

**UNIVERSITY OF NAIROBI**



**FACULTY OF LAW**

**MASTER OF LAWS (LL.M)**

**RIGHT TO LEGAL REPRESENTATION OF CHILDREN IN CONFLICT WITH THE  
LAW IN KENYA:AN INTERROGATION OF THE ADEQUACY OF THE LEGAL  
FRAMEWORK.**

{ A RESEARCH PROJECT SUBMITTED IN PARTIAL FULFILMENT OF THE  
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**Declaration**

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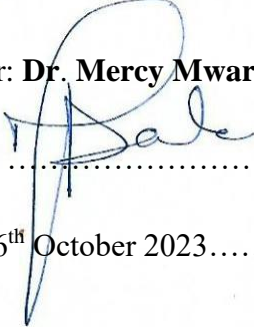
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## **Abstract**

Children are some of the most vulnerable members of the society. It is for this reason that they are prone to be severely affected by the inadequacy of the Kenyan legal system, with regards to the right to legal representation. Majority of the children who violate the law, are arrested and arraigned in court without any legal assistance. Their young age and inability to fathom fundamental principles of the law such as the rights of an arrested person, plea taking, arguments on bail and bond, examination and cross examination and raising points of objection, have acted to their detriment in a court setting.

This study examines the right to legal representation of children in conflict with the law in Kenya. It begins by tracing the historical background of this right in Kenya from the pre-colonial era to the present day. It interrogates the extent to which Kenyan and International laws provide for this right and flags out the challenges that hinder the implementation of this particular right.

The study considers best practices from comparable jurisdictions including, UK, USA and SA. From the best practices, scholarly and parliamentary proposals, this study recommends possible interventions including law reform, enactment of pending bills, political will and support from the executive, collaboration and synergy between the players in the justice sector and being intentional with benchmarking for institutions.

## **Acknowledgement**

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I greatly thank my husband for his support throughout my studies. He provided a conducive environment at home to ensure that I could focus on my studies. He took great care of our young son when I needed to step away and work on my research. I also appreciate my parents for their moral and financial support in my studies.

Finally, I thank God for good health and for provision of resources needed for my education.

## **List of Abbreviations**

ACERWC - African Charter on the Rights and Welfare of the Child

CRC – Convention on the Rights of the Child

CoK - Constitution of Kenya

CYO - Children and Young Offenders Act

DPP- Director of Public Prosecution

eKLR- Electronic Kenya Law Report

ICCPR – International Covenant on Civil and Political Rights

NLAS- National Legal Aid Service

NCAJ – National Council for Administration of Justice

SA – South Africa

SOA – Sexual Offences Act

UDHR – Universal Declaration on Human Rights

UK – United Kingdom

US- United States of America

UN- United Nations

UNHCR-United Nations High Commissioner for Human Rights

UNICEF – United Nations Children’s Fund



## **Table of Case Laws**

David Njoroge Macharia v Republic Nairobi Court of Appeal Criminal Appeal No.497 of 2007 [2011] eKLR.

James Mosabiti v Republic [2021] Eldoret High Court Criminal Appeal No. 102 OF 2019 [2021] eKLR.

JKF v Republic Malindi High Court Criminal Appeal No.3 of 2018 [2019] eKLR.

JMM v Republic Nyahururu High Court Criminal Appeal No.155 of 2017 [2020] eKLR.

Michael Kuhora Njeri v Republic Nakuru High Court Criminal Appeal No.182 of 2016 [2017] eKLR.

P K v Republic Nakuru High Court Criminal Appeal No.7 of 2014 [2019] eKLR.

P O O (a minor) V DPP & Ano Homa Bay High Court, Constitutional Petition No.1 of 2017. (2017) Eklr

Public Prosecutions & another (Interested Parties) Nairobi High Court Constitutional Petition No. E385 of 2020 [2021] eKLR.

Republic v J W K Bungoma High Court Criminal Case No.57 of 2009 [2013] eKLR.

Republic -vs- Karisa Chengo & 2 Others Supreme Court Petition No. 5 of 2015 [2017] eKLR.

Republic v Pauline Maisy Chesang & 4 others Machakos High Court Criminal Appeal No.10 of 2019 [2019] eKLR.

Thomas Alugha Ndegwa v Republic Court of Appeal at Nairobi Criminal Appeal No.2 of 2014 [2016] eKLR.

### **Table of Cases from Other Jurisdictions**

In re Gault, 387 U.S. 1 (1967).

Miranda v. Arizona, 384 U.S. 436 (1966).

Mphukwa v S (CA&R 360/2004) [2012] ZAECGHC 6.

R (on the application of Catt) (Respondent) v Commissioner of Police of the Metropolis and another [2015] UKSC

S v. Miller 2001 SLT 531.

## **Table of Kenyan Legislation**

Children and Young Persons Act 2010 (KEN) (Repealed)

Children Act 2001 (KEN) (Repealed)

Children Act 2022 (KEN)

Constitution of Kenya 2010 (KEN)

Judicature Act 1967 (KEN)

Kenya Constitution 1963 (KEN) (Repealed)

Proposed Legislation; Child Justice Bill 2022. (KEN)

Sexual Offences Act 2006 (KEN)

The Legal Aid Act 2016. (KEN)

## **Table of Legislation from other Jurisdictions**

Children Act 1989 (UK)

Children Act 2005 (SA)

Constitution of South Africa 1996 (SA)

Legal Aid, Sentencing and Punishment of Offenders Act 2012 (UK)

The United States Constitution, 14<sup>th</sup> Amendment. (USA)

## **Table of International Instruments**

African Charter on The Rights and Welfare of the Child, 1990 (ACERWC)

Convention on the Rights of the Child (Adopted and opened for signature, ratification on 20 November 1989, entered into force on 2 September 1990) (CRC)

European Convention on Human Rights, 1950 (As amended by protocols Nos. 11,14 and 15, supplemented by Protocols Nos, 1,4,6,7,12,13 and 16)

Guiding Principles for the Domestic Implementation of a Comprehensive System of Protection for Children Associated with Armed Forces or Armed Groups, 2011

International Covenant of Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976)999 UNTS 171

Universal Declaration of Human Rights 1948 (General Assembly Resolution 217 A)(UDHR)

## CHAPTER ONE

### 1.0 Introduction

#### 1.1. Background to the Study

Children are natural persons below the age of eighteen years.<sup>1</sup> They are categorized amongst the most vulnerable members in society, owing to their lack of cognitive ability which makes it difficult for them to survive independent from adults.<sup>2</sup> Like other human beings, they are prone to error and often fall in contention with the law. As a result, a good number of them get arrested and arraigned in court. Majority of the offences committed by children range from petty offences such as theft and shoplifting to serious offences such as terrorism, murder and robbery with violence. In Kenya, children who fall between the age of twelve to seventeen years are presumed by law to be criminally liable for their actions.<sup>3</sup>

Upon arrest, children are entitled the right to a fair hearing. However, not all children get to enjoy this right. Most of them are arraigned in courts without legal representation, despite express provisions in the Constitution<sup>4</sup>, the Children's Act<sup>5</sup> and the Legal Aid Act<sup>6</sup> of Kenya, requiring children to be accorded significant legal assistance whenever they are presented before a court of law.<sup>7</sup>

The Constitution of Kenya 2010, accords every accused person including children, the right to have counsel at the expense of the state<sup>8</sup>. Courts are required not only to inform children of their right to representation under the constitution, but to also ensure that they have counsel before the

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<sup>1</sup> Convention on the Rights of the Child (Adopted and opened for signature, ratification on 20 November 1989, entered into force 2 September 1990) (CRC) Art. 1

<sup>2</sup> United Nations Global Impact 'Children's Rights' (n.d) < <https://www.unglobalcompact.org/what-is-gc/our-work/social/childrens-rights> > (UNGI) accessed on 6 December 2022

<sup>3</sup> Children Act, 2022 (KEN) s 221(1)

<sup>4</sup> The Constitution 2010 (KEN)

<sup>5</sup> Children Act (n3)

<sup>6</sup> The Legal Aid Act ,2016 (KEN)

<sup>7</sup> Kitegi Mary Awuor, 'Determinants of Access to Legal Representation by Child Offenders in Nairobi County, Kenya' (Masters thesis, Kenyatta University 2018) < <https://ir-library.ku.ac.ke/handle/123456789/22202?show=full> > Accessed on 7 August, 2023.

<sup>8</sup> Constitution of Kenya (n 4) Art. 50

beginning and proceeding of a case, especially in serious matters such as terrorism, murder, robbery with violence and offences under the Sexual Offences Act.<sup>9</sup>

The CRC which informed the provisions in the Constitution of Kenya on the rights of children, require member states to recognize the rights of children charged with infringing a penal provision. The CRC further provides that children who contravene the law should be treated in a way that enhances their best interest and fundamental rights such as legal representation.

In upholding the provisions of the constitution and the CRC, Kenyan courts have delivered judgement to that effect. In *P O O (A Minor) v Director of Public Prosecutions & another*<sup>10</sup>, where the petitioner (a minor) was arrested and detained at sixteen years old for the offence of defilement<sup>11</sup>, the court noted that the Petitioner who was a child was left on his own without legal representation in a complex case which attracts a hefty penalty. The court held that the child suffered substantial disadvantage and declared that the Petitioner's right to a fair hearing had been adversely infringed.<sup>12</sup>

The above decision reflects the reality where children are left on their own to tackle criminal cases against prosecutors who have undergone thorough legal training, hence discriminating against them. The decision further exposed prejudice against children, when they are left to comprehend and defend themselves on complex processes and matters of law as and when they are arraigned in court. It further demonstrates that the government has failed to effect mechanisms to ensure that the children's right to legal representation is adequately provided for.<sup>13</sup>

In order to achieve the right to legal representation of children in Kenya, this study aims to critically examine the legal framework for children's right and identify any potential legal gaps and offer recommendations for potential reforms.

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<sup>9</sup> Constitution of Kenya (n 4) Art. 50(2)(h)

<sup>10</sup> *P O O (a minor) V DPP & Ano Homa Bay High Court, Constitutional Petition No.1 of 2017*. (2017) eKLR

<sup>11</sup> Sexual Offences Act, 2006 (KEN) s 8

<sup>12</sup> *P O O* ( n 10)

<sup>13</sup> *ibid*

## **1.2. Statement of the Problem**

Kenya has an elaborate legal framework on the rights of children in conflict with the law including the right to legal representation. This framework includes international instruments such as the CRC, ACRWC, the Bill of Rights in the Constitution of Kenya and the Children's Act 2022. Despite the plethora of laws, children continue to stand trial in court without legal representation. This is because there exist gaps in the law such as lack of express provisions stating that no child should be arrested and arraigned in court without legal assistance or counsel. These gaps hinder the implementation of the right to legal representation of children. The purpose of this research is to interrogate the legal framework with a view of identifying the legal gaps and recommending the best practices as garnered from select jurisdictions.

## **1.3. Objectives**

The following goals are pursued by this research;

- i. Interrogate the legal framework on the right to legal representation for children in conflict with the law with a view to identifying the gaps.
- ii. Identify the best practices and lessons that can be learned from other jurisdictions on the implementation of children's right to legal representation.
- iii. Make recommendations and propose policy directions to take to implement children's right to legal representation.

## **1.4. Research Questions**

This study seeks to respond to the following research questions;

- i. What is the historical background of children's right to legal representation in Kenya?
- ii. What is the legal framework that governs children's right to legal representation in Kenya?
- iii. What are the barriers to the implementation of children's right to legal representation in Kenya?



- iv. What best practices can Kenya learn from other jurisdictions on the implementation of children's right to legal representation?
- v. What possible legal and policy interventions can address the existing gaps in the implementation of children's right to legal representation in Kenya?

### **1.5. Research Hypothesis**

This study is based on the hypotheses that despite the fact that the Constitution, statutes, international and regional instruments establish children's right to legal representation, implementation remains a challenge because of the inadequacies in the framework. Other children's rights, such as the right to access justice, to be treated with dignity, and the right to have their best interest protected, are also hampered by the gaps.

### **1.6. Justification for the Study**

Children in Kenya are estimated to be 53% of the entire population.<sup>14</sup> Being a majority, they are more likely to contravene the law. Courts often witness children presented before them unrepresented. This is also evident in various decisions of courts such as the matter of *P O O (a minor) V DPP & Another*<sup>15</sup>. Arraignment of children in courts without legal representation denies them an opportunity to be heard. Their inability to understand the principles of law or the procedures of courts presents a barrier for their defense.

This study probes the legal framework and challenges which affect the legal representation of children. It provides legislators and legal practitioners with data which can be used in decisions regarding policy formulations, law reform and practical implementation of children rights to legal representation. This study stands to add on to the existing literature in the field of children's rights. Its findings and recommendation are significant to scholars for citation and reference purposes. The study is important to future researchers as it will form a basis for further research on the rights to legal representation with a focus on children.

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<sup>14</sup> Kenya National Commission for Human Rights, 'Right to health in Kenya', <[https://www.ohchr.org/sites/default/files/Documents/Issues/Children/Study/RightHealth/KenyaNationalCommissionHR\\_2.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Children/Study/RightHealth/KenyaNationalCommissionHR_2.pdf)> Accessed on 10 September, 2023.

<sup>15</sup> *P O O ( n 10)*

## 1.7. Conceptual Framework

This research is underpinned on two concepts; access to justice and the best interest of the child. Access to justice is principal to this study because it is the backdrop of legal representation. It involves accessibility of courts by court users and an efficient judicial process and procedure which enable adjudication of cases. Conversely, the principle of the best interest of the child resonates with this study because the research is centered on children. In addition, it is a constitutional requirement that the best interest of the child is paramount in any matter involving them. Therefore, marrying the two concepts of law extrapolates the importance of legal representation of the child as discussed below.

### 1.7.1. Access to Justice

Justice refers to fairness.<sup>16</sup> Access to justice is, a process and procedure of dispute resolution, which is affordable, expedient and easily understandable to the user<sup>17</sup>. It is through the concept of access to justice that courts get to uphold children's rights, by ensuring that the bottlenecks of court procedure, language of the court and financial constraints do not interfere with their right to a fair trial.<sup>18</sup>

One of the essential ingredients of access to justice is legal aid.<sup>19</sup>The process of accessing justice needs to be clear and cost effective.<sup>20</sup> As provided in the constitution, children should be afforded legal representation by the state. This can be through providing means where they can access lawyers in the most affordable rates.<sup>21</sup> It can also be through creating a body of lawyers, whom are paid by the State, to provide free legal services for unprivileged children in conflict with the law.

In addition, when it comes to cases involving children, the court ought to use the simplest language understandable to them. This is in a bid to assist them to understand the events that are taking place

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<sup>16</sup> Miriam Webster dictionary, [Justice Definition & Meaning - Merriam-Webster](#) Accessed on 27 July 2023

<sup>17</sup> Kariuki Muigua, *"Improving Access to Justice: Legislative and Administrative Reforms under the Constitution."*

<sup>18</sup> Ibid

<sup>19</sup> United States Institute for Peace, 'Necessary Condition: Access to Justice', < <https://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/rule-law/access-justice#:~:text=Access%20to%20justice%20involves%20normative.enforcement%2C%20and%20civil%20society%20oversight.> > Accessed on 4<sup>th</sup> June 2023

<sup>20</sup> Liefwaard, T. "Access to justice for children deprived of their liberty. *Protecting Children Against Torture in Detention: Global Solutions for a Global Problem*" (2017) 57-80.

<sup>21</sup> Ibid

in court, such as the charges they are facing, what is a plea and why is it important for them to take a plea, what is a bail and bond and so on. On appeal in children matters, courts should consider whether the right procedure was followed when arresting, prosecuting and sentencing the child.<sup>22</sup>

The concept of access to justice is relevant to this study, as it seeks to outline the bottlenecks found in the Kenyan legal system, that have enabled gaps in the legal framework concerning the right of children to legal representation. In other words, justice leaks through the existing gaps in law.

### **1.7.2. The Best Interest of the Child**

The best interest of the child generally refers to the considerations of the court when deciding on the welfare of the child<sup>23</sup>. The principle is equally rooted to the traditions of the Kenyan communities.<sup>24</sup> For instance, in one community early marriage might be perceived to be in the best interest of a child while in another it might be seen as morally wrong. Notwithstanding, it is the interest of the child that is being advanced.

The concept of the best interest of the child is meant to ensure that the child enjoys full benefits of his/her rights as outlined under the CRC.<sup>25</sup> It underscores the importance of according the child legal assistance as soon as they are arrested<sup>26</sup>. The ACRWC equally echoes the provisions of CRC by requiring member states to afford legal assistance for a child accused of infringing the law. The UNHCR Guidelines emphasize on the need to ensure that the child's best interest is determined through a formal process designed to protect his/her rights.<sup>27</sup> However, assessing and safeguarding the best interest of the child does not need to be formalized or made temporary.<sup>28</sup> The assessment process needs to flow from the moment it is identified that a child is at a risk or unaccompanied to the time when a solution is found.<sup>29</sup> This includes considering all actions

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<sup>22</sup> Muigua, K., "Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya".

<sup>23</sup> Roselyne Mukuhi, "Application of the Best Interest Principle to the Criminal Justice Juvenile System: A Review of Emerging Case Law", University of Nairobi.

<sup>24</sup> Ibid

<sup>25</sup> General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) < [https://www2.ohchr.org/english/bodies/crc/docs/gc/crc\\_c\\_gc\\_14\\_eng.pdf](https://www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf) > Accessed on 10 September 2023.

<sup>26</sup> CRC (n1) Art. 3

<sup>27</sup> United Nations High Commissioner for Refugees Guidelines on Determination of the Best Interest of the Child, 2008 (UNHCR), Pg. 22.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

regarding the child that emphasizes on their well-being, inclusive of their growth and fundamental needs in a manner that they can explore their full potential.<sup>30</sup>

The Constitution of Kenya on the flip side provides that the interest of the child is paramount in every matter.<sup>31</sup> Legal representation serves in the best interest of a child, as it safeguards their right to fair trial. The child needs someone who understands their point of view and articulate their side of the story in an efficient and professional manner with understanding of the law.

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<sup>30</sup> Andrew Wanga “Best Interest Factors of the Child in Kenya” (2019) < <https://mmsadvocates.co.ke/9-%EF%BB%BFbest-interest-factors-of-the-child-in-kenya/#:~:text=What%20is%20the%20best%20interest,to%20the%20maximum%20extent%20possible.> > Accessed on 5 June 2023

<sup>31</sup> Constitution of Kenya (n 4) Art. 53(2)

## 1.8. Literature Review

This study is significantly premised on interrogating the legal framework pertaining to children's rights, particularly the right to legal representation. It interrogates the relevant literature on three thematic areas; access to justice, the right to legal representation and the best interest of the child.

### 1.8.1 Access to Justice

Kariuki Muigua in his research paper 'Improving Access to Justice; Legislative and Administrative Reforms under the Constitution'<sup>32</sup> critically analyses the legislative and administrative reforms set out under the new Constitution of Kenya on access to justice. He defines access to Justice as, the provision of dispute resolution mechanism which is affordable, proximate and ensure speedy justice and whose process and procedures are understood by users. Similarly, Eloisa Torlig<sup>33</sup> espouses that the phenomenon of access to justice has two elements, one procedural and the other substantive. The procedural element refers to the process or system which people can resolve their disputes and or obtain justice. The substantive element of access to justice is the necessary condition which allows the system or process of accessing justice to produce fair results.

Muigua notes that the attributes of access to justice which includes the language of the court, court fees, public participation in administration of justice and availability of information<sup>34</sup>, are bedeviled by multiplicity of hurdles such as high court fees, complex rules and procedure, use of legalese, geographical location and backlog of cases to mention but a few<sup>35</sup>. He argues that the constitution of Kenya<sup>36</sup> has emboldened access to justice through article 48, by obligating the state to undertake measure which ensures justice for all persons. The article further provides that where

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<sup>32</sup> Kariuki Muigua "Improving Access to Justice; Legislative and Administrative Reforms under the Constitution".

<sup>33</sup> Eloisa Torlig, "Access to justice: An epistemological guide for future research" ; University of Brasilia

<sup>34</sup> Draft Report on Audit of Laws on Access to Justice, KLRC (March, 2012). See also FIDA Kenya, "The Peoples Version Informal Justice System" (2011), which defines access to justice as 'the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards'; "Judicial Reforms and Access to Justice in Kenya: Realizing the Promise of the New Constitution", A Report by the Kenya Civil Society Strengthening Program, 2011.

<sup>35</sup> Strengthening Judicial Reform in Kenya; Public Perceptions and Proposals on the Judiciary in the new Constitution, ICJ Kenya, Vol.III, May, 2002; Jackton B. Ojwang, "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 Kenya Law Review Journal 19 (2007), pp. 19-29: 29.

<sup>36</sup> Constitution of Kenya (n 4)

legal fees are applicable, the same must be reasonable enough not to obstruct justice. Muigua further points out that schedule five of the constitution requires parliament to pass laws in order to implement the obligations under article 48. He also acknowledges the existence of article 22 of the Kenyan Constitution, which requires the Chief Justice to formulate important guidelines outlining the rights of individuals to access courts.

Muigua concludes his paper by making several recommendations which can lead to the realization of access to justice such as the review of the procedural obstacles such as some of the evidential rules used in courts, construction of courts in rural areas for easy access, use of simplified language in courts to accommodate the illiterate and the integration of ADR, and Traditional Dispute Resolution Mechanisms into our court system.

Muigua's writing shall be of immense importance to this study as it brings out some of the factors that impede access to justice to vulnerable members of the society such as children. Some of the recommendations by Muigua such as construction of courts in rural areas continue to be realized by the Judiciary. However, unlike Muigua's this study aims at critically interrogating the existing legal framework on the right to legal representation of children who contravene the law with a view of identifying the legal gaps that hinder the realization of this right and therefore impede access to justice.

Kameri Mbote and Migai Akech in their paper, 'Justice Sector and the Rule of Law' argue that access to justice involve the culmination of the following, 'Knowledge of Rights, Physical Access, Financial Access and Provision of Legal aid'<sup>37</sup>. In their paper, they argue that access to justice is hinged on the knowledge of one's rights. They posit that a litigant needs to understand their basic rights such as their civil, political, service and economic rights before they access the courts. They assert that by understanding these rights, a litigant can determine which route to follow in the pursuit of accessing justice.

On physical access as a component for access to justice, they argue that most courts are found in major towns and at times far from rural areas. That in some places in the Northern part of Kenya, litigants have to travel five hundred kilometers away from their homes in order to access courts.

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<sup>37</sup> Kameri Mbote and Migai Akech, "Justice Sector and the Rule of Law" A review by AfriMAP and the Open Society Initiative for Eastern Africa (March 2011).

Further, those who manage to access courts, still have problems locating where the courts are, this is due to the lack of sign boards around the towns to direct the litigants to the courts. Therefore, due to these challenges, most litigants end up giving up on their course to access justice.

Kameri Mbote and Migai Akech, note that financial access is equally a key hurdle to access to justice. They state that high court fees hinder ordinary citizens from going to court. They further argue that legal fees for lawyers according to the Advocate Remuneration Order is above what an ordinary citizen in Kenya can afford. Therefore, most litigants are discouraged from going to court, because of the fear that they cannot afford to be represented and that the court fees can be beyond what they can afford. The professors also take note of the importance of legal aid in access to justice, especially for the poor.

In their study's conclusion, Mbote and Akech make several recommendations, including that the government and civil society create systems for informing the public about their rights, that the nation's lawyer-to-population ratio be improved, and that the government, working with other stakeholders like the Law Society of Kenya, create the national legal aid program to allow more Kenyans to access the justice system.

Similarly, Pia Letto<sup>38</sup> argues that the principle of access to justice is the principle of the rule of law. He notes that in any democracy, the rule of law is emboldened by the clarity of rules of procedure in courts, reasonable cost of proceedings and the quality of decisions produced by courts. He argues that the principle of access to justice is what makes up the concept of fair trial, this is because access to justice implies that there is existence of a concrete and equal right to use courts or other dispute resolution institution in society.

Mbote and Akech as well as Pia Letto provide important and useful information for this study on what access to justice entails and this includes reasonable cost of proceedings. In an effort to improve access to justice to indigent members of the society, the NLAS has since been established under Legal Aid Act<sup>39</sup>. However, despite the enactment of the Legal Aid Act, children continue to stand trial without legal representation. This study sought to critically interrogate what gaps still

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<sup>38</sup> Pia Letto- Vanamo, *'Access to Justice: A Conceptual and Practical Analysis with implications for Justice Reforms'* International Development Law Organization.

<sup>39</sup> Legal Aid Act (n6)

exist in the legal framework such as the Legal Aid Act that hinder the implementation of the right to legal representation of children.

### **1.8.2 Best Interest of the child**

The Best Interest of the Child principle is an important component in achieving access to justice for children. The Best Interest Principle requires that in any decision-making process that involve the child, their interest should be of paramount. Josimar Antonio<sup>40</sup> notes that the best interest of the child is a common tool used in deciding matters children, however, there is still uncertainty in definition an application of the principle. He argues that the context of the definition and application of the doctrine should encapsulate the child's characteristic and his social environment, which includes family community and school

Roselyn Mukuhi a children's rights lawyer, argues in her writing that the best interest of the child is the main principle that governs the justice system in regards to matters that affect children nationally and globally<sup>41</sup>. She defines the best interest of the child as 'the deliberation that courts undertake when deciding what type of services, actions and orders will best serve a child with the child's ultimate safety and well-being the paramount concern'. The scholar outlines that the first element of the 'best interest of the child' in the criminal justice system, is the treatment of the child by the police upon arrest. The second component concerns the custody of minors during the legal proceedings, encompassing questions like the appropriate duration of detention and the availability of bonds or bail for juvenile offenders. The third component is evaluating the courts' adherence to established statutes that were enacted to protect the best interest principle. The child's priority and interest in the criminal procedures, which revolves around questions like promptness of hearing, caseload priority, and legal representation, is the fourth component. The matter of a child's evidence such as *voire dire*, is the final and fifth component.

The study by Roselyn is very useful to this study as this research paper shares a lot of findings with the above literature. However, this study does an in-depth research on legal representation being in the best interest of the child. It focuses its arguments in Kenya, and outlines the gaps in

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<sup>40</sup> Josimar Antonio, "the best interest of the child: and intergrative review of English and Portuguese Literature", University of Oxford

<sup>41</sup> Roselyn Mukuhi, 'Application of the Best Interest Principle to the Criminal Justice Juvenile System: A Review of Emerging Case Law' *Interdisciplinary Journal on the African Child* Special edition 2019 Vol. 01, Issue 01.



the legal framework in Kenya, which weakens the principle making it lack coherence and consistency in our courts of law.

Lahny R. Silva<sup>42</sup> posits that even though “the best interest of the child” principle continue to be used in courts of law, the interpretation of the theoretical underpinnings of the principle lack coherence<sup>43</sup>. She argues that the best interest of the child should encompass the following elements: First, recognition that minors are distinct from adults and therefore children matters should not be adjudicated in adult courts. Second, minors are malleable meaning that they are in psychological and biological transition, therefore, they are capable of changing their behaviors, hence, courts should deal with children matters on a case by case basis.

Lahny’s study is important to this research because it sheds light on the significance of the child’s psychological and biological state, in deciding matters affecting them. In addition to Lahny’s findings, this study gives examples of best practices from comparable jurisdictions such as Scotland, who have managed to integrate assessment of a child’s biological and psychological state in the justice system, as an important factor to consider while deciding on matters affecting them.

Geraldine Van Bueren<sup>44</sup> in examining the international law regulating children justice in Europe, argues that international law which enhance the rights of children obligates states to enact child-oriented laws. He opines that it is not in the best interest of the child to be rehabilitated in prisons, but rather they should be reintegrated in to the society. He argues that the concept of reintegration assists the child in developing a sense of responsibility to the society. He further notes that it will be in the best interest of the child to take in to consideration their age when determining their criminal responsibility.

This study agrees with the arguments of Van Bueren, especially on the fact that international law is central in achieving the best interest of the child in legal representation. In addition, this study establishes the link between child-oriented international laws principally on legal representation,

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<sup>42</sup> Lahny R. Silva is a professor of law at the University of Indiana

<sup>43</sup> Lahny R. Silva, ‘The Best Interest Is the Child: A Historical Philosophy for Modern Issues’, Brigham Young University Journal of Public Law, Volume 28, Issue 2

<sup>44</sup> Geraldine Van Bueren (1992) “Child-Oriented Justice – An International Challenge for Europe,” 6:3 International Journal of Law and the Family 381-400.

with the provisions of the constitution of Kenya 2010 and the Children’s Act. It appreciates the contribution of international instruments such as CRC and ICCPR in Kenya, in providing the context for legislation of the child-oriented laws in the country, in addition to building our jurisprudence on interpretation of children’s rights.

### **1.8.3. Right to Legal Representation**

One of the key elements of the doctrine of access to justice is legal representation. Legal representation is an indispensable constituent of the right to access to justice. Don Cipriani<sup>45</sup> notes that despite the fact that children enjoy a vast of rights under the law, they may not be able to exercise the rights by themselves.<sup>46</sup> Some of the children lack the capacity to exercise their rights effectively. Therefore, the question of competence is very significant when it comes to ensuring the rights of the children are protected within the legal framework. Additionally, protection and establishment of a right go hand in hand. A right established within the law must be protected.<sup>47</sup> Protection of children’s right is equally important as their establishment by the laws. This study shall interrogate the right to legal representation of children who infringe the law.

Madalyn K. Wasilczuk in her paper, ‘Substantial Injustice: Why Kenyan Children are entitled to counsel at State Expense’<sup>48</sup> underscored the effects of non-representation of children in the Kenyan Justice system. She does this by analyzing the case of *David Njoroge Macharia vs Republic*<sup>49</sup>, where the court had outlined the importance of legal representation. She argues that the court in the aforementioned matter, directly applied the provisions of ICCPR and the ACHPR when the court stated that ‘the provisions of the ICCPR regarding the right of all person to legal assistance provided by the state, is binding to the Kenyan government and are directly applicable in Kenyan courts.

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<sup>45</sup> Don Cipriani “Children’s Rights and the Minimum Age of Criminal Responsibility: A Global Perspective” (2<sup>nd</sup> edn, Routledge (2016)

<sup>46</sup> Ibid; Pg. 2

<sup>47</sup> Ibid.

<sup>48</sup> Madalyn K. Wasilczuk (2013) “Substantial Injustice: Why Kenyan Children are Entitled to Counsel at State Expense,” in 45:291 International Law and Politics 291-333, at <http://nyujilp.org/wp-content/uploads/2013/04/45.1-Wasilczuk.pdf> (accessed 5/11/2023).

<sup>49</sup> David Njoroge Macharia v Republic Nairobi Court of Appeal Criminal Appeal No.497 of 2007 [2011] eKLR

She further argues that the court in *David Njoroge case*<sup>50</sup> acknowledged the importance of a lawyer in any matter, when it stated that, ‘a lawyer’s knowledge of the applicable laws, rules of procedure in the matter before court, and his ability to relate the fact, sieve relevant admissible and sometimes complex evidence, makes him vital at a trial’. The court further noted that, ‘the right to counsel ‘relieves the trial judge the burden of explaining to the accused the basic rules of court rooms, and in assisting the accused in overcoming routine and regular legal obstacles which the accused may encounter if he represents himself. That the courts role in a case should remain adversarial, and not a pro-active participant in the proceedings.’ Madalyn therefore argues that from the above decision of the court, it is equally important for children to be assigned lawyers. This is because of their inability to comprehend the law, courts rules and procedure and the language of the court.

In addition to the above, Madalyn argues that Kenya has appropriate laws on the right to legal representation of children including the Children’s Act, 2001, however, Kenya deviated from best practices in its minimum age of criminal responsibility. She argues that there should not be a minimum age of criminal responsibility, but rather courts should asses the capacity of the child to stand trial in order to determine his criminal responsibility. Emma Akinyi a lawyer in the ODPP in Kenya, discusses in her writing that the main problem facing legal representation for children is ‘access to a lawyer’. She posits that the inability to access a lawyer either because of financial constraints or lack of being provided for by the court, hinders children’s right to be represented. She underscores the need to legal representation of children, in view of averting the violation of their rights to a fair trial.<sup>51</sup>

This study resonates to the writings by Madalyn and Emma and therefore their writings are of essence to this study. This study shall also interrogate the need for mandatory legal representation of children in contravention with the law. However, this study shall interrogate the current Children Act, and the Legal Aid Act with a view of unveiling the gaps that still exist in these laws that hinder children from being accorded legal representation.

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<sup>50</sup> David Njoroge (n 49)

<sup>51</sup> Emma Akinyi Okok, ‘The need for legal representation for children in conflict with the law: An African Perspective’, World Congress on Justice for Children, 29<sup>th</sup> May, 2018.

Guggenheim a scholar in children's rights, negates the right of young children in accessing lawyers.<sup>52</sup> He propounds that the appointment of a lawyer to provide legal representation to children, is not realistic when the child is too young to direct and or instruct the lawyer. He argues that introduction of legal representation for young children is not pragmatic since the lawyer would not be advancing the child's interest. He further argues that legal representation of children undermines legitimate parental interest in privacy and autonomous decision making as representative of the child. He decries the need for parents to represent the interest of the child when they offend the law, because they have great understanding of the child and their interests.

Unlike Guggenheim's study which focused on custody and visitation rights of children, this study shall underscore the need for children offenders to be legally represented to avert any substantial injustice that may be occasioned by lack of legal representation.

Geoff Monahan<sup>53</sup> in contributing to this discussion notes that there are various approaches in legal representation of child offenders, these approaches are 'direct representation and best interest representation. Under the direct representation, the lawyer acts upon the instructions of the relevant child. Under best interest representation, the lawyer does not act upon the instruction of the child but instead acts separately upon his own assessment of the child's best interest, rather than the child's explicit instructions. This study shall expound on this study by looking at South Africa as one of the countries that has adopted this mode of legal representation for children who have contravened the law.

## **1.9. Research Methodology**

This study undertakes a qualitative method of research. It majorly relies on desk research which involves analyzing scholarly books, reports and journal articles to establish the essence and applicability of the right to legal representation of children in court. It also relies on the doctrinal approach, which heavily relies on core legislated instruments, their subsidiaries and case laws. These include national and international laws pertaining to the rights of the child. Primary sources of data such as constitutions, statutes, case laws and international instruments were used alongside

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<sup>52</sup> Martin Guggenheim, 'Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings' (1998) 29 Loy U Chi LJ 299

<sup>53</sup> Geoff Monahan 'Autonomy vs Beneficence Ethics and the Representation of Children and Young People in Legal Proceeding', Queensland University of Technology Law & Justice Journal 392

secondary sources of information such as books, articles and journals obtained from the University of Nairobi e-library.

The internet plays a significant role in this study, particularly on matters touching on international implications. The researcher used the internet to establish recent publications by scholars and other organizations that work towards ensuring the implementation of children's rights. The internet was also used in finding and analyzing relevant case laws to this study.

The study also looks into garnering the best practices from comparable jurisdictions, that is, United States of America (USA), the United Kingdom (UK) and Republic of South Africa (S.A). The study leads to borrowing from the best practices with an aim to making recommendations on how to improve the implementation of children's right to legal representation. The USA and the UK are some of the leading nations in championing for the rights of the child. S.A, on the other hand has a constitution that is almost similar to that of Kenya. It would be prudent to study their performance in terms of implementing the right of children to legal representation and learn from their best practices.

### **1.10. Scope and Limitation**

This research is limited to analyzing the legal aspects relating to the right of children to legal representation in Kenya. It touches on the legal issues raised by experts concerning children's right to legal representation. This study foresees minor limitations such as inaccessibility of the subjects in person, that is children in conflict with the law due to time constraint which limited the primary sources of information needed for this study. However, this limitation shall be mitigated through finding their voices in case law.

### **1.11. Chapters Breakdown**

The first chapter of this study comprises of the introduction and background of this research. It outlines the problem statement objectives of this study with regards to the right to legal representation and briefly analyses the position of the law pertaining to children's right to legal representation. The chapter further establishes the relevant theories that this study is premised on. It borrows a few ideas from the literature that will guide this study. It confirms the problem statement by highlighting the legal position of the right to legal representation. Finally, this chapter sets out the outline of the research by providing the chapter breakdown.

The second Chapter traces the historical development of children's right to legal representation dating back to the pre-colonial era, the colonial era and post-colonial era. It endeavors to establish how children were accorded legal representation in Kenya before the existence of the current laws. This chapter is significant as it gives the chronological development of children's right to legal representation in Kenya.

The third chapter seeks to discuss the legal framework pertaining to the right to legal representation. It analyzes relevant domestic laws, regulations international and regional instruments, and case law touching on the children's right to legal representation. This is with a view to unveiling possible shortcomings.

The fourth chapter outlines the challenges facing children in Kenya as hindrance and cause for their inability to acquire legal representation in Kenya.

The fifth chapter focuses on garnering the best practices from jurisdictions that have managed to implement the child's right to legal representation with some success. From the jurisdictions, it borrows lessons for application in the Kenyan situation. Jurisdictions with the best practices in this chapter are the United States of America (USA), the United Kingdom (UK) and the Republic of South Africa.

This sixth chapter concludes the study by summarizing the previous chapters and the findings of this study. It also makes recommendations on the best ways to address the challenges facing the implementation of the child's right to legal representation in Kenya.

## CHAPTER TWO

### 2.0. Historical Background of Children’s Right to Legal Representation

#### 2.1. Introduction

This chapter traces the historical development of the right of the child to legal representation from the pre-colonial to post-colonial era, before the dawn of the Constitution of Kenya, 2010. It endeavors to contextualize the right to legal representation of a child in an African set up before Kenya was declared a British Protectorate and after Kenya attained its full independence in the year 1963.

Historical literature reveals that the responsibility of ensuring the welfare of children rested on the shoulders of parents or guardians notwithstanding the society at large in an African set up.<sup>54</sup> The community had the duty to ensure that the environment the children lived in was conducive for them to grow and develop.<sup>55</sup> Whenever the children would be in conflict with the communities customs and norms, they would be summoned by the relevant judicial organs of the community such as the council of elders or chiefs, represented by their parents or guardian.

This chapter is divided into four parts. It commences with the introduction of the concept of legal representation of children during the pre-colonial era. This part also sheds light on how children involved in behaviors that were in conflict with the community’s norms were disciplined during that era. The second part delves into children’s right to legal representation during the colonial era. It looks at the introduction of common law in Kenya and how this impacted on the right to legal representation of children. A discussion on the right to legal representation of children during the post-colonial period takes place in part three. Finally, the last section concludes by summarizing the historical background on the right to legal representation of the child.

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<sup>54</sup> Julinda Beqiraj and Lawrence McNamara “Children and Access to Justice: National Practices, International Challenges” (2016) Bingham Centre for the Rule of Law Report

<sup>55</sup> Ojo, I. O., & Ekhaton, E. (2020). Pre-colonial legal system in Africa: an assessment of indigenous laws of Benin kingdom before 1897. *Umewaen: Journal of Benin and Edo Studies*.

## 2.2. Children's Right to Legal Representation During the Pre-Colonial Era

Before colonialism, the territory that is now Kenya was inhabited by multiple and diverse communities who did not have a uniform system of dispute resolution mechanism. There was no professional legal representation amongst Africans. Each community had its unique ways of promoting peace, justice and order amongst the members of the community.<sup>56</sup>

Scholars however concede the dearth of written literature or recordings of the history of pre-colonial legal history in Africa.<sup>57</sup> Kenya is no exception to this since most of the communities that existed in its geographical location did not have a written literature style to keep written records of what happened. Instead, communities relied on oral literature as a way to pass information to the next generation. There is, however, consensus that most of the communities embraced a justice system that utilized tools such as mediation, negotiation, conciliation and reconciliation to resolve disputes.<sup>58</sup>

These indigenous communities relied on their customary laws to resolve disputes. Customary laws were the norms that emanated from their religion or customary practices that were enforceable by the communities' central political system or what they perceived to be their authority such as village elders, chiefs or kings.<sup>59</sup> Collective responsibility was the central nerve of the legal systems in African communities, including those in Kenya.

The collective responsibility ensured that everyone including extended family members and members of a clan in general took part in the upbringing and discipline of the child. Thus, whenever a child deviated from the customary laws of the community, his/her relatives were held liable for their actions<sup>60</sup> They were treated as the child's guardian since they had all the means to tame the child's unbecoming behaviors before they reached uncontrollable levels. Most communities avoided individualism and encouraged collective responsibility since successes and failures were celebrated together. Therefore, a child in conflict with the customary norms appeared

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<sup>56</sup> UNDP, U., & Women, U. N. (2016). Human rights and traditional justice systems in Africa.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> Justice Modibo Ocran, "The Clash of Legal Cultures: The Treatment of Indigenous Law in Colonial and Post-Colonial Africa" (2015). Akron Law Review.

<sup>60</sup>Don Cipriani (n 45).



before the council of elders or chief together with the persons who were responsible to him or her in view of explaining why the child was in conflict with the law.

The practice of having family members answer for a child in conflict with the law was practiced amongst members of different communities in Kenya and across Africa.<sup>61</sup> Every interested person was invited in the public hearings and the person with the knowledge of the case in motion would be allowed to ask questions and seek clarity on behalf of the child.<sup>62</sup> Involvement of the community cemented the goals of the African traditional justice system such as reconciliation. The involvement of the family members or the guardians of the child in a traditional hearing set up ensured that children were well represented in cases involving them.

African communities relied on both restorative and retributive justice as a means to discipline a child found in conflict with the communities' norms and ways.<sup>63</sup> Resolution of disputes was majorly pegged on restorative values which worked to restore peace between the families involved and the community at large. Hearing of cases was done before the elders who made sure that the parents of the child were present to clarify on issues concerning the child.<sup>64</sup>

### **2.3. Children's Right to Legal Representation During the Colonial Period**

After the 1885 Berlin Conference, East Africa was divided into various territories including present day Kenya. In 1920, Kenya was declared a British Colony.<sup>65</sup> The British introduced the English common law as a means to control the behavior of the vast Kenyan tribes.<sup>66</sup> The introduction of English common law ensured that all African societies were treated the same.<sup>67</sup> However, variance was seen when Africans were presented in different courts compared to the British who were subjected to common law. The British colonial system introduced a hybrid legal system where courts of law existed under common law concomitantly with the African judicial

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<sup>61</sup> B. A. Ogot, *Pre-Colonial Kenya - Kenya Before 1900* (Nairobi: East African Publishing House, 1976. Pp. xix + 291).

<sup>62</sup> United Nations Human Rights Commission (2016) *Human rights and traditional justice systems in Africa* (United Nations Publications).

<sup>63</sup> Kinyanjui S, 'Restorative Justice in Traditional Pre-colonial 'Criminal Justice Systems' in Kenya' (2009-2010) 10 *Tribal Law Journal* 2.

<sup>64</sup> *Ibid*

<sup>65</sup> 'The History of Kenya', < <http://www.kenyarep-jp.com/en/kenya/history/> > Accessed on 21 August 2023

<sup>66</sup> United Nations Publications (n 50).

<sup>67</sup> Okech, C. (2017). *The juvenile justice in Kenya: Growth, system, and structures.*

system.<sup>68</sup> Courts applied African customary laws for Africans and common law for British. Similarly, children of African descent were subjected to the African courts.

Children appeared before the African judicial authorities together with the parents or guardians and even extended families when required to do so.<sup>69</sup> According to traditions, the guardian of the child had to appear before the authorities to explain their lack of responsibility in nurturing the child and modeling them in the ways of the tribe.<sup>70</sup> There was no point in time a child would appear alone in the African judicial authorities and the thought of street children did not exist as it was assumed that children would stay with their parents or guardians.<sup>71</sup>

The common law, on the other hand, transplanted the English common law system by establishing various agencies and procedures such as arrest, the police, court rooms and imprisonment.<sup>72</sup> Unlike the African traditional communal ownership of a child, common law introduced individual ownership of their deeds.<sup>73</sup> The responsibility of arrest, trial and detention of a child became the responsibility of structures and institutions of corrections. The colonial government considered this as a measure of ensuring that children are tried and detained separately from adult suspects or convicts. Over time, children moved to the urban areas either through their parents seeking greener pastures or colonial resettlement. This necessitated the need to have more courts to hear and determine criminal cases involving children as suspects.

Most of the time African children did not have legal representation as they could not afford one. Almost all lawyers were Europeans and Asians which made it difficult for Africans to be represented in either European or African courts.<sup>74</sup> The right to legal representation was largely weak as most of the Africa families were illiterate and did not appreciate the concept of legal representation for a child. Hence, it was up to the judges to decide on what was just and what was

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<sup>68</sup> Ibid.

<sup>69</sup> Ibid. 16

<sup>70</sup> Ibid 9.

<sup>71</sup> Philista M. Onyango Katete Orwa Aloys A. Ayako J. B. Ojwang' Priscilla W. Kariuki (1991), "Research on Street Children in Kenya" (ANPPCAN- Attorney General's Office). Pg. 64

<sup>72</sup> Kercher, L. C. (1981). *The Kenya Penal System: Past, Present, and Prospect*. Washington, DC: University Press of America.

<sup>73</sup> Okech (n 67).

<sup>74</sup> Swanepoel, P. (2015). Kenya's Colonial Judges: The Advocates' Perspective. *Journal of Asian and African Studies*, 50(1), 41–57. < <https://doi.org/10.1177/0021909613510696> > Accessed on 5 June 2023.

unjust.<sup>75</sup> The British law applied was not clear on the African children's right of legal representation in a court. European children were accorded representation under the common law. However, the law did not specify who to bear the cost of such legal representation.<sup>76</sup>

The colonial system was adverse to Africans in all socio-political and economic aspects. For instance, the colonial authorities made it difficult for Africans to get good jobs to enable them make an income.<sup>77</sup> Most of the time when children were in conflict with the law, their parents, guardians or relatives could not be able to help them appeal to the common law courts due to lack of financial means. Still, British government maintained its rule stamping the supremacy of the British in Kenya compared to the native citizens.

Furthermore, the colonial system of government failed to empower African courts. It failed to acknowledge the decisions made by courts.<sup>78</sup> Instead, when one found themselves in conflict with the law, particularly where an African was alleged to have wronged a British settler, the government would bring the accused/offender to justice through the common law.<sup>79</sup> The government would not appreciate the authority of the African customary laws or practices. This would adversely affect individuals of African descent who included child offenders.

## **2.4. Children's Right to Legal Representation Post-Colonial Period**

Post-colonial era was marked with changes in law ranging from national, regional to international laws. Kenya, a young state in 1963 legislated national laws right from the constitution to statutes such as Children and Young Offenders Act and Children Act. Decades later, Kenya ratified international and regional conventions such as the CRC and ACRWC to ensure the best interest of the child was made paramount and protected.

### **2.4.1. Constitution of Kenya, 1963**

Kenya attained her independence in 1963. This meant that she needed to come up with her own Constitution and other legislation to safeguard the rights of her citizens including children. This

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<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> E. Huxley, (1963) "White Man's Country" New York, Vol. II.

<sup>78</sup> Okon John, Ph.D, (2014) 'Colonialism in Africa and Matters Arising - Modern Interpretations, Implications and the Challenge for Socio-Political and Economic Development in Africa' (ISSN) Vol.4, No.18, 19.

<sup>79</sup> Ibid.

led to the promulgation of the Independence Constitution in 1963. It recognized both the common law court and the African courts. Generally, it encouraged legal representation for everyone brought before the common law court. However, it exempted legal representation as a right for those who were charged in an African customary court for breaching African customary laws.<sup>80</sup>

The 1963 Kenya Constitution did not have express provisions on the rights of children, including the right to legal representation. However, it specifically forbade discrimination on any basis including age.<sup>81</sup> By implication, children were also entitled to legal representation like any other persons who came into conflict with the law.

#### **2.4.2. Children and Young Persons Act, Chapter 141**

The Act herein came into force in 1963.<sup>82</sup> The main reason for legislating the Act was to provide measures to safeguard and discipline minors and young persons.<sup>83</sup> According to the Act, a person is considered a child if they are younger than fourteen, a juvenile if they are between fourteen and sixteen, and a young person if they are more than sixteen but younger than eighteen.<sup>84</sup>

The Act mentioned the term “right” only thrice, and in the three times it did not refer to the child’s right to legal representation. However, the Act required parents of the child to appear in court throughout the proceedings.<sup>85</sup> Under the act, court was vested with power to summon the parents of the child to be present in court where they could be found, unless the court found it unreasonable to have them present.<sup>86</sup> This provision was insufficient since the parents were not allowed to represent their children in case they were in contravention with the law.

The court had the full authority to determine what was just for the child including how the proceedings would take place. The court only allowed few individuals during the proceedings which included the court clerk, the parties, lawyers, parents, guardians and journalists.<sup>87</sup> However, permitting lawyers to be present during the court proceedings is not synonymous with granting the

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<sup>80</sup> Kenya Constitution, 1963 (Independence Constitution); Section 20(12).

<sup>81</sup> Ibid; s14.

<sup>82</sup> Kenya Law Report <<http://kenyalaw.org/kl/index.php?id=5571>> Accessed on 14 December 2022.

<sup>83</sup> Children and Young Persons Act, 1963 (KEN) (Repealed), Preamble.

<sup>84</sup> Ibid, Preamble.

<sup>85</sup> Ibid, s 9.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid, s 4.

child a right to legal representation. The lawyer must have instructions to act for the child. Failure of the statute to include a provision for the right of a child to formally have legal representation during the court's proceedings on behalf of the child portrayed lack of consideration for children's right to legal representation.

Nevertheless, the Act sought to remove terms/words that stigmatized against children from being used in courts. The Act forbade the use of certain terms such as 'conviction' and 'sentence' during the court proceedings.<sup>88</sup> The Act also provided that the means or procedure for arresting a child should not be confrontational but rather more informal.<sup>89</sup> Despite the Act being silent on the right to legal representation, the arrest and hearing procedures were a clear indication that courts and the police had a duty to ensure that a child in conflict with the law was treated fairly and with dignity.

#### **2.4.3. Children Act, 2001 Chapter 141**

In 2001, the Kenyan Parliament enacted the Children Act, whose main purpose was to breathe life into the principles of the CRC and the ACRWC.<sup>90</sup> The Children Act repealed the Young Persons Act and substituted certain terms like "juvenile" and "minor" with the term "child".<sup>91</sup> The Children Act also removed the term "juvenile delinquents" by recognizing vulnerable children in need of care and protection<sup>92</sup>.

The Act appreciated the need for legal representation of children in courts. It provided that the court had the power to order that a child be represented in the proceedings before a court.<sup>93</sup> The Act clarified that the money used to pay the child's legal aid would be defrayed out of the monies given by Parliament.<sup>94</sup>

The provision for legal aid in the Children Act was narrow and inconclusive. For instance, the Act failed to outline the circumstances under which the child would be entitled to representation court.

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<sup>88</sup> Dr. Patricia Kameri-Mbote, 'Custody and the Rights of the Children' (2000) Kivutha-Kibwana & Lawrence Mute eds Law and the Quest for Gender Equality in Kenya.

<sup>89</sup> Marcos (n 36).

<sup>90</sup> Children Act (2001) (KEN) (Repealed), Preamble.

<sup>91</sup> *Ibid*, s 2

<sup>92</sup> *Ibid*, s 119

<sup>93</sup> *Ibid*, s 77.

<sup>94</sup> *Ibid* (n) s 77.

It did not also bar prosecutors from arraigning unrepresented children in court. There was no mechanism to ensure that children's right to legal representation was firmly enshrined in the statute.

## **2.5. Conclusion**

The history of legal representation of children in Kenya dates back to the pre-colonial era. However, tangible literature sources begin to surface during the colonial era. Literature reveals that collective responsibility created a scenario where children appeared before the colonial courts, together with their guardians, parents or extended family. Hence, there was no point in time when children were unrepresented. Colonialism introduced individualism where sometimes children arrested in the streets of urban areas were taken to court to defend themselves. The law on children has metamorphosized to ensure that children are protected. Over time, the need to have children's right to legal representation implemented has grown. This is seen through the adoption of international instruments by the Kenyan government as one of the ways to protect the interests of the child. In the next chapter, the study interrogates how international and recent national laws in Kenya with regards to children, have tried to cure the lack of representation of children which was countenanced by post-colonial legislation.

## CHAPTER THREE

### 3.0 A critique of the Kenyan Legal, Regulatory and Policy Framework.

#### 3.1. Introduction

We covered the historical context of children's legal representation in Kenya in the preceding chapter. We examined the pre and post-colonial justice system with regards to representation of children. In this chapter, we will interrogate the international and national legal and regulatory framework in Kenya with regards to children who contravene the law, and how the policies have enhanced representation of children to date. The chapter is divided into three parts. The first part comprises a discussion of the national legal framework including the Constitution, statutes and case law. The second part includes regional and international laws relating to the rights of children and peremptory norms emanating from the international law principles.

This chapter outlines and interrogates the Kenyan legal framework on children's right to legal representation. The laws include the constitution, domestic laws and regulations and case laws and international instruments signed and ratified by Kenya. It establishes the provisions in the laws that provide for the right to legal representation of children who contravene the law and the gaps within the provisions.

The chapter also seeks to unveil the institutions and persons bestowed with the responsibility of ensuring that children's right to legal representation is actualized. This is by interrogating the powers and resource allocated towards ensuring that the right to legal representation is respected and implemented.

#### 3.2. National Laws on Children's Right to Legal Representation

##### 3.2.1 The Constitution of Kenya, 2010

This constitution is considered as one of the most progressive set of laws in the world. It was borne as a result of years of clamor for a new constitution, where Kenyans sought to eradicate imperialism, and give to themselves a more people centric supreme law.<sup>95</sup> Its supremacy emanates from the citizens and binds every person and states organ at each level of the government. It

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<sup>95</sup> Constitution of Kenya (n 4), Art. 2(1).

provides that everyone is equal before the law and enjoys equal benefit and protection by the law. The Constitution enjoins the state to protect everyone from direct or indirect discrimination regardless of their age, sex, ethnic, social origin, culture, religion, or any other form of discrimination.<sup>96</sup> The spirit of this provision is to protect the marginalized and the vulnerable members of the society, including children in conflict with the law.<sup>97</sup>

The constitution defines a child as an individual who has not attained eighteen years of age.<sup>98</sup> It declares that a child's best interest should always come first in matters involving children.<sup>99</sup> The right of children to be safeguarded against maltreatment, abuse, inhumane punishment, and neglect is one of the rights outlined in the Constitution.<sup>100</sup> Additionally, the constitution stipulates that minors must only be detained in extreme circumstances and that they must be kept apart from adults during their brief detention.<sup>101</sup>

The provisions of article 50 of the constitution, which lists the right to a fair trial as one of the fundamental rights enjoyed by every individual, strongly imply that the right to legal representation is one of a child's rights even though the constitution does not specifically state this. This was outlined in the case of *Republic v J W K*,<sup>102</sup> where a child with a mental disorder was charged with murder, the court pronounced itself by stating that fair hearing is a fundamental face of due process that is founded on the cardinal rules of natural justice where one had been accused of a criminal offence.<sup>103</sup> The constitution further guarantees every accused person the right to have their disputes resolved in an independent and impartial court of law or in an independent body.<sup>104</sup> The term "every accused person" in this context includes children in conflict with the law.

The right to a fair hearing encompasses various components such as the right to choose and be represented by a lawyer of his or her choice.<sup>105</sup> To illustrate the importance of legal representation,

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<sup>96</sup> Ibid, Art. 27.

<sup>97</sup> *Thomas Alugha Ndegwa v Republic* Court of Appeal at Nairobi Criminal Appeal No.2 of 2014 [2016] Eklr.

<sup>98</sup> Constitution of Kenya (n 4), Art. 260.

<sup>99</sup> Ibid, Art. 53(2).

<sup>100</sup> Ibid.

<sup>101</sup> Ibid, Art. 53.

<sup>102</sup> *Republic v J W K* Bungoma High Court Criminal Case No.57 of 2009 [2013] eKLR.

<sup>103</sup> Ibid.

<sup>104</sup> Constitution of Kenya (n 4)Art. 50(1).

<sup>105</sup> Ibid, Art. 50(2)(h).



the Supreme Court in *Republic -vs- Karisa Chengo & 2 Others*,<sup>106</sup> where the respondents had been charged with the offence of robbery with violence held that the right to legal representation as outlined under Article 50 is a fundamental ingredient of the right to a fair trial and is enjoyed in accordance with the edict of the Constitution. The Constitution also elucidate that where there is a possibility of serious injustice, an accused person is entitled to be assigned a lawyer by the state and at the state's expense. This right can only be fulfilled if the accused person has been informed of their right to legal representation under such circumstance by the arresting officer.<sup>107</sup>

Courts have a duty to enforce adherence to the constitution and ensure the principles of the right to a fair trial, especially where a child has contravened the law.<sup>108</sup> The Constitution grants the High Court the jurisdiction to hear any question touching on denial, infringement of, or violation of the rights provided in the Bill of Rights.<sup>109</sup> The same court has the power to interpret the Constitution on any question touching on constitutional provisions. These interpretative powers are significant as they enable the court to decipher the meaning of individuals in the Constitution to mean everyone including children.<sup>110</sup>

The Constitution also guarantees the right to access to justice to everyone and where a fee must be charged, the same must be reasonable so as not to impede access to justice.<sup>111</sup> The right to access to justice is not limited and applies to everyone as envisioned by Articles 48 and 50. While Article 48 of the Constitution establishes the right to access to justice for everyone in conflict with the law, Article 50 on the other hand establishes the right to have counsel assigned to them where they are likely to suffer substantial lose.<sup>112</sup>

Article 159 of the Constitution enunciates that justice should be done to everyone regardless of their status.<sup>113</sup> Status in this context refers to every possible status that one might have including childhood. For justice to be administered it must be seen substantially and procedurally.

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<sup>106</sup> *Republic -vs- Karisa Chengo & 2 Others* Supreme Court Petition No. 5 of 2015 [2017] eKLR.

<sup>107</sup> Constitution of Kenya (n 4) Art. 50(2)(g) &(h).

<sup>108</sup> *Mphukwa v S* (CA&R 360/2004) [2012] ZAECGHC 6.

<sup>109</sup> Constitution of Kenya (n 4), Arts. 23 & 165.

<sup>110</sup> *P O O* (n 10).

<sup>111</sup> *Ibid.*

<sup>112</sup> *Thomas* (n 84).

<sup>113</sup> Constitution of Kenya (n 4) , Art. 159(2).

### 3.2.2 Children Act No. 29 of 2022

The act herein was enacted to cure the shortcomings that existed in the Children Act of 2001. It sought to improve children's welfare based on the emerging issues concerning children's rights.<sup>114</sup> For instance, the Act increased criminal liability age from the previous 8 years to 12 years.<sup>115</sup> It further introduced family based alternative care as opposed to the repealed Act which was more inclined on institutionalization of children.<sup>116</sup> The Act established Child Welfare Fund which would be financed by the national exchequer to facilitate the social security of children in Kenya per the constitution .<sup>117</sup> Further, the Act gives full effect to Article 50 of the constitution, by expressly providing that children who breach the law have a right to be legally represented.<sup>118</sup>

In the preamble of the statute herein, it reads that '*this act of parliament give effect to Article 53 of the Constitution; to make provisions for children's rights, parental responsibility, alternative care of children including guardianship, foster care placement and adoption; to make provisions for care and protection of children and children in **conflict with the law***'.<sup>119</sup> The statute in its preamble echoes the need to protect children who are arrested and charged in court.

The Act proclaims that fair hearing demands the child to be heard either by themselves or through representatives.<sup>120</sup> It relies on the edicts of the Constitution to emphasize on the child's right to a fair trial which includes to be presumed innocent until proven otherwise, the right to be informed of the charges preferred against them, the right to legal representation, the right to be accompanied by parents or guardians in the proceedings, the right to examine or cross-examine the witnesses and the right to remain silent and the right to appeal to higher courts.<sup>121</sup>

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<sup>114</sup> Kenya News Agency, ' Public Sensitized on the Amended Childrens Act 2022', <[<sup>115</sup> Children Act \(n 3\), s 2](https://www.kenyanews.go.ke/public-sensitized-on-the-amended-childrens-act-2022/#:~:text=The%20amended%20Children%20Act%202022,implementation%20of%20the%20previous%20law.> Accessed on 10 September 2023.</a></p></div><div data-bbox=)

<sup>116</sup> Ibid.

<sup>117</sup> Children Act (n 3) s 12(7).

<sup>118</sup> Ibid, s 96

<sup>119</sup> Children Act (n 3) Preamble.

<sup>120</sup> Ibid, s 221(1).

<sup>121</sup> Ibid, s 221(2).

In addition to the above, the Children's Act, 2022 grants other courts the power to remit children cases to Children Courts, except where the child has been charged with murder. Children Courts are special courts established under the Act.<sup>122</sup> The court forms part of the subordinate courts but should be guided by the edicts of the Act. The courts are bound to apply all the edicts of the Act, particularly those relating to safeguarding the interests of child offenders.<sup>123</sup> More so, the courts are obliged to handle children cases with utmost care and concern.<sup>124</sup>

Whereas the right to legal representation of a child is provided for in the Act<sup>125</sup>, there still exists legal gaps that hinder the realization of this right. The courts as the custodians of the law, have the mandate to seal this gap by making decisions that give full effect to the realization of children's right to be represented. This can happen when the court is conscious of the complexity of the matter and the charges leveled against the child before allowing him or her to stand trial alone<sup>126</sup>

In a nutshell, the Act endeavors to replicate constitutional provisions on the right to a fair trial. It has set out clearly the rights of child offenders which includes their right to be legally represented. However, the implementation of the rights such as the right to legal representation majorly lies with the court during the proceedings and during the interpretation of the law.

The Act is further silent on legal representation of children during arrest or before trial. It does not expressly require the arresting officer, to notify the parent or guardian of children offenders in the shortest period of time after their arrest.<sup>127</sup> The absence of legal representation during the arrest and before trial of the child exposes the child to the risk of confessing or revealing information to the officer that might be self-incriminating hence violating his/her right to fair trial.

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<sup>122</sup> Ibid, s 90.

<sup>123</sup> Ibid, s 219(5).

<sup>124</sup> Children Act (n 3) s 95.

<sup>125</sup> Ibid.

<sup>126</sup> *P O O* (n 10).

<sup>127</sup> Children Act (n 3) s 218.

### 3.2.3. The Legal Aid Act No. 6 of 2016

Parliament enacted this Act to fulfil to the edicts of the constitution.<sup>128</sup> These Articles form the basis for the right to access to justice in Kenya. The main objectives of the Act is to avail legal services to needy persons in the society for free.<sup>129</sup> It is on that basis that the statute establishes the National Legal Aid Service, which provides legal services to needy and marginalized persons including children offenders at the expense of the State.<sup>130</sup> Further, the body formulates policies on matters legal aid, by determining the areas of law that need to be assigned legal services.<sup>131</sup> The statute is also aimed at promoting legal awareness in Kenya and ensuring that the National Legal Aid Service is governed by the principles of rules of natural justice, protection of the marginalized groups, inclusiveness and non-discrimination.<sup>132</sup>

The Act categories children as some of the individuals who are eligible for legal aid.<sup>133</sup> Indigent in this context refers to children who are unable to raise legal fees. The Act also specifies that an individual cannot be eligible for legal aid unless the NLAS establishes that indeed they qualify for legal aid.<sup>134</sup> Legal costs are mostly higher than what parents, or guardians can afford. There is a likelihood of a right being lost if the child is not represented in court. This was referred to in the case of *Thomas Alugha Ndegwa v Republic*<sup>135</sup> where the appellant had been charged with the offence of defilement. He had applied for legal aid at the court due to financial constraints. The court stated that legal aid is a constitutional, legal and human right.<sup>136</sup> This is one of the reasons why the Act provides that children need legal aid where they cannot afford the legal fees. A parent, guardian or any person responsible for the child can apply for legal aid service on behalf of a child in conflict with the law.<sup>137</sup>

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<sup>128</sup>Legal Aid Act (n 6), Preamble.

<sup>129</sup> Ibid (n 131), s 3.

<sup>130</sup> Ibid, s 35(1) & (2).

<sup>131</sup> Ibid, s 35(3).

<sup>132</sup> Ibid, s 4.

<sup>133</sup> Ibid, s 36(1).

<sup>134</sup> Ibid, S36(3).

<sup>135</sup> *Thomas* (n 84).

<sup>136</sup> Ibid.

<sup>137</sup> Legal Aid (n 6), s 41.

Children who contravene the Law suffer substantial injustice when unrepresented during court proceedings. In the case of *David Njoroge Macharia v Republic*,<sup>138</sup> the court held that ‘every capital offence where death or lifetime sentence is likely to be ordered connotes the likelihood of a substantial injustice where an individual appears in court unrepresented. Children are also likely to be charged with capital offences. Despite the fact that the case did not include a child as a party, the same principles apply to them. The court needs to consider children cases as those that merit free legal representation to and the possibility of serious prejudice to them’.<sup>139</sup>

The statute places on the court an obligation to inform unrepresented persons of their right to legal aid.<sup>140</sup> To determine whether to notify an accused person of the aforementioned right, the court considers the charges and penalty preferred against the person, the complexity of the matter and the financial capacity of the accused person.<sup>141</sup> However, where a child is presented to court as a child offender in accordance with the Children’s Act, the court has the option of ordering the NLAS to provide the child with legal representation.<sup>142</sup> This option has been clarified by superior courts by stating that the use of the word ‘may’ in the Act should not prevent courts from ordering that children should be represented in courts. In the case of *JKF v Republic*,<sup>143</sup> where a minor had been charged with the offence of defilement, the court of appeal stated that, ‘although provision of legal aid to children in conflict with the law was not in mandatory terms, trial courts were obliged to ensure that the children are provided with counsel at the public’s expense’.<sup>144</sup>

### **3.2.4 The Child Justice Bill, 2022**

The Child Justice Bill, 2022 was tabled before the National Assembly for debate on 10<sup>th</sup> March 2022, and its first reading held on 6<sup>th</sup> April 2022.<sup>145</sup> The Bill seeks to protect children suspected or accused of crime by protecting their rights as established in the various international instruments that provide for human rights. The Bill seeks to establish the components of the right of children

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<sup>138</sup> *David Njoroge* (n 49).

<sup>139</sup> *Ibid.*

<sup>140</sup> *Legal Aid* (n 6), s 43.

<sup>141</sup> *Ibid.*, s 43(1A).

<sup>142</sup> *Ibid.*, s 43(3).

<sup>143</sup> *JKF v Republic* Malindi High Court Criminal Appeal No.3 of 2018 [2019] eKLR.

<sup>144</sup> *Ibid.*

<sup>145</sup> Kenya Law Reports < <http://kenyalaw.org/kl/index.php?id=11561> > Accessed on 5<sup>th</sup> April 2023.

to legal representation.<sup>146</sup> It seeks to clarify that a legal representative of child in court has to be a lawyer, who should allow a child in conflict with the law to issue independent instructions concerning their case.<sup>147</sup> The legal representative shall explain to the child offender of their rights to fair trial and legal representation in a manner that is best understood by the child at their level of development and understanding.

The Bill also seeks to allow the child to give instructions to the legal representative in a language that the child understands. The parents or an appropriate adult responsible for a child in conflict with the law should appoint a legal representative for the child where they can afford one.<sup>148</sup> Where a preliminary conclusion has been made that the parents of the appropriate person is unable to appoint a legal representative, the Bill proposes that the state provide legal representation at its expense.<sup>149</sup> However, the Bill provides for certain conditions that would make the state provide legal representation for a child in conflict with the law. These include situations where the child is in detention pending plea taking, proceedings are adjourned for plea and trial and a sentence involving detention might be entered against the child, the child is under the fourteen years and has been proved so, or substantial injustice might occur if the proceedings happen without legal representation.<sup>150</sup> the Bill seeks to have such fees payable to the legal representatives obtained from the National Consolidated Fund through the Cabinet Secretary in charge of the administration of justice.<sup>151</sup>

The Bill also guides on the waiver of the right to legal representation by the child. It envisions a situation where a child may not waive his or her right to legal representation.<sup>152</sup> Where a child in conflict with law refuses to give instructions to the legal representative, the legal representative shall bring this to the attention of the court. The court shall question the child of the reasons for refusal to give instructions and shall note the reasons given by the child.<sup>153</sup>

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<sup>146</sup> Child Justice Bill, 2022, Part VI.

<sup>147</sup> Ibid, Clause 62(1) & (2).

<sup>148</sup> Ibid, Clause 63(1) & (2).

<sup>149</sup> Ibid, Clause 64.

<sup>150</sup> Ibid.

<sup>151</sup> Ibid, Clause 64(4).

<sup>152</sup> Ibid, Clause 65(1).

<sup>153</sup> Ibid, Clause (65)2.

### 3.3. International Legal Framework

The jurisdiction of international laws in Kenya is underpinned by the Constitution, whilst Article 2(5) and (6) confirm the supremacy, the same emphasizes on applicability of international law and principles as part of the laws of Kenya. Article 2(5) of the Constitution stipulates that the general rules of international law form part of the laws of Kenya.<sup>154</sup> Any treaty or convention ratified by Kenya automatically forms part of the laws of Kenya under the Constitution.<sup>155</sup> All the international conventions discussed in chapter two, including CRC and ACRWC, of this study still form part of the laws of Kenya under the Constitution of Kenya. Therefore, other than analyzing other international instruments, this part of the study delves into courts' interpretations and application of international laws in issues surrounding legal representation of children in conflict with the law.

Kenyan courts have relied on international treaties and covenants to resolve questions of fundamental human rights.<sup>156</sup> For instance, in the case of *P O O (A Minor) v Director of Public Prosecutions & another*<sup>157</sup>, the Court relied on article 37(d) of CRC, in determining whether the minors right to fair trial was contravened.

International instruments such as UDHR, ICCPR, ACRWC and International Guidelines on Children in Conflict with the Law bestow the duty of ensuring children in contravention with the law are accorded the right to legal representation to the state parties.<sup>158</sup> This was noted in the case of *P K v Republic*,<sup>159</sup> where the Court referred to Section 186 of the repealed Children Act as the section that is keeping the Convention of the Rights of the Child alive, by providing for what is required of the member states, which is to ensure that all the administrative bodies, social welfare institutions or courts of law prioritizes the best interest of child, including legislating laws that ensure that the right of children to legal representation is adhered to.<sup>160</sup>

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<sup>154</sup> Ibid Art. 2(5).

<sup>155</sup> Ibid, Art. 2(6).

<sup>156</sup> Judicature Act, 1967 (KEN) s 3.

<sup>157</sup> *P O O* (n 10).

<sup>158</sup> *P K v Republic* Nakuru High Court Criminal Appeal No.7 of 2014 [2019] eKLR.

<sup>159</sup> *ibid*.

<sup>160</sup> CRC (n 1), Art. 3(1).

### **3.3.1. Universal Declaration of Human Rights**

The UDHR which was adopted by the UN General Assembly on 10<sup>th</sup> December, 1948, was the outcome of the experience of the second world war. Even though the instrument does not have a binding force, its provisions constitute customary international law. Kenya ratified the UDHR in 1990. The declaration recognizes the inherent dignity and equality of the human race which is founded on freedom, justice and peace around the world.<sup>161</sup> The declaration further recognizes that human beings have led a life of barbarous acts and do not wish to live in that state but rather, a state where human rights are protected by the rule of law.<sup>162</sup> It envisions a world where no one would be discriminated on the basis of their age, race, sex, place of origin, birth, financial status or any other form of discrimination.<sup>163</sup> In other words, the laws developed by a member state such as Kenya should be legislated in such a manner that they cater for every individual's rights.

UDHR further declares that everyone is guaranteed the right to a fair hearing by an independent tribunal or court when determining any charges.<sup>164</sup> The right to a fair hearing accorded to an adult is not the same as the right accorded to a child. This is because an adult might be capable of expressing themselves in courts or tribunals but a child might not be able to understand the proceedings in court let alone how to respond to allegations. Therefore, despite the fact that the UDHR declares equal treatment before the law, the same fails to clarify to what extent children in conflict with the law should be treated. This is because it generalizes everyone without going into the details of children's vulnerability.

### **3.3.2. International Covenant on Civil and Political Rights**

The ICCPR which was ratified by Kenya in 1972 is an international instrument which protects the civil and political rights of all persons. The covenant which came into place to create binding commitments on the general principles that were set forth in the UDHR, binds all state parties to respect and uphold the human rights provisions set forth in it. The covenant mandates Kenya to adhere to the provisions of the UN Charter that ensures respect for, and observance of human rights

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<sup>161</sup> Universal Declaration of Human Rights (UDHR), Preamble.

<sup>162</sup> Ibid.

<sup>163</sup> Ibid, Art. 2.

<sup>164</sup> Ibid, Art. 10.



and freedoms.<sup>165</sup> The Covenant also mandates the member states to develop laws that can give effect to the rights stipulated in the ICCPR.<sup>166</sup>

Children are protected under Article 24 of ICCPR. The Article connotes that children should be protected on equal basis without discrimination as to their language, sex, religion, social origin, birth or property.<sup>167</sup> The Article also emphasizes on the need of the member states to ensure that measures are put in place to protect the interest of a children as a minor.<sup>168</sup> Kenya has fulfilled this requirement by enacting several laws that protect the interest of the child, including the inclusion of Article 53 of the Constitution, enactment of Children Act and the Legal Aid Act amongst other legislation that ensure that children in conflict with the law are accorded the right to legal representation in courts of law.

ICCPR stipulates that everyone has the right to legal assistance and to be prosecuted while present. If they lack legal representation, they should have one assigned to them where the interest of justice so requires.<sup>169</sup> Where they are accorded the necessary legal assistance, they should not be asked to pay if they lack the means to pay for the legal services.<sup>170</sup> This provision resonates well with the Legal Aid Act of Kenya.

The right to legal representation has also been impliedly provided for under Article 14 of the ICCPR. It provides that all persons are equal before a court of law. It states that anyone charged with criminal offence has the right to be presented before an independent and impartial court or tribunal and be represented by a counsel of his own choosing.<sup>171</sup> However, it is noteworthy that the Article fails to outline certain issues such as the fact children lack the capacity to contract a legal counsel to represent them in courts. It calls upon the courts or their guardians to help them choose counsel to represent them in courts of law.

The ICCPR's provisions on the rights of the child to legal representation are quite general and difficult to implement at a personal level. They do not single out the uniqueness or specialness of

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<sup>165</sup> Ibid.

<sup>166</sup> Ibid, Art. 2.

<sup>167</sup> Ibid, Art. 24.

<sup>168</sup> Ibid.

<sup>169</sup> Ibid, Art. 14(3)(d).

<sup>170</sup> Ibid.

<sup>171</sup> Ibid, Art. 14(3).

children in conflict with the law and the need to have a categorical approach in handling court proceedings, especially where children are in conflict with the law.

### **3.3.3. Guiding Principles for the Domestic Implementation of a Comprehensive System of Protection for Children Associated with Armed Forces or Armed Groups**

Though the Guidelines make very limited comments on the right to legal representation, they make a few mentions on the right to a fair trial. The Guiding Principles establishes the “juvenile justice” which recommends that children associated with the crime relating to armed forces need to be treated with humanity.<sup>172</sup> This is regardless whether their accusations are based on the international or domestic law. The Guidelines state that children need to be accorded a fair trial.<sup>173</sup> They also emphasize on the need of a state to have a separate judicial system for children.

The Guidelines also indicate that members of the CRC need to ensure that children associated with armed conflict are accorded necessary legal assistance where necessary.<sup>174</sup> Kenya is prone to Al-Shabaab terrorism radicalization and children are no exception.<sup>175</sup> There is a need to ensure that children accused of being members of such armed groups are accorded legal assistance where necessary. The member states are encouraged to have a children’s justice system that is favorable to all the children.

### **3.3.4. Convention of the Rights of the Child, 1989**

The UN General Assembly adopted the CRC in 1989. Kenya was one of the first African states to ratify the Convention in 1990.<sup>176</sup> The Convention defines a child as an individual below the age of eighteen or one who has not attained the age of the majority as per the laws of the member state.

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<sup>172</sup> Guiding Principles for the Domestic Implementation of a Comprehensive System of Protection for Children Associated with Armed Forces or Armed Groups, pg. 484.

<sup>173</sup> Ibid, pg. 385.

<sup>174</sup> Ibid.

<sup>175</sup> UNODC, ‘ Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System <[https://www.unodc.org/documents/justice-and-prison-reform/Child-Victims/Handbook\\_on\\_Children\\_Recruited\\_and\\_Exploited\\_by\\_Terrorist\\_and\\_Violent\\_Extremist\\_Groups\\_the\\_Role\\_of\\_the\\_Justice\\_System.E.pdf](https://www.unodc.org/documents/justice-and-prison-reform/Child-Victims/Handbook_on_Children_Recruited_and_Exploited_by_Terrorist_and_Violent_Extremist_Groups_the_Role_of_the_Justice_System.E.pdf) > Accessed on 10 September 2023.

<sup>176</sup> Maniza Zaman and Siddharth Chatterjee ‘Child rights in Kenya – 30 years on’ (2019) UNICEF <<https://www.unicef.org/kenya/stories/Child-rights-in-kenya-30-years-on#:~:text=When%20world%20leaders%20came%20together,countries%20to%20ratify%20the%20CRC.> > Accessed on 13 December 2022.

It gave a child a stature in the society as right holders and not mere objects that desire protection and domination.<sup>177</sup> It set the universal standards upon which children should be treated.

The CRC is one of the instruments that generally shaped children and the law in Kenya. It sets the standard for children's right internationally, which was borrowed and expounded on Kenya through its national laws. Some of the words used in the Convention have been borrowed and inculcated into the Constitution of Kenya, 2010. This cements the role of the Convention in the gradual development of the law of children in Kenya, especially with regards to the right to legal representation

The CRC requires each state party to ensure that children's rights are upheld and that no child is discriminated against based on their gender, color, race, religion, language, political opinion, ethnic or social origin, disability, property or other status.<sup>178</sup> Furthermore, the Convention behooves member states to establish measures to ensure that children are accorded necessary support to avoid discrimination or punishment based on their status or beliefs.<sup>179</sup> The convention requires that the best interest of the child should be of primary consideration when any actions or decision concerning the child is made.<sup>180</sup>

Article 37 of CRC lays down the basic duties of the states that are of relevance to children in conflict with the law. One of the duties includes ensuring access to legal assistance.<sup>181</sup> The convention also accords children the right to challenge the legality of any action taken against them in a court of law or tribunal, with legal assistance.<sup>182</sup>

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<sup>177</sup> J W Muyila, *African Values and the Rights of the Child: A View of the Dilemma and Prospects of Change in Lagoutte S and Svaneberg N (eds.), Women and Children Rights, African Views* (Karthala, 2011).

<sup>178</sup> CRC (n 1), Art. 2.

<sup>179</sup> *ibid*

<sup>180</sup> *ibid*, Art. 3.

<sup>181</sup> *Ibid*, Art.37(d).

<sup>182</sup> *Ibid*.

### 3.3.5. African Charter on the Rights and Welfare of the Child, 1990

The African Charter on the Rights and Welfare of the Child was adopted by the OAU in 1990, came into force in the year 1999 and was ratified by Kenya in 2000. It sets the basic norms and status of children in the society. The Charter covers a whole spectrum of the civil, political and economic rights of a child within the member states.

The charter defines a child to mean every individual below the age of eighteen years.<sup>183</sup> Further, it stipulates that no child should be discriminated based on gender, race, color, origin, social status, ethnic, language, parents or place of birth. The Charter obligates states to take the best interest of the child into consideration when any actions concerning a child is taken. In fact, the charter uses the word paramount, which signifies that the best interest of the child should be of utmost importance, unlike the Convention of the Rights of the Child which uses the word ‘primary’.<sup>184</sup> The ACRWC was passed by the OAU to provide for the unique circumstances of the African child which was not sufficiently addressed by the CRC<sup>185</sup>. The framing of the best interest principle in the ACRWC affords the African child more extensive protection. The Charter provides that where a child is capable of talking or expressing themselves, the child should be allowed to do so either personally or through an impartial representative.<sup>186</sup> Further, the views of a child need to be taken into consideration by the relevant authorities established by the laws of the nation.<sup>187</sup>

The Charter mandates all the member states to ensure that a child in conflict with the law is accorded all the necessary support that they might need. These include availing the child with an interpreter where necessary and ensuring that the child is afforded legal representation where the child is in conflict with the penal laws of the nation.<sup>188</sup> This should enable the child to prepare their defense adequately in a quest for a fair hearing.

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<sup>183</sup> ACERWC, Art. 2.

<sup>184</sup> *ibid*, Art. 4.

<sup>185</sup> Kaime T, ‘The African Charter on the Rights and Welfare of Children : A socio- legal perspective’, Pretoria University Law Press 2009

<sup>186</sup> ACERWC, (n 173).

<sup>187</sup> *Ibid*.

<sup>188</sup> *Ibid* ,Art. 17.

### **3.4 Conclusion**

Kenya being a monist state by dint of article 2(6) of the Constitution, international laws form part of the laws of Kenya. Therefore, international instruments which provide for the rights of the child especially on legal representation has an automatic effect and are enforceable in the country. Kenya has however enacted statutes such as the Children's act 2022 and the Legal Aid Services Act, with a view of aiding the implementation of the provisions in the aforementioned international laws. The Statutes and the International instruments have enabled the Kenyan child to have an avenue to enforce their rights to legal representation. However, there are still challenges which hinder the full implementation of the right of the child to legal representation. These challenges are discussed in the next chapter.

## **CHAPTER FOUR**

### **4.0 Challenges hindering implementation of Children's Right to Legal Representation in Kenya**

#### **4.1. Introduction**

The previous chapter discussed the international and domestic laws that provide for the rights of children especially with regards to legal representation. This chapter examines the bottlenecks that face the implementation of children's right to legal representation in Kenya. The chapter is broken down into eight topics. The first topic discusses the absence of express provisions in legislations which provide for the right to legal representation. The second topic, interrogates whether there are provisions providing for the right to legal representation of children upon arrest while the third topic examines the cultural and gender disparity which affect the fundamental right of children to be legally represented. Poverty as a hindrance to children in accessing legal representation follows as the fourth topic which is followed by the fifth topic which touches on weak organizational structures on institutions mandated to provide legal aid. The sixth topic examines the availability of lawyers vis a vis the population of children. A discussion on the directorate of children services takes place as the seventh topic. Finally, the chapter concludes with a discussion of the budgetary allocation to institutions providing legal aid as a bottleneck to effective implementation of the right to legal representation of children.

#### **4.2. Absence of express provision on the Right of Children to Legal Representation in Kenya**

The previous discussion on the Kenyan laws on the right of the child with regards to legal representation, reveal that the intention of the drafters was to secure the best interests of the child to a fair trial. However, the legislations do not categorically address the issue of legal representation in courts. Rather, the provisions generalize the right to legal representation as one of the elements of a fair trial that everyone is entitled to. Generalization of the legal provisions does not accord children the special attention they require when they are in conflict with the law.

For instance, the Children Act 2022 and Legal Aid Act do not clarify who should take charge of ensuring that children do not appear in courts unrepresented. Rather, they merely state that children should be accorded free legal assistance where there is a likelihood of substantial injustice.

This means that up until courts have established that there is a risk of substantial injustice, children can appear before them unrepresented.<sup>189</sup>

The wording of the statutes also plays a key role in limiting the exercise of the right to legal representation. For instance, the Legal Aid Act uses the word “may” instead of “shall”. The Act states that courts “may” order that a child who appears before it unrepresented gets free legal assistance.<sup>190</sup> This means that courts have the discretion to decide whether to order or not for legal representation of the child.

#### **4.3 Absence of provisions on legal representation of children on point of arrest**

It is noteworthy that the Children’s Act 2022 and the Legal Aid Act provide for legal representation of children during trial. The laws do not preempt the possibility of children giving self-incriminating evidence upon arrest, which can be detrimental to their right to a fair trial. It is silent on whether there’s is need to accord children legal assistance shortly after they are arrested. Instead, it is left for the court to decide on the need of legal representation of children during trial.

#### **4.4. Culture and Gender Discrimination**

Culture refers to the ideas, customs and norms of a particular people or society. Gender on the other hand is the identity of a person with regards to being male or female. In a society like Kenya, a male person is viewed differently from a female. The boy child has for the longest time been viewed as a strong and willed individual, capable of thinking his way through difficult situations. Unlike the girl child whom the society feels the need to protect, especially in dire circumstances. This reflects in the child’s right to legal representation. The boy child is more likely to be left to represent himself in court whereas the girl child is more likely to be accorded significant legal assistance.

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<sup>189</sup> Legal Aid Act (n 6), s 43.

<sup>190</sup> JKF (n 148).

In the case of *P O O (a minor) VDPP & Another*,<sup>191</sup> the High Court overturned the decision of the trial court and released an under 18-year-old boy sentenced to imprisonment on the ground that both the boy and girl were minors and could not consent to sex. The Court stated that there was need for both minors to be protected by the law'. This decision is important because it reveals that the boy child is easily vilified under the law, whereas the girl is easily protected. In that case, the girl child had representation through the prosecutor, but the boy was left to represent himself, which led to a miscarriage of justice. It took the boy to be represented by a lawyer in his appeal, to be able to convince the court that he is being discriminated against under the law, by being condemned for defilement whilst him and the complainant were both minors when they engaged in sex.

#### **4.5. Poverty**

Despite statistics revealing that the number of persons living below the poverty line is on the decline, there is still a considerable number of individuals who live in poverty.<sup>192</sup> This means that most families in Kenya cannot afford to pay for legal representation.<sup>193</sup> They tend to let the justice system take its course hoping that things will get better.<sup>194</sup> Children from poor backgrounds are discriminated against those from rich backgrounds, with regards to affordability of legal fees. They are forced to either proceed with their cases unrepresented or seek free legal services which is tough in the Kenyan setting.

Additionally, some of the courts are geographically located in far places where the guardians or parents of poor children are unable to attend. Unrepresentation due to poverty may in some circumstances force the children to pre-trial detention since they are incapable of arguing to be released on bail or bond.<sup>195</sup>

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<sup>191</sup> *P O O (n 10)*.

<sup>192</sup> Natalie Cowling, 'Extreme Poverty Rate in Kenya from 2016 to 2030', Statista < <https://www.statista.com/statistics/1227076/extreme-poverty-rate-in-kenya/> > accessed on 21 February 2023.

<sup>193</sup> Ton Liefwaard, 'Access to Justice for Children: Towards a Specific Research and Implementation Agenda', Brill < [https://brill.com/view/journals/chil/27/2/article-p195\\_195.xml?language=en](https://brill.com/view/journals/chil/27/2/article-p195_195.xml?language=en) > accessed on 21 February 2023.

<sup>194</sup> Ibid.

<sup>195</sup> UNICEF, 'Justice for Children : Justice systems worldwide are failing to protect children and to uphold their most basic rights', < <https://www.unicef.org/protection/justice-for-children> > accessed on 21 February 2023



#### 4.6. Weak Institutions

Organizational politics is when individuals or groups within an organization use their power and influence to achieve their own interest. This subtopic examines how politics in organizations such as the Legal Aid Service or the DPP affect the rights of the child to be legally represented. Most of the time, organizational politics influences the behavior of a group or individuals' benefit.<sup>196</sup> Looking at the rights of a child to legal representation, one needs to reflect on the various institutions such as the Legal Aid Service, the Judiciary, the police and every other institution that plays a role in the criminal justice system in Kenya. The NLAS is only located in places where the Office of the Attorney General is situated. Children residing away from the regional offices of the Attorney General face difficulties in trying to legal aid.

Some courts are on record for trying children without legal representation.<sup>197</sup> If the courts play a key role in ensuring that no child is presented before them without legal representation, then no child shall be tried unrepresented. This can be done throughout the courts starting from the children's court to the High Court in order to curtail the issue of children being presented in court unrepresented. Courts are where children in conflict with the law are tried. It is also where the interests of the child are considered and upheld. Hence, a positive organizational politics within the judiciary, particularly in courts can boost the implementation of children's right to legal representation.

Another institution that is affected by organizational politics is the prosecution. Prosecutors operate from the local areas from where they prosecute cases. They are likely to be affected by the local politics regarding children in conflict with the laws.<sup>198</sup> The danger with this is that prosecutors might engage in political prosecutions forgetting that every child has a right to legal representation and the same should be brought to the court's attention at the first appearance of the child. Also, Legal Aid Service might be filled with organizational politics when it comes to deciding which lawyers to locate to which cases, which cases are preferred over others and which lawyers to get

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<sup>196</sup> Kaya, N., Aydin, S. and Ayhan, O. "*The Effects of Organizational Politics on Perceived Organizational Justice and Intention to Leave*" (2016) American Journal of Industrial and Business.

<sup>197</sup> P O O (n 10).

<sup>198</sup> 'The Politics of Criminal Justice', Cliff Notes < <https://www.cliffsnotes.com/study-guides/criminal-justice/the-criminal-justice-system/the-politics-of-criminal-justice> > accessed on 21 February 2023.

paid first. Decisions involving these choices can either improve or disapprove the implementation of the right of a child to legal representation.

The Child Welfare Society of Kenya is also a significant institution for safeguarding the interest of the child. However, the objectives of the institution are much more visible in writing than in action. The institution is supposed to promote the rights of the child as outlined in the national and international statutes.<sup>199</sup> However, the institution is not very active in demanding that children in conflict with the law are accorded legal representation when in court. The institution needs to liaise with other institutions involved in the mainstream justice system to ensure that children are accorded the legal assistance required, not just in courts but everywhere including police stations.

Governmental legal aid institutions such as the NLAS are under-funded, therefore, they cannot meet the needs of the enormous number of children that seek free legal aid. The National legal Aid Service for example is allocated three million five hundred thousand dollars, to employ staff, both advocates and paralegals and to administer legal aid in all the 47 counties nationwide. This is practically impossible considering the high number of people including children who are need of free legal services.

#### **4.6. Limited Number of lawyers in the Country**

Kenya has a population of approximately fifty-five million people, 53% whom are children. On the other hand, there are twenty-two thousand lawyers currently<sup>200</sup>. The lawyers are spread between those who serve at the judiciary as the bench, and those who serve the bar. Further, not all lawyers practice criminal law. If we are to ratio the number of lawyers to the population of Kenya, it will be unfathomable to think that the right to legal representation can be fully achieved. This means that even if the state stretches its muscles to ensure that children are accorded the right to legal representation, some of the children will have to wait for a while before their cases are assigned to advocates.

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<sup>199</sup>Child Welfare Society of Kenya < <https://www.cwsk.go.ke/mission-vission-and-objectives/> > Accessed on 10 September 2023.

<sup>200</sup> Ibid.

#### **4.7 Directorate of Children Services in the Ministry of Labor and Social Protection**

The directorate of children services in the Ministry of labor is mandated to safeguard and protect the rights and welfare of all categories of children in the country. It is further mandated to provide a national children protection database<sup>201</sup>. The department is also tasked with managing the statutory institutions of children. In the financial year of 2022/2023, the department of social protection for children had a budget estimate of five billion shillings, however, the directorate was allocated less than five hundred million shillings<sup>202</sup>. This connotes that the department is underfunded, therefore, it can barely perform its obligations. In fact, the directorate has been reduced to only collecting data about children's welfare around the country.

The underfunding of the department can largely be attributed to the obscene focus of the Ministry on matters labor or workers welfare thereby neglecting other departments such as the directorate for children services.

#### **4.8 Budgetary Allocation**

Institutions such as the NLAS are under-funded. NLAS receives about seventy-five million shillings annually to run its operations while it needs approximately four hundred and fifty-five million each financial year to effectively deliver on its mandate<sup>203</sup>. Due to under-funding, the NLAS has only five offices countrywide, while it is supposed to provide services across the 47 counties in Kenya.

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<sup>201</sup> Directorate of children services, <<https://www.socialprotection.go.ke/directorates>> Accessed on 10<sup>th</sup> October 2023

<sup>202</sup> National Treasury, '2022/2023 Programme Based Budget of the National Government of Kenya for the year ending 30<sup>th</sup> June, 2023.

<sup>203</sup> Government of Kenya, 'Open Government Partnership National Action Plan IV 2020-2022'

## **4.9 Conclusion**

Implementation of the existing national and international laws on the right of children to legal representation, has had a counter effect from its goal, because of the bottlenecks such as poverty, discrimination, organizational politics and others as discussed above. Kenya might legislate several legislations on the right of a child to legal representation, but without addressing the challenges facing the implementation of the laws and rights, children will continue suffering in the existence of the unimplementable legislations. The next chapter considers best practices from comparable jurisdictions which have managed to implement successfully the right to representation of the child such as the mandatory nature of the aforementioned right.

## CHAPTER FIVE

### 5.0 Best Practices from Comparable Jurisdictions

#### 5.1. Introduction

The previous chapter discussed the challenges affecting Kenya in implementation of the domestic and international laws with regards to the right of legal representation of children. This chapter analyses best practices in comparable jurisdictions such as the United Kingdom, that have managed to effectively implement the right of legal representation of children in court. The study makes its examination by reviewing the relevant legal and institutional frameworks of countries such as the United States of America, the United Kingdom and the Republic of South Africa. The choice of these countries is informed by the evolution of law and advancement in the practice of implementation of the right to legal representation.

#### 5.2. The United States of America

Children's right to legal representation in the United States of America (USA) dates back to the year 1967.<sup>204</sup> The right bases its foundation on the decision of the USA Supreme Court in the case of *In re Gault*,<sup>205</sup> where a fifteen-year-old child was accused of making an obscene phone call to a neighbor in 1964, who filed a complaint against the child and friend. The two were arrested and detained at a children's detention home. Both parents of the child were at work at the time of the arrest and the police left no notice for them and made no effort to inform them that their child was arrested. The case went all the way to the Supreme Court. The court unanimously held that despite the fact that an adult and a minor are both entitled to due process, the latter ought to be treated differently. Children in conflict with the law are entitled to certain procedural safeguards under the Fourteenth Amendment.<sup>206</sup>

The court stipulated that due process is a conglomeration of human rights such as the right to timely notice of criminal charges, the right to examination in chief, cross-examine and re-examine witnesses in court, the right to keep quiet and not to testify against oneself and the right to be

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<sup>204</sup> 'Youth Interrogations & Access to Counsel' Juvenile Law Centre < <https://jlc.org/issues/access-counsel> > accessed on 9th March 2023.

<sup>205</sup> *In re Gault*, 387 U.S. 1 (1967).

<sup>206</sup> *Ibid.* 1(1967)

represented by a lawyer. Further, the court emphasized on the need of a child to have legal assistance for purposes of determining his accusations and charges.<sup>207</sup>

The Fourteenth Amendment of the USA Constitution grants every individual, including children the right to due process. It states that no state should deprive any person of life, liberty or property without due process of the law.<sup>208</sup> States in the USA have gone further to legislate their own laws that establish juvenile courts that deal with children in conflict with the law<sup>209</sup>

The right to legal representation is a right that stems from the Sixth Amendment of the USA Constitution which was sealed by the case of *Gideon v. Wainright*<sup>210</sup>, where the Supreme Court of the USA held that where the defendant is poor and cannot afford counsel, then he or she should be accorded one by the state. In *Gideon v. Wainright*, the defendant could not afford counsel and was outmatched by the state counsel in court. On appeal, the court emphasized that it was a fundamental right for one to be accorded counsel at the expense of the state since it formed a critical component of the right to fair trial. The right to an attorney is a right that must be communicated to the person being arrested, including children.<sup>211</sup> These is commonly referred to as the Miranda warning whereby during arrest, police officers are supposed to inform the person being arrested that they have a right to remain silent and right to an attorney and if they cannot afford one, they'll be accorded one by the state.<sup>212</sup> This is different from Kenya where the right to legal representation is not one of the rights communicated to persons being arrested.

In the USA, free legal attorneys are appointed to the defendants at the first court attendance, usually within 24 hours from the time of their arrest. The attorneys are usually public defenders who are paid by the state to represent individuals who are unable to represent themselves in court.<sup>213</sup> The defendants can also ask the courts to change their attorneys where they have a problem with the

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<sup>207</sup> 'In Re Gault' Legal Information Institute, Cornell Law School [https://www.law.cornell.edu/wex/in\\_re\\_gault\\_\(1967\)#:~:text=In%20re%20Gault%2C%20387%20U.S.,Amendment%20of%20the%20U.S.%20Constitution](https://www.law.cornell.edu/wex/in_re_gault_(1967)#:~:text=In%20re%20Gault%2C%20387%20U.S.,Amendment%20of%20the%20U.S.%20Constitution) accessed on 9<sup>th</sup> March 2023.

<sup>208</sup> The United States Constitution, 14<sup>th</sup> Amendment.

<sup>209</sup> 'In Re Gault' Legal Information Institute, Cornell Law School < [https://www.law.cornell.edu/wex/juvenile\\_justice](https://www.law.cornell.edu/wex/juvenile_justice) > accessed on 15<sup>th</sup> March 2023.

<sup>210</sup> *Gideon v. Wainright*, 372 U.S. 335 (1963).

<sup>211</sup> Ibid. (1963)

<sup>212</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>213</sup> ' I Have No Money, How Can I Hire and Attorney' HG Legal Resources < <https://www.hg.org/legal-articles/i-have-no-money-how-can-i-hire-an-attorney-35348> > accessed on 15<sup>th</sup> March 2023.

attorneys or where there is conflict of interest. Similarly, where a child is in conflict with the law, the local state juvenile court will order that the child be accorded legal assistance by a state employee or volunteers. Each state has different ways of ensuring children in conflict with the law have appointed attorneys.<sup>214</sup>

Compared to USA, the office of the public defender and the NLAS in Kenya are more or less the same. This is because the mandate of both institutions is to offer free legal services to persons who cannot afford to hire lawyers. However, Kenya should seek to borrow from the structure and operations of the office of the public defender in USA which includes putting mechanisms to ensure rapid response in representation of children by allocating lawyers to them in the shortest period of time after their arrest. Kenya should also seek to amend the children act 2022, and make it mandatory for children offenders to be represented especially in criminal cases.

Conversely, Kenya should also seek to learn from the challenges that the office of the public defender is facing in USA. Due to understaffing and underfunding of the office, the attorneys working for the public are overloaded with cases, to the point where a single attorney is handling cases four times the maximum annual cases he or she should handle<sup>215</sup>. The shortage of attorneys in the office of the public defender, has led to poor management of cases, in addition to increasing the wait time at which a litigant can access a lawyer through the office. As a result of the increased wait time, people have been jailed, lost their properties and jobs while wait to be assigned a lawyer to help them<sup>216</sup>. Kenya can learn from the aforementioned impediment in USA, by ensuring sufficient staffing and funding for the NLAS.

### **5.3. The United Kingdom**

The United Kingdom operates on an unwritten constitution. It relies on the Acts of Parliament, court precedence and international laws on the rights of the child to legal representation. Courts in the UK have a duty to ensure that the rights of children in conflict with the law are observed and

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<sup>214</sup>National Academies Press, 'The Juvenile Justice System' < <https://nap.nationalacademies.org/read/9747/chapter/7> > accessed on 19<sup>th</sup> March 2023.

<sup>215</sup> Emily Hamer, ' Public defenders work 3 times too many cases, milestone study and new data show' [https://www.stltoday.com/news/nation-world/crime-courts/public-defenders-attorneys-dangerously-overworked/article\\_5a63628b-63d0-56dc-bc91-ce908820ac75.html#:~:text=Across%20the%20West%2C%20public%20defense,their%20constitutional%20right%20to%20counsel.](https://www.stltoday.com/news/nation-world/crime-courts/public-defenders-attorneys-dangerously-overworked/article_5a63628b-63d0-56dc-bc91-ce908820ac75.html#:~:text=Across%20the%20West%2C%20public%20defense,their%20constitutional%20right%20to%20counsel.) Accessed 22<sup>nd</sup> November, 2023

<sup>216</sup> Ibid

upheld.<sup>217</sup> All the four constituent member countries of the UK, that is, England, Scotland, Wales and Northern Ireland are governed by the principles of the United Nations Convention on the Rights of the Child.

The UK also retained some of its laws after Brexit with the aim of providing legal certainty and continuity of individual rights.<sup>218</sup> One of the laws that were retained is the Human Rights Act of 1998 which refers to the European Convention on Human Rights. Article 6 of the European Convention on Human Rights establishes the right to fair trial. It declares that everyone charged with a criminal offence has the minimum right to defend himself in person or through a legal representative and where they are unable to pay for such legal assistance, they have the right to be accorded free legal representation where justice requires.<sup>219</sup>

The concept of legal representation is appreciated at the national level and the member country states of the UK. For instance, in the case of *S v. Principal Reporter and the Lord Advocate* (Scotland)<sup>220</sup> the court held that lack of legal representation of children at a hearing in a court adversely affects the ability of the child to influence the outcome of the case.<sup>221</sup> A person accused of criminal charges including a child in conflict with the law has the right to free legal assistance where they lack the means to pay and the interest of justice so requires.<sup>222</sup>

The UK's Children Act provides for a hearing procedure for a case that involves restriction of a child's liberty.<sup>223</sup> The Act provides that no court should exercise its authority of hearing a case involving a child unless the child appears in court represented.<sup>224</sup> The Act also stipulates that every child has the right to be informed of their right to apply for legal representation and that they must have exercised the right either by applying or refusing to apply for legal representation.<sup>225</sup>

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<sup>217</sup> Louise Forde, "The role of the courts in protecting children's rights in the context of police questioning in Ireland and New Zealand" 2022 *The Howard Journal of Crime and Justice*.

<sup>218</sup> *Ibid* 45

<sup>219</sup> European Convention on Human Rights, 1950, Art. 6.

<sup>220</sup> *S v. Miller* 2001 SLT 531.

<sup>221</sup> *Ibid*.

<sup>222</sup> *S v Principal Reporter and Lord Advocate* (UK)

<sup>223</sup> Children Act, 1989 (UK), s 25.

<sup>224</sup> *Ibid*, s 25(6).

<sup>225</sup> *Ibid*. s 25



The UK's Legal Aid, Sentencing and Punishment of Offenders Act<sup>226</sup> provides for the requirements of funding legal services where legal aid is required.<sup>227</sup> It provides that the first legal representation of a child is that the child needs to be legally represented before a court of law.<sup>228</sup> The Act also stipulates that the second legal representation of a child is where the child has not been legally represented in court owing to the fact that the child was accorded legal representation but it was withdrawn due to the child's conduct or because it appears that the child's financial resources disqualified him or her from such representation.<sup>229</sup> The Act also notes that a child can be denied legal representation where the child was informed of his or her right to apply for legal representation had the opportunity to do so, but refused to apply.<sup>230</sup>

Every constituent country member of the UK has a system through which the rights of the child are protected. The countries have established various offices that ensure the rights of the child as enshrined in the UNCRC are respected and adhered to.<sup>231</sup> In the UK, every child under the age of sixteen is entitled to free legal assistance.<sup>232</sup> This right is communicated right from the moment the child is arrested. While at the police station, a child in conflict with the law has to be informed by the police of his or her right to legal representation.<sup>233</sup> Duty solicitors are always available at the police station independent of the police. Where the child invokes the right to counsel, the policeman has to obey and not question the child further until the lawyer of the child arrives.<sup>234</sup> It is the duty of the police to ensure that the child is accorded a solicitor where he or she asks for one.

The UK has a platform known as Defense Solicitor Call Centre, which enables the police to get a lawyer for a child in conflict with the law.<sup>235</sup> Defense Solicitor Call Centre is an independent body that enables the UK legal aid agency respond to requests for legal aid assistance made by police

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<sup>226</sup> Legal Aid, Sentencing and Punishment of Offenders Act, 2012 (UK)

<sup>227</sup> Ibid, Preamble.

<sup>228</sup> Ibid, s 98(5).

<sup>229</sup> Ibid, s 98(6)(a).

<sup>230</sup> Ibid, s 98(6)(b) & (c).

<sup>231</sup> Nidirect government services, < <https://www.nidirect.gov.uk/articles/childrens-human-rights> > Accessed on 20 March 2023.

<sup>232</sup> <[https://www.gov.uk/legalaid/eligibility#:~:text=Criminal%20cases,education\)%20or%20on%20certain%20benefits](https://www.gov.uk/legalaid/eligibility#:~:text=Criminal%20cases,education)%20or%20on%20certain%20benefits). > Accessed on 20<sup>th</sup> March 2023.

<sup>233</sup> Ibid.

<sup>234</sup> Ibid.

<sup>235</sup> Legal Aid Agency, 'Contracting the Defense Solicitor Call Centre', < <https://www.gov.uk/government/news/crime-news-contacting-the-defence-solicitor-call-centre> > Accessed on 20<sup>th</sup> March 2023.

officers at the police stations.<sup>236</sup> Once the officers request for a solicitor for the child, the child can wait up to a maximum of thirty six hours before a solicitor is assigned to the child.<sup>237</sup> This means that a child in conflict with the law does not get to appear in court without legal representation by a solicitor either paid by the government or a parent or a guardian.

Compared to the UK, the Kenyan legal framework does not enjoy the privileges created by the UK's Legal Aid, Sentencing and Punishment of Offenders Act and the Children Act, which makes it mandatory to inform children in conflict with the law of their right to legal representation. Instead, it is left upon the Kenyan courts to determine instances where a child might be accorded legal representation. The reality is that some children are unable to fathom or differentiate the level of seriousness of a crime, hence, it shouldn't be left to the courts to decide on which cases needed legal representation. The Judiciary, the National Legal Aid Service and the National Police Service should also seek to collaborate like the UK that when a child is arrested he should be assigned a lawyer within twenty four hours before he is presented to court.

In view of the above, Kenya can also learn from the challenges that face the Legal Aid system in the United Kingdom. Budgetary cuts on the Legal aid Agency in the United Kingdom has discouraged law firms which were participating in the legal aid scheme from continuing to work with the agency. Most of them have withdrawn their services from the agency due to inadequate funding. In addition, budgetary cuts has necessitated the Legal Aid Agency, to reduce the number of legal issues especially civil, which a person can apply for legal aid. This decision has seriously affected the right to legal representation of people in the UK, by making it difficult for persons in need of legal aid, to meet the criteria of eligibility<sup>238</sup>. Kenya learn from the aforementioned impediment in the UK, by ensuring sufficient funding for the NLAS.

### **5.3.1 Scotland**

Scotland, a member of the United Kingdom has one of the most elaborate children legal system. The justice system in Scotland has twofold purpose: that is protecting children suffering or likely to suffer harm and dealing with children alleged to have committed offences. The system is

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<sup>236</sup> Ibid.

<sup>237</sup> Ibid.

<sup>238</sup> Jonathan Wheeler, 'Key issues in the British Legal Aid System' < <https://www.openaccessgovernment.org/key-issues-in-the-british-legal-aid-system/120337/>> accessed 22<sup>nd</sup> November, 2023

designed to recognize that all children, whether or not they have committed an offence, require care and protection<sup>239</sup>.

The adjudication of children cases in Scotland is called Children Hearing System. It begins by a person raising a concern or making a report of a child in conflict with the law to an official called the Children Reporter. The reporter investigates and if they find that there is evidence of culpability of the child, he/she may refer the matter to the Social Work department if it is not a big issue or propose a Children Hearing<sup>240</sup>. The purpose of the hearing is to decide on what action is needed in the best interest of the children, including whether the children are in need of compulsory measures of supervision from the social work department<sup>241</sup>.

The Courts role in the hearing of a child are to establish disputed grounds of referral to the sheriff, issuing child protection orders, issuing child assessment orders and handling appeals against a decision of the children hearings. They also handle cases of children who are above eight years old and have committed serious offences<sup>242</sup>.

Kenya should endeavor to have a legal system as Scotland, where children are not put in contact with the courts in the first instance, especially on offences which are not serious. Stakeholders like teachers, health providers and social work departments should be involved in preferring consequences on child offenders.

#### **5.4. The Republic of South Africa**

In South Africa, the right to legal representation of children in conflict with the law is established in the Constitution <sup>243</sup>and Children's Act.<sup>244</sup> Article 35 of the Constitution of South Africa elucidates that every accused person has the right to a fair trial, which includes the right to legal representation.<sup>245</sup> The Children's Act of South Africa provides that every child has the right to express their views in matters that are of concern to them. This right can be expressed through

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<sup>239</sup> Scottish Legal Aid Board, 'Review of Children's Legal aid' February, 2008

<sup>240</sup> Ibid

<sup>241</sup> Ibid

<sup>242</sup> Ibid

<sup>243</sup> Constitution of South Africa 1996 (S.A).

<sup>244</sup> Children Act 2005 (S. A).

<sup>245</sup> S.A (n 225), Art. 35(3).

their legal representatives.<sup>246</sup> The Act grants the courts the power to order appointment of a legal representative of the child. The court has the power to order either of the parties, mostly the state to pay for such legal representation if the proceedings would otherwise result into substantial injustice.<sup>247</sup> The difficulty with this provision comes with the unclarity of the terms “substantial injustice”. The term is elusive and has not been defined clearly in the law.<sup>248</sup> For a child to access legal representation paid for by the state, he or she must be at a risk of suffering substantial injustice, a term which has been left for the courts to determine.

The Act also directs parents or guardians to always consider the views and wishes of the child when making a decision.<sup>249</sup> This ensures that the parents or guardians involve the child when deciding his or her legal representation. This makes the child feel as part of the decision-makers on issues that touch on his or her rights.<sup>250</sup>

The Act also provides that where the court forms the opinion that it would be best if a child in conflict with law acquires legal representation, the court must refer the child to the Legal Aid Board.<sup>251</sup> Unlike Kenya where the Legal Aid Act makes it optional for the court to decide whether to refer the child to Legal Aid Service, the Children’s Act of South Africa gives the courts no choice but to ensure that the child is referred to the Legal Aid Board for purposes of assignment of legal representation. The presiding officer in court also has to accord a child in court an opportunity to participate in the proceedings.<sup>252</sup>

South Africa has two models of legal representation of children.<sup>253</sup> These two models are client direct legal representation and the best interest’s legal representation. Client direct legal representation is mostly applicable to children of sufficient age to succinctly express their views

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<sup>246</sup> Children Act of South Africa, s 10.

<sup>247</sup> Ibid, s 29.

<sup>248</sup> Marita Carnelley, “The Right to Legal Representation at State Expense for Children in Care and Contact Disputes – A Discussion of the South African Legal Position with Lessons from Australia” (Dphil thesis, University of Kwazulu 2010) .

<sup>249</sup> Children Act of South Africa (n 228), s 31.

<sup>250</sup> Ibid.

<sup>251</sup> Ibid, s 55(1).

<sup>252</sup> Ibid, s 61.

<sup>253</sup> Jenna Jones, ‘When do children require Legal Representation’ Jenna Jones Attorneys <[https://jennajonesattorneys.co.za/when-do-children-require-legal-representation/#:~:text=Section%2029\(6\)%20states%20,the%20costs%20of%20such%20representation](https://jennajonesattorneys.co.za/when-do-children-require-legal-representation/#:~:text=Section%2029(6)%20states%20,the%20costs%20of%20such%20representation)> Accessed on 28 March 2023.

and issue instructions. The lawyer appointed in this case acts for the child and not the parents on behalf of the child. On the other hand, best interest's legal representation is suitable for children who are unable to give instructions, either because they are too young or incapacitated in some way. In this case, the legal representative has more contact with the parents of the child than the child.<sup>254</sup> Hence, at the first role of the legal representative when appointed by the court, Legal Aid Board or the parents of the child is to determine what type of legal representation the child requires.

In the case of *FB and Another v MB 2012(2)*<sup>255</sup> the court concentrated on one key issue that touched on the right of the child to legal representation. The case involved a sixteen-year-old boy who made an application in the South African High Court to be allowed to appoint his own legal representative. The court granted his application by relying on the provisions of the Constitution and the Children's Act. The court held that the child had the right to bring a matter to court and be assisted by his own legal representative.<sup>256</sup> The Parliament of Kenya should borrow from South Africa by amending the Children's Act 2022, and make provisions to that effect including the right of a child to appoint a guardian ad litem, in circumstances where they are found in conflict with the law.

In view of the above, understaffing and underfunding has been a major impediment for Legal Aid South Africa. On equal footing most of the citizens in South Africa are not aware of the existence of the Legal Aid South Africa, therefore, most people remain unrepresented in courts<sup>257</sup>. Kenya can learn from these challenges facing south Africa by increasing funding for the NLAS, and further committing educational programs to the public on the existence of the institution and the services it offers, in order to improve on its Legal Aid system.

## **5.5. Conclusion**

The above discussion reveals that children are protected internationally. The UK, USA and South Africa have enacted legislation to ensure that the rights of children are respected, upheld and protected. The countries have put in place measures that protect children from unfair trials right from the time of their arrest to when they are arraigned in court.

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<sup>254</sup> Ibid.

<sup>255</sup> SA 394 (GSJ).

<sup>256</sup> *FB and Another v MB 2012(2)* SA 394 (GSJ).

<sup>257</sup> Dave Holnes, 'Promoting the quality of legal aid South Africa through better coordination pf service provision'.

Kenya should amend their legislations in view of safeguarding the right to legal representation of children, synonymous to the laws in the UK, USA and South Africa. Police officers in Kenya should be trained that upon arresting children, they inform them of their right to legal representation and make a follow up to ensure that they are accorded legal assistance. In a nutshell, it is the cordial relationship or chain between the law enforcement officers, the courts and the legal aid agencies that makes the implementation of the right to legal representation of children successful.

## CHAPTER SIX

### 6.0 Conclusion and Recommendations

#### 6.1. Conclusion

From above, the study has examined the legal framework pertaining to the rights of children to legal representation in Kenya. It has also illustrated the historical background of the right of a child to legal representation, right before Kenya was colonized to the current legal framework. The study borrows from best practices on comparable jurisdictions. Finally, this study has made relevant recommendations on how to improve the implementation of the right to legal representation of children in Kenya.

This research has confirmed the hypothesis that despite the Constitution, statutes and international instruments, there exists a vacuum in the legal framework pertaining to the right of children to legal representation in Kenya. It has also demonstrated the hypothesis that the existence of the legal gaps denies the children the right to legal representation, which extends to other rights such as right to access to justice.

This research has demonstrated that Acts of Parliament establishing the rights of the child and legal aid services are insufficient and do not prioritize the right to legal representation of children. Instead, the Acts only mention the right of legal representation but does not clarify on its implementation process. This can be seen through the number of case laws discussed in the study where children appeared before courts of law unrepresented and put into custody.

The study has also illustrated that some of the challenges that hinder the full enjoyment of the right to legal representation of children in Kenya, include lack of express provisions in the law with regards to ensuring that children are accorded their right to be legally represented. The culture of discrimination against certain genders when it comes to the criminal justice system also plays a key role in hindering the exercise of the right to legal representation of children. In addition, the social status of children also matters when it comes to acquiring the necessary legal assistance, as those who hail from rich families can easily pay for the services. Weak institutions and limited number of lawyers in the country are also key challenges that hinder the implementation of the right to legal representation of children in courts.

## **6.2. Recommendations**

This study makes the following recommendations in a bid to mitigate the legal and social challenges inhibiting full realization of the right to legal representation of children in conflict with the law in Kenya. The recommendations seek to address the challenges through law reform, enactment of statutes, political will and support from the executive, being intentional with bench marking for institutions and bringing together all the relevant institutions that play a role in the criminal justice system of Kenya as a way of ensuring that each institution plays its role comprehensively.

### **6.2.1 Law Reform**

Parliament should amend the Children’s Act 2022, to expressly provide for legal aid to all children found in conflict with the law. Currently, the Act excludes children aged sixteen and seventeen. Further, the Act should be amended to require that children be informed of their right to legal representation immediately upon arrest and be provided legal aid at that point of arrest. The act should also expressly require the court not to proceed with any matter with regards to a child offender, where the child is not legally represented. This will necessitate the government to act in apportioning enough budgetary allocation to the Judiciary Fund and the NLAS, to hire lawyers and or legal practitioners for the job.

Parliament should also amend the Legal Aid Act, 2016 to expressly provide that where a child appears in court unrepresented then the court “shall” order the NLAS to provide legal representation. Replacing the word “may” with the word “shall” in the Act places a mandatory duty on the court to refer the matter to the NLAS for provision of legal aid. As it stands, the word “may” infers that it is not mandatory for the court to refer unrepresented children to the NLAS for provision of legal representation. The Act should also be specific that legal aid shall be accorded to children upon arrest and not only during trial.

### **6.2.2 Enactment of pending bills.**

Parliament should act speedily in enacting pending bills such as the Child Justice Bill, which will shed light on the rights to legal representation of children, as the government will be forced to ensure that the right is not just a mere statement in the Constitution and other instruments but rather a practical and implementable constitutional right. It will require children to be assigned lawyers



as and when they are arraigned in courts. The enactment of the Bill will also see other rights such as the right to dignity and fair trial come into fruition.

### **6.2.3 Political will and support from the executive.**

The government of Kenya should endeavor to fully implement the extant laws on children rights especially on the right to legal representation. It should ensure that the National Legal Aid Service and the directorate of children services under the ministry of labor and social protection are sufficiently funded, and are visible to the public through advertisements of their services, in view of ensuring that they deliver on their mandate which includes providing legal aid for children. The NLAS offices should be located in all 47 counties of the country for accessibility. This is only possible if parliament defrays enough funding to the NLAS. Further, as already discussed the directorate of children services being under the ministry of labour and social protection is underfunded and overshadowed due to the fact that the ministry's core mandate is on labour matters. It would therefore be prudent to move the department to another ministry to improve its visibility, funding and ensure it delivers on its mandate.

The Executive should also endeavor to allocate and actually deposit money in the judiciary fund, as budgeted by the Judiciary. This is important because, the Judiciary uses the money in the judiciary fund to improve access to justice and fund such programs such as the Young Advocates Professional Program, which was launched by the Chief Justice on the 17<sup>th</sup> day of April, 2023. Young Advocates are lawyers who have practiced law for less than five years. One of the main objectives of the Young Advocate Professional program includes creating jobs for young lawyers through pro bono initiatives.<sup>258</sup> This is geared towards ensuring that lawyers take part in the social transformation of the justice system.

The Judiciary needs to come up with the means of retaining young lawyers through stipends, acknowledgement and appreciation. Whilst the Judiciary proposes to pay the pro bono lawyers a sum of Kenya Shillings thirty thousand per case, it is proper that the Judiciary devices a way to ensure that cases do not extent beyond unreasonable duration. Expeditious conclusion of pro bono matters will encourage more lawyers to take up the matters, including children's cases.

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<sup>258</sup> Law Society of Kenya (2023) "The Legal Insight" The Official LSK Weekly Newsletter [ISSUE 5] Page 4.

Further, the Program should give priority to cases concerning children in conflict with the law. Children should be categorized as some of the most vulnerable members of the society who need immediate legal attention with regards to legal representation. Hence, any child presented before a court should always be considered and accorded a lawyer who will be next in line under the pro bono program.

#### **6.2.4 Collaboration and synergy between the various players in the justice sector.**

The stakeholders in the children justice system should collaborate in view of ensuring that the right to legal representation of children is fully implemented. The National Commission on Administration of Justice which encompass the players of the Kenyan justice system, should come up with a structure where, upon arrest of children, the arresting officer in collaboration with the judiciary and the Law Society of Kenya, can within the shortest period allocate a lawyer to the children, before they are presented to court. This is to ensure that the children have legal representation upon arrest, and can access legal tools such as police bail, in order to prevent subjecting them to pre-detention.

The Judiciary and the Law Society of Kenya should also endeavor to incentivize lawyers in view of encouraging them to take up matters involving children on pro bono basis. This can be through being awarded extra Continuous Professional Development points for their pro bono services, and or being paid sufficiently from the judiciary fund for the cases they deal with in regards children on behalf of the government. Another incentive would be subsidizing fee payment for issuance of practicing certificates for lawyers who prove that they have offered pro-bono services to children charged with various offences.

#### **6.2.5. Being intentional in Benchmarking for institutions**

The Kenyan government should ensure that institutions tasked with matters children, especially on the right to legal representation, are exposed to other comparable jurisdictions which have best practices in implementing the right to legal representation of children. This can be through benchmarking in comparable jurisdictions like USA, UK and South Africa to collect data on how best we can implement the right to legal representation of children. The government should also be intentional in implementing the data collected in order to improve actualizing the rights of children especially in legal representation.

In view of the above, Kenya can borrow from Scotland in the UK by reengineering its children justice system in a bid to shield children from appearing in court unless in serious cases. It can do this by operationalizing and funding the social welfare departments in government, which can be tasked in investigating crimes involving children, and preferring disciplinary measures in consultation with other stakeholders such as teachers. This method can largely assist in decongesting the backlog of cases in the children's courts and therefore freeing up lawyers to offer legal representation for the few matters that end up in court that involve children.

Kenya can also borrow from the UK, by engaging stakeholders such as parents, teachers and the social welfare department in government in matters involving children in conflict with the law. Their inclusion is important because they can assist in assessing the child by understanding his behavior and the reason behind his commission of the crime. The assessment is what will be used by an adjudicator in preferring a punishment to the child for committing the offence.



## Bibliography

### Table of Books and Article

A. M. Marcos, “Access to Justice and the Right to Legal Aid: A Comparative Analysis of Kenya and the United Kingdom England and Wales)” (2011) Budapest: Hungary

Beqiraj Julinda and McNamara Lawrence “Children and Access to Justice: National Practices, International Challenges” (2016) Bingham Centre for the Rule of Law Report

Black’s Law Dictionary, 11<sup>th</sup> Edn.

Cipriani Don “Children’s Rights and the Minimum Age of Criminal Responsibility: A Global Perspective” (2<sup>nd</sup> edn, Routledge (2016)

Draft Report on Audit of Laws on Access to Justice, KLRC (March, 2012). See also FIDA Kenya, “The Peoples Version Informal Justice System” (2011), which defines access to justice as ‘the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards’; “Judicial Reforms and Access to Justice in Kenya: Realizing the Promise of the New Constitution”, A Report by the Kenya Civil Society Strengthening Program, 2011.

E. Huxley, (1963) “White Man’s Country” New York, Vol. II.

Eloisa Torlig, “Access to justice: An epistemological guide for future research”; University of Brasilia

Geraldine Van Bueren (1992) “Child-Oriented Justice – An International Challenge for Europe,” 6:3 International Journal of Law and the Family 381-400.

Guggenheim Martin, 'Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings' (1998) 29 Loy U Chi LJ 299

Joachim Theis, “The State Of International Children’s Rights” (2018) CPC Learning Network < [https://bettercarenetwork.org/sites/default/files/CPC\\_State-Intl-Children-Rights\\_FINAL-1.pdf](https://bettercarenetwork.org/sites/default/files/CPC_State-Intl-Children-Rights_FINAL-1.pdf) >  
Accessed on 29 January 2022

Josimar Antonio, ‘‘the best interest of the child: and intergrative review of English and Portuguese Literature’, University of Oxford

Justice Modibo Ocran, ‘‘The Clash of Legal Cultures: The Treatment of Indigenous Law in Colonial and Post-Colonial Africa’’ (2015). Akron Law Review.

Kaime T, ‘The African Charter on the Rights and Welfare of Children : A socio- legal perspective’, Pretoria University Law Press 2009

Kaya, N., Aydin, S. and Ayhan, O. ‘‘*The Effects of Organizational Politics on Perceived Organizational Justice and Intention to Leave*’’ (2016) American Journal of Industrial and Business.

Kercher, L. C. (1981). *The Kenya Penal System: Past, Present, and Prospect*. Washington, DC: University Press of America.

Kinyanjui S, ‘Restorative Justice in Traditional Pre-colonial ‘Criminal Justice Systems’ in Kenya’ (2009-2010) 10 Tribal Law Journal 2.

Kudrat E Khuda, ‘‘Juvenile Delinquency, Its Causes and Justice System in Bangladesh: A Critical Analysis’’ (2019) Journal of South Asian Studies 7(3):109-118 <  
[https://www.researchgate.net/publication/340876896 Juvenile Delinquency Its Causes and Justice System in Bangladesh A Critical Analysis](https://www.researchgate.net/publication/340876896_Juvenile_Delinquency_Its_Causes_and_Justice_System_in_Bangladesh_A_Critical_Analysis) > Accessed on 29 January 2022

Law Society of Kenya (2023) ‘‘The Legal Insight’’ The Official LSK Weekly Newsletter [ISSUE 5] Page 4

Lahny R. Silva, ‘The Best Interest Is the Child: A Historical Philosophy for Modern Issues’, Brigham Young University Journal of Public Law, Volume 28, Issue 2

Louise Forde, ‘‘The role of the courts in protecting children's rights in the context of police questioning in Ireland and New Zealand’’ 2022 The Howard Journal of Crime and Justice.

Liefaard, T. ‘‘Access to justice for children deprived of their liberty. Protecting Children Against Torture in Detention: Global Solutions for a Global Problem’’ (2017) 57-80.

Madalyn K. Wasilczuk (2013) “Substantial Injustice: Why Kenyan Children are Entitled to Counsel at State Expense,” in 45:291 *International Law and Politics* 291-333, at <http://nyujilp.org/wp-content/uploads/2013/04/45.1-Wasilczuk.pdf> (accessed 5/11/2023).

Maniza Zaman and Siddharth Chatterjee ‘Child rights in Kenya – 30 years on’ (2019) UNICEF

Maniza Zaman “Children Rights in Kenya”, UNICEF

Mbote P.K, Kivutha-Kibwana & Mute Lawrence ‘Custody and the Rights of the Children’ (2000) eds *Law and the Quest for Gender Equality in Kenya*.

Mbote Kameri and Migai Akech, “Justice Sector and the Rule of Law” A review by AfriMAP and the Open Society Initiative for Eastern Africa (March 2011).

Muigua Kariuki ‘Improving Access to Justice; Legislative and Administrative Reforms under the Constitution’.

Mukuhi, Roselyn ‘Application of the Best Interest Principle to the Criminal Justice Juvenile System: A Review of Emerging Case Law’ *Interdisciplinary Journal on the African Child* Special edition 2019 Vol. 01, Issue 01.

Muyila J W, African Values and the Rights of the Child: A View of the Dilemma and Prospects of Change in Lagoutte S and Svaneberg N (eds.), *Women and Children Rights, African Views* (Karthala, 2011).

Muigua, K., “Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya”.

Natalie Cowling, ‘Extreme Poverty Rate in Kenya from 2016 to 2030’, Statista

National Council on the Administration of Justice “Criminal Justice System in Kenya : An Audit, 2017

Nessa Lynch, Yannick van den Brink & Louise Forde: *Responses to Serious Offending by Children Principles, Practice and Global Perspectives* (1<sup>st</sup> edn, Routledge 2022)

Nyandoro Omuria & Eric K. Bor Beatrice Onsarigo “Social Factors Affecting Implementation of Children’s Rights Policies in Nakuru County, Kenya” (2017) Volume 22, Issue 5, *IOSR Journal of Humanities And Social Science (IOSR-JHSS)*.

Report of the United Nations High Commissioner for Human Rights. “Access to Justice for Children’,

Report of the National Council for Administration of Justice on ‘Social Transformation Through Access to Justice; Child Justice Strategy’,

Strengthening Judicial Reform in Kenya; Public Perceptions and Proposals on the Judiciary in the new Constitution, ICJ Kenya, Vol.III, May, 2002; Jackton B. Ojwang, “The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development,” 1 Kenya Law Review Journal 19 (2007), pp. 19-29: 29.

Ogot B. A, Pre-Colonial Kenya - Kenya Before 1900 (Nairobi: East African Publishing House, 1976.

Ojo, I. O., & Ekhaton, E. (2020). Pre-colonial legal system in Africa: an assessment of indigenous laws of Benin kingdom before 1897. Umewaen: Journal of Benin and Edo Studies.

Okech, C. (2017). The juvenile justice in Kenya: Growth, system, and structures.

Okon John, Ph.D, (2014) ‘Colonialism in Africa and Matters Arising - Modern Interpretations, Implications and the Challenge for Socio-Political and Economic Development in Africa’ (ISSN Vol.4, No.18, 19.

Olorunleke G.K (Ph.D.) “Effect of Organizational Politics on Organizational Goals and Objectives” (2015) Vol. 4, No. 3 International Journal of Academic Research in Economics and Management Sciences.

Omondi S, ‘Balancing Rights of Children Victims of Sexual Abuse and Accused Persons’: A Critique of the Adversarial Trial Process in Kenya (LAP Lambert Academic Publishing 204) 106.

Penal Reform International, ‘Access to Justice in Sub-Saharan Africa: The role of Traditional and Informal Justice Systems’ (2000 [www.penalreform.org](http://www.penalreform.org) Accessed on 9 December 2022.

Pia Letto- Vanamo, ‘Access to Justice: A Conceptual and Practical Analysis with implications for Justice Reforms’ International Development Law Organization.



United Nations Global Impact ‘Children’s Rights’ (n.d) <  
<https://www.unglobalcompact.org/what-is-gc/our-work/social/childrens-rights>>  
(UNGI)accessed on 6 December 2022

UNDP, U., & Women, U. N. (2016). Human rights and traditional justice systems in Africa.

UNICEF, ‘Justice for Children: Justice systems worldwide are failing to protect children and to uphold their most basic rights’

UNICEF ‘Child-Friendly Legal Aid in Africa’.

Swanepoel, P. (2015). Kenya’s Colonial Judges: The Advocates’ Perspective. *Journal of Asian and African Studies*, 50(1), 41–57. < <https://doi.org/10.1177/0021909613510696> > Accessed on 5 June 2023.

Ton Liefwaard, ‘Access to Justice for Children: Towards a Specific Research and Implementation Agenda’, Brill

### **Table of Online Publications**

Justice Definition & Meaning - Merriam-Webster Accessed on 27 July 2023

< <https://www.statista.com/statistics/1227076/extreme-poverty-rate-in-kenya/> >accessed on 21 February 2023.

< [https://brill.com/view/journals/chil/27/2/article-p195\\_195.xml?language=en](https://brill.com/view/journals/chil/27/2/article-p195_195.xml?language=en) > accessed on 21 February 2023.

,< <https://www.unicef.org/protection/justice-for-children> > accessed on 21 February 2023

<<https://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/rule-law/access-justice#:~:text=Access%20to%20justice%20involves%20normative,enforcement%2C%20and%20civil%20society%20oversight.> > Accessed on 4<sup>th</sup> June 2023

Andrew Wanga “Best Interest Factors of the Child in Kenya” (2019) <  
<https://mmsadvocates.co.ke/9-%EF%BB%BFbest-interest-factors-of-the-child-in->

[kenya/#:~:text=What%20is%20the%20best%20interest,to%20the%20maximum%20extent%20possible.>](#) Accessed on 5 June 2023

<http://kenyalaw.org/kl/index.php?id=5571> Accessed on 14 December 2022.

<https://www.corecommitments.unicef.org/kp/the-african-charter-on-the-rights-and-welfare-of-the-child#:~:text=of%20the%20Child-The%20African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the,entered%20into%20force%20in%201999>. Accessed on 13 December 2022.

< <https://www.statista.com/statistics/1227076/extreme-poverty-rate-in-kenya/> > accessed on 21 February 2023.

< [https://brill.com/view/journals/chil/27/2/article-p195\\_195.xml?language=en](https://brill.com/view/journals/chil/27/2/article-p195_195.xml?language=en) > accessed on 21 February 2023.

< <https://www.unicef.org/protection/justice-for-children> > accessed on 21 February 2023

< <https://www.cliffsnotes.com/study-guides/criminal-justice/the-criminal-justice-system/the-politics-of-criminal-justice> > accessed on 21 February 2023.

< <https://jlc.org/issues/access-counsel> > accessed on 9th March 2023.

[https://www.law.cornell.edu/wex/in\\_re\\_gault\\_\(1967\)#:~:text=In%20re%20Gault%2C%20387%20U.S.,Amendment%20of%20the%20U.S.%20Constitution.](https://www.law.cornell.edu/wex/in_re_gault_(1967)#:~:text=In%20re%20Gault%2C%20387%20U.S.,Amendment%20of%20the%20U.S.%20Constitution.) > Accessed on 9<sup>th</sup> March 2023.

< [https://www.law.cornell.edu/wex/juvenile\\_justice](https://www.law.cornell.edu/wex/juvenile_justice) > accessed on 15<sup>th</sup> March 2023.

< <https://www.hg.org/legal-articles/i-have-no-money-how-can-i-hire-an-attorney-35348> > accessed on 15<sup>th</sup> March 2023.

< <https://nap.nationalacademies.org/read/9747/chapter/7> > accessed on 19<sup>th</sup> March 2023.

<<https://www.scotcourts.gov.uk/search-judgments/judgment?id=6edd86a6-8980-69d2-b500-ff0000d74aa7> > Accessed on 23 March 2023.

[https://www.googleadservices.com/pagead/aclk?sa=L&ai=DChcSEwjF5cew6-9AhXQ93cKHQ5PAzUYABABGgJlZg&ohost=www.google.com&cid=CAESauD2imzcRKqIuiIOliRjFpqcGizbxDG09pebSeLX9a9\\_HcP7LZGIuWKvAOapws8rr4C6Yk0\\_0hf1FsY1p30nq](https://www.googleadservices.com/pagead/aclk?sa=L&ai=DChcSEwjF5cew6-9AhXQ93cKHQ5PAzUYABABGgJlZg&ohost=www.google.com&cid=CAESauD2imzcRKqIuiIOliRjFpqcGizbxDG09pebSeLX9a9_HcP7LZGIuWKvAOapws8rr4C6Yk0_0hf1FsY1p30nq)

[gPDyjGOo33-sfRkoa6jP\\_zfijzietZh7KiqGm22mLBI2SsslwKsErhRmU&sig=AOD64\\_1P4tv-trBOUrpFColaWm8DadOOtQ&q&adurl&ved=2ahUKEwjgw8Gw6-9AhWJNuwKHRHiAZkQ0Qx6BAgKEAE](https://www.nidirect.gov.uk/articles/childrens-human-rights) > Accessed on 22 March 2023.

< <https://www.nidirect.gov.uk/articles/childrens-human-rights> > Accessed on 20 March 2023.

<[https://www.gov.uk/legalaid/eligibility#:~:text=Criminal%20cases,education\)%20or%20on%20certain%20benefits.](https://www.gov.uk/legalaid/eligibility#:~:text=Criminal%20cases,education)%20or%20on%20certain%20benefits.) > Accessed on 20<sup>th</sup> March 2023.

< <https://www.gov.uk/government/news/crime-news-contacting-the-defence-solicitor-call-centre> > Accessed on 20<sup>th</sup> March 2023.

<[https://jennajonesattorneys.co.za/when-do-children-require-legal-representation/#:~:text=Section%2029\(6\)%20states%20,the%20costs%20of%20such%20representation.](https://jennajonesattorneys.co.za/when-do-children-require-legal-representation/#:~:text=Section%2029(6)%20states%20,the%20costs%20of%20such%20representation.)> Accessed on 28 March 2023.

< <http://kenyalaw.org/kl/index.php?id=11561> > Accessed on 5<sup>th</sup> April 2023.

< <https://www.judiciary.go.ke/judiciary-fund-operationalised/> > accessed on 17<sup>th</sup> April 2023.

< <https://www.cwsk.go.ke/mission-vission-and-objectives/> > Accessed on 10 September 2023.

<<https://www.businessdailyafrica.com/bd/lifestyle/personal-finance/why-lawyers-should-adapt-to-the-rapidly-changing-times-2099504> > Accessed on 10 September 2023.

<<https://www.kenyanews.go.ke/public-sensitized-on-the-amended-childrens-act-2022/#:~:text=The%20amended%20Children%20Act%202022,implementation%20of%20the%20previous%20law.> > Accessed on 10 September 2023.

Emiliy Hamer, ‘ Public defenders work 3 times too many cases, milestone study and new data show’ [https://www.stltoday.com/news/nation-world/crime-courts/public-defenders-attorneys-dangerously-overworked/article\\_5a63628b-63d0-56dc-bc91-ce908820ac75.html#:~:text=Across%20the%20West%2C%20public%20defense,their%20constitutional%20right%20to%20counsel.](https://www.stltoday.com/news/nation-world/crime-courts/public-defenders-attorneys-dangerously-overworked/article_5a63628b-63d0-56dc-bc91-ce908820ac75.html#:~:text=Across%20the%20West%2C%20public%20defense,their%20constitutional%20right%20to%20counsel.) Accessed 22<sup>nd</sup> November, 2023

### **Table of Theses/Dissertations**

Carnelley Marita, “The Right to Legal Representation at State Expense for Children in Care and Contact Disputes – A Discussion of the South African Legal Position with Lessons from Australia” (Dphil thesis, University of Kwazulu 2010).

Contact Disputes – A Discussion of the South African Legal Position with Lessons from Australia” (PhD Thesis, University of Kwazulu 2010)

Deche Mwarah Mercy, “Legal Responses to Intra-Familial Child Sexual Abuse In Kenya: A case for Restorative Justice” (PhD Thesis, University of Nairobi, 2019)

Kitegi Mary Awuor, ‘Determinants of Access to Legal Representation by Child Offenders in Nairobi County, Kenya’ (Masters thesis, Kenyatta University 2018).