THE ADOLESCENT AND THEFT:

INTERVENTION BY THE JUVENILE COURTS

BY

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DECLARATION

I, ERIC OLUOCH OGWANG certify that this Thesis is my original work and has not been submitted and is not currently being submitted for any degree in any other University.

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DEDICATION

To the Lord and Saviour Jesus Christ.
He is the same yesterday and today and forever.

To my special friend Grace Odhiambo,
for her unfailing love, prayers, support and encouragement.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Abstract</th>
<th>i</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preface</td>
<td>iii</td>
</tr>
<tr>
<td>Acknowledgements</td>
<td>viii</td>
</tr>
<tr>
<td>Table of Abbreviations</td>
<td>ix</td>
</tr>
<tr>
<td>Table of Cases</td>
<td>x</td>
</tr>
<tr>
<td>Tables of Statutes</td>
<td>xi</td>
</tr>
</tbody>
</table>

## CHAPTER ONE

### JUVENILE DELINQUENCY

1. **TERMINOLOGY**
   1. Juvenile 1
   2. Delinquency 5
   3. An overview of juvenile delinquency 5

2. **TYPES OF DELINQUENCY**
   1. Children engaged in anti-social activities 7
   2. Children involved in crime 10

3. **FACTORS ASSOCIATED WITH DELINQUENCY**
   1. Family influence 12
   2. Social influence 17
   3. Economic influence 25

4. **THEORIES ON JUVENILE DELINQUENCY**
   1. The sociological theory 28
   2. Economic theory 33

5. **SUMMARY AND CONCLUSION** 38
CHAPTER TWO
THEFT: A FORM OF JUVENILE DELINQUENCY

1 DEVELOPMENT OF THE LAW OF THEFT 47

2 DEFINITION OF THEFT 49
   A - The ingredients of theft
   B - Penalty for theft 49

3. APPLICATION TO CHILDREN OF THE LAW OF THEFT 50

4. CAUSES OF THEFT BY ADOLESCENTS 62
   A - Poverty as a cause for stealing 63
   B - Family influence 66
   C - Peer group pressure 68

5. TRENDS IN THEFT AMONG ADOLESCENTS 69
   A - The ages of offenders who are charged 69
   B - Incidence of theft by sex 70
   C - Items stolen by adolescents 71
   D - Trends in theft over the past years 72

6. SUMMARY AND CONCLUSION 74

CHAPTER THREE
THE ADOLESCENT THEFT SUSPECT AND THE LEGAL PROCESS

1 THE STATE'S RANGE OF INSTRUMENTS 80
   FOR DEALING WITH THE PROBLEM
   A - Preventive Instruments 81
   B - Remedial Instruments 87
CHAPTER FOUR

LEGAL AND INSTITUTIONAL REHABILITATION
FOR ADOLESCENTS INVOLVED IN THEFT

1 PROBATION

2 INSTITUTIONAL REHABILITATION
   A - Approved Schools
   B - Borstal Institution

3 PROBATION VERSUS INSTITUTIONAL REHABILITATION:
   A COMPARATIVE ANALYSIS

4 SUMMARY AND CONCLUSION

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

BIBLIOGRAPHY
Juvenile delinquency, especially theft by adolescents, is a fast growing phenomenon in the society. Its dramatic spread, particularly in the urban areas, calls for state action, both to curb its growth, and to reform the delinquent youth.

Delinquent children can be categorized in two groups. The first group is described in section 22 of the Children and Young Persons Act (Cap 141), as children in need of protection or discipline. These are children who have not committed any criminal acts, but are none the less engaged in anti-social activities like begging, smoking, and frequenting places where alcohol is sold and consumed. Such children are generally out of parental control, and the law provides that they may be brought to court, so that appropriate orders, of a rehabilitatory nature, may be made in respect of them.

The second category of juvenile delinquents are those who have committed criminal acts contrary to written law.

The most common crime committed by the youth is theft. Indeed it is not uncommon in the Kenyan urban centres to see boys running at breakneck speed across the streets oblivious of the danger posed by motor vehicle traffic, after snatching a necklace or watch from an unsuspecting victim, which item is later to be sold at a throw-away price to get money for basic needs.

Whereas several texts have been written, and many seminars and conferences organized on the first category of juvenile delinquency, the second category has largely been overlooked - at least as far as the position in Kenya, the main focus of this study, is concerned. This thesis addresses the second category of juvenile delinquents. It represents an attempt to understand and to clarify the position of the adolescent who steals. It aims at unravelling the reasons why he steals, at examining the judicial process he undergoes when arrested, and the ultimate effect of legal intervention in his life through rehabilitation efforts.
To accomplish this, the concept of juvenile delinquency is first discussed. This is necessary as the offence of theft, although common, is just one act of delinquency. General causes of delinquency are also discussed. This serves as a prelude to the more focused discussion on the phenomenon of theft. Its ingredients are analysed, and legal and judicial decisions of relevance are considered. The discussion also includes causation, in relation to theft among juveniles.

Next, the legal process applicable to cases of theft by juveniles, is examined. A discussion is undertaken on the role of the police, before the theft suspect is brought to court, and up to the time he appears before the magistrate. It is submitted that the laws that a child-accused faces in court are generally beyond his comprehension. The thesis devotes its discussion to the application of these laws, and considers how to improve the machinery of juvenile justice.

The last major issue to be discussed is the methods of rehabilitation that the court may order for the adolescent offender. It emerges that each method - probation and institutional rehabilitation - has its specific role, and the roles are not interchangeable, even though for most offenders, probation is the most effective method of rehabilitation.

The final chapter examines the issues discussed and conclusions reached in the body of the thesis. These points taken together, lead to the conclusion that the main cause of theft is found in the failure within the family to impart the right influences on the child. The conclusion is also reached that the law and the juvenile court have one basic goal, of rehabilitating juvenile offenders, if possible within the family environment.
"Children are the most precious possession of a nation because they are the future of that nation. Children should therefore be cared for like delicate blossoming flowers. They are born in love, and brought up in love, but alas! not all continue to be cared for in love, so they become delinquents. Being forsaken through the neglect of their parents, and the society, it is the discarded children who under a misnomer, are brought face to face with the criminal justice in the juvenile courts".

This study has been inspired by my concern over the steady growth in the numbers of juvenile delinquents, especially those who steal, within Nairobi, and by my encounter with these children while working as a magistrate at the Nairobi Juvenile Court. Yet, in spite of this growth in juvenile criminal activity, it is noted that most seminars and conferences in the recent past have only addressed the delinquent children who are in need of protection or discipline, especially when they are abused and neglected. Comparatively less attention, if any, has been accorded to delinquent juveniles who break the law.

This study seeks to address this overlooked issue of crime committed by adolescents. The study in general represents a critical examination of adolescents who steal (since they constitute about three quarters of adolescent criminal offenders), and the existing legal and institutional framework for handling cases of such juveniles charged with theft.

More specifically, the study aims at identifying the causes of juvenile delinquency, and particularly, why adolescents are involved in theft. The reason for this is that theft is not just one aspect of delinquency, but it is the most common type of juvenile delinquency; and the children who steal are usually involved also in other delinquent activities. Secondly, it is only when it is known why children steal, that realistic steps can be taken to prevent future acts of theft, and to rehabilitate the juveniles already involved in theft.
The study also seeks to critically examine, analyse and assess the role of the juvenile court and related institutions in handling cases of theft by adolescents. Is the role of the juvenile court merely to grant a fair hearing to the accused, and if guilty, punish him for the offence, or is it, on the contrary, to help rehabilitate him. In other words, is the role of the juvenile court different from that of the other courts, or does it play the same role as other courts, but for the age difference of the accused persons? This study proceeds from the view that the juvenile court's most important duty is not just to establish the innocence or guilt of an accused and punish the offender, but to direct on his rehabilitation if, from the trial, it is established that he committed an offence.

An increase in juvenile crimes, especially theft, raises the question whether the juvenile justice system is faulty, and is assuming that it is rehabilitating the juvenile offenders when it is in fact not accomplishing this goal. This study approaches the question by examining the procedural and substantive laws applied in the juvenile court, and in related institutions. The study seeks to establish whether the laws help to achieve the goal of rehabilitation or not.

The analysis undertaken in the study will demonstrate that the substantive and procedural laws applied in the juvenile courts are not easily understood by the juveniles charged. It therefore behoves the magistrate to go beyond his ordinary role, to the extent of appearing as an advocate for the accused, to ensure that justice is done. This position shows the genuine need for an advocate, to handle the cases of juveniles in court, so as to ensure a fair hearing for them.

The study would be incomplete, without a discussion of how the court and other related legal institutions seek to rehabilitate juveniles who have been involved in theft, or who have committed other delinquent acts. Accordingly, a discussion is also undertaken on the methods of rehabilitation that are employed, especially probation, approved schools, and borstal institutions. The question may be asked, and the study has sought to arrive at an answer for it, whether the youthful offenders are truly reformed in these institutions, or the whole attempt at institutional treatment is a failure.
The discussion sets out with four working hypotheses. These are as follows:

1. That the basic cause for adolescent thefts is the failure of parents and guardians of juveniles to set a good example for, protect discipline, and provide the basic needs of their children.

2. That, the judicial process is so complicated as not to be easily understood by the juvenile charged with theft. The magistrate must therefore be flexible in the application of court procedures to ensure that the rights of the juvenile charged with theft are protected.

3. That the role of the juvenile court transcends just according to the accused a fair trial, and incorporates seeking after his welfare, if possible through rehabilitation.

4. That juvenile rehabilitation is best carried out in a family context, subject to the direction and supervision of the court.

This discussion is divided into four chapters. Chapter one discusses the concept of juvenile delinquency generally. It attempts to clarify the two terms "juvenile" and "delinquency". Then it goes on to discuss the general causes of delinquency. The chapter also deals with two types of delinquency - the children in need of protection or discipline, and children involved in crime, including theft. The chapter concludes with a discussion of the sociological and economic theories of delinquency causation - these two being some of the main theories of delinquency causation.

The second chapter is focused on theft as a form of juvenile delinquency. The offence of theft and its ingredients are analysed. The causes of theft by adolescents are also explored. It is here that the first hypothesis is tested and verified. The chapter concludes with a general discussion of the trends in theft among adolescents, over the years, and among the different age groups and sexes.
The fulcrum of the thesis may be said to be chapter three, which starts by considering the state's strategies in controlling adolescent crime. The state has the major task of both prevention and "cure", in respect of theft offenders. The judicial system is just one part of the state machinery, and it deals mainly with the identification of the persons who steal; and its approach is, in a sense, curative.

Judicial intervention in the matter of adolescent theft is discussed under the topics: "arrest and charge", and "the judicial process". It is here that the second and third hypotheses are tested. Are the procedural and substantive laws suitable for the juvenile court? Does the court effectively engage in the rehabilitation of the offender? Perhaps no better answer can be given to the latter question than that which will be obtained through a consideration of the working relationship between the magistrate and the probation officers. This is the strategy of the present study.

The fourth chapter is devoted to the rehabilitation methods applied for juvenile offenders. Chapter four crystallizes the issues already raised in relation to the role of the probation officer, as it deals with specific issues regarding the rehabilitation process for adolescents involved in crime. It confirms that while institutional rehabilitation is important and has its place in the rehabilitation process in general, probation is no less advantageous, as reformation of juvenile offenders is best accomplished while the subject stays at home with parents, but under the supervision of the court.

Chapter five summarises the fundamental points and findings of the entire discussion. It reflects on judicial intervention in the rehabilitation process, and makes the submission that the working hypotheses have been verified.
FOOTNOTES


2. The figure is obtained from police records cited by B.K. Njinu, Commissioner of Police, at the workshop on Criminal Justice and Children - Ibid.

3. Prof. T. Asuni, "Criminal Justice and Children" found in Justina Muchura (Ed.) Ibid.
ACKNOWLEDGEMENT

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ERIC OLUOCH OGWANG
NAIROBI
4TH OCTOBER 1993
## TABLE OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>All.E.R</td>
<td>All England Law Reports</td>
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<tr>
<td>A.J.I.L.</td>
<td>American Journal of International Law</td>
</tr>
<tr>
<td>Cap.</td>
<td>Chapter</td>
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<td>East African Law Reports</td>
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</tr>
<tr>
<td>E.A.L.B.</td>
<td>East Africa Literature Bureau</td>
</tr>
<tr>
<td>Ed.</td>
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</tr>
<tr>
<td>K.B.</td>
<td>Law Reports of Kings Bench Division, England</td>
</tr>
<tr>
<td>K.I.A.</td>
<td>Kenya Institute of Administration</td>
</tr>
<tr>
<td>K.L.R.</td>
<td>Kenya Law Reports</td>
</tr>
<tr>
<td>Q.B.</td>
<td>Law Reports of Queen's Bench Division, England</td>
</tr>
<tr>
<td>U.O.N.</td>
<td>University of Nairobi</td>
</tr>
<tr>
<td>Vol.</td>
<td>Volume</td>
</tr>
<tr>
<td>W.L.R.</td>
<td>Weekly Law Reports</td>
</tr>
</tbody>
</table>
# TABLE OF CASES

## REPORTED CASES

<table>
<thead>
<tr>
<th>Case</th>
<th>Citation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kaisa v. R. (1972)</td>
<td>E.A. 532</td>
</tr>
<tr>
<td>Keteta v. R. (1972)</td>
<td>E.A. 532</td>
</tr>
<tr>
<td>Leitoiyani v. R. (1972)</td>
<td>E.A. 50</td>
</tr>
<tr>
<td>R. v. Cory (1864) 10 Cox.C.C.</td>
<td>23</td>
</tr>
<tr>
<td>R. v. Gilks (1972)</td>
<td>I.W.L.R. 1341</td>
</tr>
<tr>
<td>R. v. Gorrie (1918)</td>
<td>38J.P. 136</td>
</tr>
<tr>
<td>R. v. Metropolitan Police Cons. exparte Blackburn (1968)</td>
<td>2.Q.B. 118</td>
</tr>
<tr>
<td>R. v. Metropolitan Police Cons. exparte Blackburn (No.3) (1973)</td>
<td>Q.B. 241</td>
</tr>
<tr>
<td>R. v. Shickle (1868) L.R. ICCR</td>
<td>159</td>
</tr>
<tr>
<td>Tumuheire v. R. Uganda (1967)</td>
<td>E.A. 323</td>
</tr>
<tr>
<td>Williams v. The People and State of New York (1949)</td>
<td>337 U.S. 241</td>
</tr>
</tbody>
</table>

## UNREPORTED CASES (NAIROBI JUVENILE COURT)

<table>
<thead>
<tr>
<th>Case</th>
<th>Citation</th>
</tr>
</thead>
<tbody>
<tr>
<td>R. v. Agnes Mudeva J</td>
<td>832/92</td>
</tr>
<tr>
<td>R. v. Chiliki Kamoti J</td>
<td>1158/92</td>
</tr>
<tr>
<td>R. v. Daniel Kungu J</td>
<td>297/93</td>
</tr>
<tr>
<td>R. v. David Iruungu Njoroge J</td>
<td>862/92</td>
</tr>
<tr>
<td>R. v. Mwangi Maina J</td>
<td>793/92</td>
</tr>
<tr>
<td>R. v. Peter Mwaira Kivunja J</td>
<td>1458/92</td>
</tr>
<tr>
<td>R. v. Richard Owiti Wango J</td>
<td>1307/92</td>
</tr>
<tr>
<td>R. v. Samson Kibe Nyathira J</td>
<td>932/92</td>
</tr>
</tbody>
</table>
LIST OF STATUTES OF KENYA


The Judicature Act, Chapter 8.

The Magistrates Courts Act, Chapter 10.

The Age of Majority Act, Chapter 33.

The Penal Code, Chapter 63.

The Probation of Offenders Act, Chapter 64.

The Criminal Procedure Code, Chapter 75.

The Police Act, Chapter 84.

The Borstal Institutions Act, Chapter 92.

The Children and Young Persons Act, Chapter 141.
CHAPTER ONE

JUVENILE DELINQUENCY

1. TERMINOLOGY

The first problem to be encountered by any person dealing with the subject of "juvenile delinquency" is its definition. The term has no standard definition and has been interpreted differently by different people. This situation results from the different outlooks and emphases by different professions. For example, there is no uniform definition of who a juvenile is and what acts constitute delinquency among sociologists and lawyers. Generally the sociologists will consider all acts that are socially unacceptable as acts of delinquency, while the lawyer will normally only consider those acts which are a breach of the written law.

Notwithstanding this drawback, we shall endeavour to discuss the subject with a view to arriving at a generally acceptable definition. To do this, we shall first seek to understand the terms "juvenile" and "delinquency".

A. JUVENILE

The Longman Dictionary of Contemporary English defines a juvenile as "a young person no longer a baby but not yet fully grown".

This definition, being so wide, raises a second problem of age. When does a person cease to be a baby, and when does one become fully grown? From the definition given in the dictionary, it is apparent that the age span between these two points, that is, "baby" and "fully grown" is what constitutes a juvenile.

One way that is universally accepted in ascertaining whether a person is a baby or not is the age at which a person may be charged in a court for committing a crime. This is because it is recognized that a baby cannot be charged in a court of law for committing a crime.
However, the age at which criminal liability begins is set at different levels in different countries, and this makes it difficult to give a general definition of a juvenile. In Kenya, the age of criminal responsibility is fixed at eight years\(^2\). Below this age there is an irrebuttable presumption that a child is not criminally responsible for any act or omission; because of this tender age the child does not know that what he was doing is criminally wrong. The child is believed to be incapable of entertaining the requisite \textit{mens rea}.

There is, however, a rebuttable presumption that a child "under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had the capacity to know that he ought not to do the act or omission"\(^3\). This principle is well expounded in the case of \textit{R.v.Gorrie}\(^4\), an account of which follows:

In this case a child jabbed another with a pen knife and caused his death. He was charged with manslaughter, but the jury was directed that it was not sufficient to prove the presence of a guilty mind as would suffice in the case of an adult, that is, the knowledge that the act is dangerous. It was necessary to go further and prove that when the boy did the act, he knew that what he was doing was not merely wrong, but gravely wrong. The requirement is often expressed in the phrase, "\textit{militia supplet act etem}" meaning "malice makes up for want of age".

It is apparent from the above discussion that for legal purposes, a child below eight years of age (in Kenya) is a baby, while a child of eight or more years of age may be referred to as a juvenile.

The second issue is how far the age of a juvenile stretches above the eight-year mark. As previously stated, the juvenile is not a baby, yet he is not yet fully grown. The person who is fully grown is an adult.
In Kenya under the Age of Majority Act (1974)\textsuperscript{5} it is provided in section 2 that, "A person shall be of full age and cease to be under any disability by reason of age on attaining the age of eighteen years". Such a person is an adult and is therefore not a juvenile. He is legally liable for any acts or omissions he may commit, unlike the juvenile who is still seen to be of immature intellect and imperfect discretion. Going by this Act then, a person who is below eighteen years of age is not an adult but a juvenile.

It is noted that in Kenya as in most countries, there is not an all-embracing definition of the term "juvenile", as this varies with different statutes. In Kenya's Children and Young Persons Act of 1972\textsuperscript{6} for example, a child is defined as a person under the age of fourteen years, a juvenile is a person who has attained the age of fourteen years but is under sixteen years, and a young person is one who has attained the age of sixteen years but is under eighteen years.

The position in Kenya, it may be pointed out, is not a peculiar one. In English law for example, under the Children and Young Persons Act of 1933, a child was defined as a person under the age of fourteen years, and a young person as a person who has attained the age of fourteen years but is under the age of the twenty one years. But for the purposes of the Children and Young Persons Act of 1948, a child was simply defined as a person under the age of eighteen years.

In Nigeria, the Children and Young Persons Act (1958)\textsuperscript{7} defines a "child" as a person under the age of fourteen years\textsuperscript{8} and a "young person" as someone who is between the age of fourteen and seventeen years\textsuperscript{9}.

The problem of getting a uniform definition of the term "juvenile" is further compounded when one considers that different terms such as "child", "minor", "infant", "juvenile" and "young person" are used in differing statutes\textsuperscript{10} to refer to the same people whose cases are dealt with in the juvenile courts.
D.N. Nsereko expounding on the "Rights of Children in Botswana" attempts to answer the question, "who is a child?". He points out that under the Botswana Interpretation Act (1984) any person who has not attained the age of twenty one is considered a minor. Generally minors have limited legal rights. They cannot enter into binding contracts on their own, marry without the consent of their parents or guardians, sue or be sued directly.

Under the Botswana Children's Act (1981) "any person who has attained the age of fourteen years and is under the age of eighteen years" is considered a juvenile. Juveniles are considered old enough to be "criminally responsible", but because of their tender age, the law provides special modalities for dealing with them. The Children's Act (1981) defines a child as "any person who is under the age of fourteen years". According to the Penal Code a person under the age of fourteen years is not criminally responsible for an act or omission unless it is proved that at the time of doing the act or making the omission he had the capacity to know that he ought not to do the act or make the omission.

Lastly, the Children's Act defines an infant as "a person under the age of seven years". According to the Penal Code, "A person under the age of eight is not criminally responsible for an act or omission". Similarly under the Roman Dutch Common law which is applicable in Botswana's Civil matters, persons under the age of eight do not possess the culpa, and so they are not responsible for their acts or omissions, and may not be sued in delict.

Thus while all infants, children and juveniles are minors, not all minors are juveniles, children or infants. Such minors may not be able to shelter behind those statutes to escape obligations that the law imposes on them. This goes for juveniles and children as well.

The law also sets certain age limits in order to confer certain rights or protection on children. In Kenya, for example, the Adoption Act (1979) defines an infant as a person under the age of eighteen years for the purposes of adoption. However, this definition does not include a person aged under eighteen years who is or has been married. A similar definition is found in the Guardianship of Infants Act (1962). The Employment Act (1972) recognizes that a person who has not attained the age of sixteen years is a child for the purposes of being engaged in gainful employment in any industrial undertaking.
From the above discussion we may conclude that in Africa, there is not a single definition of the term "juvenile" that is universally acceptable. This is because the statutes in the various countries define the term juvenile by reference to differing age-categories, and according to the purposes of the differing statutes. For the purposes of our discussion, the youth whose ages are between eight and eighteen years are referred to as juveniles.

B. DELINQUENCY

Delinquency has been defined as "behaviour especially by young people that is not in accordance with accepted social standards or with the law". It is an "offence against the law or accepted social standards".

The question may be asked whether there is a universal or uniform understanding of what behaviour is socially acceptable since this may vary with the different religions, cultures and national laws. This is a debatable issue and worthy of further consideration, but for the purposes of our discussion, what is socially acceptable or not will be based on the present practices in Kenyan society.

Acts that are socially unacceptable or that are an offence against the law are many, and will be considered later in this chapter. With this background and definition, we may now discuss the subject of juvenile delinquency with greater understanding.

C. AN OVERVIEW OF JUVENILE DELINQUENCY

Generally speaking, the term "juvenile delinquency" refers to a large variety of disapproved and anti-social behaviour in juveniles for which some kind of admonishment, punishment or corrective measure is justified in the public interest.
Juvenile delinquency has been of much global concern and has attracted attention at the United Nations for some time. The second United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in London in August 1960 took up this problem, and the consensus was that the issue of definition need not be stretched too far. It was agreed that the meaning of the term "juvenile delinquency" should be restricted to all violations of criminal law, and maladjusted behaviour of minors which are disapproved by society.

Scholars in different fields also have their own views of what the definition of juvenile delinquency should be. Erasto Muga in his text, *Causes of Delinquency In Kenya* adopts the definition of the Committee on Young Persons, which was appointed to look into children's welfare in colonial Kenya. The committee defined a juvenile delinquent as a person between the statutory court age of seven years and sixteen years who commits an act which when committed by persons beyond this statutory court age would be punishable as a crime, or an act injurious to another individual or the public.

This definition is clearly not exhaustive because it has restricted juvenile delinquency to criminal acts, when it also includes non-criminal acts. This is clear when one considers the definition of delinquency as found in the dictionary, and as we shall see later, as set out in the Children and Young Persons Act (1972).

D.J. West, a renowned criminologist, also strongly supports the view that delinquency cannot be restricted to criminal acts. Nor can a delinquent juvenile be limited to mean a juvenile who has committed an act which when committed by an adult would be punishable as a crime. The reason he gives for this, is that certain acts of delinquency the juveniles engage in cannot apply to adults. He states:

".... how does one categorize the condition of being beyond the control of one's parents or being in moral danger or failing to attend a school?... these matters have no parallel in the criminal code relating to adults."
2. TYPES OF DELINQUENCY

It is evident from the foregoing discussion that there are two types of delinquency. The first type is the case of children who are engaged in anti-social activities but are not committing any offence against the written law. The second type of delinquency is the case of children who are engaged in criminal activities contrary to written law. We shall now consider these two types of delinquency.

A. CHILDREN ENGAGED IN ANTI-SOCIAL ACTIVITIES

Children are presumed to be ignorant and immature beings who are not fully competent to determine and safeguard their own interests. They are therefore dependent on and in need of, direct care from adults who will guide, discipline and train them to appreciate the societal values and be socially responsible. Children who lack the training, or are unfortunate to find wayward company of youth in their neighbourhood, will instead adopt practices that are not approved for children in the society.

A great many of such activities are in fact non-criminal, and are tolerated if done by adults. They are, however, not acceptable in the society and, if children take to them, they may actually end up in the juvenile court. Examples of such acts are smoking, drinking alcohol, being disobedient to parents, absenting oneself from home, and missing school. These may be permissible conduct for adults but the same are treated as delinquent acts if committed by children or adolescents.

The Children and Young Persons Act (1972) sets out a number of circumstances which may lead a child to a juvenile court, even if such a child has not committed a crime in a legal sense. The children who are brought to court because of such activities are said to be in need of protection or discipline. The law states that a child or juvenile is in need of protection or discipline:
"(a) who has no parent or guardian or has been deserted by his parent or guardian, or is destitute or a vagrant,
or

(b) who cannot be controlled by his parent or guardian;
or

(c) whose parent or guardian does not, or is unable or unfit to exercise proper care and guardianship;
or

(d) who is falling into bad associations or is exposed to moral or physical danger;
or

(e) who is being kept in any premises which in the opinion of the medical officer, are overcrowded, insanitary or dangerous;
or

(f) who is prevented from receiving compulsory education, or is an habitual truant;
or

(g) who frequents any public bar or gambling house, or who is found buying or receiving or in possession of any drug which is deemed to be dangerous or habit forming;
or

(h) who is found begging or receiving alms or inducing the giving of alms whether or not there is any pretence of singing, playing or performing;
or

(i) if any of the offence mentioned in the First Schedule to this Act has been committed against him, or if he is a member of a household as a child or a juvenile against whom any such offence has been committed or is a member of the same household as a person who has been convicted of such an offence against a child or juvenile".
Many people have made the mistake of assuming that once a child is taken to court on a criminal charge, or as being in need of protection, care or discipline, then he must be a delinquent. From my sitting as a Magistrate, and from my research at the Nairobi Juvenile Court, I wish to point out that such assumption is grossly wrong. Several children are taken to court on criminal charges only to be acquitted by the court because they in fact did not commit the alleged offence. Certain children may also be brought to the juvenile court on allegations that they are delinquent, when in fact they are not.

Several children are also brought to court under section 22 of the Children and Young Persons Act (1972), not because they are engaged in anti-social activities, but because they are helpless and need care and protection. Included in this group are children who have been deserted by parents, who have run away from cruel employers, whose parents are physically disabled and unable to take care of them, among others. Also common in Nairobi are cases of children who get lost from their parents in the rush of human traffic, and end up in the juvenile court as vagrants. The situation of such children calls for sympathy, and the court's help to offer them protection, and to trace parents or guardians who can care for them. It is noted that this group of children have not engaged in anti-social activities that would call for their rehabilitation, as would be necessary in the case of delinquent children.

It is, however, not to be disputed that should such children, in need of protection, be left without immediate solution to their problems, then inevitably, in an attempt to survive, they will end up being delinquents.

Section 22 of the Children and Young Persons Act (1972) also sets out a wide variety of activities that would land a child in a juvenile court, because he is engaged in delinquent activities. Such a child is not only in need of protection and care, but also of discipline. Included in this section are such acts as, being beyond parental control, falling into bad associations, frequenting bars, being in possession of drugs, and begging.
The Act does not define or set a limit to the provisions set out in section 22. For example, it does not explain what it means to be controlled by one's parent or guardian, or what "bad associations" is. This has the effect of making the law wide and possibly vague, but in a situation where the behaviour of children may greatly vary towards their parents, it has the advantage of giving the court a greater discretion to consider each case subjectively and to declare whether a juvenile is beyond parental control or not.

B. CHILDREN INVOLVED IN CRIME

In addition to children engaged in anti-social activities, delinquents also include children involved in crime. Like an adult offender, a juvenile can be apprehended by the police and charged before the juvenile court for breaking the law, if he is eight years of age and above. The procedure and other aspects of the case would be very much like in the case of adults, except that throughout the case, until the final order is pronounced, the court must keep in focus that its goal is the reformation and welfare of the accused child.

Although normally overlooked, it should be born in mind that more children are charged with criminal offence than those that are brought to court because they are in need of protection or discipline. In other words, there are more juvenile delinquents who are involved in crime than those who are only engaged in anti-social activities. For example, in 1984, in the Nairobi Juvenile Court, there were only 44 cases of children in need of protection and care, out of the total of 1,014 registered cases - the rest being cases of vagrancy, theft and other criminal offence. In 1985, the cases of children in need of protection or discipline were only 9 out of a total of 1,112 registered cases. This trend has not changed, and to-date there are only 16 registered cases of children in need of protection or discipline, out of a total of 1,094 registered cases.

As stated before, the decision the court makes in both types of delinquency cases, must have the welfare of the child as its goal. This is in keeping with section 14 of the Children and Young Persons Act which provides that:
"Every court dealing with a person who is brought before it shall have regard to his welfare .......".

In the case of children who are merely in need of protection the court will normally commit them back to their parents and guardians for protection and care. In a case where the court is of the opinion that the juvenile is delinquent, the court will give an order aimed at restoring and rehabilitating him.

3. FACTORS ASSOCIATED WITH DELINQUENCY

It is important to identify and understand the causes of juvenile delinquency, for without a sound knowledge of the causes of maladjusted behaviour, the legal machinery set up in the juvenile courts and statutes cannot be successful in curbing or even minimizing juvenile delinquency.

Researchers on causes of juvenile delinquency show that the juvenile takes to deviant behaviour due to frustrations in his attempts to adjust to demands of his family and other social relations, or because of immediate environmental pressures.

It is difficult to set out for detailed examination the specific social, psychological and physical factors that are important in delinquency causation. This is because delinquency is due to a complex combination of factors. It is therefore not surprising to find that the theories or explanations of causation overlap and are greatly related to each other. It is with this in mind that Sir Leon Radzinowicz stated in relation to the above:

"To attempt to explain all crime and delinquency in terms of a single theory of causation should be abandoned altogether with such expressions like crime and causation. The most we can do now is to throw light on factors or circumstances associated with various kinds of crime..."
The study is set out to echo the words of Radzinowicz: to throw light on factors or circumstances associated with delinquency. To help accomplish this, the study discusses the causes of delinquency by considering three influences in the life of the child, namely:

a. Family influence;
b. Social influence;
c. Economic influence;

The views of other scholars and schools of thought in explaining the cause of delinquency among juveniles are also considered. These views include among others the sociological theory, psychological explanations, and economic theory.

A. FAMILY INFLUENCE

The family and the home are the first and basic environment that a child knows. Like a tender shoot that is directed in the way it should grow before budding, the child's behaviour, character and direction in life is normally shaped by the family influence. It is the family, more than any institution, that first and foremost should ensure that the child respects and obeys both the law and society. The family should provide a healthy environmental atmosphere for the child to meet basic needs of his life like love, food, clothing and shelter. The family that fails to meet these needs renders the child susceptible to delinquency. Most scholars are of the view, and I agree, that ill-managed and broken families that fail to provide these needs turn out to be breeding grounds for child delinquency.

In Britain, for example, in a survey based upon a sample of 500 youths discharged from the Borstals during the years 1941 to 1944, A. Gordon Rose found that at the time of being committed, half of the boys were from homes permanently broken by parental death, desertion, separation or divorce. In an unselected sample of 100 boys committed to approved schools and sent to Aycliffe for classification, J. Gittins found that in half the cases either one or both parents were dead or else they were separated, deserted or divorced, the latter categories being much more numerous. In only one third of the cases did the children come from homes with both parents.
The situation in Kenya is not much different from the above observations. In a research by Erasto Muga\textsuperscript{41} covering cases of 1,171 juvenile delinquents from 1,171 families, it was established that there were 691 families in which both parents did not live together because of death of one or both parents, divorce or separation, or mothers not living in marriage bonds. It was only in 480 families where the husbands and wives lived together.

The following types of families falling below the standard of the "ordinary reasonable family" tend to promote delinquency among children:

i. Families with single parents as a result of separation, divorce or desertion;

ii. Families that exercise no discipline on the children;

iii. Families with defective family relationships resulting from jealousy, drunkenness and immorality;

iv. Families with neglected and abused children.

A common starting point for delinquency is insecurity at childhood due to a broken home, or a defective family relationship. Lopez-Rey has described a broken home as:

"... a home from which one or both parents are absent because of death, desertion, separation, divorce, employment as a migrant worker elsewhere, sentenced to prison or for any other reason unable to fulfil in continuous and due form what are generally regarded as parental duties and responsibilities"\textsuperscript{42}

It is the duty of parents to teach, guide and protect their children so that they mature to be good citizens. It is difficult to bring up children in this manner when a home is broken.

Indeed both parents could be present yet the home is broken, because of the poor relationship between the family members. Family malfunctioning results in abnormal relationships which may in turn distort the personality of the child. The child may seek love and peace away from the family or merely withdraw into a state of solitude and thereby miss proper guidance from the parents. When personality is distorted it may be expressed in delinquency.\textsuperscript{43}
A child from a broken family feels emotionally insecure and unloved. To him the one prospect of security, esteem and status which he missed at home seems to lie in the street gang, or in defiance of society, and this is often the start of delinquency.

The physical presence of both parents may not ensure the fulfilment of the essential rules, particularly when both parents are at work, since in most cases the children are already deprived of attention and love. Juvenile delinquency cases usually show a substantial causal connection with broken homes. Broken homes, in effect, ruin the foundation of human character which is first formed in the family unit.

Another characteristic which is usually connected to broken homes is lack of discipline for the child, or practices of "discipline" which by their excess, turn into child abuse. Broken homes have the effect of depriving the children of parental care and discipline. If parents fail to discipline their children, then it becomes almost a hopeless job for anyone, especially the court or any other institution, to attempt to do so. Parental love takes more than providing the material comforts of life. It also involves training children in the right values and character. It is with this objective that the Holy Scripture has a lot to say on child training and discipline. How true the scripture is that states:

"Train up a child in the way he should go, and when he is old he will not depart from it."

The seed is sown in the home where the child's socialization and initial training begins. It is with this realization that Judge Rodney stated:

"I am sick and tired of spanking someone else's children in court. This has to be done at home where the moral fibre of a young person is woven. Until we place the responsibility where it belongs, with the parents, our country will continue to see a rising incidence among teenagers of larceny...."
Inappropriate disciplinary practices on the other hand may have serious consequences in the development of a child's personality and character. One common such practice is child battering or abuse where children are mercilessly beaten in the name of discipline. At times such children are thrown out of the house through windows and doors by angry parents. Severe forms of punishment inflicted on a child at home and even at school, end up being child abuse rather than discipline.

Children below eight years may be abused without any active reaction and no self-defence. But above eight years of age, they begin to react to any negative action manifested in the form of child abuse. At this age, the child is aware of his environment and is capable of manipulating and exploiting it, in the pursuit of survival. A battered child, or a child whose basic needs like food and clothing are not met will go out of the home to seek ways and means of meeting these needs irrespective of the means employed. In the urban areas, they will normally engage in various forms of anti-social activities such as begging and petty thefts.

Another related factor is neglect of children, especially by their parents. Although all children are potential delinquents, yet very few become delinquent through their own voluntary designs, because usually they are too young to choose to become deviant. In the words of the late Chief Justice Madan:

"They are forced into an errant life principally by the neglect of their parents - the parental neglect of the primary needs of children for love, care, food and schooling".

This neglect gives the children no alternative but to fend for themselves, and to do so without any knowledge or training on how to do it, the result is that they end up in disreputable vocations that require no training, such as directing motor vehicles on parking, washing cars, begging, prostitution and stealing.
In summing up his opening address at the workshop on "Criminal Justice and Children", the late Chief Justice Madan expressed his opinion that: "The parents are the biggest criminals whose neglect drives children into what society is pleased to refer to as criminal activities". Some parents on the other hand over-indulge their children with money and in certain activities. A child who is normally given too much money when he does not know how to rightly use it will most likely be irresponsible and undisciplined. Some children are also over-indulged in activities which expose them to delinquency, for example, attending cinemas, going to parties and dances where there are people who practice unbecoming behaviour. These acts by themselves need not lead to depravity, but when they are not for the child, or the child is left to over-indulge in them, there is a high risk that he will imitate the behaviour he observes. Such a child might indulge in acts of taking alcohol, truancy and smoking, which are acts of juvenile delinquency.

The influence of the family in the life of a child may be seen in the size of the family. Several studies indicate that a large number of delinquents spring from large families because they lack proper care and attention. The larger the family, the greater the chances of being delinquent, as the following findings illustrate.

D.J. West, writing on this issue, stated: "Another point on which investigators all agree is that families with a large number of children contribute a disproportionately large number of juvenile delinquents". He goes on to point out that T. Ferguson demonstrated this most convincingly with his sample of 1,349 Glasgow boys. Of these, from families of not more than four children, eight per cent were convicted by eighteen years of age. Of those from families of more than four children, sixteen per cent were convicted. A similar finding was reported by Treneman from his sample of 700 young delinquent soldiers.

The fact of a large family per se is not a cause of delinquency, for in the past there were and even now there are several large families without delinquent children. But normally the size of the family is directly related to the personal attention and discipline each child gets and the socio-economic factors and resources available to the family.
W. Merill in her study verified that children from large families are not delinquents because of size alone but because of over-crowding, poor nourishment and bad neighbourhood. As the per capita income is low, the children are stricken with poverty, having no adequate shelter, food and education. This state renders the children frustrated, exposes them to illegal avenues and compels them to indulge in deviant behaviour in an effort to obtain their needs.

B. SOCIAL INFLUENCE

After the family, the main causes of delinquency are to be found in a child's social and environmental influences. These include his physical residential neighbourhood, his schooling, and other immediate social conditions that the child associates with, and that influences his development.

i. Societal and Environmental Factors

A healthy and morally sound society will produce children who are morally upright and responsible. But a society of the nature of Sodom and Gomorrah will invariably produce delinquents, because children are attracted to the behaviour and criminal activities of those around them since children are very impressionable. It was with this in mind that Ron Nikkel, instead of laying any blame on children, saw in delinquent children a reflection of the society. In his words:

"As a community, we must see these children of ours who are in prison (delinquent) and when we see them, we must see in them, the reflection of our corporate sinfulness, of unresponsiveness and of preoccupation."

Whereas the society still proclaims the need for morality, the practice is that a wide spectrum of the society has rejected the ideal moral values. The society has chosen to conform to increasing immorality which has become the pattern of life. Crimes and other anti-social behaviour are now accepted as a matter of course, and many people's consciences have been hardened to see no ill in them. Dr. Appianda commenting on this issue said:
"There seems to be a creeping all-pervading gas of immorality which has now become a principal satisfaction of life. Our sensibilities have been so hardened that crimes are accepted as a matter of course".\textsuperscript{59}

The child at a tender age gains entry into the outer community life, or the neighbourhood environs, where he spends his leisure time. Whether he will be delinquent or not depends on the influences of the social life in the neighbourhood. The pressures in such a situation that would encourage delinquency include poverty and delinquency traditions in the area. In the view of Erasto Muga, a sociologist:

"... the area of the highest incidence of delinquency is one of deterioration in the sense that from a physical standpoint, it is likely to be a neighbourhood of dilapidated houses, dirty alleys, low rents, much poverty and dependency and inadequate recreational facilities. From a cultural standpoint, it is a place where the neighbourhood has ceased to be integrated.... and moral standard of behaviour has to some extent developed a tradition of delinquency and has largely failed to furnish unifying and edifying substitutes for the crumbling traditional patterns of behaviour and authority".\textsuperscript{60}

The influence of the environment in the life of the youth was expounded by the late Edwin Sutherland in the theory of "differential association". As originally proposed, the theory states that:

"Criminal behaviour is developed by normal social process common to all learning. Like all behaviour, crime is learnt from friends and associates and is often influenced by the areas in which one lives."\textsuperscript{61}

The theory holds that when one is exposed to more criminal than non-criminal influences in his immediate environments, the chances of his breaking the law are thereby increased. Certain kinds of anti-social behaviour might be condoned, and people may even be required to conform to them. Children in such a situation will be no exception and they will start adopting the culture.
Sutherland's theory clearly explains the growth and influence of delinquency in the urban environment. It also explains the relationship between the environment's influence and the growth rate of delinquency. This is especially clear when one considers the cases of the youth who go to towns with the hope of securing jobs, but end up frustrated by lack of jobs. Once the youth fail to realise their goals and expectations, of securing employment in urban areas, they revert to deviant behaviour as a means of compensation for their frustrations. Their concentration in towns exposes them to delinquent youths having the same objective, thereby enabling them to gang together to fight a common enemy - "poverty".

Clinnard, commenting on urbanization and delinquency, says that:

"Urban life is characterized by extensive conflicts of norms and values, rapid social change and emphasis on material goods and individualism. Such factors severely weaken the social control mechanisms provided by the family and interlocking patterns of friends in the rural home. The emphasis on material goods and their inability to obtain them honestly may make a juvenile commit delinquent acts."

In Kenya, the influence of the urban environment on the youth, and the growth of delinquency are evidenced by a higher concentration of juvenile delinquents in the urban areas, than in the rural areas. For example, in the research conducted by Erasto Muga in 1970, although the urban areas had only 10% of the national population, it had produced 483 or 41.3% juvenile delinquents, while the rural areas that housed 90% of the population had 688 or 58.7% juvenile delinquents.

Related to the phenomenon of urbanization, is the growth of slums. The youth who flock into the urban areas looking for jobs soon face the sad reality of lack of gainful employment and hence no reliable means of survival. Such youth, because of the financial constraints, reside in slum areas which are regarded in physical terms as overcrowded, congested, marked by poor sanitation, and short of social services.
The slums it may be noted represent a way of life, of their own creation. A slum has its social organization and its own set of norms and values. Some of these norms and values are reflected in the social ills of crime, prostitution and other types of delinquency. The theory of differential association comes into play when a young person living in slum and of no employment is lured to learn the criminal behaviour. A study carried out in the Mathare Area, the biggest slum in Nairobi, verified that most of the youth in disreputable vocations like plying the streets and prostitution, reside in this part of the city where the rent is low. It is no wonder therefore that a majority of those involved in crime and acts of delinquency come from such areas. What this also means, is that the youth in urban areas, being exposed to more crime (especially in the slums), are at a greater risk of adopting delinquent behaviour than those not exposed to the criminal activities.

Where both parents are employed, the children may be left at home without a (responsible) caretaker. The neglected children may be victimized by adults, or they may take to violation of the law, as a shortcut to survival. In the case of single mothers, the problem is even greater, for while in the rural areas the parents of such a mother may have helped her to bring up the children, in the urban area, such a woman may resort to bringing up her family by prostitution or same other unorthodox method. This further makes it hard for her to be able to exercise proper control and care over her children. Her low standards of morals could influence her children who may want to imitate her behaviour.

Sometimes children are inducted into delinquency because of people's attitudes towards them. It is common for example, to find people always pointing accusing fingers at poorly dressed children, causing them to harbour grudges against the society that discriminates against them. This could lead to anti-social behaviour so as to hit back at the society which has refused to recognise them.
ii. Schooling Environment and Educational Expectations

The school is next to the home in its close contact with and influence on the child. The purpose of the school is to educate the youth and help them realise their best potentials and develop into wholesome individuals and useful citizens.

Today some schools have failed to fulfil the demands of the society as they have not helped the child develop into a responsible citizen. This could be attributed among other factors, to the location of the schools, the school rules and the character of its teachers. For example, a school located in an urban setting is more likely to produce delinquent students than one removed from the town. This is because in the town there are many potentially harmful sources of attraction that will tempt the student -like disco, cinemas and fashionable commodities, which may cause him to be a truant or to steal to fulfil his desires. These things are however, in a relatively short supply in a school far removed from them town.

A school that has relaxed rules to guide student behaviour easily produces delinquents. Students in such a school easily flout the school rules and engage in delinquent activities. The lax school rules also make it easy for other students to learn and indulge in harmful acts like smoking and taking alcohol, from their delinquent colleagues at school.

On the other hand, unduly stringent rules and excessive acts of discipline have a retrogressive effect on the students. Such severe punishments as crawling on murram paths for long distances, excessive caning and denial of food, among others, force some students to flee the school and instead occupy their time in delinquent acts.

At school, the teachers have a lot of influence on the life of the students. They replace the parents of the student, and as much as possible ought to fulfil the role of the parents. But some unsympathetic and impatient teachers fail in their duty, and instead damage the emotional growth of the child by criticising, and by discouraging remarks.
If in his first encounter with authority the child adopts the practice of defiance and attack, it later becomes difficult to accept habits of obedience. Some children begin their school careers with already formed habits of disobedience and excessive aggression. Understanding teachers are able to control these tendencies. However, when this is not the case, then the habits of disobedience and defiance are likely to become entrenched.

Truancy, disappearance from home, restlessness, and gross over-activity are commonly found in delinquents. Careful teachers, who observe these signs, can play an important role in the early detection of delinquent tendencies and may be able to stop them.

From his schooling every child will have his goals and expectations. When these are realised, the child will grow into a responsible and mature person. Unfortunately, these goals and expectations are not realised in many cases, and this raises a problem that has been termed "anomie". The concept of "anomie" was originally imported into sociology by Durkheim, and developed by R. K. Merton. The theory points out that in modern societies the individual can change his social status and is not bound within the narrow limits of the "station in life" into which he is born. Thus if he is born of a peasant farmer, he does not have to be a peasant farmer like his parents.

In some societies, this emphasis on the individual's chances of improving his status has become an implication that this is expected of him; so that if he does not try to "get ahead" he may well incur disapproval. To this extent, enhancement of status might be said to be a goal which these societies force upon individuals.

The proponents of the theory of anomie hold that when a gap exists between the aspirations and reasonable possibilities of achieving the desired goals, the individual experiences a state of anomie - a feeling that there are no norms which the society operates by which he can operate his life. Without such norms in his life such an individual is likely to be delinquent.
D. J. West\textsuperscript{77}, commenting on the theory of anomie, says that Durkheim coined the word "anomie" for a form of social malaise in which the regulating and controlling pressures of accepted social custom are reduced, so that people find themselves without guidance or constraint, and as a result, unrest and delinquency multiply.

Modern sociologists have redefined anomie as a form of cultural chaos due to imbalance between the approved goals of society and the legitimate means of attaining them. R. K. Merton\textsuperscript{78} suggests that anomie develops because of a breakdown in the relationship between goals that place great stress on success and to which all groups in our society are indoctrinated, without equivalent emphasis on institutional or legitimate channels of access to these goals. In the areas where the discrepancy between goals and means is greatest, a condition of anomie prevails and individuals resort to illegitimate means to achieve the goals.

Most modern societies emphasize material achievement in the form of acquisition of wealth and education as the accepted status goals, but provide limited institutional means to achieve them, particularly for the members of the lower classes. This gap between the means and goals results in a situation of anomie, and persons frustrated by the system may resort to stealing to achieve societal goals, or retreat from the goals through mental disorder, alcoholism and drug taking. Thefts of property may represent an adaptation to achieve societal goals\textsuperscript{79}. Writing on crime in developing countries, M. Clinnard comments on the situation:

"... the emphasis on material goods and the inability to obtain them honestly make a juvenile commit delinquent acts".\textsuperscript{80}

The theory of anomie may be used to explain the frustration of many young people after they finish school. When the youth fail to get jobs, their hopes of a bright future are shattered, and so they resort to unlawful means of attaining their goals.
The situation is true in Kenya where the education system has frustrated many youths. The Kenya educational system is in the nature of a pyramidal structure rather than one of uniform opportunities at all levels. Primary education (standards 1-8) is meant to be free and compulsory, but we do not always have the resources to accomplish this. There is shortage of classrooms, and teachers, to meet the needs of Kenya's primary school education. Thereafter, public examinations designed to exclude students at each level intervene. The result is to drastically reduce the intake into secondary stage (Forms 1-4) and subsequently into national universities.

This is reflected in the following figures: In 1990 about 350,000 sat for Kenya Certificate of Primary Education (K.C.P.E.) exams but only 125,000 could go to secondary schools. The forecast is that four years later only 20,000 students will be accommodated in the Universities. 

The government has over the years tried to increase the intake of students at every level of education, and many private and voluntary institutions also add to the government effort. Yet despite all this, the population increase puts an inordinate amount of pressure on the total system, and many children are forced to drop out of the schooling system prematurely because of lack of opportunity and resources. Such children, having no training or employment, are likely to become street boys who spend most of their time idling and wandering along the streets, and finally end up adopting delinquent behaviour.

This failure of the education system may explain why the bulk of the juvenile delinquents are primary school dropouts. In his research, Erasto Muga established that among his sample of 1,171 children who were in remand homes and approved school, 796 children had a few years of primary education; and 367 had no primary education at all. There were only 8 children who had two years of secondary education. In terms of age, 681 of these children were aged between 12-14 years, the normal age when most students complete primary education. Although it was not established at what stage these children left school, the findings strongly suggest that most of them became delinquents before completing their primary education.
The situation in Kenya is particularly grim for secondary school leavers who complete their schooling without any practical skills. Such youth can easily resort to crime, especially theft. This is more probable when such youth come from poor families (as in fact most of them do), where such basic needs as food and clothing are not met.

C. ECONOMIC INFLUENCE

It is important to note that adverse economic conditions especially at home has a major role to play in juvenile delinquency causation. The occupation of parents is important in relation to the economic status and upbringing of children. If there is total unemployment among parents, there is difficulty in maintaining and supporting the family in all basic necessities like clothing, food, education and other welfare amenities, and this increases chances of children being delinquents, especially if strict discipline is lacking.

Poverty leads to parents neglecting their children, children dropping out of school prematurely, and children being raised in a poor environment which has a combination of factors that encourage delinquency. A consideration of some of these situations will show the relationship between poverty and delinquency causation.

One of the ways in which poverty may operate in the development of juvenile delinquency was shown in a study conducted in Flint, Michigan. In this study, a sample of delinquent boys, and a control sample of non-delinquents of similar age, race and intelligence were interviewed and questioned about attitudes to their poor parents. Among the delinquent group, those with fathers in lower-status occupations had less respect for their parents. This tendency for low-class fathers to be less attractive to, and less influential with their sons was also present among non-delinquents, but to a lesser extent. The investigators concluded that poor parents (of low status) are at a disadvantage in trying to assert control over their sons, and that this factor aggravates the tendency for their sons to react to social frustrations in a rebellious and delinquent fashion.
Another feature of poverty-stricken homes, namely poor educational attainment, is one of the most prominent and characteristic features of juvenile delinquents. Where the parents are not well educated, their chances of getting well paying jobs, and consequently living above the poverty-line are greatly reduced. This is likely to lead to loss of control over their children, because the children cease to respect them.

Commenting on the British situation, D.J. West makes an observation that is also applicable to the Kenyan situation. He notes that although state education for all has tempered the grosser differences between social classes, the fact remains that dirty and ill-mannered children from poor-class homes are unpopular with teachers, do not get much encouragement from their parents to do well in school, and often play truant.

Economic influence on delinquency causation cannot be restricted to particular societies or time spans. In Victorian England for example, sheer want was such an obvious cause of theft, that it seemed plausible to expect that relief of poverty would bring about a dramatic reduction in delinquency. The Second Report of the House of Commons Committee on the state of the police in the Metropolis, published in 1817, referred to "this alarming increase of juvenile Delinquency" which it was inclined to attribute to "the existence of poverty and distress, unknown perhaps in any former period to the same extent." The same report also narrated what can be mistaken for the life-style of some of the street children in Nairobi. The report stated in part:

"The condition of these poor children is of all others the most deplorable, numbers are brought up to be thieves as a trade, are driven into the streets every morning, and dare not return home without plunder, others are orphans, or completely abandoned by their parents, who subsist by begging or pilfering, and at night sleep under sheds, in the streets and in the market places; when in prison no one visits them ..."
Poverty, in the sense of lack of basic necessities, has undoubtedly been an important concomitant of juvenile delinquency, especially in economically depressed areas. At the same time, poverty, especially when surrounded by wealth, is a direct incentive to delinquency. In a capitalist society, where some people are very rich while others are poor, theft is normally a direct result of economic imbalance. The temptation to commit a crime like theft is even greater for children who have no self-restraint. Such children, desiring to be like their colleagues, may want more than their parents, or more than they themselves can afford, and this results in grave temptations to acquire dishonestly what they do not have.

In a country like Kenya where the gap between the rich and the poor is wide, some families live in abject poverty and do not have enough resources for their own subsistence. The children are forced to seek other channels to make ends meet. They are compelled to go out, even if it means using illegitimate means, just to acquire a portion for survival. It is at this stage that they become entangled with law enforcement agencies, like the police, who apprehend them as thieves or vagrants, and they later appear before the juvenile courts as delinquents.

In studies carried out on "parking boys" in Nairobi, it was established that most of them have run away from home principally because they are neglected, and their parents do not have enough resources to meet expenses for education, shelter and food. Father Arnold Grol, the founder of Undugu Society of Kenya, which has cared for thousands of juvenile vagrants and delinquents, states: "It is a question of poverty. About 90% of them come from fatherless homes. Most of these juveniles have resorted to picking pockets, stealing, soliciting for alms and other delinquent acts. There is evidence that most of the delinquents brought to court are charged with stealing. It was for these reasons that one scholar said, "poverty drives men to steal."

4. THEORIES ON JUVENILE DELINQUENCY

Several theories have been propounded by different scholars, in attempts to explain criminal and other delinquent behaviours. Of the various theories on juvenile delinquency, we shall consider:

(a) the sociological theory, which deals with delinquency as a product of learning.
the economic theory on delinquency causation.

A. THE SOCIOLOGICAL THEORY

Writing on "Theories of Criminality," Kirson Weinbery says that following the advent of modern sociological theories of criminal behaviour, human behaviour was explained by learning, and explanations based upon instincts and innate characteristics were repudiated. The person was "generally defined as a subjective aspect of his culture and as cultural type." The delinquent from this perspective was viewed as a product of deviant subculture, especially within the urban community. The delinquent was a deviant type who became acculturated to a special behaviour system in a learning process by association with other criminals.

The sociological theory, which views delinquency as ordinary learned behaviour, rests on the "rules" and "laws" of the psychology of learning. The theory holds that intimate group contact with a way of life contrary to the law, and offensive to conventional morality, may thus "set" or "condition" the attitudes of the individual, just as naturally as it occurs in more conventional settings. In other words, the acquiring of attitudes favourable to delinquency, and the learning of delinquent behaviour patterns are just as "normal" a psychological process as that which accompanies the learning of the way of life approved by law-abiding society. Delinquency is conceived as a pattern of behaviour learned in the course of time, in contact with "definitions of behaviour" favourable to delinquency, in the world of experience surrounding the individual. Thus, delinquency is a "learned behaviour," as in any other activity of man, always reflecting something of his personality and special talents, but generally consisting of routine-action and attitudes, peculiar only in being non-law abiding and in conflict with the generally prevailing official morality of the established social and political order.

Sociologists drew these inferences primarily from delinquents in high-rate delinquency areas, and from confirmed adult offenders. The delinquents who were studied were in urban areas, where the criminal culture was dominant, and where a network of relations extended from adult criminals to pre-delinquent children.
George B. Vold points out that there are many areas of contemporary criminological research, in which the explanatory theory utilized for generalization and for systematic presentation, reflects the general view that delinquency and criminality, in particular, is a kind of behaviour acquired or learned from surrounding environmental influences. One area of research is the thoroughly documented fact, apparently world-wide in its distribution, of regional and rural-urban differences in the amount of crime characteristic of particular locations.96

The whole group of "ecological" studies of criminality rests on and emphasizes the significance of the nature or quality of association in the region or area considered.97 The higher crime rates of urban centres, especially in relation to crimes against property, are too consistent, even in the context of world-wide patterns, to make sense in terms of either biological or economic theory, except where the idea of social influences ("learning by association") is given a high order of priority in the scheme of explanation.98 The "delinquency areas" of the city are characteristically areas where the normal, everyday living of the child encounters the example of adult crime, and an on-going "delinquency pattern," among his juvenile companions and associates. His delinquency really consists of learning the existing patterns in the area.

i. **Sutherland's Differential Association Theory.**

One of the most carefully formulated statements of the nature and effect of environmental group influence on the individual is that of the late Professor Edwin H. Sutherland, which is usually referred to as the "differential association" theory of criminality.99 The theory attempts a logical, systematic formulation of the chain of inter-relations that makes crime reasonable and understandable as normal, learned behaviour without having to resort to assumptions of biological or psychological deviance. It is peculiarly a "sociological theory" in that it centres attention on social relations, and the frequency, intensity and meaningfulness of association, rather than on the individual's qualities or traits, or on the characteristics of the external world of concrete and visible events.

The differential association theory, which is considered by most sociologists as the best formulation to-date of a general theory of criminality, holds in essence, that criminality is learned in interaction with others in a process of communication.
Simply stated, the theory explains criminality as a result of an "excess of definitions favourable to violation of the law over definitions unfavourable to violation of the law," learned by the prospective offender in social interaction with existing criminals.

By way of further elucidation of the differential association concept, the crux of this theory is presented in the following words:

"The specific direction of motives and drives is learned from definitions of legal codes as favourable or unfavourable. In some societies an individual is surrounded by persons who invariably define the legal codes as rules to be observed, while in other he is surrounded by persons whose definitions are favourable to the violation of legal codes. In our American Society these definitions are almost always mixed, with the consequence that we have culture conflict in relation to the legal codes. A person becomes delinquent because of an excess of definitions favourable to violation of law over definitions unfavourable to violation of law. This is the principle of differential association".

According to D. R. Crossey, "The ratio between such definitions and others unfavourable to law violation determines whether or not a person becomes a criminal." 

Unfortunately, nobody has in fact actually counted the number of definitions favourable to violation of law, and definitions unfavourable to violation of law, and demonstrated that in the pre delinquency experience of the vast majority of delinquents, the former exceed the latter.

Notwithstanding this weakness, Sutherland's differential association is a logical consequence of the principle of learning by association. It is really another way of saying that he who runs with thieves is very likely to become a thief. Or to set the illustration on another plane, let us say that he who runs with Methodists rather than Roman Catholics, is likely to become a Methodist, largely due to the principle of differential association. It should be noted that the fact of high or low I.Q., phlegmatic or excitable temperament, or neurotic or well-balanced personality organization may have little or nothing to do with the religious denomination the individual will embrace. A similar irrelevance of the individual's personality traits, is assumed to apply in the situation where association is with either criminal or anti-criminal groups.
Like his contemporaries, Sutherland was eager to make his sociological approach as "objective" and "scientific" as possible by trying it with the visible, external aspects of association that might be counted, or in some way quantified in relation to the individual's immediate associates. His first full formulation of the theory, in the 1939 edition of *Principles of Criminology*, made much of the frequency and consistency of the individual's association with criminal patterns that are the product of a society characterised by cultural diversity and cultural conflicts. Individual differences in personal characteristics, or in social situations, were said to be important only as they affected the frequency and consistency of association with criminal patterns.

But one of the persistent problems that always has defied the theory of differential association, is the obvious fact that not everyone in contact with criminality adopts or follows the criminal pattern. What, therefore, is the difference in the nature or quality of association that in one case leads to acceptance of the attitude of a group by an individual, but in the case of another individual leads to only acquaintance with but not acceptance of the behaviour characteristic of the group? Sutherland tried to give an answer to this problem in terms of frequency and consistency of contacts with the criminal pattern. This solution remained at the level of assertion, and was not empirically established.

August Aichhorn recognized the gap in the development of the theory of criminality when he stated:

"When I ask parents how they account for the dissocial behaviour of their children, I usually receive the answer that it is the result of bad company and a running around on the streets. To a certain extent this is true, but thousands of other children grow up under the same unfavourable circumstances and still are not delinquent. There must be something in the child himself which the child brings out in the form of delinquency."
The Glueks have been more explicit when they said:

"They (sociologists) do not explain why the deleterious influences of even the most extreme delinquency area fail to turn the great majority of its boys into persistent delinquents. They do not disclose whether the children who do not succumb to the evil and disruptive neighbourhood influences differ from those who become delinquents, and, if so, in what respects."\textsuperscript{109}

It is to be noted that, although the theory of differential association does not explain why all juveniles exposed to crime do not become criminals, it continues to be true that many individuals are involved in criminality through a chain of circumstances or associations analogous to that of any other normal vocational life adjustment. The theory can thus help explain the many cases where children learn delinquent behaviour from parents and family members at home, and from the playmates in their schooling and residential environment, as already discussed under the topic, "Factors Associated with Delinquency."

But it is also true that much of the criminal behaviour is impulsive and irrational, with little resemblance to anything that could be called "learned" behaviour. In criticising the differential association theory, Sheldon Gluek states:

"What is there to be learned about simple lying, taking things that belong to another, fighting and sex play. Do children have to be taught such natural acts? If one takes account of the psychiatric and criminological evidence that involves research into the early childhood manifestations of anti-social behaviour, one must conclude that it is not delinquent behaviour that is learned; that comes naturally. It is rather non-delinquent behaviour that is learned."\textsuperscript{110}

It is emphasizing the relatively obvious to point out that the differential association theory should not be stretched to include psychologically irrational and impulsive behaviour simply because such behaviour may happen to have been defined as criminal. The theory may be adequate and applicable to many kinds of crimes without necessarily having to be applied to every type of behaviour called criminal.
The differential association theory has provided an exciting episode in criminological thinking. Through a fortunate combination of words and illustrations in its first formulation, it seemed to offer much more than it had been able to deliver. Its shortcomings appear not to be due to any probability that the dissociation-complex of the delinquent is any less important now than before, but rather to the fact that the theory outran the capacity of either psychology or social psychology to give adequate scientific answers to the question why there are more qualitative (selective) differences in human association. In the words of George B. Vold:

"There are obvious limitations to the adequacy of any theory so general and non specific in application as the differential association formulation. It reaches far into the margin of unreality, if by its use an attempt is made to provide a theoretical explanation of "crime in general", since it is difficult to conceive of such an entity."  

B. ECONOMIC THEORY ON DELINQUENCY CAUSATION.

Explanations of delinquency in terms of differences in economic factors and influences are perhaps the oldest and most elaborately documented, of the theories with an individual orientation. This stems from the proposition that economic life is fundamental and therefore the determining influence, upon which all social and cultural adjustment is made; for the ideology of economic factors influence the nature and form of all social relations. In extreme form, it has been elevated to the role of a basic or "determining" factor, such as to dominate and control all other aspects of living. This is the essential content of the phrase "economic determinism."

One of the most famous formulations of the idea of economic determinism, may be found in the words of Karl Marx in his Critique of Political Economy (1859) in which he says:

"In social production men carry on, they enter into definite relations that are indispensable and independent of their free will, these relations of production correspond to a definite stage of development of their material powers of production. The sum total of these relations of production constitutes the economic structure of society - the real foundation on which rise legal and political structures and to which correspond definite forms of social consciousness. The mode of production in material life determines the general character of the social, political and spiritual purposes of life."
In supporting the economic theory the Marxists suggest that juvenile delinquency is the result of inequalities of the social and economic order in which an acquisitive society encourages aggression and discourages altruism. Marx himself considered that private ownership of property results in poverty, which distinguishes those who own the means of production from those whom they exploit for economic benefit. The latter as a means of survival, turn to crime, as a result of poverty, which is produced by the general maladministration of wealth and the inevitable class struggle. To the marxist: "Crime was the outcome of competitive economic conditions and exploitations which would eventually disappear in a socialist structure of society."\textsuperscript{114}

It is clear therefore why in its developed form, Marxian economic determinism has tended to become a broadly inclusive philosophy of social reform, aimed at changing the form and organization of the economic life in society. Since these factors are conceived as "controlling" or "determining", for all other aspects of social relations and social institutions, the entire society could be reforming the economic system.

Since the theories of economic influence or "determinism" assume that social arrangements generally are profoundly affected or determined by the existing system of economics, it follows that the problems and maladjustments of society such as crime and delinquency, are likewise the product of the existing economic arrangements. Hence, theories of economic influence on social arrangements generally, also become theories of more specific influence of economic factors on crime in society.

In support of this theory, several studies have been done, drawing some kind of conclusion about the relations claimed to exist between economic conditions and criminality. For example, George Von Mayr, in his study, correlated the fluctuation in certain types of offence in Bavaria for the period 1836-61. Using crimes known to the police as his crime index, he found a very positive correlation between offence against the person, and the price of rye. His conclusion that for every half-penny increase in the price of rye, there would be an increase of one theft per 100,000 persons, and for every drop in the price of rye there would be a corresponding decrease in the crime of theft, has often been taken as a firmly established fact.\textsuperscript{115}
Von Myr's conclusion is quoted with approval, and apparently without reservation by Hans Von Hentig in a more recent research. By way of approval and comment, he says:

"Many surveys have been made since in Europe and on other continents; nearly all of them supported Von Mayr's thesis. Of course the standards of economic prosperity or distress were variable; in England and France it was the price of wheat, in Germany and Scandinavia rye; in Rumania and the Balkans it was corn, and in Egypt, cotton ...."\(^{116}\)

From the earlier studies to the present ones, the conclusion has usually been taken for granted that poverty and unemployment are the major factors producing criminality. The English literary celebrity Charles Dickens, in his famous fictional account, *Oliver Twist*, was only expressing a point of view on the cumulative effect of poverty and economic want just like many counterparts in more serious "factual" studies of his time. One such was the Governor of Coldbath Prison, who, in giving evidence before the select committee on crime in 1830, declared:

"In my opinion, the crowning cause of crime in the metropolis is to be found in the shocking state of the habitations of the poor, their confined and fetid localities, the consequent necessity for consigning children to the streets for requisite air and exercise. These causes combine to produce a state of frightful demoralization. The absence of cleanliness, of decency, and of all decorum; the disregard of any needful separation between the sexes, the polluting language, the scenes of profligacy, hourly occurring, all tend to foster idleness and vicious abandonment."\(^{117}\)

But another early writer, Mary Carpenter in her book *Juvenile Delinquency*\(^{118}\), examined the whole problem of the kind of children who became delinquents, and found economic distress much less significant than the influence of the social and institutional class of professional criminals who "live by the plunder... their hand against every man,"\(^{119}\) and who then transmit their view of life to their children. She does not rule out poverty as an influence, but she does not give it top billing.
Economic influence, as the determinant of delinquency, was also challenged by Sigmund Freud when he said:

"But it cannot also be assumed that economic motives are the only ones which determine the behaviour of men in society. The unquestionable fact that different individuals, races and nations behave differently under the same economic conditions in itself proves that the economic factor cannot be the sole determinant..."120

Charles Booth in his monumental work, *Life and Labour of the People of London*121, which is one of the most complete social and economic studies of a large city population, documented the widespread extent of economic want with nearly one third (30.7%) of the entire population living in poverty. This 30.7% of the population produced 56% of the juvenile delinquents. Booth, however, left unexplained why the comfortable and luxurious population (69.3%) produced the other 44% of delinquents.

The logic of economic determinism gets a bit muddled when it is said that opposites - economic distress and economic comfort - both produce about the same level of juvenile delinquency. It would then be more logical to conclude that neither poverty nor wealth, as these are experienced in modern society, is a major determining influence in crime and delinquency.

It may also be argued that there is no conclusive answer in the causal relation between delinquency and economic circumstance, because poverty is always in part, a subjective fact of the presence or absence of a certain amount of property or other measure of wealth. What one man considers poverty, another may consider as a level of satisfactory comfort, if not of abundance.

Another problem in this issue is the frequent lack of perspective on the basic theoretical assumptions made about the relationships that may exist between economic conditions and crime.
In general two opposite assumptions need to be considered:

i. that the relationship is inverse, that is, that when economic conditions are good, the amount of criminality should be low, but when times are bad, criminality should be high;

ii. that the relationship is direct or positive, that is, that criminality is an extension of normal criminal activity and that therefore it increases or decreases in the same manner and at the same time as normal economic endeavour. Under the second assumption, the amount of crime should increase and be at its highest point in periods of prosperity, and it should decrease when there is lessened economic activity.

The general theoretical position of the first assumption is that implied in all marxist doctrine. The theoretical position represented by the second assumption has been most explicitly developed by the Italian, Fillipo Poletti. Polleti's theoretical position has been re-stated by Ploscowe in light of contemporary American conditions as follows:

"Where increased incentives and increased occasions for illegitimate activities result from an increased amount of legitimate activity, there is bound to be an increase in crime."

With this reformation by Poletti, Ploscowe developed a carefully formulated, theoretically consistent interpretation of the significant fact that crime has probably increased throughout much of the western world during the last two hundred years, despite the obvious and indisputable increase in the economic well-being of nearly everyone everywhere. The unparalleled economic and social progress of the last two centuries has given the ordinary worker a much better economic position than he has ever enjoyed in the past, but it has also brought new pressures and demands that often result in criminality. Thus Ploscowe concludes:
There is the relentless pressure extended by modern industry towards the stimulating of new needs, through the countless forms which advertising may take... there is the example of a leisure class openly enjoying all the advantages of modern society.... Democracy has broken down the caste lines which formerly cut an individual off from the privileges of the class above him. The modern individual does not wish to be a spectator at the feast of others. He interprets the democracy theory to mean that all men are born with an equal right to enjoy the good things in life. What cuts him off is no inherent inferiority but merely the lack of money. Thus as Jacquart observes:

"The more well-being becomes widespread and wealth greater, the more thieves, forgers and swindlers there are. Most of them do not steal because of poverty. They are... thieves who wish to live from the fruit of their depredations. They are greedy individuals... (whose crimes are committed)... not as an insurance against hunger, but to obtain enjoyment of all kinds that it makes possible."

5. SUMMARY AND CONCLUSION

In this chapter we have first sought to understand the term "juvenile" and "delinquency". The term "juvenile", it was noted, has a wide use that differs with different statutes. The age span of a juvenile varies with national legal systems, and even in the various statutes within a nation. For the purpose of our discussions, we have opted to use the term to refer to persons who are at least eight years old, and would therefore be criminally liable in Kenya, but who are below eighteen years of age - the age at which they would be considered adults.

Delinquency, it has been noted, is a terminology that defines acts that are anti-social and disapproved by the society. These include acts that are socially unacceptable for children to engage in, but are not necessarily criminal. It also includes acts that constitute crimes against the written law, the most common one being theft.
The causes of delinquent activities have been considered under "factors associated with delinquency". These, we found out, include the negative influence on the juvenile from his family, such as lack of discipline, neglect of the children, and failing to provide their basic needs, among others. The juvenile could also be influenced into delinquent activities through influences of his residential neighbourhood, schooling environment and other social influences within the society. It was also noted that there is a strong influence on the juvenile from the prevailing economic conditions, especially at the family level. Poverty was identified as responsible for motivating many children to engage in anti-social activities especially theft.\textsuperscript{125}

Finally, we discussed two of the widespread theories that have attempted to give general explanations for juvenile delinquency. These include the sociological theory, particularly the "differential association theory", which stipulates that acts of delinquency are learned from colleagues whom the juvenile associates with. We also considered the economic theory on delinquency causation, which holds that all social actions, including delinquency, are determined by a country's and a family's economic status. It is clear from the discussions on these theories that neither of them gives an exhaustive and all-embracing explanation of the causation of juvenile delinquency. In conclusion, we are in agreement with Sir Leon Radzinowic\textsuperscript{126}, that attempts to explain all crime in terms of a single theory of causation should be abandoned altogether, because no single theory gives an exhaustive explanation of delinquency causation. Thus our discussion in this chapter has only thrown light on certain of the factors and circumstances associated with delinquency.
FOOTNOTES


3. Ibid., Section 14(2).

4. (1918) 38 J.P. 136.


7. An ordinance to provide for the welfare of the young, and for the treatment of young offenders, and to establish juvenile courts which come into effect in the colony of Lagos and Southern Cameroon as though they were regions on 1 July, 1964.

8. The Children and Young Persons Act, 1958, Section 2.

9. Ibid.

10. In Kenya for example, the Age of Majority Act, Chapter 33 of the Laws of Kenya, and the Law of Succession Act, Chapter 160 of the Laws of Kenya refer to a person below 18 years of age as a minor. The Adoption Act, Chapter 143 of the Laws of Kenya, and the Guardianship of Infants Act, Chapter 144 of the Laws of Kenya refer to a person below 18 years of age as an infant; while Criminal Law generally as embodied in the Penal Code, Chapter 63 of the Laws of Kenya refer to such a person as a child.


14. Ibid.

15. Laws of Botswana, Chapter 08:012, section 15(2).


Op. cit. note 1


Chapter 141 of the Laws of Kenya


Chapter 141 of the Laws of Kenya

The offence mentioned in the first schedule of the Act include offence under sections 140-167, 250 and 251 of the Penal Code, Chapter 63 of the Laws of Kenya, offence under the Children and Young Persons Act, Chapter 141 of the Laws of Kenya, any other offence involving bodily injury.

Chapter 141 of the Laws of Kenya, section 22.

Ibid.

All cases that require protection and discipline (P&D) fall in this category. To date (17-7-92) 116 such cases have been registered for hearing at the Nairobi Juvenile Court. Many children who are brought to court as vagrants under the Vagrancy Act, Chapter 58 of the Laws of Kenya, section 2(1) also fall in this category.

Chapter 141 of the Laws of Kenya.

Ibid.

Source: The 1984 Nairobi Juvenile Court Register.

Source: The 1985 Nairobi Juvenile Court Register.


This was made clear in the case of Kaisa v. Republic (1972) E.A 532 where the High Court made the following statement:

"... a boy so young as the accused... is clearly in need, not only of discipline but also of care guidance and encouragement given and provided by persons equipped with suitable training and qualifications, and possessed of enough time and requisite facilities to attempt rehabilitation."

Chapter 141 of the Laws of Kenya.
Such orders are set out in section 17 of the Children and Young Persons Act, Chapter 141 of the Laws of Kenya. They include: caning the child as a method of deterrence, putting him under the care of a children's officer for the purpose of supervision, and if no other fitting solution can be found, he can be committed to an approved school for rehabilitation.


P. Onyango, "Child Abuse and Neglect" Keynote address of the 4th Scientific Seminar on the Kenya Medical Women's Association held in March 1989 at Nairobi.

Ibid.

C.B. Madan (Chief Justice), Opening Address at the Workshop on Criminal Justice and Children, held at K.I.A. Nairobi in April 1986.

Ibid.


D.J. West, *op.cit.*, note 24, page 73.


Sodom and Gomorrah were cities in early Palestine that were renowned for their wickedness. The Lord God destroyed them because of their love for sin. The account is narrated in *The Holy Bible*, the book of Genesis, chapter 19.

Quoted by A. Appianda, *loc.cit.*, note 43.

Ibid.

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E. Muga, *op. cit.*, Note 41.

D.J. West, *op. cit.*, note 24, page 65.


Ibid.

Ibid.


P. Onyango: *loc. cit.*, note 47.

M.W. Mwangi *op. cit.*, note 44.

Ibid.

Ibid.


D.J. West, op. cit, note 24, page 87.

R.K. Merton op. cit., note 76.


M. Clinnard-Abbotto, op. cit., note 63.


D.J. West, op. cit, note 24, page 58.

Ibid. page 61.

Ibid. page 62.


Ngumo was Kuria, "Priest who Devotes His Life to Street Children"Sunday Standard, 20 November 1988, Standard Newspapers Ltd, Nairobi page 4.


Ibid.

Ibid.

Clifford R. Shaw (Ed). The Natural History of a Delinquent Career, 1931.

Ibid.


98. Ibid.


102. Ibid.


104. S. Gluek (Ed), *op. cit.*, note 91, page 244.


124. Ibid.

125. J.C. Caldwere, op. cit., note 90.

126. Leon Radzinowicz, op. cit., note 38.
CHAPTER TWO

THEFT: A FORM OF JUVENILE DELINQUENCY

1. DEVELOPMENT OF THE LAW OF THEFT

Before the imposition of colonial rule in Kenya, each ethnic community had its own criminal laws that were known, respected and applied to the community. These laws set out the offence and their penalties, but they were unwritten and some differed from one community to another. One of the common offence among the different communities, though with varying penalties, was theft.

Following the introduction of colonial rule, the colonial government, which was unfamiliar with the various communal laws, considered them uncertain and unsatisfactory. It decided that all criminal laws should be written and uniformly applied to all tribes. To facilitate this, the colonial government imported the British criminal laws, which were used in Kenya throughout the colonial period.

The conference on the future of law in Africa held in London in 1960 also affirmed the need for written law when it recommended that the general criminal law should be written and be uniformly applicable to persons in all communities. It was also recommended that this criminal law might be supplemented where local circumstances rendered it desirable, by particular local criminal laws applicable in defined localities, provided that these are not held to be discriminatory in their application to the particular communities.

The subsequent African conference on local courts and customary law held in Dar-es-salaam in 1963, re-affirmed that:

"Every country accepted the principle that the penal law should be written and that the present position in some countries, whereby unwritten criminal offence existed side by side with a written penal code must be altered"
This position was adopted by Kenya when it attained independence and was enshrined in section 77(8) of the constitution (1969) which provides that:

"No person shall be convicted of a criminal offence unless the offence is defined, and the penalty therefor is prescribed, in a written law..."

The effect of this law was that unless any act which constituted a criminal offence within the customary law was also enshrined in the written penal laws of the country, and its penalty prescribed, it ceased to be recognised as such.

The position of African customary law in Kenya is further clarified by the Judicature Act (1968). Section 3(2) of the Act provides:

"The High Court, the court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law..."

It is to be noted from the above provision of the law, that African customary law, where applicable, shall only guide the courts in civil matters and not in criminal matters. Customary law is therefore no longer applicable in cases of theft. This position is further enhanced by the Magistrates' Courts Act (1980) which states in section 2 that:

"Claim under customary law" means a claim concerning any of the following matters under African customary law -

(a) Land held under customary tenure;
(b) Marriage, divorce, maintenance or dowry;
(c) Seduction or pregnancy of an unmarried woman or girl;
(d) Enticement of or adultery with a married woman;
(e) Matters affecting status, and in particular the status of women, widows and children, including guardianship, custody, adoption and legitimacy;
(f) Intestate succession and administration of intestate estates, so far as not governed by any written laws;"
The effect of these post-independence statutes was to restrict the meaning of customary law to a few aspects of, or claims in civil matters, and to abolish African customary criminal law. The British colonialists had applied the British criminal laws when they settled in Kenya to replace the customary criminal laws. At independence, the government of Kenya did no more than to adopt these statutes, which, during the colonial rule, had a national application. It is therefore needful to point out, in light of this development, that the criminal law of theft discussed hereafter embodies the principles of English common law. This position is further enhanced when one considers that many of the English judicial decisions are still relevant and helpful as court authorities, in the interpretation of the laws in Kenya. However, we must be careful to note that such substance of the common law, doctrines of equity and statutes of general application in England, relating to the law of theft, as in other matters, apply to Kenya "so far only as the circumstances permit and subject to such qualifications as those circumstances may render necessary."

2. DEFINITION OF THEFT

The offence of theft, or stealing is defined in section 268(1) of the Kenyan Penal Code (1970) as follows:

"A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property."

A. THE INGREDIENTS OF THEFT.

For the offence of theft to be proved, the following ingredients must be present:

(i) There must be a fraudulent intention;
(ii) There must be absence of claim of right
(iii) There must be an act of taking or conversion
(iv) The item must be capable of being stolen.
Fraudulent Intention: The Mens Rea For Theft

The first ingredient of theft is that there must be a fraudulent intention (animus furandi). According to section 286(2) of the Penal Code (1970) a person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently, if he does so with any of the following intents:

(a) "an intent permanently to deprive the general or special owner of the thing of it." For example, in the case of R. v. Ndesario, the accused was charged with theft of water from a furrow on the night of 19th January 1967 contrary to section 265 of the Penal Code. "The accused had an agreement with the complainant wherein he was allowed to draw water from a furrow, which crossed the complainant's land. According to the agreement the accused was only allowed to extract water between the hours of 6 am and 9 am. The evidence showed that the wife of the accused, and several others had taken water on the occasion mentioned on the charge. Although the High Court acquitted the accused on appeal, because there was no evidence that the accused stole water on the said date, it pointed out that "to extract water at any other time meant that he was taking away a moveable object which did not belong to him. The water was used for irrigation and therefore his intent must have been to deprive the complainant permanently of it." (emphasis added.)

(b) An intent to use the thing as a pledge or security.

(c) An intention to part with it on a condition as to its return which the person taking or converting it may be unable to perform;

(d) An intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of taking or conversion;

(e) In the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner.
In the case of Republic v. Jones the respondent was employed as a clerk by the East African Railways and Harbours Administration. A few days before 24th December 1965 he was paid £1,413 by the administration and he was at the time, due to receive several thousand pounds compensation for loss of office. On 24th December, however, contrary to regulations, he took Kshs. 3,680 belonging to the administration from a safe and put in his own cheque for that amount in its place. In February 1966, the respondent took Kshs. 400 from the administration's safe and replaced it with his own cheque for that amount. When the two cheques were later presented for payment, they were both honoured. The respondent was charged with stealing money which had come into his possession by virtue of his employment in the Public service contrary to section 280 of the Penal Code. At his trial a plea of no case to answer was made on his behalf at the conclusion of the case of the prosecution. The magistrate, finding that the prosecution had failed to show that the respondent had taken the money with an intent to deprive the administration of it permanently dismissed the charge. The prosecution appealed.

The High court remitted the case to the magistrate ruling that on a charge of theft it was necessary to prove a fraudulent taking or conversion without a claim of right and an intent to use it at his will, even if he intended afterwards to repay the amount to the owner.

In the words of Sir John Ainley, C.J,

"At the conclusion of the prosecution case there was before the magistrate the strongest evidence that the respondent had taken money not only without a claim of right and without the consent of the owner but contrary to the orders of the owner, and very ample evidence that the respondent's intention was to use the money "at his will". That there was evidence of an intention to repay is true, but that in view of the provisions of section 268(2) (e) does not avail the respondent."
(ii) **The Claim of Right**

A person who takes goods under a claim of right is not guilty of theft. Thus in the case of *Francisco Sewava v. Uganda*, the appellant was charged with theft of six doors and twelve iron sheets which he had in fact sold, but which he claimed were his property. The appellant was convicted, but the magistrate never directed his mind to the "claim of right" of the appellant. The conviction was quashed on appeal to the High Court of Uganda. Sir Udo Uduma, C. J. cited with approval the following passage in *Stephen's History of Criminal Law of England*, Vol. III, page 24.

"Fraud is inconsistent with a claim of right made in good faith to do the act complained of. A man who takes possession of property which he really believes to be his own does not take it fraudulently, however unfounded his claim may be."

(iii) **The Act of Taking or Conversion.**

The "taking" means there must be a trespass. There should also be a carrying away, but only a slight removal is enough to satisfy this condition. A person shall not be deemed to take a thing unless he causes it to move. The taking can be by trick, by intimidation, under a mistake on the part of the owner, or by finding.

Theft by trick occurs when a person obtains possession of the property without the real consent of the owner. If the owner consents to the transfer of the property in the goods, there is no theft (although it could be the offence of obtaining goods by false pretences). Thus if Kamau deposits his car with Mutua for repair and Mutua later sells the car to Otieno, Mutua has committed theft by trick because Kamau only agreed to part with possession of the car.

Theft as a result of a mistake takes place when a person parts with possession of property by mistake, and the offender on discovering the mistake decides to keep the property. The commonest example would be a sales clerk giving excess change, and the offender realising this deciding to keep the excess change. An almost similar situation occurred in England, leading to the case of *R. v. Gilks*. 
Gilks in a betting shop, bet on various horses, including a horse called Fighting Scot. Some bets won and some lost, but the bet on Fighting Scot lost, the race being won by Fighting Taffy. The betting shop clerk paid Gilks his winnings and by mistake included a sum of £106 in respect of the bet on Fighting Scot. When he was being paid Gilks realised the clerk's mistake, but he took all the money and refused to return any. He was convicted of stealing £106 and he appealed. His appeal was dismissed by the Court of Appeal who upheld the decisions of the lower court as Gilks took the money without a claim of right.

The case of Rogers v. Arnot illustrates the judicial interpretation of theft by conversion. In this case, the question arose whether a bailee had committed larceny (theft) by fraudulently converting goods to his own use by offering to sell them to a person (who turned out to be a policeman). In the words of Donovan J.,

"It would be rash, I think to attempt a definition of the term "converts ... to his use" which would cover every possible case. A sale of the property by the bailee contrary to the terms of the bailment and for his own benefit is clearly such a conversion. The reason is that the bailee in such a case has usurped the powers of the owner for his, the bailee's benefit ... If I am lent property, and then determine in my own mind to sell it for my own benefit contrary to the terms of the bailment, I have determined that in relation to the property I will no longer be a borrower but an owner, and an owner who wishes to sell.

When I proceed to carry that intention into effect by offering the property for sale, I am standing in the owner's shoes in relation to that property and exercising an owner's right. In these circumstances, I have in my view already converted the property to my own use whether the attempted sale takes place or not, and if I have acted dishonestly in the matter, as the defendant here is found to have done, then the offence of larceny is committed..."
The Penal Code (1970)\textsuperscript{21}, section 267, sets out a list of things capable of being stolen. The section provides that:

"(1) Every inanimate thing whatever which is the property of any person and which is movable is capable of being stolen.

(2) Every inanimate thing which is the property of any person and which is capable of being made movable is capable of being stolen as soon as it becomes movable in order to steal it.

(3) Every tame animal whether tame by nature or wild by nature and subsequently tamed which is the property of any person is capable of being stolen.

(4) Animals wild by nature of a kind which is ordinarily found in a condition of natural liberty in Kenya which are the property of any person and which are usually kept in a state of confinement are capable of being stolen whether they are actually in confinement or have escaped from confinement.

(5) Animals wild by nature of a kind which is ordinarily found in a condition of natural liberty in Kenya which are the property of any person, are capable of being stolen while they are in confinement and while they are actually pursued after escaping from confinement, but not at any other time.

(6) An animal wild by nature is deemed to be in a state of confinement so long as it is in a den, cage, sty, tank or other small enclosure, or it is otherwise so placed that it cannot escape and that its owner can take possession of it at pleasure.

(7) Wild animals in the enjoyment of their natural liberty are not capable of being stolen."
(8) Everything produced by or forming part of the body of an animal capable of being stolen is capable of being stolen."

The judicial interpretation of some of these provisions of the law are set out in the English case of R. v. Shickle. The case involved theft of eleven partridges which had been reared from eggs which had been taken from the nest of a female partridge and had been hatched by a common hen. They were about three weeks old and could fly a little. The hen had at first been kept under a coop in the prosecutor's orchard, the young birds running in and out as the brood of a hen so confined are wont to do. The coop had, however, been removed and the hen set at liberty but the young birds still remained about the place with the hen as her brood and slept under her wings at night.

The birds in question were neither tame by nature nor reclaimed. On the other hand, from their instinctive attachment to the hen that had reared them, and from their inability to escape, they were practically in the power and dominion of the prosecutor. The question was whether, in the circumstances, they could be the subject matter of larceny.

Confirming the conviction of the accused who had appealed, Bovin C. J. quoted from R. v. Cory case, about pheasants hatched under similar circumstances, where the presiding judge said:

"Those pheasants having been hatched by hens and reared in a coop were tame pheasants at the time they were taken, whatever might have been their destiny afterwards. Being thus, the prosecutor had such a property in them they would have become the subject of larceny, and the inquiry for stealing them would be of precisely the same nature as if the birds had been common fowls or any other poultry, the character of the birds in no way affecting the law of the case but only the question of identity."

The question in this case was whether these birds were the subject of property. The court ruled that "they were so when first hatched, and they remained so at the time they were taken by the accused though it might be that a later period they would become wild and cease to have an owner."
It should be noted that the thing stolen must have an owner, for a conviction to stand. It is usual for stolen goods to be identified by the owner in criminal proceedings, but it is not strictly necessary under the Criminal Procedure Code (1983) to name the owner.

There is no definition of the term "owner" in the Penal Code (1970) although the expression "general or special owner" is used in section 268(2) (a) of the Penal Code (1970). I presume, however, that since the British case law and statutes are relied on as authorities to help interpret our law, then the provisions of the British Theft Act (1968) give a clear indication of who an owner of the property is, and we may rely on it.

Section 5(1) of the British Theft Act (1968) states:

"Property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from any agreement to transfer or grant an interest)".

The term "special owner" is defined in the Kenyan Penal Code (1970) as including "any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question." This embraces a garage proprietor who has possession of a car for repair purposes, from whom it is stolen.

In the case of R. v. Turner (No 2), Turner took his car to a garage to have it repaired. Those repairs having been practically completed, the car was left in the road outside the garage. Turner called on the garage and told the proprietor that he would return the following day, pay him and take the car. But at night, he took the car using his spare key without paying for the repairs. Later he lied about the matter to the police. He was convicted of theft of the car, the judge pointing out that the sole question in the case was whether the garage proprietor had possession or control of the vehicle, for then it belonged to him as provided for in section 5 of the Theft Act (1968).
The provisions of section 5(1) of the Theft Act, are embodied in section 273 of the Kenyan Penal Code (1970), which provides that:

"When a person takes or converts anything capable of being stolen under such circumstances as would otherwise amount to theft, it is immaterial that he himself has a special property or interest therein or that he himself is the owner of the thing taken or converted subject to some other person therein or that he is a lessee of the thing or that he himself is one or two or more joint owners of the thing or that he is a director or officer of a corporation or company or society who are owners of it."

Just like the common law, the Penal Code (1970) seeks to bar people from taking items, in circumstances that would amount to theft, because they own them, or have interest or control of the items. The case of R. v. Turner (above) is applicable in Kenya and it makes this point clear. The work of Professors Smith and Hogan, present the academic view on this issue:

"D and P are co-owners of a car D sells the car without P's consent since P has a proprietary right in the car it belongs to him under section 5(1) ... Obviously there is no reason in principle why D should not be treated as a thief if he dishonestly appropriates P's share, and he is so treated under the Theft Act."

B. PENALTY FOR THEFT

The general punishment for theft is set out in section 275 of the Penal Code (1970). The section states that: "Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen, some other punishment is provided, to imprisonment for three years."

Various categories of theft and their individual penalties are also set out in sections 276 to 285 of the Penal Code (1970). For example, if the thing is stolen from the person of another, or from a dwelling house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence, on any person in the dwelling house, the offender is liable to imprisonment for fourteen years together with corporal punishment. If the offender is a clerk or servant and the thing stolen is the property of his employer or came into the possession of the offender on account of his employment, he is liable to imprisonment for seven years for the offence known as theft by servant.
However, if the offender is a person employed in the public service and the thing stolen is the property of the Government, or came into the possession of the offender by virtue of his employment, he is liable to imprisonment for seven years for the offence of theft by a person in the public service, contrary to section 280 of the Penal Code (1970).37

The Ugandan case of Tumuheire v. Uganda38 illustrates the judicial rulings on different categories of theft. The appellant stole a Barclays Bank Savings Book, and, impersonating the owner by means of forgery, withdrew shs. 500/= and shs. 100/= on two occasions. He was charged with and convicted of: (i) theft (1st count under section 252 of the Penal Code of Uganda); (ii) stealing from a public office (2nd and 3rd counts); and (iii) forgery (4th and 5th counts). He was sentenced to two and a half years imprisonment in respect of each count; the sentences were to run concurrently. He appealed.

On appeal, the High Court upheld the convictions and sentences for theft and forgery. But the charges of stealing from a public office were quashed on the ground that the Bank was not a public office. A public office being an office maintained by public funds but the bank was a privately owned limited liability company.

3. APPLICATION TO CHILDREN OF THE LAW OF THEFT

The law of theft generally applies to children as it does to adults, but the penalties for theft set out in the Penal Code (1970)39 do not apply to children, juveniles and young persons. The law with regard to children has a mandatory requirement that imprisonment for juveniles can only be ordered as a last resort. Alternatives to imprisonment must be considered and exhausted before imprisonment is employed. This is set out in section 16(3) (ii) of the Children and Young Persons Act40, and has been supported by several judicial decisions. The section provides that:

"No juvenile or young person shall be ordered to imprisonment unless the court is of the opinion that he cannot be suitably dealt with in any other way permitted by law and the court shall duly record such opinion and the reason therefor."
In the case of Maina v. R.\textsuperscript{41} the appellant whose age was estimated at 18 years was convicted of rape and robbery with violence (contrary to section 296(2) of the Penal Code\textsuperscript{42}), and on the latter conviction was sentenced to 14 years imprisonment, the law being that a convicted person was liable to a minimum of 14 years (and up to 20 years) imprisonment together with corporal punishment.

It was argued by the prosecution on appeal that upon conviction for the offence of robbery with violence, the accused person, notwithstanding that he was a young person, had to be sentenced to imprisonment of between 14 and 20 years. It was submitted that the only discretion which the court possessed in the matter was the choice of the term of imprisonment ranging between 14 and 20 years. It was argued as a matter of statutory interpretation, that the provisions of section 296(2) of the Penal Code\textsuperscript{43} having been enacted later than those of the Children and Young Persons Act\textsuperscript{44} must accordingly prevail over the latter.

The court held:

"We do not agree we think the Children and Young Persons Act is an enactment of a special nature with a special purpose. Its provisions are designed for the protection of children, juveniles and young persons. For example under sub sec (4) of section 16 a juvenile or young person ordered to imprisonment shall where practicable be confined apart from and shall not be allowed to associate with adult prisoners during his term of imprisonment. Under sub sec. (5) where a juvenile is ordered to imprisonment, the warrant of committal shall clearly show that such a person as the case be. The object no doubt is to prevent contamination of juveniles and young persons by keeping them apart from adult prisoners. In our opinion this kind of expressly created statutory protection could only be taken away by equally express statutory provision in the clearest language. We think neither S. 26(Penal Code) nor S. 296 (Penal Code) aim to do this. We venture to express the opinion that the punitive provision in S. 296(2) is more appropriately applied to others than to juvenile and young persons such as for example hard core criminals."
The court then stated that the appellant, as a young person, should not be ordered to serve a term of imprisonment unless the court were of the opinion that he could not be suitably dealt with in any other way permitted by law. Being satisfied that "it is expedient for his reformation that the appellant should undergo a period of training in a borstal institution and having ascertained under S.8 that accommodation is available, it is directed that the appellant be sent to a borstal institution for three years."

These principles were upheld in *Keteta v. R.*\(^{45}\) where the appellant, aged under 18 years, had been convicted of attempted stock theft, and sentenced to six months imprisonment. On appeal, the High court set aside the imprisonment order, and substituted it with an order discharging the appellant subject to the condition that he commits no offence within 12 months.

The requirement that other alternatives be considered before an order for imprisonment can be given was emphasised by Justice Harris in the case of *Letoyiani and Another v. R.*\(^{46}\). In that case the appellants, both aged below 18 years, had been charged and convicted on their own plea of guilty for stock theft, contrary to section 278 of the Penal Code (1970)\(^{47}\). Notwithstanding that each was a first offender and aged below 18 years, they were both sentenced to 4 years imprisonment and 15 strokes. In his ruling Justice Harris said:

"It is regrettable that this provision which is mandatory is sometimes over-looked by magistrates as it appears to have been in this case for there is no reference whatever to it on the record. The provision is, however, one of great importance and forms part of the effort of the state to divert young persons from the ways of crime before it is too late."

The judge allowed the appeal on sentence, and instead committed the appellants to a Borstal Institution for three years.

Perhaps more than any other case, the case that sets out the application of the law of theft to children is the case of *Kaisa v. R.*\(^{48}\) where the court, in very strong terms, expressed its disapproval of imprisonment of a child, and also enumerated the various aspects of the law as it relates to such a convicted child.
The facts of the case briefly are that, the accused, a child of 12 years, was charged with assault and handling stolen property (contrary to section 322 of the Penal Code). The ordinary penalty for the latter offence is imprisonment with hard labour for not less than seven and not more than fourteen years. The accused was correctly found to have committed the offence of handling a stolen watch worth Shs. 70/=. The probation report being found unfavourable, and a place not being available for him in an approved school, the trial magistrate sent him to jail for seven years, with hard labour and 6 strokes of the cane.

The judge, on appeal, set aside the sentence as illegal, since section 16(1) of the Children and Young Persons Act explicitly provides that. "No child shall be ordered to imprisonment to detention in a detention camp." A child is defined in section 2 of the Act to mean a person under the age of fourteen years. It was also held that it would have been a misuse of discretion to award imprisonment and corporal punishment under any other powers, simply because of the child's tender years. The court said:

"But leaving all that aside, a boy so young as the accused who has, as the accused had, committed the offence of assault and theft when only ten years old is clearly in need not only of discipline but also of care, guidance and encouragement given and provided by persons equipped with suitable training and qualification and possessed of enough time and the requisite facilities to attempt rehabilitation. Indeed rehabilitation is the most important factor to be borne in mind when considering what to do with someone who is about to enter or has only just entered his formative years."

The judge concluded the case by pointing out that if no institution had room for the accused in the foreseeable future, the magistrate should have considered any other order like, corporal punishment, or a discharge in preference to the long term period of imprisonment which was likely to do more harm than good. The accused was subsequently committed to Getathuru Approved School until he would attain the age of 16.
The judicial decisions above bring out and emphasise the important principle that the court in its decisions seeks the welfare of the children convicted of theft, and other criminal offence. This is in keeping with section 14 of the Children and Young Persons Act (1972), which provides that "every court in dealing with a person under eighteen years of age who is brought before it, shall have regard to his welfare". Such welfare is provided not through leniency or punishment for the offender, but through his rehabilitation.

It may be inferred from the decisions of the High Court above that the prisons do not cater for the welfare of juveniles. This is because, apart from being a penal institution, the prisons do not have the programmes, facilities and staff appropriate for juvenile rehabilitation. This explains why the High Court readily cancelled the sentences of imprisonment for the juveniles, and substituted them with orders committing the offender to approved schools or borstals.

4. CAUSES OF THEFT BY ADOLESCENTS

The offence of theft is just one among the many acts of delinquency that the youth engage in. The general causes of this offence are varied and are included among the "causes of delinquency" already discussed in chapter one. However, since most of the acts of juvenile delinquency are not criminal in nature (as already pointed out in chapter one), it is to be noted that some of the motivating forces are different from those that cause thefts. In discussing the causes of theft among adolescents, I shall endeavour to identify specific motives that drive young people to steal, as these vary with their ages and sexes. As D.J. West observes:

"The offence committed by young people differ in kind and in motive from the typical crimes of adults. Infants may steal things not knowing this is forbidden, older children may do so because they have not learnt the self restraint which normally develops with increasing years and adolescents may break the law to show off their daring or to annoy their parents."  

The main causes of theft by the adolescents include negative influence within the family and residential environment, poverty and negative peer-group pressure. These factors are usually not independent of each other. The adverse factors tend to occur in clusters and to interact to make a potential crime - producing situation.
A. POVERTY AS A CAUSE FOR STEALING

The basic cause of theft among adolescents is their desire to meet their basic needs, and their inability to do so without breaking the law. In the words of the late Chief Justice C.B. Madan, "... the ache to survive is the only reason for the children's transgression against the law."

My research at the Nairobi Juvenile Court and the Probation Department indicates that most of the juveniles charged with theft come from poor homes, that is, where the parents are not in gainful employment, or if in gainful employment, their incomes are low and they are unable to provide the basic needs of their families. About 80% of the juveniles charged with theft proceed with court hearings of their cases while in remand because their families are poor and cannot raise a cash bail of shs 500/= or a security bond of shs 1,000/= to enable them to be released from remand.

The poor state of the families of these adolescent offenders is further evidenced by their living in the slums of Mathare, Kaiyafa, Kariua, Kawangware and Kibera Laini Saba, in Nairobi. The cost of living is low in these slums, but this is because there is a correlative poor supply or lack of basic necessities like housing, water and sanitation services. Many of the juveniles who engage in theft also live alone or as gangs in the by-ways and alleys in the city centre, where they have no regular or legal source of livelihood.

The juveniles who come from poverty ridden homes normally steal, to meet their basic needs which cannot be provided for in their homes, like food and clothing. The younger children (aged between 8 and 14 years) of both sexes, who have been charged with theft, have usually been arrested and charged with stealing food-stuff and money. When questioned, most children confess they needed the money to buy food. Asked why he stole shs 300/= from his grandmother, a child replied that he did it so that he could buy food, as he was hungry. This claim was in keeping with the evidence of the grandmother who gave evidence that after the theft, the child was found eating chips which he had bought with part of the money.

In many cases the children also steal certain items like motor vehicle wheel caps and watches which they sell at throw away prices, and the proceeds of the sale they use to buy food and sometimes clothes.
It would appear that whereas food is the greater motivating factor for younger children to steal, the same may not be true for the teenagers, whose interests also include clothing and a desire for a more luxurious lifestyle than their families can afford. This is evident when one considers that the older juveniles steal more expensive items like motor vehicle headlamps, watches and golden chains, which when sold fetch a lot of money in excess of the cost of food alone.

In the case of R. v. Chiliku Kamoti the subject aged 14 years had been charged with house breaking and stealing contrary to sections 304 (1) and 279(b) of the Penal Code (1970). The particulars of the offence were that on 18 June 1992, the accused (and colleagues who were not arrested) broke into Nairobi Academy and stole one radio, a casio calculator, one umbrella and a stop watch, all valued at KShs.7,000/-. The accused was convicted on his own plea of guilty. In his report to the court, the probation officer, Mr Isaiah Munyu observed: "The accused does not deny the offence. He says he had the intentions of raising some money for personal use by selling some of the stolen items". The accused, it was reported, is the only child of his single mother who, although not rich, is able to feed him. This case illustrates that among the older children, food is not the sole motivation for theft.

Similarly in the case of R. v. Richard Owiti Wang the accused, aged 15 years, had been charged with theft from a person contrary to section 279(9) of the Penal code (1970). The particulars of the offence were that, on the 26th day of August 1992, at Pumwani, in Majengo with Nairobi jointly with others not before the court stole a purse containing KShs.500/- from Naomi Kaloki Muli. The accused was found guilty by the court on his own plea of guilty. When questioned on the theft, the offender said he and his friends needed money to go to cinema, but because none of them had any money, they decided to get it by stealing.

Records from the Nairobi Juvenile Court register and court files (1992) indicate that out of the 188 cases of theft that the court had handled between January and June 1992, only 11 juveniles were involved in theft of food, 28 were cases of theft of shoes and clothes, and the remaining 106 involved a variety of items, like motor vehicle parts, bicycles and cash. Most of the stolen items would be of no use to the children who, for example, have no cars, and this suggests that the items would instead be sold so that they get money for other purposes.
It may also be pointed out that whereas it is the younger children who are motivated to steal food, this forms a small percentage of theft cases, as most of the thefts are committed by teenagers. Only 20 out of 188 cases involved theft by children below 13 years of age. Sixty four out of 188 thefts were committed by boys aged 13-15 years, while the rest of the thefts (104 out of 188) were committed by juveniles aged 15 years and above.60 These facts are illustrated below:

Incidence of Theft by Juveniles:

a. According to Age

<table>
<thead>
<tr>
<th>Numbers</th>
<th>0</th>
<th>20</th>
<th>40</th>
<th>60</th>
<th>80</th>
<th>100</th>
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</thead>
<tbody>
<tr>
<td>Below 13 yrs</td>
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<tr>
<td>13-14 years</td>
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<td>15-17 years</td>
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</table>

(b) Items stolen

<table>
<thead>
<tr>
<th>Numbers</th>
<th>0</th>
<th>20</th>
<th>40</th>
<th>60</th>
<th>80</th>
<th>100</th>
</tr>
</thead>
<tbody>
<tr>
<td>Foods</td>
<td></td>
<td></td>
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<td></td>
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</tr>
<tr>
<td>Clothes</td>
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<td></td>
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<tr>
<td>Miscellaneous items</td>
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</tbody>
</table>

(Source: Nairobi Juvenile Court Register and court files for 1992)

Unlike the boys who steal a wide variety of items, including watches, livestock and money, girls, especially in the urban centres, are normally charged with theft of money, women's and children's clothes and shoes.61 Most of the girls who are charged with theft work as maids, with a low salary of not more than KShs.500/- per month. When asked why they stole most of the girls reply they stole because their employers refused to pay them their salaries - a claim that is normally denied by their employers. But even if their claims are true, the question may still be asked: "why did they only steal money clothes and shoes, instead of the more expensive items like radio cassettes?"

It is my opinion that what they steal is an indication of their needs, which because of poverty, have not been met. Like every girl in the adolescent stage, the ones who steal desire to dress in a particular style and standard. When they fail to attain this goal legitimately, they opt to steal what they need.
In *R. v. Grace Wanjiku*\(^62\), the subject was charged with and convicted of the offence of theft by servant, contrary to section 281 of the Penal Code (1970)\(^63\). The evidence established that the accused, aged 15 years, was working as a maid. She stole from her employer the sum of KShs.4,200/-, three skirts, three dresses, a travelling bag and three pairs of ladies' shoes, all valued at KShs.6,560/-\. In mitigation the offender said she had worked for the complainant for three months without pay, so she stole the money because she wanted to buy clothes. The court released her on condition that she commits no offence within the ensuing 12 months. Some of the older girls also have children whom they have to clothe, and this explains the fact that they steal children's clothes.

It may be inferred from the above that, if the girls were not living in their present state of poverty, and their needs for clothing and shoes were met, then there would little or no cause for theft among them.

**B. FAMILY INFLUENCE**

More than any other single factor, the family has been known to have the greatest influence on the character - development of a child. A stable and responsible family is more likely to produce children who are responsible and who do not have the tendencies to steal, than is the case in homes which are broken, or where the parents are negligent and irresponsible.

A broken family has the tendency to deny a child his basic needs of love, care and discipline. The child may also miss such basic needs as food, clothing and shelter, especially if the children in the family are many. The result of this situation is that the child will seek these needs outside the home, and this will invariably drive him to steal, since the society is not ready to provide such needs to the child. The unaccommodating attitude of the society has the effect of forcing the children to take care of themselves, usually by stealing.

The influence of the family especially in the case of a broken home, is responsible for children engaging in thefts because they are neglected, and not disciplined. Commenting on the case of *R. v. Peter Mwaura Kivunja*\(^64\), where the accused had been convicted of stealing two bedsheets, contrary to section 275 of the Penal Code (1970)\(^65\) B. Ngonga, the probation officer who handled the case, said:
"The parents are separated.. The incomes in the family are stable and regular and the subject's needs can be attended to adequately. However, there appears to be a laxity on the part of the mother who lives with the children. It appears she does not mete (out) proper guidance and control on the children".

In a family where the children are neglected, the parents may be providing the material needs of their children, but that, it appears, is where their concern ends. Such parents do not care if their children came home late or what activities they may have been engaged in. If the child comes home with some toys, money or other item, they do not question the child on how he acquired them, or show any concern. On many occasions, such items may have been stolen, and the lack of concern merely encourages the child to continue pursuing the same line of activity. similarly when a child is indisciplined, he is likely to disregard the property of other people, and see no ill in stealing it.

Neglected children may also steal because they desire certain items which their colleagues and playmates have, but their own parents have refused or neglected to buy these for them, although the parents are able to do so.

The influence of the parents in the life of children is also seen in the practice of imitation. Children normally try to be like the persons they admire and love, and these are usually their parents and immediate family members. The children not only imitate the behaviour of their parents but they also absorb their traits and standards of behaviour.

In many homes, children do not have much that is worth imitating because the parents are unfaithful and unloving. In my work as a magistrate at the Nairobi Juvenile Court, I observed that many parents expressed no love for their children and only came to court when summoned by the court, but not of their own free will. Some parents even gave inaccurate information about their children, in attempts to persuade the court to commit them to approved schools, and thereby take away the children from the day to day care of the parents.

Many parents lack definite established social and moral standards to pass to their children. Among such groups, certain kinds of theft, although recognised to be unlawful, are taken as normal means of existence. The effect of the life of dishonest parents on the child is illustrated by Dr Appianda when he states:
"The child who sees his father change his car every year when he knows his normal salary cannot afford such a lifestyle begins to wonder then tries to find out how and why and wherefore and gradually believes his father's way of life. He begins to emulate this in his own small way using whatever means he can think of to gain the better of his colleagues. He begins to cheat at school, pinches a coin here, a note there to appear a little more affluent than his peers. The practice gradually begins to expand."

C. PEER GROUP PRESSURE

"He came to town with other boys. He was instructed on what to do by his colleagues. He grabbed the purse in question and attempted to escape. He gave it to his colleagues who ran away while the subject was arrested."

The above is part of the probation officer's report after his interview of Samson Kibe Nyathira, who had been convicted at the Nairobi Juvenile court for stealing a purse from a person contrary to section 279(a) of the Penal Code (1970). The case is just one among many that illustrates the ultimate effect that a delinquent group will have on an individual. Most children tend to operate in groups, both in play and in work. If a child joins a group of delinquent youth, he will inevitably end up with the same group in delinquent activities like stealing. A child who is not strong-willed, and joins a group of youths already engaged in stealing, will, out of peer group pressure, end up engaging in acts of theft.

During my research I observed that in most of the probation officer's reports presented to the court, many children were reported to have engaged in theft because of "bad company". These were usually children who had absconded from school and taken to collecting and selling waste paper and tins. Many of them were also reported to be begging for money, and engaged in petty thefts. The "bad company", in many cases, were also reported to be sniffing gum and smoking cigarettes or bhang, and were out of parental control.
Interviews I had with some of the younger children engaged in theft and theft-related activities revealed they were engaged in it for the fun of it. These children in their ignorance, were usually persuaded by the older ones to join them in their adventures. While the older boys were aware of the illegality of their actions, the younger children, whom the former used to achieve their own goals, acted innocently. The young children see their actions as an adventure and a fun, where the person who is not caught emerges as a hero, like in the films.

5. TRENDS IN THEFT AMONG ADOLESCENTS

In the following discussion, I have specifically considered the trends relative to the ages of the juveniles, the sexes, and the items stolen. Attempts have also been made to consider the general trend in numbers of those charged with theft over the past years.

A. AGES OF OFFENDERS WHO ARE CHARGED

The incidence of juvenile theft, leading to charges in the juvenile court in Nairobi, between the months of January and June 1992 is shown in the table below:

<table>
<thead>
<tr>
<th>Age of Juvenile</th>
<th>Number charged</th>
</tr>
</thead>
<tbody>
<tr>
<td>10</td>
<td>1</td>
</tr>
<tr>
<td>11</td>
<td>3</td>
</tr>
<tr>
<td>12</td>
<td>16</td>
</tr>
<tr>
<td>13</td>
<td>31</td>
</tr>
<tr>
<td>14</td>
<td>33</td>
</tr>
<tr>
<td>15</td>
<td>30</td>
</tr>
<tr>
<td>16</td>
<td>40</td>
</tr>
<tr>
<td>17</td>
<td>34</td>
</tr>
</tbody>
</table>

(Source: Nairobi Juvenile Court Register and Court Files for 1992).
The above figures indicate that very few children below 12 years of age are ever brought to court on a charge of stealing. Sophia Gatere, the police prosecutor at the Nairobi Juvenile Court, suggests that the police do not charge the children with theft because by their tender age, many of them do not know that their actions are illegal. They are instead dealt with as children in need of protection or discipline.69

The numbers of children who are charged with theft greatly increase when the children become teenagers, reaching a peak when they are sixteen years old. Among the teenagers between 13 and 17 years of age, there is only a small variation in the numbers charged for the different ages. But the kinds of items they steal greatly vary with the age groups.

B. INCIDENCE OF THEFT BY SEX

Among the juveniles charged with theft before the juvenile court, between January and June 1992, 89.4% were boys and only 10.6% were girls. The figures show that, like in other towns and countries, boys constitute the main problem in Nairobi.

The girls charged with theft were mainly between 15 and 16 years of age. Most of them stole where they worked, as maids, so that they were charged with theft by servant, contrary to section 281 of the Penal Code (1970)70. This was in striking contrast to the boys charged with theft, whose ages varied between 10 and 17 years. Unlike the girls, who had stolen mainly clothes and shoes, the boys were charged with stealing different items, under different sections of the Penal Code (1970)71. These include theft from the person, contrary to section 279(a) of the Penal Code (1970)72, and theft from a house, contrary to section 279 (g) of the Penal Code (1970)73.

It is to be noted that whereas the girls acted singly in committing the offence, the boys normally acted in groups. The charge sheets and evidence on record show that in, over 50% of the cases the boys had committed the offence as a group, although only one or two members of the group were arrested and charged with stealing.
C. ITEMS STOLEN BY ADOLESCENTS

The table below indicates the items stolen by juveniles and the numbers of juveniles charged with theft:

<table>
<thead>
<tr>
<th>Item Stolen</th>
<th>Number Charged</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Boys</td>
</tr>
<tr>
<td>Watches</td>
<td>14</td>
</tr>
<tr>
<td>Money (usually in purses and wallets)</td>
<td>42</td>
</tr>
<tr>
<td>Motor vehicle parts</td>
<td>40</td>
</tr>
<tr>
<td>Clothes, shoes and other personal effects</td>
<td>12</td>
</tr>
<tr>
<td>Foodstuff</td>
<td>9</td>
</tr>
<tr>
<td>Bicycles</td>
<td>8</td>
</tr>
<tr>
<td>Other miscellaneous items</td>
<td>43</td>
</tr>
<tr>
<td></td>
<td>168</td>
</tr>
</tbody>
</table>

Source: 1992 Nairobi Juvenile Court Register and Court Files

The theft of watches, motor vehicle parts, and bicycles were offence that were committed by boys alone. The offence were committed by boys of various ages, and cannot be limited to any particular age groups.

Theft of cash was mainly an offence committed by boys, but there were also a few girls who committed this offence. Of the 20 girls who were charged with theft over the six-month period of research, 16 (80%) were charged with theft of clothes, shoes and other personal effects. Two girls were charged with theft of foodstuff. Apart from the two girls charged with theft of food-stuff, all the other thefts of food were committed by boys aged below 14 years.
An analysis of the tables and figures that emerge from the research indicates that no clear pattern or trend emerges when one considers theft relative to the different age groups. The different kinds of theft were committed by juveniles of all age-groups. It is, however, clear that while the younger boys "specialise" in stealing food, and the girls steal clothes and shoes, the older boys engage in a lot of theft of watches, money and motor vehicle parts.

D. TRENDS IN THEFT OVER THE PAST YEARS

It is generally agreed among the police and probation officers, and the juvenile court magistrates, that there has been a steady, and more recently an alarming growth in the rates of juvenile theft, especially of motor vehicle parts, and of street thefts from the person. Unfortunately none of the relevant institutions has any reliable records that specifically show the cases, or trends of theft among juveniles. The last such record appears to be the police records of 1984, which, when set alongside the 1983 record, gives an indication of the trend in juvenile theft, as shown in the table below.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Robbery and allied offence</td>
<td>64</td>
<td>6</td>
<td>70</td>
<td>106</td>
<td>1</td>
<td>107</td>
</tr>
<tr>
<td>Break-ins</td>
<td>393</td>
<td>10</td>
<td>403</td>
<td>391</td>
<td>15</td>
<td>406</td>
</tr>
<tr>
<td>Cattle thefts</td>
<td>4</td>
<td>-</td>
<td>4</td>
<td>6</td>
<td>1</td>
<td>7</td>
</tr>
<tr>
<td>Theft of other stock</td>
<td>18</td>
<td>-</td>
<td>18</td>
<td>13</td>
<td>1</td>
<td>14</td>
</tr>
<tr>
<td>Theft of over 400/-</td>
<td>140</td>
<td>17</td>
<td>157</td>
<td>171</td>
<td>29</td>
<td>200</td>
</tr>
<tr>
<td>Other thefts</td>
<td>327</td>
<td>48</td>
<td>357</td>
<td>470</td>
<td>48</td>
<td>518</td>
</tr>
<tr>
<td>Theft from motor vehicles</td>
<td>49</td>
<td>-</td>
<td>49</td>
<td>74</td>
<td>-</td>
<td>74</td>
</tr>
<tr>
<td>Theft of bicycles</td>
<td>19</td>
<td>-</td>
<td>19</td>
<td>21</td>
<td>-</td>
<td>21</td>
</tr>
<tr>
<td>Theft of produce</td>
<td>53</td>
<td>3</td>
<td>56</td>
<td>74</td>
<td>4</td>
<td>78</td>
</tr>
<tr>
<td>Theft by servant</td>
<td>53</td>
<td>65</td>
<td>118</td>
<td>51</td>
<td>73</td>
<td>124</td>
</tr>
<tr>
<td>Receiving stolen property</td>
<td>67</td>
<td>7</td>
<td>74</td>
<td>64</td>
<td>8</td>
<td>72</td>
</tr>
</tbody>
</table>

(Source: Criminal Justice and Children - report of the seminar held at K.I.A. in 1986, page 30).
The above figures indicate that there was a marked increase in cases of robbery, theft of cash, theft from motor vehicles, theft of produce, and theft by servants. There is no immediate reason to explain this increase. What is notable though is that compared with the present figures at the juvenile court in Nairobi, that the trend has not changed.

Theft by servant is still most common among the girls while thefts of bicycles and from motor vehicles is exclusively a masculine affair. The items that have suffered most from theft have also not changed. Not to be forgotten too is that like before, theft is still by and large an offence that is committed by the boys who have continued to be the problem in the community.

Various explanations have been proffered for such a theft incidence, by sex. Perhaps it is partly a matter of opportunity. The boys go out and about more, and so have more chances to steal, and learn about criminal ways and means. The girls, on the other hand, by tradition, are restricted to a largely domestic role, playing a very little part in the wider social and economic life; hence their crime rate is correspondingly low.74

Another suggestion why the boys are more delinquent than the girls, is that girls, in our culture, are brought up to be more passive and conformist than men, and so they are more likely to support morality and the status quo, and avoid crime. Boys are expected to be more assertive, to compete and to provide, and are therefore under greater temptations to dishonesty.75

D.J. West, commenting on "Girl Delinquents", has said: "It seems to be a general rule that as women become emancipated, so the proportion of women among convicted persons increases." Based on this observation, I can only assume that even in Kenya, and specifically in Nairobi, as the girls get greater exposure to the greater socio-economic life, and our culture changes, the trends in theft may change, as more girls take to crime.
6. SUMMARY AND CONCLUSION

We have considered the development of the law of theft in Kenya, and noted that although each ethnic community had its own criminal laws, these were done away with at the advent of colonial rule. When Kenya attained independence, the customary criminal laws (like the law on theft under customary law) were discarded. In their place, British criminal laws, used during colonial rule, were adopted through various statutes, like the Penal Code. The present law on theft is one such law.

The offence of theft is defined in section 268 of the Penal Code (1970). Our discussion of the offence of theft included an examination and analysis of the various ingredients of theft as defined in law and interpreted by the courts. We have also considered briefly the penalties for theft as provided for in the Penal Code (1970). It was subsequently noted in the discussion of "the application to children of the law of theft," that the penalty for theft does not apply equally between adults and children.

The discussion established the principle that the court, in applying the law to children, seeks to safeguard their welfare. This conclusion, we may submit, has validated the third hypothesis considered in this thesis: that the court in its application of the law seeks to rehabilitate rather than to punish the children. This hypothesis has been considered in depth in chapter three.

Within the chapter, we also discussed the causes of theft by adolescents. The discussion has confirmed that the main causes of theft by juveniles, is negative influence at the family level, poverty and bad peer-group pressure. Having considered the general causes of delinquency in chapter one, the discussion in this chapter has made it manifestly clear that the basic cause of adolescent theft is the failure of the parents to set a good example, to train, and to discipline the child, as well as providing the child's basic needs. This failure of the parents in their duties, it is submitted, is what makes the children susceptible to temptations to steal, especially if the family is poor, or the child is in bad company. In conclusion, it is submitted that the first hypothesis, which has been considered above has been established.
In concluding the chapter we also examined the trends in theft among adolescents. It was noted that the majority of the juveniles who steal are boys. And while the girls steal mainly clothes, shoes and money, the boys steal a wider variety of items. The reason for this, it was suggested, is because the boys are exposed to a wider environment, and hence have more temptation and opportunity for theft, than the girls.

Ibid.


Chapter 63 of the Laws of Kenya.

Ibid.


Chapter 16 of the Laws of Tanzania.


Chapter 63 of the Laws of Kenya.

When the case was heard (Criminal case 839 of 1966, of the resident magistrates court at Nairobi), the magistrate found the respondent guilty on both counts and fined him a total of £200.

(1966) E.A. 487.


Adopted from Tudor Jackson, Ibid.

(1972) I.W.L.R. 1341.


Chapter 63 of the Laws of Kenya.

(1868) L.R. I.C.C.R.159.
23. (1864) 10 Cox. C.C.23.
26. Ibid.
27. Ibid., section 268(2).
30. Ibid.
34. Ibid.
35. Ibid., section 279.
36. Ibid., section 281.
37. Ibid.
42. Chapter 63 of the Laws of Kenya.
43. Ibid.
44. Chapter 141 of the Laws of Kenya.
45. (1972) E.A. 532.
46. (1972) E.A. 50.
47. Chapter 63 of the Laws of Kenya.
50. Ibid.
52. Ibid., page 55.
Justice C.B. Madan, Opening address at the Workshop on Criminal Justice and Children, held at K.I.A. April 7-11, 1986.

65% of the children aged less than 13 years were identified during the research (January to June 1992) at the Nairobi Juvenile Court had stolen money.

R. v. Kariuki Nderu, Juvenile Court Case No. J510/92. Also see R. v. John Njenga Njoroge, Juvenile Court Case No. J1458/92 where the accused confessed after conviction for theft of two bedsheets, that he intended to sell them so as to raise money for food.

Nairobi Juvenile Court Case No. J1158/92.

Chapter 63 of the Laws of Kenya.

Nairobi Juvenile Court Case No. J1307/92.

Chapter 63 of the Laws of Kenya.

Data obtained from the Nairobi Juvenile Court Register (1992) and Court Files

Research conducted at the Nairobi Juvenile Court between January and June 1992 indicates that 90% of the girls were charged with theft of clothes and shoes.

Nairobi Juvenile Court Case No. J250/92.

Chapter 63 of the Laws of Kenya.

Nairobi Juvenile Court Case No. J1458/92.

Chapter 63 of the Laws of Kenya.


Chapter 63 of the Laws of Kenya.


Chapter 63 of the Laws of Kenya.

Ibid.

Ibid.

Ibid.

D.J. West, op. cit., note 51, page 197.

Ibid.

Ibid.

Chapter 63 of the Laws of Kenya.
Ibid.
Ibid.
CHAPTER THREE
THE ADOLESCENT THEFT SUSPECT AND THE LEGAL PROCESS

The first part of this chapter deals with the methods the state uses in dealing with the problem of adolescent theft. These methods include preventive measures and remedial or curative measures. The latter is the focus of this chapter, for it considers the legal process that an adolescent theft suspect must undergo, from the time of his arrest, to the time the court finally disposes of his case.

In the second part of the chapter, the role of the police in the legal and rehabilitation process of the theft suspect is examined. An in-depth analysis of the role of the court in the trial and determination of the method of rehabilitation of juvenile offenders is undertaken under the heading "The Judicial Process". Finally, the role of social workers, especially probation officers, in the rehabilitation of the offender is examined.

1. THE STATE'S RANGE OF INSTRUMENTS FOR DEALING WITH THE PROBLEM OF ADOLESCENT THEFT

In dealing with the problem of adolescent theft and other acts of juvenile delinquency, the state aims at the prevention of the crime, its detection, and the rehabilitation of offenders. The state's strategies and instruments employed to attain this goal are varied and may be broadly classified as "preventive" and "curative". Its social, economic and other policies are geared towards this end.
A. PREVENTIVE INSTRUMENTS

Different ways and means of preventing crime and delinquency, and of treating established delinquents, are suggested by different criminological theories. The different state strategies for dealing with the issue of delinquency fall within these different theories. By and large, the sociological school of thought, represented by such writers as Edwin Sutherland, Albert Cohen and R.K. Merton, favor social reforms, in attempts to rectify the supposed character-defects of individual delinquents. For example, if delinquents act as they do, in favor of a recognized role which is sufficiently accepted in certain sectors of society to enhance their standing among their peers, as well as to bring monetary rewards otherwise impossible for members of their socio-economic class to achieve, the answer would seem to lie in reforms by the government, aimed at a more egalitarian distribution of opportunity, and a general increase in legitimate means of gratification and advancement, so that the delinquent way of life loses its attractiveness and status.

In real life, the situations leading to delinquency are so complex that the state has to try many different lines of approach. While one should be able to learn something from the outcome of preventive efforts, evaluation is difficult, since any one intervention is but a drop in the ocean, in relation to the total situation. However, as D.J. West observes:

"... in human affairs one has often to act in advance of scientific knowledge and attempts to combat the delinquency problem cannot wait upon the resolution of academic controversies or the uncertain result of long term research."

Thus, although satisfactory scientific proof may be lacking, this does not necessarily mean that no benefits have been derived from preventive efforts. For example, it is a reasonable though unprovable assumption that relief of poverty has reduced certain kinds of theft, but even if it had not had that effect, it would have been a worthwhile social measure.
Crime prevention may also be sought by more direct social policies, intended to relieve people of the necessity to win a livelihood illegitimately. A classic example, when it is practised, is government assistance to victims of calamity, and poverty stricken homes, and to provide old age pensions; such measures should lessen temptations towards theft of food.

Such social welfare schemes have a long history, and in a changing and developing society their scope is constantly enlarging. In the 19th century, in Europe, for example, the realization that intolerable physical conditions of filth, pestilence, and overcrowding provided breeding grounds for immorality and crime, led to state-financed systems of public health, sanitation and housing for the poor. The continued running by the state of most of these systems all over the world represents ongoing preventive efforts to stamp out crime, by ensuring that crime-enhancing conditions do not exist.

Dealing with the problem of adolescent crime (among other social evils), Kenya's Development Plan of 1974 to 1978 declared the government's policy on the subject, in the following terms:

"The underlying principle of social welfare services is prevention rather than cure of social and individual problems."

The broad objectives in the field of social welfare are:

i. to ensure that social welfare services are available;
ii. to assist in the elimination of social and personal distress;
iii. to render opportunities to the people to participate in the life of the nation, by helping them to obtain the basic necessities of life."
The goal of the government was also stressed by Mr. Ngala Mwendwa, then Chairman of the Nairobi City Commission, when he stated that the Commission is charged with the responsibility of providing social welfare services to the residents of the city. To achieve this, he said, the Commission has "adopted a generic approach, that is, dealing with and handling problems from a macro rather than micro level. This implies that the Commission lays greater stress on preventive measures."7

In executing its social policy to prevent juvenile delinquency, the state realizes that no better place can be found to start than in the family. The family is the pivotal social unit. It has the main responsibility of determining the family size, improving the quality of life of its members, and inculcating in children the values which will guide their social and economic conduct as and when they mature. It is the government's policy to strengthen the family as a social unit, through its several community activities, its functional literacy programme, and its support for family-oriented activities of voluntary agencies.8

Professor T. Asuni, writing on the control of crime and delinquency stresses that "the developing countries could attempt to modernise and improve their formal systems or they could give primary emphasis to the family."9 He states that while continued improvement in professional standards in formal systems would appear to be a worthy goal, a family-centered social policy would be more in keeping with the cultural traditions of the developing nations and would meet with public approval.

The social planning that is called for would encourage the development of informal neighbourhood-based methods of handling minor cases of juvenile social maladjustment. Families, particularly extended families, would play a principal role in dealing with children, and the state would use whatever resources it had at its disposal, to re-enforce the role of the family, elders in the community, and indigenous organisations. Professionals would have to learn to work with local communities, to give their expertise to existing community groups, or to help create new ones. The professionals would thereby avoid stripping families of the authority and responsibility for managing their own problems.
The state, through local government, endeavours to improve the family and the children's lot, through a number of social programmes. In Nairobi, for example, the City Commission social workers work closely with families in counselling, and in the provision of material help for those families which are faced with problems beyond their means. They especially work with broken homes, abandoned children, and difficult children in the homes. Secondly, in order to improve the home environment, the City Commission has established the homecraft training centres, to train women and mothers in home management, so as to make the home more attractive for children.  

Recognizing the fate of deprived or disadvantaged children, the City Commission has established relevant facilities which can help discouraged children who tend to drift away from their homes. These include informal primary education at community centres, establishment of recreational facilities, providing skilled training in carpentry, leathercraft, and home economics at Waithaka Training Centre, to encourage future employment.  

Unfortunately, the recreational facilities have been neglected and poorly maintained, so that they are not properly utilised. The stipulated services, vis-a-vis the number of people they are meant to serve, are inadequate. Access to the facilities is limited by their small numbers, and remote locality, so that they do not effectively serve the purpose for which they were created.

In addition to the services which ensure that elementary physical and moral needs of children are being met in their homes, the school and youth services outside provide essential training on literacy, in technical knowledge, and in social skills, without which no your person can fit successfully with the requirements of modern society. Indeed, the schools are perhaps better suited than any other service, to bring positive influence to bear upon young people.

In the deliberations of the United Nations Congress on the Prevention of Crime, the role of education was given special prominence. The Congress pointed out that all kinds of improvements in educational methods have relevance, since they help to draw a large proportion of pupils into active participation in school life, and hence to reduce the numbers of discontented and potentially delinquent.
The importance of the school, as a government instrument in curbing juvenile delinquency, is stressed by Justice Muli (then the Attorney General), when he points out that after the family, the schools are the next custodians of the children for the purposes of formal education, and continuation of the socialization process. A similar view is expressed by Professor T. Asuni, when he stresses the need to enhance the role of the school within the community. He points out that since the school is a credible institution in the eyes of most juveniles and their parents, the role of the local neighbourhood school should be enhanced, by encouraging it to become fully integrated into the community. This can be accomplished by more parent-teacher contacts, perhaps some degree of parental control, and a broader perception of the role of the school in all aspects of child development.

The role of the school in the development of the child becomes clearer when we note that, "by the time the child comes to school, he is not a clean slate. He may have certain prejudices picked up during his childhood which may be a handicap for smooth progression up the socialization ladder." Teachers may therefore not only have to take the role of parents at school, but also engage in re-educating the child where his background has suffered distortions.

To accomplish this important task, it is desirable that the teachers be encouraged and motivated in their work so that they are fully committed to it. It is also necessary that the teachers be professionally trained and qualified in the appropriate disciplines. It may be noted with satisfaction that the latter requirement is already part of the government's plan, stated in the following words:

"First, the education and training institutions will be required to strengthen their guidance and counselling programmes through staff training and appointment of qualified staff."
It has been noted in Chapter 1 that one of the major reasons for juvenile delinquency is attributed to poverty within the family. The government's economic policy aims at relieving the poorer members of the society of as much economic burden as possible. This policy is evident in the tax reviews and frequent political and administrative statements. In many cases, the government seeks to solve the problem of delinquency by reaching the family directly through a number of projects. The Nairobi City Commission, for example, has organized income-generating activities, through special groups for needy families. The families are assisted to earn a living through making handicrafts. Members of the City Commission staff find markets for the handicrafts.

Since juvenile theft usually starts in the family, it can be hypothesized that the more enhancement made to a family's economic welfare status, the less will be the frequency of children engaging in delinquent activities. One of the effective methods for accomplishing this, is ensuring that the members of the family are in productive employment. This is in line with the government's goals, after it has identified that: "the leading cause of juvenile delinquency lives in idleness and the lack of productive employment."19

The youth of this country constitute a vital resource, which has to be developed for positive nation-building, rather than being allowed to be idle and hence exposed to undesirable social behaviour. To prevent them from adopting delinquent tendencies, the National Development Plan20 states that greater efforts will be made to generate more productive employment for youth in all sectors of the economy. Greater encouragement will also be given for youth to find gainful work in the informal sector and in small-scale enterprises in the rural areas.

To enable the youth to be gainfully employed, the government is relying on the 8-4-4 system of education as an appropriate measure towards ensuring that the youth are reasonably prepared for work. The National Development Plan (1989 to 1993) states that the educational system will therefore be directed to finding ways and means:
"to assist the school leaver at every cycle to find gainful employment in the modern wage sector, small scale enterprises and other forms of self-employment, make the individual more trainable at higher levels of education and training instil realistic attitudes and aspirations regarding employment in both parents and school leavers".\textsuperscript{21}

The effect of this, it is hoped, will be, the creation of more job opportunities, and enhancement of the economic position of the family, thereby preventing juvenile delinquency, especially theft.

\section*{3. REMEDIAL INSTRUMENTS}

Apart from the government's preventive instruments for dealing with adolescent theft, there are also curative measures to resort to when the preventive measures fail. The government, acting through the police, the judiciary and the children's and probation departments, will inquire into the case, and then employ the best remedial action. Where curative measures are necessary, "the government takes direct action by offering financial aid to destitute persons and by providing reformatory facilities to juvenile delinquents."\textsuperscript{22}

The government relies a lot on the police force for the prevention and elimination of criminal activities. "It has therefore been its goal to improve the efficiency of the police force through training and better interaction between the force and the members of the public."\textsuperscript{23}

Control and prevention of criminal activity needs a firm information base, to facilitate the detection of these negative tendencies which arise from rapid social and economic transformation, leading to increased productivity for criminal behaviour. To achieve this, the government has established a National Crime Research Centre, for the promotion of research into those processes leading to deviant behaviour; to re-examine existing programmes and policies for early detection of crime; and to enhance the effectiveness of the police force and the legal system.
The judiciary also plays a significant role in dealing with the problem of theft by adolescents. In fact, all the curative work of the state, in matters of juvenile delinquency, is pegged on the court, since it is the court that will determine the reformative action to be employed. The juvenile court will hear the case of every theft suspect charged before it, and determine whether he is guilty; the court will take appropriate steps for his rehabilitation acting in liaison with probation and children's officers.

The Probation Department is an important facilitator of the rehabilitation programme, and is administered under the Ministry of Home Affairs and National Heritage. The department is charged with the responsibility of rehabilitation of criminal offenders within their homes and immediate communities. It is recognised that socio-economic development and urbanisation plays a definite role in the increase of crime, hence the need to explore carefully the problems inherent in the rehabilitation of offenders on non-custodial treatment. The design is to avoid custodial treatment in the sense of sentences of imprisonment for juvenile offenders, and this is reflected in the relevant legislative provisions.

The Children's Department which falls under the same Ministry, run the remand homes and approved schools for children committed for institutional rehabilitation. The institutions offer training and guidance to juveniles who show early criminal tendencies, in an effort to mould them into responsible and mature people later on. The facilities provide training and guidance that will deter juveniles who have been delinquent, from criminal careers.

2. ARREST AND CHARGE

The police force in Kenya is the organization responsible for the prevention and detection of crime, and for law enforcement. In their role of law enforcement, police officers usually identify children who steal and/or commit other offences. Where a juvenile is reported to have stolen, they will perform the task of arresting the theft suspect. They will then carry out investigations, and if satisfied he stole, they will charge the suspect before a juvenile court.
A police officer who has detected the offence of theft being committed may arrest the
juvenile who commits the offence, without a warrant of arrest. This is in keeping with
section 29(a) and (d) of the Criminal Procedure Code (1983), which provides that:

"A police officer may without an order from a magistrate and without a warrant arrest:

a. any person whom he suspects upon reasonable grounds of having committed a
cognizable offence.

b. any person in whose possession anything is found which may reasonably be
suspected to be stolen property or who may reasonably be suspected of having
committed an offence with reference to that thing."

In many cases, however, juveniles who steal are arrested by the complainant, or the public,
in the course of the act, and taken to the police station where they are re-arrested and
detained. The re-arrest is necessary because although the private citizens are given power to
arrest law breakers, it is only the police who have the powers to take legal action (that is, to
detain and charge) against such law-breakers. Once arrest takes place the procedure the
police must follow is clearly and meticulously set out in the Criminal Procedure Code (1983)
and the Children and Young Persons Act (1972).

As with adults, the police officer's first duty will be to make sure that there is sufficient
evidence to justify the detention of the theft suspect. This he will ascertain by questioning
the complainant, and other witnesses present, and hearing their account on the circumstances
of arrest. He will also take down their statements and keep any exhibits that may have been
recovered. If satisfied that there is enough evidence to sustain a case, the police may proceed
to prepare a charge sheet.

It is noteworthy that whereas every theft suspect may be arrested for theft, yet not all can be
charged with stealing. Thus in a case where the complainant and other witnesses have
arrested a theft suspect but there is not enough evidence to sustain a case against him, he may
not be charged with an offence, and in fact, if he is already detained at the police station, then
he must be released.
Secondly, the old presumption of law embodied in section 14(1) of the Penal Code (1970) still prevails, that, "a person under the age of eight years is not criminally responsible for any act or omission." Therefore, no matter how strong the evidence may be showing that the child stole, he cannot be charged or found guilty of theft. Similarly in cases where the child is aged between 8 and 12 years, the police may opt not to charge the child if they are not convinced that he had the guilty intention of stealing. Such a child can, however be arrested and brought to court, as being in need of protection or discipline.

Thirdly, it must be remembered that it has never been a rule "that suspected criminal offenders must automatically be the subject of prosecution." Wide discretionary powers are entrusted to the police in many areas related to the enforcement of law, but the special and critical importance of the decision, regarding whether or not to prosecute, stands out in criminal process. Therefore, even if there is evidence that could lead to a conviction, the police have a discretion as to the charge or charges to bring against the suspect.

Considerable latitude exists in many cases in selecting what charge or charges to bring against an accused person. There is room here for exercise of discretion. More serious charges may be dropped in favour of lesser charges. This is frequently done in order to induce confession of guilt, or plea of guilty, the accused person being happy to plead to the lesser of several charges. In exercising discretion, decisions are constantly made by the police not to enforce the law, in particular matters or on particular occasions. Provided that there is no general direction in the exercise of the discretion, but that each case is viewed on its merits, there is no legal objection to this practice. Such discretion determines who may be charged in court, and is eventually judged to be delinquent or criminal.

Where the police are satisfied that an accused should be charged, the charge will contain a statement of the specific offence or offences with which the suspect is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. In other words, the charge sheet should state the full names identifying the theft suspect, the details of the law breached and the particulars of the offence committed.
Before the case comes to court, the police have the duty of deciding whether the juvenile will be detained at the police station or released on bail or bond. This the police will do by inquiring into the case, and, unless there are specific grounds for his continued detention, the suspect shall be released. The suspect may be detained, for example, if the police considers that the juvenile ought in his own interest to be further detained, to remove him from undesirable associations, or where the police believe the accused has committed a grave offence, or that his release would defeat the ends of justice. The theft suspect may also be detained where he has been arrested without a warrant, and the police suspect that he would fail to appear to answer the charge if released.

If he is so detained, then he must be brought to court within 14 days from the time of his arrest, as is in the case with adults, unless a police officer certifies to the court that because of illness or accident the subject cannot be brought to court within that period. The goal of this latter provision is to ensure that there shall be no delay in bringing before the court an arrested person to whom police have refused bail.

Whenever a juvenile is arrested and detained in a police station, the law provides that he or she shall not associate with adult offenders. If the juvenile is a girl it is desirable that she should, while detained, be placed under the care of a woman.

The aim of the law here is to make sure that the juvenile is not "contaminated" by adult offenders. This is because some of the adult offenders may be confirmed criminals and may pass their criminal tendencies to the juvenile. This, in fact, is the same reason why Sir William Harcourt besought Queen Victoria of Britain to ensure that children were not imprisoned with adults. He expressed his opinion:
"... that protracted imprisonment in such cases has an injurious effect both on the physical and moral nature of children of tender years. The child who has been guilty only of some mischievous or thoughtless prank which does not partake of the real character of crime finds himself committed with adults guilty of heinous offences to the common goal. After a week's or fortnight's imprisonment, he comes out of prison tainted in character amongst his former companions and he soon lapses into the criminal class with whom he has been identified."

The principal expressed by Sir William Harcourt is contained in section 6 of the Children and Young Persons Act (1972), which provides that:

"Arrangements shall be made for preventing persons under sixteen years of age while detailed in a police station, or while being conveyed to or from any court from associating with adults charged with or convicted of any offence with which a person under sixteen years of age is jointly charged or convicted."

The practice of this provision of the law is, however, far from what it stipulates. My interviews with the police officers in charge of Pangani, Central, Muthaiga and Kilimani Police Stations, which handle most of the juvenile cases in Nairobi, revealed that there is acute shortage of accommodation at the police stations. As a result, accused persons are normally only grouped according to sex but not according to age. Girls are held with women, and sometimes with young boys, in one cell. Older boys and men are kept together in one cell.

The Children and Young Persons Act (1972), however, encourages the police to release arrested children, whenever possible. Section 10 of the Act provides that:
"Where a person apparently under the age of eighteen years is apprehended with or without warrant and cannot be brought forthwith before a court, the police or administrative officer to whom such a person is brought shall inquire into the case, and may in any case release such a person on a recognizance being entered into by his parent or guardian or other responsible person with or without sureties for such amount as will in the opinion of such officer secure the attendance of such person upon the hearing of the charge."

To determine whether the juvenile can be released on bail or not, the police must first get in touch with the juvenile's parents or guardians and summon them to the police station. This is because it is the parents or guardians who will stand as surety for the theft suspect, and thereby guarantee his attending the court for the hearing of the case. Notwithstanding the good intentions of this section of the law, the provision is rarely applied because most parents of the theft suspects are not immediately traced. When their children are arrested, and when traced most of them are not able to stand as sureties for their children because of their evident neglect of and lack of concern for their children, or because of their poor and unstable economic status. Commenting on the situation, Sophia Gatere the police officer in charge of juvenile prosecution at the juvenile court in Nairobi, has said:

"Most of the parents of the children charged before this court are poor. They live in the slums like Mathare and Kibera. Many of them also appear unconcerned and never come to court for the hearing of the case or even go to see their children in remand while the case is still on."

As a magistrate in charge of the Nairobi Juvenile Court I have observed that throughout 1992, no child ever came to court on a criminal charge while out on a police bond. All the children who were charged before the court had been arrested and detained at the police station before being brought to court from the police station. This observation is considered against the fact that notwithstanding the lack of concern on the part of some parents, or their poor economic status, several children who appeared in court were granted bond with their parents being their surety, and such children proceeded with their hearings while out of remand.
This occurrence implies that such children were not offered bond or bail facilities at the police station. This can be either as a result of a silent policy not to grant such bonds, in spite of the law, or (and more likely) because the police do not make any efforts to trace the children's parents after the children are apprehended, unless compelled to do so by the court later on.

When the foregoing process is complete, the juvenile is transported to the juvenile court at a predetermined time. He is then handed over to the court to face the judicial process which every charged theft-suspect must undergo.

3. THE JUDICIAL PROCESS

Juveniles charged with theft are tried by a special court, the Juvenile Court. Section 3(1) of the Children and Young Persons Act\(^47\) (1972) provides for the establishment of the juvenile court to deal with juvenile offenders.

Except for the large urban areas, most juvenile courts in Kenya are \textit{ad hoc} courts, that is, they are constituted as and when a juvenile is arrested and charged before the court. This is because cases of juvenile delinquency end up in the courts only very rarely. It is necessary that the juvenile courts should sit as often as possible for the purpose of exercising jurisdiction. It is only in the large urban centres that there are juvenile courts that sit frequently at pre-determined times, normally once a week. A court may also be specially convened if a juvenile is charged with an offence and cannot be released on bail to appear when the court would normally be held. The exception to this is Nairobi, where the court sits everyday, because of the high incidence of juvenile delinquency.

Notwithstanding that few juveniles are charged before the juvenile courts, it is a reasonable assumption that, as the population increases, there will be a corresponding increase in cases of juvenile delinquency, and a need for more juvenile courts. The latter is true of Nairobi, where the one juvenile court is already handling many cases, and is not coping well with the increasing numbers of juvenile delinquents charged before it.
Villoo Nowrojee, a sociologist, who did research at the Nairobi Juvenile Court, recorded her observation of the state and operation of the court:

"I then went into the courtroom, a dingy place with no proper ventilation and a strong smell of ammonia. This may well have been because of the over-crowding. I could just see children sitting very close together on every one of the benches there.... Then everything happened very quickly. It took about two minutes to dismiss everyone of the cases."48

Any person who has been in a juvenile court session will appreciate that unlike the courts for adults, the proceedings in juvenile courts are slow. When each case is therefore, disposed of in two minutes as described above, it can only be deduced that the child has not received proper attention, nor has the hearing been fair. In many cases the children taken to the juvenile court are frightened of this "mysterious place," and are not willing to talk. The magistrate will therefore spend time talking even about irrelevant matters to gain their confidence and persuade them to speak. He may also spend much time explaining to the child the nature of the charge, and ensuring that he understands all that is going on within the court. This is unlike the courts for adults, where the magistrate presumes the accused knows the law, and the court is therefore under no obligation to go out of its way to constantly explain the court proceedings to him.

The Children and Young Persons Act49 (1972) provides that the juvenile court shall be presided over by a magistrate, as chairman or deputy chairman and such number of persons as the Chief Justice may think fit to constitute a panel of persons to try juvenile cases, or of a magistrate sitting alone. Where a panel is constituted, it is desirable that the members should be men and women experienced in social work involving children. In practice, however, no such panel has been gazetted in Kenya, and all juvenile courts, like adult courts, are constituted and presided over by a magistrate sitting alone.
It is also noteworthy that apart from the magistrate, the court clerk, the accused and his advocate, if any, the juvenile court also comprises police prosecutors, police witnesses, parents and guardians of the accused, children's officers, probation officers and bona fide representatives of newspapers or news agencies. This is a big contrast to the adult courts, where children's officers are absent, and probation officers may only attend the court when the court requests for a report. It is also not a legal obligation for parents of an accused who is over 18 years of age to attend court during the case. The Children and Young Persons Act (1972) provides that:

"Where a person under eighteen years of age is charged with an offence or is for any other reason brought before a court, his parent or guardian may in any case, and shall if he can be found and resides within a reasonable distance, be required to attend at the court before which the case is heard or determined during all stages of the proceedings...."50

The attendance of the parents is important for various reasons. There is firstly, the obvious one that appearance before the court, particularly if it is a first appearance, is for many juveniles an ordeal which is likely to be more resolutely faced if there is accompanying parental support and comfort. Secondly, unless the juvenile is legally represented, his parents ought to be there to help him conduct his case. But there is the further advantage that attendance often enables the court to bring home to the parents their own responsibilities concerning the upbringing of their child, and to point out their past failures in this respect.51

The presence of the parents or guardian in court will, therefore, help the court to have a proper regard for the welfare of the juvenile, as it is statutorily52 directed to do when deciding how to deal with juveniles.

The juvenile court, because of the ages of the subjects it deals with, is fairly informal compared to the adult courts. It is noted that although those children charged with criminal offences must be at least 8 years old, the court also deals with younger children who are in need of protection and care. The young children cannot be subjected to the rigorous and strict discipline of the adult courts, otherwise they will be harassed and the hearing will not be fair to them.
Commenting on the atmosphere prevailing in court, John Watson has said:

"The juvenile court like any other court of justice should be dignified, but an atmosphere of undue ceremony would be unsuitable for dealing with children in need of care or protection, many of whom are the victims of brutality and have been frightened enough already."\(^{53}\)

Unlike the adult courts whose function includes punishing law breakers, the juvenile court has the goal of guiding and rehabilitating law breakers. In the words of B. Flexner and R. Baldwin:

"Its primary function is that of guardianship as opposed to punishment, so that the court becomes a concrete expression of the state's obligation to the child, a recognition that the child is in court as a result of conditions not of his own making, and that he has a valid claim against the state and is to be saved by it, not punished by it"\(^{54}\)

The Children and Young Persons Act\(^{55}\) (1972) enhances the guardianship role, by setting out the principles and goals which all juvenile courts should observe in dealing with those brought before them.

The Act provides that:

"Every court dealing with a person under eighteen years of age who is brought before it shall have regard to his welfare and shall in a proper case, take steps for removing him from undesirable surroundings and for securing that proper provision be made for his maintenance, education and training"\(^{56}\)

It may be contended that this is not the first duty of the juvenile court. The first duty of every court is the protection of society. Salus populi est suprema lex. But in cases concerning children, it will generally be agreed that taking the long view, a consideration of their welfare is nearly always the most practical way of attaining that end.
The judicial process as, expounded here, points to one basic principle; that the issue of child delinquency is being treated as a special social problem, distinct from normal criminality. The goal throughout is to correct the child's social orientation, rather than punish him as in normal criminal cases. It is because of this that several attempts are made by the judicial process to rehabilitate the child and disassociate him from the stigma of criminality. One of the methods of accomplishing this, is having their cases held in a building which is not associated, in the minds of the public, with crime and criminals. The law in fact provides that juvenile courts should be held in a building other than that used for the trial of adults.

It is also desirable that the traditional features of the court, such as a raised bench, railed dock, a gigantic chair for the magistrate, among others, that add complexity to the court should be excluded. These ideally should have no place in the juvenile court, where simplicity should be the keynote.

The raised bench for example is undesirable for the relationship between the magistrate and a child during a case. The nearness of a child to a magistrate is important and a raised bench works against this. Personal contact between the magistrate and the child is the very essence of effective work by the court.

In order not to associate the juveniles with crime, the Children and Young Persons Act (1972) also provides that, the words "conviction" and "sentence" shall cease to be used in relation to persons under eighteen years of age, and alternative terminologies shall be used.

It is for similar reasons, that is, of disassociating juvenile cases from common criminality, that the law put restrictions on who may attend the juvenile courts, and what may be reported of its proceedings. This is unlike the adult courts which are open to the public and the full names of the accused and court procedure may be reported.
Section 4 of the children and Young Persons Act (1972) provides that:

"... no person shall be present at any sitting of the juvenile court except -

(a) Members and officers of the court,
(b) Parties to the case before the court, their advocates and witnesses and other persons directly concerned in the case,
(c) Parents and guardians of any person brought before court,
(d) Bona fide representatives of newspapers or news agencies,
(e) such other persons as the court may specifically authorise to be present."^

ORDER OF PROCEEDINGS

The procedure to be followed by the juvenile court in dealing with theft suspects is the same procedure that is followed in courts for adults. This is contained in the Criminal Procedure Code (1983). This is unfortunate, not because there is anything bad in the provisions themselves, but because procedure which may be quite intelligible for an adult is often far beyond the comprehension of a child. One of the essentials of a fair trial is that the accused, whatever his age, shall understand what is happening, and to achieve this, the magistrate may be compelled to constantly intervene and simplify the procedure as well as act as an interpreter.

It is essential not only that there should be simplicity in juvenile court procedure, but also that the juvenile and his parents should have a clear understanding of what is happening. The onus of making clear, what is going on, by means of the simplest language, rests with the magistrate in the court, throughout the proceedings. The role of such a magistrate has been described by John Watson, himself a magistrate with considerable experience:
"The efficient working of a juvenile court largely depends upon a suitable person being appointed to this office. The chairman it is submitted, should personally conduct the proceedings. He should be the mouthpiece of the court and be experienced, not merely in talking to children but in persuading children to talk to him..."  

The proceedings in court start immediately all the parties in the case are in court, that is, the magistrate, the police prosecutor, the juvenile charged with theft, and other court officers. The proceedings begin with the magistrate reading the charge and explaining in simple language to the accused, the substance of the charge against him, and he shall be asked whether he admits or denies the truth of the charge. That is, once the charge has been read and its ingredients explained to the juvenile charged with the offence, the accused may plead "guilty", or deny the substance of the charge and plead "not guilty" as provided for in the Criminal Procedure Code (1983)

If the accused pleads "guilty" to the charge, the law provides that "the court may permit or require the complainant to outline to the court the facts upon which the charge is founded." It should not be assumed, in the case of both juveniles and adult courts that because an accused appears to be admitting the offence with which he is charged, he is necessarily guilty. In the juvenile court, such a assumption would be particularly dangerous. Not infrequently, for example, a boy will unhesitatingly admit stealing a bicycle but will observe later that all he intended to was to have a joy-ride and then return it. If this was his intention, the plea would be "not guilty", and he would be entitled to a hearing and an acquittal, for the taking of someone else's bicycle without permission is not an offence of theft in law, when there is no fraudulent intention, nor the intention of permanently depriving the owner of it.

The great majority of young offenders readily admit the offence with which they are charged; indeed they are often meticulous in rendering the details about the extent of their guilt. "I had the packet of sweets and biscuits", a child charged with theft from a supermarket said, "but I did not take the handkerchief and earrings, Njoki took them"
Apart from the assumption that they know the law, it is usually not necessary to explain in depth, the ingredients of a charge to an adult because of his own knowledge and understanding. In dealing with juveniles, however, it is sometimes necessary to explain that helping to steal is the same thing as stealing, thus the boy who keeps watch, or receives the stolen item and runs away with it, is just as guilty of stealing a motor vehicle wheel cap, as his friend who actually removes it from the car wheel. In my presence as a magistrate at the juvenile court, there were many children who begun by pleading "not guilty", but at once admitted the offence when this was explained to them.

After the facts are presented to the court by the prosecutor, who will normally read them out, the magistrate will ask the juvenile charged before the court if he acknowledges the truth of the facts of not. In most cases the accused who admitted the charge will confirm they are true. But in certain cases he will disagree with certain aspects of the facts, for example, the number of items reported as stolen, or with averments as to a certain order of events. In this case it is best that the magistrate hears from the subject the story of what happened. If it is essentially like the facts of the prosecution case, and the accused admits the offence, the magistrate may go ahead and convict him of the offence charged. If the story is very different from the facts of the prosecution case, it would be unsafe to record a plea other than that of "not guilty", and the magistrate should then fix a hearing date, when the witnesses of the prosecution will be present in court to give evidence.

At the hearing of the case, it should be noted, the rules of evidence and criminal procedure, as set out in the relevant statutes, and that also apply to adults are applied. Each witness is sworn and proceeds to give evidence, led or directed by the police prosecutor.

Most adults, even those who have not been in court before, have a good knowledge of the judicial process, and will carefully listen to the prosecution witnesses before embarking on cross-examination; but the same is not true of children. It is therefore necessary before trial starts, that the magistrate explains to the accused what is to follow. He will therefore tell the accused to listen carefully to the evidence of the prosecution witness, and later to cross-
examine him, that is, ask him questions about anything he has said that the accused does not agree with, or that the witness has not fully explained. A juvenile charged in court is usually very keen to explain what happened and it is necessary to explain to him that he will later be given a chance to explain in his own words what happened. If this is not clear, the child may not do any cross-examination, but will usually embark on arguing his case, or giving his story, instead of a cross-examination. I would also add that the magistrate must explain in simple language to the juvenile what the juvenile has to do; this is to avoid the possibility that the juvenile will be confused.

Expounding on a similar situation, John Watson says:

"Far too many magistrates accustomed as they are to the ways of the adult court, are apt to forget that its formal phraseology, so familiar to them, is so much Greek to the average boy or girl to whom such expressions as "going on trial", "summarily", "cross-examination", and the like are meaningless, if not alarming. A child thus mystified seldom has the courage to interrupt the proceedings in order to inquire what such expressions mean. He merely decides privately that all this is quite beyond him and allows his attention to wander with the result that when it is his turn to make his defence, he does so badly; alternatively unknown to the magistrate, he may gain a totally false impression."

After each prosecution witness has given evidence, the accused has a right to cross-examine him. The law provides that the accused may do this by himself, or through his legal representative. The bulk of the children charged before the juvenile court come from poor homes and are rarely represented by advocates. This is to their disadvantage when it comes to cross-examination, for effective cross-examination is an art which develops only from knowledge of the law and long experience. Few lay men can cross-examine effectively and there is very little chance of a child being able to do so. This is especially so where the offence is of exceptional gravity, or where it appears that the defence might rest upon some point of law which the child might not be expected to know much (or anything) about.
Where the child is not represented by an advocate, there is always a danger that in a contest with the experienced police witness, the juvenile or his parents may think the scales are unfairly weighted against them. It is my conviction that it is the duty of the magistrate, unlike in the adult court, to redress the balance - even to the extent of seeming to act as a counsel for the defence. By insisting upon the use of the simplest possible language, he will put the child at ease, so that he may start his case from a position of advantage. And whatever the outcome of the case may be, the magistrate should do his utmost to make the child feel that he has had a patient hearing, and that the decision of the court is a fair one.

After the cross-examination, the witness has a right to say anything further that he may wish, but only to clear up points which have arisen during cross-examination. Since the witness is normally questioned by the police prosecutor on this, it is called "re-examination".

When the prosecution witnesses have all given their evidence, the police will close their case. At this point before proceeding further, the magistrate must decide upon the evidence he has heard whether there is a "case to answer". That is to say, he must consider whether a sufficiently strong case has been made against the defendant, for the court to find the accused guilty if nothing more were said. If the answer to this question is in the affirmative, then there is a case to answer and the court calls upon the defence. But if the magistrate is of the opinion that the evidence for the prosecution is so weak that he could not possibly find the accused guilty if he was to hear nothing further, then there is no case to answer. In that case it is the duty of the magistrate to acquit him forthwith.

If the court rules that an accused has a case to answer, the court will explain to the juvenile that it is his turn to conduct his defence. The accused is not obliged to say anything at all, but if he wishes to speak, it is the duty of the court to instruct him that he may give evidence on oath or make an unsworn statement, and to explain to him the considerations which govern this choice.\textsuperscript{72} Such an accused may also call witnesses to give evidence in his favour.
My observation is that very few children ever want to give evidence on oath, perhaps because they do not understand clearly the difference between the two options and they would rather imitate what another juvenile did by not being sworn. But more often than not, it is because the accused has committed the offence charged and he fears that being questioned is too dangerous. The accused therefore confines himself as would an adult in similar circumstances to an unsworn statement.

Where in the opinion of the court, a child of tender years does not understand the nature of an oath, "his evidence may be received though not given on oath, if in the opinion of the court, he is possessed of sufficient intelligence to justify reception of the evidence, and understands the duty of speaking the truth."73

After the accused has given his evidence and closed his case, the magistrate will deliver his judgement. He may do that straight away in the court room, but usually, since the judgement has to be written out, the magistrate will set a date and a time when the judgement will be delivered. An accused who is in custody will be remanded further in the juvenile remand, until the day of judgement. If he is out on bond, then his bond is extended until the day of judgement.

The law provides that on the day of judgement, the written judgement shall be read, or its substance shall be explained in open court.74 If the accused is innocent, he will be acquitted and set at liberty. But if he committed the offence, he will be found guilty75 of the offence charged, as provided for by the law.76 This completes the first part of the case. The second and last part of the case is dealt with in the next part of the chapter. This involves a consideration of the options open to the court in dealing with the juvenile offender, and deciding on the best method for his reformation.
4. THE ROLE OF SOCIAL WORKERS

The most exacting part of a magistrate's task begins when he has pronounced that the juvenile is guilty. Most juveniles charged with theft plead guilty. Where the charge is contested, the evidence is in most cases clear and simple so that the magistrate's anxiety is rarely that he may find a child guilty of a crime he has not committed, but rather that of not taking the best course for his reformation and rehabilitation.

As provided for in section 14 of the Children and Young Persons Act (1972), the juvenile court is to have regard to the welfare of the child, and shall in a proper case take steps for removing him from undesirable surroundings. In order to accomplish this, the court will consider the best method of treatment for the convicted juvenile. This calls for an enquiry report on the juvenile, from a social worker, usually a probation officer.

A. THE ROLE OF PROBATION OFFICERS

A probation officer is the social worker who usually deals with persons convicted of criminal offences. Part of his duty involves interviewing the offender and presenting to the court a report, with recommendations on how the offender can be rehabilitated. The enquiry reports of the probation officers are about the child's home environment, his intelligence, education, physical health, character and companions. The probation officer compiles this report after interviewing such persons as the accused, the parents or guardians of the offender, his teachers and any other close associate. The probation officer will also peruse, when this is possible, such documents as the school reports of the child. When compiled, the probation officer's report is a confidential report for the court and is not shown to the child or his parents or guardians. The justification for this is twofold.
First, it frequently happens that the reports contain information which would be undesirable for a child to be informed of. For example, the offender may have been born out of wedlock to a mother who has since married. He may have been brought up to think that his mother's husband is his biological father. Obviously, this would hardly be a good moment to disillusion him, and everyone would agree that the rule in keeping such information from him is a good one.

The argument in support of the practice of keeping these reports from the parents is that, since the probation officers have to put in writing what they think of the parents, and the child's home conditions, this may often be so adverse as to antagonize the parents with these officers. Yet it is the probation officer who may later have to supervise the child on probation. Most people will appreciate the force of this contention. The danger of the practice is that if a mistake is made in a report, neither the child nor his parents can challenge the inaccuracy. The likelihood of any grave miscarriage of justice occurring is, however, small. Juvenile courts are extremely conscientious bodies, with no other aim except that of promoting the welfare of the children with whom they are dealing.

A standard probation officer's report, like any other kind of report, should be terse and to the point. It should include all the essential facts but omit irrelevant details. Above all, it should be expressed in simple language, and be as brief as may be consistent with adequacy.

The report will contain details about the juvenile offender, like his names, age and residence. It will also include a statement of the charge and particulars of the offence committed. Information on his age is helpful to the court, in determining which institution he should go to, if he needs institutional rehabilitation. The Children and Young Persons Act (1972) provides that a child under the age of ten years shall not be ordered to an approved school, while an offender may only be sent to an approved school if he is less than 16 years of age. An offender above 15 years of age may only be sent to a Borstal Institution.
The difference in the regimes provided by these different institutions is discussed in chapter 4. It may, however, be summed up that the approved school rehabilitation programme is designed for the younger children, most of whom are not deeply engaged in delinquent activities. Borstal Institutions, on the other hand, have a more rigorous rehabilitation programme, as they are meant for the older boys, many of them already engaged in criminal activities.

The Probation Officer, should also include in the report details of the family of the offender. This includes names and occupations of the parents, details of the brothers and sisters of the offender, and their occupation, their religion, and residential environment. Such information is helpful to the court in assessing the socio-economic position of the family and the factors that influence the offender. For example, the offender may be part of a family of eight children, all dependents of a single mother who hawks vegetables and lives in the Mathare slum. These factors suggest to the court that the mother of the offender may not have adequate time to give each child the desired attention and discipline. A report on the environmental situation is a good guide to the court on whether the offender may continue to reside at the same place, or he should be moved to a different environment for rehabilitation.

The history and antecedents of the offender should also be included in the report. This will include such details as, where the offender has grown up, and under whose care. His schooling, character, friends, hobbies and any previous offences committed will also be included in the report. These taken together, help the court to determine the best treatment for the offender. Many times, it has also been revealed through the probation officers report, that an offender is in fact an escapee from an approved school. Such a juvenile is usually sent back to the institution, or may, on the recommendation of the probation officer, be committed to a Borstal Institution.
In view of the above, a magistrate who is content to order what seems to him an appropriate punishment, graduated according to the gravity of the offence, fails to understand, or merely ignores the primary purpose of the Children and Young Persons Act (1972). The fact, for example, that a child stole a banana, or a wheel cap, or a lot of money tells us very little and indeed may be one of the least important aspects of a case. What is more important is to try and find out why the child stole the item, and whether his home environment is such that unless firm measures are taken he is likely to steal again.

The foregoing can be illustrated by two almost similar cases from the Nairobi Juvenile Court.

In one case, David Irungu Njoroge, aged 13 years, was charged with stealing a wrist-watch worth 500/- shillings. He was convicted of the offence. The probation officer's report revealed that both of his parents are alive and the family is socially and economically stable. The accused was a first offender and had just come to Nairobi under the influence of delinquent colleagues. The accused was remorseful and his parents were concerned about his welfare, and willing to help him reform. The magistrate, in agreement with the recommendation of the probation officer, ordered that the offender should be caned, and repatriated to his home in Kiambu.

In the second case, against one Johnson Muli, aged 14 years, the subject was charged with theft of a watch worth 950/- shillings. The report revealed that the accused was the son of a single (unmarried) mother, but had grown under the care of his grandmother. He got into delinquent behaviour early, and left school prematurely. He was also reported to have been involved in petty theft, sniffing of gum and smoking of bhang.

The court considered probation unsuitable for him, because he was already out of school and out of parental control, and was lacking in discipline. The recommendation was that he should be committed to Approved School, where he could lose his links with bhang and gum. He could also resume his studies. The magistrate, after considering the report, committed him to Approved School for 4 years.
It is clear from these two cases that although the boys were age-mates, and each stole a watch, yet what was more important in determining their treatment was not what they stole, or the gravity of the charge, but their personal welfare, based on their home environment, and their personal antecedents, as revealed by the probation officer's report. This is one area where the social-agency image of the court overrides its legal image.

The social concern of the juvenile court thus seeks to understand the child, diagnose his difficulty, and treat him, with the view of preventing a recurrence of delinquent behaviour. Thus the juvenile courts' philosophy is the personalization of justice. In determining the rehabilitative and reformative measures, the offender's personality, character, home environment, and circumstance of the offence as revealed by the probation officer's report, are to be taken into account. The probation officer will also make a recommendation to the court on how the juvenile may be dealt with. For example, a child may be put on probation because he is likely to respond to supervision if he is allowed to remain at home.

Although the adjudicating magistrate will normally follow the recommendations offered by the probation officer, it is only the former who has the authority to make a probation order against the offender, commit him to an approved school, or dispose of him by some other method provided for by the Children and Young Persons Act 89 (1972).

There have been different opinions about the format the recommendations of the probation officer should take. Commenting on this issue, John Watson says:

"But his recommendation should be expressed only in general terms, a tactful probation officer will never seem to instruct the court as to what order it should make."

Lord Goddard, LCJ addressing a meeting of probation officers, said on this issue:
"A short time ago a learned chairman of a quarter sessions made some very strong remarks in reference to a probation officer's report where the magistrates had asked for a report to enable them to decide how best to deal with the case, and the probation officer had stated in the report that in his opinion no course should be taken with the particular defendant except a sentence of imprisonment. The learned chairman made some very strong observations upon it saying that is was a matter for them to decide and it was quite improper for a probation officer to make any such observation.....

Although I am not now giving a judicial decision, I am bound to say it seems to me the learned chairman's remark was wrong.... If you are asking a probation officer for his opinion, surely it is right that he should state his opinion perfectly frankly to you and if he thinks from his knowledge of the boy or the man that prison is the only thing now, why in Heaven's name should he not be allowed to mention it?

If he says that his opinion is that prison is the only thing, it may be that. The decision is yours. You are at perfect liberty to accept or disregard his opinion..."

I agree with the dissenting opinion of Lord Goddard, which not only is reasonable but also reflects the practice in Kenya.

It is therefore to be noted that a probation officer's report does not mean that the magistrate should content himself with reading what the probation officer recommends, blindly following it. He should acquaint himself with the full facts of the case, and then decide what to do, not necessarily falling in with the probation officer's recommendation.

Thus, notwithstanding the various stages when the social image of the juvenile court is felt in the judicial process, through the probation officer's work, the legal framework has the upper hand in deciding the fate of the young offender. It is only after the discretionary order of the magistrate is pronounced, that the adolescent offender can be committed to an Approved School, Borstal Institution, or probation.
It can be argued that the binding position of the court, especially if it is presided over by a single magistrate, poses a great risk to the offender, since the court can disregard the recommendations of the probation officer. In practice, the risk of making a wrong decision is very small. The guiding principle of the juvenile court is the welfare of the juvenile. To achieve this, the court will always be guided by true social considerations, as contained in the probation officer's report. The court will therefore consider the recommendations of the probation officer, and will usually agree with it. There are, however, times when because of certain factors, the magistrate will make a ruling that is different from the probation officer's recommendation. For example, a magistrate may consider that the offender has been in remand for long, or the magistrate may know he is an approved school escapee, or the magistrate may have certain information about the offender that is not in the probation officer's report.

B. THE ROLE OF CHILDREN'S OFFICERS

The foregoing section has been confined to a discussion of the role of probation officers in the rehabilitation of juveniles convicted of criminal offences. It would be wrong, however, to regard the juvenile court as being a "criminal" court, in the accepted meaning of the term. For, not only is the court required in every case to consider the child's welfare, but a great deal of business transacted in the court is of a civil, as opposed to criminal character. Most of these civil matters, in the court, are handled by children's officers.

The work of a children's officer is generally centered on children who engage in anti-social activities that are not criminal in nature. Accordingly, the civil business such officers are engaged in, at the court, includes procedure in connection with children who are beyond the control of their parents or guardians, and children who are brought before the court on the ground that they need care and protection. Yet in practice, the problems which arise in these civil cases have much in common with those arising from delinquency, dealt with by probation officers, for morally there is very often little to choose between the young offender, and the child whose parents or guardians find unmanageable. Even among those who are said
to be in need of care or protection, one frequently meets a child whose character is depraved more than that of another who has been charged with what was perhaps an isolated offence.\textsuperscript{95}

Because children's officers only handle civil cases related to the children in court, they play only a minimum role during the judicial process where a suspect has been charged with theft. The effective role of a children's officer in criminal matters commence after an offender is committed to an approved school for rehabilitation.

Both the children convicted of theft, and those found to be in need of protection and discipline are sent to the same approved schools for rehabilitation. The similarity in treatment given to these two groups is a further recognition of the guiding principle that children should be dealt with according to their needs rather than in relation to their conduct.\textsuperscript{96}

The approved schools are managed by the Children's Department.\textsuperscript{97} The children's officers are therefore responsible for the rehabilitation programmes in the approved schools. They also undertake the supervision of the inmates of the approved schools once they are discharged from the institutions.

An in-depth discussion of the rehabilitation programme of approved schools, and a consideration of whether the social aim of rehabilitation is achieved through the social workers in the institutions, are, however, outside the scope of this chapter. These are the subject of discussion in the next chapter, on "Legal and Institutional Rehabilitation For Adolescents Involved in Theft."

5. SUMMARY AND CONCLUSION
The first issue to be considered in chapter three is the state's range of instruments for dealing with adolescent theft. These instruments are preventive and curative. By its preventive methods, the state strives to prevent the youth from getting involved in crime and other acts of delinquency. The state, therefore, has several programmes, aimed at improving the socio-economic status of the families of the juveniles. Special attention is also given to the role of
schools, which are next to the home, in shaping the character and future of the juveniles.

The remedial measures of the state include activities of the police, the judiciary, social workers, and other rehabilitation agencies. The remedial measures instituted by the state form the focus of the chapter.

The role of the police in curbing theft by adolescents, and in setting the stage for the rehabilitation exercise for adolescents involved in theft, is discussed under the theme "arrest and charge". The police, it was affirmed, have the first duty of applying their discretion to determine whether an arrested youth should be freed instead of being arraigned in court, and whether the judicial process is appropriate for the rehabilitation of the youth. They have the option of bringing such a person to court, as a child in need of protection or discipline, or of charging him with theft. While such a child is still in the custody of the police, the law also provides for the manner in which he ought to be treated, and lays emphasis on considerations of the child's welfare.

Under "the judicial process", there is extensive discussion on the procedure that an accused must undergo in court. The discussion in the chapter makes it clear that this procedure is too complicated for the juvenile, and, if meticulously followed as in an adult court, it will deny the accused a fair hearing. The magistrate must therefore ensure that the court proceedings are as simple and informal as possible. The court, apart from executing justice, must also ensure that the welfare of the accused is kept in focus.

The discussion in the chapter has also brought it out clearly that both the substantive and procedural law attempt, in all ways, to dissociate juvenile cases from common criminality. It is for this reason that certain words and phrases are not used in reference to the accused.
It is clear from the discussion that the greatest task of the court, in the rehabilitation process, starts after the verdict of conviction. Here the social workers, particularly the probation officers, have a key role to play. They will interview the accused and his family, and then advise the court on the best methods for rehabilitation.

We may note, in conclusion, that this chapter has established the second hypothesis, that the court must be flexible in its procedure in order to ensure that justice is done. It can also be deduced from the complexity of the procedure and substantive laws applied that an advocate is necessary for the accused. This will enable the magistrate to adhere to his recognised role, rather than also acting as an advocate for the accused.

It is also submitted that the discussion and findings in this chapter validate the third hypothesis, that the court has the duty of ensuring the rehabilitation of the accused, and is not restricted to establishing his innocence or guilt.


3. *Ibid*.


10. *Ibid*.

11. *Ibid*.


15. T. Asuni, Keynote Address on Workshop found in Justina Muchura, *op.cit.*, note 7 page 7.


20. Ibid.
21. Ibid.
27. Ibid, page 8.
29. Chapter 75 of the *Laws of Kenya*.
30. Ibid., section 34(1).
31. Ibid., section 34(1) and 34(2).
32. Ibid.
33. Chapter 141 of the *Laws of Kenya*.
35. Chapter 63 of the *Laws of Kenya*.
38. Ibid., age 204.
For example, where the juvenile is charged jointly with an adult, and the latter is likely to bring pressure on him to falsify evidence.


There is no law on this issue, but it can be inferred from such provisions as section 27 of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya, which provides that a woman can only be searched by another woman.


The interviews were conducted during the course of the research, between January and June 1992.

Interviews with P.C. Sophia Gatere, Police Prosecutor, Juvenile Court, Nairobi were carried out in the months of March and April 1992. The interview referred to here was conducted on 10/3/92.


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Chapter 141 of the Laws of Kenya.
59. Ibid., section 15.
60. Ibid., section 5.
61. Ibid., section 4.
64. See the Constitution of Kenya (1983) section 77 (2)(b), and the Criminal Procedure Code, Chapter 75 of the Laws of Kenya, section 207(1).
65. Chapter 75 of the Laws of Kenya, section 207 (2).
66. Ibid.,
67. R.v. Agnes Mudeva, Juvenile Court Case Number J832/92 (Nairobi).
70. The right to be represented by an advocate of one's choice is provided for in the Constitution, section 77(2)(d), and the Children and Young Persons Act, Chapter 141 of the Laws of Kenya, section 4(9). The practice in British juvenile courts is that such an accused may be represented by the parents, if there is no legal advocate. There is no law for or against such practice in Kenya. The reality is that, such representation does not occur. For British position refer to H.K. Bevan, op.cit., note 51 page 76.
72. Ibid., section 211.
75. The Children and Young Persons Act, Chapter 141 of the Laws of Kenya, section 15 provides that the words "conviction" and "sentence" shall cease to be used in relation to persons under eighteen years of age dealt with by juvenile courts.
Out of the total of 170 juveniles who had been charged with theft between the months of January and May, 1992 at the Nairobi Juvenile Court, 144 pleaded guilty, that is, 85% (source: Nairobi Juvenile Court Register and Court Files).

Chapter 141 of the Laws of Kenya.


Ibid.

John A.F. Watson, *o.cit.*, note 42. He has listed a number of what he considers salient facts that the court needs to know. These are subsequently discussed from page 97 onwards.

Chapter 141 of the Laws of Kenya section 16(2).

Ibid., section 17(d).

Ibid., section 17(k).

Ibid.,


The gum referred to here is usually the glue that is used to repair shoes. The juveniles usually mix it with petrol and sniff or breath in the fumes of the mixture through their mouth or nose and it produces a state of intoxication.

Chapter 141 of the Laws of Kenya.


The duties of a children's officer are specified in section 55 of the Children and Young Persons Act, Chapter 141 of the Laws of Kenya.


Ibid.

Ibid.

See Children and Young Persons Act, Chapter 141 of the Laws of Kenya, section 55.
CHAPTER FOUR

LEGAL AND INSTITUTIONAL REHABILITATION
FOR ADOLESCENTS INVOLVED IN THEFT

The Children and Young Persons Act\(^1\) (1972) lists the methods of dealing with young offenders. These methods have one common goal - rehabilitation of offenders. The court, where it finds the accused guilty of the offence charged, will employ one of the methods it deems best suited for the rehabilitation of the offender. To accomplish this, the magistrate will handle each case individually, relying on his experience, on the probation officer's report, and on his own discretion.

Of the methods listed in section 17 of the Children and Young Persons Act\(^2\) (1972), the most common and most effective methods of rehabilitation of adolescent offenders are probation, and consignment of such offenders to an approved school or to a borstal institution.

1. PROBATION

The term probation, within the legal context, has been defined differently by different authors. John Watson defines it as "a system whereby an offender who has been found guilty, instead of being ordered to punishment, may be placed under the supervision of a trained social worker, called a probation officer, for a period of not less than one and not more than three years".\(^3\)

David Dressler defines it as "a treatment programme in which final action in an adjudicated offender's case is suspended subject to conditions imposed by or for a court under the supervision and guidance of a probation worker."\(^4\)
A discussion of probation as a method of rehabilitation of adolescent offenders will reveal that none of these definitions is comprehensive. They reveal, however, that the following are the ingredients of probation.

i. Suspension of sentence by the court.

ii. Conditional freedom - the offender is not committed to any institution but is set free subject to certain conditions laid down by the court. A breach of these conditions may call for a revocation of the order, and a substitution with a court sentence for the offence committed.

The aim of the probation system is entirely reformative; it is in no sense punitive. The system is based on the standpoint that most offenders are not dangerous criminals, but are, especially in the case of juveniles, weak characters who have surrendered to the temptations and enticements of the criminal world. Such offenders are victims of crime-factors which are likely to become more serious in their lives than the original crime committed. Probation deals with crime-factors, and thus uproots that which causes and produces crime. Being a community-based treatment, the offender remains in the society, where a variety of non-punitive methods are used.

Probation consists not merely of trusting the offender to reform through his voluntary actions, but of leading, guiding and training him, without disrupting the normal background of his family life. In special cases a probation order may contain a requirement for the offender to live away from his home. This is, however, exceptional, "for the essence of probation is the reclamation of the offender in the surroundings of his family."

Probation is not an act of leniency by the court. It is intended for offenders whose rehabilitation can be better achieved by community care, than by institutional confinement.

Probation applies to both adults and juvenile offenders. Whereas for adults probation may be a substitute for a sentence of imprisonment, for the juvenile, it may be employed as a substitute for institutional rehabilitation in approval school or borstal institution.
The appropriateness of probation as an effective method of rehabilitation for youthful offenders has been generally acknowledged over the years. At a seminar on Planning Services for Offenders in the community, held in 1986 at the Kenya Institute of Administration (K.I.A.), Justice Emmanuel O'Kubasu of the High Court observed that amongst the other methods of treating offenders in the community, probation was the most effective. He therefore recommended that, "we must consider seriously how to utilize our probation services in the treatment of offenders and here we are talking of all offenders".

In his address to the annual meeting of the American Law Institute, the Chief Justice of the United States, emphasizing the importance of probation in the reformation and rehabilitation of criminals, said:

"Probation protects both the individual and the society. If a person has been in jail he is considered by the society as a social misfit. But by having the offender in society he will realise that crime will not pay and people will not take his character seriously. By keeping offenders out of jail something is achieved. People hear of tales of how terrible life in jail is. By awarding probation we justify the doctrine of "fear of the unknown".

For the youthful offender probation is used "to provide an individualized programme offering a young and hardened offender an opportunity to rehabilitate himself without institutional confinement under the tutelage of the probation officer". The probationer is under the continued power of the court, which may impose institutional rehabilitation for his original offence, in the event that he abuses the opportunity. In this sense, probation is the treatment which reflects more than any other the spirit of the juvenile court.
Because of the above considerations, probation may be taken as the postponement of final judgement or sentence in a criminal case, giving the offender an opportunity to improve his conduct and to readjust himself to the community, often on conditions imposed by the court, and under the guidance and supervision of an officer of the court. Thus, the system of probation involves restrictions on the liberty of the probationer, and restrains him from disapproved behaviour, or conversely, compels him to perform certain required acts which may be irksome or even painful to him.\textsuperscript{11}

Through the mechanism of probation, a probationer is permitted a more normal social experience than one would expect in a closed institution. He is enabled to maintain contact with his family and other social agencies. As N. Paranjebe has observed:

"It means less routinised and more self-directed existence. Unlike imprisonment it makes the offender independent and leaves him responsible for self-support. It enables the probationer to keep away from criminogenic associations of prison and earn his living rather than lead an idle and wasteful life."\textsuperscript{12}

Since the offence of theft is normally committed by youth of different ages, sex, background and character, the question may be asked: How does the court determine who should be put on probation and who should be committed to institutional rehabilitation?

The law does not set any age-limit on who may be put on probation. It implies, therefore, that any offender who is rightfully charged and convicted in court may be put on probation. In practice, however, probation officers and magistrates agree that probation is not the best mode of disposal for young children. This is because they may not fully appreciate what probation is. Secondly the normal demands of a probation order, for example, visiting the probation officer at his office, may be beyond the ability of a young primary school child to accomplish. The court will normally given an order of conditional discharge in such cases, or sentence them to corporal punishment with a warning not to repeat the offence.\textsuperscript{13}
It may also be pointed out that probation is not confined to first offenders. It can be and frequently is applied to offenders, notwithstanding that they may have been in trouble before. It is also not restricted to offenders who commit certain specific crimes or types of theft. It applies to all adolescents convicted of theft or any other offence.

In the case of *R. v. Hasham* the respondent was convicted on his own plea of breaking into a bank with intent to rob. The offence was committed with an older man but nothing was stolen. The respondent at the time of the offence was a minor and was a first offender. The magistrate in the lower court put the respondent on probation for 12 months. While on probation, he took up employment as he continued his studies.

The Republic appealed against sentence and sought its enhancement, contending that the offence was serious, and the sentence should be increased to serve as a deterrent to others. The court held that the fact than an offence is serious does not outweigh the circumstances of the individual offender. In the words of Justice Biron:

"... the offence is serious, yes. That, however, is a general proposition and cannot be used simply as an umbrella to cover all offences of such a nature irrespective of the particular circumstances of each individual offence and offender".\(^{15}\)

This ruling is in keeping with the Probation of Offenders Act, section 4(1) which provides that:

"Where a person is charged with an offence which is triable by a subordinate court and the court thinks that the charge is proved, but is of the opinion that having regard to the youth, character, antecedents, home surroundings, health or mental condition of the offender, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may:

a. convict the offender and make a probation order; or
b. without proceeding to conviction, make a probation order."

These individual considerations may be seen in two almost similar cases which the juvenile court in Nairobi heard in 1992, but gave different orders.

In the case of R. v. Mwangi Maina the accused, aged 13 years, stole Shs.30/- contrary to section 275 of the Penal Code (1970). He was convicted on his own plea of guilty. The court noted that although the family of the accused was reported to be socially and economically stable, the accused had developed delinquent tendencies. The probation officer had stated in his report concerning the accused:

"His conduct and character started to deteriorate ... The subject was then taken to Mariakani Primary School but he continued to portray his dangerous trend towards delinquency. His parents approached one of the Catholic Church rehabilitation centres at Mukuru where the subject was admitted. He continued with school up to class 3 but he later quit this centre to join his band of gum sniffing boys. He has been arrested several times before but has never changed."

The court considered the report on the character of the accused, which was deteriorating, his lack of discipline at home, and the unsuccessful attempts to rehabilitate him at home. The court, in agreement with the probation officer's recommendation noted that as there was no control over the boy at home, he was not suitable for probation. He was therefore committed to Getathuru Approved School for 5 years.

Meanwhile, in the case of R. v. Daniel Kungu, the accused, aged 12 years, was charged and convicted of the theft of Shs. 700/-, contrary to section 275 of the Penal Code (1970). The probation officer's report revealed that the family was economically and socially stable. The accused, it appeared, was just getting into the habit of stealing, largely due to the influence of certain bad associates he had befriended.
The trauma of being found out after stealing, and the pressure of being in remand, had driven the accused to contemplate suicide. The court considered that he was in need of counselling and guidance, more than punishment or institutional rehabilitation. He was therefore placed on probation for 18 months.

In both cases, and indeed in all cases involving adolescents, the court relies a lot on probation officers' reports. It is with this in mind that a judge of the American Supreme court observed in the case of Williams v. The People of the State of New York, that:

"Probation workers' reports have been given big value by conscientious judges who want to sentence persons on the best available information rather than on guess work and inadequate information."^{21}

It is desirable that the probation officer gives his personal opinion as to whether or not the offender will benefit from probation. If the court feels that the report is favourable, it will inform the probation officer who will then ask the offender if he would like to be put on probation. The probation officer will have to explain to the accused what probation means and what it will entail. If the offender is willing, then the court may make an order to the effect that he is now released on probation and for what duration the probation is to run. But if the offender is not willing, then the court will go ahead and sentence him to whatever the offence calls for.

The "willingness" of the offender to be on probation, must not be motivated by threats of going to prison. This "willingness" must be a show of repentance and a desire to rehabilitate; otherwise it would not be construed as voluntary under the law. This was confirmed in the case of R. v. Marquis^{22} where a girl found guilty of handling stolen goods was asked for her opinion. She refused to be put on probation. She was told that the only alternative was a custodial sentence, and here she changed her mind. The court went ahead and imprisoned her. She appealed against the sentence, but the decision of the lower court was upheld because she had not shown her willingness to be on probation. The consent of the offender must not be induced by promises or threats.
i. The Requirements of a Probation order

Section 5(1) of the Probation of Offenders Act provides that:

"A probation order shall have effect for such period of not less than six months and not more than three years from the date of the order as may be specified there in and shall require the probationer to submit during that period to the supervision of a probation officer appointed for or assigned to the district or area in which the probationer will reside after the making of the order and shall contain such provisions as the court considers necessary for securing the provisions of the offender, and such additional conditions as to residence and other matters as the court having regard to the circumstances of the case considers necessary for securing the good conduct of the offender or of preventing a repetition of the same offence or the commission of other offences."

The probation order may contain such requirements as the court, having regard to the circumstances of the case, considers necessary for securing the good conduct of the offender, or for preventing a repetition by him of the same offence, or the commission of the offence by others. If the probationer faithfully complies with the conditions until the order expires, he suffers no punishment. If, however, he fails to do so or gets into further trouble, he may as in the case of conditional discharge, be punished for the original offence.

While probation is in no sense punitive, it is certainly a deterrent, in its workings. A probation order may, for example, contain conditions which the probationer may find as onerous as the payment of a fine, and, indeed, though the courts are not allowed to make a probation order and impose a fine for the same offence, they may, without prejudice to their powers, order the payment of costs and compensation. Besides, the probationer must call on the probation officer as and when the latter thinks it is desirable, and if possible, he must allow the probation officer to see him at his own home, so that in this way a close watch is
kept on the probationer's movements and activities - which some find helpful and stimulating, while others certainly find it irksome and cramping.25

The requirements of probation may be positive or negative. Examples of positive requirements are, for the probationer to attend school regularly, to submit to treatment when he needs it, and to spend all nights at home, unless prior permission is sought and granted by parents. Examples of negative requirements are, not to associate with undesirable acquaintance, not to frequent certain hotels and bars, or even areas of the town, and the like. No requirement should be unreasonable, having regard to the age and circumstances of the probationer. It is, moreover, highly important that the requirements shall be only such as the probation officer is able to enforce.26

Where a probation order contains a provision as to residence, the place at which and the period for which the probationer is to reside shall be specified in the order. Where any such provision requires the probationer to reside in an institution, the period for which the probationer is required so to reside shall not extend beyond twelve months from the date of the order.27

It is important to bear in mind that the probationer himself must be capable of complying with any requirements imposed. His ability to comply must not depend upon the action of his parents or some other person.

In general, no probation order may be made and no requirement of any kind imposed, except with the probationer's consent. The essence of probation is an acceptance by the probationer of personal responsibility for his actions, coupled with a determination to make good the harm he has caused, - by his own efforts, sustained by such friendly help as the probation officer is able to give him. An order made contrary to his wishes would be a negation of all that probation stands for.
The only exception to this rule is in the case of children, whose consent is not necessary for a probation order to stand. Personally I regret the exception, being convinced that a normal child under fourteen years of age, is able to understand what probation is and its implications, if it is explained to him in simple language. Such a child is then able to decide whether he will abide by the terms of probation or not. I cannot think that probation, imposed upon a child who was not willing to accept it, would have the slightest chance of success. The court, in such a case, should consider another method of treatment.

ii. Supervision of Probationers

The probation service has, in itself, two distinct aspects: the sanctionary aspect and the guidance aspect. The two different aspects are together termed "supervision". The former is reflected in the conditions laid down in the probation order. The probationer is given rules that he must comply with. He is warned that if he does not comply, the court could impose a more severe sentence on him. It is this sanction that will compel the slack probationers to comply. In this respect, the probation officer is an agent of the court.

The guidance part of probation is where the real work of rehabilitation lies. The law requires that during the period of probation, the offender should be guided, or assisted to adjust to the norms of the society, and become a law-abiding citizen.

The supervision starts immediately after the probation order has been signed by the magistrate and the offender, and then duly stamped by the court clerk. The offender is now a probationer. If the probationer is a boy, he can be supervised by any probation officer, male or female. But where a girl is placed under the supervision of a probation officer, the law states that the probation officer shall be a woman. The law gives no reason for this, but it can be safely assumed that the aim is to protect the girls on probation from seduction by probation officers who lack self-control, or who have low moral integrity and may want to seduce the girls they should be helping to rehabilitate.
The duty of the probation officer is to ensure that the probationer entrusted to him understands the terms and conditions of the order. He should endeavour, by encouragement, persuasion and warning, to secure his observance of them.

The probation officer has to note the progress of the probationer, and, where there are problems, he should try and help him solve them. Whenever the probationer makes a visit to the officer, or the probation officer goes to visit the probationer in his home, place of work or at school, the officer must make a report of such a visit in his file. When a probationer fails to report, the officer should ascertain the cause, and not be quick in applying for a warrant for his arrest. The warrant should only be applied for as a last resort, for example, when the probationer has absconded.

The fact that there is supervision of probationers, makes it evident that the misconception that probation is a mere "let off" by the court, has no basis. Probation is a form of treatment, and not a "let off". It gives the offender a chance to prove himself in a free society, and the probation officer makes sure that the probationer adheres to the terms and conditions of that order.

The probation officer, in exercising his powers, strives to show that his action springs from his concern for his client, and not from a desire to display arbitrary power. The guidance aspect of supervision means that the probation officer has to advise, assist, and befriend the probationer. When performed efficiently, the supervisory work of the probation officer leads to the rehabilitation of most probationers.

iii. Breach of Probation

During the currency of a probation order, a probationer can misbehave in two ways. He can commit another offence, or he can refuse to carry out his probation officer's lawful directions, or commit a breach of a requirement of the order.
If, without committing a further offence, the probationer commits a breach of requirement of the order, for example, he goes about with another boy with whom he has been forbidden to associate, the court may summon him. If the breach of the requirement is proved to the satisfaction of the court, the court may deal with the probationer in one, or the other, of two ways. If the court regards the matter as serious, it may deal with him for the original offence, in any way in which it might have lawfully dealt with him if he had only just been found guilty of it; for example, the court may commit him to an approved school. This is in keeping with section 8(3)(b) of the Probation of Offenders Act\(^{29}\)(1964) which provides that the magistrate may "deal with the probationer for the offence in respect of which the court could deal with him, if it had just convicted him of that offence".

If, on the other hand, the court takes a less serious view of the breach, it may instead of dealing with the probationer for the original offence, punish him for the breach itself, and allow the probation order to continue. If the latter course is taken, the punishment for the breach may be a fine of a maximum of Shs. 200/=\(^{30}\).

Secondly, if the probationer commits a further offence, and is found guilty during the period of the order, the probationer may be dealt with, not only for the new offence, but also for the offence for which the probation order was originally made.

Section 7(4) of the Probation of Offenders Act\(^{31}\)(1964) provides:

"Where it is proved to the satisfaction of the court by which the probation order was made that the probationer has been convicted of an offence while the probation order was in force then:

a. If the probationer was not convicted of the original offence in respect of which the probation order was made, the court may convict him of that offence and pass any sentence which it could pass if the probationer had just been convicted before that court of that offence, or
b. if the probationer was convicted of the original offence in respect of which the probation order was made, the court may pass any sentence which it could pass if the probationer had just been convicted before that court of that offence."

iv. **Discharge of Probation**

As previously stated, the probation order must run between six months and three years. This means that even if the probation officer is of the opinion that his client has been rather slow in rehabilitating, he cannot go on helping him in that capacity beyond three years, because the law does not cater for it. At the end of the probation period, the probationer must be discharged. This is a sad situation, and I can only recommend that the law be amended, to allow such an officer to apply to court for extension of the probation.

Section 12(1) of the Probation of Offender's Act\(^1\) (1964) states that:

"The court by which a probation order was made may on the application of the probationer or of the principal probation officer, discharge the probation order and where the application is made by the principal probation officer, the court may deal with it without summoning the probationer."

This application may be done when the supervising officer is of the opinion that his client has been rehabilitated enough and there is no need for him to be supervised any more. From my research which was conducted at the Nairobi Juvenile Court between January and June 1992, it appears that this is one provision that is hardly used. The court records indicated no such application being made, and all probationers were discharged when they completed their terms of probation. Margaret Gidali, commenting on a similar issue, states that "it seems to be a right that is not used. We found no such case in the Mombasa Law Courts for the years 1982-1985 which took this advantage"\(^2\)

Meanwhile, where an offender in respect of whom a probation order has been made, is subsequently sentenced for the offence for which the probation order was made, the probation order shall cease to have effect.\(^3\)
v. Success of Probation

The success rate of probation is arrived at by considering those who have completed probation satisfactorily against those who have not. A satisfactory completion shows that the probationer reported well, complied with the conditions of the order, and completed the period of probation without being in conflict with the law. An unsatisfactory completion means the order was discharged for breach, or the probationer absconded and could not be traced before the probation order expired. The latter two kinds of completion would give the basis for determining the failure rate of probation.

In Britain, in the early 1940's, an enquiry was made with the view of ascertaining what proportion of probationers were convicted of indictable offences within three years after their probation had come to an end. The result of this inquiry, which related to 2311 persons who had been placed on probation for one year, showed that more than 70% had been satisfactory according to the standard laid down. Divided into age groups, the percentages of satisfactory results were as follows:

- Children under 14: 65.3%
- Young persons (aged 14 and under 17): 68.2%
- Aged 17 but under 21: 73.3%
- Aged 21 and over: 81.8%


It is interesting to note the way in which the percentage of success, in that case, rose with age. This, it is suggested, is possibly due to a tendency on the part of the courts to use probation more freely in the case of young offenders than in the case of older offenders. The weakness of the above investigation was the shortness of the period of observation, that is, three years after the end of the probation order. It would have given better illustration if the observation had covered a longer period of time.
The Bristol Juvenile Court Magistrates did an enquiry covering eight years, from 1939 to 1947 inclusive. In 1939, Bristol court had made 104 probation orders in regard to children and young persons. At the end of eight years, success was reported among 65 children who had completed probation satisfactorily and had given no more trouble. The percentage of success was 62.5%.35

F.T. Gales points out that in 1957, in Britain, 31,000 juveniles were dealt with on probation, and some 2,900 were sent to approved schools. In his opinion:

"This is a clear indication that in most cases probation is successful, because if a high proportion of the 31,000 were later found guilty of other offences there would obviously have to be more committals to schools. In fact, many of those committed to schools are delinquents who have first been tried on probation and have failed to respond to this form of treatment. We may put it in this way. The 2,900 sent to schools are those who have failed on probation or who from the first in the opinion of the magistrates would not have responded to such treatment."36

In Kenya, there has not been sufficient research into the results of probation, or indeed of treatment generally. It is a serious omission, for there is no way of assessing the efficiency or otherwise of the various methods (probation included) available to the courts, except by observing the results in relation to a sufficiently large sample, over a considerable number of years. This limitation notwithstanding, the available data indicate a high success rate in probation rehabilitation. In the words of the principal probation officer, "According to our statistics, 3/4 do not re-offend the probation ruler",37 and from a later study, though not a conclusive one, a success rate of over 80% is indicated. "Out of every ten probationers about eight ..... completed their period of supervision satisfactorily."38

2. INSTITUTIONAL REHABILITATION

Section 17 of the Children and Young Persons Act (1972)39 provides for the commitment of a convicted person under eighteen years of age to one of the following institutions for his rehabilitation.
Approved school suitable to his needs and attainments

Borstal institution

Prison, if he is fourteen years of age and above.

It is noted that imprisonment, when applied, is an act of last resort. The law provides that:

"No juvenile or young person shall be ordered to imprisonment unless the court is of the opinion that he cannot be suitably dealt with in any other way permitted by law."

There are, therefore, very few adolescents who end up in prison. Because of the limited utility of imprisonment as a method of rehabilitation for youthful offenders, I shall restrict myself to a discussion of the approved schools, and borstal institutions.

A. APPROVED SCHOOLS

Approved schools are institutions approved and established under sections 37 and 38 of the Children and Young Persons Act (1972), for the rehabilitation of juvenile delinquents. The institutions cater for the reception, maintenance and training of juveniles who, in the opinion of the courts, are in need of institutional rehabilitation. These are children who are in need of protection and discipline, or who have been found guilty of criminal offences and would not positively respond to treatment within their home environment.

Not every youthful offender can be committed to an approved school. The law states that, "no child under the age of ten years shall be ordered by a juvenile court to be sent to an approved school unless there is no fit person or approved voluntary institution who is willing to take care of him, or unless for some other good reason the court considers that he cannot suitably be dealt with otherwise." In other words, committal of a child aged below ten years to an approved school is a last resort. It can only be done if the child is not only extremely delinquent, but also has no relatives or guardians to take care of him.
In my work as a magistrate over the last five years, I never had enough reason to commit a child so young to an approved school. The reality is that, the parents or relatives were always willing to try harder to help the child rehabilitate. In cases where the child had been neglected by the parents or guardians, such orders as, requiring the parents to give security for their child's good behaviour, or fining the parent because his child breached the law, always ensured that the parents took proper care of the child, and thereby curbed his delinquent tendencies.

The Children and Young Persons Act \(^4\)\(^2\)(1972) also provides that an offender can only be sent to an approved school if he is under sixteen years of age. Thus, if all the reports favoured the committal of the juvenile to an approved school, but it was established that he is at least sixteen years of age, the court might consider if he is also fit for a borstal institution, or it would resort to another method of rehabilitation.

Committal to approved school is not restricted to offenders who have committed particular crimes, nor those who have failed to positively change, after attempts of non-institutional rehabilitation. There is no statutory requirement that treatment in his home must be tried in the first instance, before a child can be committed to an approved school.

In a letter to The Magistrate magazine, the chairman of the British juvenile court expressed the following opinion:

"It is surely right that as a general rule magistrates should first try every other method of treatment and only commit a young offender to a school in the last resort."\(^4\)\(^4\)

Taken literally, this would mean that every child, before being committed to an approved school should be allowed to commit a series of offences; and for each offence committed, a different method of treatment should first be tried, that is, he should first be discharged, caned, fined and placed on probation, before being committed to an approved school as a last resort. This would be absurd, and it is no wonder that the chairman's opinion earned her the wrath and disapproval of other magistrates.
It is my opinion that if the magistrate had confined herself to what she in fact probably intended, that in most cases it is desirable to try some form of treatment at home, before committing a young offender to an approved school, her views would have carried much more weight.

Yet, it sometimes happens that an immediate removal from home is called for, and that all the circumstances indicate the need for long-term institutional training, notwithstanding that it is a child's first appearance before a court. Indeed, section 14 of the Children and Young Persons Act 45(1972) specifically provides that the court "shall in a proper case take steps for removing him (the child) from undesirable surroundings and for securing that proper provision be made for his maintenance, education and training"

Such a situation is illustrated in the case of R. v. Eunice Wanjiku Abuta46, which was decided by the Nairobi Juvenile Court in early 1992. In that case, the accused a girl aged fourteen years, was charged with stealing two pairs of shoes and money (shs.200/-) from the house of one Jane Wairimu, contrary to section 279(b) of the Penal Code47(1970). She was convicted on her own plea of guilty.

The probation officer's report revealed that she refused to go to school immediately she was enrolled in class one, and efforts to take her to school thereafter failed. Her parent's attempts to get her gainful employment failed, because she always preferred to go out with certain men, with whom she stayed for as long as a week at a time. When her mother questioned this relationship, she organised a "gang" who threatened to beat up her mother. She was also reported to be smoking bhang and stealing from family members. The probation officer also stated that she was rude and unco-operative, when interviewed.

The court considered the report, and, notwithstanding that she was a first offender, she was committed to Kirigiti Girls'Approved School, for four years.
One of the objectives of putting a child into an approved school is to achieve some change in his or her attitude towards life, and to try to ensure that he or she imbibes at least to some extent, new standards by which to live. By committing a child to an approved school the court seeks not only some change in the child, but also in his or her circumstances. The court recognizes that what the child thinks and does and feels, are only part of what other people who live with him or her think and do and feel. The nature of the adjustment to the approved school is such that it covers the child's whole field of living.

Most of the committals to approved schools are because of some form of theft. Commenting on the situation in Britain, Gales says that in 1957, "of 500 admissions to one approved school, it was found that no less than 436 had been sent there for theft, or breaking and entering."48

In certain cases, the offence itself may be so grave as to demand drastic action against the offender. The court may commit such offenders to approved schools, not only for their rehabilitation, but also to deter potential offenders from committing similar offences. In making such committals, the magistrates must bear in mind the dangerous effect which may be produced in their jurisdictions, if it is taken for granted that they will always give a second chance to the child who has been found guilty of theft for the first time. It is not an uncommon complaint by the heads of approved schools, that certain children would have greatly benefited by an earlier committal. "Not a bad boy at heart," a headmaster will remark, "but extraordinarily weak and helplessly indisciplined. If only we could have had him when he was a year younger we could have done so much with him..."49

Enquiries may reveal, for example, that the boy in question was found guilty of a serious offence, came from a broken home, and was the leader of a gang whose activities had become notorious, yet the magistrate, not in his wisdom but his sentimentality, placed him on probation, on the ground that he was a "first offender". By the time he was caught again for theft or other offences, he had become a great deal "tougher" and had led even more of the neighbours' children into trouble.
To remove a child from his home and send him to an approved school for a period of years is drastically to deflect the natural cause of his development. But drastic deflection is sometimes needed in the child's own interest, and in the interest of other children. There are cases where no useful purpose is served, and much harm may be caused, by delaying it.

A magistrate who has subscribed to such a decision, yet has lingering doubts whether the boy or girl is really in need of training in an approved school may find comfort in the reflection that the manager of the school is empowered to release any child or young person at the end of the year, or even earlier.

Whereas the court, on committing a child to an approved school, will specify the maximum period he can stay in the institution, the court has no power to specify the precise period of the training. The child's period of training will depend upon his attitude and co-operation, as well as the co-operation of his parents. The date of his release is determined by those who are responsible for his supervision, namely, the management of the school, advised by the headmaster. Very rarely does a child remain in an approved school for the maximum statutory period. When a child is released from an approved school, the manager is responsible for his supervision for a period which is dependant on his age, that is, until the end of the maximum period he was committed by the court to the approved school.

Once an offender has been committed to an approved school, he will be sent to a classifying school where he will spend about one month, before being allocated to a particular institution. There are seven approved schools for boys in Kenya. These are: Othaya Approved School, Wamumu Approved School, Getathuru Approved School, Kabete Approved School, Dagoretti Approved School, Kakamega Approved School, and Shimo-la-Tewa Approved School. New committals to the above approved schools are received at Getathuru Approved School which serves as the classifying school for all boys' approved schools. The case for girls is quite different since there is only one girls' approved school -Kirigiti Girls' Approved School; hence there is no need for classification.
An inmate at the classifying school will be observed, and further interviewed, to get any necessary details that may be lacking from the probation officer's report. While personality, and disciplinary needs feature in the allocation to different schools, qualifying factors such as religious attachments, or the location of vacancies, also influence the choice of the school. The age of an inmate, educational retardation, or potential intelligence are also taken into account. This is important since inmates are of tender ages, and can make up for the lost time in their education, although emotional turmoil or stubborn resistance often obstruct the way. The classifying school also undertakes interviews with the parents, where possible. By the time an inmate is dispatched to a specific approved school, he is normally accompanied by a dossier setting out his life history, present circumstances, and outstanding personality problems.

i. **The Rehabilitation Programme**

In their rehabilitation programme, the schools strive to:

1. Provide social rehabilitation and training for children, by way of discipline and counselling;

2. Provide spiritual direction for the children, by introducing religious instructions by different denominations, through chaplaincy work;

3. Ensure continuous good health of the children, through balanced diet and hygienic living conditions, and regular physical exercise;

4. Equip the children with useful skills which will help them to be economically independent and self-reliant on their return to the society; for example, training in carpentry, blacksmithing, tailoring, agriculture and animal husbandry;

5. Provide basic academic training, that is, up to standard eight, for all the children.\(^{51}\)
Unlike in the case of probation services and borstals, there is no statutory document that sets out how the rehabilitation programme should proceed, or how the approved schools should be run. Thus, although they are based on the British System of approved schools, there are variations in the rehabilitation programmes among the different approved schools. The management of each approved school determines the school's rehabilitation programme, and sets out its areas of emphasis. It would be reasonable to assume that the emphasis will depend on the character, ages and academic standing of the inmates, as determined at the classifying school. For example, the Kabete Approved School (unlike the other approved schools) emphasises scholastic instruction as part of its rehabilitation programme, and therefore has secondary school facilities for its inmates.

ii. **Discharge and Supervision**

As the process of rehabilitation continues in the approved schools, the managers will keep track of the progress of each inmate. Inmates may be involved in acts of misbehaviour, or even abscond from the institution. In such a case, the manager may prefer a charge of absconding, or of serious misconduct, in the juvenile court. If the charge is proved, the court may make a new approved school order, or extend the period of detention under the original order. My observation at the Nairobi Juvenile Court is that this option is hardly used. Instead, the approved school escapees are usually identified in court during the hearing of an offence they are charged with committing after their escape. The court will normally order corporal punishment, and repatriation, to the approved schools they absconded from.

The juvenile who does not misbehave at the approved school may be released or discharged on licence from an approved school at any date before the statutory period of his detention comes to an end. This date is fixed by the manager, who must review the progress of each child, and the circumstances of the case, including his home surroundings, and consider if he is fit to leave.
When a juvenile is released from an approved school, the manager of the school is responsible for his supervision for a period, which is dependent on his age. If his progress is unsatisfactory while he is still on licence, that is, before the end of the maximum period of detention in the school, the manager, at his discretion, may recall him to the school for further training.

The supervision undertaken by the manager, or more precisely by the probation and children's officers on his behalf, is commonly called after-care, and is a vital part of the approved school system. If an inmate's home is likely to encourage delinquent tendencies, or impede supervision on his discharge, it is the duty of the manager to seek alternative accommodation for the child, usually in a lodging, or in a hostel, so that he can be effectively supervised.

The duties of the probation and children's officers in after-care includes making contacts with homes and employers of the children. The officers pay visits to each child, frequently at first and then gradually decrease the frequency as the child finds his feet and no longer needs their support. During this period, they will also be carefully watching the home conditions, and reporting regularly to the manager by whom the child is licensed.

As Watson says, "It is difficult to exaggerate the importance of effective after-care. The lack of it can completely undo everything which the approved school has accomplished during the child's period of training."

The above statement makes it clear that successful approved school rehabilitation must be followed by effective after-care, if it is to be of any practical value. A child released from an approved school, but left without further guidance, when returned to the same poor socio-economic environment he came from, is likely to degenerate into delinquent practices.
iii. Success of Approved School Rehabilitation

The normal method of assessing the success of approved schools for boys and girls is a very simple one, namely, not being found guilty of an offence after leaving the institution.

With ex-approved school boys this criterion can just about hold water, but in the case of girls, most of whom had been committed as being in need of care or protection, the criterion of re-appearance in court is useful but a very inadequate one. A girl could thus be classified as a success if she had produced an illegitimate child per year, or cohabited with a series of men, but did not end up in court; while the girl who stole earrings from a shop and was convicted of theft, would be recorded a failure.

Rose Gordon, giving her opinion on this issue, states:

"Reconviction is a very inadequate determinant of success or failure in this context. In the first place it is a crude measure of failure, in that it takes little account of the total after-care situation of the boy or girl, and gives no indication of the seriousness of the offence that led to reconviction; moreover, approved schools are concerned not only with offenders but with non-offenders - care or protection and beyond - control cases. The numbers of non-offenders in boys' schools are too small to distort the overall figures but they predominate in girls' schools; in any case, a success rate based on reconviction has little relevance for girls."

Based on this method, in spite of its inadequacies, the British Seventh Report on the Work of the Children's Department, revealed that 66 out of 100 boys and 80 out of every 100 girls released from approved schools are not charged again within three years of release. These figures indicate a high percentage of success, and justify us in thinking that approved schools, at least in Britain, are substantially successful.
In Kenya, there is no co-ordination between the Children's Department that runs the approved schools, and the juvenile courts, and indeed all courts, on this matter. There are thus no statistics available to show how many delinquents have been charged and found guilty, since their release form approved school. I can only assume, hoping that most of the ex-approved-school inmates are not adults who are taken to the adults' courts, that since very few offenders are ever identified as ex-approved school students, then the success rate is also high in Kenya.

B. BORSTAL INSTITUTION

A borstal institution is established under section 3 of the Borstal Institutions Act (1972), for the rehabilitation of youthful offenders.

First and foremost, it is noted that a borstal is not a prison. To describe a borstal as a prison for older boys and girls, is scarcely more accurate than to describe an approved school as a prison for children. The borstal is not a penal institution in the conventional sense of the word. Its object is training, rather than punishment. "The objects of training shall be to bring to bear every influence which may establish in the inmates the will to lead a good and useful life on release, and to fit them to do so by the fullest possible development of their character, capacities and sense of personal responsibility."

Although the law anticipates that borstal institutions shall be for both girls and boys, the practice is that borstals, where found, are usually or exclusively institutions for boys. This practice stems from the fact that at the inception of the borstal the goal was to find a rehabilitation institution suited for the male youthful offenders (in England), who although not adults, and therefore not fit for prison, were above the reception age at the approved schools. Only very few girls of this age group, that is, between 15 years and 18 years, land in court on criminal charges; and accordingly, borstal institutions, where they are found, are normally institutions for boys.

The aim of borstal institutions was stated by the British Home Secretary in 1959, when he said:
"Borstal is essentially a remedial and educational system, based on personal training by a carefully selected staff. Its development since the Act of 1948 has been mainly in the existence of vocational training in selected trades and education in its widest sense."

But perhaps no one has ever expressed more succinctly the aims of the borstal system and its application to the needs of the individual boy, than the late Sir Alexander Peterson. In his words:

"The task is not to break or knead him into shape, but to stimulate some power within to regulate conduct aright, to insinuate a preference for the good and the clean, to make him want to use his life well, so that he himself and not others will save him from waste. It becomes necessary to study the individual lad, to discover his trend and his possibility, and to infect him with some idea of life which will germinate and produce a character, controlling desire, and shaping conduct to some more glorious end than mere satisfaction or acquisition."

The borstal institution, in Kenya, was established with similar aims as the English borstal institution. In 1963, as the Borstal Institutions Bill was being debated, the then Parliamentary Secretary for Home Affairs in Kenya, Sir Edward Moss, elaborated the objects and aspirations of the Bill. He said its objects were:

i. To keep young delinquents under the age of 18 years who have committed an offence out of prison.

ii. To ensure protection of society by providing that such offenders can be given the amount and type of training best suited for their needs and from which they are likely to derive the most benefit.

During the debate, he explained that the objectives of the borstal "conform to the fundamental principle which has long been accepted that the penal treatment of young offenders should be carried out in separate institutions and not in prison ..."
The treatment and training of youthful offenders provided in the borstal institution is a well tried, specialist form of constructive training, which has proved successful in reforming delinquent youths into law-abiding citizens. To do this, the borstal system seeks to strengthen the character of the offender, and is based on progressive trust, demanding increasing personal decision, responsibility and self-control. It may be recalled that an offender can be committed to an approved school if he is at least 10 years of age but is less than 16 year of age. Such an offender can be detained at the approved school until he is eighteen years of age.

Meanwhile, a youthful offender may only be committed to a borstal if he has attained the age of fifteen years but is less than eighteen years. The court shall order such an offender to be committed to a borstal institution for three years. If he is of good behaviour, he may be released after twelve months, but continue being under the supervision of a probation officer until the end of four years from the date of his sentence. If, while he is still under supervision, he fails to comply with any condition which may legally be imposed upon him, he may be recalled to the borstal and detained until the end of three years from the date of the sentence.

When a court is contemplating borstal training for a boy of fifteen years, it follows that for one reason or another it must consider him unfit for approved school. This could be because he has a bad record, or he is too mature to be sent to an approved school, without grave danger of his exercising a bad influence upon other boys.

It is for such reason that the law requires that, before sentencing a youthful offender, a court shall consider the evidence available as to his character and previous conduct, and the circumstances of the offence, and whether it is expedient for his reformation that he should undergo a period of training in a borstal institution.

A youthful offender who is imprisoned but has not attained the age of eighteen years, may on the advice of the officer in charge of the prison, be brought before a court of law to consider if he may instead be committed to a borstal institution. The court will consider whether committal to a borstal institution is appropriate for his reformation.
If satisfied that it is, the court shall direct that the offender, instead of undergoing the residue of his sentence in prison, be sent to a borstal institution.

An offender does not need to have been previously charged and convicted in a court, before he can be committed to a borstal institution. Once the court is satisfied, after considering the probation officer's report, that the borstal would be the ideal place for his reformation, and after ascertaining that accommodation is available for him in a borstal, the court will give the order committing him there for three years.

With reference to England, D.J. West says that "the English Borstals are difficult to describe because they are so varied". Some are run on sternly authoritarian, military-style discipline; others enjoy a comparatively relaxed atmosphere, with a great deal of discussion between staff and inmates. In Kenya, there are only two borstal institutions. These are: Shimo-la-Tewa borstal in Mombasa District, and Shikusa borstal in Kakamega District. Attempting to classify these borstals would not serve much purpose, not only because of their limited number, but also because the manner in which they should be administered is the same, as set out in the Borstal Institutions Act.

The two borstals are for boys. There is not borstal for girls, and any girls the court would consider fit for borstals cannot be committed to these institutions, as section 18 of the Borstal Institutions Act (1992) clearly states that, "males and females shall not be detained in the same borstal institution".

The lack of borstal institution for girls means that there is no institutional rehabilitation for girls aged sixteen years and above. This, as has been noted, is because approved schools do not admit offenders aged sixteen years or older. The court may consider imprisonment, but this is usually not the right treatment for the girls, because of their tender ages, and because prisons are more of penal institutions than rehabilitation centres.

The absence of a borstal institution for girls is not explained by the government. It is, however, reasonable to assume that its need had not been there in the past years because of the small number of girls who were charged in court and who needed borstal training.
The Borstals Institutions Act\textsuperscript{74} (1992) anticipates the presence of a girls borstal institution, as it contains provisions that apply specifically to them. It is my opinion that although the number of girls who offend against the law is relatively small, as compared to the boys, the time for a girls' borstal is overdue. The large number of young women in women's prisons is a clear indication that, had most of them got the right treatment in a borstal at the right time, they would not have ended up in jail.\textsuperscript{75}

i. The Rehabilitation Programme

During the parliamentary debate on the Borstal Institutions Bill, the Parliamentary Secretary for Home Affairs expounded on the activities that were expected to promote rehabilitation at the institution. These were stated to include:

"A full day of useful work in a workshop, on land, regular physical training, educational classes in reading, writing, arithmetic and an active evening with handicraft classes or gymnastics with a period of organized recreation".\textsuperscript{76}

These specific matters have been adopted as the regular activities in the borstal institutions. To facilitate the intended objects, section 4(b) of the Borstal Institutions Act\textsuperscript{77} (1992), provides that every borstal shall provide "the means of giving such inmates, educational, industrial or agricultural training."

To accomplish its goals, the borstal has established an educational system which caters for boys upto the level of the Kenya Certificate of Primary Education. Those who pass the examination may be discharged under leave of absence to go to secondary schools, where they will continue with their studies while under the supervision of a probation officer. The educational efforts are hampered by the boys not arriving at the institution at the same time, and then many of them also do not complete the maximum three-year period.
The boys are also taught such trades as bricklaying, masonry, carpentry, tailoring, poultry and livestock keeping. The inmates who master their trades well also enrol for Government Trade Tests, where they are applicable. The aim of the staff at the borstal, in training the boys to master a particular trade, is to prepare them for their future resettlement in society, by giving them a training that may enable them to get jobs. The training is also designed to inculcate in the inmates a discipline to remain in one place doing a particular job well, until its completion, instead of loitering and not holding down a specific vocation.

The borstals, unlike the approved schools (which are run under the Children's Department), are run under the dossier of the Commissioner of Prisons. This has the positive effect of ensuring that there is a high standard of discipline maintained at the borstal institutions. The high standard of discipline, coupled with a rehabilitation programme designed for the adolescents, makes the borstals a "hybrid institution" between the approved schools and the prison systems. In this sense borstals are particularly fitting for the adolescent offenders, many of whom are grossly indisciplined and, therefore, need firm discipline in order to effectively rehabilitate.

The discipline in the institution is effected according the provisions laid out in the Borstal Institutions Act (1992). Disregard of the measures of discipline will result in disciplinary action being taken against the inmate. Such action includes confinement within a room, forfeiture of earnings and privileges, and corporal punishment.

ii. Discharge and Supervision

After an inmate has been in the institution for twelve months, the superintendent, on the recommendation of the After-Care Committee, may issue the former with a licence to live with a named trustworthy and respected person, who is willing to receive and take charge of him and to supervise, guide and advise him. The licence remains in force until the expiration of the period for which the inmate was to be detained at the borstal, or until it is revoked. The revocation may occur, for example, if the person to whom it was granted has broken any condition of the licence.
Section 25 of the Act\textsuperscript{82} also provides that the Commissioner of Prisons may grant leave of absence to any inmate of a borstal institution for such period, and on such conditions, as he may think fit, and may at any time revoke such leave of absence, for breach of its conditions, and direct the inmate to whom the leave was granted to return to the borstal institution.

An inmate of a borstal may also leave the institution upon discharge. The Act\textsuperscript{83} provides that the minister may at any time, in writing, order any inmate to be discharged from a borstal institution, and upon discharge, the borstal order made in respect of that inmate shall cease to have effect.

Every person in respect of whom a borstal order has been made, other than a person discharged on order by the minister, or because of his exceedingly good behaviour, shall on the expiration of his period of detention, be subject to supervision for up to one year\textsuperscript{84}. The supervision is carried out by the supervisor of the borstal, or by an appointee, who is usually a probation officer.

The Borstal Institutions Act (1992) provides that, a person under supervision shall comply with the written instructions of the superintendent, regarding his residence occupation and conduct. If he fails to comply with the conditions, he may be recalled to the borstal for upto three months, or until the period of supervision is over, whichever is the shorter.\textsuperscript{85}

iii. **Success of Borstal Rehabilitation**

The rehabilitation of an inmate of a borstal institution is reckoned to be successful if he is not convicted of a criminal offence after leaving the institution. Writing in 1950, John A.F. Watson\textsuperscript{86} stated that the most recent statistics available in England show that some 50\% of borstal boys, who have completed their training satisfactorily and responded well to supervision, have therefore kept completely clear of trouble for at least seven years. Another 20\%, having failed once and having been recalled for further treatment, have as it were, "found their second wind," and achieved the same standard of success. The remaining 30\% must be counted as borstal failures.
Since then, it is clear that what Roger Hood has called the golden age of borstals, especially in Britain, has passed. At one time, the borstals admitted only the most promising and most trustworthy cases, and all the rest went to prison. Consequently, the proportion re-convicted after the release was small, and so was the level of absconding. Now the better types get probation, while the worst types get to borstal. Success rates have dwindled, absconding increased and optimism about the effectiveness of reformative training on liberal lines has correspondingly decreased.

Borstal staffs commonly complain of the ever-increasing proportion of feckless and hopeless types whom they are obliged to receive. A recent report by an allocation centre governor, in England, describes inadequate, insecure and unstable characters, with an increasing incidence of suicidal tendency and psychiatric referrals, who drift inevitably into trouble, yet remain cynical of advice and authority and contemptuous of legal and moral restraints.

In a recent follow-up of the after-careers of borstal inmates, Gibbens and Prince remarked upon the lack of correspondence between performance in borstals, and subsequent re-convictions. This is particularly noticeable among the previously institutionalised recidivists, who knew how to toe the line and keep out of disciplinary trouble while inside, but who quickly reverted to crime on release. Another group of outward conformists with bad subsequent records was made up of intelligent but markedly neurotic or unstable lads, who were able to conceal their problems while in the protected institutional environment, but who soon broke down again outside. In spite of these exceptions, there does appear to be some connection between behaviour outside and behaviour in borstal. A.G. Rose, in an analysis of files on 500 borstal inmates, found that breaches of discipline, bad work habits, and poor progress in borstal training were associated with bad previous criminal, and work records, and greater liability to subsequent reconviction. He concluded that there was probably some continuing and therefore some unchanged factor of personality, manifesting itself in different ways in and outside the institutions.
There are no records available in Kenya, to show the success rate of borstal training in the country. We may only infer that, with situations almost similar to those in Britain prevailing, that is, few borstals, and the less delinquent offenders being rehabilitated through probation and approved schools, the success rate of borstal rehabilitation is likely to be lower than that of probation.

3. **PROBATION VERSUS INSTITUTIONAL REHABILITATION: A COMPARATIVE ANALYSIS**

Both probation and institutional treatment have their distinct place in juvenile rehabilitation. There are cases of juvenile offenders who are fit only for probation, and committing such children to an institution may prove counter-productive. Similarly there are juvenile offenders who are only fit for approved school or borstal, and committing such children to the wrong institution, or to probation will not help in their rehabilitation. Instead it may give them a chance to learn new acts of delinquency.

It is noted from our discussion, that more children are dealt with on probation, than are committed to custodial institutions. There is also a higher rehabilitation success rate through probation, than through the institutions. It may be argued that this is an indication that many of the potential inmates of the rehabilitation institutions, are helped by probation before they get worse, and so they do not end up in approved schools or borstals. Those who end up in the institutions are hardened offenders, whose rehabilitation is hard and therefore success rate is low.

While this is true to some extent, it would seem that probation's higher success rate in rehabilitation may be attributed to its unique, socially-integrated mode of handling the rehabilitation process, which the institutions lack, and which the society has greater confidence in. In this regard, Professor T. Asuni observes:
"... children have less confidence in the formal social control mechanisms like the police, the courts and the correctional institutions. They have more confidence in the informal social control institutions like the family, the neighbourhood, the schools and the religious organisations".

The probation system wholly incorporates the informal social control institutions in its programme, and this greatly enhances its success because of the confidence the children have in it. Unlike the probation system, approved schools and borstals have very little to do with the informal social control institutions in their rehabilitation programmes. This has a counter-productive effect, for they not only lack the confidence of many children, but also of many adults in the social rehabilitation exercise.

Dr Arthur Appianda, who is involved in the rehabilitation exercise, for example, states that:

"While courts may have good intentions for sending a child to an approved school, all evidence seems to suggest that it is not the place for rehabilitation. If delinquents are sent away to institutions, the outcome is not always promising ..., for many, being in an institution can lead to recurring delinquency which if not checked, can progress to more serious offences." 

Unlike the rehabilitation institutions, probation has the advantage of flexibility. The probation orders of the court are so diverse that the offender can be controlled and helped, while remaining in his native habitat and perusing his normal occupation. The probation system has a remarkable adaptability which can make it fit many varying types of delinquents and their needs.

It may be asked, why not send more offenders to the schools? Why place so much reliance on probation, especially since in many instances, the schools are good institutions, far superior to most of the homes from which the delinquents come? The answer to this question is that, however good these institutions may be, there is always the danger that they will destroy in the persons sent to them, much of the sense of self-reliance, initiative, and the desire to fend
for themselves - characteristics already notably lacking in many juvenile delinquents. In two dreadful words, they become "institutionalized" and "bureaucratized". They are like severed flower in a vase of water - they lose the facility of making their own roots. As Dr. Samuel Smiles wrote in his *Self Help*, over a hundred years ago:

"Help from without is often enfeebling in its effects but help from within invariably invigorates. Whatever is done for men or classes to a certain extent takes away the stimulus and necessity of doing for themselves; and where men are subjected to over-guidance and over-government, the inevitable tendency is to render them comparatively helpless." 

Generally, the high rate of success in probation rehabilitation may be attributed to the counselling and good guidance that the probationer gets, on an individual level. This is further enhanced by the involvement of the family in this process, as the probation officers visit the probationer's family and also discuss with the parents their role in the rehabilitation process. This is particularly useful, as the cause of delinquency in most children is entrenched with the family.

It is my recommendation that the approved schools and borstal institutions, in quest of more effectiveness in rehabilitation, should ensure that they have enough qualified staff, and the right number of inmates, so that each may be given individual attention. The Kirigiti Girls Approved school, for example, is housing at least two times its ideal carrying capacity. It has a staff of 10 persons, and an average of 220 inmates, that is, a ratio of one staff member to 22 inmates, when the correct ratio should be 1 staff member to ten inmates. Further, methods of involving the families of the inmates more in their rehabilitation, and even counselling their parents, should be encouraged. If this is not done, delinquency is likely to be recurrent, for a juvenile "treated" at the institution will go back to the "delinquent" family environment, and all the work of rehabilitation would have been a waste.
4. SUMMARY AND CONCLUSION

This chapter is on the methods employed in the rehabilitation of juvenile offenders. The discussion has focused on probation and institutional rehabilitation, as suitable methods of rehabilitating adolescents convicted of theft.

In the discussion on probation we have considered different aspects of the probation system, and the demands of a probation order, on the offender. Attention has specifically been given to the supervision of probationers, and the effects of breach of a probation order and the success of probation has been considered.

Under institutional rehabilitation, we have discussed the rehabilitation programmes of approved schools and borstal institutions. The success of the schemes of institutional rehabilitation has also been considered. At the end of the discussion we have compared these two systems of rehabilitation.

The findings from the discussions of the different methods of rehabilitation indicate that certain children are better suited to probational rehabilitation than to approved school or borstal, and vice versa. Giving such children the wrong treatment, is likely to deny them a chance to be truly rehabilitated.

It is clear from the discussion that more juveniles, of all ages, are dealt with on probation, than those who are committed to the institutions for rehabilitation. There is also convincing evidence that the success rate of rehabilitatory measures of offenders is higher under probation, than under the institutions of rehabilitation. This is because of probation's special, socially-integrated method of rehabilitation that the established schools and borstals lack. This fact, it is submitted, has proved the fourth hypothesis that juvenile rehabilitation is best carried out when the child is living at home with parents under the supervision of the court and its officers, rather than in an institution.

2. Ibid. The other listed methods include discharging the offender, committing the offender to the care of a fit person, ordering the offender to undergo corporal punishment, and giving an order for the imprisonment of the offender.


14. (1968) *E.A.L.R.* 348(T) - At the time of the offence, a person aged 18 years was considered a minor and not an adult.


17. Nairobi Juvenile Court, Case No. J 793/92.
24. Ibid., Section 6.
28. Ibid., Section 14(2).
29. Ibid.
30. Ibid., section 8(3)(a).
31. Ibid.
32. Ibid.
34. The Probation of Offenders Act, Chapter 64 of the Laws of Kenya, Government Printer, Nairobi, section 12(2).
37. The Principal Probation Officer, "Probation as an Alternative to Imprisonment" found in Justina Muchura (Ed.) Criminal Justice and Children -a report on the workshop held at K.I.A. in April 1986, page 52.
38. Ibid., page 53.
40. Ibid., section 16(3)(a).
41. Ibid.
42. Ibid., section 16(2).
43. Ibid.
46. Nairobi Juvenile Court Case No. J 904/92.
47. Chapter 63 of the Laws of Kenya.
49. John A.F. Watson, op. cit., note 3, page 211
50. Ibid., page 227.
51. James M. Muturi, "The Role of Children's Department in the Rehabilitation and Protection of Children", found in Justina Muchura (Ed), op. cit, note 37, page 10.
53. Ibid.
54. Ibid.
56. Analogies with the British position must be taken with care, noting that, whereas there are many approved schools in Britain, with more staff and facilities, there are only seven such schools in Kenya, for a population of 23 million! Hence the success rate may not be so high in Kenya as in Britain.
59. Borstal Institutions Act, Chapter 92 of the Laws of Kenya, Government Printer, Nairobi - see, for example, section 18.
60. John A.F. Watson, op. cit., note 3, page 241. It states that by 1950 there were only 3 borstals for girls in Britain. Currently in Kenya, there are 2 borstals for boys, and none for girls.
63. Quoted in V.K. Mavisi, op. cit; note 61 page 11.
64. The Children and Young Persons Act, Chapter 141 of the Laws of Kenya. Section 17(e) states that he can be admitted into Approved School while he is less than 16 years of age.

65. Ibid., section 17(c).


67. Ibid., Section 26(1).

68. Ibid., section 5.

69. Ibid., section 8.


71. Borstal Institutions Act, Chapter 92 of the Laws of Kenya, Government Printer, Nairobi. It lists the Kamiti Youth Corrective Training centre as a borstal, but its 4-month programme is very different from the stipulated 3 year borstal training period.

72. Ibid.

73. Ibid.

74. Ibid.


78. Ibid.

79. This is a committee established under section 21 of the Borstal Institutions Act, Chapter 92 of the Laws of Kenya, to ensure administrative efficiency of borstal institutions. Its duties are set out in section 21 of the Act.


81. Ibid., Section 26(2).

82. Ibid.

83. Ibid., section 28(1).

84. Ibid., section 29(2).

85. Ibid., section 29(2) and 29(3).
95. Data obtained from interview with Florence Ombaso, Manager of Kirigiti Girls Approved School in May 1992.
CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

This thesis has addressed itself to the problem of juvenile delinquency. It has especially discussed the growing problem of adolescents involved in crime, particularly theft. The study has also examined the legal machinery confronting the juvenile when he is arrested for stealing. This discussion has considered the offence of theft and sought to establish why adolescents steal. Efforts have also been made to determine the role of the juvenile court and related legal institutions in dealing with the theft suspect. To accomplish this, the laws applicable in court have been examined, so as to determine whether or not they help to fulfil the role of the court.

Chapters one and two have highlighted that the causes of delinquent activities, particularly theft, include negative family influence on the juvenile. Juveniles may also be influenced to be delinquent by negative social influences within their residential and schooling environment. Poverty was also identified as a basic cause of juvenile delinquency. It is submitted that the failure of the parents in their duties make their children susceptible to temptations to steal, especially when the family is poor or the child is in bad company.

It is posited the discussion on chapters one and two have established the first hypothesis that, "the basic cause for adolescent theft is the failure of parents and guardians of juveniles to set a good example for, protect, discipline and provide the basic needs of their children."

Following from the above conclusion, the issue may be raised about how long-lasting or how effective the present reformatory methods are, if the family situation does not change. Recommendations are given on how this negative family influence can be abated or wholly done away with as a cause of juvenile delinquency.
It is posited that no matter how reformative in orientation the laws and institutions for rehabilitating delinquent children may be, the children will invariably fall back into criminal behaviour if there is no change on the part of the families whom they end up living with after their institutional rehabilitation. In examining the law governing the juvenile court, the question may be raised whether the law is in fact targeted at the wrong person, that is, the juvenile, rather than the negligent parent or guardian who has failed to look after him thereby leading him to steal. Is the situation likely to be different when the parent or guardian is punished for failing to take care of his child, and thus causing him to steal? Would the rehabilitation process not be more effective if both the parent and child were under the direction and help of the court?

The trend in our legal system has always been in favour of investigating the child as the one causing trouble. It can be observed that the Children and Young Persons Act (1972) only provides for investigations on the child, and for recommendations on what ought to be done to him, without taking into account the fact that in some cases, it is the parent and the home set-up which are the problem, and not the child.

In cases where investigations have revealed that the child steals because of negative parental influence, the focus should be on the parent and the family as a whole. The nearest the children and Young Persons Act (1972) comes to this recommendation is by providing under section 23(1) (b) that if any person who has the custody, charge or care of any child or juvenile "by any act or omission, knowingly or wilfully causes that child or juvenile to become, or conduces to his becoming, in need of protection or discipline, he shall be guilty of an offence and liable to a fine not exceeding five thousand shillings or to imprisonment for a term not exceeding six months or to both such fine and such imprisonment:...."

This provision of the law is however, very rarely used for a number of reasons. First, the scope of the law is narrow, and limited in the types of cases it applies to. This provision of the law is based on section 22 of the Children and Young Persons Act (1972) which in my opinion is limited in defining cases when a child is truly in need of protection or discipline.
Indeed most of the parental duties to their children have only been seen as moral and not legal, and except as stated in sections 22 and 23 of the Children and Young Persons Act, failure to accomplish them does not attract any penalty to the parent, or make the child be in need of protection or discipline. For example, since over indulging a child with a lot of money, or attending disco is not defined in section 22 of the Children and Young Persons Act (1972) to cause a child to be in need of protection or discipline, then a parent who engages in such acts commits no offence, nor does the parent or guardian who gives him the money, or takes him to the disco.

Secondly, the law is hard to enforce because the investigations that will show that a child stole because of negative family influence will be done by a children's or probation officer, yet such officers do not have the powers to prosecute offenders. In order to prosecute such a parent, the officer has to report the case to the police, who will conduct fresh investigations and may, using his discretion, charge him before a court. This procedure apart from being cumbersome is normally not easy to effect, as children are usually not keen on giving evidence against their parents.

Thirdly, such prosecution is not likely to be for the welfare of the child. The prosecuted parent may end up disliking the child and neglecting him more. Moreover, fining or imprisoning the parent would only deprive the child and others in the family of the little help they could perhaps have got from the parent. Such punishments may in these types of situations have a retrogressive effect.

It is my opinion, however, that the latter case may apply only to a few parents. The view has been expressed and I agree that the punishment of such parents will deter them from abdicating their responsibilities and from neglecting problematic children.
It is recommended in light of the above discussion that the law ought to be amended so that it is broad-based more than it currently is. Further it should put the duty of care and maintenance of children on the parents as a legal and not only a moral duty. Such law should specify the basic parental duties in respect of food, shelter, clothing, education, health and discipline for children; and such obligations should have clear sanctions attached to them.  

The other causes of juvenile delinquency it was pointed out are poverty and negative peer group pressure. It is noted that these are first and foremost a socio-economic problem and conventional wisdom requires that the basic solution strategies be sought in the domain of policies, programmes and administrative arrangements - this is to serve as the foundation for specific laws to children who have already become delinquent.

It is therefore recommended that the government ought to enhance its preventive role to the causes of juvenile delinquency more than the curative role that is effected through the judicial process. For example, it is recommended that all necessary measures be taken to enhance national economic productivity for the purpose of enhancing the material conditions of individual families. This will help reduce poverty as a cause of delinquency.

It is also recommended that all urban accommodation and working places be strictly planned. With this concerted efforts should be made by the government to phase out and substitute the large slum dwellings of the urban areas. This apart from improving the socio-economic state of the families will also reduce estate and street gangs which are common among children from these residential areas, where negative peer group influence is most rampant.

Chapter three examined the state's range of instruments for dealing with adolescent thieves. These instruments are both preventive and curative. The latter category include police, the courts and social workers - what may be generally called the "judicial process".
Under the topic "judicial process" there was an extensive discussion on the laws applicable to the accused, and the procedure he must undergo before and during court session. The discussion reached the conclusion that the substantive and procedural laws applied in the court are too complicated for the juvenile, and, if meticulously followed as in an adult court, it will deny the subject a fair hearing. The magistrate must therefore ensure that the court proceedings are as simple and informal as possible. The court must also ensure that the welfare of the subject is kept in focus throughout the hearing. It is noted that the above discussion and conclusion established the second hypothesis, that the court must be flexible in its procedure to ensure that justice is done.

Given the difficulty the juveniles have in appreciating the judicial process, the question before us is, "how can the judicial process be reviewed and strengthened so as to appropriately handle young criminal offenders?"

The first recommendation is that an advocate should be provided for the child charged with a criminal offence before the juvenile court. It was pointed out in the discussions that because of the complexity of the procedure, a magistrate has to go out of his way several times to explain to the subject before him the substance of the offence, the court procedure and help him as if he was his advocate to ensure the juvenile gets a fair hearing. It may be noted that not all magistrates have the sensitivity and patience to do so much for a juvenile charged in court, and even the best magistrate in this regard is limited in how much he can do.

It is needful therefore that the accused has an advocate who can explain to him in depth and to his understanding the substance and procedures of the law and effectively help him in his case. This will ensure that the subject gets a fair hearing and also enable the magistrate to adhere to his recognised role rather than also acting as an advocate for the accused. Since most of the children who are charged before the juvenile court come from poor families who cannot afford to hire the services of an advocate, it is my recommendation that this advocate should be provided by the state.
The law as it stands is geared towards legal prosecution of children. This prosecution may be done by police alone in criminal cases or by children's officers in cases of delinquent children in need of protection or discipline. But the children's officers do not have corresponding powers to prosecute parents of such children where the parents by their acts or omissions have caused the children to be thieves or to be in need of protection or discipline. It is recommended as a measure of strengthening the judicial process, that the children's officers be granted powers to prosecute parents in cases where they have caused their children to be delinquent. This will enable the children's officers not only to offer more valuable counselling to the errant parents but also with the help of the court (after conviction) to supervise the parents to ensure they care for and discipline their children. In this regard I have in mind a case where the court has granted the parent conditional discharge, or released him on bond, or some other non custodial order. The children's officer could, for example, supervise the parent to ensure he does not over-indulge in taking alcohol at the expense of the needs of his children. The children's officer could, in whatever way possible, help the parent correct the habits that have in the first place contributed to making the child delinquent.

The juvenile judicial process seeks through the substantive law and procedure not to stigmatise a juvenile charged in court as a criminal. It is recommended that further efforts can be made to accomplish this goal as a method of strengthening the judicial process. The courts should therefore be encouraged to invoke sections 204 and 176 of the Criminal Procedure Code\(^\text{10}\) by promoting reconciliation, compensation and amicable settlements out of court. The courts should resort, where possible, to handing out such orders as discharging the offender under section 35(1) of the Penal Code\(^\text{10}\), discharging the offender on his entering into a recognizance, with or without sureties; ordering the offender or his parent to pay a fine, compensation or costs; or ordering the parent or guardian of the offender to give security for his good behaviour.

Finally, I also recommend that alternative means of dealing with children should be devised to avoid children appearing in court. Children's panels which are less formal in their orientation have been developed in some legal systems to deal with juvenile matters outside the court.
A discussion of the probation and institutional methods of rehabilitation of adolescent theft offenders indicated more offenders are dealt with on probation than those committed to institutions of rehabilitation. There is also convincing evidence that the success rate is higher under probation than under the institutions of rehabilitation. This is because of probation's socially integrated method of rehabilitation, that the approved schools and borstals lack. These facts have led to the conclusion which supports the fourth hypothesis: that juvenile rehabilitation is best carried out where the child is living at home with parents under the supervision of the court and its officers rather than in an institution.

This is not to say that institutional rehabilitation is obsolete and should be done away with. There are cases that are best dealt with in institutional rehabilitation and these should not be put on probation or other non-institutional rehabilitation. The recommendation is that the courts should not be keen on committing offenders to the instutions for rehabilitation. They should consider other methods and only commit them to an institution if convinced they cannot be properly dealt with otherwise.

It is also my view that the low rate of success in institutional rehabilitation is because of falling standards in the institution, and the enforcement of a rehabilitation programme that is not suitable to the current generation of street children and juvenile delinquents that were not there when the curriculum and rehabilitation programme were put in place. The relevant government ministry could study the situation to identify and effect changes where necessary.

Finally taking into account the discussion and conclusions expounded on above, it is suggested that there is a need to review and possibly redefine the future role of the court as it deals with juveniles and their families given the dynamism of our society.
In discussing whether the law is targeted at the wrong person, that is, the juvenile rather than his family situation, it may also be suggested that since it has been noted from the foregoing discussion that the problem is with both the juvenile who steals, and the family, the law should change its focus from the individual to the family. Such a change would call for a family court. A juvenile court is concerned with the rehabilitation of a juvenile, whereas a family court would be concerned with both the rehabilitation of the juvenile and guidance for his family who may have contributed to his becoming delinquent. This would give the advantage that both the juvenile and his family will be under the direction and supervision of the court.

The family court has been tried and found to be effective in some Scandinavian countries. Such a court may be composed of a panel of say, a magistrate as its chairman, social workers and others experienced in handling family problems. The court would, hopefully, enlist the co-operation of the parents on how best to deal with children and solve the primary cause of the problem.

The family court would probably be more informal in its operations and thus help reduce the several procedural technicalities that are a problem to the accused in the juvenile court. Because of its focus on the family, the court would also have the advantage of a child not being stigmatised a criminal, a stigma that presently sticks on many children, inspite of the provisions of the Children and Young Persons Act (1972).

The need for a family court has been voiced by a number of magistrates and persons who handle juvenile matters. It is to be hoped that their views will be accorded due attention in the process of child law reform.
FOOTNOTES

2. Ibid.
3. Ibid.
4. Ibid.
5. Ibid.
7. Such a law should however be regarded as setting only minimum standards, and it should allow that retention of any higher standards such as may already be in force under particular systems of law recognised in Kenya.
13. This sentiment was expressed by R.N. Walekhwa, loc. cit., note 6 and was later unanimously recommended by the participants of the workshop.
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