

UNIVERSITY OF NAIROBI

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RIGHTS OF CHILDREN OF IMPRISONED MOTHERS: TOWARDS NON-CUSTODIAL SENTENCING FOR WOMEN OFFENDERS IN KENYA

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12TH OCTOBER 2017

Declaration

I, NDUNDA EMMANUEL, do hereby declare that this is my original work and has not been submitted for consideration in any other institution.

Signed.....

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A research paper submitted in partial fulfillment of the requirement for the award of Master of Laws (LLM) degree in the School of Law, University of Nairobi.

This Research Paper has been submitted with my knowledge and approval as the University

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DEDICATION

To my family: Dan, Ndendwa & Mimo. God is good.

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This research would not have been possible without the colossal input and guidance I received from my supervisor, Dr. Meroka who with utmost humility and patience; but with unwavering firmness guided me all the way to crystallizing my thoughts into this paper. I shall be forever grateful for the support.

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To our Heavenly Father; thank you for the Amazing Grace. All Glory belongs to you.

INTERNATIONAL HUMAN RIGHTS NORMS AND STANDARDS INSTRUMENTS

Universal Declaration of Human Rights (UDHR), 1948;

UN Convention on the Elimination of All Forms of Discrimination against Women, 1979;

International Covenant on Civil and Political Rights

International Covenant on Economic, Social and Cultural Rights

UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

UN Convention on the Rights of the Child (CRC), 1989;

UN Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), 2015;

UN Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, (1984);

UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) 1985;

UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988;

UN Basic Principles for the Treatment of Prisoners, 1990;

UN Guidelines for Action on Children in the Criminal Justice System, 1979;

UN General Comments (HRI/GEN/1/Rev.6 of 12 May 2003)

LIST OF STATUTES

Constitutions

Constitution of Kenya, 2010

Constitution of the Republic of South Africa, Act No. 108 of 1996

Legislation

Children's Act, Act No. 8 of 2001, Laws of Kenya;

Children & Young Persons (Now Repealed) Act, Chapter 141 Laws of Kenya;

Community Service Orders Act (Act No. 10 of 1998);

Criminal Procedure Code, Chapter 75, Laws of Kenya;

Kenya Prisons Service Act, Chapter 90, Laws of Kenya;

Penal Code, Chapter 63, Laws of Kenya;

Probation of Offenders Act (Act No. 28 of 1961), and

Sexual Offences Act, Act No. 3 of 2006, Laws of Kenya

CASE LAW

Emily Sanguli Mabishi v Republic [2016] eKLR;

J A N v Republic [2016] eKLR;

Lydia Mwendwa Kitheka Vs Republic [2006] eKLR;

Leonida Asiko Vs Republic [2006] eKLR;

Margaret Njeri Kipchilis v Republic [2017] eKLR;

MW Vs KC [2005] eKLR;

Republic Vs Dorine Aoko Mbogo & another [2010] eKLR;

Republic Vs Joyce Jepkoech [2011] eKLR;

Republic v F L [2017] eKLR;

Republic V Matano Katana [2004] eKLR;

Republic v S.A.O. (a Minor) [2004] eKLR;

R (on the application of P & Q) Vs Secretary of State for the Home Department [2001] EWCA Civ 1151);

R Vs Bishop [2011] EWCA Crim 1446;

R Vs Mills [2002] 2 Cr App R(S) and R (On the application of P) v Secretary of State for the Home Department [2001] 1 WLR 2002;

Refugee Consortium of Kenya & Anor Vs Attorney General & 2 others [2015] e-KLR;

S Vs Banda and Others [1991] (2) SA 352 (B);

S Vs M, Constitutional Court of SA, CCT 53/06 [2007] ZACC 18;

Sonderup Vs Tondelli and Anor [2001] (1) SA 1711;

ZH (Tanzania) (FC) (Appellant) Vs Secretary of State for the Home Department (Respondent) [2011] UKSC 4;

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ABSTRACT

This study is premised on the universal understanding that in any society, children remain the most vulnerable category and in dire need of care and protection from parents, community and the government in order to survive. This is further qualified by the understanding that children have the right to parental care and guidance from both parents. At times however, children find themselves exposed to the harsh realities of the criminal justice whenever they are subjected to spending time in prison with their incarcerated mothers or left behind by mothers serving custodial sentences. As such, children of incarcerated primary caregivers may be reduced to ultimate collateral victims of crime and the criminal justice system; not guilty but nevertheless not heard or seen. Their opinions are muzzled by stigma associated with imprisonment and lack of clear legal framework and guidelines to safeguard their interests.¹

This research has demonstrated that there is a worrying trend characterized by failure to implement the rights of children when sentencing primary caregivers. This is demonstrated in instances where primary caregivers in conflict with the law and on minor offences are awarded custodial sentencing without considering the welfare of dependent children. Further it is seen when primary caregivers are not accorded the right to identify alternative caregivers before commencing their sentences and lastly whereby there is no clear policy to ensure children of imprisoned caregivers are not neglected.

The study is structured so as to answer the major research question on the best way to accord primary caregivers special consideration during sentencing so as to ensure the right of children to parental care from both parents is considered and upheld. Further, the study answers the question on how primary caregivers about to serve custodial sentences can accorded enough time to identify suitable alternative caregivers to their children. In doing so, the study analyses international regulatory framework; including conventions, protocols and case law touching on modalities of safeguarding the rights of children during sentencing of primary caregivers.

Subsequent chapters examine the existing regulatory framework in Kenya; most notably the Children's Act, Sentencing policy and guidelines touching on the welfare of children. Further, it

¹Kathleen Marshall, 'Not Seen, Not Heard, Not Guilty: The Rights and Status of the Children of Prisoners in Scotland' <<http://dera.ioe.ac.uk/9399/2/Not%20Seen%20Not%20Heard%20Not%20Guilty%20compress.pdf>> accessed 25 November 2015.

seeks to analyze the adequacy of protection measures put in place for the implementation of child friendly sentencing practices as guaranteed under the Act and examine what guides courts in determining the suitable sentences for primary caregivers. This shall be in comparison to best practices in other jurisdictions most notably in England and Wales in an attempt to identify the existing gaps.

Lastly, the final part of the study discusses the findings from the comparative analysis and field study then finally workable recommendations on ensuring that non-custodial sentencing of primary caregivers is by default interpreted by courts and prosecution as an action to the best interest of the child. The report further makes specific recommendations to key criminal justice actors with the responsibility of making decisions about children. These include police, prosecution department, judiciary and the prisons.

DEFINITION OF TERMS

Child	Every human being below the age of 18 years unless otherwise specified under the applicable law relating to age of majority ² ;
Deprivation of Liberty	Any form of detention or imprisonment or placing a person either in public or in private custody ³ ;
Family	A social system consisting of a parent or parents and child or children all related by blood or marriage and living together;
Juvenile	A child or young person who is under the respective legal system may be dealt with for an offence differently from an adult ⁴ ;
Parent	A mother or father of a child including any person who is liable by law to maintain a child or is entitled to his custody;
Primary Caregiver	A parent of a young child under the applicable law; in this study referring to a mother of a dependent child;
Prisons	A correctional facility for lawful custody (As defined under section 24 of the Prisons Act, Chapter 90, Laws of Kenya);
Young Children	Unless otherwise stated, this refers to children below the age of four (4) years as specified under section 30 of Prisons Act.

²This is provided under article 1 of the Convention on the Rights of the Child.

³This is defined under Section II Rule 11(b) of the UN Rules for the Protection of Juveniles Deprived of their Liberty.

⁴This is provided under Article 2.2 (a) of the Standard Rules for the Administration of Juvenile Justice (famously referred as the Beijing Rules).

ABBREVIATIONS

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACRWC	Charter on the Rights and Welfare of the Child
ADR	Alternative Dispute Resolution
AU	African Union
CNC	Council for Children
DCS	Directorate for Children Services
ECHR	European Convention on Human Rights
ESCR	Economic, Social, and Cultural Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IHL	International Humanitarian Law
KPS	Kenya Prisons Service
NCCS	National Council for Children Services
NGO	Non-Governmental Organization
NPS	National Police Service
ODDP	Office of the Directorate of Public Prosecutions
QUONO	Quaker United Nation's Office
UNCESCR	United Nations Covenant on Economic, Social and Cultural Right
UNCRC	United Nations Convention on the Rights of the Child
UDHR	Universal Declaration of Human Rights
UNICEF	United Nations International Children's Emergency Fund

CHAPTER ONE

1.0 RESEARCH OVERVIEW AND STRUCTURE

1.1 Background of the Study

Under the Kenyan correctional system, Section 35 of the Prisons Act permits children below the age of four years with mothers serving custodial sentences to reside in prisons with their mothers. This is done in their best interest so as to ensure that they get the best care possible. Those above the age of four years are however not allowed to reside in prison. Instead, they are left at the mercies of alternative caregivers increasing probabilities of neglect and abandonment. Most international instruments and municipal laws emphasize on the need for states to come up with mechanisms for ensuring the rights of dependent children are safeguarded irrespective of where they are. At times, it may be absolutely necessary to imprison primary caregivers. However, where there are viable alternatives to imprisonment of this category which interfere less with the rights of children, the same should be utilized. Keeping women out of prisons in Kenya, where there are other alternatives could be a major step towards saving children under their care from possible institutionalization and victimization.

This study explores the challenges brought about by incarceration of primary caregivers who are usually mothers to both children residing in prison and those left outside. The study only included women who have already been convicted and sentenced. However, some women who did not complete the entire range of questionnaires (n = 477) were omitted. Therefore, the number of women who participated in this research amounted to 149.

The study further seeks to establish whether the fact of being a primary caregiver was a factor to determine sentence and whether the views of children are of any relevance. The conduct of the research was both qualitative and quantitative. It included reviewing of relevant existing literature in relation to the impact of incarceration of primary caregivers to children and available committal warrants for primary care givers in the three selected women prisons in Kenya with an aim of establishing whether the aspect of them being primary caregivers was a factor considered by courts before sentencing and further to establish whether at the time of sentencing, they were availed time to identify alternative caregivers to their young children left at home. In order to establish the factors considered by courts while passing noncustodial

sentencing to women offenders, women offenders accorded non-custodial sentences under and under the supervision of the probations department were also interviewed.

Sentencing process is an essential stage in which the key objectives of the judicial systems must upheld. In Kenya, sentencing policy and legal regime in relation to the rights of children, though a mere duplication of the language of international policies and instruments on the rights and welfare of children, does not fully reflect on the special roles played by women who are widely regarded as the primary caregivers to young children.⁵ Women with children just like their male counterparts are accorded equality when it comes to sentencing.⁶ Resultantly, female prison facilities across the country hold a significant number of children accompanying their mothers with a probably higher number of children left at home.⁷

Both international and domestic legal instruments set out standards to be met when dealing with children.⁸ The overriding consideration when imposing orders affecting a child, whether directly or otherwise is the “best interest of the child”. Children’s Act⁹, Kenya and Constitution of Kenya envisages the aspect of ‘best interest’ of the child in all decisions made touching on the child.¹⁰

Under the international legal framework; most notably under Article 3 of the CRC, preference is made to non-custodial measures when it comes to women offenders and in particular pregnant and those with young children. Likewise, Article 30 of the ACRWC¹¹, state parties are under obligation to offer whenever possible preferential handling to pregnant and lactating women with small dependent children in conflict with the law. Preference is recommended for out of prison sentencing options which avails care givers more time with their children. Further, states are obligated to establish and promote measures alternative to prison terms for the treatment of such

⁵ David A Balton, ‘The Convention on the Rights of the Child: Prospects for International Enforcement’ (1990) 12 Human Rights Quarterly 120.

⁶ Donna Hendrickson Christensen, Carla M Dahl and Kathryn D Rettig, ‘Noncustodial Mothers and Child Support: Examining the Larger Context’ (1990) 39 Family Relations 388; Candace Kruttschnitt and Rosemary Gartner, ‘Women’s Imprisonment’ [2003] Crime and Justice 1; Pat Carlen, *Alternatives to Women’s Imprisonment* (Open University Press 1990).

⁷ Christensen, Dahl and Rettig (n 6).

⁸ These include the Convention on the Rights of the Child, African Charter on the Rights and Welfare of the Child, the Constitution of Kenya and the Children’s Act, Kenya.

⁹ Children’s Act, Chapter 141. Revised Edition 2012 [2010]. Available at: www.kenyalaw.org.

¹⁰ See Section 4 of the Children’s Act on Survival and Best Interest of the Child and Article 53(2) of the Constitution of Kenya (2010).

¹¹ Adopted by the Assembly of Heads of State and Government of the Organization of African Unity in July 1990, and entered into force in November 1999.

offenders.¹² As a sign of commitment, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC)¹³ put in place measures to implement Article 30 in relation to children of imprisoned mothers and other primary caregivers.¹⁴ However, its domestication and implementation under municipal laws in many signatory states has proved to be a challenge hence exposing the rights and welfare of children.

The constitution of Kenya stipulates that general rules of international law forms part of the Kenyan law and more clearly that treaties or conventions ratified by Kenya shall form part of Kenya's municipal laws.¹⁵ Kenya having ratified both the UNCRC and CRWC is inevitably bound by the requirement that any action regarding a child should be to child's best interest and more relevant to this research the requirement for avoidance of custodial sentencing to primary caregivers whenever possible.

The theory of the 'best interest of the child' has no elaborate definition. CRC on its part adopts a progressive approach to define the best interest principle interpreting the concept as a general principle and an umbrella provision for the whole Convention. Thus rooting the definition of what indeed is in the best interest of the child in the substantive articles of the Convention itself. According to **Thomas Hammarberg**¹⁶, CRC adopts a progressive approach when analyzing the principle of the best interest to the effect that it deals with the concept as a general principle and an umbrella provision for the whole Convention. It roots the definition to the substantive articles of the Convention.¹⁷

Hammarberg defines best interest principle to include the sum total of the norms in the CRC which must be considered in line with other norms but it should be paramount. As such, the principle should influence lawmaking, administrative actions and all other actions affecting the

¹² Article 30.

¹³ See Article 32 of the African Charter on the Rights and Welfare of the Child.

¹⁴ See ACERWC General Comment No. 1 (Article 30 of the ACRWC) On "Children of Incarcerated and Imprisoned Parents and Primary Caregivers" 2013. Available at <http://acerwc.org/general-comments/>.

¹⁵ Article 4 & 5 of the Constitution of Kenya, 2010.

¹⁶ Commissioner for Human Rights, Council of Europe.

¹⁷ Thomas Hammarberg, 'The Principle of the Best Interests of the Child – What It Means and What It Demands from Adults' (Commissioner for Human Rights Council of Europe, Warsaw, 30 May 2008) <<https://rm.coe.int/16806da95d>> accessed 9 August 2017.

child. The biggest challenge as discussed later in this study is however on how to incorporate this principle in sentencing policies to ensure that it does not remain mere aspirations.¹⁸

For the purposes of this research however, best interest shall be defined to include a systematic approach to put in place active measures by both government and private agencies for consideration of how a child's interest may be affected by their decisions and actions. The principle shall be analyzed specifically in relation to sentencing of primary caregivers as a procedural requirement. Whether those decision-makers examine before passing sentence how custodial sentencing shall affect a child and whether the sentence is the only available option compatible to what may be to the best interest of the affected child.

Justice is generally based on the doctrine of acquitting the innocent and punishing the guilty.¹⁹ However, when mothers are imprisoned their children become the silent victims and are penalized the most. Under the CRC²⁰, it is clearly stipulated that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.²¹ Under the principles of international law, once a country has ratified a convention, it is bound to comply with its principles and standards. However, there is no evidence to indicate that states have domesticated the same under their municipal legislation.²²

Under Article 3(3), the convention provides that state parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform to the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision. Resultantly, courts are bound to envisage the welfare of the child before passing a sentence on women offenders with young children. Article 20 further provides that a child deprived of his or her family environment whether temporarily or permanently, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance at the expense of the

¹⁸ Hammarberg (n 17) 5–6.

¹⁹ Roger Shaw (ed), *Prisoners' Children: What Are the Issues?* (Routledge 1992) i.

²⁰ Adopted by General Assembly vide resolution 44/25 of 20 November 1989. Entry into force 2 September 1990.

²¹ Article 3(1).

²² Gerison Lansdown, Tony Waterston and David Baum, 'Implementing the UN Convention on the Rights of the Child.' (1996) 313 *BMJ: British Medical Journal* 1565.

state.²³ Accordingly, states have an obligation to ensure such children are accorded alternative care.

Under the United Nations Guidelines for Alternative Care of Children²⁴ States are encouraged to be on the forefront in implementing children's rights in their respective legislation, policies and practice as envisaged under the CRC and other human rights instruments touching on children.²⁵ These guidelines were designed to enhance the implementation of the provisions of the UN Convention on the Rights of the Child. In relation to children's care, the guidelines reinforce children's right to grow up in family set-up or an alternative similar environment and not to be placed in alternative care unnecessarily.²⁶

In Kenya however, female prison facilities are crowded with women who are primary caregivers serving custodial sentences accompanied by young children; majority of whom are accused of non-violence and domestic related offences.²⁷ When primary caregivers for young children who are usually mothers end up in prison, children under their care are left at the mercies of secondary caregivers and in the process disrupting their normal growth process.²⁸ This emerging trend of increasing number of young children with primary caregivers serving custodial sentences for petty and non-violent offences is an indicator that there are gaps in law and policies which need to be addressed so as to safeguard the welfare of children.

This research sought to establish the determinants of custodial sentencing of primary care givers in Kenya. The findings herein shall form a basis for recommending mechanisms on the best way to have the rights of children in Kenya recognized and protected. This Chapter looks at the statement of the research problem, theoretical framework within which the research will be

²³ 'Moving Forward: Implementing the "Guidelines for the Alternative Care of Children" | Better Care Network' <<http://www.bettercarenetwork.org/library/social-welfare-systems/child-care-and-protection-policies/moving-forward-implementing-the-guidelines-for-the-alternative-care-of-children>> accessed 8 June 2016.

²⁴ Resolution 64/142

²⁵ 'Moving Forward: Implementing the "Guidelines for the Alternative Care of Children" | Better Care Network' (n 23).

²⁶ 'Moving Forward: Implementing the "Guidelines for the Alternative Care of Children" | Better Care Network' (n 23).

²⁷ According to Prison Headquarters' Directorate of Research and Statistics, as at 27th November, 2015 prison statistics indicated that there were 2,305 female prisoners and 498 children accompanying their mothers.

²⁸ Julia Morgan and others, "'A Hidden Group of Children": Support in Schools for Children Who Experience Parental Imprisonment' [2013] Children & Society n/a; Marshall (n 1).

carried out, the research justification, objective of the research, research questions, hypotheses, the research methodology applied as well as literature review.

1.2 Statement of the Problem

Under the United Nations Convention on the Rights of the Child (CRC)²⁹, the understanding is thus in all actions relating to children, whether undertaken by state or private social institutions, courts, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.³⁰ In relation to sentencing of primary caregivers, Article 30 of the ACRWC states that state parties to the charter shall undertake to provide special treatment to pregnant mothers and to lactating mothers who are in conflict with the law and in particular ensure that a non-custodial sentence shall always be first priority when sentencing such mothers. Children's Act and the Constitution of Kenya adopt the principle of the best interest of the child whenever decisions touching on children are made.

Sentencing of primary caregivers should therefore consider the welfare of the affected child. In Kenya, as it is in many developing and recently developed countries, there is scant literature on the consideration of the treaties and the legal framework during sentencing. This is despite the fact that the population of women in prison is sharply increasing without a clear understanding what happens to their dependent children. According to Kenya prisons Service prison monthly statistics, the number of women prisoners accompanied by young children has increased sharply in the last two years.³¹ The report also indicates that majority of female prisoners with care giving responsibilities were sentenced on misdemeanors. From the foregoing, it is evident that there exists a legal gap in the sentencing practice in Kenya for the implementation of the international law, the Constitution and the Children's Act Kenya when it comes to sentencing of primary caregivers.

²⁹ Adopted by General Assembly vide resolution 44/25 of 20 November 1989. Entry into force 2 September 1990.

³⁰ Article 3(1).

³¹ This is according to Prison Annual Reports for the Financial Years 2014/2015 and 2015/2016, Kenya Prison Services directorate of Research & Statistics.

1.3 Research Objectives

1.3.1 General Objectives

The overall objective of this study is to establish whether non-custodial sentencing of primary caregivers in Kenya is considered by default as an act to the best interest of the affected child and whether the rights of the child are considered during sentencing.

1.3.2 Specific Objectives

The specific objectives of this study are:

- 1) To identify the attempts made by the courts to mitigate against custodial sentencing to primary caregivers.
- 2) To determine whether primary caregivers are accorded enough time to identify suitable alternative caregivers before commencing their sentences.
- 3) To evaluate the legal, institutional and socioeconomic factors that influence non-custodial sentencing to primary caregivers in Kenya.

1.4 Research Questions

The research questions which this study aimed to answer included:

- 1) What are the factors that influence custodial sentencing for women offenders who are primary care givers in Kenya?
- 2) How can courts establish whether a person is a primary caregiver
 - a) By what ways can court ensure that there is in place an alternative caregiver before passing sentence?
- 3) How can the sentencing process be carried out to ensure recognition and protection the rights of the child to parental care?

1.5 Research Hypotheses

This study postulates the following hypotheses:

- 1) Children rights and wellbeing do not determine non-custodial sentencing to primary caregivers in Kenya.
- 2) Institutional factors have no effect on non-custodial sentencing to primary caregivers in Kenya.
- 3) Socioeconomic factors do not influence non-custodial sentencing to primary caregivers in Kenya.

1.6 Significance of the Study

This study is premised on the assumption that in putting into consideration the best a child's best, women in conflict with the law who are primary caregivers and accused of less serious offences should be awarded non-custodial sentences. Their incarceration expose the child into perils associated with prisons and lack of parental care which negatively affects the growth and wellbeing of the child. Findings of this study are expected to make several contributions. Firstly, the study will contribute to the scant literature on the rights of children with imprisoned caregivers in Kenya. Secondly, the study will help in identification the key attempts made by courts in Kenya to mitigate against custodial sentencing to primary caregivers. Lastly, the significant determinants of non-custodial sentencing to primary caregivers in the country will be determined.

1.7 Research Methodology

Introduction

Imprisonment of women in Kenya with particular importance to primary caregivers is the main subject of this research on a broad perspective. This research is thus geared towards examining the gaps in law and practice when it comes to sentencing primary caregivers and measures incorporated to ensure their dependent children are protected. Information sought include whether courts and prosecutors consider the impact of custodial sentencing to children when dealing with matters involving primary caregivers, whether primary caregivers are availed an opportunity to identify alternative caregivers when facing prospects of custodial sentencing and lastly whether imprisonment of primary caregivers violates the rights of children in Kenya, and if yes, which specific rights are violated.

1.7.1 Study Area

From the outset, three (3) female prison facilities in Kenya with maximum and medium security measures were targeted. These include Lang'ata and Shimo La Tewa maximum security women facilities and Eldoret women main prison. In selection of a sample size, three women were skipped selecting the fourth one repeatedly. This was to ensure that every responded had an equal chance of being selected hence reducing bias. Research results discussed in this study include feedback from interviewed women and children visiting their incarcerated caregivers. All the three facilities include inmates serving both short and long term prison sentences hence covering all the targeted categories. The facilities were also balanced in terms of rural and urban inmate's population. Most of the information regarding the legal framework on the rights of children, best practices and sentencing policies and theories shall be obtained from existing secondary data.

1.7.2 Research Design

The study employed a survey design in order to enable collection of a large amount of data from a sizeable population with limited resources. Questionnaires were administered to selected sample. The survey strategy allows collection of quantitative data which can be analyzed in a quantitative structure using descriptive and inferential statistics. In addition, data collected using a survey strategy can be used to suggest possible basis for particular situations amongst variables and to generate models of these relationships.

Data collection for this study was done through combination of various methods. Use of multi-various methods is also referred to as triangulation and preferably used when targeted different categories of respondents.³² In this research, data was collected from the following sources-

- i) Review of the existing literature ;
- ii) Institution-tailored data collected at participating prison facilities;
- iii) Standardized written questionnaires for imprisoned caregivers with children both within prison facilities and outside;
- iv) Standardized questionnaires for CUC's;
- v) Observations and semi-structured interviews with prisoners and officials.

³² D. Silverman, Doing Qualitative Research: A Practical Handbook (London 2000) p. 98.

1.7.3 Sampling Design and Sample Size

According to Lunsford & Lunsford³³, a sample is a small subset of the population selected to be investigated and must represent the population and have sufficient size for a fair statistical analysis. Prison facilities were selected by stratified sampling for the distribution of data collection tools.

This study used cross-sectional data that was obtained with the aid of a semi-structured questionnaire. Also, the study also included interviews and focused group discussions to collect data from three (3) CUC's in Nairobi and Mombasa court stations. These numbers were informed by the fact that the research concentrated on key players including CUC's who have handled matters directly involving primary caregivers and whose numbers might be limited. This data shall inform the researcher on whether courts consider the best interest of affected children whenever passing judgment to primary caregivers. Due to the ethnographic nature of this research, interviews proved more effective in data collection.

In relation to information on whether primary caregivers are availed opportunity to identify alternative caregivers before imprisonment and whether imprisonment jeopardizes the rights of children, standardized written questionnaires were completed through structured interviews.

Structured interview is this case referring to interviews whereby interviewers ask uniform questions to several individual interviewees.³⁴ Due to the sensitivity of the study, consent was obtained prior from all the participants and the information obtained regarding children involved was treated with utmost confidentiality.

1.7.4 Data Analysis

In order to identify the attempts made by the courts to mitigate against custodial sentencing to primary caregivers, this study will use descriptive statistics of categorical data. Also, the analysis to determine whether primary caregivers are accorded enough time to identify suitable alternative caregivers before commencing their sentences will be based on descriptive analysis of categorical data. The evaluation of legal, institutional and socioeconomic factors that influence

³³ T.R. Lunsford & B.R. Lunsford, The Research Sample, Part I: Sampling. *Journal of Prosthetics and Orthotics Vol. 7* (3), (1995) pp. 105-112.

³⁴ W Grosshans, Using Structured Interviewing Techniques (Washington DC 199i) p. 12.

non-custodial sentencing to primary caregivers in Kenya will be based on non-linear regression models. All the analysis will be done using R software. Results will be presented using tables and histograms.

1.7.5 Research Description, Data Collection Procedures and Ethical Considerations-

Due to the sensitivity of the study area, the researcher obtained introduction letter from University of Nairobi, school of law detailing the study to be covered. Subsequently, the researcher obtained research permit from the National Commission for Science, technology and innovation (NACOSTI) and further written permission from the Commissioner General of Prisons to conduct research within the specified three prison facilities.

Consent from parents for interviews was also obtained prior to the research. This was through signed consent notes. All the respondents who participated in the exercise did so voluntarily and within the prison setup for privacy and security concerns. High level of confidentiality was observed while collecting and sampling of information. Names of children involved in the exercise were concealed for protection. The research also entailed focused group discussions (FGD) sessions at every prison setup with mothers accompanied by their children and who expressed willingness to participate. Lastly, the project was checked for plagiarism to ascertain authenticity.

1.7.6 Study Limitations

The main limitation of this study was the reluctance by most respondents to fill in the requisite data collection tools with preference to oral interviews which forms a substantive part of the study's outcome. Further, limitation of funds meant that interviews could not be extended to children home facilities to establish how often referrals are made to them.

1.8 Theoretical Framework

1.8.1 Natural Law Theory

This research is premised on the recognition of inherent child rights first as humans and right holders and then as minority groups in the society who are vulnerable to abuse. Consequently, this research shall be based on the natural law theory which advocates for the rights of all and

based on positive and just law.³⁵ Under the natural law theory, human beings are entitled to basic human rights inherently by virtue of them being human beings and not subject to the will of a state or government.³⁶ Therefore, the natural law theory advances the rights of children to protection from harmful decisions which may affect their wellbeing and growth. According to Thomas Aquinas³⁷, human beings are endowed with the power to reason hence capable of discerning the eternal law of God through this power of reason.³⁸ As stated by Dimock Susan, Aquinas further argues that law makers who are sovereigns should not make laws which are good to them but also which are destined for the common good of the entire society.³⁹

In viewing natural law as a dictate of right reason⁴⁰ with Grotius attributing human characteristic with the natural desire to live peacefully and in harmony with others,⁴¹ manmade laws should operate to ensure that the weak in the society are fully protected and given equal, if not special opportunities to compete with others. Under the current legal framework for the protection of children in Kenya⁴², Children suffer as collateral victims of imprisonment as a consequence of wrongs committed by their mothers.

Failure to treat custodial sentencing of primary caregivers as the last option and subjecting children to disrupted parental care and guidance goes against the natural law theory of equal rights and treatment. Applying John Locke's theory of inalienable rights, this goes against the very precepts of natural law jurisprudence as the children are forced to surrender their inalienable rights such as right to liberty and freedom of movement. Their development is compromised

³⁵ Strauss, Leo "Natural Law". *International Encyclopedia of the Social Sciences*. (1968). Macmillan.

³⁶ Ralph M McInerney and others, *Treatise on Law: Summa Theologica, Questions 90-97* (Regnery Publishing 1996) <<http://books.google.com/books?hl=en&lr=&id=obsll9lhRz8C&oi=fnd&pg=PR5&dq=%22is+it+an+act+of+reason:+because+then+law+would+cease,+when+the+act+of+reason+ceases,%22+%22answer+that,+Law+is+a+rule+and+measure+of+acts,+whereby+man+is+induced+to+act+or%22+%22&ots=QfbRBe5gCk&sig=zAFOasVChl3udPYIwg9hKVJZD70>> accessed 8 December 2015.

³⁷ Thomas Aquinas, *Summa Theologica, Part I (Prima Pars)* <http://documentacatholicaomnia.eu/03d/1225-1274,_Thomas_Aquinas,_Summa_Theologiae-Prima_Pars_Edente,_EN.pdf> accessed 12 December 2015.

³⁸ McInerney and others (n 36).

³⁹ Dimock, Susan, *The Natural Law Theory of St. Thomas Aquinas* (January 1, 1999). *The Philosophy of Law*, 6th Edition, Feinberg, Joel, and Jules Coleman, eds. Wadsworth, 2000. Available at SSRN: <http://ssrn.com/abstract=2197761>.

⁴⁰ Hugo Grotius, *De Jure Belli et Pacis* (Book 1, 1689).

⁴¹ Stephen Buckle, *Natural Law and the Theory of Property : Grotius to Hume* / (Clarendon Press ; 1991); Christian Gellinek, *Hugo Grotius* / (Twayne Publishers, c1983.).

⁴² Most notably the Constitution of Kenya (2010), Children Act and the Prisons Act, Cap 90 Laws of Kenya.

with prospects of stunted growth outside family set up as preferred by most international and national guidelines.

1.8.2 Attachment Theory

Attachment theory complements the natural law theory in support of the rights of children most importantly through recognition as right holders. Bowlby's attachment theory developed in 1958 is based on psychological phenomenon⁴³ to the effect that there is a lasting psychological connectedness between the parent and the child, especially the mother. He observed that children undergo untold distress when separated from their mothers who in real sense are primary caregivers.⁴⁴ This research advances the theory that separation of children from their primary caregivers due to custodial sentencing goes against their inherent human rights to parental care and guidance from their parents.

1.8.3 Sentencing Theories

In advancing the natural school of thought and the attachment theory, this research shall also examine carefully the sentencing policies in Kenya and establish the role they play towards safeguarding the rights of children with imprisoned primary caregivers. This shall be guided by the understanding that although at times it may be necessary to curtail a child's right to parental care through imprisonment of a parent, this deprivation should be exercised with proper balancing of all probabilities. Thus, where there are alternatives to imprisonment that promote order with less interference on children's rights, the same ought to be preferred.⁴⁵

The legal framework in most jurisdictions does not consider sex as a relevant factor to be considered during sentencing. The evidently male centered sentencing model negates any efforts to develop a rational sentencing policy for nonviolent female offenders who in most cases are

⁴³ John Bowlby, 'The Origins of Attachment Theory: John Bowlby and Mary Ainsworth Inge Bretherton' [1992] *Developmental Psychology* 28.

⁴⁴ Saul McLeod (2009), 'Attachment Theory' <http://www.simplypsychology.org/attachments.html> Accessed 10 Nov 2015

⁴⁵ Brett Rachel, 'Incarcerated Mothers, Their Children and Non-Custodial Alternatives' 3 <www.duihua.org/wipconference/brett_en.pdf>.

primary caregivers and as such the national sentencing policies should consider their special cases.⁴⁶

According to Graydon, the criminal justice systems across the globe have largely ignored women when it comes to sentencing.⁴⁷ This is informed by the fact that the existing theories and philosophies of punishment and sentencing have developed from essentially patriarchal models lacking feminist theoretical analysis and practical appreciation of issues which impact on sentencing female offenders.⁴⁸ Luyt further goes ahead to rightly assert that all legal considerations in addressing crime and sentencing cut across both genders equally without appreciating the role played by women in the society; most importantly as primary caregivers.⁴⁹

Justification for criminal sentencing revolves around deterrence, incapacitation, rehabilitation, and retribution ('just deserts').⁵⁰ Both deterrence and incapacitation seek to reduce commission of future crime. Deterrence seeks to make crime more costly while incapacitation removing offenders from society. Among the utilitarian rationales for punishment, the deterrence theory holds that punishment should serve to discourage the offender (specific deterrence) and members of the public (general deterrence) from offending in the future. Thus Jeremy Bentham, a proponent for deterrence states that punishment only reduces the tendency towards the prevention of like acts.⁵¹

Rehabilitative approach on the other hand adopts the stance thus crime is determined by social forces and not the decisions of criminals hence attempting to reform offenders to conform to societal norms. 'Just deserts' model asserts that penalty should be proportionate to the moral

⁴⁶ Myrna S Raeder, 'The Forgotten Offender: The Effect of the Sentencing Guidelines and Mandatory Minimums on Women and Their Children' (1995) 8 Federal Sentencing Reporter 157, 1.

⁴⁷ Charalee F Graydon, 'Habilitation: Sentencing of Female Offenders' (1992) 5 The Canadian Journal of Law and Jurisprudence 121, 121.

⁴⁸ Graydon (n 47); Areti Krishna Kumari, 'Role of Theories of Punishment in the Policy of Sentencing' [2007] Role of Theories of Punishment in the Policy of Sentencing (January 10, 2007) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=956234> accessed 31 January 2016.

⁴⁹ WFM Luyt, 'Imprisoned Mothers in South African Prisons with Children outside of the Institution' (2008) 16 European Journal of Crime, Criminal Law and Criminal Justice 299, 307.

⁵⁰ Lea John, 'Sentencing and Punishment in England' <<http://www.bunker8.pwp.blueyonder.co.uk/cjs/26906.htm>> accessed 8 February 2016.

⁵¹ Dawinder S Sidhu, 'Moneyball Sentencing' <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2463876> accessed 24 June 2016.

gravity of offenses.⁵² Rehabilitative approach operates on the understanding that any gains from positive transformation are beneficial to both the individual and the society at large. This is due to the fact the offender is likely to pose less danger to society upon rehabilitation. Such self-improvement may take place as a result of atonement or penance, which may be the product of the offender's moral code or religious tradition, or guilt or similar appreciation for one's actions.⁵³

In order for a sentencing regime to be mindful to the rights of children, the social situation of every primary caregiver offender should be considered alongside the punishment meted. Issues of women's role in the society need to be reflected in sentencing so as to ensure proper balancing of the rights of the community against those of children caught in between.

From the current sentencing policy in Kenya, punishment of women's relatively less serious crimes with heavy custodial sentencing directly hurts children. Literature review has established that women offenders who double as primary caregivers experience intense sense of loss, betrayal, desperation, and hopelessness upon incarceration. Children suffer irreparable loss of parental care in the name of the over emphasized theories of justice and deterrence. This research proposes to divert from the overly relied theory of punitive sanctions and patriarchy which according to Stephanie and Bloom connotes that a system is dominated by men and that masculinity is more valued than femininity.⁵⁴ Instead, it considers least restrictive approaches to sentencing women offenders who are primary caregivers. Reduction in women's imprisonment and reintegration of female offenders into the community is viewed as a step towards upholding rights of children to parental care.⁵⁵

Evidently from this analysis, more empirical work identifying the reasons for sentencing disparity may be necessary before policy makers recognize that elimination of the gender gap in

⁵² Vanessa E Munro, 'Emerging Rights of Imprisoned Mothers and Their Children, The' (2002) 14 Child and Family Law Quarterly 303; S Fernando Rodriguez, Theodore R Curry and Gang Lee, 'Gender Differences in Criminal Sentencing: Do Effects Vary Across Violent, Property, and Drug Offenses?*' (2006) 87 Social Science Quarterly 318.

⁵³ Sidhu (n 51).

⁵⁴ R Embry and PM Lyons, 'Sex-Based Sentencing: Sentencing Discrepancies Between Male and Female Sex Offenders' (2012) 7 Feminist Criminology 146, 147.

⁵⁵ Stephanie Covington and Barbara Bloom, 'Gendered Justice: Women in the Criminal Justice System' [2003] Gendered justice: Addressing female offenders 3, 14.

sentencing without recognizing the uniqueness of women offenders who double up as primary caregivers is an effort in futility.⁵⁶

A natural law theory based approach to the study of the rights of these children integrates within it the norms, ethics and values of the international human rights system into legal frameworks and practices. Important elements are acknowledgment that human beings are rights holders entitled to equal recognition empowerment and participation. Human-rights centered approach offers a theoretical structure that will give direction for the development of policies and offers a framework to monitor and evaluate existing structures for their real and potential effect on developmental rights of the children accompanying their incarcerated mothers into Kenyan prisons.

1.9 Literature Review

Introduction

In most jurisdictions, children in need are, as a matter of practice and policy not considered in sentencing structures. There is no prescribed means for family statuses or dependent children to come to the attention of court. Individual prison facilities offer child-friendly visiting facilities in a practice regarded as a privilege, not a right further diluting the legal basis for the same.⁵⁷ Without proper mechanisms for identification and vetting of alternative caregivers, children are exposed to possibilities of neglect and abuse hence endangering their wellbeing.

This section analyses the existing literature on protection policies put in place in other jurisdictions on the rights of children with imprisoned primary caregivers, the challenges they face and the existing protection availed, if any. The research also reviewed previous works done in relation to measures put in place to minimize custodial sentencing for primary caregivers. Lastly, the study has not concentrated much on alternatives to custodial sentencing in general which has been fairly researched on.

⁵⁶ Raeder (n 46).

⁵⁷ Chesa Boudin, 'Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship' (2011) 101 *The Journal of Criminal Law and Criminology* (1973-) 77.

According to Kathleen Marshall⁵⁸, deliberations on alternatives to imprisonment should be geared to the effect of custodial sentencing on the children of offenders with states aiming to minimize it as much as practicably possible.⁵⁹ This section has attempted to identify the gaps in implementation of legal framework and policies in many jurisdictions leading to custodial sentencing of primary caregivers against the interest of the child to have this discretion exercised as a measure of last resort.

1.9.1 Women Imprisonment

In Kenya, there is no separate legal basis for the sentencing of women offenders. Like in many jurisdictions, sentencing policies are applicable across all genders without regard to the impact on dependent children thereof. During sentencing, the preferable situation entails balancing the different legal principles and also taking into account the distinctive elements of each matter. Thus sentencing courts need to weigh the circumstances of individual offenders as well as having a consistent range of suitable sentence options in order to make desirable decisions. Considerate sentences which factor in the special care giving roles of women offenders can be beneficial to both the offenders and their families as most notably to children who are involved.

Literature reviewed in relation to women imprisonment indicates that mass imprisonment of parents might influence the intergenerational outcomes of children through families and schools. However, there is evidently limited research to provide a systematic and consistent base of knowledge about these concerns for policy purposes.⁶⁰ According to Oberman and Meyer⁶¹ Many imprisoned mothers at some point have been subjected to violence by people they trust most. Studies conducted on the causes of women imprisonment in most parts of the world indicate that high number of women end up in jail due to domestic and non-violent minor offences. Majority of women in prisons today have had disturbed marital or childhood background.⁶² Resultantly, raising children while in prison compounds the plight of children whom the mothers might view them as victims of injustices they (mothers) suffered in the past. In sentencing women offenders,

⁵⁸Marshall (n 1).

⁵⁹Marshall (n 1) 8.

⁶⁰ John Hagan and Holly Foster, 'Children of the American Prison Generation: Student and School Spillover Effects of Incarcerating Mothers' (2012) 46 Law & Society Review 37, 44.

⁶¹Michelle Oberman and Cheryl L Meyer, *When Mothers Kill: Interviews from Prison* (New York University Press 2008).

⁶²Oberman and Meyer (n 61).

the criminal justice system seeks to achieve deterrence, rehabilitation, and retribution. However, custodial sentencing for women offenders with care giving responsibilities primary ought to be done with the child's interest in mind. As such, sentencing policies should be sensitive to the particular circumstances of women in conflict with the law and address each issue on need basis.

Fortin⁶³ alludes that rights of children are left to the mercies of the law and government policies. She states that a right's based approach could be ideal in addressing most of the challenges faced by children provided that judiciaries would adopt this model of rights based approach when protecting the interests of children, in conjunction with those of other minority groups.⁶⁴

1.9.2 Children with Incarcerated Caregivers

During sentencing, the rights of the community where an offender hails must be protected. Thus offenders in some instances are actually slapped with custodial sentences to protect the interests of the community.⁶⁵ According to Fortin However, there must be a consideration between the duties of a caregiver to obey the law and the right of the child to parental care; of particular importance being the best interest of the child that override those of the parent in most instances.⁶⁶ In the same breath, it could only be prudent if the sentencing of women offenders could only be done to the best interest of the child overriding community interest.

Currently, there is a worrying trend in the gradual increase of caregivers with children both in prison and others left behind. Ordinarily, there should be empirical information on the consequential impact on children; which is conspicuously lacking⁶⁷. Consequently, this gap brings about a generation of young children and teenagers with their future distorted by imprisonment of their mothers and spending time in prison at a tender age.⁶⁸

According to Hissel, in Holland, as it is in most developed countries, children with incarcerated

⁶³ Jane Fortin, *Children's Rights and the Developing Law* (Cambridge University Press 2009) <<http://dx.doi.org/10.1017/CBO9781139168625>> accessed 26 November 2015.

⁶⁴Fortin (n 63).

⁶⁵ Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press 2010).

⁶⁶Fortin (n 63). See also Hoppe v. Germany [2003] 1 FLR 384, at para. 49;

⁶⁷John Hagan and Ronit Dinovitzer, 'Collateral Consequences of Imprisonment for Children, Communities, and Prisoners' (1999) 26 Crime and Justice 121.

⁶⁸Hagan and Dinovitzer (n 67) 142.

mothers are afforded multiple care-giving alternatives so as to safeguard their welfare.⁶⁹ This is unlike in Kenya where currently there are no measures put in place to secure the welfare of this category of children. The most critical areas that need to be addressed include measures put in place for care-giving arrangements for the children of incarcerated parents. These should envisage measures put in place to facilitate maximum contact for those children not residing in prison with incarcerated mothers or primary caregivers.⁷⁰

Morgan⁷¹ alludes that children accompanying their mothers in prison and those with primary caregivers in prison are a forgotten lot. They identify lack of proper legal frameworks and strategies to safeguard the rights of these children both in prison with their mothers and back at home with secondary caregivers as the biggest setback. He attributes parental imprisonment to a number of momentous drawbacks to children most notably feelings of loss, confusion, increase in poverty and trauma increased mental health problems and an increase in the risk of offending. According to Marlene⁷², it is evident that when persons are deprived liberty, fear creeps in due to lack of knowledge of what conditions one may face. Marlene further states that incarceration of mothers adversely affects children's lives and enjoyment of their right to parental care and survival, their health, their development and their psychological being. All these aspects are outlined in the internationally recognized human rights conventions.⁷³ Therefore, Kenya, a signatory to the CRC,⁷⁴ has a duty to protect the rights of all children accompanying their mothers in prison and also ensure that those left outside are adequately protected.

Jeremy Sarkin⁷⁵ reiterates that the aspect of incarceration as a punishment was unknown to Africans until the entry of Europeans. The local justice systems were victim centered and the main goal was compensating the victims rather than imprisoning the perpetrator. Sarkin however does not distinguish how women prisons evolved in Africa. He states, that the concept of

⁶⁹ Sanne Hissel, Catrien Bijleveld and Candace Kruttschnitt, 'The Well-Being of Children of Incarcerated Mothers: An Exploratory Study for the Netherlands' (2011) 8 *European Journal of Criminology* 346, 356.

⁷⁰ Hissel, Bijleveld and Kruttschnitt (n 69) 348.

⁷¹ Morgan and others (n 28).

⁷² Marlene Alejos, Rachel Brett and Jean Zermatten, *Babies and Small Children Residing in Prisons* (Quaker United Nations Office: Quno 2005)
<<http://www.quno.org/sites/default/files/resources/Babies%20and%20small%20children%20residing%20in%20prisons.pdf>> accessed 25 November 2015.

⁷³ Like the Convention on the Rights of Children; The African Charter on Human and Peoples Rights

⁷⁴ Ratified by Kenya on 26 January 1990.

⁷⁵ Jeremy Sarkin, 'Prisons in Africa: An Evaluation from a Human Rights Perspective' (2009) 9 *Sur International Human Rights Journal* 22.

imprisonment was a means by which the colonial masters would subjugate and punish those who resisted their authority. However, he conceives that most prisons in Africa with children are in deplorable conditions; a fact that has been ignored by policy makers.⁷⁶

According to Vitten,⁷⁷ rights of women in Africa are mostly considered as an afterthought and further highlights that African prisons do not have facilities that safeguard the special needs of pregnant and lactating mothers. In relation to the plight of children living in prison with their incarcerated mothers, little has been done to significantly address the challenges facing this category. This research examined ‘The *Childhood behind Bars: Growing up in Cambodia Prison Dara Story*⁷⁸ report which gives an account of the difficulties of raising a child in prison. This report highlights the development issues that are faced by children accompanying their mothers to prison and has been relevant in this study for comparative analysis of the experience in other jurisdictions. Mary K. Shilton⁷⁹ further outlines the guidelines and procedures to be followed to safeguard the rights of the children accompanying their mothers to prison. This paper significantly helps draw suitable recommendations for the identified gaps based on best practices.

Wolleswinkel states that forcible separation of children from their mothers may result to irreparable emotional and mental damage to children.⁸⁰ To compound this problem, accompanying their mothers to prison does not help either. This is due to prison conditions that are never friendly to the growth of children. He further alludes that many signatories to the CRC have not fully implemented the charter in the interest of the child. He goes ahead to state that focus must be shifted from the rights of offenders to that of offender’s young children with

⁷⁶Sarkin (n 75).

⁷⁷Lisa Vetten, ‘Imprisonment of Women in Africa (2005)’ <http://www.hsrcpress.ac.za/downloadpdf.php> Accessed 11 November 2015.

⁷⁸‘Report: Childhood Behind Bars - Growing up in a Cambodian Prison – Dara’s Story’ (LICADHO) <http://www.licadho-cambodia.org/collection/26/childhood_behind_bars_data> accessed 29 November 2015.

⁷⁹International Community Corrections Association and Maeve W McMahon (eds), *Assessment to Assistance: Programs for Women in Community Corrections* (American Correctional Association ; International Community Corrections Association 2000).

⁸⁰ Ria Wolleswinkel, ‘Children of Imprisoned Parents’ [2002] *Developmental and autonomy rights of children: empowering children, caregivers and communities* 191.

noncustodial sentencing measures as the only logical route to follow for non-dangerous women offenders.⁸¹

Oliver Robertson in analyzing the impact of parental imprisonment on children⁸² and how the law recognizes and protects these children⁸³ makes recommendations on what entails good practice of safeguarding the rights of children who accompany their mothers in prison. He makes reference to several international treaties protecting children rights. Further, he covers particular problems faced by women prisoners and children of imprisoned parents. It also outlines ways of solving these problems and addressing them by the government and policy makers. The report gives insight of the challenges these children are facing.

Deprivation of the right to parental care has various negative impacts on the wellbeing and growth of children. Some of these effects may be obvious such as abuse and neglect, while others may be cognitive requiring specialized attention to detect and address. According to Alejos, deprivation of liberty to mothers with care giving roles does not affect the rights of the mothers alone as guaranteed under the international and national legal framework. It affects the overall wellbeing of the concerned children. This is exacerbated by the fact that the interests of the caregivers and those of the children may be diverge. This aspect of divergence is compounded by the state of national legislations that rarely take into account this unique aspect. In addressing this problem of sentencing without the interests of children being considered, Alejos goes further to stress that any sentencing policy must be alive to the spirit of the CRC which ideally calls for the recognition of the following principles

- i) That separation of a child from parents must be discouraged unless it is totally inevitable or done to protect the child;
- ii) That a children possess the inherent right to parental care from both parents;
- iii) the state has a duty to protect and care for children who are vulnerable;
- iv) The non reducible right to have their interests considered in all decisions and treated as paramount.

⁸¹ Wolleswinkel (n 80).

⁸² Oliver Robertson, *The Impact of Parental Imprisonment on Children* (Quaker United Nations Office Geneva 2007) <http://penal-reform-azerbaijan.org/_ld/3/320_Impact_of_paren.pdf> accessed 25 November 2015.

⁸³ Oliver Robertson, 'Children of Incarcerated Parents' <http://www.quno.org/sites/default/files/resources/ENGLISH_Collateral%20Convicts_Recommendations%20and%20good%20practice.pdf> accessed 28 November 2015.

Alejos concludes by suggesting that national sentencing policies should be crafted specifically to accommodate the rights and welfare of children to benefit from non-custodial sentencing as a matter of right with an exception only in extreme cases. Further, she suggests that policies should reflect as contained in international instruments such as recognition, best interest of the child, the right of the child to life, growth and inclusion among others.⁸⁴ Although the justice process strips parents especially women offenders of their powers to control the mode of raising young children in the advent of imprisonment, it does not take away the doctrine of the ‘best interest and balancing’ during decision making.⁸⁵ Mechanisms should be put in place to ascertain the magnitude of affecting children before implementation.

1.9.3 Conclusion

Protection of children therefore begins by recognizing children as right holders and the implementation of the best interest principle whenever children are at risk of neglect, abuse or deprivation. Drafters of the “best interest” principle envisaged a situation whereby this would have been followed to letter with minimal noncompliance. The major problem however in interpreting the doctrine of the best interest of the child in any context is the threshold. Mnookin,⁸⁶ as quoted by Skivenes⁸⁷ states that the biggest flaw in the doctrine is the fact that what may be referred to as an act in the best for any child or even children in overall is often uncertain and hypothetical and usually may need adapted choice amongst alternatives. Despite the elaborate provisions in the convention on consideration of the best interest of the child, it is however not clear how municipal courts are required to implement the same when faced with proceedings touching on sentencing of primary caregivers. The most important element for sentencing courts to consider is the fact whether an accused person is a primary caregiver and whether reasonable measures have been put in place to identify a suitable caregiver.

⁸⁴ Alejos, Brett and Zermatten (n 72) 33.

⁸⁵ Katherine Gabel and Denise Johnston, *Children of Incarcerated Parents* (Lexington Books 1995).

⁸⁶ Mnookin, R. H. and Szwed, E. (1983) 'The Best Interest Syndrome as the Allocation of Power in Child Care', in H. Geach and E. Szwed (eds) *Providing Civil Justice for the Child*, pp. 7-20. London: Edward Arnold.

⁸⁷ M Skivenes, 'Judging the Child's Best Interests: Rational Reasoning or Subjective Presumptions?' (2010) 53 *Acta Sociologica* 339, 3.

1.10 Chapter Breakdown:

1.10.1 Chapter One

Under chapter one, the general overview of the study is covered. It covers the statement of the research problem, theoretical framework within which the research is carried out and the research justification. It also covers the objective of the research, research questions, hypotheses, the methodology applied, ethical considerations, limitations of the study as well as the literature review.

1.10.2 Chapter Two

Chapter two examines and provides an in depth understanding of international regulatory framework including conventions, protocols and case law touching on modalities of safeguarding the rights of children during sentencing of primary caregivers. This chapter aims to answer the research question on the attempts factors considered by courts when sentencing primary caregivers and in particular when awarding custodial sentencing.

1.10.3 Chapter Three

This chapter examines the existing regulatory framework in Kenya; most notably the Children's Act, Sentencing policy and guidelines touching on the welfare of children. Further, it seeks to analyze the adequacy of protection measures put in place for the implementation of child friendly sentencing practices as guaranteed under the Act and examine what guides courts in determining the suitable sentences for primary caregivers. The analysis is done in reference to the existing international standards as discussed under Chapter two and further through analysis of decided cases.

1.10.4 Chapter Four

This chapter examines the sentencing practice in Kenya for primary caregivers with emphasize on Lang'ata, Shimo la Tewa and Eldoret maximum security women prison facilities. Further, it undertakes a broad analysis of the actual situation on ground through scheduled interviews with selected female prison facilities and key players in the criminal justice system. In trying to establish measures put in place and what normally happens during trial of primary caregivers, this chapter will also capture results from study areas identified earlier. This chapter also includes views from participating children with imprisoned caregivers. Local case laws focused

on sentencing of primary caregivers have also been analyzed under this chapter to corroborate the feedback given by the respondents. This chapter concludes by highlighting the glaring disparities that exist when sentencing primary caregivers in Kenya.

1.10.5 Chapter Five

This chapter discusses the findings from the comparative analysis and field study. It compares the current practice in Kenya with best practice in the selected jurisdictions with an aim to identify the shortfalls therein. This chapter further concludes based on the results obtained on whether the following aspects are considered when sentencing primary caregivers-

- i) Whether courts acquire information about dependent children before passing sentence;
- ii) Whether non-custodial sentencing is considered by default as an act to the best interest of the child;
- iii) Whether primary caregivers are availed time before custodial sentencing to select suitable alternative caregivers.

Lastly, based on the findings, analysis and conclusions, this chapter proposes workable recommendations so as to ensure that the non-custodial sentencing of primary caregivers is by default interpreted by courts and prosecution as an action in the best interest of the child. It further makes particular recommendations to key criminal justice actors with the responsibility of making decisions about children. These include police, prosecution department, judiciary and the prisons.

CHAPTER TWO

2.0 INTERNATIONAL AND REGIONAL REGULATORY FRAMEWORK AND PRACTICE IN THE PROTECTION OF CHILDREN RIGHTS DURING SENTENCING

2.1 Introduction

The impact made by international and human rights law in supporting child rights is undeniably of incalculable significance. Ratification of the CRC globally and other key treaties and protocols signifies their importance as global treaties of major significance. Enactment and ratification of these instruments was solely geared towards realization of practical rights-oriented consciousness among key players dealing with legal difficulties affecting children on a day-to-day basis. With these instruments in place, it is easier for domestic courts to rationalize their decisions on matters affecting children by reference to children's rights and to draw on both these treaties to corroborate such an approach. As such, practitioners and courts in making decisions on sentencing of primary caregivers have an obligation not only to consider children's rights based on national laws, but also to recognize international instruments as core guiding principles when analyzing standards to be set under domestic law.

This chapter examines and provides an in depth understanding of international regulatory framework and precedents touching on modalities of safeguarding the rights of children during sentencing of primary caregivers. Basically, this chapter aims to answer the research question on the factors considered by courts when sentencing primary caregivers and in particular when awarding custodial sentencing.

Further under this chapter, best practices pegged on the provisions of the international legal framework which operates to the best interest of the child have been analyzed in an attempt to establish how other jurisdictions have domesticated the principle of best interest while sentencing primary caregivers. This chapter demonstrates how courts in various jurisdictions have relied on provisions of article 3 of CRC and article 30 of ACRWC to lay down specific procedures to be followed by sentencing courts whenever faced with the dilemma of balancing the interests of the society at large and then narrowing down to protect the rights and welfare of the child concerned. The chapter demonstrates how sentencing courts can rely on international legal platform to mitigate on the sentencing gaps which lead to neglect of dependent children.

2.2 United Nations Convention on the Rights of the Child (UNCRC) 1989 and the European Convention on Human Rights (ECHR) 1950

The UNCRC has been heralded by its proponents including a variety of international and non-governmental organizations as one of the greatest breakthroughs in the quest to protect and promote children's rights. The wide ratification⁸⁸ of this CRC has undoubtedly served as a tool for state parties to improve the welfare of children. Relatively little attention, however, has focused on the prospects for legal enforcement of the norms set forth in the Convention. The Convention is, after all, a legal document that purports to set binding standards for ratifying states.⁸⁹ Both the UNCRC and ECHR and subsequent implementation protocols thereto enumerate rights relating to every aspect of a child's life. These include rights to wellbeing and development, protection, and participation. Upon ratification, a member state is required under law to comply with its principles and standards. However, to date significant implementation of these provisions has not been effected most notably in countries with no elaborate child protection programs leading to violation of children rights.⁹⁰

The core principle under the CRC which has widely been referred to as the '*human rights*' for children is to be laid down in Article 3(1) to the effect that "*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*" The convention further provides that children regardless of the status of their parents have rights to family life⁹¹ and the right to benefit from the guidance of both parents whenever possible,⁹² including the right to be cared for by parents.

In relation to separation from parents, the convention envisaged situation whereby this is done to the best interest of the child involved. However, it acknowledges instances where separation may occur against the doctrine of the best interest to the child. This includes imprisonment of a parent.⁹³ Under such, an affected child must be informed effectively of the parent's whereabouts and that the right of the child to communicate with the mother must be upheld unless it is

⁸⁸ Kenya ratified the Convention in 1990, as the 20th member state to do so.

⁸⁹ Balton (n 5).

⁹⁰ Lansdown, Waterston and Baum (n 22).

⁹¹ Article 16.

⁹² Articles 5 and 14 as read together with Articles 7 and 8.

⁹³ Article 9.

harmful to the child.⁹⁴ When courts are in the process of sentencing primary caregivers, any sentence which may affect the child must be done in reference to the best interests of children affected. In essence, the balancing of all other interest must not be to the detriment of the child's welfare.

In ascertaining whether one is a caregiver, courts have to enquire where it appears that the information before it is not sufficient. The steps to be followed have been laid down in several foreign decisions whose reasoning seals the gaps leading to abuse of child rights including Kenya. In **ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)**⁹⁵ the Supreme Court in England stressed on considering best interest of the child in line with Article 3 of the CRC. In the matter which involved deportation of a mother to young children without due regard to the rights and welfare of the children, Lady Justice Hale in relation to separation through detention stated thus-

*'...This seems to me accurately to distinguish between decisions which directly affect the child's upbringing, such as the parent or other person with whom she is to live, and decisions which may affect her more indirectly, such as decisions about where one or both of her parents are to live. Article 9 of UNCRC, for example, draws a distinction between the compulsory separation of a child from her parents, which must be necessary in her best interests, and the separation of a parent from his child, for example, by detention, imprisonment, exile, deportation or even death'*⁹⁶.

Thus, this decision clearly points out that courts in making decisions touching on sentencing of primary caregivers, ought to be guided by what is best to the child as laid down under the CRC and where applicable ECHR which is used in this study for comparative analysis. In a nutshell non-custodial sentencing of primary caregivers ought to be viewed by the sentencing courts as an act in the best interest of the child.

ECHR has contributed immensely on its part towards advocating and realization of human-rights and in particular the rights of children with primary caregivers facing the possibility of custodial sentencing. Under Article 8, ECHR reiterates the right to both personal and family life. Article 8 (2) goes further to state that any limitation or curtailment of this right with the potential impact

⁹⁴ Marshall (n 1).

⁹⁵ [2011] UKSC 4,

⁹⁶ *Ibid*, at paragraph 25.

of forcible separation of a child from a primary caregiver as a result of imprisonment must be lawful and child friendly. These include interests of security or the economic soundness, prevention of disorder or crime and protection of others.⁹⁷ This calls upon courts to balance on the seriousness of the offence against the rights guaranteed under Article 8 therein.

The discretion of courts balancing between the seriousness of the offence committed against the rights of the child was emphasized in **R Vs Secretary of State for the Home Department**.⁹⁸

This matter involved the forcible separation of parents from their children based on prison rule barring children above 18 months from occupying mother and baby unit. In upholding the best interest of the child, Lord Phillips, Master of Rolls stated thus ‘... *If the passing of a custodial sentence involves the separation of a mother from her very young child (or, indeed, from any of her children) the sentencing court is bound ... to carry out the balancing exercise ... before deciding that the seriousness of the offence justifies the separation of mother and child. If the court does not have sufficient information about the likely consequences of the compulsory separation, it must, in compliance with its obligations under the requirements for a fair trial, ask for more*’⁹⁹

In **R Vs Bishop**¹⁰⁰, the appellant (Bishop) was accused of several counts of burglary and dangerous driving. The accused person who had previous charges and was a primary caregiver to five children aged below 13 years was sentenced to serve 4 months' imprisonment for the burglary and 4 months consecutively for the dangerous driving. In passing the sentence, the judge observed that the appellant had failed previously to comply with community penalties in the past resultantly imposing the consecutive sentences referred to earlier. He appealed against sentence.

The principle ground of appeal was failure by the trial court to consider the predicament of the other children aged between five and thirteen years to whom he was a primary caregiver. Appellate justices Madison, J and Sweeney, J in entertaining the appeal identified the following issues for determination-

⁹⁷ See Article 8(2).

⁹⁸ [2001] EWCA Civil 1151.

⁹⁹ Ibid. paragraph 79.

¹⁰⁰ [2011] EWCA Crim 1446

- i) Whether the seriousness of the offence or offences justifies the separation of child and care giver after balancing carefully;
- ii) Whether the court had adequate information for the balancing exercise, and
- iii) Whether the trial court should have sought for more information regarding the status of the accused in relation to care giving.

In rendering their judgment, it was observed that imprisonment was in order due to appellant's antecedents. Therefore the fact that he was a primary caregiver could not be used as an excuse to commit crimes with impunity.

In determination, the judges relied on the principles laid in the aforementioned cases of **R v Mills** and **R v Secretary of State for the Home Department** where it was categorically stated that a sentencing court, in line with Article 8 of the ECHR, ought to have in mind the cost for children should their primary caregiver be imprisoned and consider whether the seriousness of the offence committed justifies separation. Further, it was stated that if the trial court has unsatisfactory information to enable it to carry out the balancing exercise, then it must ask for more information. The appellate court observed that these factors were not sufficiently considered by the trial court hence the four month sentences, unobjectionable as to their lengths, should have been suspended.

In conclusion, the appellate court held that considering the plight and aware of the extremely unacceptable and complex circumstances faced by dependent children in alternative care situations. Consequently, the appeal to suspend for a period of 2 years the consecutive sentences which were pronounced by the judge was allowed.

In consideration of the aforementioned principles, the balancing exercise nevertheless must be done judiciously to avoid practical difficulties which may arise due to unguided balancing of rights. In **S v Banda and Others**,¹⁰¹ Justice Friedman analyzed some of the difficulties by stating that any trial (in reference to the triad case) contains symmetry and a pressure. Whereby, trial court coming up with a sentence ought to accomplish and arrive at a judicious balance between in order to ensure that there is balance. The court must at its best try to consider

¹⁰¹ [1991] (2) SA 352 (B).

circumstances of the offence, the individuality of the offender, contributing factors and the impact of the crime on the community and affected children.¹⁰²

The precedents analyzed under this section offer guidance on how Article 3 of CRC has been interpreted by courts to ensure that children whose mothers are about to serve jail terms can be made visible to law and process. The ECHR though not applicable in Kenya offers a vital guidance towards binding courts on how to treat primary caregivers while on trial. Most significantly the court in **Mills** and **R v Secretary of State for the Home Department**, as analyzed above relies on it to set vital threshold to be met by courts while dealing with caregivers.

2.3 Geneva Declaration on Rights of the Child (1959) and the Universal Declaration of Human Rights (UDHR) 1948

Both Geneva Declaration on the Rights of the Child (1959) and the Universal Declaration of Human Rights (UDHR) 1948 complement CRC to the effect that children possess rights and should benefit from legislative framework aimed towards advancing their rights and welfare. Geneva declaration¹⁰³ formed the basis for the CRC. It commences by cognition that children by virtue of their underdevelopment require exceptional care including legal safety, at all stages and that the mankind owes to the child the best it can give.¹⁰⁴

Children whose freedom and right to parental care is in danger of infringement, the treaty entitles the child to special protection to enable her grow and develop in a health and normal manner and in conditions ensuring self-determination and respect. It further urges member states to consider the doctrine of the best interest to the child whenever enacting laws aimed towards implementing this declaration.¹⁰⁵

Under UDHR, Article I therein spells out the general understanding thus human beings are by virtue of them being human beings free rights and dignity. Thus all human beings are entitled to human rights and it is upon the states to ensure that these rights are guaranteed especially to the disadvantaged members who include women and children.

¹⁰² Ibid at paragraph 355 A-C.

¹⁰³ Proclaimed by General Assembly on 20th November 1959 vide Resolution 1386 (XIV).

¹⁰⁴ See the Preamble to the Geneva Declaration of the Rights of the Child.

¹⁰⁵ Article 2.

The drafters of UDHR categorically singled out children and motherhood as special cases which must be accorded special treatment whenever matters touching on their welfare are determined. It states that mothers and babies require special care and assistance. Further, UDHR gives all children equal security under the law to eradicate discrimination.¹⁰⁶ Both the Geneva Convention and the UDHR therefore operate to advance the best interest principle that whenever sentencing primary caregivers, the welfare of the child and wellbeing must be considered first. This brings into play the balancing aspect between the gravity of the charge and the risks of separating a child from parental care.

2.4 The 1990 African Charter on the Rights and Welfare of the Child (ACRWC)

The ACRWC¹⁰⁷ was adopted by the Organization of African Unity (OAU) currently the African Union (AU) on 11th July 1990 and came into force in 1999; a year later after the adoption of the CRC and was ratified by Kenya in July, 2000. According to the African Committee of Experts on the Rights and Welfare of the Child (ACRWC)¹⁰⁸, the major reason for the adoption of a separate charter on the rights of the African child was due to the fact that Africa as a continent was under-represented during the negotiation and drafting of the CRC. Further, it was deemed necessary to draft a charter though borrowing from the CRC, which also factored in practices and attitudes within the continent which tend to disadvantage children and alive to the difficult socioeconomic factors characterizing the African continent.¹⁰⁹

Under Article 30, the charter explicitly calls for special treatment of pregnant mothers and those with small children whenever they are in conflict with the law. Section 30 goes further to state in particular that parties to the charter must-

- i) ensure consideration of out of prison sentence as a matter of priority to care giving mothers;

¹⁰⁶ Article 25(2).

¹⁰⁷ OAU, 'African Charter on the Rights and Welfare of the Child (Adopted by the Twenty-Six Session of the Assembly of Heads of State & Governments of the OAU-July, 1990, ADDIS ABABA).' <<http://www.acerwc.org/>> accessed 25 April 2017.

¹⁰⁸ 'ACRWC – African Committee of Experts on the Rights and Welfare of the Child' <<http://www.acerwc.org/>> accessed 25 April 2017.

¹⁰⁹ See UNICRIIT. (www.Unitedunicriit/wwd/trafficking/minors/legal_africa.php, accessed on 11 September 2016)

- ii) establish and make use of non custodial measures for such mothers in conflict with the law;
- iii) put in place friendly alternative facilities for mothers with babies;
- iv) ensure best interest of the child must always be paramount;
- v) ensure cruel and degrading punishment such as death sentence shall not be imposed care giving mothers;
- vi) Ensure that family reintegration is central to the core functions of the of the penitentiary system.¹¹⁰

According to the African Committee on the Rights and Welfare of the Child, Article 30 was brought forth by the fact that children of imprisoned caregivers have often been exposed to dangers and violation of their basic rights which could have otherwise been avoided through non-custodial sentencing measures.¹¹¹ It applies when primary caregivers are in conflict with the law and encompasses all stages of criminal trial right from arrest to imprisonment.

Interpretation of Article 30 thus implies state parties should review their respective sentencing policies accordingly so as ensure that all sentencing courts-

- i) Should establish whether a convict is a primary caregiver before proceeding with the trial;
- ii) Should assess the effect on the children concerned of a prison term if such a sentence is the most preferable one: in this case, court must establish whether it is necessary to ensure that the concerned children have alternative care givers before sentencing
- iii) Should treat the best interest principle as paramount.

The African Committee of Experts in supporting the doctrine of balancing interests states that Article 30 does not in any way attempt to cushion or otherwise indemnify primary caregivers from accountability or evading justice.¹¹² Thus, treating children's interests as paramount does

¹¹⁰ See Article 30.

¹¹¹ General Comment No. 1 (Article 30 of the African Charter on the Rights and Welfare of the Child) On: "Children of Incarcerated and Imprisoned Parents and Primary Caregivers" ACERWC/GC/01 (2013), Adopted by the Committee at its Twenty-Second Ordinary Session (04 - 08 November, 2013)

¹¹² 'ACERWC – African Committee of Experts on the Rights and Welfare of the Child' (n 108).

not imply that caregivers cannot be incarcerated. The balancing of rights of children must affect negatively the purpose of criminal justice system to the disadvantage of the society as well as the interests of children, who are beneficiaries of a peaceful community. Balancing must be done in a sober manner so as to ensure children are protected from harmful actions which may negatively affect them.

2.5 United Nations Rules for the Treatment of Women Prisoners and Non- custodial Measures for Women Offenders (Bangkok Rules), 2010

Bangkok Rules¹¹³ constituted a significant milestone in identifying the gender- specific needs of women involved in the criminal justice system, more importantly the primary caregivers. They cover the treatment of women prisoners and alternatives to imprisonment by incorporating gender- sensitive non- custodial measures and sanctions of gender- specific circumstances in sentencing as well as threshold relating to conditions of prison facilities.¹¹⁴

The Rules give directions on gender sensitive alternatives for both pre-trial detention and sentencing post-conviction. They recognize that prison is usually an ineffectual solution to treating women offenders and oftentimes hinder their social reintegration and ability to offer parental guidance to their dependent children.

In relation to recognition and protection of children rights, the Rules in concurrence with all other relevant international instruments have put in place several measures to this effect. Under rule 2 dealing with admission, admission procedures for women and children must be handled sensitively due to their particular vulnerability during entry. Further, the rule requires that prior to admission; caregivers must be allowed to identify suitable caregivers for their children. This includes where need be imposition of suspended sentences in order to safeguard the children concerned.¹¹⁵

Expectant and lactating mothers in prison are accorded special recognition under the rules. Their rights to health, nutrition and privacy are guaranteed. The rules stipulate that the environment provided for children in prison with their mothers need to be as close as possible to that of a

¹¹³ Adopted by UN General Assembly vide Resolution 65/229 of 12 December 2010.

¹¹⁴ See the Preamble to the Bangkok Rules.

¹¹⁵ See Rule 2(1), (2).

child in a family as possible.¹¹⁶ Sentencing for pregnant and mothers with care giving responsibilities under the rules calls out of prison sentence unless the offence is serious or violent or where the caregiver represents a continuing danger and after taking into account the best interest of the child.¹¹⁷

2.6 United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) and United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) 1990

Standard Minimum Rules for Treatment of Prisoners (SMRs) adopted by the UN General assembly in August 1955¹¹⁸ entered into force July 1957. In recognition of the struggle for a better world and fight against apartheid and democracy peace by Nelson M. Mandela¹¹⁹, the United Nation's Economic and Social Council recommended to the General Assembly the adoption draft resolutions among them which included the adoption of the name Mandela Rules from standard minimum rules.¹²⁰ The Rules provide guidelines to all state parties in treating persons held in custody so as to adhere to the recognized international human rights, most importantly for vulnerable categories such as women and children.

The rules recognize children as right holders who should be accounted for whenever a parent is incarcerated. Under rule 7 dealing with prisoner file management, a convict's file should indicate names of family members, including, where applicable, children details and status.¹²¹ Thus, before sentencing the rules anticipates that necessary arrangements should be put in place to cater for the welfare of dependent children who may be affected by imprisonment.

Mandela Rules just like all other international instruments discussed in this paper advocate for the interest of the child whenever the rights of children with imprisoned caregivers are at a risk of abuse or violation. Further, the rules require that children residing in prison with their parents should be respected and never at any time be treated as inmates.¹²²

¹¹⁶ Rules 48, 49, 50 and 52 of the Bangkok Rules.

¹¹⁷ Rule 64.

¹¹⁸ Economic and Social Council resolution 1984/47.

¹¹⁹ Nelson Mandela (1918-2013) was a South African global advocate for human rights, Anti-apartheid revolutionary and political figure who served as President of South Africa from 1994 to 1999.

¹²⁰ Resolution 2015/20 of the Economic and Social Council.

¹²¹ Rule 7(f).

¹²² Rule 29.

The Tokyo Rules¹²³ puts in place a set of principles for non-custodial measures as well as minimum safeguards for persons subject to alternatives to imprisonment. Under the Tokyo rules, there is no direct reference to women or children rights. Instead, they address the rights of accused persons in generality. However, the provisions directly deal with the rights of primary caregivers who are in conflict with the law. Under rule 6, pre-trial detention is to be utilized as a means of last resort. Under rule 8, the charter explores various modes of non-custodial measures available to the judiciary and police whenever required to make a decision. These include sanctions, conditional discharge, penalties, embargos and fines and community service orders among others.

2.7 UN Guidelines for the Alternative Care of Children

In an attempt to protect the rights of children whenever there is a possibility of separation from caregivers, and in line with the above discussed conventions and instruments, the UN adopted the Guidelines for the Alternative Care of Children.¹²⁴ The Guidelines were put in place for policy and directions with to enhance the implementation of the CRC and other related instruments on protection of children deprived of parental care. The guidelines are designed to guide policies, decisions and activities of all agencies concerned with decision making involving children and the possible separation from their caregivers.¹²⁵

In making decisions over alternative care, the guidelines requires maintaining the lifestyle of the affected child as close as possible to that of a family setup and minimize disrupting the child's normal life. Sentencing courts under these guidelines are under an obligation to ensure that separation must be the final consideration and it is done in a manner to facilitate contact and reintegration.

¹²³ Adopted by the General Assembly on 14 December 1990.

¹²⁴ Resolution adopted by the General Assembly [*on the report of the Third Committee (A/64/434)*] 24 February 2010.

¹²⁵ UN General Assembly, 'Guidelines for the Alternative Care of Children: Resolution 64/142 Adopted by the General Assembly on 18 December 2007' (2008) 13 Sixty-fourth Session 14.

2.8 Best Practice Sampling in Protecting Child Rights during Sentencing of Primary Caregivers-

One of the most relevant requirement in ensuring that the rights of children are treated as paramount during sentencing is to be found under the Bangkok Rules. Rule 64 therein as discussed earlier states that non-custodial sentences for women with dependent children should always be considered whenever possible with custodial sentences reserved for serious offences. This is further qualified by Article 30 of the ACRWC which requires that custodial sentencing of primary caregivers can only be used after exploring all other options.

To put these provisions into action in UK (England and Wales), the Advisory Panel on Sentencing in 2009 advised the sentencing guidelines council on the recognition that many women offenders are exposed hence sentencing them under a male dominated sentencing policy may sometimes be detrimental to them and their dependent children.¹²⁶ The panel recommended for statutory requirement of not imposing custodial sentence on primary caregivers unless the offence is so serious that neither a fine alone nor a community sentence can be justified. It was further recommended that any trial court before sentencing a primary caregiver to imprisonment should obtain a pre-sentence and preferably grant bail to the accused so as to limit separation with dependent children.

Under the Netherlands jurisdiction, implementation of the best interest principle is demonstrated during sentencing and even after. Primary caregivers are given adequate time after conviction before sentencing to identify suitable alternative care givers for their dependent children not accompanying them to prison.¹²⁷ Those accorded custodial sentences are housed in separate self-care units to enhance independence and privacy for the wellbeing of the children.

In Italy, Rule 64 of the Bangkok Rules is implemented by ensuring that expectant mothers together with primary caregivers to children below the age of six years cannot be placed in pre-trial detention other than in extraordinary situations, alternatively they are placed under home detention or specially designed assuaged custodial facilities.

¹²⁶ Sentencing Advisory Panel (2009) Advice to the Sentencing Council - Overarching principles of sentencing SAP: London.www.banksr.co.uk/images/Guidelines/Advisory%20Panel%20Advice%20to%20the%20Council/Overarching_principles_of_sentencing.pdf

¹²⁷ Rachel (n 45).

In South Africa, the 1996 Constitution regards a child's best interest as of paramount importance in all decisions touching on the child.¹²⁸ Section 28 of the constitution affords the much needed protection for children while recognizing their vulnerability to abuse. This additional protection compliments all the other rights as may be provided for under the Bill of Rights in the Constitution and all other protocols connected to welfare of children.¹²⁹ The understanding is thus the interests of the child whenever there is a conflict ought to override all other lawful interests including those of the community, state and the parents.¹³⁰ Courts have considered the rights of children seriously before sentencing primary care givers. In the celebrated case of **S v M**¹³¹, the constitutional court of SA emphasized that a child's best interest must be considered at all material times whenever a decision is to be made. The court further stated that specific consideration must be given to the best interests of the child whenever sentencing a primary caregiver. To ensure compliance, the court stated that trial courts must-

- i) Establish whether a convicted mother has a care giving role, if so whether solo or not;
- ii) Ascertain the impact on affected children by custodial sentence whenever applicable. Further, the court must ascertain whether the children involved have been availed a suitable alternative caregiver;
- iii) Ensure that the interest of any children is considered whether the sentence is custodial or not, and
- iv) Adopt the 'paramount' principle in relation to the best interest of the child as the guiding principle in arriving at the appropriate sentence where there are options.

2.9 Conclusion

This chapter has demonstrated that there is sufficient regulatory framework to ensure that child interests are protected whenever a primary caregiver is sentenced. The general understanding across jurisdictions is thus sentencing of primary caregivers must be done through careful balancing of the rights and interests of the affected child on one hand and the severity of the offence committed on the other. From the cases analyzed however, it is evident that the aspect of

¹²⁸ Section 28(2) of the Constitution of Republic of South Africa, 1996.

¹²⁹ Magnus Killander (ed), *International Law and Domestic Human Rights Litigation in Africa* (Pretoria University Law Press (PULP) 2010) 174.

¹³⁰ This principle was elaborated also in the matter of *Jooste v Botha* 2000 (2) SA 199.

¹³¹ Constitutional court of SA, CCT 53/06 [2007] ZACC 18.

being a primary caregiver should not be used as an excuse to commit crime and avoid punishment. Evidently, the diversity of approach in sentencing of primary caregivers as analyzed in this chapter has led to abuse of the rights and welfare of children affected.

The chapter has also demonstrated that whenever courts in different jurisdictions are guided by the principles laid down under the CRC and where applicable the ECHR, there is uniformity in the verdicts given. Most notably is the fact that the rights of affected children have been recognized and upheld, though in some instances upon appeal. Courts have laid down threshold to be followed in establishing status of convicted mothers and identified measures to be put in place to ensure safety of children. This leads to the conclusion that with strict adherence to the principles of the CRC and the ACRWC, primary caregivers can benefit from non custodial sentences in the interest of the affected child. Thus Kenya being a signatory to most of the discussed conventions can borrow from highlighted best practices and enhance the welfare of children with imprisoned mothers.

CHAPTER THREE

3.0 NATIONAL REGULATORY FRAMEWORK ON PROTECTING THE RIGHTS OF THE CHILD WHILE SENTENCING PRIMARY CAREGIVERS-

3.1 Introduction

This chapter focuses primarily on the rights of dependent children during sentencing of primary caregivers as guaranteed under international regulatory framework and how Kenya as a signatory to most of the international conventions and protocols has domesticated the same. The major focus is on the 2010 Constitution and the Children's Act, 2001 together with other relevant protocols and policies on the protection of the rights of the children in need of care and protection. In order to ascertain the direction Kenya as a country is taking towards recognition of children rights since independence, a comparison is done by first analyzing child protection mechanisms envisaged under the two major constitutional reforms in Kenya, to wit the 1969 draft and then the current constitution, 2010. Further, comparison shall be made on the repealed Children's Act and the current Children's Act 2001 assessing the modalities put in place to recognize and protect the rights of children during sentencing of primary caregivers. This is necessitated by the need to gauge the level of compliance to international regulatory framework as demonstrated through adoption and ratification of treaties and conventions.

In a detailed comparison with international regulatory framework, this chapter analyses how sentencing courts in Kenya interpret the principle of the best interest of the child while sentencing primary caregivers and whether non-custodial sentencing is considered to be an act in the best interest of the child involved.

3.2 Post Independence Constitutional Disposition

Under the repealed Constitution of Kenya¹³², protection of rights of accused persons is discussed in broad terms relating to the timeframes set before one is arraigned in court. These timelines depend on nature and seriousness of the offence committed. There were no specific provisions relating to special categories including primary caregivers in conflict with the law or juveniles.

¹³² Constitution of Kenya (repealed) (2001), repealed subject to conditions set out under Article 264 of the Constitution of Kenya, 2010.

Chapter V on the protection of fundamental rights and freedoms of the individual had been put in place for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection put in place to ensure that the enjoyment of those rights and freedoms by any individual did not affect or prejudice the rights and freedoms of others or interfere with public interests.

Under the previous constitutional dispensations, recognition of international regulatory framework including treaties and conventions was not specifically provided for. Further, there was no specific reference to the welfare of children and particularly considerations based on the principle of best interest of children.

Section 27 on prerogative of mercy under this constitution was the closest attempt to have the rights of special categories like primary caregivers considered but by the president and the prerogative of mercy advisory committee. This section was designed to empower the president to interfere with sentences awarded by courts through either

- i) conditional or unconditional pardoning of convicts;
- ii) granting respite to convicted person on the carrying out of a sentence imposed;
- iii) substituting for lesser severe punishment on an accused person, and
- iv) Remitting the entire or portion of a punishment imposed on a person.

Under these discretionary powers vested to the president, the rights of children during sentencing of primary caregivers though not directly enshrined under the defunct constitution could have exercised through child-friendly policy formulation envisaging substituted sentences for primary caregivers. As such, the prerogative of mercy committee could have been the deriving source of sentencing guidelines for special categories. In order to achieve respect for rights and primary freedoms and in particular safeguarding the rights of children during sentencing, all sentences imposed to caregivers must reflect the special needs of children and to their best interests.

3.3 Constitution of Kenya, 2010

The Constitution of Kenya 2010 has been echoed widely as progressive and with one of the most elaborate and inclusive Bill of rights. Under Article 10 (2) therein, rule of law, human dignity, human rights, equity and social justice are identified among national values and principles of governance that bind all State officers. In enforcing the rights of children during sentencing,

judicial officers are required to observe these values and exercise discretion with consistency and without any influence. Article 161 further guarantees independence of the judiciary which is subjected to the Constitution. In exercising their judicial functions, judicial officers under Article 73 are required to apply their authority in a manner that brings decorum to the office and promotes public assurance in the reliability of the office. Sentencing, which is a function of the judiciary, must be done consistently and in reference to international instruments and constitutional safeguards to ensure uniformity enhancement of public confidence in the judiciary.

This Constitution unlike the past drafts encompasses the rights of children by specifically adopting the principle of the best interest to the child. It stipulates that general rules of international law form part of the law of Kenya and more clearly that any treaty or convention ratified by Kenya forms part of the law of Kenya under the Constitution.¹³³ As such, the provisions of CRC and the ACRWC among other key declarations have their place under the Kenyan law and state parties are obligated to reflect the principles therein in their municipal laws. Under Article 53 of the Constitution, rights of children to protection from abuse and hazardous environment are recognized. The constitution further recognizes the right to parental guidance and care from both parents and the universal doctrine of best interest of the child; in line with the provision of international instruments discussed under this chapter.

The Constitution under Article 53(f) (i) further in enhancing the best interest principle stipulates that any child in conflict with the law should not be held unless it is a measure of last remedy having exploited all other avenues. In the event of detainment, a child must be detained for the shortest time possible and separately from adults and in environment that take account of the child's gender and age. This places the child's interest as paramount whenever considering other competing interests.

3.4 The Children's Act, 2001

The Children's Act was enacted in December, 2001 and came into force on 1st March, 2002 to effectively repeal the Children and Young Persons Act, Adoption Act and the Guardianship of Infants Act¹³⁴. Its purpose is to among other aspects make provision for parental responsibility,

¹³³ As provided under Article 2(5) of the Constitution of Kenya 2010.

¹³⁴ Chapters 141, 143 and 144 (Laws of Kenya) respectively.

fostering, adoption, custody, maintenance, guardianship, care and protection of children. More importantly, the introductory part to the Act states that it was enacted to implement the principles of the CRC and the ACRWC. Thus it can be asserted that the Act was an attempt in compliance with the requirement of international instruments to domesticate the aforementioned Conventions.

Under section 4, the Act adopts the principle of the best interest of the child and emphasizes that the interest of the child to be paramount whenever a decision concerning the welfare of a child is made. Right to parental care is recognized under the Act by stating that a child has a right to live with and to be taken care of by the parents. Where it appears that separation is inevitable, the Act requires that the best alternative care available is to be provided for the child.¹³⁵ This study examines how this requirement is implemented in practice; whether one has dependent children and whether before separation due to custodial sentencing one has been availed enough time to make necessary arrangements for alternative care giving. In relation to enforcement of these rights, the Act empowers any person to institute proceedings for redress whenever it is deemed that there is infringement or violation of the rights.¹³⁶

The Act establishes the National Council for Children's Services (NCCS)¹³⁷ for general supervision and management of child activities and to advise the State on all aspects related to children. In executing its mandate, the NCCS coordinates with the ministry responsible for children services and key stakeholders. The NCCS however has not been vocal in addressing the quagmire posed by custodial sentencing primary caregivers even in instances where non-custodial remedial would have been more appropriate.

3.5 The National Children Policy Kenya (2010), National Plan of Action for Children in Kenya, 2015 – 2022 and Good Practice in Child Care: A Manual for Caregivers, Kenya, 2011

The aforementioned national policies came in place to complement Children's Act and make the rights of children in Kenya more visible. The National Children Policy (NCP)¹³⁸ recognizes children as a special category in need of special protection. Under the preamble, the policy

¹³⁵ See section 6.

¹³⁶ Section 22.

¹³⁷ Section 30 (1).

¹³⁸ The NCC, 'National Children Policy Kenya' (2010) <www.nccs.go.ke> accessed 27 April 2017.

guarantees protection to ensure that these rights are protected and advanced so that children in Kenya have a chance of realizing their full potential by growing in a safe and stable environment.¹³⁹ The major aim of the policy is thus to uphold the best interest of the child in all circumstances. In relation to caregivers, the policy advocates for quality care, nurture and protection against any dangers posed by those entrusted with their care. This calls for the need to ensure that primary caregivers are accorded enough time to identify and orient prospective secondary caregivers.

The National Plan of Action for Children in Kenya¹⁴⁰ on its part acknowledges that Kenya has made great strides in its endeavors to fulfill the rights of children in spite of many challenges. It cites the promulgation of the Constitution in 2010 as a major milestone for the children of Kenya, as it recognizes some fundamental human rights, in keeping with the CRC, ACRWC and other international and regional treaties.¹⁴¹

Under the manual for caregivers in Kenya,¹⁴² the NCCS defines care-giving as the process of raising children to become useful members of the society. This involves provision of both physiological needs as well the psychosocial ones. Physiological needs include food, medical attention, protection and others. Psychosocial needs include love, a sense of belonging, appreciation, recognition and many others. Both categories of needs are crucial for children as they grow since they determine how they grow and develop and what persons they become.¹⁴³

The manual requires that care-givers especially alternative ones should have adequate training on the rights and welfare of children with emphasis on the ethics and principles of working with and for children. Surprisingly, these support policies¹⁴⁴ make no reference to situation of children residing in prison or those with imprisoned caregivers. This is in deviation from the guiding principles laid out under the key conventions including the CRC and the ACRWC.

¹³⁹ The National Council for Children's Services (n 138) 3.

¹⁴⁰ National Council for Children's Services, 'National Plan of Action for Children in Kenya' (2015) <www.nccs.go.ke> accessed 27 April 2017.

¹⁴¹ National Council for Children's Services (n 140) 3.

¹⁴² The National Council for Children's Services, 'GOOD PRACTICE IN CHILD CARE: A MANUAL FOR CHILDREN CARE GIVERS' (2011) <www.nccs.go.ke> accessed 27 April 2017.

¹⁴³ The National Council for Children's Services (n 142) 130–136.

¹⁴⁴ The National Council for Children's Services (n 138); National Council for Children's Services (n 140); The National Council for Children's Services (n 142).

3.6 Probation of Offenders Act (Act No. 28 of 1961) and Community Service Orders (CSO) Act (Act No 10 of 1998)

The Probation of Offenders Act¹⁴⁵ affords offenders an opportunity to serve their terms out of prison. It avails courts the option of placing offenders on probation. Probation orders may be issued conditionally or unconditionally depending with the circumstances surrounding commission of the offence. An offender may be required to enter a recognizance, with or without sureties, where a probation order is imposed. Among the factors that a judge may consider while imposing a probation order include age of the offender; mostly youthful offenders, personality, background, home surroundings, fitness or mental condition of the offender, the nature of the offence and any extenuating circumstances in which the offence was committed.¹⁴⁶

In cases where offenders commit offences during the probation period term, the probation order is usually cancelled and the accused becomes liable to serve the initially set or appropriate sentence. The court is under an obligation to explain these terms to the offender when the order is imposed. Under section 5 of the Act, the minimum period in which an offender can serve a probation term is six months and the maximum period is three years. According the criminal justice sector report, 50,722 non-custodial orders were issued during the 2012-2013 fiscal year.¹⁴⁷ This is a good indicator towards embracing non-custodial sentencing options which have led to among others vices the abuse of children rights and overcrowding in prison facilities.

Community Service Orders Act¹⁴⁸ on the other hand was enacted to introduce and regulate community service by offenders in specified cases. CSO's may include any unpaid public work for the benefit of the community and for a period which does not exceed the term of imprisonment that the offender could have been sentenced to. The CSO Act under section 3 limits the imposition of community service orders where an offence is punishable with jail term

¹⁴⁵ Act No. 28 of 1961, Laws of Kenya.

¹⁴⁶ See Section 4.

¹⁴⁷ National Council on Administration of Justice (Kenya), Legal Resources Foundation Trust (Kenya) and Resource Oriented Development Initiatives (eds), *Criminal Justice System in Kenya: An Audit: Understanding Pre-Trial Detention in Respect to Case Flow Management and Conditions of Detention* (National Council on Administration of Justice (NCAJ) and Legal Resources Foundation Trust and Resource Oriented Development Initiatives (RODI) 2016) 76.

¹⁴⁸ Act No. 10 of 1998, Laws of Kenya.

not exceeding 3 years or where an offence is punishable with imprisonment exceeding three years but court imposes a lesser offence.

3.7 Conclusion

The Constitution of Kenya as the ultimate law of the country incorporates the bill of rights whose applicability must be universal; subject to constitutional limitations that may affect how these rights are to be exercised. However, any limitation which purports to take away the rights of dependent children during sentencing must be done with due exercise of care and caution. Children; who are collateral to the sentencing processes, especially where there are no proper checks to ensure that at all times they are protected from the harsh realities of disproportionate sentencing practices.

Kenya as a member state to majority of the international protocols discussed herein has taken a paradigm shift for the better. The current Constitution and the Children's Act have incorporated the basics laid down under the aforementioned instruments. This is unlike the defunct constitution and Children's Act which did not directly incorporate international norms and principles as part of the national law. The main intervention on behalf of children towards recognizing and protecting their rights during sentencing can only take place through ensuring that there is minimal possibility of separation occasioned by incarceration. This can only be achieved through utilization of alternative rehabilitation-oriented measures such as reasonable fines, probation orders, CSO's and suspended sentences which on the face of it are child friendly. In conclusion, this chapter demonstrates that failure to utilize non custodial measures in Kenya does not solely emanate from inadequacy of the law rather from unstructured sentencing practice that does not embrace international norms and best practices which operate to the best interest of the affected child. National legislation and action plans, as it has been demonstrated in this study must therefore have elaborate procedures for adherence to international norms and principles on the rights of children. More importantly, there glaring gap between the existing regulatory structure on protection of the rights of children and the sentencing process which lack elaborate implementation mechanisms.

CHAPTER FOUR

4.0 SENTENCING PRACTICE IN KENYA FOR PRIMARY CAREGIVERS; CASE STUDY FOR LANG'ATA, SHIMO LA TEWA AND ELDORET MAXIMUM SECURITY WOMEN PRISON FACILITIES

4.1 Introduction

This chapter undertakes a broad analysis of the actual situation on ground through scheduled interviews with selected female prison facilities and key players under justice system. Based on the discussed international and national principles on child protection when there is imminent possibility of separation from their caregivers, there is no doubt that the substantive legal framework for the same is not delimiting. Children of primary caregivers ought to be fully protected during arrest of their caregivers all the way until sentencing which unless there are compelling reasons to suggest otherwise ought to be to the advantage of the child. This study demonstrates that majority of women in custody today in Kenya are primary caregivers who are serving sentences for mostly less serious offences and who qualify for alternative sentences. However, in some landmark decisions, courts have remarkably protected the rights of children when inconsiderate and forcible separation has occurred.

4.2 Overview of the Sentencing Practice in Kenya

In Kenya, penal sanctions recognized under law are anchored under the Penal Code; Section 24 provides a range of penalties that are recognized. It further recognizes other penal sanctions that may be prescribed by other legal frameworks. Majority of these provisions allow judiciary to exercise discretion while passing sentence and to ascertain the most appropriate sentence based on the surrounding factors in every case. In exercising these discretionary powers, courts are required to act objectively, impartially and with accountability to the entire public in relation to any decision made.¹⁴⁹

Sentences passed on accused persons often times do not reflect on the recognized objectives of sentencing in most cases leading to unwarranted repercussions to individuals as well as recipient institutions. Overutilization of custodial sentences, for instance, has been linked to high recidivism rates and overcrowding in prisons.

¹⁴⁹ This was emphasized in the case of *Fatuma Hassan Salo v. Republic* [2006] eKLR where the court emphasized adherence to sound legal principles and concrete evidence.

In Kenya, various penal sanctions are provided for under the law mostly depending on the seriousness of the offence. For capital offences, courts usually award death sentence or where circumstances necessitate, life imprisonment while in other offences ranging from felonies to misdemeanors the sentences awarded vary depending on the gravity of the offence committed. For more serious offences but not amounting to capital offences, courts may award either of the following-

- i) Imprisonment;
- ii) Community service orders;
- iii) Restitution;
- iv) Probation orders;
- v) Payment of compensation;

In less serious offences categorized as misdemeanors, courts may award either of the following sentences-

- vi) Forfeiture;
- vii) Bond to keep peace and character;
- viii) Absolute and conditional discharge;
- ix) Suspended sentences;
- x) suspension in traffic offences;
- xi) supervision by the police;
- xii) withdrawal of licenses, and
- xiii) Committal to rehabilitation centres.
- xiv) Fines;

Sentencing has posed several challenges in the process of administration and access to justice in Kenya. These range from inconsistent and unfair disproportion in sentences meted on offenders under similar offences in more or less comparable environments and an unwarranted penchant of imprisonment, in spite of availability of several out of prison options, as discussed earlier in this chapter that could be more appropriate given the circumstances. Mandatory and minimum sanctions have worked well in most jurisdictions whereby judicial officers are able to consistently pass sentences with fewer disparities. However, these fetter the discretion of courts sometimes resulting in grave injustice particularly for women with care giving responsibilities.

4.3 Study on the Sentencing Practice for Primary caregivers in Kenya: Trends and Discrepancies

According to the report on Criminal Justice Audit, female offenders in Kenya make up to 18% of the prison population annually with the cumulative annual turn-over increasing from 10,857 in 2004 to 18,112 in 2012.¹⁵⁰ Most of these female offenders are accused of less serious offences such as prostitution, offences against the liquor Act, common assault and domestic related offences with majority of them from poor backgrounds with low social status. The offences notwithstanding, those arrested find themselves in prison; Langata and Shimon La Tewa maximum security women prisons being the biggest recipients.¹⁵¹ With these worrying statistics which keep on increasing, this study in comparison with the feedback from respondents¹⁵² in relation to the aspect of balancing the interests of children whenever sentencing primary caregivers further undertook to analyze several decided cases on primary caregivers who were awarded custodial sentences. Interestingly, majority of the sentenced were overturned on appeal on various grounds; among them on the best interest of dependent children.

Under the aforementioned criminal audit report and also evidenced from the outcome of this study, most convictions on primary caregivers leading to custodial sentences have been overturned on appeals. The high rate of success on appeal for completed cases suggests that the appeal process is providing a necessary and robust safeguard in the criminal justice system in Kenya. This however leads to the disturbing question on the credibility of original convictions, notably on less serious offences including primary caregivers, where ordinarily an accused person is entitled to non-custodial sentence to protect the affected child.¹⁵³

In case of **Refugee Consortium Kenya and Another v the AG & Others**¹⁵⁴ which arguably stands out as the most significance decision towards the enforcement of the rights of children during separation with caregivers in Kenya, Justice Lenaola emphasized on the need to ensure

¹⁵⁰ National Council on Administration of Justice (Kenya), Legal Resources Foundation Trust (Kenya) and Resource Oriented Development Initiatives (n 147).

¹⁵¹ National Council on Administration of Justice (Kenya), Legal Resources Foundation Trust (Kenya) and Resource Oriented Development Initiatives (n 147).

¹⁵² These are from the three selected prison facilities for this study which include Langata, Shimo-La Tewa and Eldoret women prisons.

¹⁵³ National Council on Administration of Justice (Kenya), Legal Resources Foundation Trust (Kenya) and Resource Oriented Development Initiatives (n 147) 338.

¹⁵⁴ [2015] e-KLR.

that separation of dependent children from their caregivers for whatever reason must be in line with global principles to wit the principle of the ‘best interest of the child’.

This High Court Petition filed in 2014 under the Constitutional and Human Rights Division required the court to among others navigate the tensions between steps put in place to heighten state security and protection of the rights of minor refugees.

Brief facts in this matter are that the state through the Ministry of Interior & Coordination of National Government in March, 2014 issued a directive on the grounds of national security that refugees staying outside selected refugee camps as specified in **Gazette Notice No.1927** had to go back to their camps forthwith. Consequently, all refugee listing centres not within designated centers were to be shut. Subsequently, the government initiated “*Operation Usalama Watch*” executed by the National Police Service around Eastleigh area and other areas perceived to be “hideouts” for illicit immigrants allegedly to flush out Al-Shabaab adherents/aliens and search for weapons, improvised explosive devices (IEDs)/explosives and other arms so as to detect disrupt and deter terrorism and other organized activities. As a result, the petitioners herein who were refugees and primary caregivers were forcibly and without notice separated from their dependent children.

The petitioners herein filed a petition alleging among other aspects that the respondents failed to apply the “best interests of the child” as guaranteed under provisions of Article 53(2) of the Constitution and Section 4(2) of the Children’s Act, to the effect that any action affecting a child regardless of who undertakes it must be done having the interest of the child first before anything else hence before implementing the directive, the primary consideration out to have been the affected child. It was the petitioner’s submission that the implementation of the directive had further breached Section 6(1) of the Children’s Act providing for the right of a child to stay and be cared for by both parents and Section 7 which provides for every child’s right to education at the expense of the state and parents. Section 13(1) of the Act is also cited and prohibits any form of abuse to children including physical or psychological abuse, neglect or exploitation as well as Section 18 prohibiting torture, cruel treatment and unlawful arrest. It was further submitted that the Respondents infringed upon the Constitutional rights of the minor refugees cited in the Petition, in particular the refugee children’s rights to fair administrative action (Article 47(1)), autonomy and safety of the person which includes the rights not to be subjected to physical or

psychological torture or be treated or punished in a cruel, inhuman or degrading manner. (Article 29(d) and (f) also guarantees the child's right to be protected from abuse, neglect and inhuman treatment. In support of the application, the Petitioners also based their Petition on numerous conventions and international treaties such as the CRC, ACRWC, UDHR, ICCPR, ACHPR, among others.

The following orders were sought by the petitioners;

- i) Mandamus order to compelling Government to re-unite parents with their children in urban areas;
- ii) Mandamus order to allow refugee children to access social services in urban areas;
- iii) An order nullifying the directive to relocate refugees and asylum seekers to the refugee camps, dated 26th March 2014, for violating the rights of affected children
- iv) Order barring the Respondents (jointly and severally) from taking the children to refugee camps or any other place without consultation and agreement with the relevant families that are currently taking care of the minors, and
- v) Declaration of contravention of Article 29(d) and (f); 53(1)(d) and 53(2) of the Constitution.

The respondents on their part argued that the exercise was done on national security interest and the affected children could be reunited with their parents at the camps where there were enough facilities.

In analyzing the merits of the petition, the court noted that it is a settled principle that a petitioner on infringement of fundamental rights and freedoms under Article 22 of the Constitution must be precise in the claim and must demonstrate how it has been violated. The court noted that to ascertain what amounts to the best interest to a child calls for an elaborate evaluation of the child's personality, social background and surrounding circumstances. Further, the court emphasized the need to determine the best interests of a child must involve personalized assessment of the affected child and that the respondents failed to observe that requirement.

In his judgment, Justice Lenaola quoted Section 28 of the Constitution of South African¹⁵⁵ which stresses of the best interest principle whenever a child is involved in a decision. Consideration of child rights has been interpreted to be a right by itself and not just a mere guiding principle capable of being neglected.¹⁵⁶ As such, these sections have been interpreted by courts to require minimal interference to children when sentencing primary caregivers. Similarly, in situation where separation has to occur, measures should be put in place to reduce harm to affected children within the shortest time possible. The court further quoted **S vs M** in which the Constitutional Court of South Africa considered the obligation of a sentencing court where the accused person has care giving responsibilities, while keeping in mind the legitimate protection of the child's best interest. The Court stressed thus- *“Focused and informed attention needs to be given to the interests of children at appropriate moments in the sentencing process. The objective is to ensure that the sentencing Court is in a position adequately to balance all the varied interests involved, including those of the children placed at risk. This should become a standard preoccupation of all sentencing Courts.”*¹⁵⁷

The court ruled that the Petitioners succeeded in demonstrating infringement upon the children's rights to parental care, education and to be protected from neglect and that the interests of the children involved were not accorded the paramount importance as required under law. The court further relied on Article 24 of the Constitution on the importance of avoidance of limitation of rights and the retirements to be met before any right guaranteed under the law may be limited and the purposes of limitation having explored all other possible remedies before limitation. In upholding the rights of children during separation with caregivers, the court granted mandamus orders to reunite the children and their parents. Further, the court issued an order nullifying the Directive to relocate the 2nd Petitioner and other affected refugees who are primary caregivers to refugee camps in Kenya. Lastly, the court issued a declaration that the relocation was done in bad faith and in contravention of the Constitution.

Similarly, this principle has been reflected in other decisions whereby courts have demonstrated that regardless of the gravity of the offence and the repercussions therein, a child's interest prevails especially when the surrounding factors incline towards the possibility of violation of

¹⁵⁵ See also Article 53(2) of the Constitution of Kenya which has the same meaning and effect.

¹⁵⁶ See *Sonderup vs Tondelli and Anor* 2001 (1) SA 1711.

¹⁵⁷ See *Refugee Consortium Kenya and Another v AG and others* [2015] e-KLR, para 65.

the child. In **Republic Vs F L**¹⁵⁸, the court upheld the principle of the best interest of the child during sentencing of primary caregivers reiterating courts ought to have the welfare of dependent children whenever sentencing them. The brief facts of this matter are thus the accused person F L was accused of murder of her son which was later revised to a lesser charge of manslaughter. The court in its sentencing remarks noted the seriousness of the offence with the drafters of the penal code considering its seriousness and gravity prompting them to prescribe a maximum sentence of lifetime in jail for any offender convicted of manslaughter. Justice Nyakundi further observed thus- *“...however weighing one factor after another I find some mitigating features to persuade me tamper with the maximum life imprisonment sentence or custodial sentence for that matter in the following manner: The five surviving children aged between 5 – 13 years are at a tender age and in need of care and protection. The accused F L is the only mother they have and known. Since the occurrence of this incident the family has undergone a series of healing and reconciliation to come to terms with the death...”* Subsequently, the court awarded a non custodial sentence of three years probation noting the need to maintain family ties in the interest of the affected children.

In overturning decisions of lower courts, some superior courts have also specifically looked into the welfare of children; even when the custodial sentence was rightfully awarded in offences directly related to cruelty against the same children the courts aim to protect. In **J A N v Republic**¹⁵⁹, J A N appealed against her sentence for four years imprisonment upon her plea of guilty on the offence of causing Grievous Harm Contrary to Section 234 of the Penal Code. On the face of it, the victims sustained serious injuries and the crime was needless. Ordinarily, the sentence imposed was appropriate and there would be no reason for the court to interfere with it. However, the court was persuaded to consider the welfare of the victims of her crime. The children with no suitable alternative caregiver were sent to children’s home in their best interest. The Court deemed necessary to inquire into the effect of the sentence on the welfare of the children as the victims of the crime. Reports from probations and the children’s department indicated that it was in the best interest of the children to have them reunited with their mother. In delivering the verdict, Justice Tuiyott stated thus *“...it seemed clear to me that the best interest of the two minor children was to reconcile and reunite them with their mother. It would*

¹⁵⁸ [2017] eKLR.

¹⁵⁹ [2016] eKLR.

also be in the interests of the Victims if they were to be brought up under the love and care of their mother... ”¹⁶⁰

This study has further established that superior courts may vary decisions of lower courts where children are involved not necessarily to uphold the rights of children. In several decisions analyzed in this study, superior courts varied decisions specifically in conformity to the new sentencing policy guidelines which call for noncustodial sentences for petty offenders. The aforementioned guidelines propose that custodial sentencing for minor lawbreakers should be reduced as the reformation purpose of sentencing is seldom achieved in cases of short prison terms. The essence is thus short sentences are unsettling and contribute to recidivism. The Sentencing Policy Guidelines demonstrated that there was a high rate of repeat offenders in prisons accused of less serious offences due to over use of custodial sentencing.

In **Emily Sanguli Mabishi v Republic**¹⁶¹, The appellant in this matter was charged under Cr Case No 174 of 2016 at the Senior Principal Magistrate’s Court at Voi with the offence of selling traditional liquor without a permit contrary to Section 7(1) (b) of Alcoholic Drinks Control Act 2010 as read with Section 62 of the Act. She pleaded guilty and was sentenced to a custodial sentence of eight months with no fine. She contended on appeal that the sentence was extremely harsh and prayed for forgiveness because she had five (5) young school going children and three (3) grandchildren who were currently being taken care of by her elderly mother. In passing the sentence at the trial court, the court did not consider whether the accused person was a primary caregiver and whether there was a suitable alternative to offer parental care as required under law. Before determination, the High court acceded to a probation report to show the character of the accused. The report from Probation Officer Voi Sub County indicated that the Applicant had been of good behavior during her incarceration at Wundanyi Women Prison and that her family and the society at large were willing to accept and re-integrate her into the society. The report recommended that the Applicant be considered for non-custodial sentence.

In its ruling, the high court set aside the imprisonment of eight (8) months without the option of a fine that was imposed by the trial court and replaced it with a rather harsh option of paying a fine of Kshs 60,000/= and in default to serve eight (8) months imprisonment.

¹⁶⁰ See Republic v F L [2017] eKLR, Para 6.

¹⁶¹ [2016] eKLR.

The upshot in this matter is thus the accused person though afforded an opportunity to pay a fine, in line with the sentencing policy guidelines discussed earlier in this report, the courts both the trial and appellate, did not consider the aspect of being a primary caregiver. The considerations made were in relation to the conduct and antecedents of the accused person. This judgment leaves the wellbeing of the five involved children at the mercies of their elderly grandmother who in real sense is in need of care.

In another worrying sentencing trend in lower courts, majority of the decisions reversed on appeal are at their best inconsistent, unpersuasive and indecisive when it comes to recognizing and upholding the best interest principle. Regardless of the clear provisions to the effect that sentencing of primary caregivers must have in mind the impact of such decisions to children, some courts have gone ahead to award custodial sentencing to mothers with dependent children who are accused of minor and non violent offences. This is regardless of whether the aspect of being a caregiver has been brought before the court or not. The reasoning by the lower courts which have been overturned on appeal raises more questions on the aspect of interpretation of statutes and adherence to constitutional safeguards.

In **Republic Vs Joyce Jepkoech**¹⁶², (being an appeal from original conviction and sentence in Criminal Case number 1816 of 2010 of the Principal Magistrate's Court at Winam), The appellant herein was convicted lower court for stealing things forming parts of a railway contrary to Section 279 (d) of the Penal Code, valued at Kshs. 50,000/= the property of Kenya Railway. The appellant also faced an alternative charge of handling stolen goods.

On appeal, appellant cited several grounds among them that the learned trial magistrate failed to take into consideration the aspect of being a single mother to four children, the last born aged eight (8) months when she was imprisoned for two years imprisonment unconditionally. The state on its part submitted that the appellant was remorseful and that she was a mother of dependent children who needed consideration hence proposing reduction of sentence to the already served portion. Subsequently the accused person was set free having been no objection to the grounds of appeal filed before Lady Justice Nambuye.

This trend reasoning is also reflected in various other decisions whereby appeals have exposed the discrepancies in sentencing without considerations on children may be affected. In **Leonida**

¹⁶² [2011] eKLR.

Asiko Vs Republic and **Lydia Mwendwa Kitheka Vs Republic**¹⁶³, both matters have similar facts in that the accused persons were charged with offences related to child neglect and were all sole primary caregivers. Upon conviction and without regard to the impact on the dependent children, the trial courts awarded custodial sentences. This was done without establishing whether there were arrangements for alternative suitable caregivers to the children affected. Upon appeal, superior courts reasoned that custodial sentence to primary caregivers was in itself not harsh and excessive and totally unsuitable in the circumstances of the cases as it does not protect the children whose interest should always guide courts in passing appropriate sentences. These matters signify the total disregard of the rights of children rights when it comes to sentencing of primary caregivers.

To most of the mothers in prison and on short sentences, the question of appeal is almost non-existent. This is due to lack of information, limited timeframes and also financial constraints. The harshness to primary caregivers when it comes to appeals was demonstrated in **Margaret Njeri Kipchilis v Republic**¹⁶⁴ whereby the accused person was convicted for the offence of causing grievous harm, contrary to Section 234 of the Penal Code and awarded a two year imprisonment term. As result of incarceration, her two dependent children dropped out of school for lack of parental care. In rather a very unfortunate scenario, her appeal was heard only 64 days before she completed her sentence.

Clearly, it is a legal prerequisite that in every matter involving a primary caregiver who is at risk of being imprisoned, courts ought to acquire additional information about the involved children, weigh their rights as guaranteed under the law against the gravity of the offence. Where the offence is more serious or in the interest of the child requiring custodial sentencing, the courts may award custodial sentencing. However, where the offence is minor and where the rights of the child are at jeopardy, the court ought to either award a non-custodial sentence or suspended sentence to protect the child. This calls for a delicate act of balancing between the lesser evil which must always envisage what is best for the concerned child.

¹⁶³ Both available at [2006] eKLR.

¹⁶⁴ [2017] eKLR.

4.4 Scheduled Interviews in Selected Prisons

In an attempt to establish whether these considerations made in the aforementioned case are reflected in all courts whenever primary caregivers are involved, this study as stated earlier involved data collection on three major women facilities in Kenya (Lang'ata, Shimo la Tewa and Eldoret women prison facilities). Further, key players in the criminal justice sector including the Judiciary, police, prosecutions, prisons, probations and children services were engaged in structured interviews for their views over the sentencing process. The scheduled interviews were designed so as to answer the key research questions in this study. The major shortfall however in data collection was reluctance by CUC members mostly from the judiciary and prisons department to fill in data collection tools and giving oral interviews which formed a substantial form of the findings in this study.

4.4.1 The Imprisoned Primary Caregiver

This survey targeted a total of 200 respondents from the three facilities who had indicated willingness to participate in the exercise. However, it managed to capture 149 participants. The average age of the participants who were all female was 34 years and had at least attained primary education. Half of the interviewees had at least two children while all the participants had at least one child below 18 years. A small percentage of 3% had children in prison.

Table 4.1 Summary of interviewed mothers in prison

Variable	Mean	Std. Dev.	Minimum	Maximum
Convict Age	34.3	7.0	23	54
Convict Gender	0.0	0.0	0	0
Marital Status	0.5	0.5	0	1
Education level	2.8	1.3	0	6
Education Years	9.0	3.9	0	16
Children	2.7	1.3	1	7
Children Below 18 years	2.2	0.9	0	5
Sample size	149			

Results of the study indicate that women accused of less serious offences were likely to be afforded more favorable bail and fines options and also less harsh sentences. Past convictions and family history of convictions insignificantly affected the severity of the sentence a primary

caregiver would be accorded. The study also indicated that the fact that an accused person was a primary caregiver insignificantly influenced court's decision.

Under the Bangkok Rules, women offenders are required to be availed alternative sentencing options in recognition of their caretaking roles and criminal background. The rules further advocates for gender- specific considerations as well as the effect of custodial sentencing to the collateral victims who usually are the dependent children involved.¹⁶⁵

In respect to being availed time to identify a suitable alternative caregiver before commencement of sentences which is essential to enforcing the rights of children, all the respondents unanimously responded negatively. No single parent who was interviewed acknowledged being accorded time to during arrest or subsequently on commencing sentence. The results indicated that children were not considered during arrest and sentencing. More than half of the respondents indicated that upon their arrest and imprisonment, alternative caregivers to their children left behind were grandparents and relatives to the children with no indication of government involvement in a single case in the study.

In relation to imprisonment, the study established that having dependent children left at home insignificantly influenced the location of prison one was to be sent. Instead, all accused persons were locked in the nearest prison to the sentencing court regardless of where the children were based. According to the Bangkok Rules on location of prisons for primary caregivers, the understanding is thus women prisoners shall be allocated, whenever possible, facilities with close proximity to the homes so as to encourage continuity in care giving roles and parental guidance.¹⁶⁶The United Nations Congress on Prevention of Crime and Treatment of Offenders¹⁶⁷ discourages use of imprisonment for special category of offenders including primary caregivers and advocates for reduction of extended use of imprisonment.¹⁶⁸

Bonding sessions in prisons for mothers and their children was found to be inadequate. Most respondents indicated that it was treated as a privilege and not a right. All the respondents

¹⁶⁵ See Rules 57 and 61.

¹⁶⁶ See Rule 4.

¹⁶⁷ See the 8th UN Congress on the Prevention of Crime and Treatment of Offenders (Havana, 27 August 7 September, 1990).

¹⁶⁸ Res. 19 "Management of Criminal Justice and Development of Sentencing Policies" of the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders

indicated that imprisonment negatively affected their children in terms of performance in schools and also psychologically in that most of the children appeared withdrawn whenever they visited. Under the United Nations Guidelines on Alternative Care,¹⁶⁹ the major objective is to ensure there's implementation of the provisions of the CRC together with all other related instruments on child protection whenever parental care is jeopardized.¹⁷⁰ Under Article 155 therein on preventing separation, the guidelines require organizations and authorities tasked with the responsibility to make decisions touching on children minimize separation as much as possible where such separation hurts the wellbeing of children. CRC calls for respect to the right of separated children from parents to have adequate access to their parents.¹⁷¹

The table below summarizes the aspects discussed in relation to considerations made regarding the rights of children whenever primary caregiver is in conflict with the law and about to be sentenced.

Table 4.2 Considerations for Suitable Alternative Caregivers before Imprisonment

Variable	Mean	Std. Dev.	Minimum	Maximum
Past Convictions	0.1	0.3	0	1
Family Convictions	0.1	0.3	0	2
Convicted offence	2.6	0.6	1	3
Sentence length	9.8	11.7	2	72
Completed period	2.0	1.9	0	12
Fine Option	0.5	0.5	0	1
Fine Amount	11362.4	21685.5	0	150000
Caregiver to Children	1.0	0.0	1	1
Children in Prison	0.3	0.5	0	2
Children during arrest	0.6	0.5	0	1
Children left home	1.9	1.0	0	5
Current Caregiver	2.9	1.7	1	6
Time for alternative caregiver	0.1	0.2	0	1
Children considered at arrest	0.1	0.2	0	1
Bond terms availed	0.9	0.3	0	1
Court children enquiry	0.1	0.3	0	1
Children influence on sentencing	0.1	0.3	0	1
Non-custodial option	0.5	0.5	0	1
Children and prison location	0.0	0.0	0	0

¹⁶⁹ Assembly (n 125).

¹⁷⁰ Assembly (n 125) 2.

¹⁷¹ Article 9(3).

Imprisonment effect on children	4.5	0.7	3	5
Prison enquiry on dependants	0.4	1.2	0	10
Quality bonding in prison	0.3	0.5	0	1
Bonding as a right	0.0	0.0	0	0
Family communication	1.2	0.4	1	2
Communication means	6.4	3.8	1	9
Trial process information	0.1	0.3	0	1
Source of information	0.1	0.3	0	1
Sample size	149			

4.4.2 Children of Imprisoned Primary Caregivers

This exercise involved interviewing a total of 100 dependent children of imprisoned primary caregivers in the three targeted institutions. The average age of the respondents was 11 years with majority of them being at the primary school level.

Table 4.3 Summary of interviewed dependents

Variable	Mean	Std. Dev.	Minimum	Maximum
Dependant Age	11.2	2.3	6	18
Education Level	2.2	0.4	2	3
Education Years	7.3	2.3	3	15
Sample size	100			

According to the outcome of the study conducted as analyzed under tables 4.2 and 4.3 together with annexes 6 to 12, majority of the respondents indicated that they were visiting their mothers in prison and that they were present during arrest leading to the conclusion that this could have affected them negatively due to possibility of increased anxiety, panic and a sense of loss most notably to children who spend most of their time with the affected parent.

A significant majority of the children interviewed indicated that they resided with their mothers before arrest and that upon arrest, their lives changing significantly. The most affected aspects were feeding and schooling spheres. Less affected were shelter and clothing aspects.

The question of impact of imprisonment was met with a resounding highly significant by all the respondents. This indicates that custodial sentencing negatively affects the wellbeing of children. Majority of the respondents interviewed including those who had both parents but from relatively young mothers indicated that they were left with alternative caregivers and not their

biological fathers. In a sample of the responses from Langata Women Prison, child XX indicated thus- ‘...*police came for my mother in the evening and went away with her, the following morning aunt X come and took us to her place from where we attend school. We are planning to visit her at prison. All I want is to have her back at home...*’

A significant number of the children interviewed answered to the affirmative whether they were present during arrest of their parents. Robertson argues that the mode of arrest can significantly change the attitude of children affected either to respect and embrace law enforcement officers or resent completely. When it comes to visitation and communication with their imprisoned mothers, the children interviewed indicated that visitation was inadequate. Majority indicated that they only visited their mothers once in a month with several getting an opportunity to visit once in every two months. Communication was not impressive either. The most used platform was via letters which with occasional use of mobile phones.

Almost all the respondents indicated that no one inquired about their welfare and progress after imprisonment of their primary caregivers.

The table below summarizes the feedback from the interviewed children with imprisoned caregivers. It also indicates the areas which were considered to affect the children most.

Table 4.4 Challenges facing Imprisoned Caregivers Dependents

Variable	Mean	Std. Dev.	Minimum	Maximum
Dependant Age	11.2	2.3	6	18
Education Level	2.2	0.4	2	3
Education Years	7.3	2.3	3	15
Visiting Mother	1.2	0.4	1	2
How informed	1.4	1.1	1	11
Offered Caregiver	1.6	0.5	1	2
Imprisonment Effect	5.0	0.0	5	5
Welfare Inquiry	0.1	0.3	0	1
Resided before Arrest	0.9	0.3	0	1
Whereabouts of Father	1.8	0.9	1	4
Current Caregiver	1.8	0.7	1	3
Change of Life	0.9	0.3	0	1
Schooling Effect	1.0	0.1	0	1
Feeding Effect	1.0	1.0	0	11
Clothing Effect	0.1	0.3	0	1
Shelter Effect	0.4	0.5	0	1

Visits to prison	2.2	0.7	1	3
Communication frequency	0.1	0.3	0	1
Sample size	100			

4.4.3 Court Users Committee Members

From the research carried out majority of the interviewees were of the mean age of 40 years and had attained education level of post graduate and above. Statistics indicate that they had spent an average of 17 years and above in formal education.

Table 4.5 Summary of interviewed criminal justice sector players

Variable	Mean	Std. Dev.	Minimum	Maximum
Age	40.8	6.2	29	56
Gender	0.6	0.5	0	1
Marital Status	0.6	0.5	0	1
Education Level	6.9	0.3	6	7
Education Years	17.8	0.6	15	18
N	26			

In assessing the mitigation measures put in place to lessen custodial sentencing to primary caregivers as recommended under the relevant statutory provisions, the outcome of the study established that caregiver treatment is not afforded any special preference. According to statistics and attached questionnaire samples under annexure 11, majority of those interviewed indicated that during arrest, trial and sentencing the question of whether the accused person had dependent children did not arise. In relation to interest balancing on the rights of the accused person and public interest, majority of those interviewed indicated that this factor was dependent on the nature of crime and social enquiry reports from the probations department. The question of having dependent children didn't feature prominently. Having dependent children left at home didn't influence the location of prison a primary caregiver would likely be send.

Judicial officers indicated that there were no specific sentencing guidelines on primary caregivers save for international instruments and protocols which may be applicable in certain circumstances. They answered affirmatively to the need of having child impact statements filed in court by either the probations or children's department whenever a primary caregiver was undergoing trial. The most common trial and sentencing challenge identified by the judicial

officers in this exercise bordered along lack of legal representation to most accused persons to packed court calendars leading to lengthy trial periods.

In relation to the question whether steps have been put in place to ensure children are sensitized and protected during arrest of primary caregivers, it was established that most of the arrests were made in the presence of dependent children and that there were no guiding principles to ensure that children are shielded from any possible stigmatization.

Prison officers interviewed in this exercise indicated that the major challenges associated with imprisonment of caregivers were lack of separate facilities for children accompanying their mothers to prison. Further, majority felt that there was no quality bonding sessions for the mothers whenever visited by their children in prison.

Majority of the respondents alluded to the fact that communication with the outside world was minimal and dependent on resources to access communication platforms such as phones. In relation to record on those inmates who are primary caregivers, majority of prison officers indicated that they kept records for the same. All the respondents indicated that information on whether one was a primary caregiver was solely obtained from the imprisoned caregiver.

In regards to whether the rights of children should be considered during arrest, trial, sentencing and imprisonment of primary caregivers, all the respondents answered to the affirmative, indicating that there is a need to ensure that there must be balancing of rights whenever an accused person who has wronged the society is undergoing

4.5 Conclusion

The study has demonstrated that within the main three prison facilities visited, majority of the women imprisoned are primary caregivers with a responsibility to dependent children and with all the respondents having at least a child below the age of 18 years. Data on the seriousness of the offences indicates that a higher percentage of the offenders are accused on less serious offenses which qualify for non-custodial sentences including community sentences or fines. Criminal justice sector key players including judicial officers, police, children services, probations and prison officers indicated in general that primary caregivers are not accorded preferential treatment at the various stages of trial from arrest to imprisonment. The results

therefore indicate that despite there being adequate legal framework which operates to safeguard child rights during sentencing, primary caregivers do not benefit from non custodial terms as the law stipulates. The gradual increase of women prisoners with care giving responsibilities indicates failure by policy makers to put in place measures of identifying primary caregivers before sentencing and securing the rights of their affected children.

CHAPTER FIVE

5.0 CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter sets out the findings from the study and draws conclusion based on the findings. Most importantly, this chapter seeks to answer the research questions set out in this study in relation to factors considered during sentencing of primary caregivers, recognition of primary caregivers and identification of alternatives and establish whether there exists a gap between the provisions and principles set out under the international regulatory framework together with the constitutional safeguards in Kenya on one hand and the sentencing practice on the other. This chapter also examines whether objectives set out herein have been achieved.

Upon drawing the relevant conclusions, actionable recommendations on ensuring that children of imprisoned caregivers are guaranteed during the entire trial process shall be proposed. These recommendations shall be tailored to suit each of the key criminal justice players including, but not limited to the NPS, ODPP, DCS, KPS, probations department and majorly the judiciary.

5.2 Overview of the Findings

This study in three major female facilities and Court Users Committee members within several court stations on how children of primary caregivers who are about to be sentenced are protected has established that there is no data of any contemplation of Article 53(2) of the Constitution and Section 4(2) of the Children's Act on the best interest principle. Majority of the respondents in the interviews indicates extensive discrepancy in the manner in which the care of dependent children appears to be considered in sentencing, with emphasize mostly on the welfare of children instead of rights recognition. Contrary to the requirement that a trial court should ascertain if a convicted person is a caregiver, **Table 4.3** of the statistics summary from the respondents indicates that only three respondents affirmed that the trial courts inquired whether they had dependent children. This is collaborated by a few precedents analyzed whereby even when higher courts overturn decisions from lower courts the aspect of best interest to the child does not feature prominently. Instead, aspects such as being a first offender and time spend on pre-trial detention come first.

Regardless of the discretion of the courts to make decisions whenever sentencing primary caregivers, this diversity of approach as demonstrated in this study has in no doubt led to the abuse of the rights to parental care and also to benefit from non-custodial sentencing of their care givers. In appreciating the fact that sentencing practices will always vary due to judicial discretion, the target must be on how this discretion may be guided and harmonized to guarantee protection of children during decision making as envisaged under the law.

In relation to the research question on the considerations made by court before passing custodial sentence to primary caregivers, this study analyzed several factors which ordinarily are considered before making a decision as to whether to award a custodial sentence or not. These include first of all identifying caregivers, identification of alternative caregivers in the event of custodial sentencing whereby this study established that none of the imprisoned caregivers across the three stations was availed time to identify alternative caregiver suitable to take care of the children left behind. This contravenes Section 6 of the Children's Act which requires identification of suitable alternative caregiver before a child is separated from a caregiver.

Responding to the question if being a caregiver to dependent children influence the type of sentence given, this study established that contrary to the international standards requiring child's interest to be paramount at all times, this was not considered in 138 cases out of the 149 respondents involved in this study. This translates to a paltry 7.3% compliance to the requirement; evidently leading to abuse of the rights and welfare of depended children. The respondents were further asked to describe the arrest process and whether the arrests were child friendly. As indicated in the results, majority of the respondents indicated that they were arrested in the presence of their children and that the entire process was no child friendly.

The respondents were further required to commend on the aspects of quality bonding in prison and whether prison authorities treated bonding as right to the child, visitation, family communication and communication means. Overall, the study established that all the above aspects were not fully met as required under law and other relevant guidelines. At Lang'ata women prison, majority of the respondents indicated satisfaction in the manner in which visitation was conducted. The indication was that they were afforded enough time with their dependent children whenever they visited on weekends. Family communication was however very poor across the three facilities mostly through welfare phones and letters. Some respondents

indicated that they did not prefer their children to be present during visits, while others indicated that it was too far and expensive for the children to visit on a regular basis. In relation to proximity of prison location so as to boost visitation by dependents, this study established that none of the sentencing courts across the three selected facilities considered the welfare of dependent children while settling on the prison facility to serve the sentence.

In essence, considerations made for the sentence to be imposed as indicated in the summary below do not reflect on the best interests of the child.

Table 5.1 Marginal effects of the factors that influence non-custodial sentencing to primary caregivers in Kenya

Variable	dy/dx	Std. Err.	t-Test	Significance
Convict Age	-0.01	0.00	-2.17	0.03
Marital Status	0.06	0.05	1.19	0.23
Education Level	0.08	0.07	1.11	0.27
Education Years	-0.08	0.03	-2.36	0.02
Children	0.16	0.06	2.64	0.01
Children below 18yrs	0.02	0.07	0.24	0.81
Family Convictions	0.17	0.12	1.44	0.15
Convicted Offence	-0.06	0.04	-1.39	0.16
Children considered at arrest	-0.30	0.08	-3.85	0.00

Delta-method

In response to the overall question on the impact of imprisonment to the children and the relationship with their children upon imprisonment, majority of the respondents indicated that imprisonment affected their children negatively. Children interviewed indicated that the areas affected mostly included feeding, school interruption and clothing. 68 out of the 100 (68%) participating children indicated that they were left to other caregivers other than their fathers while 74% indicated that they did not know the whereabouts of their fathers upon the arrest of their mothers. This indicates that primarily majority of the mothers who were imprisoned and who participated in this study were sole caregivers. From the foregoing, it is evident that decisions to imprison primary caregivers in Kenya seldom take into consideration the potential impact on affected children. Where social enquiry reports are called for, the focus is mainly on the antecedent of the accused primary caregiver and not on the dependent children. Further, there was no specific requirement in procedure requiring judicial officers to ask for social enquiry

reports when dealing with primary caregivers. In practice, it's done at discretion of the presiding magistrates and judges, of which this study established was sparingly.

5.3 Conclusion

Data obtained from imprisoned caregivers through focus group discussions at the participating stations in summation indicates that primary caregivers are disadvantaged when it comes to legal representation and knowledge, identification of alternative caregivers, bail and bond decisions, communication, and visitation. Further, the fact of being primary caregivers was not a determinant factor to non-custodial sentencing. No decision to them appeared to be made in consideration of their children. This was more pronounced to women who were accused of felonies as compared to their counterparts on misdemeanors. Of special concern is the fact that more than half of the respondents had no legal representation at all. Rights of the child are jeopardized whenever a primary caregiver is at risk of imprisonment. Majority of imprisoned caregivers with children outside prisons expressed feelings of marginalization in relation to making decisions about their children. This situation is exacerbated by prison conditions which in no way are not conducive for rehabilitation and rising of young children accompanying their mothers.

Deprivation of liberty to primary caregivers, as confirmed in this study not only affects them negatively but also their dependent children. Children who are not involved in the crime committed by their parents were affected mostly in relation to education and food whenever their mothers were sent to prison to serve custodial sentencing. Balancing the rights of imprisoned caregivers in Kenya and those of their dependent children has been a delicate act which in most situations has left the child disadvantaged and exposed to dangers of harm and abuse. The legal intricacies encompassing the aspect of imprisoning caregivers and identifying alternative caregivers to children in case of imminent custodial sentencing have not been checked through both policy and practice.

Under all relevant international instruments on child protection examined in this study, it is a widely accepted that parenthood especially mothers and children deserve exceptional recognition, care, and protection. This is also reflected in various policies and practices regarding children of incarcerated caregivers. In as much as efforts are being made globally to ensure that prison facilities are bettered to suit the needs of children who may accompany their mothers

there, the ultimate goal in the first place is to ensure that primary caregivers do not end up in prison unnecessarily. This is derived from the basic international instruments, specifically the UNCRC and the ACRWC. In Kenya however, the biggest challenge is failure by sentencing regime to recognize impact of custodial sentencing to primary caregivers on dependent children. This is further complicated by uniformity in trial and sentencing all accused persons in Kenya regardless of whether one is a primary caregiver in need of special consideration or not.

Based on international law standards and practice expounded in this study, it is a legal prerequisite that in every matter where a primary caregiver is about to be send to prison, the trial court must have dependent children in mind and then balance the competing interests and the gravity of the crime against the impact on the child. In felonies, the balance may at times be inclined more towards custodial sentencing. However, the ultimate goal must be towards noncustodial sentences to enhance the principle of the interest of the child.

This research through thorough analysis of the existing international regulatory framework and case study in comparison with best practices in various jurisdictions has identified the major challenge to the enforcement of child rights during conviction of primary caregivers as failure by criminal justice key players such as the judiciaries and prosecution to implement the existing legal provisions to that effect. Under chapter three of this study, the same challenge was identified as a major drawback to recognition, enhancement and protection of children rights in Kenya. Discretion of sentencing courts has contributed to this problem significantly. This is demonstrated by the fact that whereas some courts consider the plight of children while sentencing primary caregivers, majority of others did not enquire over dependents before passing custodial sentences which clearly negates the rights of children.

Regardless of there being adequate legislative framework both internationally and locally to ensure non-custodial sentencing for primary caregivers, it is imperative to point out that the number of women offenders on minor offences serving custodial sentences is unjustifiably high. This translates to the abuse of the rights of children to parental care occasioned by imprisonment of their caregivers contrary to the preposition that non-custodial sentencing of primary caregivers is an act in interest of the child involved. This necessitates mechanisms for ensuring that sentencing courts are guided on the factors to consider before sentencing a primary caregiver. The outcome would be a unified sentencing practice sensitive to the affected child whose

harmonizing exercise weighs all existing child rights guaranteed under law against the seriousness offences.

5.4 Recommendations

Upon the conclusion of this study that indeed there exists gaps between international and municipal regulatory framework on recognition and enforcement of child rights during sentencing of primary caregivers on one hand and the sentencing practice in Kenya on the other, this section proposes key and specific recommendations for ensuring that the in any decision made towards sentencing a primary caregiver, non-custodial sentencing shall be deemed as an act towards the best interest of the child. These recommendations are made fully aware of the difficulty in implementing the best interest principle in all decisions made affecting the child. However, with proper domestication of international law principles on protection of children, Kenya could make remarkable progress in recognition and upholding the rights of the child. The following recommendations; both specific and general are proposed so as to mitigate on the glaring gaps identified in this study-

5.4.1 Legislative Reform

In Kenya, Children's Act stipulates under sections 4 & 6 that any action taken involving children must treat the interest of the child as paramount and overriding all other vested interests. Some of the interests which must prevail include right to parental care and protection. Regardless of these requirements, courts do not in most cases factor in the best interest of children whenever sentencing primary caregivers as demonstrated in this study. Thus, there exists a gap between the regulatory framework and the sentencing policies in Kenya which leads to neglect of the rights of children through omission.

5.4.1.1 Sentencing Policy-

- Non custodial sentencing must be treated as a matter in the best of the child unless there are compelling grounds to the contrary

In 2014, the NCAJ formed a Taskforce to look into matters of sentencing in Kenya. In 2016 via gazette Notice No. 2970, the Chief Justice published the Sentencing Policy Guidelines which sought among other things to provide a platform for judicial officers to carry out their sentencing duties with discretion being exercised consistently and with a measure of uniformity,

transparency and impartiality. To a greater extent, these guidelines helped streamline the exercise of discretion by courts. However, the guidelines made no specific attempt to address the rights of children affected through custodial sentencing of primary caregivers. This research therefore makes a specific recommendation to the NCAJ to relook into the sentencing policy with a keen interest on the sentencing of primary caregivers and ensure that trial courts are required to take specific steps before passing custodial sentence to primary caregivers. These may include

- i) Before commencement of trial to establish whether one is a primary caregiver;
- ii) Establish whether adequate alternative care giving arrangements have been put in place;
- iii) Ensure that pre-trial imprisonment is avoided for the good of the child involved, and
- iv) Ensure that non-custodial sentencing to primary caregivers is treated as an act safeguarding the affected child's welfare.

Sentencing policy guidelines in addition may be tailored to require justification in sentencing notes for awarding custodial sentence to mothers who are primary caregivers with elaborate report on how the children involved have been taken care of. This would guarantee protection of children during sentencing with more information on the status of affected children hence reducing imprisonment.

5.4.1.2 Bail and Bond Policy Guidelines; Minimization of Pre-Trial Incarceration to Primary Caregivers-

- Primary caregivers must be accorded bail pending trial and non custodial sentencing on less serious offenses as a matter of priority unless in extreme cases in which sufficient grounds must be furnished

Right to bond and bail pending determination of a matter is guaranteed under Article 49 of the constitution of Kenya. This is unless there are compelling reasons to necessitate denial. In 2014, the Chief justice gazette Bail and Bond policy guidelines to streamline issuance of bond and minimize disparities whenever similar offences are to be considered. These guidelines however failed to consider the special category of women offenders who are primary caregivers in the report. In most jurisdictions, women offenders who are primary caregivers and on less serious offences are afforded automatic bail. This is the case in Italy as established in the research.

It is a recommendation that in recognition of the uniqueness of women offenders who mostly double up as primary caregivers, the right automatic bail pending trial should be considered for women offenders in Kenya to protect the rights of affected children. This is unless the offence committed is grave in nature or if their release is considered harmful to dependent children. In doing so, this shall ensure that the right to parental care and guidance is upheld. This recommendation is directed to the judiciary through the NCAJ whose functions include formulation of policies relating to smooth administration of justice in Kenya.

5.4.2 Domestication and Compliance to Principles of International law on Child Protection

- Monitoring mechanisms for ensuring child protection compliance

Kenya as a signatory to most of the international conventions and treaties on recognition of child rights has an obligation to domesticate and adhere to the standards laid down therein.

Under the sphere of Articles 2 (5) and (6) of the Constitution, Kenya has in no doubt complied with the domestication aspect through adapting ratified general rules of international law and treaties as part of municipal law. However, the implementation aspect is lacking during sentencing of women who are caregivers with majority of them being sent to prison on petty offences. This study recommends appropriate legislative mechanisms to guarantee compliance with obligations laid down internationally on the protection of children. Lastly, there is need for monitoring mechanisms to act as checks and balances to government institutions tasked with the responsibility of protecting and promoting child rights.

5.4.3 Children's Right Impact Assessment Data

- Courts must be furnished with care givers report in every matter involving a caregiver

The practice in most jurisdictions considered in this study involves courts being furnished with detailed Children rights impact assessment reports before sentencing accused caregivers. In Kenya, pre-sentence reports are filed by the probations department whose others duties include generating advisory opinions to courts for purposes of bail and release. This study established that some courts did not request for reports before making determination on the sentence given to primary caregivers. It is a recommendation that before any trial court in any matter involving a primary caregiver, specific child impact reports ought to be filed indicating how a child may be deprived. This should where necessary incorporate the views of the child. Administrative

directions may require the Probations department to file these reports in collaboration with the children's department to ensure efficiency.

5.4.4 Prison Proximity and Visitation Rights-

- Primary caregivers to serve terms in prison facilities closest to their residential areas

The proximity of a prison facility determines to a great extent the frequency of visits to primary caregivers by dependent children. This study established that courts do not consider the rights and welfare of dependent children whenever passing custodial sentence. Further, it was established that visitation to primary caregivers in prison by dependent children is treated as a privilege in the current legal regime in Kenya. It is a recommendation by this research that visitation should be anchored on law and treated as a right. As it is in most other jurisdictions, visitation hours should also be tailored not to coincide with school hours for children. This shall guarantee more quality bonding sessions as required under law. This study recommends both to NCAJ through the sentencing policy guidelines to ensure that whenever possible the proximity of the prison to serve is child friendly for purposes of visitation. Further the Prison Act, chapter 90 laws of Kenya and its subsequent rules are tailored to embrace bonding and visitation by children as a right and ensure that adequate time is set aside for the same.

5.4.5 Accounting for Dependent Children of Imprisoned Caregivers

-Establishment of database for all children deprived of parental care due custodial sentencing-

UNICEF estimates that millions of children across the globe live in residential care while a greater percentage is unaccounted for due to wide gaps in data collection and accurate records found in the majority of countries. In Kenya, the number of children with imprisoned caregivers whether residing in prison or not is not known. It is a recommendation that children of imprisoned caregivers whether in prison or otherwise must be accounted for. As such, all prison facilities with primary caregivers must keep a register of dependent children to imprisoned caregivers and their location together with details of the alternative caregivers. This report which must be kept confidential shall help in tracking the welfare of the children and raise any issues of abuse or negligence.

5.4.6 Sensitization on the Rights and Welfare of Children

-Continuous training and sensitization to all child handlers

Due to their dependent nature and vulnerability, children need extra measures to be put in place to ensure their safety whenever a caregiver is to be withdrawn. Likewise, child handlers must be aware of the special and sensitive needs for children at any point of contact.

Violence meted on parents during arrest in the presence of children may lead to stigmatization. As a result police and prison officers need to be continuously sensitized on how to handle children. Prison officers who spend most of their time with inmates must also act in decorum and to the best interest of the child involved. As stipulated under law and regulations, female prison facilities with children and who are subject to visits by children must be manned by female prison officers to enhance confidentiality and privacy.

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APPENDICES

APPENDIX I

INFORMATION AND CONSENT FOR PARENTS AND CAREGIVERS

Dear Participant,

I am a postgraduate student in the University of Nairobi. In partial fulfillment of the requirement for the award of Master of Laws degree, I am conducting a survey entitled "Rights of Children of Imprisoned Mothers: Towards Non-Custodial Sentencing for Women Offenders in Kenya".

The following survey is part of a study to determine what factors are considered while sentencing primary caregivers and how the same can be improved to factor in the rights of dependent children who are affected by custodial sentencing of primary caregivers.

By participating in this interview that will take about 30-45 minutes, (or allowing your child to take part), you will have the chance to provide information that may be used to make children's lives better in the country. You will also improve the understanding about what happens to children when a parent goes to jail. Please answer all questions in such a way as to reflect most clearly your experience. All the information provided will be treated with utmost confidentiality and shall be used for academic purposes only.

Thank you for participating.

Yours sincerely,

Emmanuel Ndunda.

CONSENT FORM

Please read through the following statements and indicate your agreement by signing below:

1. The researcher has told me about the research project and answered any questions I had;
2. I give my consent for the interview in understanding that the same shall be voluntarily;
3. I understand that his/her name and personal details will not be used in any way that could identify him/her individually in the report or in any publicity about the research.

Name of Parent/caregiver _____ Signature: _____ Date: _____

Child's name: _____ Age: _____

Researcher's Signature: _____

GENERAL INFORMATION

- 1) Age of the respondent(years)
- 2) Gender of the respondent Male Female
- 3) Marital status Married Not Married
- 4) Highest level of education:
 - No Education
 - Primary Education
 - O-Level (Secondary School) Education
 - A-Level (High School) Education
 - Tertiary Education
 - Undergraduate University Education
 - Postgraduate University Education
- 5) Years of education.....(integer)
- 6) Number of children(integer)
- 7) Number of children aged below 18 years(integer)
- 8) Number of past convicted offences (integer)
- 9) Number of other convicted members of your family.....(integer)

**APPENDIX III: QUESTIONNAIRE ON RIGHTS OF CHILDREN OF IMPRISONED
MOTHERS: TOWARDS NON-CUSTODIAL SENTENCING FOR WOMEN OFFENDERS IN
KENYA**

Date of Interview	
Questionnaire Number	
Facility	
County	
Sub-County	
Interviewer Name	
Interviewee Name	

GENERAL INFORMATION

- 1) Age of the respondent(years)
- 2) Gender of the respondent Male Female
- 3) Level of education:
 - No Education
 - Primary Education
 - O-Level (Secondary School) Education
 - A-Level (High School) Education
- 4) Years of education.....(integer)
- 5) Number of other convicted members of your family.....(integer)

PART II CHILDREN OF IMPRISONED CAREGIVERS

- 6) Who are you visiting in prison?
 - Mother
 - Other (Specify)
- 7) How did you know your mum/caregiver was in prison?
 - She was arrested in my presence
 - Informed by Relative
 - Informed by Police
 - Other (Specify)

APPENDIX IV: QUESTIONNAIRE ON RIGHTS OF CHILDREN OF IMPRISONED MOTHERS: TOWARDS NON-CUSTODIAL SENTENCING FOR WOMEN OFFENDERS IN KENYA

Date of Interview	
Questionnaire Number	
Facility	
County	
Sub-County	
Interviewer Name	
Interviewee Name	

INTRODUCTION

Dear Participant,

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The following survey is part of a study to determine what factors are considered while sentencing primary caregivers and how the same can be improved to factor in the rights of dependent children who are affected by custodial sentencing of primary caregivers.

By participating in this interview that will take about 30-45 minutes, you will have the chance to provide information that may be used to make children's lives better in the country. Please answer all questions in such a way as to reflect most clearly your experience as a key player in the criminal justice sector in Kenya. All the information provided will be treated with utmost confidentiality and shall be used for academic purposes only.

Thank you for participating.

Yours sincerely,

Emmanuel Ndunda.

GENERAL INFORMATION

- 1) Age of the respondent(years)
- 2) Gender of the respondent Male Female

APPROVALS