

## **ACCESS TO JUSTICE FOR INTRA FAMILIAL CHILD SEXUAL ABUSE VICTIMS IN KENYA: A MIRAGE?**

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### **ABSTRACT**

Child sexual abuse within the family, hereinafter referred to as Intra-Familial Child Sexual Abuse (IFCSA) is prevalent enough to prompt specialized attention. Its impact differs from that of child sexual abuse by a non-family member because of the unique specificities associated with it. These include its interaction with patriarchy, family set up, livelihood, associated stigma and taboos, community expectations, and the question of ownership of the conflict. The law in Kenya, however, responds to IFCSA under the same legal framework that it responds to child sexual abuse by a stranger. When the law fails to pay due regard to these specificities, the victim's right to access to justice is impeded and remains out of reach for IFCSA victims.

This paper discusses the specificities and the extent to which they impede access to justice. The discussion in this paper is based on a qualitative desk and field research carried out as part of the author's doctoral research. The field data was collected from three of the forty seven counties in Kenya. This was mainly through in-depth interviews with judicial officers, senior officers from the Department of Children Services, and Probation and After Care Services, legal practitioners, community elders, police officers and IFCSA convicts and victims.

**Keywords:** Child Sexual Abuse, IFCSA, Justice, Kenya.

### **1. INTRODUCTION**

Children are more vulnerable to victimization than adults.<sup>1</sup> The Constitution of Kenya acknowledges their vulnerability by including them in the list of vulnerable groups. This is alongside women, older members of society, persons living with disabilities, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities.<sup>2</sup> Several reasons have been advanced to explain this heightened vulnerability vis-à-

<sup>1</sup> D Finkelhor and J D Leatherman, 'Victimization of Children' (1994) *American Psychologist*, 49(3) 173.

<sup>2</sup> The Constitution 2010 (KEN) Art 21(3) Available at

<http://www.kenyalaw.org/lex/actview.xql?actid=Const2010> accessed 2 June 2018.

vis adults. First and most obvious is their physical weakness due to their small physical stature. Second is the power imbalance between them and those older than them. Closely related to this is their dependence on adults for protection and provision, and lastly, children are impressionable and compliant in nature.<sup>3</sup> They are hence more susceptible to violence and abuse in its various forms including neglect, psychological, physical, and sexual abuse.<sup>4</sup> The gravest non-fatal violation is sexual abuse as its effects are not only widespread but also long term and complex.

Though reference to child sexual abuse is more likely to conjure the image of a stranger lurking in the street corner lying in wait for a child, there is a marked trend of children suffering from sexual abuse perpetrated by those closest to them, including members of the family. The World Health Organization (WHO) has estimated that 150 million girls and 73 million boys under eighteen years have experienced sexual abuse at the hands of people known to them including members of the household.<sup>5</sup> Startling statistics from the Caribbean reveal that as high as 47.6% of girls and 31.9% of boys interviewed reported that their first sexual intercourse was forced or coerced by family members.<sup>6</sup> The Committee on the Rights of the Child in its General Comment No 8 has also confirmed the trend by noting that in every place where sexual violence has been studied, a substantial proportion of children are reportedly sexually harassed and violated by people closest to them.<sup>7</sup>

Statistics are not any different in Kenya where it has been reported that 43% of child sexual abuse in the country takes place within the home and is perpetrated by family members.<sup>8</sup> At the Kenyan coast region, a study analysis of a sample of 165 sexual offence cases concluded in Mombasa Law Courts revealed that the sexual assault in 80 of them took place within the home

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<sup>3</sup> L Hoyano and C Keenan, *Child Abuse: Law and Policy Across Boundaries* (OUP 2010) 194.

<sup>4</sup> WHO (Report of the Consultation on Child Abuse Prevention) 'World Health Organization, Social Change and Mental Health, Violence and Injury Prevention' (1999) 13 <[www.who.int/mip2001/files/2011/childabuse.pdf](http://www.who.int/mip2001/files/2011/childabuse.pdf)> accessed 16 July 2013.

<sup>5</sup> UNGA Report of the Secretary General 'Violence Against children in the home and family' (2006), para 28 <[http://www.unicef.org/violencestudy/reports/SG\\_violencestudy\\_en.pdf](http://www.unicef.org/violencestudy/reports/SG_violencestudy_en.pdf)>, accessed 27 November 2013 (emphasis mine).

<sup>6</sup> UNGA Report of the Special Representative of the Secretary General 'Violence Against Children With Respect to the Caribbean' (2006) <<http://srsg.violenceagainstchildren.org>> accessed 4 April 2012.

<sup>7</sup> UN Committee on the Rights of the Child, 'General comment No 8' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (2 March 2007) UN Doc CRC/C/GC/8. <<http://www2.ohchr.org/english/bodies/crc/comments.htm>> accessed 4 April 2012.

<sup>8</sup> UN Committee on the Rights of the Child, 'Replies by the Government of Kenya concerning the list of issues (CRC/C/KEN/Q/2) Received by the Committee on The Rights of the Child relating to the consideration of the second periodic Report of Kenya (28 November 2006) UN Doc CRC/C/KEN/2 [https://digitallibrary.un.org/record/589667/files/CRC\\_C\\_KEN\\_Q\\_2\\_Add.1-EN.pdf](https://digitallibrary.un.org/record/589667/files/CRC_C_KEN_Q_2_Add.1-EN.pdf) accessed 2 June 2018.

and over 80% of them involved child victims.<sup>9</sup> The above statistics are however not necessarily an accurate reflection of the reality on the ground as many IFCSA incidents remain undetected and /or unreported.<sup>10</sup> The bottom line however is that IFCSA is prevalent enough to cause concern.<sup>11</sup>

The primary obligation of any state is to keep its children safe from harm including sexual abuse. The child has a corresponding right to protection from sexual mistreatment. This right is critical enough to be entrenched as part of customary international law.<sup>12</sup> Where however there is a lapse and the abuse takes place, then the state has an equally important obligation to ensure that the abuse is responded to appropriately. This includes facilitating access to justice for the victim It is this right that forms the main concern of this paper with specific reference to IFCSA victims.

In Kenya, the criminal justice system responds to child sexual abuse uniformly regardless of whether it is perpetrated by a stranger or a family member. This means that, for instance, the case of a child sexually abused by her own father is processed under the same legal framework as that of another child sexually abused by a total stranger. The underlying philosophy guiding the legal response in both scenarios is based on two hard line stances: First is the imposition of long and stiff custodial sentences on the perpetrator in proportion to the age of the victim.<sup>13</sup> Second is the absolute ousting of any opportunity for a negotiated or plea bargained outcome.

The reality, however, is that IFCSA considerably differs from child sexual abuse by a non-family member. According both types of abuse the same legal response results in injustice for IFCSA victim. The aftermath of IFCSA is undeniably unique and, in the words of Ryan, 'complex in emotional and social aspects.'<sup>14</sup> This is because it takes place within the context of a family setting. It is the same family that is expected to act as a safety net for the child and safeguard the enjoyment of most child related rights including the right to access to justice. When this safety net is breached from within by the very people vested with the duty to protect the child, chances of the victim accessing justice are highly diminished by certain factors. These are the factors that consort closely with IFCSA and act as hindrances to an effective legal response to this abuse. This paper identifies the factors as specificities of IFCSA and they

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<sup>9</sup> ICRH Kenya ' An Investigation of the Barriers to Accessing Justice Study for Survivors of SGBV in Mombasa, Kenya' (2013) (unpublished, on file with the author).

<sup>10</sup> Interview with Chege, Sub County Children's Officer, Naivasha (Naivasha Children's Office, 15 November 2016).

<sup>11</sup> Interview with Okwengu, J, Judge of the Court of Appeal, Kenya (Supreme Court Building, 17 July 2017).

<sup>12</sup> Roger J R Levesque, *Sexual Abuse of Children: A Human Rights Perspective* (Indiana University Press 1999).

<sup>13</sup> Section 8, The Sexual Offences Act 2006 (KEN).

<sup>14</sup> B Ryan, et al. 'Treatment of Intra-familial Crime Victims' (1998).

<[http://www.vcgcb.ca.gov/docs/forms/victims/standardsofcare/Chapter\\_6.pdf](http://www.vcgcb.ca.gov/docs/forms/victims/standardsofcare/Chapter_6.pdf)> accessed 11 September 2013.

include the influence of patriarchy, family set up, concerns of livelihood, associated stigma and taboos, community expectations, and the tension around the issue of ownership of the conflict. The criminal justice process in Kenya operates oblivious of these underlying specificities. This makes the realization of the right to access to justice beyond the reach of many and hence a mirage.

The concern of this paper is to highlight the uniqueness of the context within which IFCSA occurs and thereby identify the bottlenecks that diminish the chances of the victim accessing justice. The specificities of IFCSA are compiled from desk research, analysis of concluded IFCSA cases and in-depth interviews carried out as part of the author's doctoral research. The interviews were held with IFCSA victims and convicted perpetrators as well as professionals from the Judiciary, the Department of Children Services, the National Police Service, and Probation and Aftercare Service. The field research was carried out in three of the forty seven counties in Kenya. The three counties are representative of both rural and urban populations.

## **2. ACCESS TO JUSTICE**

Article 39 of the Convention on the Rights of the Child (CRC) prescribes an ideal response to child abuse. It obligates States Parties to take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of abuse. The recovery and reintegration is required to take place in an environment which fosters the health, self-respect and dignity of the child. This standard is echoed in the African Charter on the Rights and Welfare of the Child (ACRWC) which calls for the identification, reporting, referral investigation, treatment, and follow-up of instances of child abuse and neglect.<sup>15</sup> Closer home, the Constitution of Kenya provides in its bill of rights, the right to access to justice to all people.<sup>16</sup> Children are entitled to this right as much as adults. This right is all encompassing and includes the right to access fair laws, basic civic education, and justice of one's choice, including restorative justice, whether through informal or conventional means. This is in line with the broad definition given by Penal Reform International:

Access to justice should be considered in its broad sense to encompass: access to a fair and equitable set of laws; access to popular education about laws and legal procedure; as well as access to formal courts and, if preferred in any particular

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<sup>15</sup> Article 16, African Charter on the Rights and Welfare of the Child, (adopted July 1990, entered into force 29 November 1999) (1990) OAU Doc.CAB/LEG/ 24.9/49.

<sup>16</sup> The Constitution (n 2 ) Art 48.

case, a dispute resolution forum based on restorative justice (both subject to appropriate regulation in order to prevent abuse).<sup>17</sup>

The Committee on the Elimination of Discrimination Against Women (CEDAW committee) in its General recommendation on Women's access to justice has pronounced itself on the scope.<sup>18</sup> Though the committee's recommendation specifically addresses women, it is of relevance to this paper as a majority of IFCSA victims are girls.<sup>19</sup> The committee conceptualizes access to justice as multi-dimensional and encompassing 'justiciability, availability, accessibility, good-quality and accountability of justice systems, and the provision of remedies for victims.'<sup>20</sup>

It is clear from the above that access to justice involves much more than provision of physical infrastructure. Its realization demands the attendance of several incidentals.<sup>21</sup> First and foremost, the enjoyment of access to justice must be preceded by knowledge of one's rights as one cannot possibly access rights they have no knowledge of. In the case of IFCSA, this includes the right for the child and/or their family to know what constitutes a violation together with their procedural rights vis-à-vis government service providers as they seek intervention from various justice institutions. The victim, for instance, has a right to know that in their quest for intervention, they are entitled to the consumer protection enshrined in the constitution, which sets expectations from both public and private entities in terms of service delivery.<sup>22</sup> Victims of IFCSA often seek intervention from a point of vulnerability and disempowerment. The importance of their empowerment through awareness of their procedural entitlements can therefore not be overstated.

Apart from knowledge of the rights, the other important components of access to justice are the physical access to both conventional and alternative justice system institutions and the victim's financial ability to meet the costs incidental to the physical access, legal and transport costs. Physical access itself also goes beyond the mere presence of physical buildings. The design and the actual facilities must be user friendly to IFCSA victims. The institution's operating schedule

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<sup>17</sup> Penal Reform International, 'Access to justice in sub-Saharan Africa: The role of traditional and informal justice systems' (November 2000) 10. Available at [www.penalreform.org](http://www.penalreform.org), accessed 25 November 2013.

<sup>18</sup> UN Committee for the Elimination of All Forms of Discrimination against Women, 'General Recommendation No 33' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (29 July 1994) UN Doc HRI/GEN/1/Rev.1

<sup>19</sup> H N Snyder, 'Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics' (2000) A NIBRS Statistical Report. < <https://www.bjs.gov/content/pub/pdf/saycrle.pdf> > accessed 5 June 2018.

<sup>20</sup> General Recommendation No 33 (n 18) 3 para 1.

<sup>21</sup> P K. Mbote & M. Akech, *Kenya, Justice Sector and the Rule of Law* (Johannesburg: Open Society Initiative for Eastern Africa 2011) 157.

<sup>22</sup> The Constitution (n 2) Art 46.

must as much as possible be convenient to that of the victims.<sup>23</sup> This includes managing the time expeditiously without unreasonable delay. IFCSA cases should especially be heard and determined within the shortest time possible as prolonged court attendance is in itself counterproductive to access to justice. It results in a situation where the child victim dwells longer than necessary on the harm done instead of recovery.<sup>24</sup>

An institution's image also has a bearing on access to justice. All institutions dealing with administration of justice have a duty to ensure that their image, ambience and operations are non-intimidating and in touch with what the ordinary population they serve is familiar with. The more formal the institutions' approach is to issues, the more skeptical the people are. In particular, Kenyan courts and police stations are traditionally viewed as places that are far removed from ordinary people's experiences and therefore best avoided. Most people still regard them with a lot of skepticism and only engage them when they have no alternative.<sup>25</sup> Where they find the slightest opportunity to resolve issues without interacting with these state institutions, they do not hesitate to bypass them. Access to justice must therefore be packaged in a manner that is familiar to and resonates with all that is important to a community including their language and rituals. Where it is presented in an elitist manner, there develops mistrust between the organs of justice and the community who then opt for the informal or total cover up of the abuse.

### **3. THE SPECIFICITIES**

The greatest hindrance to access to justice by IFCSA victims is failure by the legal system to acknowledge that IFCSA occurs within a unique context. This context has the ability to disempower a victim in pursuit of justice. Failure to concede to this reality in responding to IFCSA frustrates access to justice. It is this context that is unpacked in this part and discussed as specificities of IFCSA. These include the influence of patriarchy, family set up, livelihood, associated stigma and taboos, community expectations, and tension around the issue of ownership of the conflict. They form part of the hurdles an IFCSA victim must navigate through on their path to access to justice.

#### **3.1 Influence of Patriarchy**

IFCSA, its subsequent detection, disclosure and response thereto, all take place against an external environment dominated by patriarchal norms. This reality forms the basis of discussion

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<sup>23</sup> Ibid.

<sup>24</sup> Group interview with Police Officers under Chief Inspector Mutinda, (Naivasha Divisional Police Headquarters, 15 November 2016).

<sup>25</sup> Interview with Edith Njeri, Naivasha Deputy Sub County Probation Officer (Naivasha Probation Office, 15 November 2016).

in this part. Like many concepts, there is no convergence on the meaning of patriarchy especially among feminists.<sup>26</sup> In common parlance, patriarchy simply means ‘rule by the father’. It therefore refers to a social organization in which a male is the head of the descent with kinship and title being traced through the male line.<sup>27</sup> It is applied to refer to male domination in both public and private spheres which ordains men as the ultimate decision makers. Feminists often use the term ‘patriarchy’ as a tool to describe the power relationship and parity between men and women in order to assist in contextualizing women’s realities.<sup>28</sup> Patriarchy may hence be described as a system which pervades both the structure of the society as well as the attitudes of the individual members of that society.

Whereas structures can easily be undone, renegotiated and remade, attitudes are harder to change or negotiate around as they have usually crystallized in people’s mindsets over generations. Patriarchy is therefore a difficult status quo to alter or deal with. Patriarchal attitudes are undeniably key in determining how societal issues are responded to. The family, as the basis social institutional unit, has been described as ‘a brewery for patriarchal practices’ where its members are socialized to unquestioningly accept sexually differentiated roles.<sup>29</sup> The family setting is therefore one place where the effects of patriarchy are most felt. It then follows that IFCSA, being a kind of abuse that takes place within the home, is enveloped in patriarchal considerations in both the manner in which it is perceived by the society and the way it is ultimately responded to. This is a reality that has to be reckoned with in the quest for justice for an IFCSA victim.

Kenya is a pluralistic society with the common law based formal justice system operating alongside the largely informal African traditional justice system. This is as a result of its British colonial heritage. The state of pluralism has enhanced the role of patriarchy in the legal response to IFCSA. Though the traditional justice system hardly exists in its original unadulterated form, its remnant is still largely unfriendly to women especially victims of sexual violence. Whereas the African traditional system is inherently and unpretentiously patriarchal, the existing formal system has also been described as patriarchal by default. It is believed that the transition from the traditional to the western justice system proceeded without the input of women during the period of decolonization. Instead, local customs were either relayed through male tribal leaders or observed by male colonizers resulting in women losing even the few rights previously accorded

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<sup>26</sup> H Barnette, *Introduction to Feminist Jurisprudence* (Cavendish Publishing Ltd, 1998) 57.

<sup>27</sup> Collins English Dictionary (3<sup>rd</sup> edition, HaperCollins,1991) 1143.

<sup>28</sup> A Sultana, ‘Patriarchy and Women’s Subordination: A Theoretical Analysis’ (2010) 4 Arts Faculty Journal 2.

<sup>29</sup>M Kambarami, ‘Femininity, Sexuality and Culture: Patriarchy and Female Subordination in Zimbabwe ‘ (2006) University of Fort Hare South Africa 4 <<http://www.arsrc.org/downloads/uhsss/kmabarami.pdf>> Accessed 18 April 2017.

them by native African customs.<sup>30</sup> The long term result of the above is a situation where women who engage the justice system are trapped between formal western law and the African traditional cultural laws, both of which have patriarchal inclinations.

Patriarchy plays the role of an indirect gatekeeper in the responses to IFCSA. Its influence determines whether an IFCSA case is reported or covered up. If reported, patriarchal considerations play an important role in the choice of forum for determination of the issue. Patriarchy prefers handling IFCSA in a manner that assures the male in the family, including the perpetrator, retention of their dominant role in the management of the conflict. The chairman of the Taskforce on Alternative Justice System explained how a typical response to IFCSA in a patriarchal society is presented:

It is the patriarchal system that operates and they would prefer a system where the actors feel they are in control so to that extent it is oppressive to women. They feel if we go to that system you have more of a say and you can control it. In many cases there is the issue of stigma especially for sexual offences cases and they feel that going to the formal system is like washing dirty linen in public so we would rather handle it in-house so they find their own mechanisms. It is oppressive because the procedures are all aimed at covering up rather than dealing with it.<sup>31</sup>

The problem with an approach influenced by patriarchy is that its priority is not justice but the preservation of patriarchal norms. A Child Rights Advocate described it as ‘power play.’<sup>32</sup> The outcome is usually sympathetic to the male perpetrator. This is because he has the advantage of enveloping himself in unquestioned authority over time which is characterized with fear by both the victim and those expected to intervene on her behalf. This is best illustrated by a mainstream media account of sixteen year old Clemence<sup>33</sup>, a victim of IFCSA perpetrated by her biological father:

In 2014, he defiled her again and again threatened to kill her if she ever informed anyone of what goes on at home. However it was too much for her and she

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<sup>30</sup> K B Wester, ‘Violated: Women’s Human Rights in Sub-Saharan Africa’, Topical Review Digest: Human Rights in Sub Saharan Africa <https://www.du.edu/korbel/hrhw/researchdigest/africa/WomensRights.pdf> accessed 5 June 2018.

<sup>31</sup> Interview with Joel Ngugi, Judge of the High Court of Kenya and Chairman of the Task Force on Informal Justice System (Judge’s Chambers, Kiambu Law Courts, 17 January 2017).

<sup>32</sup> Interview with Allan Nyange, Defence Counsel, Kituo Cha Sheria (School of Law, Mombasa Campus, 22 July 2013).

<sup>33</sup> Pseudonym

decided to talk to her school headmistress, whose reaction made her regret opening up. Clemence said that the headmistress told her that there was nothing she could do because they feared her father. 'It broke my heart that the person whom I thought was going to protect and assist me turned me down. I felt like dying but remembered I had siblings to take care of.' She said. In a further bid to unshackle herself from being a sex slave to her own father, she went to the police station and filed a complaint. Instead of arresting her father, the officer in-charge called him and informed him of the charges her daughter had lodged against him. 'I think they later met and my father bribed him against investigating the matter because he was never arrested', she said. However, the father pounced on her that evening, beating her up to a point of temporarily losing her mind for three days.<sup>34</sup>

The ultimate fate of a woman and child who dares to assert their individuality in an IFCSA case against the grain set by patriarchy presents itself in a complicated and uphill state of affairs for both of them. Once in court, they have to give evidence against the male relative. This translates into a tussle between herself and the entire extended family. She is seen as fighting the entire clan who in turn ensure that she loses her place in the society. In the words of Okwengu, J, 'the mother not only stands to lose her means of livelihood, she also loses face.'<sup>35</sup> This was illustrated in the case of Machocho<sup>36</sup> who had reportedly caught her husband defiling her daughter:

Machocho says she was banished from her husband's family after declining to accept money they offered to drop the case. 'His family offered to do anything for me as long as I dropped the allegations against their son. But I could not sleep knowing I had sold justice for my daughter for some few coins.' Machocho said. She said her husband's family distanced itself and she has been forced to endure insults as long as the three daughters are safe.<sup>37</sup>

The isolation of a child alongside the mother may be more bearable than in situations where the child has no mother to look up to for social support. In such cases, going against patriarchal norms may result in permanent disruption of the child's life and total loss of their identity as in the following case narrated by the Mombasa Chief County Children's Officer:

Maybe I give you a case that we did recently. There was this girl who was abused by the father. After the father abused her then the matter came to our office

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<sup>34</sup> Malemba Mkongo, 'Innocent Terrorized. I Wish I Could Kill My Dad For Raping Me: Rage of Incest Victims in Taita Taveta' *The Star*, (Friday 2 June 2017) 20.

<sup>35</sup> Interview with Okwengu, J (n 11).

<sup>36</sup> Pseudonym

<sup>37</sup> *The Star* article (n 34) 21.

through the teacher and the father was arrested. Unfortunately he died while in custody at *Shimo la Tewa* Prison. So when he died, now the family does not want anything to do with that child. Like now that child has no family. She was an orphan, the mother had died, now the father has died and the family is accusing her of killing her father. They were saying there are some rites they could have done. If they would have conducted these rites the case would have ended there; but now the fact that the child made the father go to '*Shimo*' (remand prison), the family feels that she is responsible for the death of their father and want nothing to do with her. She lives with the teacher. ...She cannot even register for an Identity Card because she does not know where to get the supporting documents.<sup>38</sup>

The issue of patriarchy is further compounded by the question of the place of children in the African society. The position is reflected in the African Charter on the Rights and Welfare of the Child, albeit in good faith. The Charter places on the African child certain duties and responsibilities towards the family. These include the duty to:

- (a) Work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need;
- (b) Serve his national community by placing his physical and intellectual abilities at its service;
- (c) Preserve and strengthen social and national solidarity;
- (d) Preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society;
- (e) Preserve and strengthen the independence and the integrity of his country;
- (f) Contribute to the best of his abilities at all times, and at all levels, to the promotion and achieve.<sup>39</sup>

The upshot of the above is that where the interests of the child conflict with those of the family or community, then the interests of the patriarchal family have a high likelihood of prevailing over those of the child. The child is hence expected to abandon their personal interest in favor of

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<sup>38</sup> Interview with C Muinde, Deputy County Coordinator, Department of Children Services (Tudor, Mombasa, 16 July 2013).

<sup>39</sup> Article 31.

those of the community.<sup>40</sup> Often times, whenever truth is sought on the occurrence of an IFCSA, it is the adult's version of events that is believed over that of the child.<sup>41</sup>

The girl child is in an even more precarious situation. The patriarchal expectations of the girl child are anything but child centered. During the community forum discussion in Kwale County, it came out clearly that the girl child in the African society has the additional responsibility of maintaining her virginity. This is for the sole purpose of enhancing and preserving her value which ultimately accrues to her family. This standpoint was from participants drawn from the four major communities residing in Kwale County. These include the *Digo*, *Duruma*, *Kamba*, and *Taita*.<sup>42</sup> The African attitude towards an adolescent girl is such that if she engages in sexual activity, then she is deemed to have played a part in seducing the man. When the virginity is lost within reprehensible circumstances such as those that pertain in IFCSA cases, the tendency is for patriarchy to take over and manage the conflict in a manner designed to mitigate the loss incidental to loss of virginity. In such a case, the child's interests are relegated or totally ignored.

The overall impact of patriarchy therefore is that a family's response to an incidence of IFCSA largely depends on how it is perceived by the dominant male in that particular family or community. Where an IFCSA case does not receive the full support of the father, it becomes almost impossible for the rest of the family to have the case reported and successfully prosecuted.

### **3.2 Family Set Up**

Closely related to patriarchy is the question of family set up. When a child is abused by a stranger, they, most likely, have their family to fall back on for support, love, care and protection. The support is available from the time of detection, through reporting, prosecution until sentencing and thereafter. However, in case of IFCSA, the child has to deal with the awkward situation of relating with the person that they previously trusted and probably loved but who now has turned against them. It therefore follows that an IFCSA victim cannot access justice without disrupting the family unit in various ways. First and foremost, when the criminal justice process is set in motion, the rest of the family members often have to play a role in the process. They may be called upon as witnesses, either for the prosecution or for the accused.

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<sup>40</sup> J W Muyila, 'African Values and the Rights of the Child: A view of the Dilemma and Prospects of Change', in S Lagoutte and N Svaneberg (eds.), *Women and Children Rights, African Views* (Karthala, 2011) 97.

<sup>41</sup> Interview with Elizabeth Aroka, Legal Officer, International Center for Reproductive Health (Coast General Hospital Gender Recovery Center, 22 July 2013).

<sup>42</sup> Bofa Community Focused Group Discussion, (Kasemeni Sub County Headquarters, Kwale County, 30 September 2016).

This creates opposing camps with members of one family split between siding with the perpetrator and sympathizing with the victim. The process inevitably disrupts the family and has the potential to cause family break up and loss of relationships. This tension often spreads to the extended family.

The African traditional social set up is acclaimed for its deep sense of kinship.<sup>43</sup> The onus of ensuring that the family unit remains cohesive is largely placed on the mother. Her mothering role also positions her at the forefront in protecting and nurturing the children. The cohesion and nurturing roles are often attained at substantial sacrifice of individual rights by the mother. The two roles are also often in conflict. Whereas it is incumbent on a mother, as the nurturer and agent of the child, to report when the child is abused, her other duty of 'keeping the family together' demands equal or more attention. The impact that the pursuit for access to justice by an IFCSA victim has on the parent's marriage is therefore even more pointed. Women often have to weigh between the value they place on their children vis-à-vis their marriage. Often times the subsistence of the marriage is prioritized over seeking justice for the abused child. It is not uncommon for the mother herself to protect the perpetrator from justice especially where he is her husband. On the other hand, a mother's cooperation with the legal system often marks the end of her marriage. Most mothers therefore prefer not to 'spoil their home' as observed by a Probation Officer:<sup>44</sup>

Some mothers are simply cold about it; as if nothing happened. They say, it could have been worse, the child could have died. She has not died. She is still alive, why should I make things worse by destroying my marriage? In that particular case, the girl was an imbecile who had been defiled by her biological father.<sup>45</sup>

Pressure exerted on the woman by her in laws and the rest of the extended family also plays a significant role in the manner in which IFCSA is responded to. Some women are evicted from their homes by the extended family.<sup>46</sup> This often follows the narrative that emerged from the facts in the case of *S.N.T. v Republic*.<sup>47</sup>

At around 5:00 p.m. on the same day, while J, the complainant's mother, was cooking, she observed the complainant was having difficulties while in a sitting

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<sup>43</sup> A I Kanu, 'Kinship in African Philosophy and the Issue of Development' (2014) 1(9) IJHSSE 1 <[www.arcjournals.org](http://www.arcjournals.org)> accessed 15 June 2017.

<sup>44</sup> Interview with, Naivasha Deputy Sub County Probation Officer (n 25).

<sup>45</sup> Ibid.

<sup>46</sup> Group Interview with Sergeant Rozet Kusimba, Constable Wanjiru and Constable Hanifa, (Nyalı police station Gender Office 30 November 2016).

<sup>47</sup> *S.N.T versus Republic*, In the Court of Appeal at Nyeri, Criminal Appeal No 20 Of 2012 [2013] eKLR.

position. Upon inquiring, the complainant informed her that the appellant had sexual intercourse with her. J examined the complainant and noticed she had some spermatozoa on the vagina. J told the court that when she confronted the appellant, he refused to take the child to the hospital. J informed the appellant's mother and other elders about the sexual assault. The appellant's mother forbade J from disclosing the sexual assault to anybody else.

The influence of family ties in IFCSA's access to justice is more pronounced in a polygamous setting. Apart from the now magnified extended family pressure, there are more family members to take sides. The main division is along the line of those who support the victim and those who support the perpetrator. The division plays itself out even during the perpetrator's incarceration. In the case of Pastor A, convicted of an IFCSA offence, his two wives do not see eye to eye on the issue of his incarceration. He stated that one of his wives, the mother of the victim never visits him but her co wife and her son visit him in prison regularly.<sup>48</sup> The strain on family relations does not therefore end at sentencing. The relationship between the child victim and the perpetrator of IFCSA is filial, permanent, and incapable of being erased by a jail sentence. Whereas a divorce can legally terminate matrimonial ties, there is no known legal method of severing other kinship relations. It is even more complex where the perpetrator is a father and the victim has other siblings who have not been abused. The latter may side with the perpetrator creating more strain in the family.<sup>49</sup>

The children of a family responding to IFCSA particularly suffer hardship both during trial and where the perpetrator is incarcerated. In extreme cases where a father is incarcerated and the mother is deceased, the family unit disintegrates completely and the children are left without a fixed address of abode. IFCSA against older girls may also result in pregnancy and the children born out of the incestuous relationship complicate the dynamics of the family further. In most African traditions, such children are generally unwanted. Among the Luhya community of western Kenya, in particular, a child born out of incest is a taboo child and cannot be raised within the family. This was the case in *Re Baby GTO alias Unknown Male Child* where the child was voluntarily given up for adoption by his birth parents. The birth mother, who was only fifteen years when she bore the child, had been sexually abused by her uncle leading to conception of the child.<sup>50</sup>

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<sup>48</sup> Interview with M Inmate Shimo la Tewa GK Prison (Shimo la Tewa Prison Premises, 16 September 2016).

<sup>49</sup> Interview with Waswa, Sub County Probation Officer, Kwale County, (Kwale County Children's Department Office, 10 November 2016).

<sup>50</sup> *In Re Baby GTO alias Unknown Male Child* In the High Court of Kenya at Mombasa Adoption Cause No 14 of 2013 eKLR 2013.

From the foregoing, it is evident that the legal response to IFCSA usually takes place against the background of a myriad of conflicting family interests. The management of those interests gives rise to unique circumstances that the legal framework cannot afford to overlook if access to justice is to be realized. Failure to manage these interests effectively is often the reason why the legal response to IFCSA is often shrouded in a conspiracy of silence within the family. It is hence more likely to be covered up or dealt with away from the glare of the open criminal justice system. The end result is defeating a victim's right to access justice.

### **3.3 The Victim's Livelihood**

Livelihood refers to the means of securing the necessities of life including food, clothing, shelter, education, amongst other needs. It therefore goes hand in hand with economic empowerment.<sup>51</sup> A child falls in the position described as 'dependency based vulnerability' where they rely on others to meet their needs.<sup>52</sup> They lack independence as far as livelihood is concerned. Livelihood therefore has a strong bearing on the trajectory of an IFCSA. It determines whether the case will be disclosed, to what extent, and whether the family will submit itself to and cooperate with the criminal justice system. As is apparent from the discussion in the preceding part above, the parent who is more affected by the ramifications of IFCSA is the mother. It is her livelihood therefore that primarily calls for interrogation.

Despite being amongst the more hardworking of the two genders, women still constitute two thirds of the world's poor.<sup>53</sup> Patriarchal structures and attitudes discussed above have been identified as great contributors to the feminization of poverty.<sup>54</sup> In Kenya, as in most of sub Saharan Africa, women rarely have control of the means of livelihood. It is no wonder that poverty has been said to wear the 'face of a woman'.<sup>55</sup> The males within the family are often the providers and bread-winners. A lot of women also owe their access to basic necessities like the roof over their heads and medical insurance to their husbands. This may be due to the fact that the home is in the husband's ancestral home where the wife's interest over the matrimonial home is more complicated than clear. It could also be by virtue of the fact that the husband is the one with the ability to pay rent. In a place like Naivasha, a considerable percentage of the population is employed in the flower farms where they are housed by the employer. Where the man is the

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<sup>51</sup> Oxford Dictionaries, <http://oxforddictionaries.com/definition/english/livelihood>, accessed on 14 October 2013.

<sup>52</sup> L A Weithorn, (n 283) 185.

<sup>53</sup> L Maloiy, Patriarchy and the control of resources: Contributing factors to the feminization of poverty in Kenya? [https://www.afdb.org/uploads/tx\\_llafdbpapers/Patriarchy\\_and\\_the\\_control\\_of\\_resources-\\_Contributing\\_factors\\_to\\_the\\_feminization\\_of\\_poverty\\_in\\_Kenya\\_.pdf](https://www.afdb.org/uploads/tx_llafdbpapers/Patriarchy_and_the_control_of_resources-_Contributing_factors_to_the_feminization_of_poverty_in_Kenya_.pdf) accessed 23 August 2017.

<sup>54</sup> Ibid 7

<sup>55</sup> A Jagger, 'Does Poverty Wear a Woman's face? Some Mora Dimensions of a Transnational Feminist Research Project' (2013) 28 (2) *Hypatia*, a Journal of Feminist Philosophy 240.

one assigned the house by his employer, the mother enjoys the shelter at the pleasure of both her husband and his employer.<sup>56</sup>

When the provider doubles up as the perpetrator, the victim's livelihood becomes a major concern both during trial and where the process results in incarceration. A research by Lalor on child sexual abuse in Kenya and Tanzania has hence observed that children are less likely to report where there is discomfort about the effect of engaging the criminal justice process will have on the family's livelihood.<sup>57</sup> The concern of the victim's livelihood is expected in a developing country like Kenya where state welfare is unknown or erratic.<sup>58</sup> It is in this light that Kisanga observes that the protection of children from child sexual abuse within the family is closely tied to economic empowerment of women.<sup>59</sup> A child rights advocate working at the Coast General Hospital Gender Based Violence Recovery Center (GBVRC) narrated how she frequently witnessed victims and their mothers agonize over the dilemma of their livelihood upon being advised to report the sexual abuse to the police. The dilemma is often verbalized in statements such as,

‘even if I report and he is convicted, what happens to me and my children...how do I feed the other children and how does it help the child who was defiled?’ or a child will be heard wondering aloud, ‘Now if I report my dad, who will look after my mother...’<sup>60</sup>

When a victim of IFCSA is forced to engage the formal justice system against their deeply entrenched concerns about their livelihood, the likelihood of sabotaging their own case during trial is high. One of the ways is through turning into a hostile witness. This is a witness who intentionally gives evidence totally different from what they initially recorded when reporting the offence in order to frustrate the case.<sup>61</sup> Evidence given by a witness who is declared hostile has no value. Where the victim, who is the usually the only eye witness in an IFCSA case, is declared a hostile witness, a likely result is the collapse of the case and subsequent acquittal of the perpetrator.

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<sup>56</sup> Group Interview Naivasha Police (n 24).

<sup>57</sup> K Lalor, Child Sexual Abuse in Tanzania and Kenya (2004) 28(8) Child Abuse and Neglect 833.

<sup>58</sup> There exists a National Plan of Action for Orphans and Vulnerable children but this program does not include victims of IFCSA < <http://www.ovcsupport.net/s/library.php?lk=demographic+factors>> accessed on 17 October 2013.

<sup>59</sup> F Kisanga et al, ‘Parents’ Experiences of Reporting Child Sexual Abuse in Urban Tanzania’ [2013] Journal of Child Sexual Abuse 482.

<sup>60</sup> Interview with E Aroka (n 41).

<sup>61</sup> Section 161 The Evidence Act 1963 (KEN).

The other intersection of livelihood with access to justice in IFCSA is with regard to the cost incidental to court attendance. The cost is both hidden and direct but both aspects impact on the victim's livelihood. One major concern is the time the primary care givers spend away from their work stations as they engage the justice sectors on behalf of the child victims. Many are in the informal sector where absenteeism translates to nil income. The legal officer at the Gender Recovery Center explained the difficulty encountered at the center as they persuade victims' parents to engage the justice system after reporting an IFCSA case at the center:

... majority of cases you are seeing here are from victims in the low economic strata. ...getting that transport to come and report this matter is a challenge. So you can imagine a situation where they still have to go to probably a police station and to court and all that. And at times they are told *enda urudi, enda urudi*. (go back and come back later). Sometimes they just decide, what is in it for me? So they decide to give up because they are looking at what they are putting in terms of their finances what they are losing out in the process of walking up and down. You can imagine if it is someone who sells *viasi karai* (deep fried potatoes) in the streets. They are thinking, 'when I am out am pursuing my case, my business is at a stand-still' in any case, most of them still do not have much faith in the justice system. So they look at it and say, 'after all I might do all these things and in the end I might not get justice. Why should I follow it up as much as I should?' So the person abandons the case.<sup>62</sup>

In an ideal situation, an IFCSA's victims' livelihood is the concern of the state. In the Kenyan situation, however, there is no demonstrable goodwill from state organs to shoulder this responsibility. Despite the enactment of the Victim Protection Act that establishes the Victim Protection Fund, the reality on the ground is that the state has no budgetary allocation for victims.<sup>63</sup> The Witness Protection Agency established under the Witness Protection Act may also play a part in alleviating the livelihood needs of the mother in her capacity as the witness.<sup>64</sup> However, despite the decentralization of the Agency to the coast region, none of the professionals interviewed in the three regions were familiar with the office or the workings of the Agency. The Department of Children Services, in whose docket IFCSA victims primarily fall, is grossly underfunded and not prioritized by the state. Funds allocated to them are supposed to be released from the consolidated fund quarterly in advance. It is however common for the same to reach the regional offices after an inordinate delay. The Children's Officer in Naivasha, for

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<sup>62</sup> Interview with E Aroka (n 41).

<sup>63</sup> Interview with Kwale Probation Officer (n 49).

<sup>64</sup> Witness Protection (Amendment) Act 2010 (KEN) Section 3A.

instance, confirmed that they had received their 2016 second quarter allocation in October and painted a gloomy picture of their state of funding as follows.

We have no money for emergencies. We usually mobilize resources from partners like Red Cross like for transportation and reintegration. As for vehicles, we share with the Probation Department..... We are not consulted when the budget is prepared in Nairobi. Money is supposed to be sent every quarter but it always arrives late.<sup>65</sup>

Placing victims in rescue centers would go a long way in attending to a lot of their livelihood needs. There are, however no state run or sponsored rescue centers. There are few privately sponsored ones in Naivasha, Kwale and Mombasa. None has the capacity of holding more than one hundred children at a go. Their existence has however not totally ameliorated the problem of livelihood. This is because IFCSA, by its very nature, generates multiple victims with diverse and at times conflicting interests. Apart from the abused child, there is the mother and the victim's siblings. The rescue centers' sole concern is the safety of the primary victim. This therefore means that even where a child victim is accommodated in a Rescue Center, the livelihood of the mother and the non-affected children remains outstanding.<sup>66</sup> Other livelihood issues that are not catered for by the Rescue Centers include the victim's education. The Centers are also provisional in nature pending a permanent intervention by the state and do not take up the children on permanent basis.<sup>67</sup> In Mombasa County, the longest period the rescue center can house a child is six months after which they must leave.<sup>68</sup> At the core of the issue of the victims' livelihood is the government's over reliance on the goodwill of Non-Governmental Organizations at many levels. This has resulted in the privatization or total neglect of public facilities. Many public facilities exist only by name with real services only available in private institutions which is beyond the reach of most victims.<sup>69</sup>

The gap left by the state as far as the livelihood of an IFCSA victim is concerned is a governance issue which cannot be addressed comprehensively in this paper. Suffice it to say, the issue of the victim's livelihood cannot be ignored in pursuit of justice for a victim of IFCSA. Failure to do so results in a breach of the right to access to justice. The upshot of above is that the price a mother and child victim pay to maintain their autonomy and pursue formal justice in cases of IFCSA is normally very high. Most therefore prefer to forego the right to pursue the cases.

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<sup>65</sup> Interview with Chege, Sub County Children's Officer, Naivasha (Naivasha Children's Office, 15 November 2016).

<sup>66</sup> Ibid.

<sup>67</sup> Group Interview Naivasha Police (n 24).

<sup>68</sup> Interview with C Muinde (n 38).

<sup>69</sup> Ibid.

### **3.4 Beliefs, Taboo and Stigma**

Sex is generally considered a taboo subject in most communities in the sub Saharan African region.<sup>70</sup> This taboo hallmark is magnified where sex has to be discussed in the context of deviation from accepted social and moral norms. IFCSA represents one of the highest forms of such deviation. IFCSA's association with mystic beliefs and taboos translates into the stigmatization of all the parties involved. These include the unborn. As stated above, many communities consider any child born out of an incestuous relationship cursed and capable of bringing bad luck on anyone who raises them. Such children are usually abandoned or given up for adoption to be raised away from the community.<sup>71</sup> The general stigmatization of IFCSA has the potential of impeding an objective legal response. In the words of the presiding judge in *PMM v Republic*, 'the offence of incest invokes shame, and is taken to be a curse among most communities of Africa.'<sup>72</sup> When faced with the reality of stigma, most victims and/or their families prefer to keep the abuse to themselves. It is therefore no wonder that none of the three adult victims of IFCSA interviewed in this research had the courage to immediately report the abuse to anyone including their family members. Victim DSB was repeatedly defiled by her older cousin who lived with them for a period of five years since the age of six years. This happened while her mother slept in the adjoining room. She stated that she chose to remain silent as she felt that the mother could not handle this grave taboo issue as she was at the time battling schizophrenia and HIV related ailments.<sup>73</sup> Victim JG was severely defiled by a cousin who lived in the same neighborhood in the village. She too never reported as she feared that the mother would 'collapse' if she learnt of the abuse. This was despite the fact that she had the opportunity to inform the mother when she complained of pain while taking a bath.<sup>74</sup> Victim WA, on the other hand was defiled by her uncles who frequently visited her home. While explaining her reason for not telling anyone about the abuse, she simply stated that in their home, 'you did not talk of such things'.<sup>75</sup>

The stigma is not confined to the community. It is detectable even at the level of professionals. This is discernable from the attitude of the service providers. Upon receiving the report of an

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<sup>70</sup> Lalor (n 57) see recommendations at the end of the unpaginated publication.

<sup>71</sup> In Western Kenya, there is a home established specifically for the rescue of children born out of incestuous relationships <<http://www.janddchildrenscentre.org/what-we-do>> accessed on 16 October 2013.

<sup>72</sup> *P.M.M versus Republic* High Court of Kenya at Nakuru High Court Criminal Appeal No 188 of 2010 (2011) eKLR.

<sup>73</sup> Interview with DSB (Pseudonym) victim of IFCSA (Nairobi, 20 February 2016).

<sup>74</sup> Interview with JG (Pseudonym) victim of IFCSA (by phone, 26 January 2017).

<sup>75</sup> Interview with WA (pseudonym), victim of IFCSA (Rainbow Estate, 3 July 2013).

IFCSA incident, their initial reaction often betrays their deep seated attitudes. This usually takes the form of insensitive expressions of disbelief designed to discourage the victim from pursuing the shameful issue further. The Mombasa based child rights advocate gave the example of a nurse who would ask an IFCSA victim, 'Why are you telling such lies about your father?' or the police officer warning another IFCSA victim, 'if this story ends up being false you shall be jailed'.<sup>76</sup> The professionals are therefore more comfortable responding to abuses by strangers than those by members of the family because the former have less stigma attached to them.<sup>77</sup> The reality of the stigma associated with IFCSA cases must be reckoned with if the victim is to be guaranteed effective access to justice. It is the need to manage the stigma that brings to the fore the question of who really owns the conflict that arises in after an IFCSA, as discussed in the following part.

### **3.5 Whose Conflict?**

Though the conventional parties in a criminal case are the state and the perpetrator, the place of the victim and their family in an IFCSA setting often creates tension vis-a-vis the role of the state. The tendency for the state is to claim total ownership of the conflict. Nils Christie perceives conflict as property capable of being stolen. He argues that the criminal justice system plays the role of facilitating the taking away of the conflict from the parties who are directly involved to other parties.<sup>78</sup> He reckons that the state steals the conflict from the complainant. The confiscation of the conflict is not only at the conceptual level. The location, venue and setting where the conflict is ultimately designated is usually alien and far removed from the world of the victim and their families. This is because courts traditionally function mechanically.

Formal state organs of dispute resolution are designed to resolve compartmentalized disputes separately under distinct fields like contract, tort, or crime.<sup>79</sup> Many people therefore feel that the formal system is incapable of resolving complex issues that give rise to claims that cut across the various fields of the formal system. The reality is that most conflicts in any given society cut across these fields. For instance, a land dispute may give rise to a murder case or defilement case give rise to child maintenance and custody dispute. The compartmentalized formal system however only deals with single issues presented before it in a legally cognizable way and in a

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<sup>76</sup> Interview with E Aroka (n 41).

<sup>77</sup> Ibid.

<sup>78</sup> N Christie, 'Conflict As Property' (1977) 17 (1) *The British Journal of Criminology*.

<sup>79</sup> B J Winick, 'Therapeutic Jurisprudence and Problem Solving Courts', (2002) 30 (3) *Fordham Urban Law Journal* 1055.

singular manner without going deeper to interrogate underlying social problems. Pursuing wholesome justice arising from one incidence from multiple fields becomes tedious.<sup>80</sup>

Faced with the above circumstances, a natural reaction by the protagonists is resistance to handing over the conflict to the formal justice system and an inclination to hoard it. After retaining the conflict, they may deal with it in various ways including sweeping it under the carpet or resulting to traditional dispute resolution mechanisms which they deem 'free from lawyers, their law, and the law system of the capital.'<sup>81</sup>

Other factors that incline the victim and their family towards retaining the conflict within the informal circles include the assurance of more direct participation both in the process and in designing the final settlements. It also has opportunity for more direct dialogue and reconciliation. Another important attraction is the potential for the informal system to maintain higher levels of confidentiality since no public records are kept. It is also more flexible in designing creative settlements, and it can easily be controlled as it has less power to subpoena information, and less direct power of enforce its orders. Lastly, the end result of the informal process is more likely to translate to a form of justice familiar to the victim's family than the one meted out by the courts. The end result of the formal adversarial system is usually not of much direct benefit to the family. For this reason, the family may be more resistant to allow their conflict to be taken away from them. This is especially where the interests of the formal system do not appear to resonate with their interests and where the state appears ready to cross certain boundaries to enforce its orders. In such cases, their preference is to retain the management process and outcome of the conflict and resolve it informally in a manner a majority of them are more comfortable with.<sup>82</sup>

Unfortunately in IFCSA cases, the interests of the family hardly ever resonate with those of the state. The tension around the ownership of the conflict between the state and the concerned family is therefore bound to be more pronounced in IFCSA cases. Whereas the state's ultimate goal is to punish the perpetrator, the family's priority is to retain custody and control of the conflict in order to manage it in a way that is meaningful and beneficial to them as a family unit. Where, for instance, the child is of tender years, the family may feel that jailing the perpetrator may result in no direct satisfaction to the child victim.<sup>83</sup> The family may then opt to spare the child victim from the rigorous court process and instead exclusively focus on the healing of the

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<sup>80</sup> Interview with Joel Ngugi, J (n 31).

<sup>81</sup> W Mutunga, 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court Decisions' (Inaugural Distinguished Lecture Series, University of Fort Hare, 16 October 2014).

<sup>82</sup> Interview with Joel Ngugi, J (n 31).

<sup>83</sup> Interview with Naivasha Children's Officer (n 65).

child through psycho-social and medical support. An adult victim of IFCSA who gets a belated opportunity to report an IFCSA incident in their adulthood may also opt to keep the conflict away from the formal justice process. In a discussion between the author and DSB on whether JG should seek formal justice against the relative who had defiled her during her childhood thirty years earlier, DSB advised that JG should consider concentrating on healing instead of having the perpetrator investigated and prosecuted as it would not add much direct value to JG.<sup>84</sup>

The question of conflict ownership was indirectly discussed by the court in *PMM versus Republic*.<sup>85</sup> The court was called upon to make a determination on the consequences of lack of cooperation by the immediate victims of IFCSA during trial. The case was an appeal against a conviction where the appellant had been charged with the offence of defiling his ten year old daughter. The appellant's main ground of appeal was that the case was not sustainable as it had no complainant. He based this averment on the evidence of his daughter, the victim, who during trial gave an unsworn statement and denied that her father had defiled her. She stated that she had been asked by their neighbor, 'Mama Shiko' to say that her father had defiled her so that she could be taken to see her mother in the hospital. Her mother had gone to the maternity hospital to deliver a baby. The court observed that, many victims of sexual abuse, by relatives, and those close to them, suffer from trauma and self-denial. Such a victim is hence torn between denial in the presence of the relative or friends (the father and the mother in this case), while complaining quietly to third parties, (*Mama Shiko*). The appellant further raised the question of the actual complainant in the case was in the light of the fact that the victim had denied having been defiled by him. In answer to this question, the court found that the complainant does not have to be the victim. It identified a complainant as follows:

The complainant is any concerned citizen of good will. A neighbor concerned with the fact the child or children are habitually locked in the house by a single parent, or parents without food, or denied to go to school, or that they are battered. Such neighbors, or witness to a hit and run accident, are all legitimate complainants. In this case, the complainants were the victim's and the appellant's neighbors, ladies who were concerned that a child was being defiled by the father, the appellant.<sup>86</sup>

The above finding is a clear demonstration that the formal justice system's attitude towards ownership of the conflict can be counterproductive to the victim's quest for justice. The discovery that the conflict neither belongs to the victim nor the family does not always resonate

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<sup>84</sup> Interview with DSB and JG (n 73 and n 74 respectively).

<sup>85</sup> *PMM versus Republic* (n 72).

<sup>86</sup> Ibid 3.

well with that of the immediate family. This tension is often the cause of the difference in expectation between the community and the immediate family when an IFCSA case arises. This is discussed in the final part below.

### **3.6 Community Expectations Vis-à-vis Family Expectations**

A typical response to an IFCSA incidence by the larger community usually takes the form of the following report:

There was drama in Kilgoris when a group of women stormed the home of a middle-aged man believed to have impregnated his sixteen year old daughter. The women marched into the homestead of Samson Momposh whose daughter is nursing a one month old baby. Momposh is alleged to have slept with the standard six pupil and fathered her child, an allegation he denied. His wife and daughter fell pregnant at the same time and are both nursing babies of almost the same age alleged to have been fathered by Momposh. The women, armed with *pangas* (machetes) marched Momposh to the Kilgoris police station six kilometers away and handed him over to the police officers. The man was remanded in custody and is set to appear in court next Tuesday. DNA samples have been collected from father and daughter and have been sent to the labs in order to establish the veracity of the allegations.<sup>87</sup>

There is a general assumption that the expectations of victims of IFCSA and their families correspond with those of the larger community. The above account, though reported as any other sensational news feature by the media, chronicles a typical scenario of the differentiated way in which IFCSA cases are perceived by the family and the community at large. As is evident from the story, the response of families immediately affected by IFCSA is often at variance with that of unaffected third parties. To the latter, it immediately evokes outrage and a range of other strong emotions directed at the perpetrator whom they feel should be subjected to severe punishment. The reaction of the immediate family is however neither immediate nor clear cut.

IFCSA is usually less likely to be voluntarily disclosed by the victim and their family than child sexual abuse by a stranger. As discussed earlier, the more natural response by the family is to manage it in a way that will best mitigate incidental loss and damage. This may include sweeping the incident under the carpet altogether. These multiple conflicting interests relegate

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<sup>87</sup>Standard Digital News report of 6<sup>th</sup> October, 2013 on <http://www.standardmedia.co.ke/mobile/ktn/watch/2000070588/a-man-slept-with-her-standard-six-pupil-daughter-and-fathered-her-child>. Accessed 6 October 2013.

the punishment of the perpetrator lower on the list of priorities. It is therefore not a wonder that the offence in the Momposh case above was reported by 'a group of women' and not the primary victim or her mother. This was after curious neighbors figured out a sexual abuse following a pregnancy whose paternity the rest of the family appeared not keen on following up.<sup>88</sup>

The expectation of the general community, on the other hand, is inclined more towards an overt public denunciation of the harm and the punishment of the offender.<sup>89</sup> This resonates more with the criminal justice system whose main goal has been described as to 'serve and visit opprobrium and moral reprehensions on offenders who engage in morally impermissible exploitation of gullible children.'<sup>90</sup> The expectation of the community is therefore often at cross purposes with the immediate interests of the victim and their family. The family may not be too eager to escalate the case to the criminal justice system as the system does not come with economic or social support for the family. It is therefore a specificity of IFCSA that they are often disclosed and reported by persons other than the concerned family members. The outsiders therefore usually appear more zealous in having the case prosecuted than the family members. The effect of the disparity between the expectation of the family and that of the outsiders complicates the trial process as discussed earlier in this chapter. When the immediate family feels overwhelmed by the overzealousness of the rest of the community, they hold back and are likely to cease cooperating with the justice system. Such a scenario impedes the victim's access to justice.

#### **4. CONCLUSION**

The context and after-effect of IFSCA undeniably differ from those that pertain to child sexual abuse by a non-family member. The context within which the former takes place is more fragile and its after-effect is graver, more permanent, far reaching and complex than the latter. An IFCSA victim engages the legal system encumbered by the demands of patriarchy, family set up, concerns of livelihood, associated stigma and taboos, community expectations, and the tension around the issue of ownership of the conflict. It is these encumbrances that have been unpacked in this paper as specificities. The paper has analysed the specificities against the backdrop of the victims' right to access to justice. It has brought to light handicaps that have the potential of impeding access to justice if left unacknowledged and unattended by the legal system. The handicaps have the cumulative effect of complicating the reporting, investigation and prosecution of IFCSA cases. The complications propel the victims and their families towards the

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<sup>88</sup> Ibid.

<sup>89</sup> B Naylor, 'Effective Justice for Victims of Sexual Assault: Taking Up the Debate on Alternative Pathways' 33(3) UNSW Law Journal 666 [http://www.unswlawjournal.unsw.edu.au/sites/default/files/28\\_naylor\\_2010.pdf](http://www.unswlawjournal.unsw.edu.au/sites/default/files/28_naylor_2010.pdf) accessed 22 February 2017.

<sup>90</sup> Email from Willy Mutunga, then Chief Justice of the Republic of Kenya to author (13 May 2016).

path of least resistance. This may take the form of either sweeping the incident under the carpet, or outright complicity and acquiescence by those supposed to report the offence. As long as the justice system remains blind to the specificities and respond to IFCSA under the same legal framework as any other child sexual abuse, justice for IFCSA victims in Kenya largely remains a mirage.