



# TESTIMONIAL COMPETENCE

of persons with intellectual and  
psychosocial disabilities  
in criminal proceedings  
**IN SOUTHERN AFRICA**



Centre for  
Human Rights  
UNIVERSITY OF PRETORIA



OSISA  
Open Society Initiative  
for Southern Africa

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Louis Oyaro and Dianah Msipa



Centre for Human Rights | Open Society Initiative for Southern Africa

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## ABBREVIATIONS AND ACRONYMS

<b>CPA</b>	Criminal Procedure Act
<b>CPC</b>	Criminal Procedure Code
<b>CPEA</b>	Criminal Procedure and Evidence Act
<b>CPEC</b>	Criminal Procedure and Evidence Code
<b>CRPD</b>	Convention on the Rights of Persons with Disabilities
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>MHA</b>	Mental Health Act
<b>NDCA</b>	National Disability Council Act
<b>PCA</b>	Penal Code Act
<b>PPC</b>	Penal Procedure Code



## EXECUTIVE SUMMARY

In 2017, the High Court of Lesotho, sitting as the Constitutional Court, delivered a landmark ruling in the matter of *Koali Moshoeshoe and Others v DPP and Others*. The court declared that the provision in section 219 of the Criminal Procedure and Evidence Act stating that persons with intellectual and psychosocial disabilities may not be competent to testify in court was unconstitutional and therefore, null and void. The Court's ruling in *Moshosho* is a positive development for securing the right of persons with intellectual and psychosocial disabilities in Lesotho to access justice on an equal basis with others.

In light of the fact that many countries in southern Africa share a common legal history, a research study to determine whether other countries in Southern Africa have a similar provision was conducted. The study reviewed relevant legislation in eleven southern African countries, namely, Angola, Botswana, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mozambique, Namibia, Zambia, and Zimbabwe. The study found that nine of the eleven southern African countries under review have provisions in their laws stating that persons with intellectual and psychosocial disabilities may not be competent to



testify in court. Madagascar and the Democratic Republic of Congo are the two exceptions.

This report makes two recommendations: the first recommendation is that the relevant stakeholders receive training on access to justice and the use of accommodations as well as legal capacity and the use of supports; the second recommendation is legislative reform in each of these countries to repeal the discriminatory provisions.



## INTRODUCTION

Testimonial competence laws have a disproportionate impact on the ability of persons with intellectual and psychosocial disabilities to access criminal justice. These laws require the courts to conduct an inquiry into the competence to testify of any witness with an intellectual or psychosocial disability. Typically, these inquiries involve assessing one's mental state with a medical professional's report being the main consideration. Marginal to no regard is given to facilitating effective participation in court processes for example through providing accommodations and other forms of support. This is contrary to the standard found in article 13 of the Convention on the Rights of Persons with Disabilities (CRPD), which underscores the right of all persons with disabilities to access justice on an equal basis with others. The CRPD makes a clear connection between access to justice, legal capacity and non-discrimination of all persons with disabilities generally, and especially for persons with intellectual and psychosocial disabilities. The CRPD introduces a new paradigm that shifts the focus away from individual impairment to the removal of barriers that hinder full and effective participation of persons with disabilities in all areas of daily life, including in criminal court proceedings. By implication,

legislation and court procedures should focus on removing all barriers that prevent meaningful participation of persons with intellectual and psychosocial disabilities in all aspects of criminal proceedings. This is to be achieved through the provision of accommodations.

The main objective of this Report is to review legislation governing testimonial competence in criminal proceedings with the aim of assessing the impact of these provisions on the right of persons with intellectual and psychosocial disabilities to access justice as set out in article 13 of the CRPD. In its discussion, the Report also refers to other relevant provisions in the CRPD including those on accommodations and the right to legal capacity. The Report also makes reference to provisions in the Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa (African Disability Protocol). Although the African Disability Protocol is not yet in force because it has not yet received the requisite amount of ratifications, it remains an integral part of the African human rights system and is particularly important for persons with disabilities in Africa.<sup>1</sup>

The report begins with a discussion of some key foundational concepts including disability, access to justice and testimonial competence. The Report then discusses existing legislative provisions and judicial interpretations of provisions on testimonial competence for persons with intellectual and psychosocial disabilities in criminal proceedings. The Report concludes by emphasizing the need for a shift in focus, from impairment to prioritization of accommodations to enable persons with intellectual and psychosocial disabilities to participate effectively criminal trials.

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1 The African Disability Protocol was adopted by the African Union in January 2018. According to its article 38, the Protocol will come into force after the deposit of the fifteenth instrument of ratification.



## KEY FOUNDATIONAL CONCEPTS

Literature on disabilities tends to proceed on the assumption that readers understand certain terms and concepts the same way. This is an unhelpful assumption and is certainly not true, especially in the field of disability rights. In this study, a different approach will be adopted, and certain key foundational concepts will be explained from the outset. These concepts include disability, access to justice and testimonial competence.

### Disability

#### The meaning of disability

Disability has been understood differently over time leading to the development of several models of disability at different stages in history.<sup>2</sup> These models are important because they provide explanations for the causes of disability and influence the nature of any interventions.<sup>3</sup>

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2 The term 'model of disability' simply means a way of understanding disability.

3 M Retief & R Letšosa 'Models of disability: A brief overview' (2018) 74 *HTS Teologiese Studies/Theological Studies* 1.

They are therefore, important in guiding the formulation of laws and policies.<sup>4</sup> To illustrate this point, a number of models of disability that have had the greatest influence on thinking around disability rights will be explained.<sup>5</sup>

The oldest model of disability is the moral or religious model of disability based on the Judeo-Christian tradition.<sup>6</sup> This model takes different forms or variations. One form espouses to the idea that disability is a punishment from God for sins committed either by the person with disability or his/her parents/ancestors.<sup>7</sup> Another form of the religious model of disability is the idea that disability is a test of faith, which is passed through endurance, resilience and piety.<sup>8</sup> Receiving healing is a sign of having passed the test and conversely, a lack of faith is signaled by the failure to receive healing.<sup>9</sup> A final form of this model states that disability is a blessing from God in that having a disability is an opportunity to strengthen and develop essential character traits such as patience and perseverance.<sup>10</sup> A central tenet of the moral or religious model of disability in its different forms, is that disability is an act of God that no one can do anything about.

This view changed in the mid-1800s when a new model of disability, known as the medical model, gradually began to replace the moral or religious model.<sup>11</sup> This model came about as a result of advances in science that led to a better understanding of impairments.<sup>12</sup> According to this model, disability is inherent in the individual with impairment.

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4 As above.

5 These are not the only models of disability. Other models include the charity model and the human rights model.

6 Retief & Letšosa (n 3) 2.

7 As above.

8 As above.

9 S Niemann 'Persons with disabilities' in M Burke et al (eds) *Religious and spiritual issues in counseling: Applications across diverse populations* (2005) 105.

10 Retief & Letšosa (n 3) 2.

11 As above.

12 As above.

In other words, if one has an impairment, such as a hearing or sight impairment, then one has a disability in the sense of being unable to do something. Under the medical model, unlike the moral or religious model, intervention is possible in the form of a cure, where possible, or rehabilitation to adjust the individual with disability to their environment.<sup>13</sup>

In the 1960s and 1970s, a new model of disability known as the social model began to change the way disability was understood. Disability began to be perceived as a socially constructed disadvantage arising from an environment that takes little or no account of people with impairments.<sup>14</sup> Disability is therefore, the result of the interaction between a person with impairment and attitudinal and environmental barriers. The mere fact that one has an impairment does not make them disabled. Disability only arises from the interaction between a person with impairment (internal factors) and an environment, which does not accommodate the person and presents attitudinal and environmental barriers (external factors). The CRPD is based on this understanding of disability as a social construct.<sup>15</sup> The appropriate intervention therefore, involves making changes to the external environment in response to the person's internal needs. This differs from the medical model, which locates the problem in the individual and responds by attempting to cure or rehabilitate the individual.

The way disability is understood therefore, has an important impact on intervention through law and policy. How we understand disability, influences how we respond to disability. The moral or religious model perceived disability as an act of God that no one could do anything about. The response to disability was therefore, based on charity to help ease the inevitable impact of their condition. However, under the

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13 R Olkin *What psychotherapists should know about disability* (1999) 26.

14 Union of the Physically Impaired against Segregation *Fundamental principles of disability* (1976) 14.

15 Preamble para (e) of the CRPD and art 1 of the African Disability Protocol.

medical model, which views disability as a medical condition inherent in the individual with impairment, the appropriate intervention is to cure the individual where possible or to rehabilitate the individual as far as possible. Whereas, under the social model that perceives disability as the result of the interaction between a person with impairment and attitudinal and environmental barriers, the appropriate intervention must be directed at societal change in response to the individual's needs rather than rehabilitating the individual.<sup>16</sup> This study espouses to the social model of disability.

## Intellectual and psychosocial disabilities explained

Intellectual and psychosocial disabilities are types of disabilities and as such, have also been influenced by the shifts in understanding disability.<sup>17</sup> This is evidenced by the changing terminology used to refer to both intellectual and psychosocial disabilities. The naming of scientific constructs is not an arbitrary process, rather it is intended to 'reflect to the greatest degree possible, the general idea(s) underlying the construct'.<sup>18</sup> Therefore, the terminology used to describe a certain construct reveals something about the underlying ideas as demonstrated below in relation to intellectual and psychosocial disabilities.

Intellectual disability is characterised by limitations in intellectual functioning and adaptive behaviour, that originate before the age of 18 years.<sup>19</sup> For example, persons with Down syndrome are said to have an intellectual disability because they have limitations in both intellectual

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16 C Barnes, G Mercer & T Shakespeare 'The social model of disability' in A Giddens & P Sutton (eds) *Sociology: Introductory readings* (2010) 163.

17 The other types of disabilities include physical disabilities, speech and hearing impairments, visual impairments and communication disabilities.

18 ML Wehmeyer et al 'The intellectual disability construct and its relation to human functioning' (2008) 46 *Intellectual and Developmental Disabilities* 311 at 312.

19 RL Schalock et al *Intellectual disability: Definition, classification, and systems of supports* (2010) 47.

functioning and adaptive behaviour that are present before the age of 18 years. Persons with intellectual disabilities have been referred to using different terms at different stages in history. Each of these terms exemplifies an underlying concept.<sup>20</sup> Over the last 200 years, intellectual disability has been referred to using terms such as ‘idiocy’, ‘feble-mindedness’, ‘mental deficiency’, ‘mental subnormality’ and ‘mental retardation’, to mention but a few.<sup>21</sup> These terms had a common underlying theoretical assumption, which is that disability was innate in the individual.<sup>22</sup> Wehmeyer et al, explained it succinctly when they said:

To have mental retardation was to be defective. The loci of that defect was the mind ... The nature of the defect of the mind (mental deficiency) was inferior mental performance (mental subnormality) characterized by mental slowness (mental retardation).<sup>23</sup>

The underlying construct behind this terminology was in line with the medical model of disability in that it referred to a condition (‘slowness of mind’) that was innate in the person.<sup>24</sup>

The American Association on Intellectual and Developmental Disabilities’ (AAIDD) Terminology and Classification Committee introduced the term intellectual disability in 1992.<sup>25</sup> The term was introduced in response to the change in the manner in which disability is understood as a social construct.<sup>26</sup> Intellectual disability refers to a

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20 Wehmeyer et al (n 18) 312.

21 CF Goodey ‘Blockheads, roundheads, pointed heads: Intellectual disability and the brain before modern medicine’ (2005) 41 *Journal of the History of the Behavioral Sciences* 165.

22 Wehmeyer et al (n 18) 312.

23 As above.

24 Wehmeyer et al (n 18) 314.

25 JR Thompson et al ‘Conceptualizing supports and the support needs of people with intellectual disability’ (2009) 47 *Intellectual and Developmental Disabilities* 135.

26 As above.



state of functioning that is influenced by the external environment and ‘responds with interventions that focus on individual strengths and that emphasize the role of supports to improve human functioning’.<sup>27</sup> This is in line with the social model of disability. The term ‘intellectual disability’ is used in the CRPD and the African Disability Protocol and is the preferred term for this study.<sup>28</sup>

The term psychosocial disability also reveals some underlying ideas about the disability. People with psychosocial disability include people with depression, post-traumatic stress disorder (PTSD), bi-polar disorder, and schizophrenia amongst others. People with psychosocial disabilities used to be called ‘insane’, ‘mad’, ‘imbeciles’, or ‘people with mental health problems’, all of which are terms indicating that it is viewed as an innate condition.<sup>29</sup> In recent years, the term psychosocial disability is in common use because of the understanding that is now generally ascribed to disability as a social construct.<sup>30</sup> This understanding of disability is reflected in the term psychosocial disability. ‘Psych’ indicates the impairment of the mind (the internal factor) and ‘social’ indicates the external social factors, such as negative attitudes, pressures, and barriers, hence the term ‘psychosocial disability’.

Psychosocial disabilities are often confused with intellectual disabilities, but the two are quite distinct. Intellectual disabilities are developmental disabilities that affect an individual’s learning,

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27 Wehmeyer et al (n 18) 317.

28 Article 1 of the CRPD and art 1 of the African Disability Protocol.

29 For more information on psychosocial disabilities, see ‘Psychosocial disability: One of the most misunderstood areas of disability’ *Disability Rights Fund* <http://disabilityrightsfund.org/our-impact/insights/psychosocial-disability/> (accessed 13 February 2022).

30 See for example, ‘Getting the NDIS right for people with psychosocial disability’ *Mental Health Australia* <https://mhaustralia.org/general/getting-ndis-right-people-psychosocial-disability> (accessed 13 February 2022).

communication and ability to perform everyday activities.<sup>31</sup> Persons with intellectual disabilities often have limited language ability, including comprehension and communication skills. Intellectual disability will often be present at birth or may develop during childhood but before the age of 18 years and lasts throughout one's life whereas psychosocial disabilities, such as depression, can arise at any point in one's life.<sup>32</sup> Persons with psychosocial disabilities can take medication to help with the difficulties associated with their condition whereas persons with intellectual disabilities do not take medication for the disability. Psychosocial and intellectual disabilities are sometimes conflated under the umbrella term 'mental disability', particularly in legislation, but it is important to remember the differences between the two types of disabilities.

The terms intellectual and psychosocial disabilities are now in common use and they both reflect an understanding of disability as a result of the interaction between the person with impairment and attitudinal and environmental barriers as espoused by the social model of disability.

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31 See for example the definition by the American Association on Intellectual and Developmental Disabilities definition, available at <http://aaidd.org/intellectual-disability/definition> (accessed 13 February 2022). See also the World Health Organisation definition, available at <http://www.euro.who.int/en/health-topics/noncommunicable-diseases/mentalhealth/news/news/2010/15/childrens-right-to-family-life/definition-intellectual-disability> (accessed 13 February 2022).

32 As above.

## Access to justice

### Meaning of access to justice

Broadly, access to justice denotes the right of an individual or groups of persons to enter a court of law and have their case heard and adjudicated in accordance with substantive standards of justice and fairness.<sup>33</sup> It also involves the right to meaningful access to all stages of the justice process, including the ability to actively testify as a witness before a court or tribunal established by law.

Access to justice is often regarded as a synonym for judicial protection. In this respect, it maintains that one shall always have the right to seek a legal remedy before a court or tribunal which is constituted by law and which can guarantee an effective hearing premised on the principle of impartial application of the law.<sup>34</sup> In this way, access to justice is a crucial tool to the enjoyment and enforcement of all other rights, freedoms and liberties.<sup>35</sup>

Consequently, guaranteeing access to justice implies the removal of barriers that may hinder one's right to access justice. It comprises the duty to take proactive measures to ensure effective participation of all persons in court processes. Examples include, providing legal aid to persons that cannot afford to hire legal representation, providing interpretation and/or translation services, ensuring physical accessibility of court premises and providing accommodations.

With respect to persons with intellectual and psychosocial disabilities the provision of individually-tailored accommodations constitutes a major component of guaranteeing their right to access justice. Given variations in the degree of disability, ensuring access to justice for persons with intellectual and psychosocial disability

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33 F Francesco (ed) *Access to Justice as Human Rights*, Oxford University Press, 2007 64.

34 Francesco (n 33) 67.

35 UN 1

requires constant and honest interaction between individuals and institutions of justice.<sup>36</sup>

## Access to justice in international human rights law

In international human rights law, the right to access justice was included for the first time as a substantive right in the CRPD. Prior to that, various components of the right including the right to a fair trial, the right to an effective remedy, the right to equal recognition before courts and tribunals and other related provisions guaranteeing procedural justice were included in numerous instruments. As outlined below.

The right to an effective remedy was first codified in article 8 of the Universal Declaration of Human Rights (UDHR). According to article 8;

*Everyone* has the right to an effective remedy by competent national tribunals for acts violating the fundamental rights granted him (*or her*) by the constitution or by law.

Underpinning the right to an effective remedy in the UDHR, is the principle of rule of law; and that people should be able to have their voice heard, exercise their rights and challenge discrimination or violation of their fundamental rights by governments and private individuals.<sup>37</sup> Other relevant provisions in the UDHR include article 6 on the right to recognition for all before the law; article 7 on equal protection for all by the law and; articles 9 to 11 that regulate the conduct of a fair and impartial trial.

The International Covenant on Civil and Political Rights (ICCPR) sets out the right to a fair and public hearing in article 14 and prescribes that;

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36 DA Larson 'Access to justice for persons with disabilities: An emerging strategy' (2014) 3 *Laws Journal* 221.

37 See <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/> accessed October 7, 2021.

Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Unlike the UDHR, the ICCPR adopts the language of ‘a fair and public hearing’ and includes the right to equality before courts and tribunals in the same provision.

Expanding on what equality before courts and tribunals comprises, the Human Rights Committee in its General Comment 32, notes that it includes the right to equal access and ensuring that parties to legal proceedings are treated without any discrimination.<sup>38</sup> The Committee further notes that effective access means that no individual should be deprived, in procedural terms, in his or her attempt to claim justice.<sup>39</sup>

Significantly, the Committee clarifies that any distinction in treatment should be based on law and should not entail any disadvantage or unfairness to either party.<sup>40</sup> Therefore, no individual should be prevented from testifying in legal proceedings and any distinctions in treatment should be based on law and should not defeat or make impossible one’s pursuit for justice.

At Regional level, article 7 of the African Charter on Human and Peoples’ Rights provides for the right to have one’s cause heard. In its *Guidelines and Principles on the Right to a Fair Trial and Legal Assistance*, the African Commission on Human and Peoples’ Rights affirms the right to equality of all persons before any judicial body without any distinction on the ground of disability.<sup>41</sup> The African Commission also expounds that the right to fair trial includes equal access and equal

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38 UN Human Rights Committee, General Comment 32, CCPR/C/GC/32, 23 August 2007, par 8.

39 General Comment 32 par 9.

40 General Comment 32 par 13.

41 African Commission on Human and Peoples’ Rights, *Guidelines and Principles on the Right to a Fair Trial and Legal Assistance*, 2.

participation of all persons as complainants, witnesses, victims or accused in all stages of legal proceedings.<sup>42</sup>

The Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa provides for the right to access justice in article 13 which reads as follows:

**Article 13 (1) of the African Disability Protocol**

State Parties shall take measures to ensure that persons with disabilities have access to justice on an equal basis with others, including through the provision of procedural, age and gender-appropriate accommodations, in order to facilitate their effective role as participants in all legal proceedings.

## Access to justice for persons with intellectual and psychosocial disabilities

The CRPD re-defines existing rights and their application to persons with disabilities. It adopts the social model in its conceptualisation of disability and articulates that 'disability results from the interaction between persons with impairment and attitudinal and environmental barriers.'<sup>43</sup> Accordingly, the CRPD emphasises a shift in focus from an individual's impairment(s) and instead stresses investment in the removal of barriers in order to enable persons with disabilities to effectively participate in society and enjoy rights on an equal basis with others.

Generally, the right to access justice is provided for in article 13 of the CRPD. The said provision mandates member states to 'ensure *effective* access to justice for persons with disabilities on an equal basis with others.' Specifically, it stresses the provision of 'procedural and age-appropriate accommodations' in order to facilitate effective

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42 As above.

43 Convention on the Rights of Persons with Disabilities, UN General Assembly, A/Res/61/106, 24 January 2007, Preamble Par (e).

participation of persons with disabilities including as witnesses in all legal proceedings.<sup>44</sup> The above accommodations are in addition to guaranteeing general accessibility standards.<sup>45</sup>

The right to access justice cannot be separated from the right to equal recognition before the law.<sup>46</sup> Article 12 of the CRPD guarantees the right to equal recognition before the law on an equal basis with others. It mandates states parties to take appropriate measures and provide support to enable persons with disabilities to exercise their legal capacity.<sup>47</sup>

Highlighting the significance of equal recognition before the law, the Committee on the Rights of Persons with Disabilities (CRPD Committee) notes that ‘equality before the law is a basic general principle of human rights protection and is indispensable for the exercise of human rights.’<sup>48</sup> The right to legal capacity enables individuals to enjoy, protect and enforce their fundamental rights at all times, including in the event of violation. As such, actions aimed at stripping legal capacity amount to causing civil death and/or disabling individuals from effectively protecting themselves before the law in the event of violation of their rights.

Despite its significance, the CRPD Committee notes that persons with intellectual and psychosocial disabilities have been disproportionately denied the right to legal capacity.<sup>49</sup> Often these denials are based on application of the status or the functional approach. Under the status approach one is denied legal capacity simply on the basis of a diagnosis of a cognitive, intellectual or psychosocial disability.<sup>50</sup> Whereas under

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44 Convention on the Rights of Persons with Disabilities article 13.

45 Convention on the Rights of Persons with Disabilities article 9.

46 Concurrently referred to as the *right to legal capacity* in the Report.

47 Convention on the Rights of Persons with Disabilities, article 12(3).

48 Committee on the Rights of Persons with Disabilities, General Comment 1, CRPD/C/GC/1, 19 May 2014, par 1.

49 General Comment 1 par 9

50 General Comment 1 par 15.

the functional approach, one's legal capacity is removed based on their failure to pass a pre-determined competence test.<sup>51</sup> In both approaches, marginal emphasis is given to the provision of support and/or appropriate accommodation in order to overcome any perceived deficiencies.

In reality, legal capacity is instrumental to ensuring realisation of the right to access to justice for persons with intellectual and psychosocial disability. This is especially so since it preserves their status and equal recognition before courts and tribunals, enabling their effective participation including as complainants, defendants and witnesses in civil and criminal legal proceedings.

## Testimonial competence

It is well established that testimonial competence is 'central to the workings of the adversarial trial.'<sup>52</sup> In the law of evidence, the concept of competence to testify 'relates to the ability or the capacity of a person to give evidence in court proceedings.'<sup>53</sup> Only witnesses who are competent to give evidence may testify in court.<sup>54</sup> Although all persons can testify, the general rule is that a witness needs to be *competent* before giving evidence in court. No universal test for determination of testimonial competence exists.<sup>55</sup> However, a common approach used in most jurisdictions to determine testimonial competence is through a 'trial-within-a-trial' where a witness is questioned by a presiding judicial officer. An inquiry into the competence of a witness involves questions of fact and usually includes interrogations into 'whether the

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51 As above.

52 Du Toi et al *Commentary on the Criminal Procedure Act 22-20A* in M Bekink 'The Testimonial Competence of Children: A Need for Law Reform in South Africa' (PER/PELJ 2018/21) 4.

53 *Koail Moshoeshe and Others v DPP and Others*, Constitutional Case No.14/2017 para 7. A witness is compellable if they may be required to give evidence in court.

54 M Hannibal and L Mountford *Criminal Litigation* (2007) 301.

55 M Bekink 'The Testimonial Competence of Children: A Need for Law Reform in South Africa' (2018) 21 *PER/PELJ* 4.



witness understands and appreciates the nature of an oath.<sup>56</sup> Another component of the inquiry is whether the witness has the capacity to understand the difference between the truth and a lie.<sup>57</sup> Ultimately, the aim is to ensure that a witness is capable of giving a *rational, coherent* and a *truthful* account of his version of events.<sup>58</sup>

Common examples necessitating testimonial competence inquiries include cases involving child witnesses, and in scenarios involving persons with intellectual or psychosocial disabilities. Being its main focus, this Report shall limit its discussion to how testimonial competence is applied to persons with intellectual and psychosocial disabilities.

Often, where an individual is adjudged to have an intellectual and psychosocial disability, their testimonial competence is disproportionately and *prima facie* put into question. Yet, ‘other witnesses’ are often not subject to similar processes. The result is that this leaves out important evidence by persons with intellectual and psychosocial disabilities and presents an unnecessary barrier in their quest to enjoy their right to access justice. Furthermore, there is no guarantee that ‘other witnesses’ not subject to testimonial competence inquiries will actually speak the truth.

The question of one’s competence to testify is particularly critical in cases involving single witnesses. Examples of these instances include in *intimate* crimes such as rape, defilement and other forms of sexual abuse. Preventing victims in such cases from testifying in court on the basis of their testimonial competence, thus presents serious challenges to their ability to achieve justice for wrongs committed against them. Yet, the reality is that persons with intellectual and psychosocial disabilities are among those that experience violations the most.<sup>59</sup> Moreover, these

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56 DT Zeffert et al *Essential Evidence*, Lexis Nexis (South Africa) 259.

57 As above.

58 As above.

59 D Sobsey *Violence and abuse in the lives of people with disabilities: The end of silent acceptance?* (1994) 34.

crimes are commonly committed by caregivers and people in positions of trust who exploit the individual's disability.<sup>60</sup>

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60 Amicus Brief by the National Aphasia Association (US) et al submitted in the case of *Commonwealth of Massachusetts v Kofi Agana* before the Massachusetts Supreme Judicial Court (SJC – 10609) 16.



## RESEARCH FINDINGS

The statutes governing criminal procedure and evidence in most of the southern African countries under review, except Madagascar and the Democratic Republic of Congo, contain provisions declaring persons with the requisite state of mind as incompetent to testify. The terminology used in most of the statutes is strikingly similar perhaps owing to the influence of colonialism through English law and Roman Dutch law.<sup>61</sup> Each of the relevant provisions in these countries is outlined below.

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61 TP Van Reenen and H Combrinck 'The UN Convention on the Rights of Persons with Disabilities in Africa: Progress after 5 years' (2011) 8:14 *International Journal of Human Rights* 145.



## Angola

The law of criminal procedure and evidence is provided for in the Penal Procedure Code of Angola.<sup>62</sup> There is a provision stating that persons with a ‘psychic anomaly’ may be banned from acting as a witness in court. This provision may affect persons with psychosocial disabilities. Section 131 of the Penal Procedure Code reads as follows:

### **Section 131 of the Penal Procedure Code (Angola)**

‘Anyone who is not banned due to psychic anomaly has the capacity to be a witness and can only refuse in the cases provided by law.’<sup>63</sup>

Section 131 goes on to state that the ‘judicial authority verifies the physical or mental fitness of any person to testify when it is necessary to assess your credibility and can be done without delaying the normal running of the process.’<sup>64</sup>

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62 Penal Procedure Code 48/2007 (Angola).

63 Art 131 (1) Penal Procedure Code 48/2007 (Angola).

64 Art 131 (2) Penal Procedure Code 48/2007 (Angola).



## Botswana

The Criminal Procedure and Evidence Act of 1939, governs criminal proceedings in Botswana.<sup>65</sup> In Botswana, the general rule is that everyone is competent and compellable to give evidence in a criminal court provided they are not expressly excluded from doing so by the law.<sup>66</sup> The Criminal Procedure and Evidence Act goes on to state that persons with intellectual and psychosocial disabilities are not competent to testify.<sup>67</sup> The provision reads as follows:

**Section 216 of the Criminal Procedure and Evidence Act (Botswana):**

‘No person appearing or proved to be afflicted with idiocy, lunacy, or insanity, or laboring under any imbecility of mind arising from intoxication or otherwise, whereby he is deprived of the proper use of reason, shall be competent to give evidence while under the influence of any such malady or disability.’<sup>68</sup>

No court case or judicial interpretation was found expanding section 216 of the Criminal Procedure and Evidence Act. However, lessons can be drawn from how courts in Botswana have dealt with fitness to stand trial procedures, including fitness to make a defence.

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65 Laws of Botswana, Criminal Procedure and Evidence Act, Chapter 08:02, Date of Commencement 1<sup>st</sup> January 1939.

66 Sec 214 of the Criminal Procedure and Evidence Act Chapter 08:02 (CPEA) (Botswana).

67 Sec 216 of the CPEA (Botswana).

68 As above.

Section 158 (1) and (2) of the Criminal Procedure and Evidence Act, provides that where court has *reason* to believe that the accused is of unsound mind, it shall inquire into such unsoundness and if it is of the opinion that the accused is of unsound mind, the court shall postpone further proceedings in the case.

In *State v Mathabane*,<sup>69</sup> Dendy Young CJ held;

Only when the judicial officer has tried the issue and is satisfied that the accused is incapable of making his defence by reason of unsoundness of mind can he prevent the trial from proceeding. To satisfy himself on this issue involves a trial of the issue. ...The judicial officer's own observation are important and should be noted on the record; and he will usually consider it desirable to have the assistance of expert medical opinion...The ultimate inference whether or not the accused is capable of making defence is for the judicial officer, not for the psychiatrist.<sup>70</sup>

In the above case, the psychiatric opinion of an expert witness was relied upon as a basis to determine *unfitness* to stand trial by the defendant. No reference is made requiring inquiry into how the court could facilitate effective participation of the 'unfit' defendant.

Moreover, it is unclear what is meant by phrase 'postpone further proceedings in the case as stipulated in section 158 of the Criminal Procedure and Evidence Act. There is no clarification on how long a postponement based on the defendant's 'unfitness to stand trial' should be and when the case may proceed. This manner in which unfitness to stand trial is assessed, may provide an indication as to how the competency of witnesses to testify may be addressed.

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69 *State v Mathabathe* 1968-1970 BLR 214(HC). Also see the similar case of *Sete v Director of Public Prosecutions (DPP)* 2010 3 BLR 234 (HC).

70 *State v Mathabathe* (n 80) par 215 – 216.



## Democratic Republic of Congo

The law of criminal evidence and procedure in the Democratic Republic of Congo is found in the Code of Criminal Procedure.<sup>71</sup> This law does not contain a provision stating the persons with intellectual and psychosocial disabilities are not competent to act as witnesses in court.

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71 Decree of August 6 1959, Code of Criminal Procedure (Democratic Republic of Congo).



## Eswatini

The principle law governing criminal procedure in Eswatini is the Criminal Procedure and Evidence Act of 1939.<sup>72</sup> Under the said Act, testimonial competence of witnesses is addressed in sections 212 – 214. The general rule is that everyone is competent to give evidence in court unless they are expressly excluded from doing so. The Criminal Procedure and Evidence Act states that:

**Section 212 of the Criminal Procedure and Evidence Act (Eswatini)**

‘[e]very person not expressly excluded by this Act from giving evidence shall be competent and compellable to give evidence in a criminal case in any court or before a magistrate on a preparatory examination.’<sup>73</sup>

Persons with intellectual and psychosocial disabilities are expressly excluded from being competent to testify.<sup>74</sup> Section 214 reads as follows:

**Section 214 of the Criminal Procedure and Evidence Act (Eswatini)**

No person appearing or proved to be afflicted with idiocy, lunacy, or insanity, or labouring under any imbecility of mind arising from

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72 Laws of Swaziland, Criminal Procedure and Evidence Act, Act 67/1938, Commencement Date 1<sup>st</sup> January 1939.

73 Sec 212 Criminal Procedure and Evidence Act 67/1938 (CPEA) (Eswatini).

74 Sec 214 CPEA (Eswatini).



intoxicating or otherwise, whereby he is deprived of the proper use of reason, shall be competent to give evidence while under the influence of any such malady or disability.

The court shall decide on the question of witness competency as stated below:

**Section 214 of the Criminal Procedure and Evidence Act (Eswatini)**

The court in which any criminal case is depending or, in the case of a preparatory examination, the magistrate may decide upon all questions concerning the competency or compellability of any witness to give evidence.<sup>75</sup>

In the case of *Themba Jeremiah Magongo v the King*<sup>76</sup>, the Court of Appeal of Eswatini interpreted section 214, setting aside the judgement of the High Court and hence acquitting the appellant.

**Facts**

The appellant was initially found guilty of rape of an eleven-year-old child who was also considered to be ‘*very retarded and mentally handicapped.*’ The child’s condition arose from an illness she suffered when she was six years old. She was only capable of uttering the words ‘mama’ and ‘mammy’ and especially when she was agitated.

On appeal, the Court considered whether the child could effectively communicate. The Court held that the words communicate in this context must be confined to

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75 As above.

76 *Themba Jeremiah Magongo v the King*, Criminal Appeal No.15/1997. See <https://swazilii.org/sz/judgment/supreme-court/1997/24/> accessed 11 October 2021.

communicating by words or signs. The Court held that the complainant was not a competent witness by virtue of her idiocy or lunacy. Furthermore, it found that the problem was not purely one of communication which could be solved by the use of an interpreter and that the complainant suffered from one of the deficiencies mentioned in section 214 of the *Criminal Procedure and Evidence Act*.

As a result, the child (complainant) was not called as a witness but rather her mother was tasked to give an account of what transpired. The Court of Appeal noted that 'a complaint made by the victim to another immediately after sexual assault may be admissible as evidence in certain circumstances'.

Unfortunately, the Court of Appeal held that the trial Court erred in swearing in the mother as an ordinary witness and not as an interpreter. In its evaluation it relied the principles of hearsay evidence. Consequently, although the Court agreed that the mother was able to put meaning to the signs and actions of her child, the mother's testimony which had the effect of interpreting what her child (the complainant) had reported to her after the assault could not stand.

The Court held that in the absence of any other evidence, there was nothing to indicate that the Appellant was the person responsible for the apparent sexual assault. Thus, on the basis of lack of *sufficient* evidence the Court of Appeal set aside the judgement of trial Court and effectively acquitted the Appellant.



## Lesotho

Until recently, Lesotho had a similar provision in its law. Section 219 of the Criminal Procedure and Evidence Act was declared unconstitutional in the Constitutional Court decision of *Koali Moshoeshoe and Others v DPP and Others*. Section 219 Criminal Procedure and Evidence Act (Lesotho) states as follows:

**Section 219 of the Criminal Procedure and Evidence Act (Lesotho)**

[n]o person appearing or proved to be afflicted with idiocy, lunacy or inability or laboring under any imbecility of mind arising from intoxication or otherwise whereby he is deprived of the proper use of reason, shall be competent to give evidence while so afflicted or disabled.<sup>77</sup>

Section 218 of the Criminal Procedure and Evidence Act stipulated that the question of a witness's competence shall be determined by the court.

**Section 218 of the Criminal Procedure and Evidence Act (Lesotho)**

It shall be competent for the court in which any criminal case is pending or, in the case of a preparatory examination, the magistrate, to decide upon all questions concerning the competency or compellability of any witness to give evidence.<sup>78</sup>

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77 Criminal Procedure and Evidence Act 9 of 1981 (CPEA) (Lesotho).

78 Sec 218 of the CPEA (Lesotho).

It is important to note that section 219 is no longer in force in Lesotho as a result of *Koali Moshoeshoe and Others v DPP and Others*.<sup>79</sup>

*Koali* facts:

Koali Moshoeshoe, an adult man with an intellectual disability, claimed to have been sexually assaulted by a one Mokebisa – a woman.

The claim arose from a series of events that took place in August 2016. According to the facts, Koali was sent by his mother to deliver cash in the amount of M300 (three hundred Maloti) to a fellow villager. On his way to make the delivery, he passed by the accused's house, who invited him into her house and offered him soft porridge (motoho). After eating the porridge, the accused directed Koali to sit on her bed, and at which point she started undressing him. Koali then asked the accused what she was doing, and the accused replied she wanted to sleep with him. Koali indicated that he did not want to sleep with her but she forcefully undressed him and had sexual intercourse with him without his consent.

The matter was reported to the police and subsequently taken to court. At court, the prosecutor declined to prosecute on the basis that Koali was not competent to testify due to his intellectual disability. In reaching this decision, the prosecutor relied on section 219 of the Criminal Procedure and Evidence Act. *Koali's* case could therefore, not move forward without his testimony.

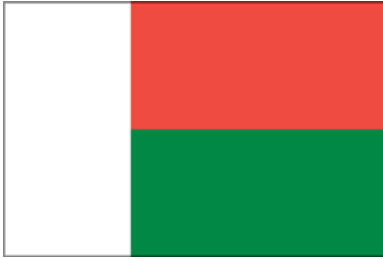
Two disabled people's organisations, namely, the Lesotho National Federation of Organisations of the Disabled, and the Lesotho Society of Mentally Handicapped Persons, Parents and Families, responded by instituting proceedings in the Constitutional Division of the High Court of Lesotho challenging the constitutionality of section 219 of the Criminal Procedure and Evidence Act.

The Court ruled that section 219 was inconsistent with the

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79 *Koali Moshoeshoe and Others v DPP and Others*, Constitutional Case No.14/2017.

right to equality before the law and the right to freedom from discrimination as enshrined in the Constitution of Lesotho.<sup>80</sup> Consequently, the Court declared section 219 to be unconstitutional and effectively null and void since it was not in accordance with the above constitutional provisions.<sup>81</sup> The Court went on to order a fresh trial (trial de novo) in which Koali's testimony would be heard.



## Madagascar

The law of criminal evidence and procedure in Madagascar is provided for in the Code of Criminal Procedure 1962. There is no provision in this Act preventing persons with intellectual and psychosocial disabilities from testifying.

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80 The right to equality before the law is enshrined in section 19 of the Constitution of Lesotho 1993. The right to freedom from discrimination is enshrined in section 18 of the Constitution.

81 Section 2 Constitution of Lesotho 1993.



## Malawi

The conduct of criminal proceedings in Malawi is governed by the Criminal Procedure and Evidence Code.<sup>82</sup> Specific to testimonial competence section 210 of the Code provides:

**Section 210 of the Criminal Procedure and Evidence Code (Malawi)**

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 immature or extreme old age, disease, whether of mind or body, or any cause of the same kind...

As a general rule, everyone is considered competent to testify.<sup>83</sup> However, the law goes on to state that those who are ‘prevented from understanding the questions put to them, or from giving rational answers to those questions, by immature or extreme old age, disease, whether of mind or body, or any cause of the same kind’ may not be considered competent to testify.<sup>84</sup> Persons with intellectual and psychosocial disabilities may fall under the category ‘disease of the mind.’

The case of *Republic v Lutepo*,<sup>85</sup> although being premised on the

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82 Laws of Malawi, *Criminal Procedure and Evidence Code*, Cap 8:01.

83 Sec 210 Criminal Procedure and Evidence Code Chapter 4:07 ( CPEC) (Malawi).

84 As above.

85 *Republic v Lutepo*, Criminal Cause No. 02/2014.

accused's fitness to stand trial, sheds light on how courts interpret testimonial competence in respect of intellectual and psychological disabilities.

In *Lutepo's* case, the accused through his legal counsel made an application for an order that an assessment of the accused person's mental health be done, for the purposes of ascertaining his fitness to stand trial. The accused at the time manifested signs of acute and deteriorating psychiatric disorder. In granting the order, the Court held that decisions on orders as to mental assessments are hard to come by in Malawi. The Court went on to agree that:

Determining fitness is a moral, social and legal matter determined by legislation and courts using *common-sense viewpoint of laypersons*. Courts should not shift responsibility to mental health professionals to define what fitness is...<sup>86</sup>

Impliedly, in ordering a mental assessment of the accused, the Court agreed that one's testimonial competence is subject to their being free from any mental incapacities.

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86 *Republic v Lutepo* (n 74) par 13.



## Mozambique

The Penal Procedure Code in Mozambique prevents persons with psychosocial disabilities from testifying in court.<sup>87</sup> The relevant provision reads as follows:

**Article 216 (1) of the Penal Procedure Code (Mozambique)**

Who is not competent to give evidence as a witness? Those who have been interdicted due to mental illness.<sup>88</sup>

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87 Art 216 (1) Penal Procedure Code 2015 (PPC) (Mozambique).

88 As above.





## Namibia

Section 192 - 194 of the Criminal Procedure Act<sup>89</sup> regulates the competence of witness during the conduct of criminal proceedings in Namibia. As a general rule, everyone is competent and compellable to give evidence in court.<sup>90</sup> The exception to this rule relates to persons with intellectual and psychosocial disabilities who are regarded as not competent to give evidence in court.<sup>91</sup> Specifically, section 194 provides:

**Section 194 Criminal Procedure Act (Namibia)**

No person *appearing* or *proved* to be afflicted with mental illness or to be labouring under any imbecility of mind due to intoxication or drugs or the like, and who is hereby deprived of the proper use of his reason, shall be competent to give evidence while so afflicted or *disabled*.

The question of competence shall be decided by the court.<sup>92</sup> In *Elvis Kheib v the State*,<sup>93</sup> the appellant who had been convicted on the charge of rape, sought to appeal his conviction and sentence among others on the ground that the court of first instance erred by not declaring the complainant as an incompetent witness because of her mental state.

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89 Laws of Namibia, Criminal Procedure Act (As Amended), Act 51/1977.

90 Sec 192 Criminal Procedure Act 51 of 1977 (CPA) (Namibia).

91 Sec 194 CPA (Namibia).

92 Sec 193 CPA (Namibia).

93 *Elvis Kheib v The State*, Case No. CA 155/07 (HC), Judgement delivered 4 October 2010.

It should be noted, that the complainant's mental state had come into question during trial in the regional court whereupon she was subjected to an assessment and was adjudged to have 'moderate mental retardation'. The appellants appeal thus hinged on the fact that on the basis of the above assessment, the regional court should have *prima facie* disregarded the evidence of the complainant on the basis of her insanity.

In dismissing the appeal, the High Court held that:

It is also clear that the section (194) is directed at a certain degree of mental illness or imbecility of mind, which deprives the witness of the ability to communicate properly in regard to the subject-matter in question. Therefore, a person who is affected to some extent but still endowed with the proper use of his reason, which enables him to convey his observations in an understandable way to court, will be a competent witness.

Despite, the ruling in *Kheib* still reinforces inquiry assessments on the person and gives no focus to individual or supports.



## Zambia

In Zambia, the Criminal Procedure Code Chapter 88 states that everyone is competent to testify and does not contain a provision preventing persons with intellectual and psychosocial disabilities from being able to testify.<sup>94</sup> In the past, courts used to rely on the repealed Mental Disorders Act of 1951 to prevent persons with intellectual and psychosocial disabilities from testifying. Once a person with intellectual or psychosocial disabilities was called as a witness in both civil and criminal trials, the court had a duty to conduct a determination on whether notwithstanding their impairment, they could give evidence and their testimony could be relied on. This provision has since been replaced by section 4 of the Mental Health Act No. 6 of 2019, which reads as follows:

### **Section 4 Mental Health Act (Zambia)**

Subject to the other provisions of this Act, a mental patient shall enjoy legal capacity. Where the nature of the mental illness, mental disorder or mental disability results in the absence of mental capacity of that mental patient, the mental patient shall not enjoy legal capacity and is legally disqualified from performing a function that requires legal capacity.

Presently, criminal proceedings are governed by the Criminal Procedure

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94 Criminal Procedure Code Chapter 88 (CPC) (Zambia).

Code Act cap 88.<sup>95</sup> The Act contains no specific provision in reference to testimonial competence and intellectual and psychosocial disability. However, it provides relative clarity that ‘unsoundness of mind or any other disability’ capable of affecting one’s ability to defend themselves shall be inquired into.<sup>96</sup>

Effectively, a finding of incapacity to make a defence due to unsoundness of mind or other disability stops further proceedings as to the substance of the charge; and the accused is instead subjected to treatment under the Mental Disorders Act.<sup>97</sup> Similar to other jurisdictions, the Criminal Procedure Code contains no reference to reasonable accommodation or support necessary to overcome testimonial challenges due to ‘unsoundness of mind or any other disability’.

The case of *The People v Thomas Manroe*,<sup>98</sup> illustrates how courts in Zambia deal with scenarios where one’s testimonial competence is at issue. Although the case involved determination of competence of a minor witness, it nonetheless offers insight on how intellectual and psychosocial disability is treated before courts during trial proceedings. One of the decisions in the *Manroe case* noted that:

Both common sense and experience suggest that there are certain categories of witnesses, and certain types of evidence which are *dangerous* to rely on...<sup>99</sup>

Considering that soundness of mind is a prerequisite for one to defend themselves in criminal proceedings in Zambia, it is very hard not to see intellectual and psychosocial disability not included in the above ‘dangerous’ category. Not least, it simply suggests *certain* testimonies to

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95 Laws of Zambia, Criminal Procedure Code Act, Chapter 88.

96 Criminal Procedure Code Act (n 94) Secs 160 - 167

97 Laws of Zambia, Mental Disorders Act, Chapter 305.

98 *The People v Thomas Manroe*, HPA 50/2010 or 2010 ZMHC 50.

99 *The People v Thomas Manroe*, available at <https://zambialii.org/zm/judgment/high-court-zambia/2010/50> accessed 2 November 2021.

be unreliable and does not include considerations of how such evidence can be made more reliable. By the above ruling, it is therefore inferred that the mere manifestation of certain traits including intellectual and psychosocial disability, makes one's an unreliable witness.



## Zimbabwe

In Zimbabwe, testimonial competency of witnesses in criminal procedure is regulated under sections 244 – 246 of the Criminal Procedure and Evidence Act.<sup>100</sup> Persons with intellectual and psychosocial disabilities in Zimbabwe are not competent to testify. The general rule is that every person, apart from those excluded by the Act, is competent to give evidence in court.<sup>101</sup> The provision reads as follows:

**Section 244 Criminal Procedure and Evidence Act (Zimbabwe)**

Every person not expressly excluded by this Act from giving evidence shall be competent and compellable to give evidence in a criminal case in any court in Zimbabwe, or before a magistrate on a preparatory examination.<sup>102</sup>

The Act goes on to state that persons with intellectual and psychosocial disabilities are not competent to give evidence in court.<sup>103</sup> The provision reads as follows:

**Section 246 of the Criminal Procedure and Evidence Act (Zimbabwe)**

‘No person appearing or proved to be afflicted with idiocy or mental disorder or defect or labouring under any imbecility of mind arising

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100 Laws of Zimbabwe, Criminal Procedure and Evidence Act, Cap 9:07.

101 Section 244 of the Criminal Procedure and Evidence Act Chapter 9:07 (CPEA) (Zimbabwe).

102 As above.

103 Sec 246 of the CPEA (Zimbabwe).

from intoxication or otherwise, whereby he is deprived of the proper use of reason, shall be competent to give evidence while under the influence of any such malady or disability.<sup>104</sup>

The Act also states that the court shall make a determination on the question of competency of witnesses.<sup>105</sup> The Act provides that:

**Section 245 Criminal Procedure and Evidence Act (Zimbabwe)**

It shall be competent for the court in which any criminal case is depending or, in the case of a preparatory examination, the magistrate, to decide upon all questions concerning the competency and compellability of any witness to give evidence.<sup>106</sup>

In *Ndiweni*,<sup>107</sup> the Court applied the above provision, interpreting that by virtue of section 146 certain witnesses are not competent to give evidence. The appellate Court further held that where an allegation that a witness is ‘mentally disordered’ is made, the court must properly investigate such claim.<sup>108</sup> Thus, the trial Court’s failure to probe and verify an allegation of mental disorder of one of the witnesses amounted to an irregularity.

It seems therefore that in criminal trial, a mere assertion or allegation as to a witness’s mental capacity has the effect of triggering inquiries into one’s testimonial competence. Little to no emphasis is given to investigating and clarifying what accommodations can be implemented to facilitate effective participation.

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104 As above.

105 Sec 245 of the CPEA (Zimbabwe).

106 As above.

107 *Ndiweni* S-148-89.

108 As above.



## THE IMPACT OF TESTIMONIAL COMPETENCE PROVISIONS ON ACCESS TO JUSTICE

The language used in many of these provisions such as ‘idiocy,’ ‘lunacy,’ ‘insanity,’ ‘imbecility of mind,’ ‘disease of the mind,’ ‘mental illness,’ ‘mental disorder,’ and ‘mental defect’ are all indicative of the underlying understanding of disability as innate in the individual in line with the outdated medical model of disability. The testimonial competence of witnesses with intellectual and psychosocial disabilities is challenged because of a misconception that their disability makes them incompetent and unreliable witnesses.<sup>109</sup> In other words, their incompetence or unreliability is perceived as innate in the individual with impairment. Because of this, no efforts to support or accommodate the person are made. Accommodations are any ‘necessary and appropriate modification and adjustments.’<sup>110</sup>

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109 GH Gudjonsson and others ‘Assessing the capacity of people with intellectual disabilities to be witnesses in court’ (2000) 30 *Psychological Medicine* at 307.

110 See art 2 CRPD and art 1 African Disability Protocol.



A finding of incompetence means that the witness will not be permitted to testify and this may in turn have a negative impact on the outcome of the case. For instance, in sexual assault or rape cases such as *Koali's* case, the evidence of the complainant is of utmost importance because the sexual act constituting the offence usually takes place in private with no other witnesses around. Furthermore, the complainant is the only person who can say whether or not the sexual act was consensual.

However, a finding of incompetence has consequences on a much deeper level in that it affects what has been described as the 'most basic human right' the right to access justice.<sup>111</sup> The right to access justice is crucial because it has a bearing on the enjoyment of other rights. When one's rights have been violated, one turns to the justice system for redress, but this crucial right is denied to persons with intellectual and psychosocial disabilities.<sup>112</sup> Cappelletti and Garth effectively summarize the importance of this right by noting that 'the possession of rights is meaningless without mechanisms for their effective vindication'.<sup>113</sup> This is why the CRPD included a substantive right of access to justice.<sup>114</sup> This is the first time that a substantive right to access justice has been included in an international human rights instrument. This right of access to justice is usually framed in International Human Rights Law as the right to an effective remedy.<sup>115</sup> The inclusion of a substantive right of access to justice in the CRPD was not by chance, but was a response to the 'specific rights experience of persons with disability'<sup>116</sup> in

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111 M Cappelletti and B Garth 'Access to justice: The newest wave in the worldwide movement to make rights effective' (1978) 27 *Buffalo Law Review* at 185.

112 As above.

113 As above.

114 Article 13 CRPD and article 13 African Disability Protocol.

115 See eg the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, art 2(3) (a), (entered into force 23 March 1976) [ICCPR].

116 Frédéric Mégret 'The disabilities convention: Human rights of persons with disabilities or disability rights?' (2008) 30 *Human Rights Quarterly* at 512.

particular, the numerous barriers they face to accessing justice.

Testimonial competence should be viewed in the light of the social model of disability. Incompetence is not innate in the individual with impairment, but results from the interaction between a person with impairment and attitudinal and environmental barriers. Therefore, interventions should be made to the external environment in response to the individual's needs. Persons with intellectual and psychosocial disabilities can still provide reliable testimony provided they are properly accommodated in court. The CRPD requires that all persons with disabilities, including persons with intellectual and psychosocial disabilities, be provided with procedural and age appropriate accommodations to enable them to participate effectively in court.<sup>117</sup> Instead of preventing persons with intellectual and psychosocial disabilities from testifying in court, they should be permitted to testify and provided with the necessary and appropriate accommodations.

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117 As above.



## TESTIMONIAL COMPETENCE AND LEGAL CAPACITY

The right to equal recognition before the law, for persons with disabilities, is one of the most fundamental human rights enshrined in global and regional human rights instruments. At the global level, the right is enshrined in the CRPD.<sup>118</sup> At the African regional level, it is enshrined in the African Disability Protocol.<sup>119</sup>

Historically, all persons with disabilities have been denied the right to equal recognition before the law.<sup>120</sup> However, persons with intellectual disabilities and psychosocial disabilities are disproportionately represented amongst those who are frequently denied this right.<sup>121</sup> The most contentious part of the right to equal recognition before the law, in relation to persons with intellectual and

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118 Art 12 CRPD.

119 Art 7 African Disability Protocol.

120 Para 8 of General Comment 1 of the Committee on the Rights of Persons with Disabilities available at: [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en).

121 Para 9 General Comment 1 of the Committee on the Rights of Persons with Disabilities.

psychosocial disabilities, is the right to legal capacity.<sup>122</sup>

During the process of drafting the CRPD, the meaning of legal capacity was subject to much debate and contention.<sup>123</sup> At issue was the question whether legal capacity involves both the capacity to have rights (identity) and the capacity to act (agency). There was agreement that persons with intellectual and psychosocial disability have a right to hold rights on the basis of being human. However, the capacity of persons with intellectual and psychosocial disabilities to act in order to exercise those rights was questioned. Consequently, the CRPD did not include a definition for the term 'legal capacity.'

However, the Committee on the CRPD had occasion to look into this question in its very first general comment.<sup>124</sup> The Committee clarified that legal capacity means both the capacity to hold rights and the capacity to exercise those rights.<sup>125</sup> The term bears the same meaning in the African Disability Protocol. The term is defined in the African Disability Protocol as 'the ability to hold rights and duties and to exercise those rights and duties.'<sup>126</sup> A person must have both the capacity to hold rights and the capacity to act in order to exercise those rights for the right to legal capacity to be fulfilled. In practice however, there is a reluctance to recognise that persons with intellectual and psychosocial disabilities have the capacity to act in order to exercise their rights. This is shown by the fact that they are often denied the opportunity to enter into contracts, buy and sell property, participate in the public and political life of their country, found a family, testify in court etc. The denial of legal capacity therefore, has far-reaching effects as it cuts across many spheres of life.

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122 Art 12 (2) CRPD and art 7 (2) (a) African Disability Protocol.

123 A Dhanda 'Legal capacity in the disability rights convention: stranglehold of the past or lodestar for the future' (2006 – 2007) 34 *Syracuse Journal of International and Commerce* 438.

124 General Comment 1 (n 48).

125 General comment 1 para 12.

126 Art 1, African Disability Protocol.

Recognition of one's right to legal capacity is crucial for the enjoyment of the right to access justice. It is necessary to acknowledge that persons with intellectual and psychosocial disabilities have legal capacity, that is, both the right to hold rights and the right to act in order to exercise those rights. Exercising the right to access justice is tantamount to acting in order to act for the purposes of exercising one's rights. Therefore, upholding the right to access justice is amounts to recognising their legal capacity. Conversely, denying access to justice is tantamount to denying legal capacity. In that sense therefore, provisions on testimonial competence amount to a denial of the legal capacity of persons with intellectual and psychosocial disabilities.



## CONCLUSION

This research study found that nine of the 11 Southern African countries under review have legal provisions that are discriminatory to persons with intellectual and psychosocial disabilities. Madagascar and the Democratic Republic of Congo were the only exceptions. The laws in each of these nine countries contain provisions that state that persons with intellectual and psychosocial disabilities are not competent to testify in court. This has a negative impact on their right to access justice on an equal basis with others. This means that they are unable to vindicate their rights and seek redress for any rights violations in the courts of law.

The common underlying reason for the denial of the right to testimonial competence is that all these laws are based on the medical model of disability. Although all the countries under review have ratified the CRPD which subscribes to the social model of disability, they have not all aligned their laws with the CRPD. They still have laws that use outdated terminology such as ‘unsound mind’, ‘idiocy’, ‘lunacy’, ‘insanity’, ‘imbecility of mind’, ‘disease of the mind’, ‘mental disorder’ and ‘mental defect’, all of which are terms that indicate a medical

model understanding of disability. A medical model understanding of disability views disability as inherent in the individual with impairment whilst a social model understanding of disability perceives disability as the result of an interactional process between a person with impairment and environmental and attitudinal barriers. A medical model approach would therefore view testimonial incompetence as inherent in the individual with impairment whilst a social model approach perceives incompetence as a result of the interaction between internal factors (impairment) and external factors (the environment). Similarly, a medical model approach views the lack of legal capacity as innate in the individual whilst a social model approach views the lack of legal capacity as a result of the interaction between internal and external factors. A medical model intervention involves curing or rehabilitating the individual so that they can be competent to testify and be able to exercise legal capacity. Where it is not possible to cure the individual, the response is to conclude that the person cannot be helped and therefore has to be denied the right. Consequently, they are not permitted to testify and they are not permitted to exercise the right to legal capacity. Conversely, a social model intervention involves making adjustments in the external environment. For example, procedural, age-appropriate and gender-appropriate accommodations are made to enable a person to testify in court.



## RECOMMENDATIONS

The following two recommendations are made:

### Training of relevant stakeholders

The first recommendation is to provide training that educates relevant stakeholders on:

- a. Access to justice and the accommodations that can be made in the justice system to ensure that persons with intellectual and psychosocial disabilities can participate effectively in the justice system in accordance with article 13 of the CRPD. The training should also cover theoretical concepts such as the models of disability.
- b. The right to legal capacity, focusing specifically on the supports that can be provided to enable persons with intellectual and psychosocial disabilities to exercise their right to legal capacity in accordance with article 12 of the CRPD.



## Legislative reform

The discriminatory laws identified in this study have to be repealed but it is imperative that the relevant stakeholders first have a proper understanding of why the provisions need to be repealed and what the alternative should look like. The training should therefore, aim to provide stakeholders with an understanding of what the alternative looks like before legislative reform can be implemented. For instance, one of the mechanisms that should be in place before legislative reform takes place is a system of providing accommodations for persons with intellectual and psychosocial disabilities to effectively participate as witnesses in court.