

**UNIVERSITY OF NAIROBI  
COLLEGE OF HUMANITIES AND SOCIAL SCIENCES  
SCHOOL OF LAW**

**STRENGTHENING THE JUSTICE SYSTEM FOR SOCIALLY DISPLACED CHILDREN IN  
KENYA: A CASE OF ENHANCED RIGHT TO BE HEARD AND TO PARTICIPATE IN  
JUDICIAL PROCEEDINGS**

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**A RESEARCH PAPER SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS  
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**DECLARATION**


I, Telewa Stellah Nekesa, hereby declare that this work is entirely original and that all relevant sources have been properly cited. I certify that no academic or research organization has accepted this work for review or publishing, and no phase of the study may be generated without my permission or the University of Nairobi's.

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## DEDICATION

This research study is devoted explicitly to the legal policymakers in pursuit of justice for socially displaced children, caregivers and families.

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## **LIST OF ABBREVIATIONS**

ADR -	Alternative Dispute Resolution
AIDS -	Acquired Immunodeficiency Syndrome
CJEU -	Court of Justice of the European Union
CM -	Chief Magistrate
CUCs -	Court Users Committees
ECHR -	European Convention on Human Rights
ECtHR -	European Court of Human Rights
EU -	European Union
HIV -	Human Immunodeficiency Virus
ICCPR -	International Covenant on Civil and Political Rights
LSK -	Law Society of Kenya
NCAJ -	National Council on Administration of Justice
NGO -	Non-Governmental Organization
SPM -	Senior Principal Magistrate
SRM -	Senior Resident Magistrate
TDRM -	Traditional Dispute Resolution Mechanisms
UDHR -	Universal Declaration of Human Rights
UN -	United Nations
UNCRC -	United Nations Convention on the Rights of the Child
UNICEF -	United Nations International Children's Emergency Fund
ACRWC -	African Charter on the Rights and Welfare of the Child

## **LIST OF CASES**

B. K. v E.J.H. [2012] e KLR

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JKK v Republic (2013) eKLR

Johnson Muiruri v Republic {1983} e KLR 447

KMM v Republic [2015] eKLR

Manika Gandhi v Union of India {1989} 45 CRR 1

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Nairobi Law Monthly Ltd v Kenya Electricity Generating Company [2013] e KLR

Nakuru Criminal Petition No. 3 of 2015: Daniel Langat v R.

N M M v J O W (2016) e KLR

P K v Republic [2019] eKLR

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The Children Act (No. 8 of 2001, Laws of Kenya)  
The Victims Protection Act (No. 17 of 2014, Laws of Kenya)  
Legal Aid Act (No. 6 of 2016, Laws of Kenya)  
The Evidence Act  
The National Police Service Act, 2011  
The Penal Code, Cap 63 of the Laws of Kenya  
Probation of Offenders Act, Cap 64 of the Laws of Kenya

### **REGIONAL AND INTERNATIONAL LEGAL INSTRUMENTS**

The African Charter on the Rights and Welfare of the Child (ACRWC)  
The Charter of Fundamental Rights of the European Union  
The European Convention on Human Rights (ECHR)  
The International Covenant on Civil and Political Rights (ICCPR)  
The Universal Declaration of Human Rights (UDHR)  
The United Nations Convention on the Rights of the Child (UNCRC)

### **FOREIGN LAWS**

The Constitution of the Republic of South Africa  
The Child Care Act (No. 74 of 1983, Laws of South Africa)  
The Criminal Procedure Code, (No. 51 of 1977, Laws of South Africa)  
The Promotion and Prevention of Unfair Discrimination Act, 2000 (South Africa).

## **ABSTRACT**

The right to obtain justice is guaranteed by Articles 48, 159, and 232 of the Constitution. This right is critical as it accords equal protection to socially displaced children. This study is grounded in the notion that a minor's right to counsel and involvement in legal proceedings, particularly when such proceedings have an impact on their rights, are also in their best interests. According to Article 12 of the Children's Convention, state parties to adopt reasonable measures to permit children to voice their opinions and to give those opinions due regard. While this right has not been fully implemented, its scope has been elaborately defined in international, domestic and administrative frameworks. Although the youngster's right to take part in court cases is emphasized, this study acknowledges children's vulnerabilities and argues for child-sensitive court procedures and systems.

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## CHAPTER ONE

### Introduction

A minor may interact with the legal system as a witness, victim, offender or a minor in need of care and protection. This grouping of minors consequently includes socially displaced children. A son or daughter who is regarded as being related to the father or mother is what the term "child" means in the law of domestic relations and as to descent and distribution, according to Black's Law Dictionary<sup>1</sup>. The displacement of children refers to their total removal or separation from their parents, their immediate family, or the environments where they were first raised.<sup>2</sup> Children who are displaced are divided into many groups and experience being taken away from their homes and social networks for a variety of different reasons. Children separated from their parents, refugees, orphans, internally displaced people (IDPs), and asylum seekers are some of these demographics. For this study, 'socially displaced children' means children not living with their biological parents. Recourse to justice as a fundamental right has long been a top priority in Kenya, Africa, and actually throughout the world, especially when considered given the rights of minors.

### Background

The foundation of a civic and democratic society is access to justice. Its central concept addresses a person's standing within the legal system in addition to the type, administration, and even calibre of justice that may be found in a certain setting. It has the potential to evaluate a society's level of governance and how well the law's rule is upheld there. The aptitude of individuals to search for as well as obtain a redress via formally or unofficially constituted judicial systems while abiding by human rights criteria has been defined as access to justice. The right to justice is a basic human right that must be upheld in democracy-based, participatory, and equal communities. By abiding by the laws and its rules, everyone has the right to safeguard their other rights. When judicial systems that are set up for economic, social, or political motives discriminate against people, access to justice is absent. The many access issues can be resolved by acknowledging that the right to justice is an important human right. But as more rights are acknowledged, more enforcement is anticipated.<sup>3</sup> However, insufficient enforcement is one of the key reasons for the lack of justice access.

Over the past few decades, the concept of children having access to justice has developed and is now firmly entrenched within the frames of global human liberties, rights and sustainability. The right of a child to pursue judicial recourse when their liberties are purportedly infringed is the basis

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<sup>1</sup> Brian A. Garner, editor in chief, *Black's Law Dictionary* (St. Paul, MN: Thomson Reuters 2014).

<sup>2</sup> Lisa Alfredson, 'Child Soldiers, Displacement and Human Security' (2002) 4 *Disarmament Forum* 17.

<sup>3</sup> Francesco Francioni (ed.), *Access to Justice as a Human Right* (2007).

of juvenile justice. It suggests that in addition to legal empowerment, minors have access to justice systems and kid-friendly alternatives. Early twentieth-century industrialized nations lacked any kind of child protection regulations. They frequently performed tasks in dangerous and unclean environments with grownups. A drive to better protect them was prompted by a mounting acknowledgement of the inequity of their position and a substantial sense of the progressive requirements of minors. A notable occurrence occurred in 1989. In response to a changing international order, world leaders made an unprecedented promise to the youngsters of the world. They adhered to their commitment to uphold and defend the rights of all youngsters by passing the United Nations' Convention on the Rights of the Child.<sup>4</sup>

The fundamental tenet of this agreement is that youngsters aren't just little adults learning how to be grownups or just something that belongs to their guardians and parents and for whom choices are made. As opposed to that, they are human beings with rights. According to the Convention, childhood is separate from adulthood and is a special time that should be protected so that children can grow, learn, play, and develop in dignity. The Convention has improved children's lives, and it has now become the most broadly endorsed human rights agreement in history.<sup>5</sup>

Despite recognizing children's substantive and procedural rights, the CRC is uneasy about the fundamental right to an operative remedy. Their actions in violation of the UNCRC serve as an important example of child exploitation occurring within institutions that are permitted to care for socially displaced children. Historically the right to access justice for minors had not taken into consideration the best minor's interests. In Africa, minors have been subjected to a lot of varying types of abuse, like gender discrimination in access to medical attention and education, sexual and economic exploitation, child-headed households, early marriages and poverty.<sup>6</sup> Significant barriers preventing adolescents from exercising their liberty to access the legal system have been identified as being ineffective and inadequate human resources, insufficient laws, ambiguous and contradictory directives for safeguarding minors, and a fallible and inadequate comprehensive application of the law.<sup>7</sup>

To improve the situation of children facing judicial proceedings, both the UN and African Union have separately championed promulgations of key legal instruments and institutional frameworks geared towards advancing this right.<sup>8</sup> Regionally, access to justice by a socially displaced child is

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<sup>4</sup> Unicef, 'History of child rights' < <https://www.unicef.org/child-rights-convention/history-child-rights>> accessed 21 October 2022.

<sup>5</sup> *ibid.*

<sup>6</sup> *ibid.*, Note 1.

<sup>7</sup> Child Rights Information Network, *Rights, Remedies & Representation. Global Report on Access to Justice for Children* (2016).

<sup>8</sup> Dr. Julieta Marotta, 'Access to Justice: A Driver for the Sustainable Development Goals.' <http://www.mepli.eu/2018/04/access-to-justice-a-driver-for-the-sustainable-development-goals/> accessed 4 March 2021.

embodied under the ACRWC<sup>9</sup> while internationally it is embodied in the UNCRC.<sup>10</sup> The UNCRC and the ACRWC are based on four main principles: the child's best welfare, survival rights and growth, lack of prejudice, and taking into account the minor's opinions. Regardless of their talents, religion, colour, or circumstances, all minors are protected by these laws in terms of their economic, social, cultural, and civil rights.<sup>11</sup>

In particular, the UNCRC requires state parties to take into account the opinions of the minor's children in any judicial, administrative, or judicial processes.<sup>12</sup> The ACRWC, on the other hand, not only affirms the right of minors to be heard but also places specific responsibilities on the Party States to the Charter to ensure that:

(a) no minor who is imprisoned or arrested shall be subjected to cruel and degrading treatments (b) minors in their place of imprisonment or detention are divided from adults (c) every minor accused of violating the penal code: (i) until officially acknowledged guilty shall be presumed innocent; (ii) shall in a language that they understand be promptly informed of the element of the charge against him, and shall be permitted the aid, if they do not comprehend the language, an interpreter; (iii) will be given necessary aid including legal aid in the presentation and preparation of his defence; (iv) shall have a just and fair tribunal determine the case promptly if found not innocent, be decided as fast as probable by an independent tribunal and if deemed guilty, an appeal be permitted; (d) stop the public and the press from the trial.<sup>13</sup>

The Charter is premised on the need for reformation, reintegration, and social rehabilitation.<sup>14</sup> Further, the Charter provides that for minors below a certain minimum age it will be presumed that they cannot violate the penal code.<sup>15</sup>

Many legal instruments in Kenya have established the right of socially displaced children to seek justice. The right to pursue justice is guaranteed by Article 48 of COK 2010. Equivalent benefit from the law, equal treatment, and parity before the law are the fundamental pillars of the justice access right under Articles 159 and 232 of the Kenyan Constitution, which serve as the cornerstone for the institutional, policy, and legal structure for the judicial protection administration for socially displaced children.<sup>16</sup> The Kenyan Children's Act of 2001 was ratified to provide for guardianship, custody, parental oversight, maintenance, adoption, and protection and fostering of minors; to

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<sup>9</sup> The African Charter on the Rights and Welfare of the Child (also called the ACRWC or Children's Charter) was adopted by the Organization of African Unity (OAU) in 1990 (in 2001, the OAU legally became the African Union) and was entered into force in 1999.

<sup>10</sup> The Kenya Government ratified the Convention on the Rights of the Child (CRC) on July 30, 1990.

<sup>11</sup> UNICEF, 'Four principles of the Convention on the Rights of the Child' (24 June 2019) <https://www.unicef.org/armenia/en/stories/four-principles-convention-rights-child> accessed 4 March 2021.

<sup>12</sup> The United Nations Convention on the Rights of the Child (UNCRC), Art. 12.

<sup>13</sup> The African Charter on the Rights and Welfare of the Child (ACRWC), Part 1, Art. 4.

<sup>14</sup> *ibid* Art. 3.

<sup>15</sup> *ibid* Art. 4.

<sup>16</sup> The Constitution of Kenya 2010, Art. 232.

bring into reality the codes of the ACRWRC and to elaborate on the administration of institutions of children. It provides for equal treatment for all children despite their backgrounds.<sup>17</sup>

This study conceptualizes access to justice from the standpoint of structures and systems embedded in law. It implies equal rights for all people and the protection of those rights by law enforcement organizations. It also implies easier accessibility to the judicial system, transparency in the aforementioned system, ease of hearing and decision-making in cases, and a supportive atmosphere for children who have experienced abuse, had their rights violated, or who have been accused of committing crimes.<sup>18</sup>

### Statement of the Problem

This study has been based on the fact that despite having robust legislation that appreciates the liberties of socially displaced minors to partake in the justice system, Kenyan enforcement agencies have failed to design proportionate systems and procedures for taking into consideration the particular weaknesses in the realization of the minor's best welfare and interests. Disproportionate systems plus procedures are evident across the value chain of conduct of complaints, investigations, arrests, hearings, custody, and sentencing of socially displaced minors in the justice system. For instance, whether a socially displaced child should be requested to air their opinions about procedures of arrest, confinement, and treatment by law enforcement officers and families in front of law enforcement officers or their adopted parents is contentious. In particular, if alleged cases of neglect or abuse are in issue it will not be appropriate to request minors to air out their experiences with the suspects in the same courtroom.<sup>19</sup>

Proceedings are hurried and don't provide kids with a fair chance to be heard, whether in regular courts or juvenile courts. Children are usually confused and terrified during court procedures, which prevents them from understanding the type of cases that are handled or the outcomes of those cases. Children that require translation do not always have access to it. Judicial proceedings may be puzzling, the language used may not be appropriate to a socially displaced minor's ear and the players in the court may be strange.<sup>20</sup> The difficulties faced by the Children Courts were observed with concern by the Chief Magistrate of the Milimani Children's Court and Committee of Court Users' head, Lucy Gitari. The court is not kid-friendly, which is a significant problem. When these children are released from remand, there is no transportation available. The majority

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<sup>17</sup> Preamble and object to the 2001 Children Act.

<sup>18</sup> N Bala, and R Bromwich 'Introduction: An International Perspective on Youth Justice' in N Bala et al (eds) *Juvenile Justice Systems: An International Comparison of Problems and Solutions* (Toronto: Thompson 2002).

<sup>19</sup> Jill Duerr Berrick, Jonathan Dickens, Tarja Pösö, and Marit Skivenes, 'International Perspectives on Child-responsive Courts' (2018) 26(2) *The International Journal of Children's Rights*, 2 [https://brill.com/view/journals/chil/26/2/article-p251\\_251.xml?language=en&body=citedBy-39140](https://brill.com/view/journals/chil/26/2/article-p251_251.xml?language=en&body=citedBy-39140) accessed 5 March 2021.

<sup>20</sup> [https://www.unicef-irc.org/portfolios/documents/785\\_jj\\_ngorep\\_kenya2.htm](https://www.unicef-irc.org/portfolios/documents/785_jj_ngorep_kenya2.htm) accessed 21 October 2022.

of the time, they are grouped with adult offenders, which is problematic because, in some cases, hard-core criminal suspects are returned to custody while the children are left in the care of the authorities while they plead with well-wishers for transportation. She also mentioned that there was no independent children's court, which was significant since it would have provided children with a favourable setting for the proper handling of their situations.<sup>21</sup>

Similarly, empirical data demonstrates that many minors who have been abused by their caregivers, guardians and parents still want to live together with them.<sup>22</sup> Minors as well as conflicting with themselves when describing their families' circumstances when trying to determine what is best for them, can be confused about being in the know about what they aspire for in future. The demands of the courtroom, and the court's context, may increase symptoms common with PTSD and in certain cases cause children's trauma.<sup>23</sup> Although it can be argued that there are well-defined legal and policy guidelines that direct the police, prosecutors, and courts in protecting the liberties of socially displaced minors generally to justice, this may not be the case. There are still countless instances of these kids' rights being violated at the time of their arrest, while they are being held in custody, throughout their trials, and even afterwards. Due to the interference with these youngsters' growth and evolution in addition to their education, these infractions have turned otherwise would-be successful kids into social misfits. To achieve the desired end goal, as will be stated later, significant reforms and capacity building are required. To improve the system, reforms based on top practices in other jurisdictions will be put forth.

## Study Objectives

The main objectives of this research are to: -

1. Examine the applicable laws, regarding the capacity of socially dislocated children to take part in court cases as envisioned in Article 12 of the CRC.
2. Scrutinize the institutional structures and administrative processes and procedures regarding the right of socially displaced children to take part in judicial proceedings.

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<sup>21</sup> 'Kenya embarks on addressing challenges in juvenile justice system' (18 January 2018) <https://reject.awcfs.org/article/kenya-embarks-on-addressing-challenges-in-juvenile-justice-system/> accessed 21 October 2022.

<sup>22</sup> Block S.D., Oran H., Oran D., Baumrind N., and Goodman G.S., 'Abused and neglected children in court: Knowledge and attitudes' (2010) 34(9) *Child Abuse and Neglect*, [https://brill.com/view/journals/chil/26/2/article-p251\\_251.xml?language=en&body=citedBy-39140](https://brill.com/view/journals/chil/26/2/article-p251_251.xml?language=en&body=citedBy-39140) accessed 5 March 2021.

<sup>23</sup>Jenkins D., 'Reducing trauma for children involved in dependency and the criminal court' (2008) 27(1) *Child Law Practice* [https://brill.com/view/journals/chil/26/2/article-p251\\_251.xml?language=en&body=citedBy-39140](https://brill.com/view/journals/chil/26/2/article-p251_251.xml?language=en&body=citedBy-39140) accessed 5 March 2021.



3. To compare and contrast the legal and institutional framework of the justice rights of socially displaced children in South Africa to provide a comparative jurisdictional analysis.
4. Evaluate the administrative, legal, and policy solutions and reforms that will improve the right of socially displaced minors in Kenya to participate in and be heard in legal procedures.

## Research Questions

The study shall be steered by the subsequent queries: -

1. Does the legal framework in place, make provisions for the right of socially displaced minors to partake in justice proceedings as envisioned in the CRC's Article 12?
2. Are the institutional frameworks, administrative processes and procedures sensitive to the unique vulnerabilities of socially displaced children in terms of access to justice?
3. What lessons can be drawn from South Africa's legal and institutional framework of the rights or claims of socially displaced minors in South Africa?
4. What could be the appropriate and proportionate legal, institutional and administrative interventions to ameliorate the right of socially displaced persons in Kenya to take part in and be heard in legal proceedings?

## Research Hypotheses

The study proceeded on the hypotheses: -

1. The present legal, institutional, and administrative frameworks in Kenya are out of proportion and do not take into account the difficulties faced by socially displaced children.
2. The current legal frameworks are proportionate, and responsive and take into account the right of socially dislocated minors to be engaged and heard in judicial processes affecting them.

## Justification of the Study

Despite the mounting quantity of socially displaced minors in disharmony per the law, the existing institutional, administrative and legal infrastructure seems inadequate. A publication done by the

Kenya National Bureau of Statistics (KEBS) demonstrated that the slow legal system is partially blameworthy for a large number of instances of violence against minors despite stringent laws passed to safeguard minors.<sup>24</sup>

This study will evaluate the shortcomings in procedure and practice as provided under 2001's Children Act vis-à-vis the CRC under Article 12. In addition, this research will underscore the issues facing socially displaced minors within the legal system in the Country due to insufficient institutional safeguards, procedural, comprehensive and legal framework and why there is a need for institutional and procedural judicial reform.

The highlighted shortcomings and proposed legal, institutional, and administrative interventions shall provide the necessary source of information to Policymakers, the actors within the Justice Law and Order Sector, the institutions involved with protecting the children's welfare to better the predicament of children displaced socially as well as allow them to take part in legal processes. This is done by facilitating their public participation.

## Theoretical Framework

This study is anchored on the relationship between the justice theory and interest theory. John Finnis's Interest theory as its foundation<sup>25</sup> positions that;

Rights provide the purpose of serving the right-holder's relevant interests. It advances the notion that rights are a fundamental tactic to the rationalization of rights, in that rights are fundamental in fortifying a person's well-being.<sup>26</sup>

According to John Rawls's book, *A Theory of Justice*<sup>27</sup>, theories of justice are concerned with the most suitable means of organizing society and government. He goes on to say that a justice theory is necessary because widely accepted conditions for social mutual assistance are not only possible but also necessary.

The theory of justice is premised on three principles: equal opportunity, equal liberty and the principle of difference.<sup>28</sup>

John Rawls posits that individuals are at liberty to do anything as long as their actions do not affect the rights of others. He argues that this idea is essential in a society founded on justice principles because it ensures that all people recognize and have a personal state vital for the preservation of

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<sup>24</sup>Pontificia University, Centre for Child Protection, <https://childprotection.unigre.it/understanding-child-protection-and-safeguarding-through-the-Kenya-media-lens/> accessed 27 February 2021.

<sup>25</sup> John Finnis, *Natural Law and Natural Rights* (Oxford; Clarendon Press 1980).

<sup>26</sup> *ibid.*

<sup>27</sup> John Rawls, *A Theory of Justice* (Harvard University Press, Cambridge, Mass 1971).

<sup>28</sup> *ibid.*

impartial order.<sup>29</sup> Additionally, freedom ensures that all society members are free to follow their vocation without any interference.<sup>30</sup>

According to Rawls, the concept of equal opportunity requires that economic and social disparities be made accessible to everyone under circumstances of just equality of opportunity.

Finally, on the deference concept, Rawls argues in favour of it because unequal treatment of extra advantages and opportunities within a society may be to the citizenry's overall interest. Nevertheless, Rawls adds a caveat to the difference principle: economic disparities must be structured in such a way that they help the least advantaged the most, in line with the principle of just savings.

Both theories are crucial to the current research since justice access serves as a guiding principle for the implementation of judicial power in the management of justice as well as a fundamental right protected by Kenya's 2010 Constitution under Article 48.<sup>31</sup> Additionally, the 2010 Constitution under Article 27 guarantees equality before the law and freedom from prejudice.

These theories are significant to the current study because they both emphasize that, in addition to being a fundamental right enshrined in the Constitution, access to justice should also serve as a guiding principle for the exercise of judicial power when dispensing justice.<sup>32</sup> The 2010 Constitution upholds the idea of equality by mandating that everyone shall have access to the fundamental liberties and rights outlined in the Bill of Rights as much as possible compatible with those liberties and rights' nature.<sup>33</sup>

According to the principle of difference, constitutional restrictions on basic liberties only apply to the degree they are fair and justified in a democratic and open society. Dissimilar to the previous Constitution, which had limits, exemptions, and provisos for every right, the new Constitution in addition to the internal limitation provided for under specific rights also adopts a general limitation clause.<sup>34</sup> The Constitution acknowledges special interest groups such as minors for proportionate as well as special treatment through the doctrine of differentiated treatment as a means of mitigating the problems faced by socially displaced children.

Another theory that can also be discussed is the Transformation Theory. Regarding, Daszko and Sheinberg define transformation as the development and alteration of a completely new shape, function, or structure.<sup>35</sup> To transform is to generate something fresh, unheard-of, and unpredictably

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<sup>29</sup> *ibid.*

<sup>30</sup> *ibid.*

<sup>31</sup> The Constitution of Kenya, 2010, Art. 159.

<sup>32</sup> *ibid.*

<sup>33</sup> The Constitution of Kenya, 2010, Art. 20(20).

<sup>34</sup> *ibid.*, Art 24.

<sup>35</sup> Marcia Daszko and Sheila Sheinberg, *Survival is optional: only leaders with new knowledge can lead the transformation* (2005) 1.

unpredictable from earlier times. Transformation stands as a mental "change." It is built on developing a system of thorough understanding and acting on the knowledge of what to do and the bravery to do it.<sup>36</sup> They also note that transformation happens when leaders establish a vision for it as well as a framework for persistently challenging presumptions, patterns, habits, and paradigms to advance and apply management theory through the prism of a system of profound knowledge.<sup>37</sup> The contribution of this theory to this study can be viewed in understanding the children's laws and institutions that are present in providing a robust foundation for ensuring that access to justice rights is available to minors. The possibility of adequate reforms can be used to streamline the legal and administrative framework to ascertain that socially displaced children have a platform to express themselves and effectively take part in judicial proceedings.

## Research Methodology

### Methodology

This study relied on desktop research techniques. Research from books, journals, and case law—from both Kenyan courts and foreign courts—informed the study. The Constitution, as well as other legislative documents relating to the right to access justice and juvenile justice, will be examined. Additionally, regional and international legal instruments affecting access to justice will be looked at. Concerning the literature materials, the focus will be on different child justice reviews and child care, case law, Kenyan law reform commission reports, international researchers' reports, academic texts, declarations, background papers, academic articles, books and resolutions. The literary resources and legal instruments were obtained from the libraries in Kisumu compass and Kisumu high court library, Kenya Law reports and through subscriptions to recognized academic sites on the internet.

### Study Limitations

The following are the limitations that were encountered in the research period:

1. Physical access to the libraries and Court stations might be restricted due to Covid 19 situation; and
2. Time constraints due to the busy work schedule in the judiciary

### Mitigation Measures

The study employed the following measures to mitigate the limitations: -

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<sup>36</sup> *ibid* 4.

<sup>37</sup> Jack Mezirow, 'Understanding Transformation Theory' (1994) 44(4) *Adult Education Quarterly* 222.

1. Obtaining a letter from the University authorizing the paper and compliance with all the Ministry of Health protocols on Covid 19 is including wearing masks, hand washing, sanitizing, and possibly taking a Covid 19 vaccination; and
2. Working to avoid delays as per the scheduled timetable.

## Literature Review

### Introduction

The study reviewed several legal instruments, reports, and literature to establish the magnitude (if any) to which any of the aims of this report have been carried out. Therefore, the literature review informs the study concerning the objective, research questions, and theoretical framework. However, the study mainly progressed based on gaps in the literature materials identified to provide an informative basis for the recommendations that shall be proposed.

### Coming Up with a Literature Review

**Chris Hart's *Doing a Literature Review***<sup>38</sup> offers a wonderful structure for supporting the creation of a literature review which is frequently an experiential process. It works best when used as a guide through the complex sea of scholarly literature with the supervisor. A research project's literature review can appear to be a difficult, if not impossible, undertaking. Students in the humanities and social sciences can use this book as a complete and practical guide to preparing a literature review. Hart provides excellent guidance on how to do a literature study, analyze arguments and ideas, map ideas, arguments, and viewpoints, and build a case for researching a topic. Additional literature is **David Silverman's**<sup>39</sup> book that puts across various instructions and guidelines on conducting comprehensive qualitative research and overall study.

**Mouton's** book's purpose is to close some of the gaps in the existing literature. To make the text more beneficial to South African students, it makes an effort to reflect some of the conditions unique to higher education in South Africa as well as to research in general.<sup>40</sup> Additionally, **Diana Ridley's**<sup>41</sup> book offers a step-by-step instruction manual for carrying out a search of literature and review of said literature, utilizing instances and samples to show the finest practices.

Ridley provides instructions on how to conduct a structured search of the available literature as part of an undergrad study paper, master's thesis, or Doctor of Philosophy disquisition. He also goes through how to read and take notes while reading and how to write a literature review.

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<sup>38</sup> Chris Hart, *Doing a Literature Review* (1998).

<sup>39</sup> David Silverman, *A Very Short, Fairly Interesting and Reasonably Cheap Book about Qualitative Research* (2 ed., SAGE Publications, Ltd 2013).

<sup>40</sup> Johann Mouton, *How to Succeed in your Master's & Doctoral Studies: A South African Guide and Resource Book* (J L van Schaik Uitgewers/ Publishers 2001).

<sup>41</sup> Diana Ridley, *The Literature Review: A Step-by-Step Guide for Students* (2<sup>nd</sup> ed. SAGE Publishers 2012).

The literature review took a two-pronged approach. First, Access to justice as an essential human rights concept. Second, access to justice and Juvenile Justice for Socially Displaced Children.

### Conceptualizing the Access to Justice

Since there isn't a consensus on what access to justice is, it's possible that it can't be defined. It can therefore be described in a variety of ways. Access to justice, however, is the cornerstone of a civil and democratic society. Individuals' ability to seek and receive reparation through official or informal mechanisms of judicial fairness and in line with human rights principles, is referred to by **Cappelletti and Bryant**<sup>42</sup> as the idea. They claim that although the notion of justice access is difficult to define, it nonetheless serves to maintain citizens' legal liberties and under the general supervision of the state, they settle their issues.

According to **Ojukwu et al.**<sup>43</sup>, the concept of access to judicial recourse encompasses both the individual's position within the court system and the nature, mechanism, and even the quality of justice that can be obtained in a community. It is a means of determining the standard of governance in society as well as the degree to which the rule of law is upheld in that culture. The capacity of individuals to seek and obtain redress via informal or formal justice systems per human rights standards has been defined as access to justice as put across by **Maregere in Justice in Transition and the Complexities of Access, Accord, and Conflict Trends**.<sup>44</sup> This research paper seeks to expound on the idea of judicial access and examine mechanisms through which juvenile justice can be accorded to socially displaced children.

### The Universality of Access to Justice

**Fitz-Gibbon and Pfitzner**<sup>45</sup> explored the implications of justice rights in Australia and their availability to women in social need. They emphasized the need for judicial options for redress to be made available to all women regardless of whether legal intervention is sought or not. Justice is accessible to everyone. Their paper focuses primarily on women whereas this study aims to make a compelling case for children's rights as well. In **Equal Access to Justice, Henrik Alffram**<sup>46</sup> puts across that a fundamental human right that should be protected by well-established global and regional human rights laws as well as founded on the principles of non-discrimination is access to recourses of justice. Though his work touches on juvenile justice, it is mostly based on a general approach as opposed to a child-centred approach.

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<sup>42</sup> M Cappelletti and G Bryant, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) Buffalo Law Review 181.

<sup>43</sup> E Ojukwu, G Yemi-Akinseye, C Isa Hayatu, S Erugo, E Idorenyi, CK Nwankwo and A Omaka (eds), *Handbook on Prison Pre-Trial Detainee Law Clinic* (Network of University Legal Aid Institution 2012).

<sup>44</sup> TP Maregere, 'Justice in Transition and the The Complexities of Access, Accord, Conflict Trends' (2017) Conflict Trends 11-17.

<sup>45</sup> Kate Fitz-Gibbon and Naomi Pfitzner, 'Ensuring access to justice for women experiencing family violence beyond the pandemic' (2021) 46(1) Alternative Law Journal.

<sup>46</sup> Henrik Alffram, *Equal Access to Justice: A Mapping of Experiences* (Sida 2011).

## Access to Justice as a Fundamental Human Right

**J.B Ojwang & J.A. Otieno-Odek**<sup>47</sup> seek to establish an evolving pattern for enforcing the notion within the Kenyan setting, albeit in the limited arena of judicial review of the applicable legislation.<sup>48</sup> According to the article, the critical importance of human rights is to raise the private interest above the underlying public interest; essentially, the individual above the wider society; it constitutes a constraint on utilitarianism's unfettered path.<sup>49</sup>

The role of international law in upholding fundamental human rights is emphasized in the study. As per the 2010 Constitution's Article 19(2), The purpose of protecting human fundamental freedoms and rights is to foster social fairness and the entire actualization of all people's potential as well as to uphold the dignity of individuals and communities. Nonetheless, the paper does not contextualize right based approach to juvenile justice as a human right concept hence the rationale of this study.

The Council of Europe and the European Union's Agency for Fundamental Rights collaborated to create a **Handbook on European Law Relating to Access to Justice**.<sup>50</sup> The ECHR and the ECtHR, as construed by the European Union's Charter of Fundamental Rights and the Court of Justice of the European Union, correspondingly, are discussed as essential components of recourse to justice in Europe.

Justice access allows persons to defend their persons against violations of their rights, to seek redress for violations of the law, to hold the government responsible, and to defend themselves in proceedings of a criminal nature. Access to justice facilitates the enforcement of substantive and procedural rights.

**Mayer Gainer (2015)**<sup>51</sup>, in her research of the Kenyan court, judicial officials are obligated to do everything possible to alleviate the magnitudes of anxiety of individuals appearing before them, particularly individuals who represent themselves, under the principles espoused in Article 159 of the Constitution. Kenyan judiciary has evolved through simple acts of courtesy toward litigants and the use of plain language to explain the proceedings. Additionally, she says that the NCAJ and CUCs (which include, children's departments, the Law Society of Kenya, paralegals, civil society groups, and police and prison services) have improved access to justice.

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<sup>47</sup> J.B Ojwang and J.A. Otieno Odek, 'The judiciary in Sensitive Areas of Public Law: Emerging Approaches to Human Rights Litigation in Kenya' (1988) 35(1) Netherlands International Law Review.

<sup>48</sup> *ibid.*

<sup>49</sup> *ibid.*

<sup>50</sup> Philippe Boillat and Michael O'Flaherty, *Handbook on European law relating to access to justice* (2016) [http://www.echr.coe.int/Documents/Handbook\\_access\\_justice\\_ENG.pdf](http://www.echr.coe.int/Documents/Handbook_access_justice_ENG.pdf) accessed 5th March 2021.

<sup>51</sup> Mayer Gainer, *Transforming the Courts: Judicial Sector Reforms in Kenya, 2011–2015* [https://successfulsocieties.princeton.edu/sites/successfulsocieties/files/MG\\_OGP\\_Kenya.pdf](https://successfulsocieties.princeton.edu/sites/successfulsocieties/files/MG_OGP_Kenya.pdf).

While the report paints a rosy image of what the societies and courts are doing to improve access to justice, it makes no mention of juvenile justice or the critically significant right of justice access for socially displaced minors, which forms part of the study's hypotheses.

**Lima and Gomez** in, **Access to Justice: Promoting the Legal System as a Human Right**<sup>52</sup> Reiterate that in fair, equitable, and egalitarian communities, the right to seek justice must be protected as an essential human right. Everyone has the right to protect their constitutional rights by following the rules and regulations of the law. People who are subjected to discrimination by the legal and judicial systems due to economic, societal, or political factors do not have justice access. Despite covering several justice-related systems and themes in their thesis, the protection of children is not discussed.

Edited by **Francesco Francioni**, **Access to Justice as a Human Right**<sup>53</sup> is a collection of essays that explores the connection between human liberties, rights and access to justice. The collection focuses on the availability of judicial remedies in a global setting and as prescribed by international law, a shared view with **Capelletti's**<sup>54</sup> guiding concern with remedying injustice. The authors appear to think that recognizing justice access as a new important individual right will assist solve the accessibility issues. But as more rights are acknowledged, more enforcement is expected. However, insufficient enforcement is one of the key reasons for the lack of access to justice. Knowing that unleashing the full force of the legal system could bring everyone to their knees and doom the cause of justice, the authors present a variety of, if generally caustic, ways. Though the book is a robust outlook on various rights and justice concepts, it does not make comprehensive contributions towards juvenile justice.

**Professor Bem Angwe** in his paper, **Access to Justice and Protection of Rights of Citizens**<sup>55</sup>, states that justice and human rights are essential components of the rule of law and the advancement of every community. Maintaining order in any given community is one of the goals of the law, which is given for the satisfaction of all parties involved, from the powerful to the average citizen, with fairness as its ultimate goal. All citizens should be able to access justice mechanisms. Again, his paper focuses on justice as it affects the entire citizenry, whereas this paper seeks to give a particular emphasis on juvenile justice.

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<sup>52</sup> Valesca Lima and Miriam Gomez, 'Access to Justice: Promoting the Legal System as a Human Right' in W. Leal Filho et al. (eds.) *Peace, Justice and Strong Institutions*, Encyclopedia of the UN Sustainable Development Goals (Springer Nature Switzerland AG 2020).

<sup>53</sup> Francesco Francioni (ed.), *Access to Justice as a Human Right* (2007).

<sup>54</sup> Mauro Cappelletti and Bryant Garth, (eds.) *Access to Justice: A World Survey* (Milan: Stijoff and Noordhoff 1978).

<sup>55</sup> Bem Angwe, *Access to Justice and Protection of Rights of Citizens* (2017).



## Access to Justice and Juvenile Justice; a Case of Socially Displaced Children

**Ton Liefwaard and Machteld Vonk**<sup>56</sup> in their article note that the Convention on the Rights of the Child is still hesitant on a minor's basic right to a successful remedy, despite recognizing both substantive and procedural rights for youngsters. However, over the past few decades, the concept of children having a right to justice has developed and is now firmly established in international human liberties and sustainable development objectives. The core of juvenile justice is a child's right to pursue justice when their protected rights are allegedly desecrated. It suggests that in addition to legal empowerment, minors have access to judicial systems and kid-friendly alternatives. Academic research and literature with a specific focus on children, in-depth consideration, categorization, or contextualization have not yet provided access to justice. This research paper seeks to rectify this gap.

**Stella Nyagwencha and Naomi James**, in their journal article address abuse symptoms among adolescents in charitable children's institutions. In particular, the research is based in Nairobi County within the Republic of Kenya.<sup>57</sup> Due to their dependence and fragility on caregivers, adolescents are more likely to be subjected to possible abuse. The goal of their research was to discover the types of maltreatment that teenagers with moderate and mild symptoms of anxiety illness face while being raised in a humanitarian environment.

They discovered that caretakers could abuse children sexually, physically, and emotionally. They, however, failed to determine whether neglect or abuse happened before children's entry into charitable children's institutions or afterwards, the procedural and legal frameworks were lacking. They posit that the main reason for the reference to charitable children's institutions within the Country is abuse, and as such, it seems probable that in a lot of cases, neglect or abuse occurred before admission. This paper will address the gaps in the procedural and judicial frameworks for an SDC to access justice.

In a status report by **UNICEF (2014)**, titled "Formal Justice in Timor-Leste", The Human Rights Council focused on children's rights as they relate to access to justice. The CRC's standards, which emphasize that minors have the same legal protections as adults, plus the guarantee to a just court case, served as a guide in this.<sup>58</sup>

Minors should have faith in the legal system, especially if they come into confrontation with the law as right-bearers, witnesses, or victims.

The article states that;

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<sup>56</sup> Ton Liefwaard and Machteld Johanna Vonk, 'The Rights of the Child in the Netherlands: A Family Law Perspective' *The Rights of the Child in a Changing World* (2016).

<sup>57</sup> Stella Nyagwencha, Ph.D.; Alice Munene, Psy. D., Naomi James, Ph.D., Daystar University 'Types of Abuse Experienced by Adolescents Living in Charitable Children's Institutions in Nairobi County, Kenya' (2018) 1(3) *African Journal of Clinical Psychology* **ISSN: 978-9966-936-05-9**.

<sup>58</sup> Resolution A/HRC/25/L.10 March 2014. Found in the report on Formal Justice in Timor-Leste.

Most cases of a criminal nature involving minors that get to the courts involve wrongdoings of physical and sexual violence against minors. While cases involving physical and sexual violence are the most frequently brought before the courts, sources indicate that they likely represent a minor portion of wrongdoings committed against minors as a result of extensive tolerance of violence against minors, misunderstanding of the official legal system and a fondness for traditional justice resolution mechanisms.<sup>59</sup>

## Challenges and Obstacles to Children Accessing Justice

Research carried out by **Desmond K. Runyan Engel et al**, establishes the types of child abuse-related cases that include infanticide, mutilation, abandonment of children, sexual-related abuses, child labour as well as other forms of child violence. He asserts that several charitable groups and others concerned with the welfare of youngsters have fought for their protection. Children or a kid may be institutionalized as a result of several factors.

Although the UNCRC in addition to substantive rights recognizes the procedural rights of the minor, it makes no pronouncement on the fundamental rights as an actual solution. A significant occurrence of child exploitation witnessed within institutions authorized to provide care for socially displaced children is exemplified by their activities in infringement of the UNCRC. A minor is acknowledged as a bearer of individual rights, a person legally entitled to all fundamental human freedoms and rights, outlined in global human rights documents as well as instruments, the CRC, and related law, according to the additional protocol on the sale, prostitution, and pornography of minors.<sup>60</sup> It suggests having access to legal processes, giving minors more legal rights, and finding child-friendly solutions.

Incompetent and insufficient human resources, inadequate laws, vague and overlapping directives in safeguarding minors and a flawed and inadequate understanding application of the law have been recognized as major factors hindering the realization of minors' right to access the official legal system. **Crin**<sup>61</sup> concludes that children may encounter unusual legal challenges because they lack legal ability, legal standing, or access to an attorney in their own right. This can be problematic if the child and his parents or legal guardians have competing interests. Additionally, children encounter unique challenges while attempting to seek justice. Such obstacles are related to how difficult it is for children to access and effectively engage in legal systems due to their complexity. Children could not know their rights and did not have access to crucial information, such as how to get legal aid and what to anticipate from it.

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<sup>59</sup> Stella et al (n 37).

<sup>60</sup> Convention on the Rights of the Child, 20 November 1989, A/RES/44/25.

<sup>61</sup> Child Rights Information Network, *Rights, Remedies & Representation. Global Report on Access to Justice for Children* (2016).

**Buzawa and Buzawa** in their book, **Domestic Violence: The Criminal Justice Response**<sup>62</sup> contend, as, in other regions of the world, that youngster sexual exploitation is a chief problem in the nation of Kenya. The consequence is that more youngsters are becoming witnesses or victims in CSA-related cases, which means there is a need to address their concerns and secure their active engagement in the legal system. Furthermore, juvenile justice systems may not be developed with children in mind; they may not be kid-specific or kid-friendly. The academic work recommends understanding and documenting minors' rights situations, the need to develop child protection services and child justice and establishing monitoring mechanisms. This international scope is not explored in the regional and Kenyan legal justice system, a tenet this study will explore.

The **CRC Committee**<sup>63</sup> has noted that children's unique and dependent condition makes it extremely difficult for them to seek redress when their rights are violated. States must consequently pay special attention to making sure that children and their representatives have access to efficient, child-sensitive procedures. Such procedures ought to include giving kids access to self-governing complaint measures, the courts, as well as the required legal and other support, as well as guidance, support, and sustenance for self-advocacy as emphasized by **Fridriksdottir** in his paper, **Relational Representation: The Empowerment of Children in Justice Systems**<sup>64</sup>.

Stephen Gaetz in his journal article, **“Street Justice: Homeless Youth and Access to Justice”** examines a case study in Toronto, Canada. He took a needs assessment to determine the justice range and legal problems that youths on the street face. A good number have lived in either group homes or foster care. To see youths in the street only as lawbreakers disregards the point that most of them are victims of harassment, discrimination and crimes. Most of them are from backgrounds in which they were casualties of emotional, sexual and/or physical abuse and where they saw various types of family violence.

The study concludes that the fact that street youth are probable to end up as casualties of crime, while they often are inclined to do illegal things, demonstrates the inescapability of their conflict with law enforcement agencies. Regrettably, this conflict is aimed at their wrongful acts, instead of them as victims. This study will examine the access to the legal system for socially displaced minors as the offended.

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<sup>62</sup> E S Buzawa and C G Buzawa, *Domestic Violence: The Criminal Justice Response* (3<sup>rd</sup> ed. London: Sage Publication 2003) 25.

<sup>63</sup> UN Committee on the Rights of the Child, *General Comment No.5 (2003): General measures of implementation of the Convention on the Rights of the Child*, CRC/GC/2003/5, 27 November 2003.

<sup>64</sup> H Fridriksdottir, 'Relational Representation: The Empowerment of Children in Justice Systems', in S. Mahmoudi, P. Leviner, A. Kaldal and K. Lainpelto (eds.) *Child-Friendly Justice: A Quarter of a Century of the UN Convention on the Rights of the Child* (Leiden: Brill| Nijhoff 2015) 55-72.

## Child Protection in Kenya

**Dr Scholastica Omondi**<sup>65</sup> in her paper looks at Kenya's court system for cases involving child sexual assault. She reiterates that every child in the country is entitled to child protection as a constitutional right. Her study looked at the trial system used for child sexual assault and discovered that it was insufficient for safeguarding kid witnesses. She argues, along with other procedural theorists like **Rawls**<sup>66</sup> and **Galligan**<sup>67</sup>, that equitable processes that guarantee equal rights, opportunities, and resources for everyone in a conflict are the only way to achieve the purposes of substantive laws. Scholastica suggests creating procedural legislation to guarantee the utilisation of children's rights to safeguard those who have been sexually abused. Her work just focused on the court environment and left out socially displaced youngsters, which is a void that this research aims to fill.

**Leah Ndimurwimo and Leonard Opara** in their paper, **Access to justice for Internally Displaced persons: the Global Order**<sup>68</sup> focused on internally displaced people when examining the displacement of children. IDPs are those who have been uprooted from their social and economic environments. They are forced to live as squatters within their own country's borders, disrupting their cultural and educational environment, and as a result, they lack a permanent home. Therefore, internal displacement creates a circumstance that denies these types of children accessibility to the mechanisms of justice and ensues into the infringement of their fundamental human rights.<sup>69</sup> They are denied recourse to justice in a variety of ways, including because they are hopeless, unstable, and uncertain.

In contrast to the case of refugees, they observe in their article that States have not implemented any significant or well-coordinated policies to give emergency support to IDPs.<sup>70</sup> Ndimurwimo and Opara contend that to effectively address the situations and advance the social and economic rights of internally displaced minors and meet their immediate needs, the international community, civil society, NGOs, and other humanitarian organizations must be made aware of the horrific conditions that these children are living in.<sup>71</sup> It is only then that adequate supporting justice reforms can be made. This paper seeks to recommend these said reforms at the culmination of the study.

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<sup>65</sup> Dr. Scholastica Omondi (Ph.D.), 'An Evaluation of Child Sexual Abuse Trial Procedure in Kenya' (2014) 2(4) Journal of Research in Humanities and Social Science 11-63.

<sup>66</sup> John Rawls, *A Theory of Justice* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press 1971).

<sup>67</sup> D. J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (1997).

<sup>68</sup> Leah Ndimurwimo and Leonard C. Opara, 'Access to Justice for Internally Displaced Persons: The Global Legal Order' (2021) 6(1) Journal of Law Society and Development.

<sup>69</sup> *ibid* 1.

<sup>70</sup> *ibid* 15.

<sup>71</sup> *ibid*.

**SM Kinyanjui's** thesis, **A Genealogical Analysis of the Criminal Justice System in Kenya: Rebirth of Restorative Justice for Juveniles**<sup>72</sup>, the court system of juveniles discussed by the author in Kenya since its independence as well as its varied successes and criticisms for ensuring that everyone's rights to seek justice are fully realized. Additional literature is **The Undugu Society of Kenya and the Consortium for Street Children's** and **CRADLE's**<sup>73</sup> paper that includes a survey that was done to learn more about the issues that street kids encounter when they either end up in trouble with the law or when they are arrested and wrongly charged because of their social and economic standing. Given that it gives data on how street children are handled by Kenya's juvenile court system, it will be useful for this research study which will consequently make reforms to cater for all minors and not just street children.

### Child Protection in South Africa

**Adam Cooper**<sup>74</sup> explores that both historically and today, South Africa's child justice policies are intimately entwined with the prevailing ideas from which they have developed. African customary law was overtaken by Roman-Dutch and English laws throughout the colonial era, which resulted in more harsh child punishment policies and procedures as contended by **Skelton and Tshehla**.<sup>75</sup> Racial divisions created by legislation during the oppressive apartheid era veered to an upsurge in the racialization of minor justice policies. In the post-apartheid era, child justice policy has been impacted by the principles of constitutional democracy within the framework of progressive concepts of restorative justice and human rights discourse. Although the modern policy framework is based on the commendable restorative justice model, there is still a great deal of economic and social inequalities because of the effects of colonialism and apartheid. This thesis seeks to make contributions towards the solving of these socio-economic inequalities.

**Taylor and Triegaardt**<sup>76</sup> note that South Africa's child welfare laws and policies are centred on a protection model that fights penury and purposes to remedy the wrongs brought on by the mechanisms of the castigatory benefits that impacted the majority of people during the apartheid era. According to one definition, developmental social welfare refers to a welfare system that emphasizes "a rights-based perspective, economic and social development, democratization and involvement, a pluralist strategy, and overcoming the macro and micro divide." In **The current landscape of child protection services in South Africa: a systematic review, Strydom, Orme and Schiller**<sup>77</sup> nonetheless stipulate, that South Africa typically trails a child welfare schematic

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<sup>72</sup> SM Kinyanjui, *A Genealogical Analysis of the Criminal Justice System in Kenya: Rebirth of Restorative Justice for Juveniles?* (2009).

<sup>73</sup> CRADLE and The Undugu Society of Kenya and the Consortium for Street Children, *Street Children and the Juvenile Justice in Kenya* (2011).

<sup>74</sup> Adam Cooper, 'Juvenile Justice in South Africa' in Marvin D. Krohn and Jodi Lane (eds.) *The Handbook of Juvenile Justice* (1<sup>st</sup> ed. John Wiley & Sons 2015) 65.

<sup>75</sup> A. Skelton and B. Tshehla, 'Child Justice in South Africa' Institute for Security Studies Monograph 150.

<sup>76</sup> V. Taylor and J.D. Triegaardt (eds.) *The Political Economy of Social Welfare Policy in Africa: Transforming Policy Through Practice* (Cape Town, South Africa: Oxford University Press).

<sup>77</sup> Marianne Strydom, Julie Orme and Ulene Schiller, 'The current landscape of child protection services in South Africa: a systematic review' (2020) Social Work/Maatskaplike Werk.

that prioritizes legislation and regulatory obligation to protect minors from exploitation when it pertains to assisting in youngster protection.

With the implementation of new rules and initiatives to implement a Western standard of participation, the minor safeguard scheme in post-apartheid SA has undergone varying modifications as evaluated by **Schmid**<sup>78</sup>. Such include legislation like the Child Justice Act. In his paper, **An Evaluation of the Child Justice Act**, **Melissa McGregor**<sup>79</sup> notes that in a critical assessment of the act that emphasizes the alternate solution of siphoning issues away from the criminal judicial system as a core component of the new system for children, the act aims to establish a criminal justice process for children who violate the law that affirms the values underlying the Constitution and the nation's international obligations. Children whose issues are not deflected are treated per those principles.

Mutual respect is a fundamental restorative virtue that fosters trust and good faith among individuals. According to **Howard Zehr**<sup>80</sup>, restorative justice is a practice in which those who have a stake in an offence take part to jointly recognize and resolve grievances, needs, and responsibilities to repair the harm and attempt to set things right. When accepting responsibility, there must be a connection between the harm caused and the steps taken to make things right. **The South African Law Reform Commission** published a dialogue study on restorative justice in 1997.<sup>81</sup> According to its definition, restorative justice is a way of dealing with criminals and victims that emphasizes settling disputes that result from criminality and treating the basal causes that contributed to it. **Shearing and Foster**<sup>82</sup> examine how restorative justice offers a flexible framework that fosters the use of a variety of community, family, and grassroots institutions by the police, but the implementation of this strategy requires professional, well-trained officers who can make use of these resources. This research paper seeks to evaluate how adequate policing structures are required to foster restorative justice.

## Chapter Breakdown

There are five chapters in this paper.

**Chapter One:** The chapter elaborately pictures the underlying study problem. The chapter contains the study's background, the general and specific objectives, the hypothesis, the justification for the research and the significance of the entire study. The chapter further contains the theoretical frameworks and literature review that informs the study.

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<sup>78</sup> J. Schmid, 'Trends in South African child welfare from 2001-2010' (2012) Centre for Social Development: Johannesburg, South Africa.

<sup>79</sup> Melissa McGregor, *An Evaluation of the Child Justice Act* (2010) 13.

<sup>80</sup> Howard Zehr, *The Little Book of Restorative Justice* (2002) 34.

<sup>81</sup> South Africa Law Commission, *Sentencing: Restorative Justice* (1997) Issue Paper 7, 4.

<sup>82</sup> C. Shearing and D. Foster, 'Back to the future in South African security: from intentions to effective mechanisms', in E. van der Spuy, S. Parmentier and A. Dissel (eds.) *Restorative Justice: Politics, Policies and Prospects*. (Cape Town: Juta and Co. 2007).

**Chapter Two:** To guarantee that this group of children has justice access, this study investigates the degree to which the right of socially uprooted children is integrated into our administrative, legal, and policy frameworks. The Children Act as well as the Kenyan Constitution are discussed in the chapter's first half as protecting the right of youngsters who have been socially displaced to express themselves. The application of these minors' right to be catered for by the judiciary at various levels for young people who have breached the law will be examined in the following section.

**Chapter Three:** Captures the legal framework on child justice as discussed from articles and international instruments.

**Chapter Four:** Compares how the capacity of socially dislocated children to be acknowledged and take part in administrative, legal, and policy processes is implemented in South Africa.

**Chapter Five:** This chapter will give the research's summary, conclusion, and recommendations.

## CHAPTER TWO: KENYA’S LEGAL AND POLICY FRAMEWORKS GOVERNING THE RIGHT OF SOCIALLY DISPLACED CHILDREN TO BE HEARD AND TO PARTICIPATE IN JUDICIAL PROCEEDINGS

### Introduction

This section looks at how the rights of socially displaced children are incorporated into our administrative, policy, and legislative institutions to make it easier for this group of minors to get justice. This is investigated in terms of its application in legal proceedings. The first section of this chapter will look at how the 2001 Children Act and the Kenyan Constitution define the liberties of socially displaced minors. The next section will look at how the right to be heard of socially displaced minors is employed within the court system at various levels for juveniles who have breached the legal rules in place.

### Children’s Access to Justice in Kenya

The Kenyan government has created, adopted, and passed laws to safeguard children. In particular, it extensively protects minors’ rights in Article 53 as well as emphasizes the significance of considering the minor's overall best interests in all instances involving youngsters. This emphasis on equal justice access is reflected in the 2010 Kenyan Constitution since it is a constitutional right.<sup>83</sup> The 2001 Children's Act makes facility for the same. The cornerstone of Kenyan legislation that outlines children's rights while also ensuring their protection, development, and safety is the Children's Act of Kenya. Access to justice for children continues to be a vital tool for strengthening the protections for the rights of minors as stipulated in numerous legislative documents.

### The Normative Content of the Right to be Heard

The Kenyan 2010 Constitution elaborately defines the essential freedoms and liberties of children.<sup>84</sup> Nonetheless, it has not taken a distinct stance on the fundamental principles governing the operation of minors' rights as detailed in the ACRWC as well as the ICRC.

Rather than that, the Constitution takes a two-pronged approach. This includes the specific attribution of specific rights.<sup>85</sup> The primary goal of the concept is to guarantee that minors are handled in a manner that is consistent with the need to promote the minor's restoration to the community while also taking into account their age.<sup>86</sup> Advocacy, counsel, child-friendly

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<sup>83</sup> Dr. Scholastica Omondi (Ph.D.) ‘An Evaluation of Child Sexual Abuse Trial Procedure in Kenya’ (2014) 2(4) *Journal of Research in Humanities and Social Science* 11.

<sup>84</sup> The Constitution of Kenya, 2010, Art. 53.

<sup>85</sup> *ibid.*

<sup>86</sup> Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (The Hague: Martinus Nijhoff Publishers 1999) 703.



information, the right to self-resolve disputes, and access to legal aid are just a few examples. State Parties should devise mechanisms for investigating, reporting, preventing, identifying, referring, monitoring, and treating minors, among other things.

### The Best Interest Principle

The doctrine of a minor's best welfare ought to direct the resolution of all cases affecting children.<sup>87</sup> Even though the term's definition is up for debate "best interests of the child," it usually denotes the factors that judicial institutions take into account when determining what sorts of facilities, activities, and instructions will best aid youngsters and who is most competent to care for them.<sup>88</sup> Every matter that concerns a youngster should take into deliberation the best interest of such a minor. Kenyan courts have defined the minor's principle of the most favoured interest as an objective based on the minor's discernible aspirations. The same should be interpreted broadly and purposefully, as it is the human rights concept applicable to minors, as means of maximizing the available benefits of the rights.<sup>89</sup>

Yvonne Dausab has explained these principles in a very straightforward manner. According to her, including the child before a resolution that will affect the youngster's life is made is in the youngster's best welfare.<sup>90</sup> She asks the relevant institutions to take the following into account whenever they are evaluating a problem involving a child to put it in perspective:

- The particular interest in the issue
- The special interest's nature
- If the child's wants are objective or subjective, the length of the interest, and the factors used in evaluating the interest.<sup>91</sup>

The overarching message of the principle is that anytime policies, regulations, or choices are made that have an immediate or long-term impact on children, deliberation ought to be granted to their best interests. Article 53(2) of Kenya's 2010 Constitution and the Children's Act under section 4 both recognize this notion. The Kenyan courts have likewise acknowledged the importance of this principle in all issues involving juvenile justice. In ***P K v Republic***<sup>92</sup>, the Nakuru High Court reversed a magistrate's court's verdict to sentence a minor to life in prison for defilement and released him by using the best interests principle. In another case, ***KMM v Republic***<sup>93</sup>, the High Court in Machakos upturned a magistrate's court's judgment that had found a youngster guilty of violent robbery and given him the death penalty. The high court ruled that the minor, who had

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<sup>87</sup> *ibid.*

<sup>88</sup> Legal Information Institute, 'best interests (of the child)' [https://www.law.cornell.edu/wex/best\\_interests\\_\(of\\_the\\_child\)](https://www.law.cornell.edu/wex/best_interests_(of_the_child)) accessed 17 October 2022.

<sup>89</sup> *Kigula and Others versus Attorney-General* [2005] 1 EA 132 & *S v Zuma* [1995] 2 SA 642 (CC).

<sup>90</sup> Yvonne Dausab, 'The best interest of the child', in C. Oliver (eds) *Children's Rights in Namibia* (Ruppel Macmillan Education, Namibia 2009).

<sup>91</sup> *ibid.*

<sup>92</sup> *P K v Republic* [2019] eKLR.

<sup>93</sup> Machakos High Court Criminal Appeal No. 114 of 2015.

already spent a year in jail, had been severely wronged because, had the sentence been administered following the law, he ought to have been attending school or another suitable institution.

According to Jean Zermatten<sup>94</sup>, the interests of children fall in the realm of both substantive and procedural rights. The state as the custodian of rights is obliged to design mechanisms that facilitate the realization of the same. Further, relevant authorities ought to comply with the necessary procedures. The impact and concerns of the child are examined in the judicial and administrative decision-making processes as a matter of procedure. While effecting these rights of children, due consideration must also be given to connected rights such as freedom of speech<sup>95</sup>, access to information<sup>96</sup> and rights of an arrested person.<sup>97</sup>

Every person has the fundamental freedoms and rights enshrined in the Bill of Rights.

All person's liberties and rights are acknowledged under the Bill of Rights. The government and all of its organs are also given the responsibility of realizing, respecting, observing, promoting, and protecting the Bill of Rights' fundamental freedoms and liberties. Article 24 of the Kenyan Constitution, which outlines permissible restrictions on rights, must be applied justifiably.<sup>98</sup> Accordingly, the authorities involved in administrative and judicial processes involving socially displaced children should not discriminate against them based on their status.

To exercise this right, the government is expected to adopt actions, such as affirmative action laws and programs, aimed at redressing any disadvantage that groups or people have suffered as a result of prior discrimination.<sup>99</sup> As a vulnerable group, the State is needed to put in operation affirmative action programs aimed at ensuring that socially displaced children are represented and take part in governance and other sectors of life.<sup>100</sup> The standard of measures to be taken is that of genuine need.<sup>101</sup> Further, special actions should be taken in the best interest of minors to access opportunities in life.<sup>102</sup>

The protection of the right to be heard should be done *in tandem* with the need to advance the self-respect of socially displaced children.

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<sup>94</sup> Jean Zermatten, *The Best Interests of the Child Literal Analysis, Function and Implementation* (2010) [https://www.childsrightrights.org/documents/publications/wr/wr\\_best-interest-child2009.pdf](https://www.childsrightrights.org/documents/publications/wr/wr_best-interest-child2009.pdf) accessed 24 March, 2021.

<sup>95</sup> The Constitution of Kenya, 2010, Art. 33.

<sup>96</sup> The Constitution of Kenya, 2010, Art. 35.

<sup>97</sup> The Constitution of Kenya, 2010, Art. 49.

<sup>98</sup> The Constitution of Kenya, 2010, Art. 21.

<sup>99</sup> The Constitution of Kenya, 2010, Art. 27(6).

<sup>100</sup> The Constitution of Kenya, 2010, Art. 56(a).

<sup>101</sup> The Constitution of Kenya, 2010, Art. 27(7).

<sup>102</sup> The Constitution of Kenya, 2010, Art. 53.

Justice O'Regan stated in the renowned South African case of *S v Makwanyane*<sup>103</sup> that emphasized the importance of the sanctity of life and human dignity as follows:

“The Constitution's significance cannot be emphasized. The acknowledgement of individuals’ intrinsic value is required to define a right to dignity: persons are entitled to be treated with care and respect. As a result, a great number of additional rights contained in the Bill of Rights are founded on this right.”

"At various stages of constitutional interpretation and adjudication, human dignity serves as a guide. It is a value that guides the construction of numerous rights and freedoms. The centrality of the constitutional principle of dignity in construing fundamental rights such as the right to life, the right to equality, and the right not to be subjected to arbitrary punishment has been acknowledged by this Court. Human dignity is also a core constitutional element that weighs heavily in the interpretation of limits. ... Dignity is both a basic principle inscribed in our Constitution and a legally enforceable and justiciable right that must be protected and respected. The principal constitutional breach may be of a more specific right not to be subjected to forced labour, servitude, or slavery, the right to equality, or the right and right to bodily integrity when the value of human dignity is infringed.<sup>104</sup>

Given the foregoing, socially displaced children should be protected from degrading, inhuman punishment, and cruel punishment. This right is one of those inalienable.<sup>105</sup>

Children who have been socially displaced have a constitutional right to receive, seek, and import ideas or information.<sup>106</sup> In *Edmonton journal v. Alberta*<sup>107</sup>, the Canadian Supreme Court (Corey J), underscored the significance of freedom of expression by stating that it facilitates the expression of new concepts and puts forth views about the operationalization of government institutions. Additionally, the Indian Supreme Court stated in *Manika Gandhi v. Union of India* that;

“Open conversation is at the heart of democracy, as it is the only way for a democratic system to redress governmental acts. Democracy demands that in matters affecting the public, public views should be collected through public discussions.”

Rights of socially displaced children become realized when a child has the benefit of full disclosure of information affecting him or her in administrative or judicial proceedings such as to remain silent, reasons for arrest and information on consequences of remaining silent. However, access to information may be restricted to protect private and public interests, including privacy.

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<sup>103</sup> [1995] ZACC 3; [1995] (3) SA 391(CC).

<sup>104</sup> *ibid.*

<sup>105</sup> The Constitution of Kenya, 2010, Art. 25.

<sup>106</sup> The Constitution of Kenya, 2010, Art. 33(1)(a).

<sup>107</sup> [198] 45 CRR 1.

## The Children's Court

To preserve children's rights to be heard and to grant heed to their best welfare, the Children's Act, 2001 establishes<sup>108</sup> the children's court as a specialized institution to have authority to deal with civil proceedings regarding parental responsibility over a child, guardianship, upkeep and custody, care and protection and foster care placement<sup>109</sup>; and criminal responsibility concerning a minor in contravention of the law.<sup>110</sup>

The Act has built-in mechanisms to safeguard the minor's best interests. First is having a separate sitting. The sitting is expected to be conducted in private except with the attendance of parties who are directly affected by the proceedings.

However, due to resource constraints, few magistrates and courts have been designated as special children courts.

Secondly, The Court, according to Section 76(3) of the Act, is enjoined to observe several general principles in conducting judicial proceedings involving a child including:

the minor's emotional, educational and physical needs, the capability of any institution or person to deliver any special medical attention needed for the minor; the probable effect on the minor of any variation in conditions; the minor's sex, cultural background, religion, age and cultural background; any harm inflicted on the minor, or is at risk of being inflicted on the minor, the circumstances of the parent or caregiver to whom the court is of the view that the issue to be appropriate, to look after and provide for the minor; the minor's society's practices and customs; and the minor's exposure to drugs and, in particular, whether there is any addiction on the same on the part of the minor, and the capability of any individual or institution to give medical care or special care that may be needed by the minor.<sup>111</sup>

Thirdly, the Act provides legal aid to an unrepresented child.<sup>112</sup> Under Section 77(2) of the Act;

Any incurred expenses relating to the representation of a minor in a Court of Law under subsection (1) will be paid out of money provided by Parliament.

As a means of providing comprehensive mechanisms for legal aid in Kenya based on constrained resources and previous instances of disjointed and uncoordinated approaches to legal aid programs in Kenya, Parliament enacted the Legal Aid Act.<sup>113</sup> The Act establishes a legal aid fund.<sup>114</sup>

Numerous problems are encountered by several children courts. Some are designed like regular courts, with the magistrate's seat elevated above the others and a severe demeanour that intimidates

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<sup>108</sup> The Children's Act, 2001, s 73.

<sup>109</sup> *ibid* s 73(a).

<sup>110</sup> *ibid* s 73(b), (c) and (d).

<sup>111</sup> *ibid* s 76(3).

<sup>112</sup> *ibid* s 77(1).

<sup>113</sup> The Legal Aid Act 2016.

<sup>114</sup> The Children's Act, 2001, s 29.

even grownups. The courtroom's extraordinary quietness, officers in uniform, and handcuffed individuals, the atmosphere is unpleasant due to people conversing in low tones and their dejected expressions. Adult witnesses in court are tense, suggesting that the atmosphere is intimidating overall. Children who have been socially excluded typically find it difficult to express their opinions in a setting like a courtroom.<sup>115</sup> The administrative structures can be viewed as not being child-sensitive and not taking into account the sensitive needs of children.

### Social Inquiry Reports

According to Beijing regulations, matters in the Children's Court can only be resolved if a Probation Officer or Children's Officer creates a Social Inquiry Report that would aid the judge in rendering the best decision in the good will of the child's "reformation". The mandatory social inquiry report must include information on the kid, such as but not limited to, the child's social background and other crucial details that could help the court decide what orders to issue for the child. The probation officer must consider the children officer's assessment report and consult with other experts who have dealt with the child while writing the social inquiry report. The social inquiry report must be factual, impartial, and free of bias. It must also include specific recommendations and possibilities for any orders the court might wish to issue regarding the kid. The Court must notify the child of the social inquiry report's contents and ensure that the youngster or the child's father/mother, guardian, or legal agent receives a copy of the report after receiving it.<sup>116</sup>

Although this document is a crucial part of diversion, several restrictions and barriers prevent the prompt submission of these reports. These include failing to notify the Children's/Probation Offices of the file by the police or court registry, not having information about a child's home life, and taking too long to get in touch with the child's relatives, who might reside elsewhere within the nation.<sup>117</sup>

### Pre-trial Proceedings

Alternative mechanisms of dispute resolution mechanisms should be employed as the first resort in children's cases. The application of alternative dispute resolution ought to be done in a manner that does not defeat the purpose of the Bill of Rights.<sup>118</sup> The primacy of alternative means of dispute resolution involving children is to promote and safeguard their reintegration and role in society.<sup>119</sup> CRC Committee opines that the responsibility of Countries to propel mechanisms for dealing with minors who break the law should not be restricted to minors who are first-time child

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<sup>115</sup> Scholastica (n 77) 33.

<sup>116</sup> The Children in Conflict with the Law (Practice and Procedure) Rules, 2020, Rule 26.

<sup>117</sup> CRADLE and The Udungu Society of Kenya and the Consortium for Street Children, *Street Children and the Juvenile Justice in Kenya* (2011) 20.

<sup>118</sup> The Constitution of Kenya, 2010, Art. 159.

<sup>119</sup> CRC, Art. 49(3)(b).

offenders or who commit minor offences.<sup>120</sup> Rather, the best method is to gauge whether a minor's wrong could be handled without resorting to legal proceedings.

### Arresting and Detaining Children

Although there may be numerous steps taken to stop adolescent delinquency, it might not be possible to completely eradicate it. Therefore, to help them learn from their errors and receive rehabilitation, children who have committed crimes should be held accountable. The juvenile court system ought to support this. A minor who is charged with a crime first engages with the criminal judicial mechanisms at their arrest's time. The National Police Service Act<sup>121</sup> mandates the police to make arrests in the majority of cases.

Unlawful detention and arrest of minors are prohibited by law. This was observed by the High Court in **M W K v another v Attorney General & 3 others**<sup>122</sup>;

High Court is mandated to construe actions of law enforcement agencies premised on provisions on detention, searching and of minors with the view of Article 53 of the Constitution to gauge if law enforcement agencies have afforded the best interests of the applicant utmost significance.<sup>123</sup>

However, where a child is to be arrested and detained, he/she should be given contact with his family as well as legal aid by the State.<sup>124</sup> Persons in charge of the police station are required under the Child Offender Rules to notify the minor's caregiver, guardians, or parents of the minor's arrest as soon as practicable.<sup>125</sup> Where a minor's parent or caregiver cannot be communicated to immediately, a Children's Officer shall as promptly as probable be informed after the minor's detention so that the police interview can be attended by him/her.<sup>126</sup>

The law requires that an arrested child should as soon as possible, be brought before the Court.<sup>127</sup> A child should not be held in custody, without leave of the court, for longer than twenty-four hours.

Concerning police investigations before or during the trial, the police are required to make sure that the caregiver, guardian or parent, or counsel representing the minor is available during the police interview of the minor.<sup>128</sup>

Gathering of statements and interviews from minors should be taken by trained persons and in an environment that is friendly to the child. When multiple interviews are necessary, they should if

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<sup>120</sup> Committee on the Rights of the Child, General Comment No. 10, para 10

<sup>121</sup> The National Police Service Act, 2011.

<sup>122</sup> [2017] eKLR.

<sup>123</sup> *MWK v Attorney General and 3 others* [2017] eKLR.

<sup>124</sup> The Children's Act 2001, s 18(4).

<sup>125</sup> The Child Offender Rules, Rule 4(2).

<sup>126</sup> *ibid* Rule 4(4).

<sup>127</sup> *ibid* Rule 4(1).

<sup>128</sup> *ibid* Rule 4(3).

possible be taken by one individual, to guarantee the coherence of the approach in the minor's best interests.

Regarding child offenders, the Act provides that;

Every accused child shall be made aware directly and promptly of the charges preferred<sup>129</sup>; if he/she is not able to get legal aid, be given by the State with aid in the presentation and preparation of his/her defence<sup>130</sup>; have the case determined promptly; not be put under duress to confess guilt or give testimony; have free aid of an interpreter if the minor is not able to speak or understand the language used<sup>131</sup>; have the decisions imposed if found guilty revised by a superior court<sup>132</sup>; his privacy guarded; if disabled, be handled with the same dignity as a minor without any disability and be handed special care.<sup>133</sup> The Act further makes a requirement for Children's courts to have a friendly set-up for children.<sup>134</sup>

The Child Offenders Rules specify the conditions and circumstances to facilitate the expression of children. Rule 4(2) of the fifth schedule demands that when a juvenile is detained, the arresting officer is under obligation to notify (a) the child's caregivers, guardians, or parents; or (b) the police on duty.<sup>135</sup>

The police should make sure that the caregiver or parent or the minor's counsel is present.<sup>136</sup> And if a minor's parent or caregiver cannot be reached at all or immediately, an authorized officer or Children's Officer should be present.<sup>137</sup>

To improve the realization of these rights, every court is enjoined in dealing with a minor brought before it to take into consideration the minor's best interests and to take measures for removing him or her from uncondusive environments and for ensuring that appropriate measures be taken for his or her training, education and upkeep.<sup>138</sup> The government has established Children Protection Units in every police station to handle minors who have broken the law.

Research conducted by UNICEF in 2016<sup>139</sup> found that:

Minors on remand in the homes seemed to be fewer than those arrested by the police. This infers that minors are being held in non-designated facilities. Further, concern was raised that minor offenders are housed in remand homes, minors requiring attention and minor victims, in one facility.

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<sup>129</sup> The Children's Act, No. 8 of 2001, s 186(a).

<sup>130</sup> *ibid* s 186(b).

<sup>131</sup> *ibid* s 186 (d).

<sup>132</sup> *ibid* s 186 (e).

<sup>133</sup> *ibid* s 186 (h).

<sup>134</sup> *ibid* s 188.

<sup>135</sup> *ibid* s 194 as read together with Rule 4(2) of the fifth schedule.

<sup>136</sup> *ibid* s 194 as read together with Rule 4(3) of the fifth schedule.

<sup>137</sup> *ibid* s 194 as read together with Rule 4(4) of the fifth schedule.

<sup>138</sup> The Children's Act, 2001, s 187(1).

<sup>139</sup> UNICEF, *Situation Analysis of Children and Women in Kenya 2017* (2018) UNICEF, Nairobi, Kenya. Cover photo © UNICEF Kenya/2016/Noorani.

Conditions in the minor's remand homes were difficult in several instances, mostly due to ageing infrastructure. In many cases, there is a lack of floor space per minor. Minors in detention homes in Murang'a and Nyeri did not have enough space to play. In some instances, the ratio of toilets to minors was too large, in four homes showers were not working, due to either vandalism, water rationing, or there being not fitted. In only a remand home in Kisumu did minors get an education: as in most instances minors are held in remand for prolonged periods, this infringes on their right to education. Inadequate care was given in the medical homes to promotive and preventive medicine as well as to ensure continuity of treatment for HIV and AIDS and Tuberculosis.

Only in extreme cases and for the least possible timespan can a youngster be kept in detainment. A youngster ought to be kept apart from adults and members of the opposite sex while they are in custody. Therefore, a police officer should try every alternative option before detaining a child to fulfil their legal objective. Less invasive techniques ought to be used. This fundamental principle is intended to protect the right to freedom and make it difficult to restrict it, save for justifiable grounds. Second, the traumatizing and humiliating impacts of detention can worsen in already vulnerable children and can harm their physical and emotional health.<sup>140</sup> The courts have recognized this element. For instance, Mativo J acknowledged that jails and police stations lack the conditions needed to serve as homes or places to raise children, causing them psychological and social issues that influence their development. This fact is corroborated by scientific data. As a result, he supported juvenile detention as a last option and for the least amount of time as permitted by Article 53(2) of the Constitution.<sup>141</sup>

The situation for girls is a bit precarious since at detention they get exposed to physical, sexual and psychological abuse. This led the government to establish a girl's only borstal institution called Kamae in 2016.<sup>142</sup> The risk is that it might be overwhelmed by overcrowding unless the government takes deliberate steps to establish many such institutions. In *Raduvha v. Minister of Safety and Security*<sup>143</sup>, the South African Constitutional Court tackled the unconstitutional detention and suspected illegal arrest by the police of a fifteen-year-old girl. To prevent law enforcement from making an arrest, the girl had to step in between her mother and the cops. This was the first instance where the court had the chance to specifically address the facts surrounding the case, taking into consideration Section 28(2) of the South African Constitution and the pre-trial detention of a minor criminal in police custody. A child should only be arrested and held in police custody when there is no alternative less invasive way to ensure that they appear in court, the Court declared, underlining the significance of minors' rights within the provided constitutional framework. Detention ought to be an extreme measure. In its ruling in the child's favour, the Court ruled that the officer doing the arrest "must" use the Bill of Rights to establish a

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<sup>140</sup> *MWK & Another v Attorney General & 3 Others* [2017] eKLR, para 76.

<sup>141</sup> *ibid* para 77.

<sup>142</sup> Bureau of Democracy, Human Rights and Labour, US Dept. of State, *Kenya 2018 Human rights Report 5* (2018); International Juvenile Justice Observatory.

<sup>143</sup> *Raduvha v Minister of Safety and Security* [2016] (2) SACR 540 (CC) 24.



standard judgment while arresting a child, giving special weight to the primacy of the best welfare of the minor in question.<sup>144</sup>

### Child-Friendly Justice During Judicial Proceeding (Trial Process)

Articles 49 and 50 of the Constitution and section 186 of the Children Act decree a dignified, expeditious and fair process of justice. The Children Act stipulates that in any procedural issues regarding a minor, the minor will be given a chance to air his view, and that view will be taken into consideration taking into consideration the minor's understanding and age.<sup>145</sup> The right to be heard is to be effected without discrimination based on residence or local connection, disability, race, economic or another status, political, social, conscience, birth, colour, religion, opinion, language, custom, creed, tribe, origin, or sex.<sup>146</sup>

At the beginning of judicial proceedings, the court should ensure that the child who otherwise is unrepresented obtains legal representation. However, very few competent advocates are willing to take up these cases leaving them to young lawyers who have not acquired the necessary experience to mount a serious legal representation.<sup>147</sup>

Secondly, all cases involving children should be heard without undue delay based on the premise that delays in the hearing of a case would be to the detriment of the minor's interest. In criminal proceedings, where the case of a minor is not finished in three months after his taking plea, the matter will be thrown out and the minor will not be legally responsible, in respect of the same offence to any further proceedings.<sup>148</sup> The maximum duration of custody for a minor is 6 months, following which the youngster is released on bond when a case is decided by a higher judicial institution instead of the Children's Court.<sup>149</sup>

Courts in Kenya and comparative jurisdictions have attempted to define the paramountcy of the best interest principle. While seeking to define the best interest principle concerning custody Justice Kariuki in NMM v JOW<sup>150</sup> stated that;

The best interest standard can be difficult to define but designed some factors to give effect to the principle in custody situations including the Wishes of the minor (depending on his level of understanding); the Physical and mental health of the parents; Cultural and/ or religious considerations; Requirement for continuation of steady home environment; Opportunity and support

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<sup>144</sup> R. Fambayasi and A. Moyo, 'The best interests of the child offender in the context of detention as a measure of last resort: A comparative analysis of legal developments in South Africa, Kenya and Zimbabwe' (2020) South African Journal on Human Rights 8-9.

<sup>145</sup> The Children's Act, 2001, s 4(4).

<sup>146</sup> *ibid* s 5.

<sup>147</sup> Odongo, G.O 'The Birth of a Regional Juvenile Justice Network in East Africa' (2004) 6(1) Article 40 10.

<sup>148</sup> Fifth Schedule to the Children's Act of Kenya, s 109(2).

<sup>149</sup> *ibid* s 109(3).

<sup>150</sup> [2016] eKLR.

for contact with family; reintegration to the community; Sex and Age of minor; Parental use of excess emotional abuse or discipline; and Evidence of parental alcohol, drug or sex abuse.<sup>151</sup>

Where a minor is called into the proceedings as a witness, the court is enjoined to conduct a *voire dire* to appreciate whether the minor understands the import and nature of the testimony. The Appellate court in **Johnson Muiruri vs Republic**<sup>152</sup> gave its direction on the issue of *voir dire* examination as follows:-

We wish to bring to the attention of our courts the proper procedure to be followed when bringing minors as witnesses. According to Peter Kariga Kiume, "When a child of minor years is summoned as a witness before a court, the court is expected to evaluate whether the minor understands the meaning of an oath through a voir dire examination." If the court is dissatisfied, his unsworn testimony may be admitted if the court believes he possesses sufficient intelligence and understands the responsibility of speaking truthfully. In the latter case, the suspect cannot be convicted solely based on that evidence unless it is corroborated by material evidence implicating him (Section 19, Oaths and Statutory Declarations Act).

In many cases, Kenya's Children's Act illustrates the youngster's entitlement to partake in and be heard and perceived in proceedings. To begin, agreements regarding parental responsibilities<sup>153</sup> confirmed by the court, with the court's permission, upon application by among others a minor, can be determined by order of the court.<sup>154</sup> Secondly, a minor aged fourteen years and above must agree to his or her adoption.<sup>155</sup> The guardian ad litem is charged with the following duties under Section 160(2) of the Act:

Protect the rights of minors before the outcome of the adoption process; Inform and examine the court on the facts behind the minor's adoption; Recommend the issuance of interlocutory orders or an adoption order concerning the minor; intervene on the minor's behalf in the event of the withdrawal of any consent and arrange for minor's care, and undertake such responsibilities as may be directed by the Court or prescribed by law from time to time.

Fourth, a legal aid program is incorporated as part of the Act for a minor brought before judicial proceedings. The court is empowered to, direct that the minor be given legal representation, where the minor is unrepresented.<sup>156</sup> The National Legal Aid Service was formed by the Department of Justice in the State Law Office with the mission of educating Kenyans about legal aid and serving as a primary source of legal counsel and representation for the nation's poor, vulnerable, and marginalized citizens. The objective of legal aid, which is an individual liberties problem, is to offer an efficient, practical, and cost-effective service delivery model for legal assistance that improves everyone's access to justice. The Legal Aid Act<sup>157</sup> formulates the National Legal Aid Service, which offers legal aid services to qualified individuals covered by the Act at state-funded

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<sup>151</sup> *ibid.*

<sup>152</sup> [1983] KLR 447, 448-450

<sup>153</sup> The Children's Act, 2001, s 26.

<sup>154</sup> *ibid* s 26 (2) and (3).

<sup>155</sup> *ibid* s 158(4)(f).

<sup>156</sup> *ibid* s 77 (1).

<sup>157</sup> Legal Aid Act, 2016.

rates.<sup>158</sup> Children's issues are among the situations that qualify for legal aid from the Legal Aid Service.<sup>159</sup>

Despite these protective measures under the law, Human Rights Watch in their report (1997)<sup>160</sup> documents that;

Minors are put to trial without special protections given to them under the Laws of Kenya as their cases are mostly heard along with adult cases in regular courts. However, even in instances when children's cases are before children's courts, the proceedings are hurried and the minors are not handed a fair chance to be heard.

The report further notes that:

None of the interviewed minors was ever represented by advocates in either regular or children courts, and a small number stated that a caregiver appeared at the proceedings. Frightened in court, minors do not often comprehend the import and nature of the proceedings. Some stated that through the pressure they receive from magistrates, they were forced to plead guilty to avoid long periods of detention.<sup>161</sup>

### Post-Trial (Sentencing)

The court's ability to penalize juveniles who break the law is defined in very specific terms. Institutionalization of adolescents who breach the law should be the last resort under Article 53 and sections 40 and 191.<sup>162</sup> Furthermore, by dint of 191(2) of the Act, 2001, physical punishment be exercised upon children. Particularly, this provision provides that;

- (1) Subject to this Act and other applicable laws, where a minor is tried for an offence and found guilty, the court may:
  - (a) Discharge him pursuant to section 35(1) of the Penal Code (Cap. 63);
  - (b) Discharge him upon his entering into a recognizance;
  - (c) Make a probation order against the wrongdoer pursuant to the Probation of Offenders Act (Cap. 64);
  - (d) Commit the wrongdoer to the care of a fit person;<sup>163</sup>

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<sup>158</sup> *ibid* s 35(1).

<sup>159</sup> *ibid* s 35(2).

<sup>160</sup> Human Rights Watch, *Juvenile Injustice: Police Abuse and Detention of Street Children in Kenya* (1997) <https://www.refworld.org/docid/3ae6a7e94.html>. accessed 4 May 2021.

<sup>161</sup> *ibid*, Note 77.

<sup>162</sup> The Children's Act 2001.

<sup>163</sup> *ibid* s 191.

Therefore, remedies regarding children should not necessarily take a conventional approach to sentencing but should be considered holistically to ameliorate the minor's pedagogical orientation bearing in mind the minor's views and wishes.<sup>164</sup>

However, the application of the proscribed sentencing poses a two-tier lacuna: how to deal with the different developmental stages of a teenager; and how to deal with an offender who at the time was a child but at conviction attains the age of majority. Graduated sentencing is meant to rehabilitate and correct a young wrongdoer while taking into consideration the primary objective of safeguarding the minor's life and promoting his well-being. Therefore, an offender of majority age can only be released after serving a custodial sentence.

This has been intimated in some judicial rulings. In **Nakuru Criminal Petition No. 3 of 2015**, Justice Joel Ngugi observed the decision in **Daniel Langat v. R** where the court found that:

“Only two sorts of lawbreakers are recognized by our legal system: minor lawbreakers (those under the age of eighteen) and adult lawbreakers (those aged eighteen and over).

The legal system does not distinguish minors' different developmental phases, especially those in their adolescent years, who are stereotypically both in need of protection and care while also posing a risk to the community owing to their deviant conduct. Children who are aged sixteen years and above can be detained in borstal institutions.

The Court of Appeal in **JKK v. Republic** replaced a death verdict with a prison term of twelve years in an instance where the appellant was a youngster at the point of his wrongdoing but had turned 21 years at the time of punishment by the court.

Regarding the maximum period of custody of three years in borstal institutions, the courts have inclined to circumvent this on the foundation that the period is not enough to rehabilitate the child offender. In the case of **Republic v P M K**<sup>165</sup> Justice Joel Ngugi held that:

“As per our laws, 3 years is the maximum number of years in which a person may be locked up in custody in a Borstal Institution. In this instance, this duration is not sufficient to rehabilitate fully the individual and to make sure family and public security and safety. Given the instant conditions, the Subject is sentenced as follows:

- a. Be locked up in custody for three years at Shikusa Borstal Institution
- b. Thereafter, the subject is to be transferred to and serve a further sentence of two years in an adult prison.”

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<sup>164</sup> Liefwaard T. and Doek J.E. (eds.), *Litigating the Rights of the Child. The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Dordrecht: Springer, 2015) 231–248, DOI: 10.1007/978-94-017-9445-9.10.1007/978-94-017-9445-9\_14inLiefwaardT.andDoekJ. E.

<sup>165</sup> [2018] eKLR.

## Age of Criminal Responsibility

A person, eight years or under is not responsible criminally for any omission or acts<sup>166</sup> whilst “an individual below 12 years is not responsible criminally for omissions or acts, except if it is substantiated that during the making the omission or the doing of the act, he could be aware that he should not make the omission or do the act.”<sup>167</sup> The growth and evolution of the human brain, on the other hand, has led to medical advances that have made criminal responsibility insufficient.

## Human Rights Watch

A global NGO with its head office in New York City, Research and advocacy on behalf of human rights is done by Human Rights Watch (HRW). The group frequently promotes rights on behalf of migrants, children, political prisoners, and refugees. It also exerts pressure on those who violate human rights, including governments, businesses, and business leaders.<sup>168</sup> The UDHR and other global human rights standards that Human Rights Watch believes to be violated are the subject of research reports it publishes. These reports serve as the foundation for exposing human rights violations and urging governments and international groups to make changes. Researchers carry out fact-finding missions to look into suspicious circumstances while also using diplomacy, keeping in touch with victims, documenting individuals and the public, and providing the necessary security for them in urgent situations and at the appropriate time. These missions result in coverage in local and global media.<sup>169</sup>

According to HRW, many times, the protections to which children all over the world (including nations like Kenya) who are detained and arrested for alleged misconduct are entitled are not provided. Minors are frequently charged and given sentences aimed at behaviours that should not qualify as crimes, such as truancy or misconduct at home. Some governments have a lower minimum age for criminal liability than the generally accepted worldwide standard of 14 years. Certain children may also be treated as adults in some states during their trial and sentencing, notably older adolescents or young people charged with exceptionally heinous offences. Some countries still use the death penalty, the life without parole option, and corporal punishment.<sup>170</sup>

Street children's all-too-common path from the streets to a police-station detention centre, from incarceration to trial, from the court to confinement in remand facilities, and eventually from judicial custody to imprisonment in prisons was chronicled by HRW in their 1997 study on juvenile injustice. The report details how the Kenyan police treated street children, as well as the justice system for minors as a whole. In Kenya, street kids deal with a variety of challenges and

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<sup>166</sup> The Penal Code, s 14(1).

<sup>167</sup> *ibid*, s 14 (2).

<sup>168</sup> Human Rights Watch, *Strategic Plan: The Netherlands Fiscal Year 2022 – 2021/2022 & Fiscal Year 2023 – 2022/23*.

<sup>169</sup> *ibid*.

<sup>170</sup> HRW, ‘Juvenile Justice’ < <https://www.hrw.org/topic/childrens-rights/juvenile-justice> > accessed 17 October 2022.

dangers daily. Merely because they are homeless, they are frequently arrested. After being detained, street children in Kenya are handled through the parameters of the child juvenile system, frequently by civilian-clothed police in roundup operations. Before their cases are resolved, the children move back and forth between detention facilities and court. They may well be finally sentenced to facilities such as authorized schools, borstal institutions, or adult prisons after spending unlimited amounts of time in confinement where they are mistreated and exploited. These facilities do little to better their lives.<sup>171</sup> Furthermore, the methods used to take away street children's freedom and place them in these facilities do not adhere to international law's rules for due process. All of these factors have led to changes being made to the juvenile justice system.

## Conclusion

The chapter examined Kenya's legal infrastructure concerning socially displaced minors' rights and liberties, in particular, the right to voice their opinions, be heard and take part in judicial decisions. The elaborate appraisal of the existing laws demonstrates that Kenya has a comprehensive legal infrastructure that demands strict implementation. The final chapter of this study examines the various enabling provisions and how they have been translated into administrative and judicial procedures and systems, with appropriate recommendations being formulated.

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<sup>171</sup> Human Rights Watch (n 105).

## CHAPTER THREE: INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK GOVERNING ACCESS TO JUSTICE BY SOCIALLY DISPLACED CHILDREN

### Introduction

The chapter commences by recognizing the right of access to juvenile justice because of their vulnerabilities. Generally, minors have insufficient knowledge, and inadequate financial resources and are in the main not set to handle the justice system's complex nature. This makes them ill-equipped to face the justice system. A child may encounter the judicial system as a lawbreaker, victim, witness or minor in need of protection and care. The right of socially displaced children, upon which this study is based, has been a source of contention on national, regional, and international levels.

As a result, this section discusses how the ACRWC and the CRC address access to justice for socially displaced minors. The discussion focuses on the steps and actions that must be taken to guarantee that socially displaced minors have the opportunity to speak up and partake in society. The application and interpretation should be directed at the youngster's well-being.

### The Concept of Access to Justice

Regionally as well as internationally, accessibility to justice for minors is considered in light of the youngster's potential to access justice. Justice access is the cornerstone of a civil and democratic society. It refers to a person's capacity to look for and obtain redress through informal or formal structures of judicial recourse, in conformism with individual rights principles. Access to justice preserves individuals' legal rights and helps them settle conflicts under extensive state authority, although it might be difficult to define.<sup>172</sup> The concept of accessibility to justice includes a person's standing within the judicial process as well as the type, process, and even quality of justice that may be attained in a specific community. It can be used to evaluate a society's level of governance and how well the rule of law is maintained there. While upholding human rights principles, individuals may look for and receive redress through formal or unofficial systems of justice.

Access to justice is an embodiment of structures and systems embedded in law. It connotes recognition of the child's rights by caregivers, equal rights, protection of rights, simplified admission into the justice system, convenient adjudication, trouble-free accessibility of physical legal infrastructure and a conducive environment to deal with children abused or whose rights have been violated or minors accused of committing crimes.

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<sup>172</sup> M Cappelletti and G Bryant, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) *Buffalo Law Review* 181.

## The International Standards on Juvenile Justice

A large array of international laws and rules safeguard children. Even after the UDHR was ratified, minors' rights as individuals under global law were still not secured. The League of Nations adopted the Declaration of the Rights of the Child in 1924 and is credited with establishing child defence under international law. Five guiding principles for children's welfare were outlined in the declaration.<sup>173</sup> Though children were addressed in the statement, many people felt that there was a need to address children's needs in a separate document due to the grave peoples' rights crimes that befell during World War II. This resulted in a United Nations General Assembly (UNGA) decision in 1959 adopting the Declaration of the Rights of the Child. The UNGA later approved the Declaration as the CRC, which went into effect in 1990 and adopted a "child rights approach" to access justice.<sup>174</sup>

The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights were the first to codify the notion of access to justice. The Declaration emphasizes a duty for competent national tribunals or courts to efficiently resolve alleged violations or actions. Furthermore, regardless of age, the term implies the right to a public and fair hearing. The ICCPR is bolstered by the UDHR, which acknowledges redress through legislative, administrative, and judicial means.<sup>175</sup>

The African Union and the United Nations adopted the ACRWC and the CRC, respectively, to safeguard socially displaced youngsters' access to justice. Together, they provide a worldwide normative structure governing the preservation and promotion of minors' rights. The UNGA recognized the right of all individuals, including members of vulnerable groups, to equal access to justice in September 2012.

The Constitution of Kenya 2010 through Articles 2(5) and 2(6), which acknowledge global law as a valid norm within the legal system, make these instruments enforceable in Kenya. However, there is no clear hierarchy between international laws and domestic laws.<sup>176</sup> As such, the application of these laws must be guided by the Treaty Making and Ratification Act, 2012.<sup>177</sup>

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<sup>173</sup> The Geneva Declaration on the Rights of the Child was adopted in September, 1924. It laid five principles; it recognized that mankind owes the best it can to give to the child and it shall declare and accept it as its duty without consideration of race, colour or creed.

<sup>174</sup> Dianah Igati, *Access to Justice: Are Juveniles Guaranteed to the Right to Legal Representation in Kenya?* (2014) 15.

<sup>175</sup> International Convention on Civil and Political Rights, 16 December 1966, Art. 2

<sup>176</sup> T Kabau and C Njoroge, 'The Application of International Law in Kenya under the 2010 Constitution: Critical Issues in the Harmonisation of the Legal System' (2011) XLIV(3) *Comparative and International Law Journal of Southern Africa* 293, 294.

<sup>177</sup> No. 45 of 2012, *Laws of Kenya*.



## The United Nations Convention on the Rights of the Child (UNCRC) 1989

### Introduction

Kenya ratified UNCRC the same year it went into effect in 1990. It outlines the foundation for protecting all minors' cultural, political, social, and economic rights, regardless of ethnicity, religion, circumstances, or ability.<sup>178</sup>

In appreciation of the vulnerability of children and in particular, the socially displaced children, the Convention calls for efficient, minor-sensitive judicial procedures for minors and their representatives. The guiding principle is that minors must be treated appropriately for their age and per the requirement to support the minor's return to one's family and community.<sup>179</sup> These consist:

Giving child-friendly information including but not limited to assistance with self-advocacy, access to and advice from courts and impartial complaint procedures, as well as access to courts with appropriate legal and other aid.<sup>180</sup>

The Convention on Reintegration focuses on the necessity to instill the social surroundings of the child and the duty of society in supporting the minor in becoming a responsible member of the community, rather than rehabilitation, which is focused on the individual.<sup>181</sup>

State Parties must comply with the following requirements:

Take effective protective actions for youngsters in terms of investigating, detecting, preventing, treating, recommending, reporting, and following up in cases involving minor abuse, as well as through legal routes if needed.<sup>182</sup>

While the Convention acknowledges both children's substantive and procedural rights, it is silent on the basic rights required for an effective remedy. As pointed out by Liefwaard and Vonk, the United Nations CRC is still hesitant when it comes to a minor's central liberty to an effective remedy, despite recognizing both substantive and procedural rights for children.<sup>183</sup> As indicated by their activities in violation of the Convention, child exploitation is a prominent occurrence that occurs inside institutions charged with providing care for

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<sup>178</sup> Van Beuren, G., "Children's Rights" in Moeckli, D., Shah, S. and Sivakumaran, S., (eds.), *International Human Rights Law* (Oxford University Press, Oxford, 2018).

<sup>179</sup> Sharon (n 43).

<sup>180</sup> United Nations, Committee on the Rights of the Child, General Comment No. 5, General measures of implementation of the Convention on the Rights of the Child, CRC/GC/2003/5, United Nations, Geneva, 27 November 2003, para. 24.

<sup>181</sup> Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff 1998).

<sup>182</sup> CRC, Art. 19(2).

<sup>183</sup> Ton Liefwaard and Machteld Johanna Vonk, 'The Rights of the Child in the Netherlands: A Family Law Perspective' *The Rights of the Child in a Changing World* (2016).

socially displaced children. Child-friendly remedies are required for access to justice.

### The Right of a Child to be Heard

The Convention on the Rights of the Child through Article 12 has recognized the right in the following terms:

1. States ought to guarantee children who are in a position of expressing their views do so unreservedly. These views ought to be given weight as per the age and comprehension of the child.
2. Legal representation should be accorded to children in conflict with the law where a child cannot give his/her views directly.

There are various ways for creating rights. First, the state must establish appropriate measures, such as laws and rules to ensure that the voices of children are heard. Realistic steps should be taken to guarantee that socially displaced youngsters, in this case, have equal access to the hearing. Secondly, is the opportunity for children to be heard both as individuals concerning a specific issue affecting him/her and collectively as a group of people.

Third, every child "capable of establishing his or her own opinions" is included in Article 12. Findings of the Committee;

States ought, to begin with, the assumption that a minor possesses the capacity to form an opinion: it is not the minor's responsibility to establish this capacity. The minor doesn't need to have complete knowledge of the subject at hand; what is required is that he or she be able to form an opinion on the subject. Article 12 makes no restriction regarding age. The existing assumption is that minors of all ages are capable of developing opinions, even if they are unable to express them verbally.<sup>184</sup>

Fourth, the minor has the "freedom of expression of those views." As such, the minor should not be subjected to undue pressure or influence when expressing his views.

Fifth, the Human Rights Manual expressly states that the Article 12 right applies "in all matters affecting" minors.

Sixth is maturity and age.<sup>185</sup> In particular, Article 5 of the convention emphasizes as follows;

The guidance and protection given by caregivers, guardians and parents or society should put into consideration minors' evolving abilities to exercise their rights.<sup>186</sup>

Concerning judicial proceedings, the child should be permitted to voice their views, especially where they complain of ill-treatment "personally or through a representative of a relevant body or bodies," according to the law. While children must be heard following the law, the minor's capacity

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<sup>184</sup> Committee on the Rights of the Child, General Comment No. 12, para. 134.

<sup>185</sup> M S Pais, 'The Convention on the Rights of the Child' in *Manual of Human Rights Reporting*, OHCHR (Geneva, 1997).

<sup>186</sup> Gerison Lansdown, 'The Evolving Capacities of the Child'(2005) UNICEF Innocenti Research Centre/Save the Children, Florence.

to seek justice should not be harmed by legal assistance from parents or others due to conflicts of interest. The child's participation must be "compatible with the procedural requirements of national law." As a result, the government must put in place proper legal assistance procedures.

In criminal justice situations, practical measures are necessary to assure that a minor's right to be heard is appreciated.<sup>187</sup> These comprise the right to free interpretation facilities, legal and other relevant aid, and effective participation in the processes. When children choose not to make remarks, they have the right to be heard.<sup>188</sup> They also have the freedom to stay silent. States are required to guarantee that every legislation affecting minors considers the minor's best interests.<sup>189</sup> The Guidelines for Child Victims and Witnesses to Crime state that:

Throughout the legal system, minors should be handled with care and compassion, with regard for their individual needs and circumstances, gender, age, maturity level, and handicap, and with the utmost respect for their mental, moral, and physical integrity.<sup>190</sup> Strategies for creating an appropriate balance between the minor's right to protection and the minor's individual opinions and needs are examples of child-sensitive methods.<sup>191</sup>

Judicial proceedings should go beyond conventional remedies by establishing appropriate reparation measures, directing the State to take necessary efforts to support psychological and physical rehabilitation and social reintegration, for example, as well as the right to seek remedy for the effects of a wrong or damage.<sup>192</sup> Therefore, remedies concerning minors should not necessarily be monetary compensation but ought to be considered holistically to ameliorate the minor's pedagogical orientation putting into consideration the child's wishes and views.

Party states are needed to make sure that minors alleged of having violated the penal code, be handled in a way inconsistent with their worth and dignity, and favourable to the reintegrative objective the minor assumes a responsibility that is constructive within the community.<sup>193</sup> The course of proceedings should be punctuated with recesses to make sure minors can concentrate and follow whatever is going on without feeling rushed, exhausted or intimidated.<sup>194</sup>

Proceedings should be conducted without unnecessary delay to take into consideration minors' perception of the passing of time and to restrict the adverse psychological effects of legal proceedings on minors. The full effect of the right requires institutional cooperation within the

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<sup>187</sup> CRC, Art. 37(d).

<sup>188</sup> *ibid* Art. 40(2)(b)(iv).

<sup>189</sup> *ibid* Art 3.

<sup>190</sup> United Nations, Committee on the Rights of the Child, General Comment No. 12, The right of the child to be heard, CRC/C/GC/12, United Nations, Geneva, 20 July 2009, para. 34.

<sup>191</sup> Economic and Social Council resolution 2005/20, Art. 9(d).

<sup>192</sup> CRC, Art. 39.

<sup>193</sup> CRC, Article 40.

<sup>194</sup> *ibid*.

complementary roles of all troupes in the system of justice.

Non-discrimination entails the following:

Any preference, restriction, distinction, or exclusion based on religion, language, colour, race, birth, social or ethnic origin, political opinion, sex, nationality, property, disability, or other factors that may impair the enjoyment and full realization of the rights.

Save the Children in one of its programs has contextualized the prohibition of discrimination among children by recognizing that;

Minors can have diverse requirements and there can be a requirement to handle a minor differently from another to promote equity and address inequality. For example, in judicial proceedings, disabled minors may require particular tools or refugee minors' particular education in their language, to make them take part in conventional education together with other minors.

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

### Introduction

The Children's Convention has been critiqued for imposing Western standards of minor welfare and for failing to address the requirements of the African kid. As a result, when drafting the Charter, several parameters were considered, including the African children's unique circumstances as a result of their cultural, economic, social, armed special safeguards developmental and traditional circumstances, natural disasters and care; the African youngster's health, mental, physical, moral, and social development situation; and their historical background, cultural heritage, and African civilization's values.<sup>195</sup>

The Charter stresses the importance of incorporating African customs when handling children's rights. Traditional norms and cultural perspectives ought to be given critical consideration. It lays out the rights of minors in Africa in detail and establishes universal norms and principles. By integrating collectivist ideas such as learning to live in peace with others, loyalty to authority, competent participation in social activities, and an altruistic and cooperative attitude, the Charter departs from the Eurocentric view of the child.<sup>196</sup>

The Charter founds the African Committee of Experts on the Rights and Welfare of the Child entrusted with preserving and promoting established minor rights to enable its interpretation and

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<sup>195</sup> Preamble to the ACRWC.

<sup>196</sup> Miriam Rosenthal, 'Home to early childhood service: an ecological perspective' (2000) 4(1) Children's Issues 7–15.

application by the African States.<sup>197</sup> Political, administrative, and legal challenges affecting children in a given nation should all be addressed in the report.

### The Right to Access to Justice for Socially Displaced Children Under the ACRWC in Context

The Charter as a means of redressing the vulnerability of children mandates the state through relevant authorities to offer special assistance to socially displaced children.<sup>198</sup>

Historically, children's rights and access to justice have not taken into consideration their best interests. Preliminary reports are required to be submitted during the first two years of the Charter's ratification, and then every three years thereafter.<sup>199</sup>

The Party States are enjoined to give alternative suitable care for these minors including foster placement, tracing and reuniting them with family.<sup>200</sup> A child has been defined in the Charter as one who is below 18 years of age. As such, everyone below eighteen years deserves unconditional defence of the liberties under ACRWC.<sup>201</sup>

The Charter identifies as well as regulates several situations that might give rise to socially displaced children such as harmful social and cultural practices<sup>202</sup>, armed conflict<sup>203</sup>, refugee children<sup>204</sup>, drug abuse<sup>205</sup>, Trafficking, Sale, and Abduction<sup>206</sup> and Children of Imprisoned Mothers.<sup>207</sup>

### Children's Right to Participate and to be Heard in Judicial Proceedings

Children own the right to communicate and participate in judicial procedures either through direct measures or legal representatives.<sup>208</sup> As a result, the right to take part in judicial procedures can be credited to the right and freedom that allows for the expression of oneself.

The right of a socially displaced child to participate in judicial proceedings has been spelt out in the constitution and constitutes the child's best interest.

The involvement of socially displaced children in judicial mechanisms has been spelt out in the 2010 Constitution as well as the Children's Convention.

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<sup>197</sup> ACRWC, Art. 25.

<sup>198</sup> ACRWC, Art. 25(1).

<sup>199</sup> Elizabeth A. Faulkner, 'The Decolonisation of Children's Rights and the Colonial Contours of the Convention on the Rights of the Child.' (2020) 28 International Journal of Children's Rights 66-88.

<sup>200</sup> ACRWC, Art. 25(2).

<sup>201</sup> ACRWC, Art. 2.

<sup>202</sup> ACRWC, Art. 21.

<sup>203</sup> ACRWC, Art. 22.

<sup>204</sup> ACRWC, Art. 23.

<sup>205</sup> ACRWC, Art. 28.

<sup>206</sup> ACRWC, Art. 29.

<sup>207</sup> ACRWC, Art. 30.

<sup>208</sup> ACRWC, Art. 4.

The CRC provides;

All minors able to express sentiments must be guaranteed the right to do so openly in all circumstances and to disseminate those sentiments within the limits prescribed by law.<sup>209</sup>

The overriding objective is to make sure that the dignity of the minor is always upheld.<sup>210</sup>

The Charter establishes safeguards to ensure that state parties do not undermine justice access as a constitutional liberty and right.<sup>211</sup>

The reintegration of the child forms part of the main objective of the charter. Essentially, reintegration's importance can be attributed to the attendant delays during trials that accrue immense physical and psychological torture and stigma thus creating a negative influence on their life in society. However, unlike the CRC<sup>212</sup>, the Charter does not have a specific clause on imprisonment as the last resort.

Cultural, religious and traditional activities that are repugnant to justice should be eliminated.<sup>213</sup> Discrimination due to religion, sex, colour, or opinion of the parent or the child in the conduct of judicial proceedings is outlawed.<sup>214</sup> Concerning sentencing, the Charter outlaws the death sentence for offences committed by minors.<sup>215</sup> In particular, upholding the presumption of innocence of the minor, describing the particulars of an offence in a simple language comprehensible by the child, and faster dispensation of justice.<sup>216</sup>

Suits should be resolved more quickly per internationally recognized standards of criminal procedure, which expressly prohibit unnecessary delay in prosecuting suspects.<sup>217</sup> Michael Wines (2006)<sup>218</sup> states;

The state of prisons in African countries subject minors to emotional and psychological vulnerabilities such as; Congested cells, few beds, limited food and lack of mechanisms for separating children from adults when deprived of their liberty.

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<sup>209</sup> ACRWC, Art. 7.

<sup>210</sup> ACRWC, Art. 17(1).

<sup>211</sup> ACRWC, Art. 17(3).

<sup>212</sup> ACRWC, Art. 37(b).

<sup>213</sup> ACRWC, Art. 1(3).

<sup>214</sup> ACRWC, Art. 3.

<sup>215</sup> ACRWC, Art. 5(3).

<sup>216</sup> ACRWC, Art. 17(2).

<sup>217</sup> United Nations Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/44/49, 1989, Art. 14(3)(c).

<sup>218</sup> Michael Wines, 'For Young, Justice is as Impoverished as Africa - Africa & Middle East - International Herald Tribune' (31 December 2006)

<<http://www.nytimes.com/2006/12/24/world/africa/24iht-web.1224africa.3998715.html>> accessed 10 March, 2021.

### Criticism of the ACRWC relating to its Administration of Juvenile Justice

The juvenile justice system's administration is covered under Article 17 of the ACRWC. It has drawn criticism for lacking important safeguards for kids in legal trouble contained in other human rights documents, like the freedom to question witnesses and the encouragement of diverting cases from the official criminal court system. The ACRWC makes no mention of the requirement that a person's freedom is taken unlawfully or that detention should only be used as a last resort. No clause prohibits life imprisonment without the prospect of liberation (parole) or the ability to challenge a detention order. It should be kept in mind, though, that it supplements the CRC's criminal justice provisions.<sup>219</sup>

### Conclusion

The CRC and the ACRWC have demonstrated that they provide comprehensive regional and global instruments for maintaining the rights of socially displaced children to obtain justice. Such as the right of a minor to have their case heard in a court set-up is at the centre of the issue. Several devices promote child-friendly access to court remedies and processes. To firmly implement this right, states must implement child-friendly and child-sensitive policies, and administrative, and legislative measures. At the very least, the state should guarantee that a minor's engagement in judicial mechanisms and procedures, whether in the shoes of an accused or witness, is protected.

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<sup>219</sup> Penal Reform International and UKaid, *African Committee of Experts on the Rights and Welfare of the Child and fair and effective criminal justice for children*, Justice for Children Briefing No. 1 (2012).

## CHAPTER FOUR: THE RIGHT TO BE HEARD FOR SOCIALLY DISPLACED CHILDREN: A COMPARATIVE ANALYSIS OF THE SITUATION IN SOUTH AFRICA

### Introduction

This chapter compares the legal systems of South Africa's justice framework concerning socially displaced minors' right to participate in and be present at legal proceedings. As a result, the chapter looks at the conceptual nature of vulnerable children as well as the administrative, regulatory, and statutory framework in place to make the right of socially displaced children to participate in legal procedures more efficient and effective.

A proportional study of the juridical schemes of SA was thought valuable and relevant due to the transformative and liberal nature of her constitutional structure which supports the right to access justice<sup>220</sup>, the court system<sup>221</sup> and recognition of special interest groups including children.<sup>222</sup> The basis of the Constitutional Framework of SA is the dignity of the person and shared values<sup>223</sup> as per the constitution, concerning the existing rights and freedoms that all persons are citizens. This also takes into account the rule of law and entrenchment of constitutionalism.<sup>224</sup>

The change that has come about due to the constitutional dispensation was radical in SA. Reputable academics have noted that South Africa is quickly developing into a hub for the international exchange of pledges regarding individual rights and the rule of law. As a result, human liberties and rights specialists cannot discount the nation's advancement. This chapter shall provide a benchmark resource to facilitate the formulation of appropriate recommendations on how to ameliorate the rights of socially displaced minors to take part in and be heard in legal proceedings.

### South Africa's Case

In 1994, after South Africa attained independence, President Nelson Mandela committed when making his first parliamentary address to address issues faced by minors. One of the outstanding points in his address was that children were not supposed to be subjected to prison unless it was the last resort in dealing with such a juvenile offender. The ratification by SA in 1995 of the UNCRC lay the groundwork for change in the legislation and broad policy. Over time, the legislation in South Africa on rights of minors' rights has been heavily informed by the CRC.

The constitution of South Africa has a part that safeguards the rights of minors and expressly provides that the minors' best welfare is of fundamental significance in issues relating to minors.<sup>225</sup>

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<sup>220</sup> The Constitution of the Republic of South Africa, s 34

<sup>221</sup> Chapter 8 of the Constitution of the Republic of South Africa.

<sup>222</sup> The Constitution of the Republic of South Africa, s 28.

<sup>223</sup> *ibid* s 10.

<sup>224</sup> *ibid* s 1.

<sup>225</sup> *ibid* s 28(2).



Concerning detention, no child save for the last resort measure ought to be detained. Where a child is detained, it ought to be for the least possible duration, the minor ought to be alienated from grown-ups and be placed in a state that puts into consideration the minor's understanding and age. Some of the courts in SA have upheld the rights of socially displaced children in most decisions. In **Fredrick v S 2012 (1)**<sup>226</sup>, the apex court of South Africa found that both court levels made errors in the case by imposing lengthy prison sentences notwithstanding the minors being under the majority age at the time of the infraction. The SA constitution recognizes the need for special protection of minors because of their susceptibility to violations and unique interests.

### The Justice System

The Department of Judicial and Constitutional Development, the National Prosecuting Authority, and the Courts system are all part of the SA judicial system. South Africa's legal system is united.<sup>227</sup> Consisting of the Magistrates' Courts, the High Courts, the Constitutional Court<sup>228</sup>, the Supreme Court of Appeal<sup>229</sup>, as well as any additional court founded in terms of a statute of the legislature.<sup>230</sup> Looking at the legal and organizational frameworks of the courts, the court systems may be classified into Family Court Centers, Chiefs Courts, District Courts, Regional Courts and Superior Courts.

The concepts of efficacy, competence, impartiality, independence, and policy or legislative formation are used to guide the use of judicial authority to standardize performance. The principles of impartiality, efficiency and independence are at the core of standardizing the performance of judicial authority.<sup>231</sup> Particularly, the Constitution states that no state organ or person can impede the Court's operation.<sup>232</sup>

### Access to Justice

Normative content and notion of justice access or access to justice as acknowledged by a range of regional and international legal instruments is particularly anchored and forms part of the Laws of the Republic of SA as a basic principle and fundamental right in the legal system for the process of administering justice.<sup>233</sup>

Per Section 34 of the SA Constitution,

Problems which may be resolved by using the law have the right to be decided fairly in a public court or other impartial forum or tribunal.

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<sup>226</sup> SACR 298 (SCA).

<sup>227</sup> Chapter 8 of the Constitution of the Republic of South Africa.

<sup>228</sup> The Constitution of the Republic of South Africa, s 167.

<sup>229</sup> *ibid* s 168.

<sup>230</sup> *ibid*.

<sup>231</sup> The Constitution of the Republic of South Africa, s 165(2).

<sup>232</sup> *ibid*.

<sup>233</sup> *ibid*.

The right to access judicial recourses is anchored within the forum, tribunal, or courts because there are numerous institutions, administrative or quasi-judicial, engaged in various types of dispute resolution. It is stated by Kollapen that;

"The courts are not the exclusive purveyors of justice. The Constitution aims to accomplish both general and social justice, and many players such as the business sector, and autonomous institutions have a distinctive responsibility in attaining justice; hence, access to justice involves much more than court access."

The state has a responsibility to promote, defend, respect, and carry out the articles of the Charter of Rights. These roles aren't well defined. Nonetheless, the duties have the following meanings based on a range of literature assessments.<sup>234</sup>

This right was informed by the past injustices in South Africa of apartheid and the need for the new Republic to be guided by democratic principles. The Constitution of South Africa under Section 8(1) is apparent that;

All state organs as well as the judiciary, executive and legislature are bound by the Charter of Human rights.

Section 36(2) states that;

The words of section 36(1), as well as the provisions of any other portion of the Constitution, should be followed when limiting a constitutionally protected right.

As per Section 36(1), the limitation of rights is protected by the constitution and ought to abide by these subsequent requirements:

The constraints must be endorsed by general law; this means that the test of reasonability and rationality in a democratic society must be based on human dignity and must also take into account the nature, purpose and significance of the limitation. The nexus between the limitation and its purpose must at all times be drawn.

Access to justice is given further effect by the provisions regarding non-discrimination and equal protection under Section 9 of the SA Constitution sets out prohibited grounds for discrimination to include birth, culture, language, conscience, belief, religion, age, disability, pregnancy, sex, sexual orientation, gender and race.

### [The Right to be Heard and Participate in Judicial Proceedings](#)

Section 28 of SA's Constitution expressly makes provision for the involvement of minors in justice mechanisms. This clause lists an array of rights, that includes the right to paternal and maternal care, socioeconomic and basic rights like food, shelter, and the growth of the

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<sup>234</sup> *ibid.*

youngster. By dint of Section 35 of the SA constitution, minors ought to be sentenced for the shortest period and should be placed in different cells from other offenders who are adults. Section 28 of the Constitution recognizes that minors are prone to having their rights violated and that they have unique and specific interests, resulting in the inclusion of special protective measures. In South Africa, the recognition of a minor's rights has been given legal weight.

In the **S v M case**<sup>235</sup>, Sachs J. stated that;

"All minors are guaranteed the right to express themselves as both social and independent individuals, to explore in ways that best suit them, to appreciate their emotions, and most importantly to make choices that are appropriate to their development and growth. Further, they should be accorded the opportunity to live in a caring and safe environment devoid of unnecessary trauma, fear, and violence."<sup>236</sup>

It has been observed by authors that the constitutional status of the right of a child in the SA constitutional context as exemplified by the Court is that of protection together with the freedom to discover, and emancipation merged with grownup direction and guidance.<sup>237</sup>

Gallinetti<sup>238</sup> posit on the minor's best interest that the approach of the Court;

"Emphasizes the need to mainstream the best interest's concept in all areas involving children, even when time-honoured legal doctrines or laws have never been considered thereto previously."

South Africa's Constitutional Court in **AB and Another v Pridwin Preparatory School and Others**<sup>239</sup> held that;

The fact that minors have rights and ought to be taken seriously as human beings is not just an abstract idea; it is an acknowledgement of minors as full members of society. It ought to direct the manner adults look at minors and handle issues affecting minors. For that reason, minors have rights not only in the future but in the present as well. It is in the society's and minors' interest to have a conducive environment that nurtures the dignity of minors. The future is dependent on

The capacity of a youngster to voice their opinions ought to be taken into consideration when evaluating an assessment of their well-being.<sup>240</sup> Every matter involving the child, including adoption, access, and custody, involves the best interest criteria. As per **S v M (Centre for Child Law as Amicus Curiae)**,

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<sup>235</sup> *S v M (Centre for Child Law as Amicus Curiae)* [2008] 3 SA 232 (CC).

<sup>236</sup> *ibid.*

<sup>237</sup> *Sloth-Nielsen and Kruuse* [2013] IJCR 671

<sup>238</sup> Gallinetti J, '2kul2Btru: What children would say about the jurisprudence of Albie Sachs' (2010) SAPL 115.

<sup>239</sup> CCT 294/18.

<sup>240</sup> The Constitution of the Republic of South Africa, s 28(2).

Best interests must come first, taking into account the minors' interests; second, any opposing interests must be excluded from the inquest; third, appropriate weight must be assigned to the minors' interests; and fourth, minors' interests and rights must be considered separately from those of their parents. Section 28(2) urges courts to take an active role in safeguarding and promoting children's best interests.

The ability and opportunity to be heard are crucial for assessing the minor's well-being. Therefore, it is crucial to consider the ability of the minor to make an intelligent and informed decision. However, courts have not been consistent in the application of the maturity and age of the child. In some cases, courts have been inclined to consider not the maturity, but the age of the child.

The Supreme Court found in **Oppel v Oppel**<sup>241</sup> that a girl who was 8 years old could not give an opinion that could persuade the honourable court. Similarly, the Court decided in **Mathews v Mathews**<sup>242</sup> that;

The expressions of a seventeen-year-old can be given consideration, whereas those of a thirteen-year-old may not carry enough weight. Courts have taken a different approach, focusing on the child's maturity rather than his/her age.

In **Märtens v Märtens**<sup>243</sup> this same approach was followed where the court held that;

It is critical to speak with and see minors in person. It determined that they were intelligent, talented, and attractive minors who, due to their youth and lack of maturity, possessed the ability to speak freely and confidently. Consequently, the court concluded that a 15-year-old child portrayed maturity in terms of emotions and intelligence and hence could make an informed decision and that such preference ought to be given weight when the court is making its determination.

Under section 54 of the Criminal Procedure Act, investigating authorities are required to inform caregivers, guardians, or parents of an apprehended juvenile of his or her arrest such caregiver, guardian, or parent be communicated to without undue delay.' The Correctional Services Amendment Act No 7 revised section 29 of the Correctional Services Act thus ensuring that the approach adopted by systems for handling children matters must be child-centred.

At Judicial proceedings, a child is entitled to due process including freedom from degrading and inhuman punishment or treatment, freedom from cruelty and torture, protection against violence, proscription of detention without trial and the rule against arbitrary arrests. However, the provision that the minor may only be detained for the least duration, might lead to abuse since it makes it circumstantial to determine what amount to the shortest time possible. In **State v. Williams**<sup>244</sup>, the Constitutional Court took another step toward bringing juvenile penal legislation in line with

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<sup>241</sup> [1973] 3 SA 675 (T).

<sup>242</sup> [1983] 4 SA 136 (SE).

<sup>243</sup> [1991] 4 SA 287 (T).

<sup>244</sup> [1995] (3) SA 632 (CC).

international jurisprudence by ruling judicial physical punishment is illegal because it is demeaning, inhumane, and cruel.

Separating detained children from adults during the trial or after being sentenced, recognizes that minors are more susceptible to the negative results of the correctional environment than adults. Therefore, courts should opt for less punitive and intrusive sentences such as correctional supervision, caution and discharge, suspension or postponement of the sentence, imposing a fine and reclassifying the trial as a child care inquiry under the Child Care Act.<sup>245</sup> Section 35(3)(g) of the Constitution, interpreted along with Section 28(1)(h), safeguards a child's right to permissible legal representation at the government's cost if other legal actions would result in grave injustice. The provision is operationalized under the Child Care Act.

By dint of Sections 28(1)(h) and 35(3)(g) of the SA Constitution, the national government is mandated to afford every child legal representation. The rationale for this is the fact that in circumstances where the Child Care Act is inapplicable, a court cannot assist a child to have a legal representative. Second, the clause does not fully address actual implementation concerns that may arise.<sup>246</sup> A court in a bid of ensuring the well-being of a child is met, can call for legal representation of a child at the stage of a court proceeding. Such legal representation should be accorded at the expense of the state.

### Children in Conflict with the Law

The SA Constitution through Section 28 stipulates various rights that a child should be granted in justice administration processes.<sup>247</sup> Before April 2010, children who offended South African law were subjected to the Criminal Procedure Act, 1977 which is concerned with persons over eighteen years of age who commit offences.<sup>248</sup> The Child Justice Act (CJA) came as a panacea to minors in contravention of the law as it dictates that minors suspected to have committed a crime are not subject to normal Criminal Procedure but should be subjected to Child Justice Process. The CJA aims to make sure that the justice administration in children's cases is carried out in a way that is based on rights and rehabilitates the child.<sup>249</sup> Regarding criminal capacity, the CJA stipulates as follows;

A child below 10 years is presumed to lack the capacity to commit a crime and hence cannot be detained. Such minors may however only be brought before a Children's court.

A minor below 14 years but older than 10 years is presumed to not have capacity unless the prosecution proves his/her criminal capacity.

A minor older than 14 years but below 18 years old can be arrested as they are presumed to have capacity.

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<sup>245</sup> *ibid.*

<sup>246</sup> Child Care Act 74 of 1983, s 84(4).

<sup>247</sup> The Constitution of the Republic of South Africa, No. 108 of 1996.

<sup>248</sup> Francois Steyn, *Approaches to diversion of child offenders in South Africa: A comparative analysis of programme theories* (2010) <https://scholar.ufs.ac.za/handle/11660/1748>.

<sup>249</sup> Child Justice Act of 2008.

The South African Constitutional Court in the **S v Kwalase**<sup>250</sup> case reiterated the decision in the **Centre for Child Law Case** and held that minors should be handled differently compared to adults due to their greater psychological and physical susceptibility.

Contrary to the practice in South Africa, in Kenya, we only have the Criminal Procedure Code that applies to both adults and children. The Criminal Procedure Code does not make a distinction in its application. Children are usually tried in regular adult courts. Minors in contravention of the law thus face numerous mistreatment within the justice system as a whole. Many children due to fear of being locked in police custody and constant appearance from courts to remand detention centres often plead guilty in the guise of avoiding harsh jail conditions.

### Merits of the Child Justice System

The minor justice system takes into account a minor's unique needs, promotes rehabilitation, and forgives minors who violate the law.<sup>251</sup> The CJA permits a youngster's background or upbringing to be contemplated when making determinations. Consequently, it is crucial in the following respects;

- i. It balances the responsibilities and rights of the minor, victim and community hence allowing for the reintegration of minors in contravention of the law.<sup>252</sup>
- ii. It enables cases involving minors to be diverted from the Criminal Justice System.<sup>253</sup>
- iii. Matters involving children are prioritized and fast-tracked to avoid case backlog.

Unlike in Kenya, the court does not bother to find out the background of a child especially the ones in conflict with the law. A court can, however, call for a pre-sentencing report (POR). This often does not put into consideration the upbringing of a minor as the probation officers are only concerned with the background of a minor.

### Preliminary Inquiry

Before the initial appearance, a preliminary inquiry involving a legal aid counsel, the arresting officer, a probation officer, the minor, his/her parents and the magistrate must be convened within 48 hours after the child's detention, according to South African protocol.<sup>254</sup> The key issue for consideration at this stage is the circumstance of the case and the possibility of diversion.

Conversely, in Kenya, we have the child arrested and practically brought to court. The officers in charge are never keen on calling children's officers. As such, the presiding officers are not guided by detailed reports that help in establishing the best interests of minors in contravention of the law.

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<sup>250</sup> [2000] (2) SACR 135 (C).

<sup>251</sup> *ibid.*

<sup>252</sup> *ibid.*

<sup>253</sup> *ibid.*

<sup>254</sup> Catherine Wood, Diversion in South Africa: a review of policy and practice, 1990-2003 (1 Oct 2003) <https://journals.co.za/doi/abs/10.10520/EJC48983>.

For instance, in **FAA v Republic**<sup>255</sup>, the court failed to determine a child's age and conduct an investigation of a probation officer, denying the child access to his constitutionally protected right under Article 53 of the COK.

## Diversion

The children's justice system in SA embraces diversion in cases involving minors. Diversion is a method of keeping cases out of the regular system of criminal justice. The rationale per the diversion policy is to prevent a minor from having a criminal record. Additionally, it seeks to address the underlying causes of the minor's criminal behaviour to hold the child more accountable, thereby avoiding the stigmatization of children. To determine suitability for diversion the CJA calls for the completion of a probation officer's evaluation report.<sup>256</sup>

Kenya has not been keen on appreciating diversion as a chief pillar of the minors' rights-oriented juvenile justice system. The government has failed to meet its duty of ensuring that before cases are brought to court, they are considered for possible diversion.<sup>257</sup> Be that as it may, matters referred for diversion are picked selectively without strict adherence to the ODDP-Diversion Policy. For instance, defilement offences committed by a minor on another minor, or consenting sexual encounters between minors, are one of the challenges that courts have had to deal with. Usually, a boy is charged with defilement and the girl is treated as a victim. To avoid this kind of discrimination, such cases should be referred for diversion.

The Court of Appeal in **Eliud Waweru Wambui v Republic**<sup>258</sup>, while setting aside a 15 years sentence on a minor who had been convicted of defiling another minor noted as follows;

An honest public dialogue on this sensitive yet significant matter implicating the challenges of protection, autonomy, morality and maturing minors and the need for proportionality is long overdue. Our prisons have many young men serving long sentences for having had sex with adolescent girls whose consent, because they were under eighteen years old has been held to be immaterial. The justice and wisdom of this unfolding catastrophe call for serious examination.<sup>259</sup>

## Restorative Justice Options

By establishing the Child Justice Court to facilitate the re-socialization and re-education of juvenile offenders, the CJA 75 of 2008 establishes strong requirements for defending the rights of child offenders.<sup>260</sup> The Child Justice Courts of South Africa have a strong foundation in restorative justice.

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<sup>255</sup> [2020] eKLR.

<sup>256</sup> The Child Justice Act No. 75 of 2008, s 40.

<sup>257</sup> *ODDP-Diversion Policy* (2019).

<sup>258</sup> [2019] eKLR.

<sup>259</sup> *Eliud Waweru Wambui v Republic* [2019] eKLR.

<sup>260</sup> Tafadzwa Mukwende, "Reform, reintegrate, rehabilitate - Balancing restorative justice and juvenile offender rehabilitation." (2014) *De Rebus* 33-35.

In **S v FM (Centre for Child Law as Amicus Curiae)**<sup>261</sup> it was observed that Article 17.3 of the ACRWC provides that the objective of treatment of all minor offenders is the re-integration as well as social rehabilitation of the said child.<sup>262</sup> Be that as it may, there is a general assumption that child offenders are easy to rehabilitate than adults.

Similarly, the law court provided in **Centre for Child Law v Minister of Justice and Constitutional Development and others**<sup>263</sup> that judicial officials should devise punishments that facilitate the integration and rehabilitation of the concerned juvenile into his family or community wherever practicable.

Unlike Kenya, the justice system is highly punitive and rarely takes into consideration the need to mend relationships between offenders and victims are overlooked.

### Alternatives to Prison Sentences

Some sanctions must be limited in a child-centred juvenile justice system, and alternative penalties must be devised for juvenile offenders.<sup>264</sup> Every juvenile has the right not to be held unless it is a last resort measure, according to Section 28(1)(g)<sup>265</sup> as well as the international sentencing criteria provided under the CRC.<sup>266</sup> This means that a court before sentencing a child must exhaust all other alternative options. To help a court determine the appropriate penalty for a juvenile offender, one method is to take into account the probation officer's report.<sup>267</sup>

Section 290 of the Criminal Procedure Act calls for alternative sentencing options such as diversions programs, detention at reform schools and supervision by probation.<sup>268</sup> The Child Youth Care Center handles a child's behavioural management, allowing children to be taught moral behaviour in defiance of the law.<sup>269</sup> The justice system of South Africa has also been designed to allow victim-offender mediation that allows offenders to realize the severity of his/her actions and to learn from their experience.

Kenya in its laws provides for various alternative sentencing options. These include fines, community service, probation, rehabilitation or treatment programs among others. Despite the express provisions for alternative sentencing options, Kenyan courts do not exhaust alternative sentencing options before incarcerating child offenders.

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<sup>261</sup> [2013] (1) SACR 57 (GNP) para. 28.

<sup>262</sup> African Charter on Rights and Welfare of a Child 1990.

<sup>263</sup> [2009] (6) SA 632 (CC).

<sup>264</sup> CRC, Art. 40.

<sup>265</sup> The Constitution of the Republic of South Africa, 1996.

<sup>266</sup> *ibid* s 37.

<sup>267</sup> *S v M (Centre for Child Law as amicus curiae)* [2008] (3) SA 232 (cc)

<sup>268</sup> Criminal Procedure Act, No. 51 of 1997.

<sup>269</sup> J. David Hawkins, R F Catalano and J Y Miller, 'Risk and protective factors for alcohol and other drug problems in adolescence and early adulthood: implications for substance abuse prevention.' (1992) 112(1) Psychological Bulletin 64.



## Children's Court

Children's courts are conducted in special rooms other than the ones in which ordinary cases are handled. At the sitting, only people whose appearance is crucial to the case or their legal representatives are allowed. Nonetheless, to enhance confidentiality, no person is allowed to publish anything relating to the proceedings in the children's courts. In Kenya, due to limited resources allocated to the judiciary, there are no designated rooms for handling children's cases only like in South Africa. As such, children's matters are held in rooms common to adults save that there are special days for handling children's matters only.

## Legal Representation

The Child Care Act, 1993 elaborately ensures that a youngster has legal counsel.<sup>270</sup> The provision provides that a minor may have legal counsel in a proceeding, at any stage. A court handling children's issues is therefore obliged to inform a minor of his/her right to have legal representation.<sup>271</sup> Similar to Kenya, representation of children by pro bono lawyers is provided for under the legal aid act.<sup>272</sup>

## Child Witnesses

The South African government has made steps towards the preparation of child witnesses. The government has rolled out pilot programs regarding the preparation of juvenile witnesses for trial. This establishes the competence of a child witness. Whether a minor is competent to testify as a witness must be determined by the presiding officer. Where a such witness is found to be incompetent, he/she is denied the witness stand. The general rule of presuming every witness is competent does not apply to children. A child is deemed to be competent only if he/she can answer questions posed and understands the importance of saying the truth.<sup>273</sup> In **S v L 1973 (1)**<sup>274</sup> the court emphasized that the significant question is whether the magistrate or judge subjectively is of the view that the minor understands the significance of telling the truth. Similarly, in **S v T 1973 (3)**<sup>275</sup> the fact that a child could not comprehend truthfulness was in itself enough to render illegal, the whole proceedings.

## Evidence Through Intermediary

The Criminal Procedure provides for the option of evidence through an intermediary where the court feels that the child can be mentally traumatized if he/she testifies to a criminal proceeding.<sup>276</sup> In this kind of arrangement, no examination, cross-examination or re-examination is carried out. It is only the court that can examine the bid of getting clarification. This is also happening in Kenya

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<sup>270</sup> Child Care Act, No. 51 of 1983.

<sup>271</sup> *ibid.*

<sup>272</sup> Legal Aid Act 2016.

<sup>273</sup> *ibid.*

<sup>274</sup> SA 344 (C).

<sup>275</sup> SA 794.

<sup>276</sup> Act No. 51 of 1977.

whereby one can call an intermediary (usually a children's officer, social worker or a parent) who is called to testify on behalf of the minor.

### Use of Closed-Circuit Television and Application of Electronic Media

If the witness or accused consents, a court may order that an accused or witness testify through closed circuit television or analogous electronic media where the prosecution believes that that is the best way of acquiring evidence and testimony from a child. This technique has not been adopted in Kenya, unlike in the United States.

### Time Limits Relating to Postponements

All problems involving a child must be resolved as quickly as possible by the Child Justice Courts. Postponements under the Act have been restricted in duration and number. Where a child is in custody, the court cannot postpone the proceedings for more than 14 days before the start of the trial and where a minor is released on bail, the proceedings should not be postponed for more than 60 days.<sup>277</sup> Unlike Kenya, the Children's Act does not cater to this facility directly. Kenyan framework only prescribes three months for handling matters regarding children. Setting strict timelines like in the SA case is not practical in Kenya, although provided for due to case backlog.

### Conclusion

One strategy to safeguard the rights of socially displaced children is to recognize their rights that have been elaborated on in the chapter, specifically the right to be heard in a judicial court setting. The CRC's integration into South African law has been shown to have an impact and make it possible for socially displaced children to realize their rights. The apartheid government had a strong impact on constitutionalizing child-centred mechanisms and children's rights. This led to increased cognizance of minors' vulnerabilities and the need for inherent mechanisms of equality. Kenya should take a leaf from South Africa's script when it comes to dealing with lawbreakers under the age of 18.

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<sup>277</sup> Criminal Procedure Act No. 51 of 1977.

## CHAPTER FIVE: FINDINGS, CONCLUSION AND RECOMMENDATIONS

### Conclusion

This research has elaborately interrogated policy, and legal and administrative protection of the right of socially displaced minors to take part in and have themselves heard in justice matters or procedures. The research was hinged on Article 12 of the CRC which mandates nations to take into account minors' views of their circumstances in any judicial or administrative proceeding in which they are a party. The study's conceptual underpinning is the idea that a minor has a right to participate in legal procedures as a means of obtaining justice. Given the foregoing, the critical significance of delineation of unique laws, structures and systems to ameliorate the right based on the enhanced vulnerabilities of socially displaced children.

As a result, chapter one of the study established a framework for the research's scope. Despite prescriptive international, regional, and domestic legal instruments establishing the rights of a child discussed in this study, four principles must guide the process. Views of the minor, non-discrimination and development and survival.

Kenya and its law enforcement agencies have failed to design proportionate systems and procedures taking into account the specific vulnerabilities of the socially displaced children to realize the implementation of this right. From the study, deficiencies in structures and systems are evident across the entire chain of the judicial process including the conduct of complaints, investigations, arrests, hearings, custody, and sentencing.

The identified structural and systemic weaknesses were meant to provide the necessary information to Policymakers, the actors within the Justice Law and Order Sector, and the institutions involved with protecting the children's welfare to ameliorate the plight of socially displaced children in access to justice in Kenya.

The link between the concept of justice and interest theory served as the study's direction and frame of reference which underscores the best interest of children and their unique vulnerabilities in fashioning appropriate and proportionate structures and systems to ameliorate access to justice by socially displaced children.

There were five chapters in the study. Chapter One, which included information on the paper's introduction, established the study's objectives, research questions, and statement of the Problem. A brief background of the investigation was supplied before these criteria were established, which contributed to distilling the primary concerns to be addressed in the research.

To make participation easy for minors in the legal processes, Chapter Two looked at how deeply Kenya's legislative, administrative, and policy frameworks included the rights of socially displaced minors. Children's participation and methods for preserving their integrity are anchored by Kenya's 2010 Constitution and the Children's Act.

Additionally, the Constitution's Articles 159 and 232 provide standards including equal protection and legal advantages. This forms part of the basic foundations of the right to seek justice. This right is predicated on the application of mechanisms for the realization of the well-being of a child.

A theoretical inquiry into Kenyan jurisprudence finds that a minor's best interests are objective and are founded on the minor's ascertainable wishes. The well-being of a child forms the bedrock of other rights such as equality and freedom from discrimination<sup>278</sup>, fair hearing<sup>279</sup>, Rights of arrested persons<sup>280</sup>, Access to justice<sup>281</sup>, Fair administrative action<sup>282</sup>, Access to information<sup>283</sup>, Human dignity<sup>284</sup> and freedom of expression<sup>285</sup>.

The two existing international legal instruments are attentive to the vulnerability of children, particularly those who have been socially dislocated. They call for child-sensitive and effective judicial procedures for minors and their representatives. The overriding principle is that minors should be handled in a way conforming to the need to encourage the minor's reintegration into society and family as well as conforming to their age.

The CRC captures the right to be heard under Article 12. The research looked at varied facets of the right as determined by the committees and scholars including First, it is the government's responsibility to support necessary measures, such as laws and regulations, so that every minor can be heard, regardless of social class or sensitivity. Secondly, is the opportunity for children to be heard both as individuals concerning a specific issue affecting him/her and collectively as a group of people. Third, is there a presumption that a child is capable of developing an opinion or establishing a point of view, and it is not up to the minor to prove this. It is also not necessary for the minor to have a broad comprehension of a subject that concerns him or her: all that is required is that he or she be capable of forming an opinion on the subject. Fourth, is the capability of the minor to air his/ her views without pressure. Fifth, the provision applies to all issues affecting children. Sixth is the obligation to give sufficient weight in conformity with maturity and age.

The ACRWC sets guidelines for observing the well-being of children during their participation in court processes. Children are at liberty to represent themselves either through a representation or directly.<sup>286</sup> The opinions of a minor must be weighed and taken into consideration.<sup>287</sup> The overriding objective is to ensure that the dignity of the minor is upheld at all times.<sup>288</sup>

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<sup>278</sup> The Constitution of Kenya, 2010, Art. 27.

<sup>279</sup> *ibid*, Art. 50

<sup>280</sup> *ibid*, Art. 49

<sup>281</sup> *ibid*, Art. 48

<sup>282</sup> *ibid*, Art. 47

<sup>283</sup> *ibid*, Art. 35

<sup>284</sup> *ibid*, Art. 28

<sup>285</sup> *ibid*, Art. 33

<sup>286</sup> ACRWC, Art. 4.

<sup>287</sup> ACRWC, Art. 7.

<sup>288</sup> ACRWC, Art. 17(1).

The study's fourth chapter took a comparative approach to South African treatment and protection of socially displaced children. The study found that the constitutional position as typified by the Court, is that of protection combined with the freedom to explore, emancipation, and merged with an adult compass and guiding, as exemplified by the Court.

The study emphasized that minors' right to participate in and be present in court proceedings is interpreted and applied with the minor's best interests in mind, which is linked to every issue involving the child, such as adoption, access, and custody. According to case law, the best interests of minors are diverse and need an examination of a variety of considerations. First, minors' interests must be considered; second, opposing interests must be examined and withheld; third, the minor's interests must be given appropriate weight; and fourth, minors' interests and rights must be evaluated independently of their parents'. Section 28(2) instructs courts to actively ensure the protection of children in general.

Finally, the study provides the conclusion and recommendations on how best to secure the right of socially displaced minors to take part in and to be heard in legal proceedings.

## Recommendations

This chapter makes a compelling case for strengthening and reforming judicial structures and systems to progress the entitlement of socially displaced minors to participate in as well as also be listened to, drawing on the desktop reviews, theoretical and conceptual frameworks discussed in chapters one, two, three, and four of this report. The thesis presents administrative, legal, and policy proposals to ensure and defend the right to access justice, with a focus on the ability to participate in and be heard in legal procedures.

The proposals are driven by the state's responsibilities to adopt legislative and other steps in areas where it is directed, such as affirmative action initiatives. The government is required to implement mechanisms for redressing systemic biases and to ensure that socially displaced minors, as a vulnerable group, are represented and participate in a variety of spheres of life, including governance.<sup>289</sup>

The standard of measures to be taken is that of genuine need.<sup>290</sup> Further, the State is obliged by the Constitution to adopt special measures in the minors' best interests to enable them to get access to opportunities in life.<sup>291</sup>

Therefore, in response to the highlighted gaps, the study makes the following recommendations:

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<sup>289</sup> The Constitution of Kenya, 2010, Art. 56 (a).

<sup>290</sup> *ibid*, s 27(7).

<sup>291</sup> *ibid*, s 53.

### Clarity on Section 191(1) of the Act

Under Article 53 and sections 40 and 191 of the Children Act, the institutionalization of minors in contravention of the law is to be the last measure. Further, section 191(2) of the Children's Act stipulates that no minor lawbreaker is to be imperilled by corporal punishment.

The interpretation of this rule, however, puts judges in a difficult position when dealing with a child who has committed a grave crime, take for example murder, but is just a few years younger than 18. As a result, there is a need for clarity in law either through an amendment or through an advisory opinion from the Supreme Court.

### Designate More Children Courts

The Children Act mandates children's matters be handled before magistrates' sittings in specially designated courts as children courts. The court is anticipated to convene at various times or in another location, from those in which court sittings save for Children's Courts are held.

Except for guardians or parents of minors, officers and members of the court; their legal representatives; persons who may be directly affected by the decision; registered news agency or newspaper representatives, as well as others present who have been specially permitted by the Court to do so, the sitting is expected to be held in private.<sup>292</sup> However, due to resource constraints, few magistrates and courts have been designated as special children courts.

### Courts in Touch with Parties

The use of a pre-recorded video interview as evidence in Kenyan courts should be permitted as a means of enhancing children's participation. This type of evidence is important because it allows a judicial official to analyze a child's evidence outside of the intimidating and unfamiliar court setting as soon as possible after the claimed incident.<sup>293</sup> It is also a way of shielding children from open courts. In a report conducted in South Africa on minors in contravention of the law, most participants suggested that child-friendly courtrooms were important. Adjudicators should be informally dressed and minors ought to be allowed to address the court in the language they best understand.<sup>294</sup>

### Magistrates' Recruitment

The organization responsible for hiring judicial officials, the Judicial Service Commission, shall make sure that the ratio of magistrates and judges to litigants who are minors is adequate. This can be done by hiring more magistrates who specifically adjudicate sensitive children's cases.

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<sup>292</sup> The Children's Act, 2001, s 74.

<sup>293</sup> Ray Bull, 'Good Practice for Video Recorded Interviews with child Witnesses for Use in Criminal Proceedings' in G. Davies, S. Lloyd-Bostock, M. McMurrin & C. Wilson (ed.), *Psychology, Law, and Criminal Justice: International Developments in Research and Practice* (Berlin, New York: De Gruyter 2011).

<sup>294</sup> J. A. Robinson. 'Children's rights in the South African Constitution' (2003) 6(1) Potchefstroom Electronic Law Journal.

Besides, this is a strategy for reducing the backlog of children's cases.

### Employment/Engagement of Counsellors by the Judiciary

The nature of cases involving children is sensitive to their emotional and mental being. As such, cases having a direct impact on the child should be handled by trained officers who can find means of establishing truth from child testimony without leaving the child with emotional and mental traumas.

The Children's Act under section 76(3) establishes the Children Court enumerates several principles to be observed;

The discernible wants and sentiments of the youngster in question having reference to the minor's educational, emotional and physical needs; the minor's understanding and age; the practices and community's customs to which the minor belongs; the minor's cultural background, religious persuasion, sex and age; any harm the minor is at risk of suffering or might have suffered; the capability of the parent to care and provide for the minor; the probable result on the minor of any alteration in circumstances; whether the minor is disabled, the capability of any institution or individual to give any special medical attention or care that may be needed by the minor; and the minor's exposure to drug use, and the capability of any institution or individual to give any special medical attention or care that may be needed by the child.

Therefore, the Judicial Service Commission should take proactive steps to ensure that children including those socially displaced are appraised of the judicial process by well-trained counsellors before and post the hearing of a case. This will ensure that they appreciate the importance of the process and voluntary participation. To guarantee that children are treated with kindness and friendliness, a healthy collaboration between the children's department, the Prosecution as well as the National Police Service should be done in conducting counselling and legal solutions for the children in conflict with the law.

### Employment of More Qualified Court Interpreters

The Judiciary should take deliberate steps to ensure that they employ more qualified court interpreters in every language to guarantee that youngsters' involvement through the expression of their wishes is well recorded and captured. In most cases, children's wishes are lost through wrong interpretations.

### Revision of Guidelines on Handling of Children Matters

The existing guideline on the conduct of judicial proceedings involving children should be revised to provide by identifying the various categories of children based on their unique sensitivities and formulating appropriate mechanisms and procedures on how to handle them. Through this, the socially displaced children should be specifically mentioned and appropriate mechanisms and procedures should be done.

## Reshaping the Rules of Procedure

This study has demonstrated that complex procedural rules obstruct the realization of the well-being of a child, therefore, denying the principles of proportionality, fairness and expediency envisioned in the legal instruments highlighted.

Consequently, procedural rules ought to be relaxed to give room for following up on children's cases with high simplicity and ease.

## Reforming the Legal Aid System

While Children Act provides for legal aid to an unrepresented child and at state expense, due to budgetary constraints and the high cost of litigation, it might prove difficult for children to have the availability and choice of competent and experienced lawyers to represent them in judicial proceedings.

According to Article 48 of the Constitution, the government must guarantee that every person has access to justice, and costs must be reasonable and not interfere with such access.

An affordable legal structure is not only necessary to allow for access to justice but should be put into law.

Accordingly, the Attorney-General strengthen legal aid by providing for the procedure of assigning advocates.

## Implement the Children Bill 2019

Throughout this study, there has been an attempt to emphasize the need for designated children courts. This will help in dealing exclusively with children cases away from the normal set-up of courts that rarely takes into account the vulnerabilities of minors in contravention of the law. In particular, Part VIII of the Bill not only calls for the institution of children courts but also lays elaborate procedures to guide the said courts. A key principle to guide the court is the child's well-being.

## Establishment and Decentralisation of ADR mechanisms

The primacy of alternative means of dispute resolution involving children is to promote and safeguard their reintegration and role in society.<sup>295</sup> According to the CRC Committee, the obligation of the State to promote alternatives towards the normal judicial proceedings should be sought at the initial stages in any cases involving children.<sup>296</sup> Instead, the focus should be determining and devising ways in which the case of the child can be handled without resorting to the court system.

As a result, community-based alternative dispute resolution, professional-led alternative dispute resolution, the Nairobi Centre for International Arbitration, and court-administered mediation

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<sup>295</sup> CRC, Art. 40(3)(b).

<sup>296</sup> Committee on the Rights of the Child, General Comment No. 10, para 10.



should be decentralized. Additionally, procedural rules in ADR should be designed to specify and accommodate limited circumstances under which a party may reject an alternative dispute resolution offer.

Additionally, civic and legal education geared at the general public, paralegal staff, judicial officials, and legal practitioners should be maintained to promote a move toward ADR as the preferred mechanism of conflict settlement.

### The Designation, Equipping and Renovation of More Holding Facilities for Children in Conflict with the Law During Investigation, Arrest, Trial and Sentencing

As captured under Chapter Two of this thesis, a study directed by UNICEF in 2016<sup>297</sup> presented that the number of minors who had been sent to remand was less than the number of children who had been arrested by police. This suggests that minors are being held in non-designated facilities. Further, concern was conveyed that;

Minors remanded in the homes seemed to be fewer than those arrested by the police. This infers that minors are being held in non-designated facilities. Further, concern was raised that minor offenders are housed in remand homes, minors requiring attention and minor victims, in one facility. Conditions in the minors' detention houses were bad in several cases, owing mostly to outdated infrastructure. In many cases, there is a lack of floor space as a result of a minor. Minors in detention homes in Murang'a and Nyeri did not have enough space to play. In some instances, the ratio of toilets to minors was too large, in four homes showers were not working, due to either vandalism, water rationing, or them not being fitted. In only a remand home in Kisumu did minors get an education: as in most instances minors are held in remand for prolonged periods, this infringes on their right to education. Inadequate care was given in the medical homes to promotive preventive medicine as well as to ensure continuity of treatment for HIV and AIDS and Tuberculosis.<sup>298</sup>

### Collaboration and Linkages

There should be protocol engagement and collaboration among all institutions and stakeholders engaged in children matters to ensure that there is a unity of purposes in handling and processing children through the chain of the justice system.

### Implementation of Diversion Policy 2019 in Criminal Prosecution

The constitution of Kenya, 2010 endorses and recognises diversion by promoting alternatives to criminal prosecutions.<sup>299</sup>The diversion policy is meant to reduce a backlog in courts, and overcrowding in prisons and promote restorative justice especially in matters concerning children].<sup>300</sup>

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<sup>297</sup> UNICEF (n 88).

<sup>298</sup> *ibid*, Note 62.

<sup>299</sup> *ibid*.

<sup>300</sup> ODPP-Diversion Policy 2019.

As discussed earlier, diversion absolves the children concerned either as the accused, victims or witnesses from the court's formality which in most cases creates a tense environment for people who do not know the law.

### Conclusion

The proposed policy, legislative and administrative measures if implemented shall ameliorate the rights of socially displaced minors to take part in and be heard in legal proceedings. It is intended that this study shall be shared with the various stakeholders within the justice system including the DPP, police service, children's department and the Judiciary. Further, this material shall form a basis for further research on some of the proposed measures.

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