which the witnesses spoke is not stated. The record as a whole manifests a perfunctory approach to the serious trial that was before such a senior and experienced Magistrate (John Njenga Kamau v Republic [2009] eKLR, pp. 1-2).

Child Complainants Exempted from Testifying

Several child witnesses were considered too young to testify (n = 4; range 2.4 years – 4.5 years; median 2.88 years; sex: female = 3, male = 1). One of the most referenced cases in Kenya in the debate on whether to exempt a child from testifying is that of a 6-month-old victim of sodomy (Robinson Tole Mwakuyanda v Republic [2010] eKLR). The appellant got 10 years in jail for his actions. His appeal not only failed, but the court increased his jail term to 14 years, the maximum sentence the crime attracted then. The crime currently carries a mandatory life imprisonment under s.8(1) and (2) of the Sexual Offences Act (2006).

Similar appeal decisions, where the child complaint had been exempted from testifying, have affirmed convictions even though the victims were a little older. This is seen in the cases where the children were exempted from testifying (William Odhiambo Owiti v

Republic [2016] eKLR; Shadrack Mutie Ndaka v Republic [2017] eKLR; N M v Republic [2017] eKLR; J M C v Republic [2018] eKLR). For example, in William Odhiambo Owiti v Republic (2016), one of the grounds for appeal was that the complainant, aged below 3 years, did not take the stand. The Court of Appeal rejected this argument and upheld the life sentence: “The child was too young to testify. I find that the failure of the child to testify was not fatal to the prosecution case as the trial court could rely on the evidence of surrounding circumstances” (p. 3). This is also the case in Shadrack Mutie Ndaka v Republic (2017). The history court had convicted the appellant for sodomising a boy aged two years and four months by penetrating his anus with fingers. The appellant argued that the child did not testify and that the court had relied on “hearsay” in convicting him (p. 2). On their part, the prosecution argued that the trial court had assessed the capacity of the child to testify during proceedings and concluded that he was not qualified because of tender age. The trial court records read: “court questions the child asking him his name. He runs after his mother and clings onto her dress. The child cannot testify. I will declare him a vulnerable witness under Section 31 of the Sexual Offences Act (2006) due to his tender age” (p. 4). The appeal failed.

In addition to age, other grounds that have in the past been argued for in the exemption of a child witness from testifying include the nature of crime committed against the child. For example, in M.M v Republic [2014] eKLR – a CSA case involving a complainant aged four years, the court was categorical that “any requirement that insists on a child victim of defilement, irrespective of his or her age to testify in order to found a conviction would occasion serious miscarriage of justice” (p. 7).

That said, however, on whether to exempt a child from testifying because of tender age or even the nature of crime committed against him/her is a divisive topic. Some have argued that exempting a child complainant from testifying is what would occasion miscarriage of justice. For example, in John Kinyua Nathan v Republic (2017), the appellant, a husband to

the mother of (and stepfather to) the complainant, had been imprisoned by a trial court for life for allegedly sexually defiling a child aged 3 years and five months. He unsuccessfully appealed this decision to the High Court, but the Court of Appeal granted his appeal. The appellant questioned why despite the child allegedly having given details to her mother on how the defendant penetrated her vagina with his penis could not testify in court and be cross-examined. Quashing the sentence, the Court of Appeal concluded:

In this case, the High Court appears to propound the legal position that a child of tender years lacks capacity to testify and is thus not required to give evidence at all.

With respect, this is erroneous. The child was a necessary witness both in determining the third element of the offence as to whether the appellant was responsible. [If] the child was able to inform her [mother] about her injury and the person responsible and so, as argued by the appellant, she was capable of stating so to the court directly or through an intermediary (p. 3).

The main question in this debate, it would appear, is whether there is an age under which a child must be considered developmentally incapable of tendering evidence in court. The obvious answer would perhaps be that a child needs to have adequate language capabilities to enable them to narrate their experience. However, there are no simple answers to this question. It has a memory angle to it and the debate on language and memory is complex. For instance, presence of long-term memory as early as year one of life has been reported (e.g., Bauer, 2002, 2013). This debate gets richer when researchers differentiate between episodic memory (something happened) and autobiographical memory (something happened to me) (e.g., Howe et al., 2003; Fivush, 2011). Attainment of autobiographical memory is perhaps what would enable a child to tender his/her evidence about something that happened to them. But the age at which human beings attain this capacity is still a topic of ongoing debate. First, for the adherents of the social cultural viewpoint, this ability is

culturally transmitted (through reciprocal sharing of experiences between parents (particularly mothers) and their children, and that language plays a critical role in facilitating the process (e.g., Nelson & Fivush, 2004; Fivush, 1993, 1994, 1997, 2011; Nelson, 1993). But others say that this capacity is only achieved in the advanced phase of year two of life, and after the establishment of the “cognitive self” (e.g., Howe & Courage, 1997, p. 499), when “a new organizer of information and experiences becomes available and facilitates the grouping and personalization of memories for events into what eventually becomes autobiographical memory” (Howe et al., 2003, p. 480). Howe and colleagues argued that language, like all other factors, begins to have its effects on autobiographical memory only after the child has developed the *cognitive self*. As Neisser (2004) observed, “at all levels, an integrated account of the development of memory still remains an elusive goal” (p. 157).

Nevertheless, there is evidence that children aged 3 years, for example, can recall and verbally recount events they have witnessed or experienced, both after short and considerably longer periods of delay (e.g., Baker-Ward et al., 1993; Fivush & Schwarzmueeller, 1998). Indeed, in actual forensic contexts, even children aged three years can be useful witnesses in some legal contexts (e.g., Hershkowitz et al., 2012).

Defendants Claim that They did not Understand the Witness’ Language at Trial

That witnesses testified in their home language in court has been used by defendants as a ground for appeal. The claim is that the language used by the witness at the trial was alien to them, hence they were gravely disadvantaged (e.g., *J M M v Republic* [2015] eKLR; *Joseph Lemerdete v Republic* [2017] eKLR. By so claiming, the accused raises fundamental constitutional requirements for a fair trial. According to Article 50(2)(m) of the Kenyan Constitution, “every accused person has the right to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial” (p. 58). In addition, according to s.198(1) of the Criminal Procedure Code (1989), “whenever

any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands” (p. 73). If represented, s. 198(2) of the CPC says that “if he appears by advocate and the evidence is given in a language other than English and not understood by the advocate, it shall be interpreted to the advocate in English” (p. 73). This is an indication that language-related concerns during court proceedings are to be taken seriously.

However, claims of discrimination based on the language used by witnesses must be put to strict scrutiny. The complainant too has the right to offer his/her testimony in a language they are most comfortable with, a fact recognized by the law and the reason interpretation is provided for. Simply, the law does not require that a case be conducted in the accused’s home language. It guarantees that an interpreter will be made available if and when needed during proceedings. This was well elaborated in one of the case files thus:

The issue here is not whether the accused preferred to conduct the trial in Kuria but whether he understood the language the trial was conducted in. The trial was conducted in Kiswahili and it (sic) evident from the record that the appellant actively participated in it and at no time did he raise the issue of language (Morris Mongori Gisiri v Republic [2014] eKLR, p. 4; see also Kariuki Kabari v Republic [2011] eKLR, Benson Nganga Ngaruiya v Republic [2018] eKLR and J M M v Republic [2017] eKLR).

As such, for an accused to be part of proceedings and later claim that they were alienated from the proceedings on account of language is “a gimmick which holds no basis” (Kariuki Kabari v Republic, 2011, p. 4). It would appear that in order to avoid such grounds for appeal, the trial court should keep a clear record of: 1) the language used during proceedings, 2) if there is interpretation, the languages used and the name of the interpreter(s), 3) language

related concerns raised by the accused during proceedings, and 4) the language used by the accused in cross-examining the witnesses. This is affirmed in a courts' judgement thus:

I am of the view that since the appellant cross-examined all the witnesses and gave his defence, he understood the language used by the witnesses during the trial. The record shows that the appellant followed the proceedings. There was an interpreter by name Mbogo throughout the proceedings. The appellant was not prejudiced. His right was not violated (John Mugo Thiaka v Republic, 2018, p. 3).

Child Witnesses' Refusal or Deficit of Vocabulary to Describe Sexual Abuse.

Children reporting sexual abuse in Kenya use the phrase “*tabia mbaya*” (Kiswahili for “bad manners” or “bad things”) to describe sexual abuse (e.g., Joseph Makau Katana v Republic [2018] eKLR; N N M v Republic [2018] eKLR). A further search in the Kenya Law Reporting website for “child witness” and “*tabia mbaya*” yielded 100 cases, all of which are CSA-related (e.g., J K S v Republic [2018] eKLR; Simon Rokoo v Republic [2014] eKLR; Robert Kiprono Ngeno v Republic [2017] eKLR; Moses Munene Ngurani v Republic [2017] eKLR; J K v Republic [2018] eKLR). Some children have used an equivalent phrase in their home language, for example, the Kikuyu phrase *mitugo miuru* (e.g., in Peter Mwangi Kigotho v Republic [2012] eKLR). In J K S v Republic (2018), the 11-year-old complainant reported that “he laid on me. He did bad things to me here (pointing at her vagina). He used his thing for urinating to do bad things to me here” (p. 1).

Indeed, the situation seems to worsen with children's inability or unwillingness to call sexual organs by name and instead only pointing at their frontal genital area when describing abuse (e.g., J K v Republic [2018] eKLR; Joseph Mwangi Kibe v Republic [2018] eKLR; Shaban Mutua Kiptui v Republic [2017] eKLR). If the child does not offer an explicit description of what happened during the abuse, including calling sexual organs by name, this

can be, as will be discussed shortly, a major setback for the prosecutors. However, there was an exception when the four-year old complaint in the *Joseph Mwangi Kibe v Republic* (2018) referred to the penis in her home language as *kanyunyui*, a common Kikuyu name for the penis.

The use of the phrase *tabia mbaya* (Kiswahili for bad manners/things) by child witnesses to describe sexual abuse has had a negative effect on their testimony. For example, in *J K v Republic* (2018), the appellant had been charged with defiling and committing an indecent act against his seven-year-old daughter. He was convicted and given a life sentence. Allowing the appeal, the High Court slammed the child's testimony: "when I entered the house the accused closed the door. He then undressed me. He then did bad manners to me. He did it here (points at her genital area –the front part). He undressed me first" (p.2), as untenable in law:

As this court expressed itself in a similar case, Criminal Appeal number 6 of 2017 of *Langat Dinyo Domokonyang* (Appellant) versus Republic, "Bad manners" is an English phrase which refers to discourteous manners that ignores acceptable social usage. "Bad manners" is a phrase of which is not carried anywhere in the Sexual Offences Act (2006). Whenever used by a child or anyone else in evidence, it is the duty of the prosecution to ensure that the user makes it explicit to the court as to its meaning and fits it to the ingredients of the offence as disclosed in the Act. (p. 2)

Though it be the case, why are so many children in Kenyan courts using the phrase to describe sexual abuse? What must become of those among them who, for whatever reason, are not able to "make it explicit to the court as to its meaning" but other factors vividly support their allegations? For example, in the *J K v Republic* (2018) above (the case where the Judge rejected the child's testimony), defilement allegations had been medically

corroborated. The child had even been hospitalized for 7 days to repair injuries to her vagina. In addition, the child had also pointed to her genital area when describing where *bad manners* had been done to her by the father. However, justifying the decision of the court to quash the sentence, the Judge added that “the use of the words “genital organs” in definition of the very same phrase “genital organs,” does not help much in explaining those other organs referred to, save for anus” (p. 3).

Nevertheless, in stark contrast, and offering a semblance of hope to child witnesses, a conviction was upheld in *Gilbert Kibet Ruto v Republic* [2017] eKLR] based on the testimony of a girl aged 7 years that the appellant did “*tabia mbaya*” to her. The court observed that:

The complainant has given a vivid narration of what happened to her. Being a young child, she lacked sufficient vocabulary to describe the sexual act. As a court I do take judicial notice of the fact that young children invariably refer to sexual intercourse as ‘*tabia mbaya*’ or ‘bad things’. The complainant told the court that the man did bad things on her private parts. This was how she was able to explain the sexual assault (p. 3).

Indeed, “It is hardly reasonable to expect the average seven-year-old to calmly recite, “The accused penetrated my vagina with his penis” and if the child did use such words, most adults would suspect coaching” (Myers, 1987, p. 824). S. 60(0) of the Evidence Act (2012) empowers judicial officers to “take judicial notice” of “all matters of general or local notoriety” (p. 26). Should “*tabia mbaya*” as used by many children reporting sexual abuse fall under the aegis of s. 60 (0) of the Evidence Act (2012), and thus warrant a judicial notice every time it is used by child witnesses in CSA court proceedings? What problems are likely to emerge from this practice?

Conclusion

The question I set out to answer through the current review of case law was whether there are language-related concerns in CSA case files in Kenya. From the above discussion, the answer was yes, and several important lessons and conclusions were drawn. Although the designated court languages are English and Kiswahili, there are child witnesses who testified in their first language. From this review, it was not possible to tell why the children reverted/chose to use their home language. However, several reasons can be attributed to this behaviour. For example, the children may not have attained adequate skill in the English language to adequately express themselves as required in the current study. Another reason could be the effect of the language used by the participants in their daily conversations at home and other settings (e.g. market, church, sporting fields etc.) apart from the school. As indicated, the participants lived in a rural area where Kikuyu was the main language of communication. In the field of forensic interviewing, there are reports that children are likely to revert to their mother tongues to (perhaps competently, adequately, and freely) communicate their experiences – especially when the experiences are stressful (e.g., Fontes & Tishelman, 2016). It is noted, however, that the current study did not involve stressful experiences.

Children choosing to communicate in a language of their personal choice is a constitutional right enshrined in Article 44(1) of the Kenyan Constitution. Hence, the language stipulations for lower courts as English or Kiswahili by s. 198(4) of the Criminal Procedure Code (1989) cannot insubordinate the provisions of the constitution. In fact, Article 48 of the constitution demands of the state to “ensure access to justice for all persons” (p. 55) and to be cognizant of the dictates of Article 50 that “every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public

hearing before a court” (p. 57). This is to say that the child (and adult) witnesses’ right to testify in a language of their preference is properly anchored in law, and the court has a duty to facilitate them by providing an interpreter.

Two, the trial court has a duty to maintain clear records of the language(s) used during proceedings. In the event that the witness prefers to speak in their first language, failure to record what language the witness used and the language of interpretation can be a ground for the defendant to claim that they were “shut out” of the trial. This is an avoidable error.

Three, although the right of cross-examination is fundamental, exemption of a child complainant from testifying (for example on account of age or even disability), is defensible. In such a scenario, the provisions of s. 146(1) of the Evidence Act (2012) that “witnesses shall first be examined-in-chief, then, if the adverse party so desires, cross-examined” (p. 48) applies. This means that if the child complainant does not take the stand to be examined-in-chief, then the defence cannot purport to hold a right to “cross-examine” this child. In this case, especially in CSA matters, the court may rely on other available sources including corroborative evidence and the testimony of key witnesses – which the defence can cross-examine.

Four, children reporting sexual abuse may lack the necessary language to describe the abuse. Others may find it difficult to offer graphic and extensive details about the abuse. It is important for prosecutors to be patient and judicious when questioning such children in court. In view of this, prosecutors and magistrates would benefit from targeted training on developmentally-appropriate questioning of child witnesses. Also, as argued previously in this thesis, children might result to using *socially acceptable* terms and phrases to describe sexual abuse or sexual organs. They could have learnt such words and phrases from parents and caregivers who may consider it inappropriate to mention organs like the vagina, penis, or

anus by name. For example, while working on my master's degree dissertation, I examined transcripts of interviews of children reporting sexual abuse in a police station in the United States of America. Several children could not refer to their sexual organs by name.

Particularly, one 4-year-old girl referred to her vagina as “my number one”, saying “he touched my number one” (in reference to the abuser). Only after the interviewer cautiously explored from her what she meant by *my number one* did she point to the vaginal area.

In my country of Kenya, it is very common to hear parents use the word “susu” to describe the penis and/or vagina. “Usiwache mtu aguse susu yako” (Do not let anybody touch your *susu*) is a common statement from parents to children. While these words and phrases may not be found in law books, their usage in the larger society and the context in which a child witness uses them when testifying in court ought to be taken into consideration. Finally, from this review, it is apparent that the question of language use in Kenyan courts is valid and a fertile ground for research.

Section Three: Surveys

Survey of Magistrates and Prosecutors

This section is an account by magistrates and prosecutors, through a survey, about their experience, practice and opinion regarding interviews with child witnesses who do not speak/have difficulties speaking the language of the court. A magistrate's court is the court of first instance in Kenya. It is here where almost all matters involving child offenders, witnesses, or victims are first heard. The survey comprised of similar or related questions for both magistrates and prosecutors. For this reason, the results have been presented together for ease of comparison in their experience, practice and opinion.

Methods

Survey details

Constructing the Survey

As indicated previously in this thesis, I had in the past the privilege of facilitating sessions on a topic named "*Children and the Law: Nuts and Bolts*" in Continuing Judicial Education (CJE) fora for Magistrates where the question of child witnesses who do not speak the language of the court attracted a good debate. Many Magistrates shared their experiences dealing with children who could not speak or had challenges speaking the languages of the court (Kiswahili and English) and the challenges this presented to the courts. During those discussions, I took note of the different language-related areas of concern that I later used in the construction of the current survey. These areas are 1) prevalence of the concern, 2) interpretation, 3) quality of interpretation, 4) delay, 5) intervention by court, 6) court records, and 6) deployment of judicial officers. I developed likert-scale questions based on the above topics and in the order in which they appear.

Authorization

Magistrates. I wrote a letter to the Chief Registrar of the Kenyan Judiciary seeking permission to undertake a survey of magistrates. Authorization was granted (Appendix A), and I was referred to the Judiciary Training Institute (JTI) for further guidance. Fortunately, JTI was in the process of organizing an annual colloquium for magistrates, hence it was possible to administer questionnaires to a large number of judicial officers serving in stations across the country in a single sitting (Appendix B).

Prosecutors. I wrote a letter to the Deputy Director Central Facilitation Services in the Office of the Director of Public Prosecutions seeking authorization to conduct a survey for Prosecutors. Consent was granted, and I was referred to the Prosecutors' Training Institute (PTI) for further assistance (Appendix C).

Procedure

Magistrates. Paper questionnaires were administered to 200 magistrates by the colloquium's secretariat. Magistrates of all ranks came from many regions in Kenya. All completed questionnaires were collected by the conference secretariat on the third (last) day of the conference and handed over to the author.

Prosecutors. Both online and paper versions of the survey questionnaire were available for prosecutors. Since there were no planned training or meetings for prosecutors where the paper questionnaire would be administered, the PTI Director recommended the use of the online questionnaire to prosecutors. Thus, the director sent an introductory note bearing the link to the online version of the survey to all regional heads through their group WhatsApp platform to share with their colleagues. She also made phone calls to the regional heads, in my presence, to explain the reason for the survey. The director indicated that the

email platform was meant for office business communication only, and hence was not available for our use.

Unfortunately, several months on, even with my continued follow-up through the PTI, prosecutors remained unresponsive. The director advised me to try and meet the prosecutors in their offices and court and request them to complete the questionnaire. Even with this, only a few of them completed it. Fortunately, the head of the children's department in the Office of the Director of Public Prosecutions requested prosecutors attending a regional meeting to take some time and "help a student complete his studies." Thus, in the course of the meeting, the prosecutors were given time to complete the online questionnaire.

Data Entry and Analysis

Data from the magistrates was entered into a Microsoft Excel sheet while the data from the prosecutors' online questionnaires was downloaded into a Microsoft Excel sheet. Data analysis involved a series of steps. These included counting all blank and non-blank responses in the data set (this was to take account of missing data). After establishing the number of people who responded to each question/statement, then, I calculated the percentages for each feedback category. After this, I coded the data to make it possible to compute totals, averages and standard deviations. The codes are as below. Questions 1-10: *Very frequently* = 5, *frequently* = 4, *occasionally* = 3, *rarely* = 2, *never* = 1. In questions 11-14: *disagree strongly* = 1, *disagree* = 2, *slightly disagree* = 3, *slightly agree* = 4, *agree* = 5, *agree strongly* = 6. Details for each question are spelt out in the next section.

Results

The first section details the participants' demographics, while the second section details the responses for each question/statement in percentages.

Magistrates. There was a 71.5% return rate for the questionnaires ($n = 143$, total issued = 200). A total of 123 magistrates indicated their sex (females = 60, males = 63). Also, 124 indicated their years of service. In total, they had 1,017.8 years of service among them ($M = 7$ years, $SD = 6.10$, Range = 0.25 - 30 years). Hence, these are experienced magistrates, each of whom may have served in several stations in Kenya. By policy, they are expected to serve in one station for three years, after which they are eligible for transfer. Table 3 is a summary of results for questions 1 -10.

Prosecutors. In total, 63 (females = 34, males = 29) prosecutors (also called State Counsels) participated in this survey. In total, they had 262 years of experience among them ($M = 4.22$, $SD = 2.11$). Table 4 is a summary of results for questions 1 -10.

Prevalence of Children who do not Speak the Language of the Court

1. Have you presided over/prosecuted cases involving child witnesses who had some difficulties expressing themselves in Kiswahili or English in court?

Magistrates. Ninety-seven percent (15% very frequently, 30% frequently, 42% occasionally, and 10% rarely) reported to have presided over cases involving child witnesses who had some difficulties expressing themselves in Kiswahili or English in court.

Prosecutors. Ninety-eight percent (19% very frequently, 41% frequently, 25% occasionally, and 13% rarely) reported to have prosecuted cases involving child witnesses who had some difficulties expressing themselves in Kiswahili or English language in court.

2. Have you presided over/prosecuted cases involving child witnesses who had no ability, or nearly no ability, to speak the language of the court?

Magistrates. Ninety-six percent (9% very frequently, 25% frequently, 37% occasionally, 34% rarely) said that they have presided over cases involving child witnesses with no ability, or nearly no ability, to speak the language of the court.

Prosecutors. Ninety-seven percent (2% very frequently, 19% frequently, 43% occasionally, 33% rarely) said that they have prosecuted cases involving child witnesses with no ability, or nearly no ability, to speak the language of the court.

Difficulties in Finding an Interpreter

3. Have you experienced some difficulties finding a suitable interpreter in cases involving child witnesses who could not speak the language of the court [for prosecutors: during preparation for court]?

Magistrates. Eighty-six percent (very frequently 4%, frequently 11%, occasionally 37%, rarely 34%) have experienced some difficulties finding a suitable interpreter in cases involving child witnesses who could not speak the language of the court.

Prosecutors. Eighty-nine percent (very frequently 2%, frequently 6%, occasionally 30%, rarely 51%) reported to have experienced some difficulties finding a suitable interpreter during preparation for court.

4. Have you presided over/prosecuted a case in which a child witness could not speak the language of the court and no appropriate interpreter could be found?

Magistrates. Fifty-three percent (very frequently 2%, frequently 6%, occasionally 12%, rarely 33%) have presided over a case in which a child witness could not speak the language of the court and no appropriate interpreter could be found.

Prosecutors. A total of 17% (frequently 2%, occasionally 48%, rarely 43%) indicated that they have prosecuted a case in which a child witness could not speak the language of the court and no appropriate interpreter could be found.

Delay

5. Has a case you presided over/prosecuted involving a child witness who could not speak the language of the court experienced delay because an appropriate interpreter was being sought?

Magistrates. Sixty-seven percent (very frequently 1%, frequently 8%, occasionally 33%, rarely 25%) reported to have presided over cases where delay was experienced as an appropriate interpreter was being sought.

Prosecutors. Ninety-three percent (very frequently 0%, frequently 2%, occasionally 48%, rarely 43%) reported to have prosecuted a case where delay was experienced as an appropriate interpreter was being sought.

Interpreter-Mediated Interviews

6. Have you presided over/prosecuted a case where you understood the home language of the child and the interpreter inaccurately interpreted the questions posed to the child in court?

Magistrates. Fifty percent (very frequently 0%, frequently 9%, occasionally 23%, rarely 18%) said that they have presided over a case where they could understand the home language of the child and the interpreter inaccurately interpreted the questions posed to the child in court.

Prosecutors. Ninety percent (very frequently 2%, frequently 14%, occasionally 44%, rarely 30%) indicated that they have participated in a case where they could understand the home

language of the child and the interpreter inaccurately interpreted the questions they had posed to the child in court.

7. Have you presided over/prosecuted a case where you could understand the home language of the child witness and the interpreter inaccurately interpreted the child's testimony?

Magistrates. Forty-nine percent (very frequently 0%, frequently 8%, occasionally 17%, rarely 23%) said that they have presided over cases where they could understand the home language of the child witness and the interpreter inaccurately interpreted the child's testimony.

Prosecutors. Ninety percent (very frequently 2%, frequently 14%, occasionally 44%, rarely 30%) reported to have participated in cases where they could understand the home language of the child witness and the interpreter inaccurately interpreted the child's testimony.

Magistrates and prosecutors serve in any part of Kenya without consideration of whether they speak the language of the locals or not.

Court's Intervention in Interpreter-Mediated Interviews

8. *Magistrates:* When you can tell that the interpreter is not accurate in interpreting the questions put to the child and/or the child's testimony, do you intervene and request them to be accurate?

Eighty-three percent (very frequently 30%, frequently 29%, occasionally 21%, rarely 3%) said that they do intervene when they can tell that the interpreter is not accurate in interpreting the questions put to the child and/or the child's testimony.

- Prosecutors:* When you can tell that an interpreter has inaccurately interpreted your question, do you intervene and request the interpreter to be accurate?

Sixty-seven percent (very frequently 37%, frequently 11%, occasionally 5%, rarely 3%) said that they do intervene when they detect errors in interpretation on a question they have asked the child in court.

9. *Magistrates:* Has it ever been brought to your attention during proceedings of the interpreter's inaccuracy in his/her interpretation?

Sixty-eight percent (very frequently 1%, frequently 12%, occasionally 31%, rarely 24%) reported that there has been a form of intervention in their courtrooms (most likely by the defence lawyer or state counsel) to alert the court of an interpreter's inaccuracy in their interpretation.

- Prosecutors:* When you can tell that an interpreter has inaccurately interpreted the testimony of the witness, do you intervene and request the interpreter to be accurate?

Sixty-eight percent (very frequently 33%, frequently 13%, occasionally 6%, rarely 16%) reported that they do intervene in the courtrooms to alert the court of an interpreter's errors in the interpretation of the testimony of the child witness.

10. *Prosecutors:* Has it ever been brought to the attention of the court during proceedings you were involved in of the interpreter's inaccuracy in his/her interpretation?

Fifty-eight percent (very frequently 2%, frequently 5%, occasionally 10%, rarely 41%) reported to have witnessed an intervention (by others most probably by the magistrate or defence lawyers) in regard to errors in interpretation.

Official Records of the Court

10. *Magistrates:* When you can tell that an interpreter has inaccurately interpreted the child's testimony, do you enter what you understood the witness to say as the official court record and not what was interpreted?

Sixty-eight percent (very frequently 19, frequently 19, occasionally 15, rarely 15) said that when they recognize an error in interviewer-mediated interviews (when they can understand the language being interpreted), they enter into record what they understood the witness to say as the official court record and not what was interpreted. This could present challenges since even defence lawyers keep their own records of the proceedings, and they may not understand the error when it occurs because they do not necessarily speak the language of the child.

Table 3*Magistrates' Responses to Questions 1-10 in Percentages*

Questions	Very Frequently (5)	Frequently (4)	Occasionally (3)	Rarely (2)	Never (1)	M(SD)
Some difficulties with language	15	30	42	10	3	3.43(0.96)
Total or near total difficulties with court languages	9	25	37	25	4	3.11(1.00)
Difficulties finding an interpreter	4	11	37	34	15	2.55(0.99)
No interpreter found	2	6	12	33	47	1.84(1.00)
Delay as interpreter was sought	1	8	33	25	32	2.22(1.04)
Questions interpreted inaccurately	0	9	23	18	50	1.92(1.04)
Answers interpreted inaccurately	0	8	17	23	51	1.82(1.00)
Personally intervened to correct errors	30	29	21	3	17	3.51(1.35)
Intervention by others	1	12	31	24	31	2.28(1.07)
Court records	19	19	15	15	32	2.80(1.46)

Table 4*Prosecutors' Responses to Questions 1 -10 in Percentages*

Questions	Very Frequently (5)	Frequently (4)	Occasionally (3)	Rarely (2)	Never (1)	M(SD)
Some difficulties with language	19	41	25	13	2	3.63(0.99)
Total or near total difficulties with court languages	2	19	43	33	3	2.83(0.83)
Difficulties finding an interpreter	2	6	30	51	11	2.37(0.83)
No interpreter found	0	2	2	13	84	2.43(0.54)
Delay as interpreter was sought	0	2	48	43	8	2.43(0.67)
Questions interpreted inaccurately	2	14	44	30	10	2.68(0.89)
Answers interpreted inaccurately	2	14	44	30	10	2.68(0.89)
Personally intervened to correct errors	37	11	5	14	33	3.03(1.76)
Personally intervened	33	13	6	16	32	3.00(1.71)
Intervention by others	2	5	10	41	43	1.81(0.91)

In addition to experience and practice above, magistrates and prosecutors gave their opinion on some language-related concerns in answer to questions 11-14 of the survey. The findings, whose summary is contained in table 5 for magistrates and table 6 for prosecutors, are presented next.

Child's Home Language to Take Precedence in Court

11. Should the child witness' home language always take precedence when testifying in court?

Eighty-eight percent (agree strongly 46, agree 32%, 10% slightly agree) of the magistrates, and 97% (agree strongly 73, agree 21%, 3% slightly agree) of the prosecutors were of the opinion that child witness' home language should always take precedence when testifying in court.

Indigenous Languages in Kenya as Official Court Languages

12. Should home languages in Kenya be expressly included in law as languages of the court in addition to Kiswahili and English?

Forty-six percent (agree strongly 16%, agree 19%, slightly agree 11%) of the magistrates, and 78% (agree strongly 11%, agree 25%, slightly agree 41%) of the prosecutors observed that home languages in Kenya should be expressly included in law as languages of the court in addition to Kiswahili and English.

Court Assistants as Interpreters

13. Do you find the current arrangement with court assistants as interpreters efficient?

Seventy-four percent (agree strongly 10%, agree 46%, slightly agree 18%) of the magistrates, and 67% (agree strongly 0%, agree 19%, slightly agree 41%) of the prosecutors said that they found the court assistants as interpreters efficient.

Deployment of Magistrates and Prosecutors

14. In the interest of justice, should magistrates/prosecutors work in areas where they can speak the language of the local population?

Forty-two percent (agree strongly 8%, agree 14%, slightly agree 20%) of the magistrates suggested that in the interest of justice, magistrates should work in areas where they can speak the language of the local people. Equally, 56% (agree strongly 10%, agree 25%, slightly agree 21%) of the prosecutors were of the opinion that in the interest of justice, prosecutors should work in areas where they can speak the language of the local people.

Conclusion

Study one aimed at establishing the prevalence and practice when interviewing child witnesses in Kenya in their home language versus a language of the court. First, the legal framework under which child witnesses operate was examined. This was followed by an examination of language-related concerns in CSA-related case law. The last study was a survey of magistrates and prosecutors about their experience, practice and opinion regarding interviews with child witnesses who do not speak/have difficulties speaking the language of the court. A number of important findings were made from this 3-part study.

One, the question of prevalence was affirmatively and firmly answered by magistrates and prosecutors when they confirmed that there exists a large number of child witnesses in the Kenyan courts who either have challenges expressing themselves in or are unable to speak the languages of the court – English and Kiswahili. Importantly, the report especially from such a large number of magistrates serving in stations across the nation is a fair representation of how widespread the problem is.

Table 5*Magistrates' Responses to Question 11-14 in Percentages*

	Disagree		Slightly		Agree	Agree	
Questions	Strongly (1)	Disagree (2)	Disagree (3)	Agree (4)	(5)	Strongly (6)	M(SD)
Home language to take precedence	4	6	3	10	32	46	4.97(1.35)
Indigenous languages as official							
court languages	19	31	4	11	19	16	4.18(1.82)
Court assistants as interpreters	6	9	10	18	46	10	4.18(1.37)
Deployment based on language	31	24	2	20	14	8	2.87(1.74)

Table 6*Prosecutors' Responses to Questions 11-14 in Percentages*

Questions	Strongly disagree (1)	Disagree (2)	Slightly Disagree (3)	Slightly agree (4)	Agree (5)	Strongly agree (6)	M(SD)
Home language to take precedence	0	2	2	3	21	73	5.569(0.81)
Indigenous languages as official court languages	5	8	10	41	25	11	3.94(1.38)
Court assistants as interpreters	3	14	22	41	19	0	3.55(1.06)
Deployment based on language	16	13	16	21	25	10	3.59(1.58)

Two, to deal with this problem (children who cannot or have difficulties expressing themselves in the language of the court), magistrates and prosecutors observed that the child's home language should always take precedence when testifying in court. Nonetheless, their opinion on whether indigenous languages should be expressly included in law as languages of the court in addition to English and Kiswahili is divided – though a large number supports the idea.

Three, faced with the challenge of dealing with child witnesses who have difficulties speaking English or Kiswahili, courts turn to interpreters. Here, although the child gets an opportunity to testify in their primary language, a number of challenges emerge. First, is the lengthy time sometimes taken to identify interpreters. Delay in identifying an interpreter adds to the list of factors that lead to cases involving child witnesses taking longer to get concluded. Second, prosecutors and magistrates reported to have experienced distortions/inaccurate interpretations of questions directed to and answers given by the witnesses in interpreter-mediated interviews. This is a serious concern because distorted interpretations are likely to form part of the official court records and to inform the final case outcome. Magistrates and prosecutors reported that they have personally had to intervene when they could identify distortions in interpretations. They also reported intervention of other court users in the event of distortions in interpretation. This concern affirms the need for a more detailed examination of interpreter-mediated interviews in Kenya to ascertain the extent and gravity of the problem.

Four, the magistrates and prosecutors showed a general acceptance of the current practice of court assistants as interpreters in court. However, since there are doubts about the quality of interpreted interviews, it would be important to (in addition to more detailed studies to understand the extent and gravity of the problem) have a discussion about the need for professional interpreters in Kenyan courts.

Five, both magistrates and prosecutors are divided on whether they should be deployed based on their ability to speak the language of the locals. This would be an interesting discussion to have since a large percentage of magistrates reported that they have been able to intervene in the event of distortions in interviewer-mediated interviews simply because they could identify/understand when a misinterpretation occurred.

Six, there exists an extensive (and impressive) legal framework that is meant to safeguard the rights and wellbeing of child witnesses in Kenya. This includes the abolishment of the requirement for corroborative evidence in CSA cases, the introduction of intermediaries to assist witnesses who have been declared vulnerable, the powers of the court to have the child testify in camera or from a witness protection box. Others include protection for a child reporting sexual abuse from being directly questioned by an unrepresented defendant, and from any form of identifying publications among others.

However, a number of potentially problematic areas were also noted. In particular, are the discrepancies in the provisions of the law and pronouncements in judicial precedents. A good example is the case where a higher court disregarded the definition of “tender years” as contained in law, instead opting for a judicial precedence and in the process openly disadvantaging the child. An express law would be expected to prevail over case law – unless the said law is repugnant to the constitution.

Also, it is not clear how critical practices like the *voir dire* exam are to be implemented. What is the purpose of *voir dire*? To whom is it to be subjected? What constitutes its content? In fact, the removal of the classification of children under the age of 10 as of “tender years” in the children Act (2022) could have exacerbated this problem. All these concerns could have an implication on the practice of forensic interviewing in Kenya. Detailed examination of how these legal provisions are applied in Kenya is needed. Since

electronic recording and transcription of court proceedings is now being implemented in Kenya, future studies are expected to be much more informative.

Seven, examination of case files showed that language-related concerns form a major portion of issues of contestation in court proceedings on matters involving child witnesses. First, subordinate courts were faulted by superior courts for their failure to keep clear records of language(s) used in court in any proceedings. To avoid scenarios where the defendants later claim to have been alienated based on language used at trial, courts have a duty to establish and put in record that none of the parties in the case is disadvantaged based on the language(s) being used.

Second, inability by children to express themselves in a “legal” language when reporting sexual abuse disadvantaged some of them. In reporting defilement, it is expected that the witness can, at least, narrate what happened to them – even offer graphic details of what happened to them and who did it. This can be challenging. S. 8(1) of the Sexual Offences Act (2006) describes defilement as “an act which causes penetration with a child”. Penetration is “the partial or complete insertion of the genital organs of a person into the genital organs of another person” (p. 5), while genital organs are “the whole or part of male or female genital organs and for the purposes of this Act includes the anus” (p. 4). Some children in the current study could not describe abuse as graphically described in the Sexual Offences Act (2006). They either lacked the correct vocabulary to describe their experience or were perhaps too shy or uncomfortable to mention words like *penetration*, or *vagina*, *anus*, and *penis*, only resulting to the use of euphemisms or commonly used (and seemingly acceptable) words/phrases in the society (e.g., *tabia mbaya* – bad manners). This put some of them at a disadvantage even when corroborative evidence did exist. This is unfortunate. Decisions based solely (or even mainly) on the child’s ability to use formal and technical language of law can be unfair.

In summary, the current study has provided evidence that a sizeable proportion of child witnesses in our courts either have some difficulties speaking or even totally unable to communicate in English or Kiswahili. This comes with a large number of related challenges discussed above, and whose extent and effect are subjects of research.

Study Limitations The current study employed a survey method to try and find the experience, practice and opinion of magistrates and prosecutors regarding interviews with child witnesses who do not speak/have difficulties speaking the language of the court. I acknowledge that research interviews with the magistrates and prosecutors would have been most appropriate. This question came up when I was presenting the research proposal for examination. I expressed my fears about getting enough magistrates and prosecutors willing to take part in interviews. My fears were informed by my previous work with magistrates during Continuing Judicial Education fora, as earlier indicated, where they would complain about work load – that they had too much work to do in their stations. Based on this, I considered the possibility that the magistrates might be reluctant to participate in the study. With this in mind, coupled with the fact that there is a severe shortage of data about this topic in Kenya, I argued that a survey (in the form of a short paper or online questionnaire) would perhaps provide us with valuable data that would form a basis for more elaborate studies in the future.

Study two: Assessing the Effect of Language on the Informativeness and Accuracy of Child Witnesses.

Aims

The current study focused on these two questions:

1. Do child witnesses provide more details when interviewed in their primary language in comparison to when they are questioned in a language of the court, that is different from their primary language?
2. Are child witnesses more accurate when interviewed in their primary language compared to when they are questioned in a language of the court, that is different from their primary language?

Methods

Background of the Study

The current study was a modified version of the study by Righarts et al. (2014). In their study, children visited a police station and experienced a memory event in which they had their fingerprints taken, had their mugshot photos taken, they were shown the inside of a jail cell, and they were shown a police car. Finally, the children were held by their shoulders by the police and spun around to turn them into a “honourary police person”. They were instructed to keep quiet about the spinning because if they do, they would lose their police status. The spinning by the shoulder event was supposed to mimic touch in CSA situations where children are then asked not to tell. The children were later interviewed about the memory event.

Current Study

The current study presented a reasonable simulation of the general type of event that a child might witness. It was modelled on the study design by Righarts and colleagues (2014)

described above. However, unlike in their study, a tour to a police station with the pupils in the current study would have presented a number of challenges including travel costs, permission from the school and parents, permission from the police station, and other logistical challenges like the need for the pupils to be accompanied by teachers, among others. Thus, in the current study, it was the *police officer* (confederate) who visited Grade 5 pupils at school. I recruited the confederate and trained him on the role he was expected to accomplish.

The confederate was a master's degree holder in youth studies and worked as a youth worker in a Presbyterian church in the city of Nairobi, thus he knew how to communicate well with children. At the point of recruiting, training, and the visit to the school as a police officer, the confederate was not aware of the intended questioning of the children about the memory event. The confederate was required to independently seek permission from the identified school's administration for a visit (guised as a volunteer trainer from the Kenya Police Service) to offer 'nuggets of wisdom' to pupils on their personal safety. It is not common for police officers to visit schools hence it was necessary to use deceit so as not to raise any concerns. I had personally identified the school as detailed in the methodology section below. Care was taken to ensure that the school did not associate me with the confederate.

Approval

We sought and received approval to conduct the study from the Research Ethics Committee at the University of Cape Town (Appendix D). Later, approval was sought and granted by the Presbyterian Minister in charge of the institution, first through a call, followed by an email (Appendix E).

Parental Consent

Parental consent was sought before staging the memory event. Pupils took the consent forms home and returned them after signing by parents. Care was taken to ensure that both the parents and the pupils remained blind to the details of the actual memory event, only informing them that the study will involve asking the pupil questions about something that they have learnt in life. See Appendix F for the parental consent form.

Privacy and Confidentiality The study posed minimal risk or cost to the child. For example, no child had to miss classes since the sessions were conducted after lessons had finished for the day. Also, we complied with the request by the school administration to avoid physical contact with children, not to feed them, and not to take pictures of the pupils. This was not a unique request to our team but a standard requirement for all visitors to the school. Also, to guarantee confidentiality, all identifying information was erased during transcription. Importantly, data in digital form was stored in a secured computer by the principal investigator.

Participants

The study took place in a Presbyterian Church of East Africa School in rural Central Kenya where Kikuyu is the dominant home language for the locals. A total of 81 pupils participated in the memory event.

Memory Event

During the school visit, the *police officer* gave three personal safety tips to class five pupils:

- 1) do not accept gifts (e.g. food and drinks) from strangers. The food and drinks might be laced with drugs to make you unconscious, resulting in abuse or trafficking.

2) do not visit homes of people you do not know alone/unaccompanied. You could get hurt if the people in those homes are bad people.

3) do not accept a lift (e.g., either from people in vehicles, bicycles, or motorcycles) from strangers. You could be held hostage and get hurt.

After this the *police officer* showed the children a photo of a jail cell, a photo of a Kenyan police car (these photos had been obtained online), they were asked to stand and sing the first verse of the Kenyan national anthem and finally, the officer demonstrated to them how police officers salute each other, then saluted the children and asked them to salute back (just like the police do)¹. A total of 81 pupils took part in the memory event (n = 81; girls = 34; boys = 47).

¹ This was a slightly modified memory event. After the delivery of the personal safety tips (listed in the memory event), the confederate, was to show the pupils a finger printing equipment and take their fingerprints, group them into fours and take their mugshots, show them large photos of a jail cell, and finally a photo of a police car. Finally, the police officer would spin each child around by the shoulders to turn him/her into an “honorary” police officer. The child would be told not to tell anyone about it. However, minutes before the confederate and his assistant joined the pupils in the hall, for the “safety talk”, they were briefed by the head teacher on a number of regular rules that apply to such visits. All visitors are not allowed to have any form of physical contact with the pupils, to take photographs of the pupils, and to feed them. The confederate had not discussed the details of the study with the institution’s administration. These instructions from the administration directly interfered with some of the proposed activities in the planned memory event. As a result, the confederate contacted me with the new development. I urgently modified the memory event to accommodate the given conditions and shared the modified memory event to the confederate as a WhatsApp message, and called him on his phone to ensure that he had clearly understood the changes. The changes included removing the finger printing activity and turning of the participants by the shoulder to transform them into honorary police officers since both involved physical contact. Also taking participants mugshots was excluded. These activities were replaced with 1) singing of the national anthem, and 2) salutation as described in the memory event section above.

Language of the Memory Event

The *police officer* spoke to the pupils in Kiswahili. At Grade five, the pupils had been studying Kiswahili as a compulsory and examinable subject since Grade one. Hence, they were expected to be fluent in both written and spoken Kiswahili.

Selecting and Training Interviewers

I placed an advert seeking to recruit research assistants near a hall of residence for the University of Nairobi students. They had to be native Kikuyu speakers and fluent in both English and Kiswahili. I recruited a total of 10 research assistants (4 males, 6 females). Also, I recruited an independent trainer and comprehensively discussed with him the planned interviews – how the pupils will be grouped, and the procedures to be followed, without divulging the details of the memory event. The independent trainer was a master's degree holder in education and was working as a graduate assistant in a private university in Kenya. Together, the independent trainer conducted the one-day training of the interviewers. The training involved a detailed explanation of the procedure to be employed when interviewing the children. It also involved role playing among the trainers. At the end of the training, the trainees took an assessment comprising two sections: an oral presentation of the procedure to be followed during the actual interviews and role-playing, to the satisfaction of the independent trainer and the principal researcher.

Translation of the Interview Questions

Questions asked in both interviews (Kikuyu and English) were identical in content, as far as possible. I translated the questions from English to Kikuyu. Also, an independent language expert familiar with both languages translated the questions from English to Kikuyu. Then, both of us had a discussion to review and resolve any discrepancies between us regarding the translations.

Grouping Pupils for Interviewing

We conducted the interviews in school one week after the pupils experienced the staged memory event. We began by informing the pupils that we worked with children in the community and that the reason we had visited them was to try and understand some of the good lessons they had learnt in life. We assured them that we had not come to administer an exam hence they had no reason to be overly anxious. We also explained to them that each one of them would meet with a member of our team in the classrooms and would be asked some questions which they were required to answer freely. At this point we asked them if any of them did not understand/speak Kikuyu. None indicated that they did not speak/understand Kikuyu.

We did not ask about English because, at class 5, the language of instruction and examination was English since they were in Grade 1 as stipulated in the Basic Education Curriculum Framework (2017). After this, we informed the pupils that the interviews would be audio recorded and guaranteed them confidentiality of the information they would give to the interviewers. At this point, we informed them that their participation was voluntary and that they were free to choose not to participate, or even opt out at any stage during the study. Four boys opted out of the study, leaving a total of 77 participants. Later, during the interviews, one girl opted out of the study. Finally, 76 pupils were interviewed. The research exercise had been allocated one and a half hours by the school administration. To ensure that the actual interviewing phase would have enough time, we sought the pupil's assent before grouping them. We did this by reading the Kikuyu version of the assent to the children without revealing the details of the study and asked them to write their name as a signature on the child's assent form. Appendix G is the children's assent form.

The participants were first grouped according to sex (girls =33; boys = 43). They were then placed into either the "E" group (English group) or "K" group (Kikuyu group) using

random assignment. A total of 76 pupils took part in the study (Kikuyu group $n = 38$, English group $n = 38$). The participants' ages ranged from 9 -15 years, and the mean age was 11.16 years ($SD = 1.26$), with 43 (57%) of them being boys while 33 (43%) were girls. At this point, none of the pupils knew what the groupings ("E" and "K") stood for. Interviews were carried out in assigned classrooms. Children awaiting to be interviewed remained in their respective group outside the room and did not interact with the children who had already been interviewed.

Interviewing Procedure

Each participant was first reminded of the staged memory event by making reference to the visit by the *police officer*, without getting into actual details about the event. This was followed by an open-ended invitation to offer details of the memory event. The only prompts which were allowed during interviewing were "can you tell me anything else?" and "minimal encouragers" (e.g., 'okay', 'uh', 'huh') (Righarts et al., 2014, p. 278). Then the children were asked 10 yes/no questions. Thanking the child marked the end of the interview. A detailed account of the phased-out interview is provided below.

Rapport Creation Stage

The interviewers greeted the child and introduced themselves, for example: "Good morning. My name is Otieno Kimosop. I work with children like you in understanding some of the good lessons they have learnt in life. And I am here to talk about one such lesson. So, I am not here to give you an exam".

Free Recall

The interviewer asked the child to give a free account of the staged memory event: "I am told that a police officer came to your class a week ago. I was not there and would be happy to hear from you about this visit. Kindly, tell me everything you can remember about it

from the beginning to the end.” The interviewer only used facilitators (e.g., ‘mh’) sparingly to encourage the pupil to keep talking. The purpose was to see how many details pupils were able to offer given a chance to testify from their recall. The interviewers also used ‘invitations’, which are input-free utterances which prompt the child to offer free-recall responses. They do not restrict a child’s focus apart from in a general way (e.g., ‘Tell me everything that happened’). Equally, the interviewers could use details already disclosed by the child (e.g., ‘You mentioned that he touched you. Tell me everything about the touching’) as cues (Lamb et al., 2009, p.455).

There is an agreement by experts that open prompts are superior in forensic interviewing. Although they may not elicit all the needed details, they are likely to yield more detailed, longer, and accurate responses than closed questions (e.g., Oates & Shrimpton, 1991; Lamb et al., 1996). Also, unlike focused questions, open prompts are less likely to yield contradictions (e.g., Orbach & Lamb, 2001; Lamb & Fauchier, 2001). The interviewer may resort to “can you tell me anything else” after no more free-recall information is coming from the child.

Direct Examination: yes/no Questions

The interview then progressed to the next phase (yes/no). Interviewer: “I’m going to ask you some more questions now. You might have told me the answers to some of the questions already, but if you have, just tell me again” Then, the interviewer asked the child 10 yes/no questions from a script (five correct details and 5 incorrect details) about the staged memory event. Yes/No utterances refer to details about the alleged incident, asking the child to affirm, negate or select an investigator-given option, thus using recognition memory processes (Lamb et al., 2009, p. 456). For example, “did the police officer turn you around by your shoulders?” (Wrong) and “did the police officer salute you?” (Correct). Appendix H contains the full list of questions in the yes/no category.

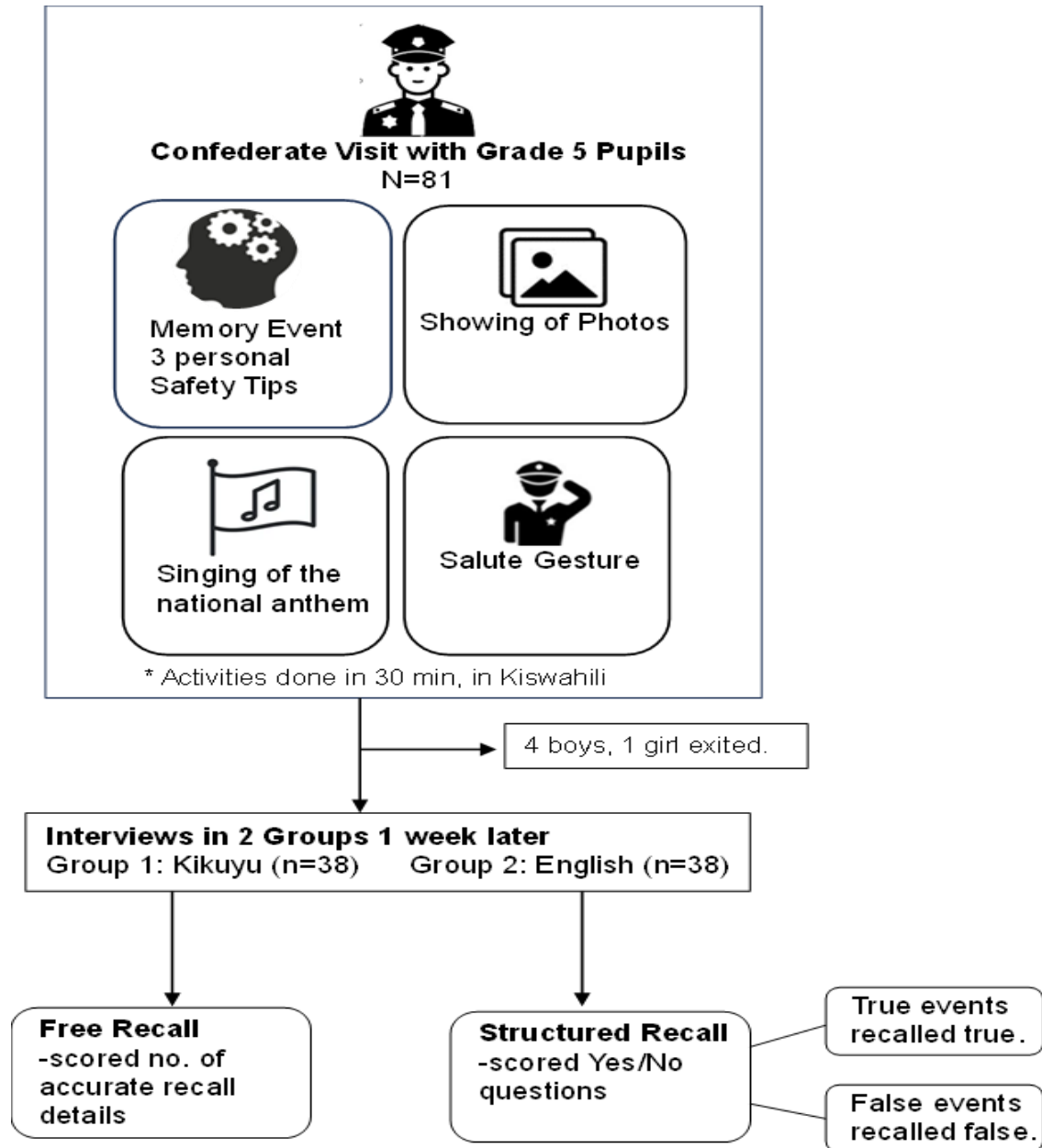
Terminating the Interview

The interviewer thanked the child for taking part in the interview and asked them to go back to class.

Debriefing

The current study involved an element of deception: the visit by the confederate dressed as a police officer. In view of this, children were debriefed immediately after the interviews. I, in the presence of Grade 5 class teachers and the head teacher, gave the pupils a brief talk about the study, revealing the parts that involved deception. One pupil asked, “Why did you lie to us?” I explained why involving deception was necessary for the study, posing a question to them about what they thought would have happened if they were to know of the details of the experiment beforehand. Their answers included: 1) “we would have taken notes and rehearsed, 2) we would have discussed, and 3) we would have memorized”. However, I informed the children that not every part of the study involved deception and that personal tips they had received from the confederate were useful. We re-stated the safety tips. Finally, each child received two copies of the debriefing form, one for themselves and the other for the parent/guardian. See the debriefing form in Appendix I.

Figure 1 is a summary explanation of the steps involved in the experimental study. Details for each step follow thereafter.

Figure 1*Steps Involved in the Experimental Study***Data Collection and Transcription**

Audio recorded interviews were transcribed by two university students who spoke Kikuyu as their home language. I verified the accuracy of the transcriptions.

Coding

Free Recall

This section was transcribed verbatim. The transcripts were coded for each correctly recalled information about the memory event (see Appendix J for the scoring schedule and the scores from the raters). I developed and later discussed the scoring schedule with the confederate to ensure that it accurately captured the activities of the memory event. Coding was done following a technique used by Cyr and Lamb (2009), which was initially developed by Yuille and Cutshall (1989) and elaborated by Lamb and colleagues (1996). However, unlike in Cyr and Lamb (2009) where the researchers focused on both central and peripheral details, the current study focused on identifying the total central details remembered by the participants about the memory event. Central details were defined as words or phrases that were key in understanding the memory event (as opposed to peripheral details which are not key to the staged memory event, for example, confederates' clothing). In identifying the central details, a distinction was made between accurate and complete and accurate but incomplete answers. In the following example, the underlined words reflect correct details, thus: "He told us not to take gifts from strangers" was coded as 3 details, compared to "He told us not to take gifts" was coded as 2 details. "He showed us pictures of police cars" was coded as 3 details, compared to "He showed us cars" was coded as 1 detail. The author and an independent researcher independently coded the free-recall sections on both Kikuyu and English language transcripts. Interrater reliability was assessed using Cohen's kappa, and we agreed about words and phrases identified as details at 0.75. We resolved the disagreements through discussions. All statistical analyses for the experimental study are contained in Appendix K.

When coding for details, grammar was not a consideration. Pupils were awarded points for their informativeness (number of details provided), their use of poor grammar notwithstanding. For example, the *police officer* had told them that they "should never accept

gifts from stranger.” One pupil reported that the *officer* told them, “*do...do not take any...the... the sweet that...we cans.... We can ...we can give.. given by the...the person who don’t know*” and was given 3 details. In another example, the *police officer* had told them “not to accept a lift (e.g., either on vehicles, bicycles, and motorcycles) from strangers.” One pupil said during interviews that the police officers had told them that “*when, when you, when when a stranger tells, when you are going home then a stranger came on the way tells you to get in a car ...you must regret it*”. This was coded as two details. It would appear the pupil wanted to say “reject it” but could not get the actual word instead using “regret it”.

Direct Examination: yes/no Questions

For every question the child answered correctly in the yes/no (direct examination) section, he/she earned one point. Thus, the total accuracy score was between 0 and 10. Further, since five questions were about things that actually happened during the memory event (e.g., did the police officer show you a picture of a jail cell?) and five were about things that were not part of the memory event (e.g., did you see the police gun?), the score for each of the two sets was computed with the total accuracy score being between zero and five. The ten questions asked to test for accuracy are listed in table 7 below.

Analysis

Scores data was entered into MS Excel and analysed using STATA 16. (*StataCorp. 2018. Stata Statistical Software: Release 16. College Station, TX: StataCorp LLC.*). Scores were summarized using means and standard deviation. Differences in mean scores across the two language groups were assessed using two sample independent Welch t-tests, to account for unequal variances.

Table 7

List of yes/no Questions Assessing the Accuracy of Recall.

Question	True	False
Did you get your fingerprints taken?		X
Did the police officer show you a picture of a police car?	x	
Did you have your photo taken?		X
Did the police officer show you a picture of a jail cell?	x	
Did you see the police officer's gun?		X
Did you sing the national anthem?	x	
Did the police officer salute you?	x	
Did the police officer tell you that you should not take gifts from strangers?	x	
Did the police officer turn you around by your shoulders?		X
Did you see the police officer arrest a man who tried to steal your teacher's phone?		X

Results

Free Recall

The total score from the details provided by the pupils during free recall was 162 ($M = 2.13$, $SD = 2.21$, $Range = 0 - 7$), with the score being higher among those interviewed in Kikuyu (73%) compared to those interviewed in English (27%), as shown in figure 2. Results of an independent two sample t-test with unequal variance comparing free recall scores by language groups indicated that the children interviewed in Kikuyu ($M = 3.11$, $SD = 2.19$) compared to those interviewed in English ($M = 1.16$, $SD = 1.78$) demonstrated significantly better free recall scores, $t(74) = -4.25$, $p < .001$.

Direct Examination: yes/no Questions

Total accurate recall in the yes/no section among pupils interviewed in Kikuyu was 89% compared to 78% among those interviewed in English. The mean difference (1.13) was statistically significant $t(59) = -3.64$, $p < 0.001$. Specifically, for true events recalled as being true, the mean difference between the two groups was 0.42, which was near-significant, $t(49) = -1.97$, $p = 0.054$, while for false events recalled as being false, the mean difference was 0.71, and was statistically significant, $t(74) = -2.74$, $p < 0.001$. Age and Sex were not independently associated with total accurate recall scores. Table 8 below shows the scores depicting the accuracy of the recall from the 10 yes/no questions (total overall score, total true events and total false events), while table 9 shows the differences in accuracy for each question.

Figure 2

Summary of Scores (Frequency) for Both Free and Structured Recall by Language of Interview

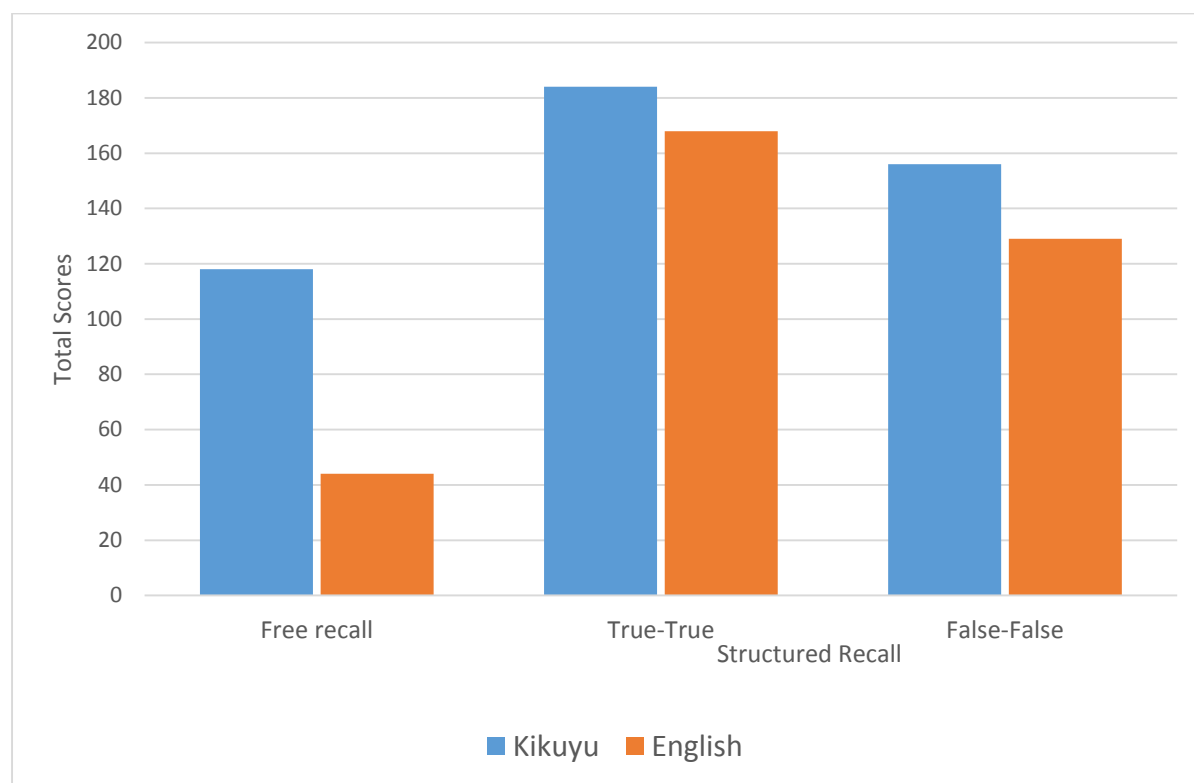


Table 8*Total Scores, True and False Events Recalled*

Independent 2 sample Welch t-test										
	Kikuyu				English					
	Total possible	Scores obtained	Mean	SD	Total possible	Scores obtained	Mean	SD	T-test	p-Value
Total Score	380	340(89%)	8.95	0.93	380	297(78%)	7.82	1.67	t(59) = -3.64	<0.001
True events identified as true	190	184(97%)	4.84	0.49	190	168(88%)	4.42	1.22	t(49) = -1.97	0.05
False events identified as false	190	156(82%)	4.11	0.86	190	129(68%)	3.39	1.35	t(74) = -2.74	<0.001

Table 9*Differences in Accuracy of Scores by Language for Each Question*

Question		Kikuyu	English	Pearson's	
				Chi2	p-value
1	Did you get your fingerprints taken?	23 61%	23 61%	0	1
2	Did the police officer show you a picture of a police car?	37 97%	34 89%	1.11	0.29
3	Did you have your photo taken?	30 79%	24 63%	2.3	0.13
4	Did the police officer show you a picture of a jail cell?	37 97%	36 95%	0.35	0.56
5	Did you see the police officer's gun?	35 92%	29 76%	2.82	0.09
6	Did you sing the national anthem? (true event)	37 97%	31 82%	5.03	0.03
7	Did the police officer salute you?	34 89%	29 76%	2.32	0.13
8	Did the police officer tell you that you should not take gifts from strangers?	38 100%	36 95%	2.05	0.15
9	Did the police officer turn you around by your shoulders? (false event)	38 100%	27 71%	12.86	<0.001
10	Did you see the police officer arrest a man who tried to steal your teacher's phone?	37 97%	34 89%	1.93	0.17

Discussion

In this study, we compared children interviewed in their home language (Kikuyu) to those interviewed in an official language of the court (English) for differences in their informativeness and accuracy. This was assessed through both free recall and through the use of yes/no questions.

Free Recall: Informativeness by the Children

Our findings show that pupils interviewed in Kikuyu provided more details in their free recall compared to their counterparts interviewed in English, and this difference was statistically significant. While most studies in the past have assessed age-appropriateness of language used among child witnesses in court, the level of informativeness comparing use of the home language to other dominant second (foreign) languages has not been well examined. Parallels can be drawn comparing this finding to other language debates, such as use of first language in primary school education being associated with higher literacy rates and better learning (UNESCO, 2007).

Our finding is significant because the level of detail can be directly related to the usefulness of the witness' testimony in court. Corroboratory evidence is often absent in CSA cases hence a more informative child may contribute significantly to the weight of the evidence adduced in court. In fact, it could be the only available evidence to start and largely maintain the criminal proceedings.

Free recall in forensic interviewing is recommended. Asking children open-ended questions accords them a chance to draw answers from their memory, and these answers have higher levels of accuracy, informativeness and detail (e.g., Goodman et al., 1991; Sternberg et al., 1996; Lamb et al., 1996; Lamb & Fauchier, 2001; Oates & Shrimpton, 1991; Lamb et

al., 2002; Sternberg et al., 2001; Orbach & Lamb, 2001). The large difference in level of detail by language 73% in Kikuyu vs 27% in English therefore underscores the need to consider utilizing a child's home language when questioning them for forensic purposes in Kenya. It has been argued that using a different language from one's home language not only negatively affects the degree to which one acquires knowledge, but also how much they can recall (e.g., Bernhofer & Tonin, 2022). This language-contributed 'cognitive cost' can be particularly deleterious in forensic interviewing, if it contributes to the child's inability to provide important details pertinent to their testimony.

Direct Examination: Assessing Accuracy Through yes/no Questions

Total scores from 'yes/no' recall were higher among those interviewed in Kikuyu compared to those interviewed in English, and the mean difference was statistically significant (Table 8). Specifically, children interviewed in English were significantly more likely to recall a false event as true compared to those interviewed in Kikuyu. Also, they recognized less true events compared to their counterparts who spoke in their mother tongue. A plausible explanation of these findings is that the children who were interviewed in English had difficulties understanding the language used by the interviewer, only choosing to offer some form of answer nonetheless. Although not directly related to the current study, children in the study by Zajac and Cannan (2009) did not ask for clarification when asked very complex questions, instead choosing to provide answers even when it was obvious that they may not have understood the questions.

The use of 'yes/no' questions in forensic contexts is not recommended because they are known to increase the likelihood of inaccuracy, especially in younger children (e.g., Heather Fritzley et al., 2013; Lamb et al., 2003; Yuille et al., 1993). That is why, as earlier emphasised, experts agree that maximum use of open prompts when questioning children both in the investigations phase and in court is good practice. Noteworthy, findings from the

current study introduces another angle to this debate – whether the use of home language can “neutralize” the negative effect of yes/no questions.

Implications for Further Research

Findings from the current study have important implications, especially because they support the “superiority” of using home language in eliciting more and accurate details from children. The findings support the opinion of 88% of the magistrates and 97% of the prosecutors in the survey study reported earlier in the current thesis who opined that child witness’ home language should always take precedence when testifying in court. This opinion was based on their own experience while presiding over or prosecuting cases involving children as witnesses. In fact, a total of 97% of the magistrates and 98% of the prosecutors reported to have dealt with child witnesses who had some difficulties expressing themselves in Kiswahili or English language in court, while 96% of the magistrates and 97% of the prosecutors reported to have dealt with child witnesses who had no ability, or nearly no ability to speak the language of the court.

Since recording and transcription of court proceedings in Kenya is now in place, albeit on a trial basis, assessment of the effect of language on children (and adults) informativeness can (hopefully) now be assessed using actual court transcripts. How would the testimony of children (and adults) who testify in their home languages compare with that of the children who testify in Kiswahili or English in terms of, for example, informativeness? Finally, the findings underscore the need for increased number of laboratory studies to investigate the effect of language and accuracy on the testimony of child (and adult) witnesses.

Study 3: Investigating the Strategies Used by Lawyers When Questioning Child Witnesses in Court

As indicated previously, several studies have investigated the strategies used by interviewers in forensic contexts (e.g., Brennan & Brennan, 1988; Flin, et al., 1989; Brennan, 1995; Davies & Seymour, 1998; Saywitz, et al., 1990; Zajac, et al., 2003). These studies have shown that the language used in court, especially by defence lawyers, does not, in many cases, take into consideration children's developmental competencies. The current study examined the interviewing strategies used by lawyers when questioning a child reporting sexual abuse in an actual court case.

Methods

Study Design and Setting

To undertake this study, I needed to audio record a section of court proceedings involving a child witness reporting sexual abuse, during both examination-in-chief and cross examination. Accordingly, I sought authorization from the Chief Registrar of the Judiciary of Kenya through a letter. Permission was granted, and I was referred to the Head of the Children's Court at Nairobi for guidance and facilitation (Appendix L). The Children's court has jurisdiction on all civil and criminal matters that involve children (both as defendants and as complainants).

Procedure

The Head of the Children's Court at Nairobi was very supportive. She gave me access to the registry to peruse files and identify a suitable case for study. The proposed ideal case for study was where I would witness both direct and cross-examination of a child complainant of tender years (below 10 years). A total of 122 files were made available. The cases were as follows: a) 58 cases were about children in need of care and protection, b) 27

cases were about children reporting defilement by other children, c) 28 cases were about children accused of other criminal charges (e.g., arson, creating disturbance, break-ins, causing bodily harm, theft, etc.), and d) nine cases were about parents/caregivers accused of neglect and/or cruelty. The Kenyan Judiciary has been advocating for alternative dispute resolutions (ADR) in matters involving child offenders. The ADR concept is a creation of Article 159(2)(c) of the Kenyan constitution, 2010. However, defilement cases, even when the alleged perpetrator is a minor, must go to a full hearing.

Out of the 27 CSA related cases, 24 were ongoing and the child witnesses had already testified. In one of the remaining three cases, the child reporting abuse was aged 3½ years and the prosecution had indicated their intention to exempt the child from testifying. Hence two cases were ideal for study. Since I had proposed to record a single case for the current study, I was prepared to proceed with either of the two cases that would first come up for hearing. It is important to emphasize here that these defilement cases were unique because the complainant and the accused were both minors.

Case 1 in a Children's Court. On the day the child was set to tender her evidence, the presiding magistrate denied me access to his court citing lack of sitting space. The matter was being heard in his chambers due to a shortage of courtrooms at the station. Also, my request to have the matter audio-recorded by the court assistant was not accepted. Therefore, I pursued the possibility of recording the other identified case that was coming up for hearing in two days.

Case 2 in a Children's Court. The presiding magistrate granted me access to her courtroom to audio record the proceedings. The proceedings took place in a closed court, thus, the magistrate introduced me (as an outsider) to the court officers – prosecutor, defence lawyer, and the court assistant. However, the case was adjourned by three weeks since the child complainant did not arrive in court owing to a miscommunication between the court and

the children's home housing her. On the second day marked for hearing, the case was again adjourned for a month to allow time for an application to test DNA evidence to be processed.

In view of these delays, the Head of the Children's Court referred me to the regular magistrates' court for further assistance. Here, cases of child sexual abuse by adults would be heard. Again, I was granted access to CSA files, which numbered nineteen in total. Seventeen cases were ongoing, and the child witnesses had already testified. Two cases were coming up for hearing.

Case 1 in a Regular Court. The presiding magistrate had resigned from his work and the case file had been referred back to the head of the station for re-assignment.

Case 2 in a Regular Court. The presiding magistrate granted me access to her courtroom to audio record the proceedings which took place in a closed court. Both the accused and the complainant were present. I audio recorded the questioning of the child witness by both the prosecutor and the defence lawyer.

Transcription

I transcribed the audio recording and double-checked it for accuracy. To ensure privacy and confidentiality, I kept the recordings of the court proceedings and transcribed data in a secured computer. Also, I redacted from the transcripts names of people, places, buildings and anything else that might reveal the identity of the persons involved in the case study. A copy of the de-identified transcripts can be found in Appendix² M.

² All other documents/forms including the ethics application form, consent form for magistrates and prosecutors, debrief for magistrates and prosecutors, survey questionnaire for magistrates, survey questionnaire for prosecutors, and study 2 (experimental study) interviewing procedure – both English and Kikuyu versions are contained in Appendix N.

Data Coding

This study was carried to examine the interviewing strategies used by a prosecutor and a defence lawyer when questioning a child witness in a Kenyan court. To do this, I closely studied the questions for potential language-related problematic areas. Four areas of concern emerged: 1) use of child unfriendly words, 2) unrealistic demand for child's memory of dates, 3) use of ambiguous language, and 4) use of credibility-challenging language. In addition, though aware that this single court case may not yield enough data to allow for adequate quantitative statistical analysis, it was important to see the type of questions that lawyers relied on in their questioning. To do this, I recruited an independent researcher, a graduate high school teacher of languages, to help with the coding. We coded both lawyers' questions into three categories according to Zajac & Cannan (2009, p. S40): 1) open – “question does not restrict response options”, 2) closed – “Yes/No or forced choice question”, and 3) leading – “statement to agree with or tag question” (e.g., “So you got a big fright?”). Also, a fourth category, summaries – “accurately restate what the child has just said without any explicit request for information or response” (Lamb et al., 2003a; Orbach et al., 2012, p. 121), was added. After discussing the definitions and meaning of the 4 coding categories, we agreed on the number of items that required coding by numbering the questions and then proceeded to independently code the questions.

Inter-coder agreement on decisions that we agreed on was calculated as a percentage of the number of agreements divided by the number of coding decisions. We agreed 88% of the time and resolved the disagreements through discussion. The results were compared with expert-guidelines on the right questions to use with children in forensic interviewing. The proposal to test for complexity of the questions using automated test complexity measure tools was abandoned since the prosecutor interviewed the child in Kiswahili, and no suitable tool that supported this language was found.

In the de-identified court transcripts of the case study under review (Appendix M), the questions were numbered for ease of reference. The numbers appear in square brackets in the text. Also, where the language of the material being referenced to was not originally in English, translations have been made as may be necessary. Findings from this case study are discussed next.

Findings

Question Type

The child was asked a total of 139 questions (47% by the prosecutor [total = 66: n = 63 during examination-in-chief; n = 3 during re-examination] and 53% by the defence lawyer [n = 73; total n = 139]). The child witness was questioned for a total of 28.49 minutes: examination-in-chief took 19.15 minutes, cross-examination took 8.34minutes, and re-examination took 1 minute. Thus, on average, the child was asked 4.9 questions per minute during the entire session she was under examination. The prosecutor asked an average of 3.28 questions per minute, while the defence lawyer asked an average of 8.75 questions per minute. Of the total 139 questions the child was asked, only 2% were open questions (prosecutors =3, defence lawyer = 0, n = 3), 75% were closed questions (prosecutor = 43, defence lawyer = 61, n = 105), 6% were leading questions (prosecutor = 7, defence lawyer = 2, n = 9), and 17% were summaries (prosecutor = 13, defence lawyer = 10, n = 23. See table 9 for total question type in each category.

Table 9*Interviewers' Question Type in the Case Study*

Question category	Prosecutor Frequency(%)	Defence Frequency(%)	Total	Percentage
Open	3(100)	0(0)	3	2%
Closed	43(41)	61(59)	104	75%
Leading	7(78)	2(22)	9	6%
Summaries	13(57)	10(43)	23	17%
Total	66(47)	73(53)	139	100%

Child-Unfriendly Words

The determination of a word as potentially child unfriendly was not based on whether the child witnesses gave an answer to the question or not. It was based on what was judged to be complex legal or non-legal words were used that the child may have had difficulties understanding, and deliberate use of less difficult alternatives was an option the lawyers could have utilized. Speaking in Kiswahili, the prosecutor, for the most part, used a language that was deemed child friendly (simple and clear) but for the use of the word “recall” in a sentence composed of both Kiswahili and English words: “*Unaweza recall after how many months baada alikufanyia?*” [20] (the prosecutor likely meant, “*would you recall that this happened so long after he did this to you?*” This was in reference to the child’s report that she had missed her next menstrual flow since she had conceived from the rape).

The use of the Kiswahili word “*alikufanyia*” could have distorted the meaning of the question. Its actual meaning is “*he did it for you*” and not “*he did it to you*”, thus the incorrect sentence, *Would you recall that this happened so long after he did this for you?* Its use would

be acceptable in an informal verbal conversation but not in the context in which it was used in this instance. The child reported rape in clear words: “...*halafu akanirusha kitandani akararua nguo zangu ...akanirape*” [8] (“He threw me on the bed, tore my clothes off and raped me”). Note that the word “*akanirape*” is a mixture of Kiswahili and English languages. “Aka” is a Kiswahili second person pronoun which stands for the perpetrator (he), “ni” is Kiswahili for the first person pronoun (I), and “rape” is English for the act of sexual abuse, thus “*akanirape*” means “*he raped me*”. Thus, the prosecutor, perhaps in search for a *softer*, more socially acceptable word, may have distorted what the child had already clearly stated. The prosecutor used the word “*alikufanyia*” four times in her interview to mean sexual abuse – which, as already said, was the wrong word to use. Why is this important? In the second section of study two of this thesis (The language question as contained in case law), a significant number of child witnesses were found either to be without enough vocabulary or were unwilling to describe sexual abuse, instead resorting to socially safe words/phrases. This became a major subject of contestation in court, often to the disadvantage of the child. On the contrary, in this case, the child is describing what the perpetrator did to her in plain language. It is the prosecutor who is struggling with words, words which would build or weaken the case.

For his part, the defence lawyer used ‘big’ words like *offence*, *allegedly*, *occur*, *concerning*, *siblings*, *incident*, *particularly*, *apartment*, *flat* (in reference to a building), *DNA*, *recall*, and *conducted*, throughout the cross-examination. For example, the first question he asked the child in the substantive part of his questioning was, “*When was the offence allegedly occur (sic)?*” [66]. This question is not only a collection of both legal and non-legal jargon but, as will shortly be discussed in a different section, it is also ungrammatical. In fact, the child had reported multiple incidents of abuse hence it was not clear which incident he was referring to, rendering the question ambiguous too. The lawyer continued, “*How long*

have you known – had you known [name withheld] before the incident?” [92]. Here, in addition to the use of the word *incident*, asking the child to be specific about the length of the duration that she had known the accused is also use of complex language. Further, the lawyer made reference to a complex medical test (DNA of parentage) without explaining or ascertaining that the child truly understood its meaning to be able to competently answer his question (even though the child had answered in the affirmative). He asked [133-135]:

Lawyer: So are you sure if DNA – do you know what’s called DNA?

Child: Yes

Lawyer: Are you sure if DNA is conducted on the baby the father will be [name withheld].

Child: Yes

Lawyer: Are you sure and you know if you are not sure it will mean you are lying?

Child: I’m sure

Unrealistic Demand for Child’s Memory of Dates

There was a near-relentless demand by the defence lawyer for the child to remember with accuracy specific dates/times for some of the reported events, and this formed a significant part of the cross-examination. Indeed, this may not be an isolated demand since scrutiny for specific details during cross-examination is to be expected. As it has been observed:

In court actions, it is not just Who did What to Whom that matters, it is *When, Where, How often – and What* did he/she/it look like that count. Obviously, the ability to answer these critical questions requires an underlying awareness of the relational

concepts of size, time, distance, and frequency, as well as the ability to describe (Walker, 1993, p. 75 - Emphasis added).

However, the defence lawyer's persistent pre-occupation with having the child remember with exactness dates, weeks, and months of when events under review took place was adjudged in this review as inappropriate. He must have assumed that the "ability" and "awareness" that Walker is referring to in the quotation above were present in this child witness. Nevertheless, his persistence to follow this line of questioning attracted an intervention of the court [66-83]:

Lawyer: when was the offence allegedly occur?

Child: [inaudible]

Lawyer: when? which month?

Child: [names a month]

Lawyer: you can't recall the date?

Child: yes

Lawyer: ok. that was the first time?

Child: yes

Lawyer: and the second time?

Child: [inaudible]

Lawyer: it was? the date, or the month?

Child: month

Lawyer: you cannot remember?

Child: [offers an answer]

Lawyer: The first one was in [mentions a month] and the second one?

Child: [names a month]

Lawyer: just in [names a month]? ok. you are sure it was in [names a month]?

Child: yes

Lawyer: ok. and when did you give birth?

Child: [gives a date]

Lawyer: [restates date] of which month?

Child: of [mentions a month]

Lawyer: [restates month] the same year?

Child: yes

Lawyer: Ok. you gave month – aahhh – the baby was how old – how many weeks when you gave birth?

Child: nine months

Lawyer: you can remember the weeks?

Child: no

Lawyer: you can't remember?

Child: yes

Lawyer: is it 40, or 42, or 36, 37, or 38?

Child: can't remember

Lawyer: you can't remember?

Magistrate (intervening): she was a very small girl. It is only the older women who can remember such details

Lawyer: ok. Thank you. But you confirm the baby was nine months?

Child: yes

Defence lawyers have previously been found to ask child witnesses questions that are often beyond their developmental competences (e.g. Brennan & Brennan, 1988; Davies & Seymour, 1998; Zajac et al., 2003). Child witnesses' language abilities should always be taken into consideration when asking them questions (Perez, et al., 2022), because their

ability to comprehend questions is age-related (Hudson & Nelson, 1983). It has long been established that apart from the amount and quality of information obtainable from a child witness, the complexity of what is recalled and narrated also increases with age (e.g. Fivush, 1997, 1998; see Pipe et al., 2004).

Ambiguous Questions

Some of the sentences used and questions asked during cross-examination were not only ungrammatical (e.g., as cited above, “*When was the offence allegedly occur?*” [66]) but they were also ambiguous, e.g., “*now concerning the day- the day- that day you said it was in the morning- morning hours?*” [84]. It was not clear which day he was referring to since the child had already reported to have been abused on two separate days, hence *the day – the day – that day*, made no sense. Wanting to know who between the accused and the alleging victim’s family first settled into the area where they lived (the area where the rape allegedly occurred) , the lawyer posed: “*You found them – you found him when he was staying there or you came when you are already in the estate or in that block?*” [94]. He continued, “*You were in which class when you started staying or you started becoming at the neighbour to [name withheld]?*” [98]. He proceeded, “*...and whom was who...she was staying with the some people in his house, [name withheld]?*” [100]. In this last question, he even refers to the accused as a “she”. The lawyer was obviously struggling, and in the process subjecting the child to questions that were ungrammatical, full of false starts and, without doubt, somewhat ambiguous.

Credibility-Challenging Language

As earlier noted, s. 154 of the Evidence Act (2012) allows for the use of credibility-challenging questions during cross-examination, so as “to test his accuracy, veracity or credibility...to shake his credit, by injuring his character...”. The child witness in the present case was subjected to numerous credibility-challenging utterances by the defence. For

example, the defence lawyer tried to poke holes in the child's testimony by questioning why the child did not scream for help or free herself from the grip of the abuser and run to safety or even why nobody heard her being violated or came to her rescue [114 -122]:

Lawyer: you said that he pulled you into the house?

Child: yes

Lawyer: did you cry, make noise, scream?

Child: I scream (sic)

Lawyer: you scream (sic)

Lawyer: did the neighbours come?

Child: no

Lawyer: why?

Child: because they were not around

Lawyer: they were not around.

Child: yes

Lawyer: did you try to run?

Child: yes, but he locked the door with a padlock

Lawyer: the house had a padlock, Inside? Had a lock?

Child: yes

The child had reported that although she was suffering from physical pain after the rape, she had delayed reporting the abuse since the defiler had threatened her parents with death if she ever disclosed the abuse. The lawyer used this delay to challenge the possibility that the child may have suffered any pain [123 – 128]:

Lawyer: why didn't you report to your mother?

Child: because I was afraid

Lawyer: mmhh you were afraid.

Child: yes

Lawyer: so you were just normal the following day you went to school?

Child: I told my mum that I had a headache [inaudible]

Lawyer: and you didn't go back to school?

Child: yes

Lawyer: were you feeling any pain?

Child: yes

Lawyer: and you didn't report?

Child: yes

The prosecutor had earlier questioned the delay in reporting, perhaps in anticipation that the defence would use it to undermine the credibility of the victim's testimony. And that is when the child revealed that the accused had threatened to kill her parents [38 – 40]:

Prosecutor: Na kwani hukumweleza mum hapo mbeleni? (Why didn't you report it sooner to your mum)

Child: vile alini-threaten (because he threatened me)

Prosecutor: alikuthreaten. Alikuambia aje? (he threatened you [restates]. What did he tell you?)

Child: [inaudible]

Prosecutor: mmhh [uses a facilitator]

Child: atawaua (that he would kill them).

In fact, the child did not disclose the abuse until they moved to a different estate away from the abuser, perhaps after she felt safe to do so. Credibility-challenging strategies by lawyers may also include questioning the certainty of witnesses about their testimony (e.g., “are you sure about that?”) or even repeating a question or the witnesses' answer (e.g., “who was there at that stage? A. They were all still there. Q. All of them?”) (Zajac and Cannan, 2009, p. s40).

In the current case study, the defence lawyer repeatedly questioned the certainty of the child witness about the paternity of her child [133-136]:

L: mmm so *are you sure* if DNA, do you know what's called DNA?

C: yes

L: *are you sure* if DNA is conducted on the baby the father will be [name withheld]?

C: yes

L: *are you sure* and you know if you *are not sure* it will mean you are lying?

C: I'm sure

L: ok. Your honour that's all for this witness

Notably, the defence lawyer may have strategically used the credibility-challenging method as a 'strong' way to end his cross-examination. A discussion of these results and implications for the way children are questioned in court is contained in the next section.

Discussion

In the current study, the strategies used by a prosecutor and a defence lawyer in court when questioning a child who had reported sexual abuse were examined. Two important findings relating to question types and language use are discussed here. First, most of the questions that the child was subjected to by both lawyers have long been considered inappropriate in forensic contexts, and nearly all of the leading questions were asked by the prosecutor. For example, she asked [25]:

Prosecutor: Uliweza kujua kwa nini tumbo yako ilikuwa inafura? (Did you know why your stomach was swelling?)

Child: Sikuwa najua (No, I didn't know).

The child had not at this point said anything in her testimony about a *swelling stomach* (as a result of a pregnancy) before the prosecutor made reference to it. In another instance, the prosecutor stated [62-63]:

Prosecutor: alikufanyia sex [summary] (“he had sex with you” --- after the child had reported that the perpetrator had sex with her).

Child: ehh (yes)

Prosecutor: na ukasikia uchungu (and you felt pain)

Child: ehh (yes)

Notably, the child at this point had not made mention to pain. The prosecutor was calculatedly using questions that suggested the answer she wished or expected to receive. Prosecutors interact with their witnesses before the cases come up for hearing in court (during the preparation for court session) where they pick strategic pieces of information as reported by the witness. Since prosecutors are trained lawyers, they are aware of critical ingredients/details of a testimony that are likely to strengthen their case, hence may be driven to asking questions that quickly and directly adduce this evidence. In Kenya, as previously indicated, s. 150 of the Evidence Act (2012) does not entirely disallow the use of leading questions during direct examination or re-examination. They may only not be used “if objected to by the adverse party” (p. 49). Thus, if not objected to, the prosecutor might deliberately take this option.

As previously stated, expert guidance on good interviewing recommends the use of open-ended questions in forensic contexts. This is because open-ended questions obtain information from memory – that is, actual memory of something experienced, seen, or heard (e.g., Lamb et al., 2007). Only 2% of the questions in the present case were open prompts.

Noteworthy, 17% of the lawyers’ prompts were summaries. Information obtained from a child witness in response to summaries (just like cued invitation) is also likely to be

accurate because it is equally likely to have been retrieved from memory (Orbach et al., 2012). When using summaries, interviewers accurately repeat the answer given by the witness for example, “You mentioned that he touched you. Tell me what happened.” (Teoh, 2014, p. 797). Recommendations for the use of appropriate utterances when questioning children (whether for investigative reasons or in court) are well documented and the findings of the current study, like those of others mentioned before in this thesis, do not conform to these recommendations (e.g., Cederborg et al., 2000; Davies et al., 2000; Sternberg et al., 2001; Korkman et al., 2006; Lamb et al., 2006; Thoresen et al., 2006; Zajac & Cannan, 2009).

The second important finding is that of the language used by the lawyers. The child was subjected to a language that was considered both age-inappropriate and unfair, especially during cross-examination. For example, the defence lawyer used both legal and non-legal jargon/complex words, and words/phrases that were deemed both ambiguous and ungrammatical. This is in addition to the defence lawyer’s strategy to relentlessly push the child to remember with exactness dates, weeks and months of when certain events relevant to the case took place. For example, asking the child to state how many weeks her baby was when she gave birth, “...is it 40, or 42, or 36, 37, or 38?” [81]. In Zajac and Cannan (2009), asking a child witness to be specific about measurements (e.g., time, height) was considered complex language. For example, “how far from your home is your school?” (p. S40).

This, it would appear, is not an isolated observation. It has been argued that, often, court language is “informal, illogical, ungrammatical ...full of blunders and grievous errors and mutations... and characterized by endless sentences, false starts . . . and other crudities”, Walker, (1985; as cited in Walker, 1993, p. 67). Results from the current study parallel findings from previous studies (e.g., Zajac et al., 2003; Brennan & Brennan, 1988; Davies & Seymour, 1998; Zajac & Cannan, 2009), who faulted defence lawyers for using words that

the child may have found difficult to comprehend. This cannot be a fair way to communicate with a child [and adult] whether in court or anywhere else. This is because, “communication is a meaning-making process, a search for understanding and relevance, and a way of establishing common ground and connecting with another’s experience” (Dolese & Kozbelt, 2020, p.1).

Having a child witness participate in proceedings where they are unlikely to make meaning and fully participate in narrating about what they have experienced, seen, or heard that is relevant to the on-going case is an outright violation of a right to access to justice. In court proceedings, words are not merely words but “exact words are taken to have exact meanings” (Walker, 1993, p. 68). That is why there must be deliberate efforts by the lawyers to use words that the child will understand to be able to offer useful answers.

Finally, the defence lawyer in the current case study relied heavily on credibility-challenging questions, which was consistent with the findings by Zajac and Cannan (2009). This line of questioning also conforms to the provisions of s. 154 the Evidence Act (2012) which allows for the use of credibility-challenging questions during cross-examination. Like the question of informativeness, the credibility of children in forensic contexts has been specifically addressed before (e.g., Hershkowitz & Lamb, 2020; Lamb, 1998). Researchers agree that the strategy used by interviewers when questioning children does affect their informativeness and the credibility of their testimony (e.g., Goodman et al., 1991; Lamb et al., 1996; Lamb & Fauchier, 2001; Lamb et al., 2002; Oates & Shrimpton, 1991).

In addition to the kind of questions asked, the use of interviewing protocols (e.g., the revised NICHD protocol) that better facilitates rapport between the child and the interviewer and helps create an environment where the child feels better supported as they report abuse, improves the credibility of children’s reports (e.g., Hershkowitz & Lamb, 2020). Apart from the need to train lawyers and prosecutors on the need to be deliberate about best practice

when interviewing children, courts have a duty to intervene and protect child witnesses from inappropriate questioning strategies that are likely to lead to miscarriage of justice.

Conclusion

This case study is the only of its kind that we know of in Kenya. The overreliance of closed and leading prompts by the lawyers is concerning. If indeed the main purpose of a court hearing is to establish the truth, then care must be taken about the kind of questions asked to obtain this truth. This is because we know that inappropriate prompts (e.g., closed and leading questions) negatively affect the credibility of witnesses' accounts (e.g., Goodman et al., 1991; Lamb et al., 1996; Lamb & Fauchier, 2001; Lamb et al., 2002; Orbach & Lamb, 2001; Oates & Shrimpton, 1991). Also, subjecting the child witness to unsound language (age-inappropriate, ungrammatical, and ambiguous) is unfair and likely to reduce their usefulness as witnesses in legal proceedings. Since children are an important constituency in the justice system, it is imperative for the Law Society of Kenya (LSK) to consider an annual compulsory course on children and the law for advocates as part of their Continuous Legal Education (CLE). The course should be developed and taught by experts in developmental science and forensic interviewing. The Law Society should also consider funding studies to review progress and offer feedback on practices in court when dealing with child witnesses.

In addition, there is need for a conversation about the fact that Kenyan law allows the use of prompts that have been found to be potentially contaminating in forensic contexts. In particular, is the use of leading and credibility-challenging prompts during cross-examination. These prompts have been linked to the change of testimony by child witnesses during cross-examination (e.g., Zajac & Hayne, 2003; Zajac et al., 2003; Zajac & Cannan, 2009), putting their reliability as witnesses to question.

With trial recording and transcription of court proceedings already in place, access to enough data for a lot more meaningful analysis is expected to improve answers to important questions found. For example, would the lawyers' questioning strategy change when dealing with child witnesses of varying ages? How would these strategies differ when dealing with adult witnesses? How do children respond to different strategies used by lawyers? For example, do they comply, resist, or even partially or fully change their testimony during cross-examination? Do courts intervene when child witnesses are subjected to inappropriate questioning strategies by lawyers? What role, if any, do intermediaries play in "shielding" the child from inappropriate questioning strategies by lawyers? Indeed, there is a lot of research ground to cover in the field of forensic interviewing in Kenya, and this study will, hopefully, serve as a springboard to more comprehensive studies.

CHAPTER FOUR

Summary and Conclusion

This chapter brings together the findings and conclusions of the studies in this thesis. The overarching goal of my PhD research was to examine the effect of language on the content and accuracy of child witnesses accounts. Answers to the following four specific questions were sought:

- i. What is the prevalence and practice of interviewing child witnesses in Kenya in their mother tongue versus the language used in court?
- ii. Do child witnesses provide more details when interviewed in their mother tongue than when questioned in a language of the court?
- iii. Are child witnesses more accurate when interviewed in their mother tongue than when questioned in a language of the court?
- iv. How developmentally-appropriate is the language of prosecutors and defence lawyers when questioning child witnesses in a Kenyan court?

In search for answer to these questions, 3 studies were conducted. Study one, aimed at answering question 1, comprised 3 parts. Part one was an analysis of the Kenyan legal framework for special measures put in place to support child witnesses. Part two was an analysis of case files for language-related concerns, and part 3 was a survey of magistrates and prosecutors on their experience, practice and opinion on the question of language use with child witnesses in court. Study 2, answering the second and third questions, was an experiment involving a staged memory event for pupils in order to assess their informativeness and accuracy based on the language of interviewing. Finally, the third study, answering question 4, was an assessment of a transcript of a real court case involving a child reporting sexual abuse for language-related concerns.

In this section, a summarised re-statement of the main findings from these studies is done in point form and a more unified conclusion is drawn.

One, there is a severe shortage of data on the effect of interviewing children in their home language versus other dominant languages in legal settings. Actually, the current experimental study is the only such attempt we know of. Children who were interviewed in English (second language) were not as informative and accurate than those who were interviewed in their mother tongue. This is to say that having children testify in a dominant court language as opposed to letting them express themselves in their home language disadvantages them: it lowers their effectiveness as witnesses. These findings are in line with available evidence, for example, that when children are forced to study in a dominant language of instruction which is different from their home language, their test scores drop (Bernhofer & Tonin, 2022; Jain, 2017; Ivlevs & King, 2014). The findings also affirm the already known fact that Kenyan pupils can hardly read an appropriate English text for a grade a year below them (e.g., Uwezo, 2021). It has been shown that Kenyan children have been struggling to learn using the English language for a very long time (e.g., Uwezo, 2016; Gathumbi, 2008; Bunyi, 2008; Sure & Ogechi, 2009). The language use concern in schools and in other important institutions like courts calls for a constructive and corrective national debate.

Two, child witnesses in Kenya are supported by an impressive and progressive wide-ranging legal framework, recognising both home-grown and international instruments to which Kenya is a signatory. However, several concerns persist. First, we simply do not know whether these special measures that are intended to support child witnesses are well implemented, and that they achieve what they are meant to achieve. Without data on each, they remain untested procedures. Second, confusion is brought about by discrepancies in the understanding of some of these special measures as contained in express law and as

applied/interpreted in case law. For example, the *voir dire* exam and the use of intermediaries emerged as areas characterised by such conflicts. In several cases, the outcome of this conflict, unfortunately, unfairly disadvantages the child. One such conflict is about the age at which the child must be subjected to a *voir dire* exam. A superior court reversed the judgement of a history court because a child aged 13 years was not subjected to a *voir dire* exam, despite the fact that an express law – the repealed Children Act (2001), existed and it only required children under the age of ten years to undergo *voir dire* before testifying. Instead the court relied on a 1959 judgement which had set the age at 14. This decision is hardly easy to explain. On the same point, there is no agreement on the content of *voir dire*.

In view of these concerns, there is need for a constructive data-driven debate on these well-intentioned and important practices to ensure a more harmonised understanding and approach to their implementation. For example, do Kenyan courts faithfully implement the requirements of s. 31(13) of the Sexual Offences Act (2006) which forbids unrepresented defendants from directly questioning vulnerable witnesses (e.g., children reporting sexual abuse), instead requiring them to ask their questions through the court which should in return repeat the question accurately to the witness?

Three, important language-related concerns emerged in the review of CSA case files. Some of these concerns come with a high price for the victims. For example, convictions have been set aside because children did not have the correct words to describe abuse in great detail (e.g., graphic description of penile or digital penetration) even in cases where forensic evidence existed. Whether out of trauma, anxiety, shyness, conforming to societal expectations on the usage of certain language, or even shortage of the appropriate vocabulary to describe abuse, children described abuse in a language that the courts considered unhelpful in proving that they had actually been sexually abused (e.g., “He did bad things/bad manners to me/on my private parts”). Some children even resulted to pointing to the body part that

was violated during the abuse. However, in what appears to be a glimmer of hope, the use of children's inability to describe abuse in great detail as a strategy to evade justice was rejected by some judges arguing that it is not out of the ordinary for children to have limited linguistic ability to describe sexual abuse.

Other concerns like poor record keeping by trial courts have equally disadvantaged children in need of justice. Persons convicted of sexually abusing children have had their convictions overturned by superior courts on account of trial courts' failure to indicate the language(s) used during plea taking and proceedings (especially if there was interpretation involved). Thus, perpetrators who had been convicted by history courts have walked out of appeal courts free men based on a technicality – by claiming to have been linguistically disadvantaged during hearing. If these kinds of problematic areas are properly documented, they can be a part of informative discussions in Continuing Judicial Education (CJE) fora for Judges and Magistrates.

Four, through the survey of magistrates and prosecutors, it emerged that a significant number of child witnesses in Kenyan courts either have some challenges communicating adequately in the language of the court, or are totally unable to communicate in the language of the court. As a result, court officers agree that the child's home language should always take precedence during proceedings. In this case, the courts have to depend on interpreters. However, in some instances, difficulties finding suitable interpreters lead to delays in concluding court cases.

Five, interpreter-mediated interviews in Kenyan courts has been identified as a potentially problematic area. For instance, distortions to both the questions asked of the children and in their testimony during interpretation were reported. The extent to which this problem affects the quality of interpreter-mediated interviews in Kenya is not known, thus

this is a call for more studies to address this concern. This problem is not unique to the Kenyan situation. Questions about quality, hence reliability, of interpreted testimony in legal settings have been raised elsewhere (e.g., Powell et al., 2016; Ernberg et al., 2022).

Six, through the current study we now have some evidence that child witnesses in Kenya could be enduring poor interviewing practices during both examination-in-chief and cross-examination. The child in the case study was subjected to a significantly high number of inappropriate questions (in fact, nearly all). Equally, we now have some evidence of the use of age-inappropriate language on child witnesses in Kenyan courts – use of complex words and phrases, language that is confusing, ungrammatical, and credibility-challenging – especially during cross-examination.

Ways Forward

In view of the findings reported in the current study, the following ways forward are presented. One, at a global level, there is a need for increased meaningful conversations on the significance of cultural and linguistic influences on testimony in forensic contexts. This, unfortunately, is woefully missing (e.g., Aydin & Ceci, 2013). All societies are defined by cultural, racial, ethnic, and linguistic diversities a fact which must have a bearing on, for example, their education and justice sectors. As argued earlier, increased global migration is likely to amplify this concern. For this reason, experts, scholars, and researchers in the field of forensic interviewing can no longer ignore or treat this concern *implicitly*. The seriousness accorded to the questions of developmentally-appropriateness of language and strategies used in forensic contexts should also be extended to the equally important question of language use in linguistically diverse societies where official languages of the court are not necessarily the primary languages of the majority.

Two, the Kenyan Judiciary through the Kenya Judiciary Academy (KJA) should undertake regular internal audits to assess the degree of success in the implementation of constitutional and statutory support for child witnesses. Are these measures practical? How well are they implemented? What are the gaps? Kenya Judiciary Academy must take constructive actions to address areas identified as problematic. For example, in the area of evidentiary rules, the practice of voir dire with child witnesses emerged as one of the areas wrought with challenges in Kenyan courts. There is need for a structured guide for use by magistrates when dealing with child witnesses to enable them fulfil the requirements of both s. 125 (1) of the Evidence Act (2012) (assess children's competence to testify) and s.19 of the Oaths and Statutory Declarations Act (2012) (assess children's competency to take oath).

In addition, Kenya Judiciary Academy should partner with relevant institutions and professionals to offer regular targeted training and capacity development for judicial officers gazetted to hear children matters. The same is required of the Prosecution Training Institute (PTI) to facilitate training for prosecutors deployed to deal with children's matters. Both the judicial officers and state counsels can benefit from topics such as child development, dynamics of child abuse, memory and suggestibility, questioning of children in legal settings, and how to support children to become effective courtroom witnesses among others.

Also, the Law Society of Kenya (LSK) should ensure that practising advocates are well trained on "children's limitations and competencies" (Lamb et al., 2007, p. 1202) as witnesses. This can be done by ensuring that courses on children and the law are part of the society's Continuous Professional Development (CPD) Program. Since CPD courses are self-financed, the society can include courses on children and the law in the list of the courses which are offered by development partners as supplementary free programs. A supplementary free course that earns the advocates continuous legal education points could perhaps attract a substantive attendance especially by lawyers in litigation who deal with children matters.

Finally, it is proposed that in the interest of justice, the Judiciary and the Office of the Director for Public Prosecutions should put in place a policy guide that allows magistrates and state counsels gazetted to deal with children matters opt to work in areas where they can understand the language of the locals.

Three, in line with point two above (and although not directly related to the findings of the current study), there is need to extend research and regular comprehensive training on developmentally-appropriate questioning of children to all police interlocutors in the Kenya Police Service. In the course of compiling this report, I learnt through a courtesy call to the Directorate of Community Policing, Gender and Child Protection of the Kenya Police Service that this is currently lacking. Therefore, a course on forensic interviewing should be introduced as an area of specialization for graduate police trainees interested in children matters. Also, the police service should consider the merits of adopting a structured investigative interviewing protocol for use with child witnesses. The NICHD Investigative Interviewing protocol, for instance, has been found to be an effective tool in forensic contexts (e.g., Bull, 2010; Cyr & Lamb, 2009; La Rooy et al., 2015; Lamb et al., 2009; Noeker & Franke, 2018; Yi et al., 2016; Żurek & Szostak, 2022) and can be translated in Kiswahili for local use.

Four, to address the problem of the quality of interpreter-mediated interviews, the Kenyan Judiciary through the Kenya Judiciary Academy can 1) develop a comprehensive program in partnership with other relevant bodies, institutions and experts to progressively train and certify all serving court assistants as interpreters, 2) require a certain level of certification in interpretation during future recruitments for court assistants, or 3) identify and keep a register of qualified interpreters to be called upon when needed. These, for example, could be teachers of languages working in schools across the country who have also taken an interpretation course.

Five, the Kenya Law Reform Commission should take stock and review certain laws and procedures and recommend their reforms in order to conform to good practice in forensic interviewing. For example, it may be necessary to review s. 150 and s. 154 of the Evidence Act (2012) to completely disallow the use of leading and credibility-challenging questions respectively when questioning children in court. As argued before, these kinds of questions have long been considered contaminating (e.g., Poole & Lindsay, 1998; Lamb et al., 2007; Zajac & Hayne, 2003; Zajac et al., 2003; Zajac & Cannan, 2009; Hershkowitz et al., 2012).

In view of the above facts, it would be important for the main actors in the Kenyan justice system including the Kenya Police Service, Office of the Director of Public Prosecutions, Judiciary, Law Society of Kenya, and Kenya Law Reform Commission among others to dialogue and identify research, practice and policy gaps in the juvenile justice system. Some of the gaps will require to be dealt with as “quick wins” while others call for continuous effort and feedback.

In conclusion, the current study raises some important questions about how language is used with children in legal setting. Particularly, the use of a dominant language versus a home language in linguistically diverse societies. It also raises concerns about the interviewing strategies used by lawyers when questioning child witnesses in court. Importantly, this study sets the stage for a better, more focused debate on forensic interviewing of child witnesses in Kenya.

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Appendices

Appendix A

Consent by Chief Registrar of Judiciary to Conduct a Survey of the Magistrates

Telephone Nairobi 2221221 JUDICIARY Email: rmc@court.go.ke When replying please quote	 REPUBLIC OF KENYA	REGISTRAR MAGISTRATES COURTS, SUPREME COURT BUILDING, P.O. Box 30041 - 00100 <u>NAIROBI.</u>
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THE JUDICIARY

RMC/1//19

19th February, 2019

Mr. Mbutu Kariuki,
 Email: mbutukariuki@gmail.com
 Mobile No: 0700611139

RE: REQUEST FOR AUTHORIZATION TO UNDERTAKE A STUDY ON THE EXPERIENCE OF HON. MAGISTRATES WHEN DEALING WITH CHILD WITNESSES WHO CANNOT SPEAK THE LANGUAGE OF THE COURT

Reference is made to your letter to the Chief Registrar dated 4th February, 2019.

It is noted that your request was approved, but that notwithstanding, we believe that your request can only be addressed by the Judiciary Training Institute (JTI) under whose activities you seek to administer your questionnaire.

Kindly direct your request to the Director, JTI.



P.M. Mulwa
Registrar Magistrates Courts

Copy to:

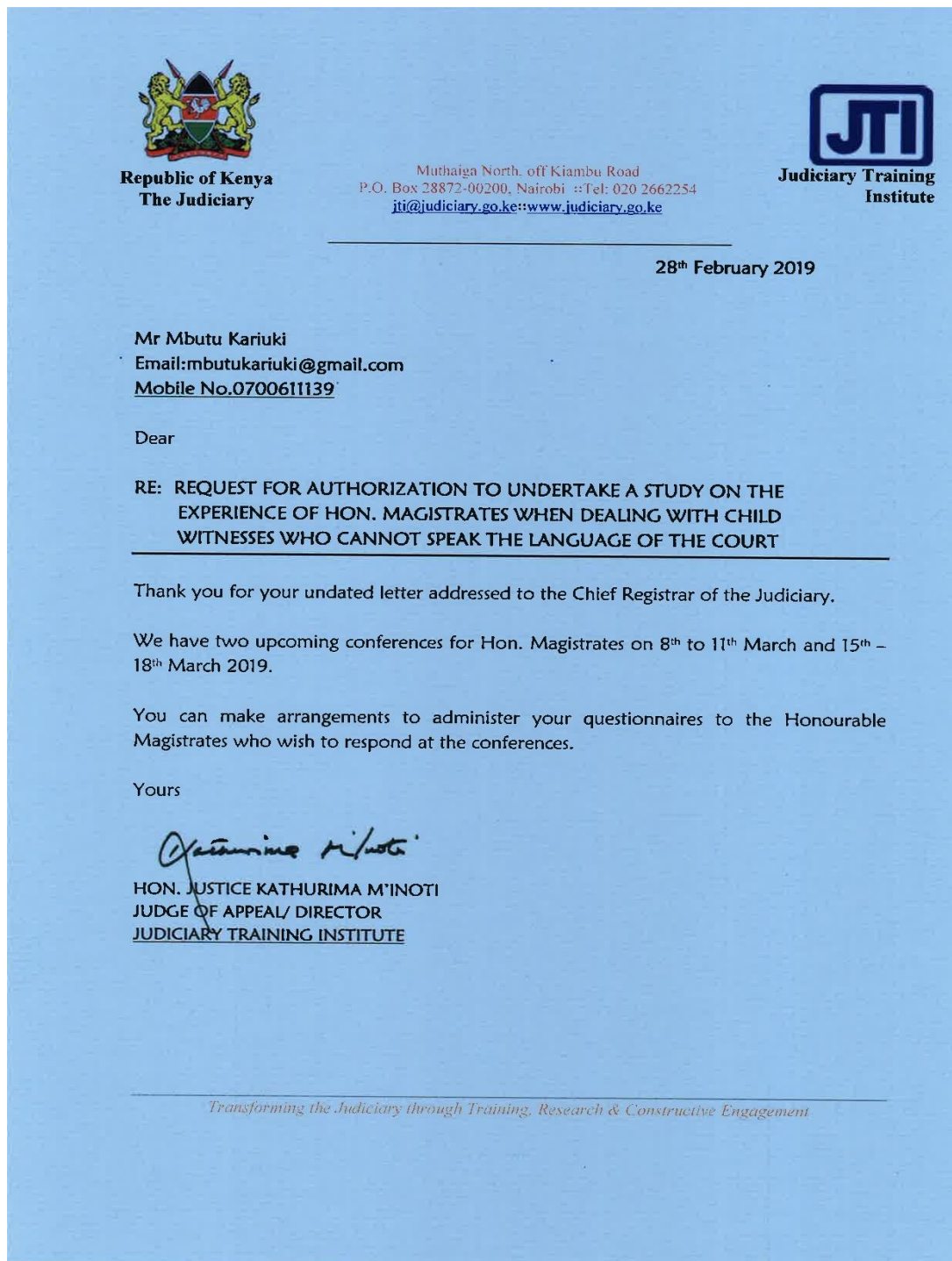
The Director,
 Judiciary Training Institute
KIAMBU. - (attached is a copy of request)

/encls.

/rk

Appendix B

Consent by the Judiciary Training Institute to Conduct the Survey of Magistrates



Appendix C

Consent by Prosecution Training Institute to Conduct a Survey of the Prosecutors

Deputy Director Central Facilitation Services (DDCFS)
Office of the Director of Public Prosecutions
P.O. Box 30701-00100
Nairobi

PTI
SADPP

04 FEB 2019 839

04 FEB 2019

4th February, 2019

Dear Sir,

REQUESTING FOR AUTHORIZATION TO UNDERTAKE A STUDY ON THE EXPERIENCE OF PUBLIC PROSECUTORS WHEN DEALING WITH CHILD WITNESSES WHO CANNOT SPEAK THE LANGUAGE OF THE COURT

Ms. Iko

Vigently identify prosecutors in the Section and coordinate

SADPP/ 19/02/2019/PTI

The above matter refers.

I am a PhD candidate in Developmental Psychology at the University of Cape Town. My study program focuses on language use, memory retrieval and accuracy of child witnesses who do not speak the language of the court.

As part of the study, we are seeking the views of the prosecutors on their experience with child witnesses who cannot speak the language of the court. This will be done by way of a survey. The study poses no known risk to both the participant and child witnesses.

In view of this, we most humbly request for permission to administer a questionnaire to Prosecutors in any of the fora where they will be gathered. The questionnaire is short and concise and should take no more than 20 minutes to complete.

The participation of the prosecutors in this study is completely voluntary. They are free to decline to participate, without any prejudice.

Any information from the prosecutors will be treated with utmost confidentiality. All identifying details will be erased. Data from this study will be kept safe in a password-protected computer by the principal researcher.

If you have any questions or comments relating to the study you should contact the following researchers:

Mbutu Kariuki mbutukariuki@gmail.com or 0700611139
Prof. Colin Tredoux Colin.tredoux@uct.ac.za

MS. KIMIRI
Kindly identify Prosecutors who can assist
Kim.
27/2/19

If you have any questions about the rights of the research participants, or any complaints about the study, you can contact the Department of Psychology Research Ethics Committee through:

Rosalind Adams rosalind.adams@uct.ac.za

Thank you for your kind consideration.

Yours faithfully,



Mbutu Kariuki

Appendix D

Ethics Approval from UCT

UNIVERSITY OF CAPE TOWN



Department of Psychology

University of Cape Town Rondebosch 7701 South Africa
Telephone (021) 650 3417
Fax No. (021) 650 4104

13 November 2018

Moses Mbutu Kariuku
Department of Psychology
University of Cape Town
Rondebosch 7701

Dear Mbutu

I am pleased to inform you that ethical clearance has been given by an Ethics Review Committee of the Faculty of Humanities for your study, *Effects of language on the informativeness and accuracy of child witness in Kenya*. The reference number is PSY2018 -065.

I wish you all the best for your study.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Lauren Wild'.

Lauren Wild (PhD)
Associate Professor
Chair: Ethics Review Committee

University of Cape Town
‡PSYCHOLOGY DEPARTMENT
Upper Campus
Rondebosch

Appendix E

Consent by the Presbyterian Church to Conduct the Experimental Study (copied from Email)

Wed, Apr 17, 2019, 11:29 PM

From: Mbutu Kariukimbutukariuki@gmail.com

To: jocalk2000@yahoo.com

Rev John Calvin Kamau

The Minister In-Charge

Presbyterian Church of East Africa

Kikuyu Parish

Dear Sir,

We are writing to introduce ourselves to you and to let you know of a study we (researchers from the department of Psychology at the University of Cape Town) are doing. The aim of this study is to learn more about language use by child witnesses who do not speak the language of the court.

In view of this, we are requesting to interview children aged between 9 and 12 years from one of the church schools in your parish (or any other church school that you may graciously recommend to us) about something they have experienced or witnessed. The brief conversation will be audio recorded for the sole purpose of data collection and analysis.

The proposed study poses no known risk to the children. It will take place under the supervision of the church school leadership.

The participation of the pupils in this study is completely voluntary. They are free to decline to participate, without any prejudice.

Any information from the children will be treated with utmost confidentiality. All identifying details will be erased. Data from this study will be kept safe in a secured computer by the principal researcher.

If you have any questions or comments relating to the study you should contact the following researchers:

Mbutu Kariuki mbutukariuki@gmail.com/0700611139

Prof. Colin Tredoux Colin.tredoux@uct.ac.za

If you have any questions about the child's rights as a research participant, or any complaints about the study, you can contact the Department of Psychology Research Ethics Committee through:

Rosalind Adams rosalind.adams@uct.ac.za

Thank you for your kind consideration.

Yours faithfully,

Mbutu Kariuki

John Calvin Kamau <jocalk2000@yahoo.com>

Fri, Apr 26, 2019,
8:06 AM

to me

Hi Mbutu,

I have received the Request.

It is okay to do the research in our Parish,
Welcome.

John Calvin Kamau (Rev)
(Bd St. Paul's , Mth Cua)
- Minister of the Gospel
- Part time Lecturer
(Biblical Theology)

Email jocalk2000@yahoo.com. [Jocalk2000@gmail.com](mailto:jocalk2000@gmail.com)
Facebook - [John.c.kamau@ Facebook .com](https://www.facebook.com/John.c.kamau)

Appendix F

Parental Consent Request to Conduct Experimental Study

Dear parent,

Greetings,

You are being requested to grant consent for your son/daughter to participate in a study being done by researchers from the Department of Psychology at the University of Cape Town, South Africa. The aim of this study is to learn more about language and memory retrieval.

Study Procedures

The study will take place at your son/daughter's school and will last for 45 minutes. It will involve asking your child a set of questions. The session will be audio recorded to ensure that the conversation between the researcher and your son/daughter is recorded accurately.

Possible Risks

The proposed study poses no known risk to your child. It will take place in school under the supervision of their class teacher.

Possible Benefits

There are no direct benefits to you or your child. Indirect benefits include helping researchers understand how to improve interviews with child witnesses.

Costs

The only cost involved is the time that your son/daughter will spend in the study.

Voluntary Participation

The participation of your son/daughter is voluntary. They are free to choose not to take part in the study or to leave during the study at any time.

Confidentiality

Any information that your son/daughter will provide during this study will be kept privately. All identifying details, such as their name, name of school etc. will be erased. Data from this study will be kept safe in a secured computer by the principal researcher.

Questions

If you have any questions or comments relating to the study you should contact the following researchers:

Mbutu Kariuki

mbutukariuki@gmail.com

Prof. Colin Tredoux

Colin.tredoux@uct.ac.za

If you have any questions about your child's rights as a research participant, or any complaints about the study, you can contact the Department of Psychology Research Ethics Committee through:

Rosalind Adams

rosalind.adams@uct.ac.za

By signing below, you are acknowledging the following:

I have understood what participating in this study will involve. I am aware of the risks and benefits. I have no further questions about the study and voluntarily offer consent for my son/daughter to participate in the study, and to have the interview audio recorded in order to keep an accurate account of the conversation.

Pupil's name

Parent's name

Parent's signature

Date.....

Appendix G

Children's Assent Form to Participate in the Experimental Study

We want to tell you about the research study we are doing. A research study is a way to learn more about something. We would like to find out more about how children remember things that have happened to them or they have seen. If you agree to join this study, you will be asked to tell us about something that has happened to you or something that you saw.

We do not think that the study will bring any problems to you. We do not know if being in this study will help you. We may learn something that will help other children who are called to courtrooms to say what they remember about something.

You do not have to join this study. It is up to you. You can say okay now. You can also say no. If you say okay and then you change your mind later, we won't be mad at you. If you want to stop, then all you need to do is to tell me you want to stop.

We have already asked your parent to allow you to take part in this study.

Before you say yes or no to being in this study, I will answer any questions you have. If you join the study, you can ask questions at any time. Just tell me that you have a question.

If you say yes, our talk will be recorded on this voice recorder. This will help us to correctly record everything you tell us. Would you like to be in this research study? Are you okay with us recording this talk?

☐ Yes, I will be in this research study and agree to have our talk recorded.

☐ No, I don't want to do this.

Child's name (written by the child as signature)

Date

Name of interviewer

Signature

Date

Appendix H:

List of Yes/No Questions in the Experimental Study

English version

Instructions: answer yes or no

- i. Did you get your fingerprints taken?
- ii. Did the police officer show you a picture of a police car?
- iii. Did you have your photo taken?
- iv. Did the police officer show you a picture of a jail cell?
- v. Did you see the police officer's gun?
- vi. Did you sing the national anthem?
- vii. Did the police officer salute you?
- viii. Did the police officer tell you that you should not take gifts from strangers?
- ix. Did the police officer turn you around by your shoulders?
- x. Did you see the police officer arrest a man who tried to steal your teacher's phone?

Kikuyu version

Cokia ii kana aca

- i. Niwoirwo irore cia moko?
- ii. Muthigari niamuonirie mbica ya ngari ya borithi?
- iii. Niwahurirwo mbica?
- iv. Muthigari niamuonirie mbica ya njera?
- v. Niwonire mucinga wa muthigari?
- vi. Nimwainire rwimbo rwa bururi?
- vii. Muthigari niamuhuriire tharuti?
- viii. Muthigari niamuirire mutikanoe iheo kuma kuri mundu mutoi
- ix. Muthigari niakunytire ciande agiguthiururukia
- x. Niwonire muthigari anyita mundu uria wageragia kuiya thimu ya mwalimu wanyu?

Appendix I

Experimental Study - Debrief for Child Witnesses

Thank you very much for agreeing to be part of our study. As you may know, there are many communities in Kenya. People in every community use their home language to speak to each other. When people from different communities come together, they use Kiswahili or English when talking to one another. Kiswahili and English are our national and official languages. When children go to court to talk about something that happened to them or something they saw, they are required to speak in either English or Kiswahili. If they cannot speak any of the two languages, they are told to speak in their home language through an interpreter. An interpreter is someone who repeats what the child has said in their home language in a language everyone in the court can understand.

Our study is trying to know if children should be asked questions in their home language and be allowed to answer in their home language. Would that help them to remember more information and make their answers better? What we learn from this study can be used to help children who have to answer questions in court.

Let me explain to you why we did not tell you everything about the study after we asked you to take part in it. We just wanted you to tell us everything you could remember about the visit by the police officer in your school. We did not want you to know that we would ask you questions about that visit. If we did, may be you would have discussed it with friends in class to prepare for the questions.

The person who came here was not a police officer. Like you, she had only been selected to be part of this study. She held you by your shoulder and turned you around saying that you are now an 'honorary police officer'. An honorary police officer is not a real police officer. It is not true that you became a police officer. She told you not to tell anyone about it. That is not correct. You are free to talk about it. She will come back to talk to you about why she pretended to be a police officer.

The information you gave to us during the study will be kept safely by the researchers. Your name, name of your school or anything that might show who you are will be removed.

If you have any questions or comments regarding your experience during the study, do please contact us:

Mbutu Kariuki - mbutukariuki@gmail.com

Prof. Colin Tredoux - Colin.tredoux@uct.ac.za

If you have any questions about your rights as a research participant, or any complaints about the study, you can contact the Department of Psychology Research Ethics Committee through:

Rosalind Adams - rosalind.adams@uct.ac.za

Appendix J

Scoring Schedule for the Free-Recall Section of the Memory Event in the Experimental Study

One point for each detail correctly remembered as below:

Personal safety tip one:

“Do not accept gifts (e.g. food and drinks) from strangers. The food and drinks might be laced with drugs to make you unconscious, resulting to abuse or trafficking”.

Correct and complete

- The police officer told us not to take gifts from strangers because we could be drugged and get (either) harmed/raped/trafficked = 5 details
- The police officer told us not to take gifts from strangers = 3 details

Correct but incomplete

- The police officer told us not to take gifts because we could be drugged and get (either) harmed/raped/trafficked = 4 details.
- The police officer told us not to take gifts = 2 details

Incorrect

- The police officer told us to take gifts [0 details]

Personal safety tip two:

- “Do not visit homes of people you do not know alone/unaccompanied. You could get hurt if the people in those homes are bad people”.

Correct and complete

- “Do not visit homes of people you do not know/strangers alone/unaccompanied. You could get hurt if the people in those homes are bad people” = 6 details

Correct but incomplete

- “Do not visit homes of people” = 2 details

Incorrect

- Visit homes of people.... = 0 details

Personal safety tip three:

“Do not to accept a lift (e.g., on vehicles, bicycles, and motorcycles) from strangers. You could be held hostage and get hurt”.

Correct and complete

- “Do not to accept a lift (e.g., either on vehicles, bicycles, and motorcycles) from strangers. You could be held hostage and get hurt” = 5 details

Correct but incomplete

- “Do not to accept a lift (e.g., either on vehicles, bicycles, and motorcycles). = 2 details

Incorrect

- Accept a lift = 0 details

Correct activities that took place during the memory event

- 1) The police officer showed us a picture of a police car = 3 details
- 2) The police officer showed us a picture of a jail cell = 3 details
- 3) We sang the national anthem = 2 details
- 4) The police officer saluted us or we saluted the officer = 1 details
- 5) The police officer told us that we should not take gifts from strangers. = 3 details

Raters' Scores

ID	Rater1	Rater2	agree=1;disagree=0
1	0	0	1
2	0	0	1
3	0	0	1
4	3	2	0
5	0	0	1
6	0	0	1
7	0	0	1
8	0	0	1
9	5	4	0
10	0	0	1
11	0	0	1
12	0	0	1
13	2	1	0
14	3	2	0
15	0	0	1
16	3	3	1
17	3	3	1
18	3	3	1
19	0	0	1
20	3	3	1
21	0	0	1
22	7	5	0
23	0	0	1
24	0	0	1
25	0	1	0
26	3	3	1
27	0	0	1
28	0	0	1
29	0	0	1
30	3	3	1
31	3	2	0
32	0	0	1
33	0	0	1
34	3	2	0

35	0	0	1
36	0	0	1
37	0	0	1
38	0	0	1
39	3	3	1
40	5	4	0
41	6	6	1
42	2	2	1
43	0	0	1
44	3	3	1
45	0	0	1
46	2	2	1
47	3	3	1
48	0	0	1
49	7	8	0
50	6	3	0
51	3	3	1
52	0	0	1
53	3	3	1
54	7	6	0
55	3	3	1
56	4	4	1
57	4	4	1
58	4	4	1
59	4	4	1
60	2	2	1
61	4	3	0
62	0	0	1
63	0	0	1
64	5	5	1
65	0	0	1
66	0	0	1
67	7	7	1
68	6	6	1
69	5	4	0
70	0	0	1
71	4	4	1
72	3	3	1
73	4	4	1
74	3	3	1
75	3	3	1
76	3	3	1
		Agree	62
		Total	76
		IRR	82%

Appendix K

Experiment Results Stata Output

Test 1: Inter-rater reliability – Cohenbi Kappa

```
. kapci Rater1 Rater2
```

Note: default number of bootstrap replications has been set to 5 for syntax testing only. `reps()` needs to be increased when analysing real data.

		B=5	N=76		
Kappa (95% CI) = 0.746 (0.692 - 0.806)		(BC)			
BC = bias corrected					
. kap Rater1 Rater2					
Agreement	Expected Agreement	Kappa	Std. Err.	Z	Prob>Z
81.58%	27.60%	0.7456	0.0606	12.30	0.0000

Cohen's Kappa is 0.75 with 95%CI:0.69- 0.81

Kappa value interpretation Landis & Koch (1977):

<0 No agreement

0 — .20 Slight

.21 — .40 Fair

.41 — .60 Moderate

.61 — .80 Substantial

.81–1.0 Perfect

Test 2: difference in free recall mean scores by language

```
. ttest detail, by (lang) welch
```

Two-sample t test with unequal variances

Group	Obs	Mean	Std. Err.	Std. Dev.	[95% Conf. Interval]	
eng	38	1.157895	.2885346	1.778647	.5732681	1.742521
kik	38	3.105263	.3553883	2.19076	2.385178	3.825348
combined	76	2.131579	.2536347	2.211136	1.626313	2.636845
diff		-1.947368	.4577696		-2.859735	-1.035001

diff = mean(eng) - mean(kik) t = -4.2540
 Ho: diff = 0 Welch's degrees of freedom = 72.8416

Ha: diff < 0 Ha: diff != 0 Ha: diff > 0
 Pr(T < t) = 0.0000 Pr(|T| > |t|) = 0.0001 Pr(T > t) = 1.0000

Test 2a Association of language with age- not significant, hence not adjusted for as a covariate.

```
. ttest age, by(lang) welch
```

Two-sample t test with unequal variances

Group	Obs	Mean	Std. Err.	Std. Dev.	[95% Conf. Interval]	
eng	38	11.39474	.2216564	1.366382	10.94562	11.84386
kik	38	10.92105	.1784299	1.099916	10.55952	11.28259
combined	76	11.15789	.1439452	1.254885	10.87114	11.44465
diff		.4736842	.2845501		-.0934765	1.040845

diff = mean(eng) - mean(kik) t = 1.6647
 Ho: diff = 0 Welch's degrees of freedom = 72.5968

Ha: diff < 0 Ha: diff != 0 Ha: diff > 0
 Pr(T < t) = 0.9499 Pr(|T| > |t|) = 0.1003 Pr(T > t) = 0.0501

Test 2b Association of language with sex- not significant, hence not adjusted for as a covariate.

```
. ta lang sex, chi2
```

0=eng 1=kik	Sex 0=boy 1=girl		Total
	boy	girl	
eng	21	17	38
kik	22	16	38
Total	43	33	76

Pearson chi2(1) = 0.0536 Pr = 0.817

Test 3: Difference in mean total scores by language (Accuracy structured)

```
. ttest totalscore, by (lang) welch
```

Two-sample t test with unequal variances

Group	Obs	Mean	Std. Err.	Std. Dev.	[95% Conf. Interval]	
eng	38	7.815789	.2715931	1.674212	7.26549	8.366089
kik	38	8.947368	.1506145	.9284503	8.642194	9.252542
combined	76	8.381579	.1675071	1.460293	8.047888	8.71527
diff		-1.131579	.3105601		-1.753027	-.510131

diff = mean(eng) - mean(kik)

t = -3.6437

Ho: diff = 0

Welch's degrees of freedom = 58.9151

Ha: diff < 0

Ha: diff != 0

Ha: diff > 0

Pr(T < t) = 0.0003

Pr(|T| > |t|) = 0.0006

Pr(T > t) = 0.9997

Test 4A: Difference in mean true events identified as true

Two-sample t test with unequal variances

Group	Obs	Mean	Std. Err.	Std. Dev.	[95% Conf. Interval]	
eng	38	4.421053	.1982555	1.222129	4.019349	4.822756
kik	38	4.842105	.0802407	.494637	4.679522	5.004688
combined	76	4.631579	.1089698	.9499769	4.4145	4.848658
diff		-.4210526	.213878		-.8507592	.0086539

diff = mean(eng) - mean(kik) t = -1.9687
 Ho: diff = 0 Welch's degrees of freedom = 49.4432

Ha: diff < 0 Ha: diff != 0 Ha: diff > 0
 Pr(T < t) = 0.0273 Pr(|T| > |t|) = 0.0546 Pr(T > t) = 0.9727

Test 4B: Difference in mean false events identified as false.

. ttest falseevent_score , by (lang) welch

Two-sample t test with unequal variances

Group	Obs	Mean	Std. Err.	Std. Dev.	[95% Conf. Interval]	
eng	38	3.394737	.2184241	1.346456	2.952168	3.837306
kik	38	4.105263	.1400542	.8633522	3.821486	4.38904
combined	76	3.75	.1352386	1.178983	3.480591	4.019409
diff		-.7105263	.2594692		-1.228809	-.192244

diff = mean(eng) - mean(kik) t = -2.7384
 Ho: diff = 0 Welch's degrees of freedom = 64.432

Ha: diff < 0 Ha: diff != 0 Ha: diff > 0
 Pr(T < t) = 0.0040 Pr(|T| > |t|) = 0.0080 Pr(T > t) = 0.9960

Test 5: Association of total accuracy score with sex- not significant, hence not adjusted for as a covariate.

```
. ttest totalscore, by (sex) welch
```

Two-sample t test with unequal variances

Group	Obs	Mean	Std. Err.	Std. Dev.	[95% Conf. Interval]	
boy	43	8.116279	.2404529	1.576755	7.631025	8.601533
girl	33	8.727273	.2144087	1.231684	8.290537	9.164009
combined	76	8.381579	.1675071	1.460293	8.047888	8.71527
diff		-.6109937	.3221625		-1.252638	.0306507

diff = mean(boy) - mean(girl) t = -1.8965
 Ho: diff = 0 Welch's degrees of freedom = 75.9843

Ha: diff < 0	Ha: diff != 0	Ha: diff > 0
Pr(T < t) = 0.0308	Pr(T > t) = 0.0617	Pr(T > t) = 0.9692

Test 5b: Association of total accuracy score with age -not significant, hence not adjusted for as a covariate.

```
. anova totalscore i.age2
```

Number of obs = 76 R-squared = 0.0687
 Root MSE = 1.43832 Adj R-squared = 0.0299

Source	Partial SS	df	MS	F	Prob>F
Model	10.982636	3	3.6608788	1.77	0.1606
age2	10.982636	3	3.6608788	1.77	0.1606
Residual	148.95157	72	2.0687719		
Total	159.93421	75	2.1324561		

NB: Had to categorize age and use ANOVA because r/ship between age and total scores had significant heteroscedasticity, using Levene's test. Therefore, doesn't meet the criteria for linear regression.

Test 6 chi2 tests for each question

. ta language q1fingerprints,chi2

Language	Q1Fingerprints		Total
	0	1	
eng	23	15	38
kik	23	15	38
Total	46	30	76

Pearson chi2(1) = 0.0000 Pr = 1.000

. ta language q2car,chi2

Language	Q2Car		Total
	0	1	
eng	3	34	37
kik	1	37	38
Total	4	71	75

Pearson chi2(1) = 1.1136 Pr = 0.291

. ta language q3phototaken ,chi2

Language	Q3Phototaken		Total
	0	1	
eng	14	24	38
kik	8	30	38
Total	22	54	76

Pearson chi2(1) = 2.3030 Pr = 0.129

. ta language q4jail ,chi2

Language	Q4Jail		Total
	0	1	
eng	2	36	38
kik	1	37	38
Total	3	73	76

Pearson chi2(1) = 0.3470 Pr = 0.556

. ta language q5gun,chi2

Language	Q5Gun		Total
	0	1	
eng	8	29	37
kik	3	35	38
Total	11	64	75

Pearson chi2(1) = 2.8224 Pr = 0.093

. ta language q6anthem ,chi2

Language	Q6Anthem		Total
	0	1	
eng	7	31	38
kik	1	37	38
Total	8	68	76

Pearson chi2(1) = 5.0294 Pr = 0.025

. ta language q7salute ,chi2

Language	Q7Salute		Total
	0	1	
eng	9	29	38
kik	4	34	38
Total	13	63	76

Pearson chi2(1) = 2.3199 Pr = 0.128

. ta language q8gifts ,chi2

Language	Q8Gifts		Total
	0	1	
eng	2	36	38
kik	0	38	38
Total	2	74	76

Pearson chi2(1) = 2.0541 Pr = 0.152

. ta language q9turn ,chi2

Language	Q9Turn		Total
	0	1	
eng	11	27	38
kik	0	38	38
Total	11	65	76

Pearson chi2(1) = 12.8615 Pr = 0.000

. ta language q10thief ,chi2

Language	Q10Thief		Total
	0	1	
eng	4	34	38
kik	1	37	38
Total	5	71	76

Pearson chi2(1) = 1.9268 Pr = 0.165

Appendix L

Consent From Chief Registrar of Magistrates to Undertake the Case Study in Court

Telephone Nairobi 2221221
Email: chiefregistrar@judiciary.go.ke

When replying please quote

Ref: CRJ/3


REPUBLIC OF KENYA

CHIEF REGISTRAR'S CHAMBERS JUDICIARY
SUPREME COURT BUILDING
P.O. Box 30041 00100
NAIROBI

26th March, 2019

THE JUDICIARY

✓Mr. Mbutu Kariuki,
mbutukariuki@gmail.com
0700611139.

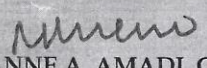
Dear Sir,

RE: AUTHORIZATION TO UNDERTAKE A CASE STUDY ON LANGUAGE USE
IN COURT DURING EXAMINATION IN CHIEF AND CROSS EXAMINATION
OF A CHILD WITNESS IN KENYA.

Your letter on the above request dated 4th March, 2019 refers.

Authority is hereby given as requested to undertake the above activity at the Children's Court at Milimani Law Court. Kindly liaise with the Magistrate in Charge in advance to facilitate the actualization of the request.

Thank you.


ANNE A. AMADI, CBS
CHIEF REGISTRAR OF THE JUDICIARY

Copy to:
The Chief Magistrate,
Children's Court,
Milimani Law Courts,
NAIROBI.

IMW/AAA

Noted
28/3/19

Mr. Ojwang - CE
I have spoken to
Hon. Munge CM
over this.
Please facilitate
the hearing to
conduct his research
in the CM's
Criminal Justice
Registry
4/4/19.

Appendix M

Case Study - De-Identified Transcripts

Coding scheme

According to Zajac & Cannan (2009, p. S40):

- 1) Open [O]- question does not restrict response options,
- 2) Closed [C] - Yes/No or forced choice question, and
- 3) Leading [L]- statement to agree with or tag question.
- 4) Summaries [SM]- “accurately restate what the child has just said without any explicit request for information or response” (Orbach et al., 2012, p. 121),

Case study

Exam-in-chief

Introduction

Prosecutor: elezea korti majina yako kamili

Child: child gives a name

P: unasoma wapi?

C: gives a name of a school

P: uko na miaka ngapi?

C: ---

P: unakumbuka tarehe yako ya birthday?

C: [inaudible]

P: mwaka wa xxxx ulikuwa unaishi wapi?

C: gives a name of a place

P: wakati huu ulikuwa shule wapi?

C: name of a school given

P: na xxx ulikuwa class gani?

C: mentions class

Substantive part of the interview

1. P: unajua kwa nini uko kortini leo?/ C
C: ndio
2. P: ningetaka uelezee hii korti utuambie nini ilifanyika mwaka wax xxx hapo mwezi wa xxxx /O
C: niliamka nikaenda kwa nyumba ya xxxx kuuliza saa kwa sababu sikuwa na saa
3. P: ilikuwa mchana ama jioni? /C
C: ilikuwa asubuhi
4. P: asubuhi /sm
C: ndio
5. P: mhhh /f
C: alafu ndio alipofungua mlango alinirusha ndani ya nyumba
6. P: eti ali? (seeks clarification)
C: aliniingiza ndani ya nyumba
7. P: alikuingiza aje? C Alikushika, alikuvuruta? /L
C: inaudible
8. P: mhh ok /f

C: halafu akanirusha kitandani akararua nguo zangu [inaudible] akanirape. Vile niliamka nilitoka kwa nyumba yake nikakuja kwetu nikatoa pantie nikaiosha nikachange nguo baaadaye akakuja akabisha mlango

9. P: mhh /f. wakati huo ulikuwa umejifungia kwa nyumba? /L

C: ehh. sikumfungulia mlango. after two weeks ndio akakuja akaniambia nimfuate akaniambia kama sitamfuata ataniua

10. P: saa ile alikuambia umfuate ulikuwa wapi? C / ulikuwa nyumbani? Ulikuwa nyumbani peke yako? /L

C: ehh. Mama alikuwa ameenda job

11. P: mhh/f

C: ndio akaniambia kama sitamfuata ataniua. Ndio nikaona monthly period yangu sikuwa nayo

12. P: kabla twende kwa kwa monthly period, alikuwa anakuita ukamfuata ulimfuata? /C

C: ehh

13. P: mkaenda wapi? C

C: kwa nyumba

14. P: kwake? L

C: ehh

15. P: kulikuwa na mtu mwingine kwa nyumba? C

C: apana. nilikuwa mgonjwa. Nilikuwa naumwa na kichwa

16. P: vyenye ulienda kwake kulikuwa na mtu mwingine kwake? C

C: apana

17. P: hapakuwa na mtu? C + 4a

C: ndio

18. P: sasa nini ilifanyika kwake? O

C: akanirape na akaniambia nisimwambie mtu

19. P: na sasa ukasema mambo ya monthly period? C+1b

C: 9:50min

Magistrate: after how many months?

20. P: unaweza recall after how many months baada alikufanyia? C + 1g

C: inaudible ndio tulihama tukakuja huruma ndio nikamwambia mama yangu vile kulifanyika

21. P: sasa vile mlishahamia huruma/ sm

C: nikaambia mama yangu

22. P: ukaambia mum/ sm

C: mmh

23. P: ulipomwambia mum mliweza kufanya test yeyote? L

C: pregnancy test. Alinipeleka hosi

24. P: hapo hospitali ulipimwa? /C

C: ehh

25. P: uliweza kujua kwa nini tumbo yako ilikuwa inafura? / L

C: sikuwa najua

26. P: hukuwa unajua /sm

27. C: mmmh

28. P: daktari alikueleza kitu yeyote? C

C: apana

29. P: ok. uliweza kwenda kwa polisi? C

C: tulienda na mum

30. P: mlienda na mum/sm

C: ehh

31. P: polisi mlienda na [inaudible]
C: eeh
32. P: baada ya how long ndio periods zilirudi? C + 1g+1b
C: haikurudi.
33. P: haiukurudi sm. Na sasa? C
C: ndio zimeanza
34. P: Imeanza sm. na vyenye uliambia mum kile kilifanyika ulimweleza ni nani alifanya hiyo kitendo? C
C: ehh
35. P: ulimwambia ni nani? C
36. C: nilimwambia ni huyu jirani wetu
37. P: ...alikuwa amekufanyia akiwa jirani wenu? /C
C: mmh
38. P: Na kwani hukumweleza mum hapo mbeleni? C +4b
C: vile alini-threaten.
39. P: alikuthreaten sm. Alikuambia aje? C
C: [inaudible]
40. P: mmhh/ f
C: atawaua
41. P: na kuna test yeyote ambayo mama alifanya na wewe? /C
C: mmm
42. P: ilikuwa test ya nini? /C
C: ilikuwa ya mimba
43. P: ya mimba sm
C: mhh
44. P: na results ilitoka aje? / C
C: [inaudible]....kama niko na mimba
45. P: uko na mimba sm [inaudible conversation]..Nani mwingine alikuwa? Mlikuwa na mum na nani mwingine? Ama mlikuwa tu nyinyi wawili? C
C: mimi na mum
46. P: na vile ulikuwa na mimba ulizaa? / C
C: ndio
47. P: ulizaa tarehe ngapi? /C + 1g
C: [gives a date]
48. P: kijana ama msichana? /C
C: kijana
49. P: kijana sm
[some conversation inaudible...prosecutors asks her to confirm a number of medical forms including a birth notification and presents them as exhibit in court]
50. P: ulisema ulienda ukapimwa hospitali uliona akijaza fomu zozote? / C
C: ehh
[prosecutor asks child to identify some forms and then presents them as exhibit in court.]
51. P: na huyu jirani yako aliyefanya hii kitendo ukimwona unaweza mkumbuka? /C
C: ehh
52. P: ako mbele ya korti? /C
C: ehh
53. P: ako wapi? C
C: ndio huyu
54. P: uliweza kuambia polisi kuwa ni yeye ndiye alikufanyia...[inaudible] /C

- C: eh
55. P: unaweza kujua vile alishikwa? /C
C: apana
56. P: huwezi jua sm. umesema..umetuambia ya kwamba vile alikupeleka kwa nyumba akakuvuta ndani alifunga mlango? C + 1b
C: eh
57. P: alifunga na? /C
C: kifuli
58. P: na kulikuwa na watu wengine hapo around? C
C: apana
59. P: hakukuwa na watu wengine? C +4a
C: eh
60. P: ukasema kwamba akakurape? C
C: eh
61. P: elezea korti ..yaani..ukisema rape unamaanisha nini? 0
C: alifanyia sex
62. P: alikufanyia sex sm
C: eh
63. P: na ukasikia uchungu / L
C: eh
64. P: nataka utufafanulie alitumia kitu gani /C+2a
C: hakuna kitu alitumia
65. P: [inaudible]

Cross-examination

Lawyer: unaelewa kizungu?

C: eh

L: so nikukuuliza maswali kwa kiingereza utajibu?

C: eh

L; ok

Substantive part of the interview

66. L: when was the offence allegedly occur? C+1c+1d+2c
C: [inaudible]
67. L: when? which month? C +1g
C: [names a month]
68. L: you can't recall the date? C+3a+1g
C: yes
69. L: ok . that was the first time? C
C: yes
70. L: and the second time? C +2a+2b
C: [inaudible]
71. L: it was? the date, or the month? C+1g+2b
C: month
72. L: you cannot remember? C
Magistrate: Month x or y?
C: answers
73. L: The first one was in (month) and the second one? C+1g
C: names a month
74. L: just in (month)? C+1g. ok. you are sure it was in (month)? C+3a+1g

- C: yes
75. L: ok. and when did you give birth? / C+1g
C: gives date
76. L: [restates date] of which month? C+1g
C: of (month)
77. L: [restates month] the same year? C+1g
C: yes
78. L: Ok. you gave month – ahhh – the baby was how old – how many weeks when you gave birth? /C+1g+2b
C: nine months
79. L: you can remember the weeks? C+1g
C: no
80. L: you can't remember? C +4a
C: yes
81. L: is it 40, or 42, or 36, 37, or 38? C
C: can't remember
82. L: you can't remember? C +4a
Magistrate intervenes: she was a very small girl. It is only the older women who can remember such details
83. L: ok. thank you. But you confirm the baby was nine months? C+1g
C: yes
84. L: ok. Now concerning the day- the day- that day you said it was in the morning-morning hours? C+2a
C: yes
85. L: why were you not in school? /C
C: because I was sick
86. L: you were sick on that day sm
C: yes
87. L: and your parents where were they? / c
C: they were at work
88. L: they were at work sm. Your siblings? /C+2b
C: they were at school
89. L: all of them were in school? C +4a
C: yes
90. L: are you the first born? /C
C: No
91. L: mmh/ f
C: the third
92. L: you are the third born sm. how long have you known ...had you known x before the incident? C+1g+1d
C: silence
93. L: but you were the neighbours? C
C: yes
94. L: you found them you found him when he was staying there or you came when you are already in the estate or in that block? C+1a+2a+2c
C: we found him there
95. L: you found him there sm. When did you start staying there? / c+1g
C: I cannot remember
96. L: you cannot remember sm
C: yes

97. L: when you started staying there, Was it in [year] or [year]? C+1g
C: names a year
98. L: you were in which class when you started staying or you started becoming at the neighbour to x? C+2c+2a
C: states class
99. L: when you open school let's say in January? /C +1g
C: yes
100. L: and ...whom was who...she was staying with the some people in his house, x? /C+2a+2c
C: yes
101. L: who particularly? / C + 1d
C: his wife
102. L: his wife sm. did they have a child? C
C: yes
103. L: and the name? /C+2b
C: Name
104. L: Name
C: yes
105. L: and on that particular day the wife and the child were not present? C +2a (day 1 or 2?)
C: yes
106. L: and in that apartment how many neighbours were you having? C+1g+1d
C: only one
107. L: only one sm
C: yes
108. L: he was the only neighbour? C +4a
C: yes
109. L: ok. Is it a flat or just a compound with 2 houses or how is it? C+1d
C: a compound
110. L: with two houses? C
C: yes
111. L: ok. F. How many rooms was he staying in... was his house? C+2a+1d
C: one
112. L: it was one bedroom? L
C: yes
113. L: One bedroom and a sitting room? L
C: yes
114. L: you said that he pulled you into the house? C
C: yes
115. L: did you cry, make noise, scream? C
C: I scream
116. L: you scream sm + 2c
117. L: did the neighbours come? C
C: no
118. L: why? C
C: because they were not around
119. L: they were not around. sm
C: yes
120. L: so when he pulled you he took you to the bed? C
C: yes

121. L: did you try to run? C
C: yes but he locked the door with a padlock
122. L: the house had a padlock, Inside? Had a lock? C
C: yes
123. L: why didn't you report to your mother? C+4b
C: because I was afraid
124. L: mmhh you were afraid. sm
C: yes
125. L: so you were just normal the following day you went to school? C +3b
C: I told my mum that I had a headache [inaudible]
126. L: and you didn't go back to school? C
C: yes
127. L: were you feeling any pain? C
C: yes
128. L: and you didn't report? C +3b
C: yes
129. L: and the clothes? C +2b +1b
C: [inaudible]
130. L: and did you get them back? C +2a
C: mmh
131. L: where were they? C
C: [inaudible]
132. L: oh kwa nyumba ze..nyumba yenu? C
C: ehh
133. L: mmm so are you sure if dna do you know what's called dna? C+2a+1d
C: yes
134. L: are you sure if dna is conducted on the baby the father will be x? C + 1d
C: yes
135. L: are you sure and you know if you are not sure it will mean you are lying? C
+ 3a
C: I'm sure
136. L: ok. f
L: your honour that's all for this witness

Re-examination

137. P: unasema ulisikia uchungu ulisikia uchungu kwa mda gani? C+1g
C: kwa mda mrefu
138. P: ulikuwa unasikia uchungu wapi? C
C: huku chini
139. P: chini wapi? C
C: [inaudible]
P: that's all for this witness

Appendix N

Other Important Documents as Ordered Below

- i. N1: Ethics application form
- ii. N2: Consent form for magistrates and prosecutors
- iii. N3: Debrief for magistrates and prosecutors
- iv. N4: Survey questionnaire for magistrates
- v. N5: Survey questionnaire for prosecutors
- vi. N6: Study 2 (experimental study) interviewing procedure – both English and Kikuyu versions

N1: Ethics Application Form

UNIVERSITY OF CAPE TOWN



Department of Psychology

Research Ethics Committee

Rondebosch, 7701

Tel: 27 21 6503417 Fax: 27 21
6504104

APPLICATION TO CONDUCT PSYCHOLOGICAL RESEARCH

1. All applications must be submitted with the documentation outlined in the attached form.
2. All documents should be submitted electronically.
3. The University of Cape Town's Department of Psychology actively supports research as an essential academic function. It is essential that all applicants consult the UCT Code for Research involving Human Subjects (available from the UCT website).
4. In the case of research involving clinical populations, drug trials, neuroimaging, and recruitment from Groote Schuur Hospital or any affiliated medical institutions, approval must also be obtained from the Faculty of Health Sciences Research Ethics Committee (FHS REC).
5. Final responsibility for the ethical and effective conduct of the research lies with the principal investigator.

HONOURS PRINCIPAL RESEARCHERS:

Complete this application form, and submit it to Rosalind Adams with the formal research proposal that forms part of your research methods module in the Honours programme.

MASTER'S AND DOCTORAL PRINCIPAL RESEARCHERS:

Complete this application form, and submit it in electronic form to Rosalind Adams attached to the research proposal you will present to a departmental thesis committee.

DEPARTMENTAL STAFF, VISITING SCHOLARS AND POST-DOC PRINCIPAL RESEARCHERS:

Complete this application form, and submit it in electronic form to Assoc. Prof. Lauren Wild (lauren.wild@uct.ac.za). The application must be accompanied by a detailed proposal (maximum length 25 1.5-spaced pages).



UNIVERSITY OF CAPE TOWN

DEPARTMENT OF PSYCHOLOGY

APPLICATION FOR ETHICAL APPROVAL TO CONDUCT PSYCHOLOGICAL RESEARCH

Section A	Proposal Identification Details	To be completed by all applicants
Section B	Study Information	To be completed for all studies
Section C	Financial and Contractual Information	To be completed by all applicants
Section D	Declaration on Conflict of Interest	To be completed by all applicants
Section E	Ethical and Legal Aspects	To be completed by all applicants
Section F	Checklist	To be completed by all applicants

Section A: Proposal identification details.

1. Title of the proposal/protocol: The effect of language on the informativeness and accuracy of child witnesses in Kenya			
2. Has this protocol been submitted to any other Ethical Review Committee?		Yes	No X
2.1 If so, list which institutions and any reference numbers.			
2.2 What was/were the outcome/s of these applications?			
3. Is this proposal being submitted for ethical approval for an amendment to a protocol previously approved by this committee?		Yes	No X

3.1 If so, what was the previous protocol's reference number?

4. Investigator details

4.1 Principal Investigator (if a principal researcher project, the principal researcher is the principal investigator):

Title	Initials & Last Name	Department and Institution	Phone	Email	Signature	Date
Mr	MM Kariuki	Psychology, University of Cape Town	+25470 061113 9	mbutukari uki@gmail .com	MK	05/10 /2018

4.1.1 (If different to 4.1 above) UCT Principal Investigator

Title	Initials & Last Name	Department and Institution	Phone	Email	Signature	Date

4.2 Co-investigators: (if a principal researcher project, add the supervisor's name here)

Title	Initials & Last Name	Department and Institution	Phone	Email
Pr.	C. G. Tredoux	Psychology, University of Cape Town	0828548 346	Colin.tredo ux@uct.ac. za

5. Is the study being undertaken for a higher degree?

Yes

No

X

If yes:

5.1 What degree? PhD Psychology

5.2 Principal researcher name: Moses Mbutu Kariuki

5.3 Supervisor name: Prof Colin Tredoux

5.4 In what department is the degree? Psychology

Section B: Study Information (summarize the information contained in the proposal).

6. Who will act as participants in the study? Magistrates and Prosecutors in the Kenya legal system; pupils aged between 9 -10 years in two primary schools in Kenya; A child witness aged between 8-10 years in a courtroom
7. Estimated number of participants: 293: 116 magistrates, 116 public prosecutors, 60 pupils, 1 child witness
8. Estimated duration of study: 8 months: February – September 2019
9. Location of study (e.g., UCT, school, hospital, etc., where you will gather data from the participants): Magistrates' Courts, two primary schools in Kenya
10. Recruitment: Please describe how and from where the participants will be recruited. Attach a copy of any posters or advertisements to be used.

Magistrates will be recruited through the Chief Registrar offices at Nairobi through an official letter of introduction.

Prosecutors will be recruited through the office of Director of Public Prosecutions through an official letter of introduction.

Pupils will be recruited through the County Director of Education.
11. Vulnerable groups: Are there pre-existing vulnerabilities associated with the proposed participants, e.g., relating to pre-existing physiological or health conditions, cognitive or emotional factors, and socio-economic or legal status?

Yes
X

No

explain briefly what vulnerability would entail in the study, and propose to safeguard participants' wellbeing.

In study two, participants are children aged between nine and ten years. They are vulnerable on account of age. First, authorization to carry out this study will be obtained from the County Director of Education. Second, I will seek parental consent through a consent form. Third, each participant will sign an assent form before interviewing. The form will be written in Kikuyu and the interviewer will be required to explain to the child the contents of the assent form before signing.

Again, a portion of the experiment in study two will involve deception. This will be remedied by a debrief 1) through a debrief form – which will give details about the deception and what it sought to achieve 2) the confederate accompanied by the principal researcher will return to both schools to give details to the participants about the study in general and offer an explanation about the deception in particular.

12. Risks: Briefly describe the research risk associated with your study, i.e., the probability and magnitude of harms participants may experience. Minimal risk means that the probability and magnitude of harm due to participation in the research are no greater than that encountered by participants in their everyday lives.

The risks are minimal. All participants will be treated with utmost respect. Confidentiality will be guaranteed by deleting all identifying information about the participants. Data will be kept in secured computer only accessible to the principal investigator. Where deception has been incorporated in the study, participants will be debriefed adequately.

13. Costs: Give a brief description of any costs or economic considerations for participants. None

Magistrates and prosecutors will spend about 30 minutes of their time filling the survey questionnaire.

Pupils will spend about 30 minutes of their time during the memory event and 15 minutes during the interview.

14. Benefits: Discuss any potential direct benefits to the participants from their involvement in the project.

None

15. Compensation: If participants are to receive compensation for participation, please provide details.

There will be no compensation

16. Consent. Describe the process to be used to obtain informed consent. Where applicable, attach a copy of the information letter and consent form.

Consent to engage magistrates in the survey will be obtained from the Chief Registrar of the Kenyan Judiciary but participants will consent individually through a consent form.

Consent to engage prosecutors in the survey will be obtained from the Director of Public Prosecutions but participants will consent individually through a consent form.

Consent for pupils to participate in the experiment will be obtained from the County Director of Education, parents, and the individual child participant.

Consent to audio record a case involving a child witness in court will be obtained from the Chief Registrar of the Kenyan Judiciary.

17. Confidentiality. Please describe the procedures to be used to protect confidentiality of the data. Audio recorded and transcribed information will be securely locked up in a cabinet by the principal investigator. After transcription, all identifying information for example names of individuals, school, places etc. will be erased. Only the age and gender of the participants will be kept for the sake of analysis. Any data in soft will be stored in a secured computer accessible only to the principal investigator.			
18. Does the protocol comply with UCT's Intellectual Property Rights Policy (including ownership of the raw data)?	Yes X		No

Section C: Financial and contractual information

19. Is the study being sponsored or funded?	Yes		No X
If yes: 19.1 Who is the sponsor/funder of the study?			
19.2 Are there any restrictions or conditions attached to publication and/or presentation of the study results?	Yes		No
19.3 Does the contract specifically recognize the independence of the researchers involved?	Yes		No
(Note that any such restrictions or conditions contained in funding contracts must be made available to the Committee along with the proposal.)			
20. Will additional costs be incurred by the department?	Yes		No X
20.1 If yes, specify these costs:			

Section D: Statement on Conflict of Interest

The researcher is expected to declare to the Committee the presence of any potential or existing conflict of interest that may potentially pose a threat to the scientific integrity and ethical conduct of any research in the Department. The committee will decide whether such conflicts are sufficient as to warrant consideration of their impact on the ethical conduct of the study.

Disclosure of conflict of interest does not imply that a study will be deemed unethical, as the mere existence of a conflict of interest does not mean that a study cannot be conducted ethically. However, failure to declare to the Committee a conflict of interest known to the researcher at the outset of the study will be deemed to be unethical conduct.

Researchers are therefore expected to sign **either** one of the two declarations below.

- a) As the Principal Researcher in this study (name: Mbutu Kariuki), I hereby declare that I am **not aware** of any potential conflict of interest which may influence my ethical conduct of this study.

Signature: MK

Date: 05/11/2018

- b) As the Principal Researcher in this study (name: _____), I hereby declare that I am **aware** of potential conflicts of interest which should be considered by the Committee:

Signature: _____

Date: _____

Section E: Ethical and legal aspects

21. Have you read the UCT Code for Research involving Human Subjects (available from the UCT website)?	Yes X		No
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Section F: Checklist

Tick

Application form	1 electronic copy	X
Covering letter and all other correspondence (e.g., ethics approval from other bodies, letters to parents, etc.)	1 electronic copy	X
Detailed proposal, including a 200-word summary/abstract	1 electronic copy	X
Consent/Assent form/s	1 electronic copy	X
Participant information sheet/Debriefing form (if separate from consent form)	1 electronic copy	X
Other documents (e.g., advertising posters)	1 electronic copy	

IMPORTANT NOTES:

- All applicable sections of this application form must be filled in OR justified why not.
- All applicable signatures must be sought
- All additional number of copies must be included with application
- All incomplete applications will be returned to the applicant, leading to delays in review.

Version February 2017

N2: Consent form for Magistrates and Prosecutors

Dear Sir/Madam,

Study Aim

You are being requested to take part in a study being done by researchers from the department of Psychology at the University of Cape Town. The aim of this study is to learn more about language use by child witnesses who do not speak the language of the court.

Study Procedures

We are carrying out a survey of Magistrates and Prosecutors to establish the prevalence and practice in our courtrooms when you have to deal with child witnesses who do not speak the language of the court. We most humbly request you to offer this information by filling the attached questionnaire that will take approximately 30 minutes.

Possible Risks

The study poses no known risk to you or to child witnesses.

Possible Benefits

This study offers no immediate benefits to you but the knowledge obtained from the study is of immense importance to the study and practice of interviewing child witnesses in court in Kenya

Costs

The only cost involved is the time you will spend filling in the questionnaire.

Voluntary Participation

Your participation in this study is completely voluntary. You are free to decline to participate now, or to withdraw at any stage in the course of the study, without any penalty or prejudice.

Confidentiality

Any information from you will be treated with utmost confidentiality. Any identifying details will be erased. Data from this study will be kept safe in a computer-protected computer by the principal researcher.

Questions

If you have any questions or comments relating to the study you should contact the following researchers:

Mbutu Kariuki
Prof. Colin Tredoux

mbutukariuki@gmail.com
Colin.tredoux@uct.ac.za

If you have any questions about your rights as a research participant, or any complaints about the study, you can contact the Department of Psychology Research Ethics Committee through:

Rosalind Adams

rosalind.adams@uct.ac.za

By signing below you are acknowledging the following:

I have understood what participating in this study will involve. I am aware of the risks and benefits. I have no further questions about the study and voluntarily consent to participate.

Participant's signature:

Date:

N3: Debrief for Magistrates and Prosecutors

Thank you very much for participating in our study.

The current research study is on the effect of language on the informativeness and accuracy of child witnesses in Kenya. The study has three components: a survey, an experiment and an analysis of an actual court case involving a child witness who does not speak the language of the court. You were called upon to participate in the survey. The principal investigator has in the past had the privilege of facilitating sessions on ***Children and the Law: Nuts and Bolts*** in Continuing Judicial Education (CJE) fora for Magistrates and the question of witnesses who do not speak the language of the court attracted a good debate. The problem is exacerbated by lack of professional interpreters in our courts and the fact that the judicial officers and prosecutors may not necessarily speak the language of the witness. But we do not know how extensive the problem is hence the need for an empirical study. The main aim of the survey, which you participated in, is to understand the extent of this concern. Through the survey, we are seeking answers to the following questions:

1. What is the prevalence of child witnesses who need to testify in a language other than the court's language?
2. What is the practice for prosecutors and magistrates when dealing with child witnesses who can't communicate in the court's language? What difficulties do they face? What works? What needs to change to adequately facilitate the child witnesses?

Like indicated, on the one hand, the legal analysis on child witnesses who need to testify in a language different from the language of the court is focusing on what the law says about it. We are taking a critical look at statutes, judicial precedents and legal opinions.

On the other hand, the survey targeted the response of State Prosecutors and Magistrates because they contend with the language question daily. What is the practice in the courtroom?

The language question (especially on questioning strategies employed by lawyers, or even age-appropriateness of the language used with child witnesses) has not gone unnoticed by researchers and experts. However much is unknown about the effect of interviewing children in their first language in comparison to other dominant languages. Hence, this study will play an important role in the field of developmental forensic psychology and in our practice with child witnesses in the Kenyan courts.

We recommend the following articles which have contributed immensely to the issue of language appropriateness on child witnesses, to which you have made a contribution through your participation in the survey.

- Davies, E., & Seymour, F. W. (1998). Questioning child complainants of sexual abuse: Analysis of criminal court transcripts in New Zealand. *Psychiatry, Psychology and Law*, 5(1), 47–61. <https://doi.org/10.1080/13218719809524919>
- Flin, R. H., Stevenson, Y., & Davies, G. M. (1989). Children's knowledge of court proceedings. *British Journal of Psychology*, 80(3), 285–297. <http://dx.doi.org/10.1111/j.2044-8295.1989.tb02321.x>
- Saywitz, K., Jaenicke, C., & Camparo, L. (1990). Children's knowledge of legal terminology. *Law and Human Behaviour*, 14(6), 523–535. <https://doi.org/10.1007/BF01044879>

Zajac, R., Gross, J., & Hayne, H. (2003). Asked and answered: Questioning children in the courtroom. *Psychiatry, Psychology and Law*, 10(1), 199–209.
<https://doi.org/10.1375/pplt.2003.10.1.199>

We want to assure you that the information you gave during the study will not be revealed to unauthorised persons and will be kept safely by the researchers. Any identifying information will be erased.

If you have any questions or comments regarding your experience during the study, do please contact us:

Mbutu Kariuki - mbutukariuki@gmail.com

Prof. Colin Tredoux - Colin.tredoux@uct.ac.za

If you have any questions about your rights as a research participant, or any complaints about the study, you can contact the Department of Psychology Research Ethics Committee through:

Rosalind Adams - rosalind.adams@uct.ac.za.

N4: Survey questionnaire for Magistrates

Sex

M	F
---	---

Number of years in service

For each of the following questions, we would like you to indicate how frequently an event occurs. You can do this by marking the appropriate box below each question

1. Have you presided over cases involving child witnesses who had some difficulties expressing themselves in Kiswahili or English in court?

Very frequently	Frequently	Occasionally	Rarely	Never
-----------------	------------	--------------	--------	-------

2. Have you presided over cases involving child witnesses had no ability, or nearly no ability, to speak the language of the court?

Very frequently	Frequently	Occasionally	Rarely	Never
-----------------	------------	--------------	--------	-------

3. Have you experienced some difficulties finding a suitable interpreter in cases involving child witnesses who could not speak the language of the court?

Very frequently	Frequently	Occasionally	Rarely	Never
-----------------	------------	--------------	--------	-------

4. Have you presided over a case in which a child witness could not speak the language of the court and no appropriate interpreter could be found?

Very frequently	Frequently	Occasionally	Rarely	Never
-----------------	------------	--------------	--------	-------

5. Has a case you presided over involving a child witness who could not speak the language of the court experienced delay because an appropriate interpreter was being sought?

Very frequently	Frequently	Occasionally	Rarely	Never
-----------------	------------	--------------	--------	-------

6. Have you presided over a case where you understood the home language of the child and the interpreter inaccurately interpreted the questions posed to the child in court?

Very frequently	Frequently	Occasionally	Rarely	Never
-----------------	------------	--------------	--------	-------

7. Have you presided over a case where you could understand the home language of the child witness and the interpreter inaccurately interpreted the child's testimony?

Very frequently	Frequently	Occasionally	Rarely	Never
-----------------	------------	--------------	--------	-------

8. When you can tell that the interpreter is not accurate in interpreting the questions put to the child and/or the child's testimony, do you intervene and request them to be accurate?

Very frequently	Frequently	Occasionally	Rarely	Never
-----------------	------------	--------------	--------	-------

9. Has it ever been brought to your attention during proceedings of the interpreter's inaccuracy in his/her interpretation?

Very frequently	Frequently	Occasionally	Rarely	Never
-----------------	------------	--------------	--------	-------

10. When you can tell that an interpreter has inaccurately interpreted the child's testimony, do you enter what you understood the witness to say as the official court record and not what was interpreted?

Very frequently	Frequently	Occasionally	Rarely	Never
-----------------	------------	--------------	--------	-------

For each of the following questions, we would like you to indicate how much you agree with the idea. You can do this by marking the appropriate box below each question

11. Should the child witness' home language always take precedence when testifying in court?

Disagree Strongly	Disagree	Slightly Disagree	Slightly Agree	Agree	Agree Strongly
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12. Should home languages in Kenya be expressly included in law as languages of the court in addition to Kiswahili and English?

Disagree Strongly	Disagree	Slightly Disagree	Slightly Agree	Agree	Agree Strongly
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13. Do you find the current arrangement with court assistants as interpreters efficient?

Disagree Strongly	Disagree	Slightly Disagree	Slightly Agree	Agree	Agree Strongly
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14. In the interest of justice, should magistrates work in areas where they can speak the language of the local population?

Disagree Strongly	Disagree	Slightly Disagree	Slightly Agree	Agree	Agree Strongly
-------------------	----------	-------------------	----------------	-------	----------------

N5: Survey questionnaire for Prosecutors

Sex

M	F
---	---

Number of years in service

For each of the following questions, we would like you to indicate how frequently an event occurs. You can do this by marking the appropriate box below each question

- 1 Have you prosecuted cases involving child witnesses who had some difficulties expressing themselves in the language e.g., Kiswahili or English that was being used in court?

Very frequently	Frequently	Occasionally	Rarely	Never
-----------------	------------	--------------	--------	-------

- 2 Have you prosecuted cases involving child witnesses had no ability, or nearly no ability, to speak the language of the court?

Very frequently	Frequently	Occasionally	Rarely	Never
-----------------	------------	--------------	--------	-------

- 3 During preparation for court, have you experienced difficulties finding a suitable interpreter for a child who does not speak Kiswahili or English?

Very frequently	Frequently	Occasionally	Rarely	Never
-----------------	------------	--------------	--------	-------

- 4 Have you prosecuted a case involving a child witness who could not speak the language of the court but no suitable interpreter could be found?

Very frequently	Frequently	Occasionally	Rarely	Never
-----------------	------------	--------------	--------	-------

- 5 Have you prosecuted a case which suffered delay as a suitable interpreter for a child witness was being sought?

Very frequently	Frequently	Occasionally	Rarely	Never
-----------------	------------	--------------	--------	-------

- 6 Have you prosecuted a case where you could understand the witness' home language and the interpreter inaccurately re-stated your questions?

Very frequently	Frequently	Occasionally	Rarely	Never
-----------------	------------	--------------	--------	-------

- 7 Have you prosecuted a case where you could understand the witness' home language and the interpreter inaccurately re-stated the child's testimony?

Very frequently	Frequently	Occasionally	Rarely	Never
-----------------	------------	--------------	--------	-------

- 8 When you can tell that an interpreter has inaccurately interpreted your question, do you intervene and request the interpreter to be accurate?

Very frequently	Frequently	Occasionally	Rarely	Never
-----------------	------------	--------------	--------	-------

- 9 When you can tell that an interpreter has inaccurately interpreted the testimony of the witness, do you intervene and request the interpreter to be accurate?

Very frequently	Frequently	Occasionally	Rarely	Never
-----------------	------------	--------------	--------	-------

- 10 Has it ever been brought to the attention of the court during proceedings you were involved in of the interpreter's inaccuracy in his/her interpretation?

Very frequently	Frequently	Occasionally	Rarely	Never
-----------------	------------	--------------	--------	-------

For each of the following questions, we would like you to indicate how much you agree with the idea. You can do this by marking the appropriate box below each question

- 11 Should the child witness' home language always take precedence when testifying in court?

Disagree Strongly	Disagree	Slightly Disagree	Slightly Agree	Agree	Agree Strongly
----------------------	----------	----------------------	-------------------	-------	-------------------

- 12 Should home languages in Kenya be expressly included in law as languages of the court in addition to Kiswahili and English?

Disagree Strongly	Disagree	Slightly Disagree	Slightly Agree	Agree	Agree Strongly
----------------------	----------	----------------------	-------------------	-------	-------------------

- 13 Do you find the current arrangement with court assistants as interpreters efficient?

Disagree Strongly	Disagree	Slightly Disagree	Slightly Agree	Agree	Agree Strongly
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- 14 In the interest of justice, should Prosecutors work in areas where they can speak the language of the locals?

Disagree Strongly	Disagree	Slightly Disagree	Slightly Agree	Agree	Agree Strongly
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N6: Study two Interviewing Procedure (English Version)

Stage 1: Rapport creation

Introduction: “Good morning. My name is (interviewer’s name). I work with children like you in understanding some of the good lessons they have learnt in life. And I am here to talk about one such lesson. So I am not here to give you an exam”.

Stage 2: Assent form.

Stage 3: Free recall

Interviewer: “I am told that a police officer came to your school a week ago. I was not there and would be happy to hear from you about this visit. Kindly, tell me everything you can remember about it from the beginning to the end.”

Notes:

Use facilitators sparingly e.g., aha, mh

Ask “can you tell me anything else” after no more information is coming from the child.

Stage 4: Yes/No section

Interviewer: “I’m going to ask you some more questions now. You might have told me the answers to some of the questions already, but if you have, just tell me again”

Instructions: answer yes or no

Terminating the interview

Thank the pupil for taking part in the interview, then send him or her to classroom with instructions not to discuss it with anyone.

Study two Interviewing Procedure (Kikuyu Version)

Itina ria mbere Kumenyana

“Wimwega? Njitagwo..... Wira uria ndutaga niwakuria ciana tumaundu turia twega mathomete twa kumateithia muturire-ini. Na nikio ndi haha umuthi. Kwoguo giki ti kigerio.

Itina ria keeri: mwana kwandika ritwa riake

Itina ria gatatu: kuririkana

Muria wa ciuria: “ndiraigua kuri muthigari urokite cukuru wanyu kiumia kiu kirathirire. Ndiari kuo na no nyende muno unginjira uhoro ucio. Njiira uria woothe ungiriikana, kuma mwambirio nginya muico, uhoro wigii icera riu ria muthigari ucio.

Huthira curia o nyinyi tu cia kumuringiriria athii na mbere na kwaria - aha, mh

Uria “kuri undu ungi ungirikana wa iceera riu ria muthigari? – akorwo ndarathii na mbeere na kuheana uhoro.

Itina ria kana: ciuria cia gucokia ii kana aca

Muuria wa ciuria: “ningukuria ciuria ingi riu. Kwahoteka niunjirite uria ngukuria no njira ringi tu”

Cokia ii kana aca

- 1) Niwoirwo irore cia moko?
- 2) Muthigari niamuonirie mbica ya ngari ya borithi?
- 3) Niwahurirwo mbica?
- 4) Muthigari niamuonirie mbica ya njera?
- 5) Niwonire mucinga wa muthigari?
- 6) Nimwainire rwimbo rwa bururi?
- 7) Muthigari niamuhuriire tharuti?
- 8) Muthigari niamuirire mutikanoe iheo kuma kuri mundu mutoi
- 9) Muthigari niakunytire ciande agiguthiururukia
- 10) Niwonire muthigari anyita mundu uria wageragia kuiya thimu ya mwalimu wanyu?

Gutiriha miario

Mucokerie mwana ngaatho niundu wa gwitikira gucokia ciuria ucoke umwire athii kirathi na ndakeere mundu maundu maria mwaria nake.