

**THE CRIMINAL JUSTICE PROCESS: THE ENFORCEMENT OF RIGHTS OF THE
CHILDREN IN KENYA**

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DECLARATION

I, KINITI JULIET WANJIRU, do hereby declare that this is my original work and has not been submitted and is not currently being submitted for a degree in any other university

Signed.....

KINITI JULIET WANJIRU.

This Thesis is submitted for examination with my approval as University Supervisor:

Signed.....

MR. ERIC OGWANG,

LECTURER.

Dated at Nairobi thisday of2013

DEDICATION

To my son Jeremy, God indeed grants us the desires of our hearts.

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I am grateful to the School of Law University of Nairobi Parklands Campus for choosing me to be part of the 2011/2012 Class, this experience has opened my world to bigger opportunities.

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I am grateful to my Father who has always encouraged me to pursue my dreams and whose motto has constantly been “you are never too old to sit in a classroom”. To my mother my unsung heroine the encouragement and support has made this Research come to fruition.

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To my Heavenly Father; All Glory belongs to you.

ABSTRACT

This research addresses the implementation of the rights of the children in Kenya with a predisposition towards the Criminal arena. The study addresses the criminal judicial process thorough the Courts and other executive structures correlated with the Judicial system. The study further interrogates the rights of children in the Criminal justice system as provided for both in statute and international instruments.

The research has demonstrated that there are massive challenges in implementation of these rights; and this is seen in instances where children are brought to court without legal representation, where there are delays in hearing of their and in other instances where they are held in custody without being released on bail terms or being mixed with adults when they have been arrested.

The research addresses the right to fair trial and speedy trial as provided for in Rule 12 of the Children offenders Rules, a right to legal representation as envisaged in Section 77 of the Children Act, the right to access to Justice as provided for in Article 48 of the Constitution 2010 and further gives an overview of the rights of the children in Kenya as provided for by statute i.e. the Children Act, Constitution and International instruments.

The research examines existing literature on the subject of the rights of the children in the Criminal process; the challenges faced in accessing justice for these children and assess theories that surround the topic. At the tail end it arrives at various conclusions makes various recommendations to fill the identified gaps.

LIST OF ABBREVIATIONS

ACHPR African Charter on Human and Peoples' Rights

ACRWC African Charter on Rights and Welfare of the Child

ANPPCAN African Network for the Protection & Prevention against Child Abuse and Neglect

CCAs Child Care Advocates

CRC Convention on the Rights of the Child

CRESS Child Rights Education Support Services

ICCPR International Covenant on Civil and Political Rights

ICESCR International Covenant on Economic, Social and Cultural Rights

NGO Non-Governmental Organization

UDHR Universal Declaration of Human Rights

UN United Nations

UNICEF United Nations Children's Fund

UNGA United Nations General Assembly

CASE LAW

B-V- Attorney General [2004] 1 KLR

C.K.L –V- Republic Kericho High Court Criminal Appeal No. 104 of 2004

C.K.(a child) through Ripples International as her guardian and Next friend) & 11 others-

V- Commissioner of Police/Inspector General of the National Police Service & 3 others

Meru High Court Petition 8 of 2012 (2013) eKLR

In the Matter of M.M Mombasa High Court, Adoption matter 15 of 2009

Kazungu Kasiwa Mkunzo & Another –V- Republic Mombasa, Court of Appeal Criminal

Appeal No. 239 of 2004

M.K –V- K.C Kakamega High Court Misc. Application No. 105 of 2004

Nakuru High Court Criminal Appeal No. 236 of 2002

OON-V- Republic Kisumu Court of Appeal, Criminal Appeal No. 257 of 2003 (UR)

Re Agar-Ellis; Agar-Ellis v Lascelles (1883) 42 Ch D 317.336

R-V- Dorine Aoko Mbogo & Another High Court Nakuru Criminal Case No. 36 of 2010

R-V-Hans Vriens CMC Cr. Case No. 1380/2001

Republic-V- Matano Katana Mombasa High Court Criminal Case No. 33 of 2004

Republic –V- S.A.O Nairobi High Court Criminal Case No. 236 of 2003

R (Williamson) –V- Secretary of State for Education and Employment [2005] 2 AC 246

**VM –V- Director of Child, Family and Commuter Services (British Columbia) (2008) 12
WWR 102**

LEGISLATION

Children Act 2001 Laws of Kenya

Child & Family Services Act Republic of South Africa 1990

Children & Young Persons (Now Repealed) Act Cap 141 Laws of Kenya

Employment Act 11 of 2007 Laws of Kenya

Guardianship of Infants (Now Repealed) Act Cap 141 Laws of Kenya

Kenya Defence Forces Act No. 25 of 2012 Laws of Kenya

Penal Code Cap 63 Laws of Kenya

CONSTITUTIONS

Constitution 2010 Kenya

Constitution of the Republic of Ghana 1992

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

CHAPTER ONE

1.1 INTRODUCTION

One thing that remains constant across the globe is that children remain the most vulnerable individuals and in constant need of care and protection by society as they depend on others such as family, community and nation in order to survive. Although vulnerable, children had no rights accorded to them until recent years and the world has seen gradual evolution of these rights over the years. The word ‘rights’ is difficult to define and there are many diverse and contrary understandings about what constitutes children’s rights. Alexander¹ likens the debates to plaiting with fog and knitting with treacle. Freeman² describes children’s rights as “just claims or entitlements that derive from moral and/or legal rules,” and argues that rights, in particular children’s rights, are important: “if we have rights we are entitled to respect and dignity?” Rights are often complex aspirational statements that defy simple categorization. Arguably perceptions of children’s rights depend on how childhood is constructed, and on children’s ability to exercise agency.³

The adoption by the UN General Assembly (UNGA) of the **Convention on the Rights of the Child (CRC) on 20 November 1989** (entered into force on 2 September 1990) was followed by the creation of regional instruments that address concerns of the rights of the child for example the African Charter on the Rights and welfare of the Child(ACRWC). Kenya signed the Charter

¹.Alexander, G. (1995). Children's rights in their early years: From plaiting fog to knitting treacle. In B. Franklin (Ed.), *The handbook of children's rights: Comparative policy and practice* (pp. 131-146). London: Routledge

² Freeman, M. (1992). The limits of children's rights. In M. Freeman & P. Veerman (Eds.), *The ideologies of children's rights: International studies in human rights* (Vol. 23, pp. 29-46). Dordrecht: Martinus Nijhoff

³ Bentley, K. A. (2005). Can there be any universal children's rights? *International Journal of Human Rights*, 9(1), 107-123.

on the Rights of Children (CRC) on the 26th January 1990 and ratified it on the 30th July 1990⁴ and ratified the ACRWC on 25 July 2000. The adoption by the United Nations General Assembly (UNGA) of the CRC was followed by national enactments of legislation addressing children rights and even going to the extent of inclusion of children rights in national constitutions thus bringing the rights of the children from backstage. For instance the South Africa Constitution in Section 28 deals specifically with the rights of the child. It also provides inter alia to have a legal practitioner assigned to the child by the state at state expense in civil proceedings affecting the child if substantial injustice would otherwise result.⁵ The Ghanaian Constitution, 1992 enshrines fundamental freedoms of, among others, children and Article 28 mandates parliament to enact

⁴ Article 40 of the CRC provides: States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians; (iv) Not to be compelled to give testimony or to confess guilt; to examine or have

examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

⁵ Section 28 South African Constitution Act No. 108 of 1996

laws in the best interest of the children.⁶ Kenya's Constitution provides for the rights of the children and provides inter alia that a child has a right to a name and nationality to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not⁷ among other rights. Article 49⁸ of the Constitution 2010 provides for the rights of an arrested person and the said provisions mirror those of Article 2 of the CRC. The preserving of the rights of the child in these constitutions shows the progression of the rights of children from backstage to center stage. The governments that ratified the CRC made commitment of giving children within these states the opportunity to develop their (children) potential.⁹ The rights of the child are no longer to be ignored or treated less than those of other persons.

Some of the rights that are provided for the children in Kenya are judicial oriented rights; such rights include but are not limited to a right to parental care by both parents, right to legal representation, a right to a fair hearing, a right to a speedy trial and a right not to be mixed with

⁶ Article 28 Chapter V Constitution of the Republic of Ghana 1992

⁷ Article 53 Constitution of Kenya 2010

⁸ **49.** (1) An arrested person has the right—

(a) to be informed promptly, in language that the person understands, of—

(i) the reason for the arrest;

(ii) the right to remain silent; and

(iii) the consequences of not remaining silent;

(b) to remain silent;

(c) to communicate with an advocate, and other persons whose assistance is necessary;

(d) not to be compelled to make any confession or admission that could be used in evidence against the person;

(e) to be held separately from persons who are serving a sentence;

(f) to be brought before a court as soon as reasonably possible, but not later than—

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the

⁹ Catarina. T "Childhood and Rights: Reflections on the UN Convention on the Rights of the Child

adults when one has been detained.¹⁰ This research interrogates the content and substance of the rights of children in the criminal justice system, rights as provided for in the Children Act 2001, the Constitution, the Sexual Offences Act Cap 62A and the Penal Code Chapter 63 Laws of Kenya.

The rights of the children in Kenya can be enforced either judicially through the courts or administratively through the Department of Children Affairs. This department is the lead Government agency that coordinates and supervises services and facilities designed to advance the wellbeing of children and their families. Its mandate is drawn from the Children's Act, which provides for parental responsibility, fostering, adoption, custody, guardianship, care and protection of children. It also provides for the administration of children's institutions, leadership, coordination, supervision and provision of services in promoting the rights and welfare of all children in Kenya.¹¹

This research however will look into the enforcement of children rights in Kenya with a disposition towards the Criminal process through the National courts and will highlight the weaknesses of these judicial mechanisms in the enforcement of rights of the Children in Kenyan. The research will address rights such as; the right to legal representation of children in conflict with the law, the right to access of justice, the right to a fair and speedy trial and the right not to be mixed with adults once the child has been arrested. The research will at its conclusion give recommendations on international and national best practices in addressing the identified weaknesses.

¹⁰ Section 77, Section 18 and Part VII of the Children Act 2001 Laws of Kenya

¹¹ See Section 30 of the Children Act 2001 Laws of Kenya

1.2 STATEMENT OF THE PROBLEM

Kenya ratified both the CRC and ACRWC without reservation; it has further specifically enacted statute (Children Act 2001 Laws of Kenya) that specifically deals with the rights and welfare of the Child. Further to this in the Constitution 2010 the rights of the children are specifically addressed in Article 53.¹² Article 49 which this research is centered around also provides for the rights of the children with regard to the criminal justice system.

However having such developed laws in place and on paper has not guaranteed the children automatic enjoyment and or implementation of the said rights. There are still cases where children in conflict with the law appear in court without proper legal representation¹³ or lack representation altogether. There is a general non-fulfillment of the principle of best interests of the child, socio-economic difficulties threatening children's right to life, survival and development of the child; police brutality against street children and a general lack of understanding by parties dealing with the children in the urgent need of fostering and promoting the rights of the children.

¹² Article 53 provides : (1) Every child has the right—

- (a) to a name and nationality from birth;
 - (b) to free and compulsory basic education;
 - (c) to basic nutrition, shelter and health care;
 - (d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;
 - (e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and
 - (f) not to be detained, except as a measure of last resort, and when detained, to be held –
 - (i) for the shortest appropriate period of time; and
 - (ii) separate from adults and in conditions that take account of the child's sex and age.
- (2) A child's best interests are of paramount importance in every matter concerning the child.

¹³ As a State Party to the CRC and the African Charter on the Rights and Welfare of the Child (ACRWC), Kenya must recognize certain minimum rights for children in conflict with the law. One right guaranteed by the CRC is the right of an accused child to “legal or other appropriate assistance.”

It has been argued that lack of legal representation of children in Kenya is a main factor contributing to difficulties in effective enforcement of the rights of the children through the judicial process. Legal representation of children is rare, and there is currently no state-paid legal aid system.¹⁴ It has been advanced that since there is lack of funding then representation becomes a rare phenomenon. A 2002 study regarding the legal representation of children in Kenya indicated that only 20% of children who appear in criminal Court have a lawyer appointed to represent them and only another 10% pay for their own.¹⁵

Unwillingness in carrying out investigation by the Police in some instances also poses a challenge in the enforcement process since the Police are part of this process too. More often than not the children in conflict with the law will always come into contact first with the Police when arrested. An illustration of this can be clearly seen in *C.K.(a child) through Ripples International as her guardian and Next friend) & 11 others- V- Commissioner of Police/Inspector General of the National Police Service & 3 others*¹⁶ where the Petitioners sought for declarations to the effect that the neglect, refusal and/or failure of the police to conduct prompt, and professional investigations into their complaints of defilement violated the first eleven petitioners' fundamental rights and freedoms.¹⁷ The Petitioners claimed that they were, on diverse dates between the year 2008 and 2012 victims of defilement and other forms of Sexual violence and child abuse. The petitioners made reports of the acts of defilement at various

¹⁴ Wasilczuk, M.K (2012) 'Substantial Injustice Why Kenyan Children are entitled to Counsel at State Expense' 45 N.Y.U. *Journal of International Law & Politics* 291

¹⁵ Assiago, J. (2002) U.N Habitat Youth & Crime in Nairobi accessed through www.unhabitat.org/programmes/safercities/documents

¹⁶ Meru High Court Petition 8 of 2012 (2013) eKLR

¹⁷ The Petitioners argued that their rights under: under Articles 2, 10, 19,21,22,23,27,28,29,48,50(1) and 53 of the Constitution of Kenya, 2010, Article 1, 2, 3, 5, 7, 8 and 10 of the Universal Declaration of Human Rights, Articles 1, 2, 3, 4, 16 and 27 of the African Charter on the Rights and Welfare of the Child, Articles 2, 3, 4, 5, 6, 7 and 8 of the African Charter of Human and Peoples Rights, Section 3, 5 15 and 22 of the Children Act 2001 of the Laws of Kenya, the Sexual Offences Act, 2006(Act No.3 of 2006 and the Police Act(Chapter 84) of the Laws of Kenya had been violated.

police stations within Meru County and the police officers at those Stations neglected, and or refused to conduct prompt, effective, proper and professional Investigation into the petitioners' complaints. The petitioners claimed the police refused to further record the petitioners' complaints in the police Occurrence Book or visit the crime scenes or interview the witnesses or collect and preserve evidence. It was their contention that they (police) did not take any other steps or put in motion such other processes of the law that would have brought the perpetrators of defilement and other forms of sexual violence to account for their unlawful acts. The petitioners argued that this treatment by the police threatened their physical and psychological wellbeing.

In arriving at its decision the court held that "...In the instant case the police owed a Constitutional duty to protect the petitioners' rights and that duty was breached by their neglect, omission, refusal and/or failure to conduct prompt, effective, proper and professional investigations and as such they violated the petitioners' fundamental rights and freedoms as entrusted in the Constitution."

There is an expectation to receive legal aid¹⁸ where the court deems it necessary and that legal aid should be granted under a system set out and paid for by funds allocated by parliament.¹⁹ Article 37(d) of the CRC²⁰ provides that States Parties shall ensure that every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court of other competent, independent and impartial authority, and to prompt decision on any such

¹⁸ This expectation is in tandem with the Provisions of the Section 77 of Children Act 2001 and Article 50 (h) of the Constitution 2010

¹⁹ Section 77 Children Act 2001

²⁰ See Article 37(d) of the CRC

action. Article 2 CRC provides that States have an obligation to respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind.

Other contributing factors in enforcing the rights of the children include difficulties in accessing the courts due to legal procedure and technicalities. Actual location of the judicial body may pose as a challenge whilst seeking to enforce their rights, where children have to travel many kilometers to access courts.²¹ In Northern Kenya for example it was established that courts were situated as far as 500 kilometers from the users providing a big challenge to women and children as well as other users of the court.²²

There is therefore a gap between the rights as provided in Law and the practical actualization of these rights as seen above.

1.3 JUSTIFICATION

The Children in Kenya are adequately protected in Law by various statutes which include; the Children Act of 2001, the Constitution 2010, the CRC and ACRWC. The provisions of such elaborate laws does not guarantee automatic or smooth flowing implementation or enforcement of the same.

However even with such elaborate provisions there are massive challenges in the process of enforcement thus creating gaps between what is contained in the law and the practical aspect of the said provision.

²¹Enforcing Child Rights in Inefficient National Systems assessed through www.crin.org last assessed 20th June 2013

²²Mbote, P & Migai, A. 'Kenya Justice Sector & the Rule of Law' Johannes burg; Open Society Initiative for East Africa. Accessed through www.ielrc.org (last assessed on 19th June 2013)

The research therefore was necessitated by a desire to propose recommendations that can bridge the gap between what is contained in the law and what is done in practice in order to regulate and harmonize the two and actualize a true realization of these rights as provided by the law.

1.4 THEORETICAL FRAMEWORK

Children pose particular difficulty for the already complex jurisprudential issues of theories. Rights can sometimes be considered as intrinsically good and with such a background it makes it easy to ascribe rights to children.²³

Judges have diverse approaches with respect to the notion of children as right bearers. Dworkin observed that “each judge’s interpretative theories are grounded in his/her own convictions.”²⁴ It is further argued that judges think about the law within society and not apart from it and thus what follows is an environment where the idea of children rights is competing with alternative models of how best to deal with children.²⁵

Historically judges had no reason to conceptualize disputes involving children in terms of their rights. This was a legacy in the Roman doctrine of *patria potestas*- parental power which entitled a father ‘not only...to all service and all acquisitions of his child as much as those of a slave, but also to the same absolute control over his person.’²⁶ Despite the emergence of rights discourse in the mid 1800’s within political and social commentary, children were still excluded from this paradigm. According to John Mill the principle of rights applied ‘only to human beings in the maturity of their faculties and disqualified from its exercise children and young person’s below

²³ Barton, C.(1996). *Law and Parenthood*, Cambridge University Press, May 1, Pg 486.

²⁴ Dworkin, R. (1986). *Laws Empire*, Harvard University Press.

²⁵ Tobin, J “Judging the Judges: Are they adopting the Rights Approach in matters involving children? Accessed through <https://www.papers.ssrn.com/sol3/papers> last accessed on August 15, 2013

²⁶ Hadley, J. (1873) Introduction to Roman Law in Twelve Academic Lecturers, 119, quoted in Garner, A.G. (2009) Blacks Law Dictionary 9th Edition, 1287.

that age which the law may fix as that of manhood or womanhood.²⁷ Some judges have adopted a position that is consistent with this theory which has been propagated as the ‘Invisible rights theory’ as seen in the case of *Re Agar-Ellis –V- Lascelles (1883)*²⁸. In this case of Re Agar Sir William Brett MR said that a father was merely “insisting upon his right” when he refused to allow a daughter who was nearly seventeen to “live with her mother and (had) put her into many and various places to live. The actual decision in this case was based on an assertion of almost absolute paternal authority until the age of twenty one (201) i.e. that it was “the law of England...that the father had the control over the person, education and conduct of his children until they were 21 years of age...” The guiding principle was said to be that when by birth a child is subject to a father, the court should not, except in very extreme cases interfere with the discretion of the father, but leave him the responsibility of exercising that power which nature had given him by the birth of the child.²⁹

A distinctive defining characteristic of the invisible rights theory is its failure to identify that the rights of the children are relevant to the dispute before the court, as seen in the case of *R (Williamson) –V- Secretary of State for Education and Employment*. The background of the case was such that Section 548 of the Education Act 1996 effectively prohibited corporal punishment in schools in England and Wales, and a challenge was brought to this prohibition by teachers at, or parents who sent their children to, independent private schools which had been established specifically to provide Christian education based on biblical observance. These schools enforced

²⁷ Stuart, J.M. (1859) Liberty. 8

²⁸ Bowen LJ in the late nineteenth century English decision *Re Agar-Ellis; Agar-Ellis v Lascelles (1883)* 42 Ch D 317.336, warned that any move by a court to override ‘the natural jurisdiction’ of a father over his child ‘would be really to set aside the whole course and order of nature, and it seems to me it would disturb the very foundation of family life.

²⁹ Denniston, G.C, Hodges F.M, & Milos F.M (2013) *Genital Cutting Protecting Children From Medical, Cultural and Religious Infringements* , June 3, Springer Science & Media P 169

discipline through the use of mild corporal punishment where appropriate, as agreed to by the parents of the children by virtue of what they claimed to be part of their fundamental Christian beliefs that such discipline should be administered as an integral part of the teaching and education of children. While the punishment was carried out by teachers in some schools and by parents in others, both argued that the teachers had the right to administer such punishment. The parents and teachers argued that the prohibition on corporal punishment in schools violated their rights to freedom of religion, to education in conformity with religious convictions, and to family life under the European Convention on Human Rights and its First Protocol. Baroness Hale declared ‘My Lords, this is, and has always been, a case about children, their rights and the rights of their parents and teachers. Yet there has been no one here or in the courts below to speak on behalf of the children. No litigation friend has been appointed to consider the rights of the pupils ... No non-governmental organization ... has intervened to argue a case on behalf of children as a whole. The battle has been fought on ground selected by the adults.’³⁰

There was however significant moves from this approach which over the course of the late 19th and early 20th centuries with the emergence of children rights. The paradigm shift has not been universally embraced by the judges and the legacy of the parental possession doctrine remains in some national courts.³¹

The invisible rights theory is strikingly at odds with the vision of the children as rights bearers as articulated in the CRC and the Children Act 2001 and other international instruments that are related to the rights of the child. It neglects to conceptualize the issues in terms of rights of a

³⁰ R (Williamson) –V- Secretary of State for Education and Employment [2005] 2 AC 246

³¹ For example as recently as 2004 Gummow J of the High Court of Australia in *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1, 57–8 stated: ‘*The starting point is the proposition that, at common law, a right of a parent or parents to custody of children who had not reached the age of discretion (fourteen for boys and sixteen for girls) incorporates a ‘right to possession’ of the child which includes the right to exercise physical control over that child.*’

child but affirms and embraces a vision of children in which they are primarily seen as an extension of their parents.

The traditional view of children's rights has come to be known as the "caretaker" view of children's rights an approach that was articulated at least as early as 1691 by philosopher John Locke. According to Locke, all humans were "born infants, weak and helpless, without knowledge or understanding." Therefore, parents were "by the law of nature under an obligation to preserve, nourish, and educate the children they had begotten, the rights of these children are therefore incidental to the rights of the parents." In the Lockean scheme, parents have the right to make all choices for their children: "Whilst [the child] is in an estate wherein he has no understanding of his own to direct his will, he is not to have any will of his own to follow." Children have only "dependency rights" rights related to reasonable expectations that they, as dependents, will be provided with whatever they require to grow into healthy and functioning adults.³²

This caretaker view seems to have found support in some court rooms, Nielsen in a study in 2002 concerning the rights of children in South Africa revealed that the main beneficiaries of children rights related cases were in fact adult litigants, who had sought to bolster their claims via children rights based arguments.³³

³² Locke, J. (1690). *Second Treatise of Civil Government*, Salus Populi Suprema Lex esto, London Printed 1689.

³³ Nielsen, J.S. (2002) 'Children Rights in South African Courts: An overview since the Ratification of the United Nations Children Rights Charter', *International Journal of Children Rights* 137, 149-51

A contemporary example of the theory can be seen in the decision of *VM –V- Director of Child, Family and Commuter Services (British Columbia)*.³⁴ The background of this case was that Premature sextuplets were born to parents who were members of the Jehovah’s Witness Church. The infants were admitted to the Neonatal Intensive Care Unit where they received life support. Two of the infants died within the first two weeks due to complications. Despite attempts to minimise the need for blood transfusions given the parents’ beliefs, the medical team eventually deemed that blood transfusions were necessary. The parents objected, at which point the Director of Child, Family and Community Service obtained orders in the Provincial Court authorising transfusions for two of the children pursuant to Section 29 of the *Child, Family and Community Service Act* (RSBC) 1996. The Director then apprehended the remaining two children and authorised transfusions for them in the absence of a court order, pursuant to s 30 of the CFCSA. The children were given the transfusions. The parents appealed the orders of the Provincial Court and sought judicial review of the Director’s actions. They argued that, in compelling their children’s transfusions, the Court and Director had violated their rights under ss 2(a) (freedom of conscience and religion) and 7 (right to life, liberty and security of the person) of the *Canadian Charter*. In framing the issues for determination the court stated; ‘This case lies at the intersection of the rights and responsibility of parents to make sound health care decisions for their children and the duty, indeed the obligation, of the state to override that right in appropriate circumstances. This court must decide where the correct intersection lies and on which side this case falls.’ It is obvious that the rights of the child in question are conspicuously absent from this

³⁴ *VM –V- Director of Child, Family and Commuter Services (British Columbia)* (2008) 12 WWR 102

conceptualization of issues which is reduced to the need to reconcile the tension between the rights of the parents and the obligation of the state.³⁵

This theory treats the rights of children as incidental rather than making the rights of the child the primary focus as provided for by the Children Act 2001 and other international instruments. As seen rather than the court having forcefully conceptualized the issue for determination as the right of life (which forms the child's best interest) but instead it chose to conceptualize the issue as between the state and the parents' rights to their religious beliefs.

In striking contrast to the "caretaker" view is the "children's liberation" view, a relatively radical view that has been advanced only in the last fifteen years. It is a view that has been advanced by writers such as Richard Farson³⁶, John Holt³⁷ and Howard Cohen³⁸. According to this view, children have exactly the same rights that adults have, including such rights as the right to choose for one's self. Farson claims, for example, that "Children should have the right to decide matters that affect them most directly." According to Farson³⁹, children have a right to privacy and freedom of expression, a right to confidentiality, and the right to choose their friends, their church (or to choose no church at all), and what they wish to read, listen to, and see at the movies. Furthermore, Farson writes, children have the right to "design their own education ... including the option not to attend any kind of school," and the right to "conduct their sexual lives with no more restriction than adults." The views as expressed in this theory are against the letter and spirit of the CRC and other international instruments as regards the rights of the children as

³⁵The case involved a challenge to the authorization of blood transfusion for 2 infants whose parents were members of Jehovah's witness Church

³⁶ Farson, R (1974). *Birthrights*, Macmillan.

³⁷ Holt, J. (1974). *Escape from Childhood*, E.P Dutton.

³⁸ Howard, C. (1980). *Equal Rights for Children*, Littlefield Adams & Co

³⁹Farson Supra P 162

it would appear to advocate for absolute rights for the children without responsibilities or limitations as provided for in the CRC.

The “interests” theory is advanced by Eekelaar⁴⁰ who proposes that one way to define a right is to identify the interests that right protect. This definition proposes that the child is a rights holder and the adult is the executor. Federle⁴¹ expounds this theory further by asserting that the child is regarded as a citizen entitled to rights endorsed by society’s legal and political frameworks. Eekelaar categorizes the interest rights into basic rights where at home parents have a duty to provide care within social capabilities and at national level where the state has a role to enforce the mechanism of neglect. Judges from this theory engage with aspects of the rights of the children in a substantive way. The judge will attempt at all times to conceptualize the issues before the court, procedures to be adopted for the determination of the issues and the meaning to be given to the content of the rights in question and substantive reasoning which may resolve the issues and the balance of competing interests.⁴²

It is against this theory that the research is founded, since this theory advocates placing the rights of the child as principle focus and in determining issues before the court, the judge is always bound to focus on the best interest of the child which is the bedrock of the Children Act 2001, the CRC, ACRWC and the Kenyan Constitution 2010.

⁴⁰ Eekelaar, J ‘The Emergence of Children Rights’, In H.D Krause (Ed) *Child Law, Parent Child and State* P. 37-58 Aldershot: Dartmouth

⁴¹ Federle, K.H. (1992). ‘Rights Flow Downhill’, *The International Journal of Children’s Rights*, 2, 343-36

⁴² Tobin, J. (2009) ‘Judging the Judges: Are they adopting the rights approach in matters involving children?’, *Melbourne University Law Review*, 579

1.5 HYPOTHESIS

The children offenders and victims in Kenya even though having ample laws that protect them on paper, experience challenges in actualization of those rights.

1.6 OBJECTIVES OF THE STUDY

- a. To identify the rights of the children offenders and victims in Kenya as laid down in statute and international instruments.
- b. To advance recommendations on access to justice to indigent children in need of care and protection and those in conflict with the law at the children's court.
- c. To advocate for the enforcement of the rights of children offenders and victims in Kenya as provided for in statute and international Instruments.

1.7 RESEARCH QUESTIONS

1. What are the rights of the children in Kenya with regard to the Criminal Justice System?
2. What statutes and International Instruments provide for these rights?
3. What is the process of accessing criminal justice through the courts for the children in Kenya?
4. Are there any limitations in accessing justice by child offenders and those in conflict with the law?
5. What methods can be implemented to effectively deal with the limitations identified?
6. What recommendations can be preferred for the criminal justice system to establish best interest practices in Kenya?

1.8 RESEARCH METHODOLOGY

Sources of information in this research shall include the following sources on international, regional and national enforcement of children rights through judicial mechanisms.

(i) Text books – the study will be based on available text books by leading authors in the foregoing areas that will be studied in this thesis.

(ii) Articles – the study will also be based on articles written by numerous authors that are relevant to the study. Such articles will be important in addressing any current trends on the research questions. Such authors will include those that have answered certain questions on this study in their articles in refereed journals and distinguished lectures.

(iii) Statutes – these will include official Government publications on studies that the Government will have commissioned, and that are relevant to this study. This will be important in examining the policy efforts of the various Governments to enable this study propose necessary reform proposals on the questions raised in this study.

(iv) Internet materials – the Internet will be important in providing current and historical information on various aspects of this study that are otherwise unavailable or limited in print.

(vi) Interviews and questionnaires with government officials especially those in the ministry of Justice and Constitutional Affairs and the office of the Attorney General and the Director of Public Prosecution.

1.9 LITERATURE REVIEW

Article 1 of the United Nation Rules for the Protection of Juveniles deprived of their Liberty (JDL Rules) emphasizes on a child rights approach that ‘Juvenile justice system should uphold the rights of and safety and promote the physical and mental wellbeing of the juveniles. Rule 5 of the Beijing lays down the aims of juvenile justice to be two fold; to promote the wellbeing of the juvenile and ensuring that any reaction to the child offenders shall always be in proportion to the circumstances of both offenders and the offence. Geert Cappelaere argues that although these guidelines are soft law and not directly binding these guidelines are indirectly binding to member states and these states have a duty to ensure that juvenile justice systems in their states promote the wellbeing of the juvenile.⁴³

In his analysis, Fottrell, apart from dealing with the historical background of the CRC and its substantive provisions touches on the issue of implementation. He discusses at length the implementation system envisaged under the CRC and its weaknesses at the level of the CRC Committee. He, however, does not attempt to deal with measures of implementation at the national level.⁴⁴ Bueren canvasses similar issues and goes further to make a comparative analysis between the CRC Committee practice and procedure and other United Nations’ treaty monitoring bodies. She also discusses regional mechanisms for the implementation of the rights of the child.⁴⁵ Just as it is in the case of Fottrell, Bueren does not deal with experiences at the state level.

⁴³ Cappelaera, G. (1995) ‘Introduction to UN Guidelines for the Prevention of Juvenile Delinquency Defence for Children International’

⁴⁴ D Fottrell (2001) ‘One step forward or two steps sideways? Assessing the first decade of the children’s Convention on the rights of the Child’ in D Fottrell (ed) *Revisiting Children’s Rights 10 years of the UN Convention on the Rights of the Child* 1.

⁴⁵ Bueren G.V. (1995) *The International Law on the rights of the child* 378.

Another attempt to deal with the issues of implementation was made by Doek; the issues he dealt with, however, are limited to how to implement the provisions relating to child abduction, inter country adoption and rights of refugee children including experiences from various parts of the world.⁴⁶

In his endeavor to deal with the issue of implementation of children's rights, Welshman argues that it is important for the norms to be translated to the specific social traditions and cultural imperative contexts in terms of legal pluralism and cultural relativism of the society concerned so as to ensure acceptance of the norms by the society.⁴⁷

In Kenya one of the key issues of concern raised in the implementation of the rights of the child is limited budgetary allocation. Wako⁴⁸ has laudably argued in his paper that Kenya's severe economic and social difficulties have prevented the full realization of children's rights and there is concern over the inadequate enforcement of legislation to ensure the "physical and mental integrity" of all children. Copper⁴⁹ points out that another major contributor to ineffective enforcement of the judicial process can be traced to the inability or challenges faced by the children while seeking to access justice, this she argues is in direct nexus to the constraints of funds as argued by other scholars above. In a case study, she found out that; for example in Kisumu district the children office there was severely understaffed in comparison to the heavy

⁴⁶ Doek J. et al (1996) *Children on the move. How to implement their right to family life* (eds).

⁴⁷ Ncube W (1998) 'Prospects and Challenges in Eastern and Southern Africa: The Interplay between International human rights norms and domestic law, tradition and culture' in W Ncube (ed) *Law, Culture, Tradition and Children's rights in Eastern and Southern Africa* 1.

⁴⁸ SA Wako 'Towards an African Charter on the Rights of the Child', paper delivered at the Workshop on the Draft Convention on the Rights of the Child, Nairobi, 9-11 May 1988

⁴⁹ Cooper, E. (2012). *Following the law, but losing the spirit of child protection in Kenya, Development in Practice*, 22:4, 486-497

work load this office had.⁵⁰ Cooper continues to argue that in dealing with the children in need of care and protection the delicate attention to details was not observed and more often than not the process was rudimentary and without concerns over the victims in the process.

Debatably lack of resources is not the only significant challenge to enforcement of the rights of children and their Kenyan state.

Madlyn⁵¹ highlights, in her article the effects of non-representation of children in the Kenyan judicial system. Her precision is demonstrated when she observes that this right to legal representation is a constitutional right that has failed to be effectively implemented in children matters. Her arguments are that Human rights instruments recognize the incapacitation of children by physical and mental immaturity that place a demand for safeguarding as far as their (children) rights are concerned. Legal aid to children who cannot afford lawyers is yet to be structured with clear provisions on how it will be funded. By failing to provide children with legal assistance, Kenya is in contravention of a number of its international obligations.⁵²

In similar hypothesis and in article on enforcement of the rights of a child Hezfeld⁵³ advances and theorizes on bureaucracy as a contributor to ineffective judicial enforcement. He states that an extremely significant problem is how job performance is appraised: in terms of the execution of official procedures, rather than in terms of supporting the best interests of specific children.

The arguments presented by Hezfeld seem to propose that in a situation where appraisals are

⁵⁰ The office had only 2 children officers, 3 volunteers, a secretary and a clerk with an occasional college student on studentship attachment for which they were not paid for. This resulted in having the children being placed with caregivers who in some instances had caused the children to seek protection in the first instance.

⁵¹ Wasilczuk, M.K (2012) 'Substantial Injustice Why Kenyan Children are entitled to Counsel at State Expense' 45 N.Y.U. *Journal of International Law & Politics* 291

⁵² African Human Rights and Access to Justice Programme 'Legal Opinion Case No. 116' accessed through www.icj-kenya.org (last accessed on 14th June 2013)

⁵³ Herzfeld, M. (1992) *The Social Production of Indifference: Exploring the Symbolic Roots of Western Bureaucracy*, Chicago and London: University of Chicago Press.

measured by the quantity rather than quality of work, then of course enforcement faces challenges. Some of this is related to the way in which the system is organized to uphold bureaucratic protocol.

Wright⁵⁴ and other scholars have noted with extreme caution that, bureaucracies function to uphold a principle of objectivity and in so doing, can obfuscate the accountability of those who act in the name of the state and the law as well as ward off appeals to individualized considerations or other ethical ideas. So that in the case study done by Elizabeth it would be more beneficial to the officers to produce results in terms of cases handled rather than dealing with the best interest of the child.

In following the procedural aspects of the law and policy above all other considerations and judgments, state actors – specifically, Children’s Officers and the children’s court – actively reduce the scope of the law, and diminish the actualization of its core principles of pursuing the best interests of the child and respecting children’s perspectives and participation in decisions that affect their lives; this is what Cooper⁵⁵ refers to as following the law but killing the spirit of the law.

It has been argued by several authors on an international level that the judicial mechanism of enforcement of children’s rights, especially those of social and economic nature is a fallacy and more so within the African states.

⁵⁴ Shore, C. and S. Wright. (1997) *Anthropology of Policy: Critical Perspectives on Governance and Power*, London and New York: Routledge

⁵⁵ Cooper, E. (2011) ‘Who cares for orphans? Challenges to kinship and morality in a Luo village in western Kenya’, unpublished DPhil dissertation, Institute of Social and Cultural Anthropology, University of Oxford, Oxford, UK.

Umozurike⁵⁶ confirms these contentions by asserting that even though most state constitutions have now preserved socio economic rights for the children the government will always have an excuse with regards to the non-availability or limited funds. When such justifications are placed before court than quite often than not the court finds its hands tied since it is sitting in judgment of the very government that appoints it and feeds it.

On the other hand Dankofa⁵⁷ observes this readily defence as an indicator of reluctance by the governments in terms of enforcing the rights of children. Such resistance more often than not derails in the enforcement of the rights of children.

The African Charter guarantees socio-economic rights and places these rights on the same status with the civil and political rights by declaring that “civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality.”

Coomans⁵⁸ has argued on this line and more specifically that the problem lies with judicial enforcement of socio-economic rights at the domestic Courts of Kenya and that to most African States these rights are not justiciable and Courts are incapable of making decisions about their implementation because they require making political choices, setting priorities, allocating resources and re-arranging budgets. “Such decisions,” it is stated, “should be left to the political bodies in a domestic system, not to Courts.”

⁵⁶ Umozurike U.O. (1988). The Protection of Human Rights under the Banjul (African) Charter on Human and Peoples’ Rights, *Afric. Journal of Inter’l & Comp. Law*, at 65 & 71.

⁵⁷ Dankofa Y. (2003-2004) Towards an Effective Safeguard for the Enforcement of Human Rights in Africa – The Need for an African Court, *Ahmadu Bello Univ. Law Journal*, Vol. 21-22, at 83.

⁵⁸ Coomans F.(ed.). (2006). *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Antwerpen-Oxford: Inter Sentia)

1.10 LIMITATION OF STUDY

The main methodological limitation of this study was the inability to conduct interviews and questionnaires as intended. The reason informing this position was that most of the officers who could provide this information were pre-engaged and not authorized to give the information sought. Funds that would have enabled a wider scope of research were limited as the project was self-funded.

CHAPTER 2: OVERVIEW ON THE RIGHTS OF THE CHILDREN IN KENYA

2.1 Introduction

This chapter primarily focuses on the rights of the children offenders and victims in Kenya as provided for under The Constitution, The Children Act, the Sexual Offences Act and CRC and ACRWC. These rights as we shall see are capable of being judicially enforced and it is imperative to expound on them so that when the author discusses judicial mechanisms of enforcing the rights of the children in Kenya, the reader is aware of the rights being discussed and clearly understand obstacles pertaining to their application.

The Children Act (2001) is Kenya's key legislation that domesticated the provisions of the CRC and the ACRWC. The Children Act replaces the repealed Guardianship of Infants Act Cap 144 of the Laws of Kenya, the Children and Young Person's Act Cap 141 Laws of Kenya and the Adoption Act Cap 143 Laws of Kenya. The Act brings under one umbrella the rights and responsibilities of a child, custody and maintenance, care and protection of children, guardianship fostering and adoption, the role of the government and parents and the juvenile system.

However, since 2007 there have been government-led efforts to review the Children Act with a view to strengthening its provisions for children in alternative care, adoption and diversion for children in conflict with the law. The need for a dedicated legislation to underpin the importance of a child specific justice system for children in conflict with the law, has led to the proposal for a specific legislation on child justice in the form of the Child Justice Bill, 2010. The Child Justice Bill proposes to raise the minimum age of criminal responsibility from the current low age of 8 to a new age of 12. The Bill also seeks to introduce improved provisions relating to the

protection of children from abuse while in alternative custodial care in line with the provisions of Article 37 (b) of the CRC.⁵⁹ It proposes the creation of child protection units, where key actors in the Juvenile system are trained in child protection. The Bill also seeks to establish places of safety and provisions that emphasize diversion of children accused or alleged to have committed crime from the formal justice system.⁶⁰

The draft Legal Aid Bill, 2012 currently being drafted by the Ministry of Justice and awaiting to be tabled in Parliament, is an attempt to enact legislation that will co-ordinate and guide the Legal Aid process in Kenya.

The Draft Bill provides for the grant of legal aid in criminal matters, civil and constitutional matters as well⁶¹. The Bill sets a threshold that litigants will be required to meet in order to be provided with legal aid.

The Bill also states lists children as eligible for legal aid⁶² and further states that a child, shall, upon application, automatically qualify for grant of legal aid and shall not be subjected to the eligibility criteria.⁶³

⁵⁹Section 37 (b) of the CRC provides: No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

⁶⁰

⁶¹Section 28 (i) of the Legal Aid Bill provides: Legal aid, at the expense of the State may be provided by the Service to persons who qualify for grant of legal aid under this Act.

(2) Legal aid may be granted in—

(a) civil proceedings;
(b) criminal proceedings;
(c) constitutional matters; or
(d) any other type of proceedings that the service may approve

⁶²(1) A person is eligible for the grant of legal aid if that person is indigent(a) is a citizen of Kenya or is resident in Kenya; or

(b) is a child

⁶³ See Section 28(5) Legal Aid Bill

The rights of the children in Kenya both under national and international law are enjoyed subject to the ‘best interest of the child’ principle. Section 4(2) of the Children Act provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. The African Charter on the Rights and Welfare of the Child provides that in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration⁶⁴.

The Committee on the Rights of Children have stated that the best interests of the child imply, among other considerations, that in juvenile justice proceedings and processes, each case will be examined on an individual basis, as every child’s needs are different,⁶⁵ and that proper weight will be given to the child’s own opinion in accordance with his or her respective age and maturity, and with the opinion of the child’s parents, guardians and/or representatives or closest family member. The Commission considers that the best interests of the child should be a guiding principle of interpretation that reconciles two realities at the moment of regulating the juvenile justice system: on the one hand, recognition of the child’s capacity to reason(understanding the crime), which means that the child ceases to be a mere object of protection; on the other hand, recognition of the child’s vulnerability, given the child’s material incapacity to fully satisfy his or her basic needs.⁶⁶ The best interest principle can also be read

⁶⁴ Article 4, The African Charter on the Rights and Welfare of the Child

⁶⁵ See ECHR. *Case of Neulinger and Shuruk v. Switzerland*, Application No. 41615/07, Judgment, Grand Chamber, 6 July 2010, para. 138. In cases in which children under the age of criminal responsibility violate criminal laws, the legal exclusion shall be generic, and no case-by-case analysis is necessary. I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17,

⁶⁶ Committee on the Rights of the Child, General Comment No. 10, *Children’s rights in juvenile justice*, CRC/C/GC/10, 25 April 2007, paras. 43 to 45.

into the Beijing Rules provision that juvenile justice shall emphasize the wellbeing of the juvenile.⁶⁷

Simply put, the *best interest of the child* means considering the child before a decision affecting his/her life is made. The process of deciding on what exactly is the *best interest* of the child is not an easy task. Courts and other institutions confronted with this question often have to ask themselves the following questions:⁶⁸

- Which specific interest is at issue?
- What is the nature of such interest?
- Is the interest of a long-, medium- or short-term duration?
- Are the criteria for determining such interest objective or are they based on the child's subjective wishes and if so is the age of the child considered?

As one may well imagine, the responses to these questions is varied. When applied correctly, the principle does yield the required results in that the interest of the child is taken care of. However, the consistency in applying this principle correctly each time there is a matter that requires the determination of the best interest of the child may require some form of uniform guidelines from the courts, without imposing a standard that disregards the uniqueness and merits of each individual case.⁶⁹

⁶⁷ Rule 5 of the Beijing Rules

⁶⁸ Mahlobogwane, F. (2005) 'South African Courts and the Best interest of the Child in Custody Disputes', *Codicillus*, p. 46.

⁶⁹ ACPF (2008), In the Best Interests of the Child: Harmonising Laws on Children in Eastern and Southern Africa, available at <http://www.africanchildinfo.net>

2.2 A General Overview of the Rights of the Children in Kenya

Section 186 of the Act guarantees due-process rights for children alleged of or in conflict with the law. These include the child's right to prompt and direct notification of the charges, the right to legal representation provided by the government (if the child is unable to obtain such representation), the right to a prompt determination of the case, the right to free assistance by a court interpreter and the right of appeal against the decision of a lower court. In relation to the right to legal representation it is noteworthy that although an institutionalised legal aid scheme, not only for children, but also for the general Kenyan populace is markedly non-existent and still ranks low in the Kenyan government's priorities, a few child-focused NGOs and individual lawyers have played an important role in the free legal representation of children.⁷⁰

The right to be heard is a core part of trial and must be respected at every stage of the criminal justice system. For this right to be effective the Committee on the Rights of the Child has stressed the need for the child to be informed not only of the about the charges but about the whole criminal justice process that is facing him and the measures that may be imposed. Rule 14.2 of the Beijing Rules states that judicial proceedings shall be conducted in an atmosphere of understanding which shall allow the juvenile to participate therein and express themselves freely. The recognition of the child's right to be heard and participate in proceedings against him is a shift from the paternalistic attitude where the child was viewed as an object rather than a subject of the juvenile system. This is mostly stated clearly in the Riyadh guidelines which states that

⁷⁰See, 2004, 'The Birth of a Regional Juvenile Justice Network in East Africa', Odongo, GO (4) 6(1) *Article 40* 10-11. For a recent example, see *The Daily Nation* report (n 94 above) 17 which quotes the comments of a judge as follows: 'The Law Society of Kenya branch has taken up the challenge of ensuring that every child in conflict with the law is afforded legal aid' and the lawyers' representative thus: 'The Law Society is encouraging many advocates to take up children's cases, and we have also introduced a legal aid scheme in which we will be able to reimburse out of pocket expenses to advocates who take up children's cases as well as pay a small stipend for every case concluded.' These efforts, however laudable, cannot make up for the lack of any form of a government-sponsored legal aid scheme which acutely results in the violation of the rights of many children who find themselves in the juvenile justice system

‘Young persons should have an active role and partnership within the society and should not be considered as mere objects of socialization or control. The guidelines emphasize the need to accept the children as ‘full and equal partners in the socialization and integration in society.’⁷¹

The Child Offender Rules in Schedule 5 of the Children’s Act provide for time limits within which a case involving a child must be completed. The Rules also make provision for the dismissal of any cases that are not completed within three (3) months after the child’s taking of plea (except for capital or serious offences which are only to be dismissed after 12 months from the date of plea).⁷² The intention here is to encourage the speedy conclusion of cases involving children and thereby redress past practice in the criminal justice system which has often been marked by common indeterminate pre-trial detention often of very young children in very inhumane and stigmatising conditions. In this way these provisions which relate to time limits within which criminal matters must be finalised seek to give effect to the principle requiring detention ‘as a last resort’ and ‘for the shortest period of time’ included in Article 37 of the CRC. The Act also enacts an array of measures by which a court may deal with a child upon a finding of guilt. By enacting these options, the Act substantially seeks to comply with relevant international law on juvenile sentencing. This is a principle seen also in the JDL Rules which provides that the deprivation of liberty ought to be a measure of last resort and even then it should be for the “minimum necessary period” and “Limited to exceptional cases”.⁷³ In provisions which are clearly aimed at promoting diversion of child offenders (from formal criminal justice processes and institutionalisation in particular) as provided for in Article 40(3) of

⁷¹ Article 10 Riyadh Guidelines.

⁷² Kenyan Act, Child Offender Rules, Rule 12(2) and (4)

⁷³ Article 2 of the JDL Rules

the CRC, the Act provides for alternative sentences for child offenders.⁷⁴ A trial court may upon recording a finding of guilt, deal with a child offender by placing him or her in a probation programme, in the care of an adult or charitable institution, committing the child to counselling, an educational institution, vocational training or to community service. The trial court may also have recourse to the options of ordering the discharge of a child (where this is appropriate) or ordering a friendly settlement between the child and victim(s) of the crime or the payment of fines/compensation. Section 190(1) specifically excludes *imprisonment* as a punishment for children. This absolute prohibition of imprisonment is broader than the CRC Article 37(1) (a) and the ACRWC Article 17(2) (a) both of which only prohibit *life imprisonment without the possibility of parole*. Further, the Act prohibits the use of both the death penalty and for the first time in Kenyan criminal procedure law, the use of corporal punishment for children (sections 190(2) and 191(2)).

This research is centered on the rights of the children in conflict with the law and will look at the enforcement process of these rights. These rights include the right to a fair hearing as envisaged in Article 49 of the Constitution which provides for the rights of an accused person, the right to a fair hearing which is provided for in Article 50 and in particular the provisions of Article 50 (i)⁷⁵ which provides for a right to legal representation, the right to have their cases heard expeditiously without unnecessary delay as is provided in Rule 12⁷⁶ of the Child Offender Rules and the right to Legal aid as is envisaged in Article 77⁷⁷ of the Children Act.

⁷⁴The Act, section 191(1)

⁷⁵ Article 50(h) Constitution 2010 provides: the right to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

⁷⁶ Rule 12 Child Offenders Rules provides: (1) Every case involving a child shall be handled expeditiously and without unnecessary delay.

CHAPTER 3: ENFORCEMENT PROCESS THROUGH THE COURTS

3.1 Introduction:

The CRC requires state parties to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. Such protective measures include effective procedures for the establishment of social programmes to provide necessary support for the child and for care givers, as well as for other forms of prevention and for identification of child maltreatment.⁷⁸

Implementation, in relation to CRC and ACRWC, is the process whereby state parties take action to ensure the realization of all rights in the CRC and ACRWC for all children in their jurisdiction. The importance of implementation and enforcement is summarized by Flekkoy in the following words:⁷⁹ ‘Laws, national and international, are after all, words on paper. They may codify attitudes, but the real results depend on how they are implemented, and what is done to follow up to reach the ideals.’

(2) Where the case of a child appearing before a Children’s Court is not completed within 3 months after his plea has been taken he case shall be dismissed and the child shall not be liable to any further proceedings for the same offence.

(3) Where, owing to its seriousness, a case is heard by a court superior to the Children’s Court the maximum period of remand for a child shall be six months, after which the child shall be released on bail.

(4) Where a case to which paragraph (3) of this rule applies is not completed within twelve months after the plea has been taken the case shall be dismissed and the child shall be discharged and shall not be liable to any further proceedings for the same offence

⁷⁷ Section 77 of the children Act Provides: (1) Where a child is brought before a court in proceedings under this Act or any other written law, the court may, where the child is unrepresented, order that the child be granted legal representation.

(2) Any expenses incurred in relation to the legal representation of a child under subsection (1) shall be defrayed out of monies provided by Parliament.

⁷⁸ See Article 3 of the CRC

⁷⁹ MG Flekkoy *A voice for children: Speaking out as their ombudsman* (1991) 218.

The process of application of human rights treaties may take different forms depending on the circumstances of a given country. It involves various sectors enforcing different measures and as such implementation is therefore by no means straightforward process.⁸⁰ It needs to be seen as a ‘policy/action continuum in which an interactive and negotiated process is taking place over time between those seeking to put policy into effect and those upon whom action depends.’⁸¹

The two instruments, CRC and ACRWC, stipulate various measures for the enforcement of children’s rights which include, among others, law reform, establishment of national independent human-rights institutions for children, national plans of action, and coordinating bodies; location of resources for children; monitoring mechanisms on implementation and subsequent enforcement of the Convention; awareness raising and advocacy; and measurement of the involvement of civil society, including children, in the realization of children’s rights. In dealing with the issue of enforcement Article 2 of the CRC provides that ‘ States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular: ...Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

When it comes to the hearing of the cases against children several things are important to consider. One of this is the requirement of specialized infrastructure and systems to deal with child offenders according to the provisions of Article 40 (3) of the UNCRC⁸². Such specialized

⁸⁰ The Challenge of Human Rights and Cultural Diversity, Published by the United Nations Department of Public Information DPI/1627/HR--March 1995 accessed through <http://www.un.org/rights> on 12th June 2013

⁸¹ Barret and Fudge (1981) 25 cited in H Michael “*The Policy Process in the Mobilisation in Low Income Countries*” (1997) 137.

⁸² Article 40 States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the

infrastructure includes specialized courts that must strive for informality of proceedings such as may be sensitive to the need for effective participation by children and to prevent stigmatization of children.⁸³

States have discretion in determining what manner of form these specialized courts shall take.

Kenya in its own case has constructed separate courts buildings in some towns to hear children matters⁸⁴ while other towns have magistrates designated as children magistrates who hear children matters, and it has gone further calling for a ‘friendly setting’⁸⁵ in the children court and for words such as ‘conviction’ and ‘sentence’ not to be used.⁸⁶

It is noteworthy that section 40 of the UNCRC calls for specialization in authorities meaning that police officers, magistrates, probation officers and other authorities that come into contact with the child offender within the criminal justice system ought to be trained in dealing with children.

The state has failed in this area as the training offered to the role players is rare and on the few occasions it has been offered it has been offered by civil society organizations. In 2001 child desks were established in several police station in Nairobi and the objective of these desks was that officers at these desks would deal exhaustively with children matters and would be trained in how to deal with children accused of committing crime. These desks worked for a while but eventually failed due to lack of monitoring and evaluation of the training officers as well as lack

desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

⁸³ Odongo, J. (2008) ‘The Impact of International Law on Children’s Rights on Juvenile Justice Law Reform in the African Context’ in Children Rights in Africa: a Legal Perspective, Ashagate Publishing Ltd

⁸⁴ Nairobi and Nyeri courts have such separate courts specifically set out to hear children matters.

⁸⁵ Section 188 of the Children Act provides : A Children’s Court shall have a setting that is friendly to the child offender .

⁸⁶ Section 189 of the Children Act provides: The words “conviction” and “sentence” shall not be used in relation to a child dealt with by the Children’s Court, and any reference in any written law to a person convicted, a conviction or a sentence shall, in the case of a child, be construed as including a reference to a person found guilty of an offence, a finding of guilt or an order upon such a finding, as the case may be.

of monitoring and evaluation of the project to ensure sustainability and also mainly due to the lack of ownership by the state.

3.2 Administrative/Executive Structures Correlated to Judicial Enforcement

The Kenyan state is recognized in some policy arenas as a leader in Africa for the care and protection of children although there being challenges. The African Child Policy Forum (ACPF) has ranked Kenya first among all African countries for ‘its effort to put in place an appropriate legal and policy framework for⁸⁷, and Kenya has been evaluated as one of the most child friendly African governments (sixth among 52 governments).

Judicial enforcement can be viewed as a process of administering legal power in the society to ensure that the rights of that society are observed and upheld and in this context we refer to the rights of the children in Kenya, which process is administered either through executive structures like the Police and the Children department or Judicially through the National courts i.e. at the High Court of Kenya and at the Children’s Court.⁸⁸

The Kenyan conceptualization of the criminal justice process for children is generally a benign one, focusing on ‘rehabilitation’ and ‘education’ rather than on punishment. This is seen in the fact that even the current law does not use the terms ‘conviction’ and ‘sentence’. Imprisonment is rarely used and children do not get criminal records. These features indicate a leaning towards welfarism which is also referred to as the ‘protection model’, in the criminal justice system for children towards regulating and implementing the best interest principle⁸⁹. By and large this is

⁸⁷ ACPF (African Child Policy Forum) (2008) ‘How Child-Friendly Are African Governments?’, Addis Ababa: African Child Policy Forum, available at www.africanchildinfo.net/africanreport08/ (retrieved 29th May 2013).

⁸⁸ The Lawyers & Jurists, Barissters and Legal consultants, Judicial Enforcement of Social Economic & Cultural Rights, Accessed through <http://www.lawyersnjurists.com> last accessed 19th September 2013

⁸⁹ Kenya as a signatory to the CRC seeks to ensure that it implements the best interest principle as enshrined in the CRC in Article 3 (1) In all actions concerning children, whether undertaken by public or private social welfare

the theory upon which the early juvenile justice courts in the United States and Western Europe were founded and it did provide the rationale for the approach to children deemed to be delinquent.⁹⁰

According to this concept, courts assume an important role in protecting a child. Welfarism advocates for a separate justice system for juveniles. At the heart of such a system is a social construction of childhood under which children are perceived as immature, both mentally and socially. Indeed, the prevailing philosophy underlying the original idea of a juvenile court was that rather than use criminal punishment to address children's violations of the law, children were to be nurtured and given guidance with a view to making them responsible adults. Thus, welfarism was informed by a desire to be benign as manifested in the general role of the state as *parens patriae*.⁹¹ By this, the juvenile court judge was an instrument of the state for the application of intervention measures in situations that embodied prevailing social inadequacies. The danger in this is that in reality the system may be far less benign than it seems on paper. Children are not sent to prisons-but alternatives to imprisonment may also be damaging.⁹²

institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

⁹⁰Zimring, F.E "The Common Thread: Diversion in the Jurisprudence of Juvenile Courts" in Rosenheim, M.K, *et al* (eds) (2002) *A Century of Juvenile Justice* Chicago/London: University of Chicago Press

⁹¹An English law doctrine symbolizing the role of the Monarchy in protecting vulnerable parties in courts of equity. The advent of welfarism saw the extension of this doctrine in English law to children's issues, in which judges assumed wide discretionary powers to forcibly order the removal of children from destitute families. In the realm of juvenile justice, the philosophy of the doctrine meant securing the welfare of the child in the belief that the state must act as a child's parents 'securing needs rather than rights of the offender', see Schissel, B (1993) *Social Dimensions of Canadian Youth Justice* Toronto: Oxford University Press vi. Elizabeth Scott explains that under this doctrine, interpreted as 'parenthood of the State', the State 'has the responsibility to look out for the welfare of children and other helpless members of society. Thus, parental authority is subject to government supervision; if parents fail to provide adequate care, the State will intervene to protect children's welfare.'" See Scott, E (2002) "The Legal Construction of Childhood" in Rosenheim, M.K *et al* (eds) *A Century of Juvenile Justice* Chicago: University of Chicago Press 116. In the early 20th century one consequence of this approach was that 'children's courts should not be an instrument to punish the child but one that protects and educates', see Bottoms, A and Dignan, J "Youth Justice in Great Britain" in Tonry, M and Doob, A.N (2004) *Youth Crime and Youth Justice: Comparative and Cross-National Perspectives (Volume 31)* Chicago & London: The University of Chicago Press 22.

⁹²South Consulting (1999) "Juvenile Justice in Kenya: Project Identification Mission" (An Unpublished Report Commissioned by the Royal Netherlands Embassy). (Discussing the juvenile justice system put in place by the now

Different public structures have been established under the Children Act and they aim to promote the welfare of the child and further protect their rights. Part IV of the Children Act 2001 establishes the National Council for Children's Services ("the Council"), which is responsible for exercising general supervision and control of child rights and welfare agencies. This part confers powers and obligations on the Director of Children's Services, Children's Officers, and local authorities to safeguard and promote the rights and welfare of children. Through the National Programme of Action for Children (NPA), the Council is expected to play a critical role in implementing the child welfare system in Kenya.⁹³ The Council is also responsible for ensuring that Kenya realizes its international obligations relating to children, such as fulfilling the reporting requirements of the CRC. The NCCS prepared a Strategic Plan for the period 2005 - 2009 in order to promote and defend the rights and welfare of the child in Kenya. Relevant issues relating to child protection were identified and grouped into four thematic areas that required attention. During the period, the NCCS focused on policy development and review of laws and several gaps identified such as the need to change the juvenile justice system in order to meet the requirements of the CRC.⁹⁴

Other structures that assist in the process of judicial enforcement include the police force that has more often than not, primary contact with the children whom they bring to court. The children appearing before the court may be in two categories i.e. those facing criminal charges and those in need of care and protection.⁹⁵ Training for the police in matters pertaining to handling children with regard to the law has remained paramount to many NGO (related with the rights of

repealed 1969 Children and Young Persons Act. The Children's Act of 2001, discussed in subsequent chapters contains the new law on juvenile justice).

⁹³ See Section 30 Children Act 2001 Laws of Kenya

⁹⁴ National Council For Children Services *Strategic Plan 2005-2009, Realising the Rights and Welfare of the Child*, accessed through <http://www.nccs.go.ke> last accessed 20th September 2013.

⁹⁵ International Contribution to the Kenyan Juvenile Justice assessed through www.unafei on 20th September 2013

children) such as Save the Children UK Program and African Network for the Prevention and Protection Against Child Abuse and Neglect (ANCPPAN). The training seeks to equip police with skills and knowledge on their role in child protection and has enhanced protection of the children with the Juvenile Justice system by utilizing and instilling modes of restorative justice to the offices.⁹⁶

Section 5 of the Children Act provides for children officers.⁹⁷ Children officers shall perform functions and exercise powers conferred on them by the Act and in addition may perform such duties as the director of children services may direct. The primary duty of the children officer is to safeguard the welfare of children and to act as a liaison between the children and the court.

3.3 The Children Courts

The Children Act has provisions providing the establishment of the Children's Courts.

According to section 73, these courts shall deal with civil matters such as parental responsibility, custody and maintenance, orders for the protection of children and children in need of care and protection among others. They shall hear criminal matters against children and have also jurisdiction to hear any case regarding an offence under the Children Act.

Section 74 of the Children Act stipulates that Children's Courts shall sit in a different room or building from other courts. In practice, there are Children's Courts separate from the other courts only in Nairobi and Mombasa. In the rest of the country, ordinary courts are turned into courts

⁹⁶ In December 2003-2006 ANPPCAN Kenya in collaboration with Save the Children Sweden targeted 400 police officers for training in handling children as victims and or offenders.

⁹⁷ See Children Act 2001 Laws of Kenya

for children. ⁹⁸Children's Courts have jurisdiction on cases involving children as offenders except when the child is charged with murder or an offence in which the child is charged together with an adult. ⁹⁹

The Children Act also limits the sentences available when disposing of a child's case. First, the court is not permitted to order a child to be imprisoned or sentenced to death. ¹⁰⁰ Second, if the child is under the age of ten he is not to be sent to a rehabilitation school. Permissible alternatives to imprisonment are described in section 191 of the Children Act. It should further be noted that the seriousness of the offense will particularly affect children who are charged with murder, as murder suspects lose the protection of having their cases heard in Children's Court. ¹⁰¹

Children who are charged with adult co-defendants cannot be tried before a children's court, ¹⁰² yet those children may be vulnerable to manipulation or pressure that will result in an unjust judgment that is not in their best interests.

The children courts can issue orders to send children from 10 years old to a rehabilitation school. These are schools where children can be taken care of and rehabilitated. ¹⁰³ The schools also receive children in conflict with the law and Section 48 of the Children Act provides that those children in need of care and protection shall be kept separately from those in conflict with the law. In practice this has proved difficult to achieve though separation in terms of gender has been successfully achieved where the boys and girls are kept separately.

⁹⁸ In Nyeri, for instance two days in the week are dedicated to children matters at the court. Moreover, Children Magistrates have been appointed by the Chief Justice to preside over courts in most parts of the country to deal with children's issues.

⁹⁹ The Children Act, an executive summary of the Children Act in English and Kiswahili, published by the Ministry of Home Affairs Children's Department

¹⁰⁰ The Children's Act, Section 190

¹⁰¹ The children Act section 79 (b)

¹⁰² Ibid 26

¹⁰³ Section 47 of the Children Act 2001

Children in conflict with the law who are committed to rehabilitation schools are generally those who have been convicted and are not over 10 and under 15 years of age.¹⁰⁴ Worth mentioning is that children who are committed to rehabilitation schools cannot stay for a period longer than 3 years and can neither stay beyond their 18th birthday except if so ordered by the children's court.¹⁰⁵

The children's court can also send children to remand homes which homes are established in Section 50 of the Children Act. These homes receive both children in need of care and protection and children in conflict with the law. Those in conflict with the law are sent to these homes as investigations pend.

Young children in need of care of and protection from the children's court can be sent to children homes. These offer a safe haven for the children who are abused, sexually or otherwise. Children are sent to these homes on recommendation or request from authorized officers such as magistrates or police.

Section 58¹⁰⁶ provides for charitable children institutions. These institutions are defined as "... a home or institution which has been established by a person, corporate or unincorporated, a religious organization or a non-governmental organization and has been granted approval by the Council to manage a programme for the care, protection, rehabilitation or control of children.

Children in need of care and protection can be taken into a charitable home either in an emergency situation or in an interim care order or a care order.¹⁰⁷

¹⁰⁴ Section 191 (e) of the Children Act 2001

¹⁰⁵ Section 53 (3) of the Children's Act 2001

¹⁰⁶ See Section 58 Children Act 2001

¹⁰⁷ See Section 63 (1) (a) and (b) of the Children Act 2001

3.4 The High Court

The High Court has original jurisdiction in criminal and civil matters; jurisdiction to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; jurisdiction to hear appeals from the lower courts and tribunals; and jurisdiction to hear any question respecting the interpretation of the Constitution. The High Court in Nairobi has a Family Division, Criminal Division, Civil Division, Commercial Division, Constitutional and Judicial Review Division. There are 15 High Court stations in the country.¹⁰⁸

The High court derives jurisdiction to hear children matters from the Constitution and the Children Act. The Act stipulates that any person may apply to the High Court in any instance where that person feels that the rights of a child are being contravened.¹⁰⁹ The High court has the power to hear and determine such applications and may give writs or orders that are considered appropriate for the purpose of enforcing or securing the enforcement of such rights contravened.

The question of the High court's jurisdiction is one that has been subject to court interpretation in many instances.

It arose in the case of *B -V- Attorney General*¹¹⁰ where the applicant had moved the High Court by way of originating Summons under Section 22 of the Act for an order challenging certain deportation orders issued against a child who was at the center of a custody dispute between a Kenyan mother and Belgian father. The Respondent challenged the jurisdiction of the court on, among other grounds, that the proper forum for the matter was the Children Court. The court's

¹⁰⁸ See Article 165 of the Constitution of Kenya 2010

¹⁰⁹ See Section 22(i) of the Children Act 2001

¹¹⁰ *B-V- Attorney General* [2004] 1 KLR

holding on this contention was: that the High Court did have jurisdiction to entertain any complaint turning on the rights of the child as set out in the Children Act.¹¹¹

Jurisdictional issues also arose in the case of *O.O.N (a minor) Vs Republic*¹¹² where OON had been charged with murder in the High Court at Kisii. On the date of plea, he offered to plead to the lesser charge of manslaughter. The offer was accepted and the trial judge entered a plea of guilty for the lesser charge. The accused preferred an appeal on a number of grounds. One of the grounds related the question whether the plea had been unequivocal. The other, and more material, question was whether upon the appellant's plea to the lesser charge of manslaughter, the High Court lacked jurisdiction and it ought to have referred the matter to the Children Court in light of section 185(1) of the Act. To this contention, the court held: Section 60 (1) of the constitution confers upon the superior court unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by the constitution or any other law.¹¹³ The high court therefore retains jurisdiction over any other matters touching on the Act by virtue of its unlimited jurisdiction on both civil and criminal matters and is not only limited to the provisions of Section 22 of the Children Act.

In seeking to stamp its authority on the issue of jurisdiction the court in the case of *MK –V- KC*¹¹⁴ the court stated "... it is clear in my mind that this court had jurisdiction under Section 22

¹¹¹ The plain words of section 22 of the Children Act entrust to the High Court full jurisdiction in resolving disputes pertaining to the rights of children.

¹¹² *OON-V- Republic* Kisumu Court of Appeal, Criminal Appeal No. 257 of 2003 (UR)

¹¹³ That jurisdiction having been conferred by the constitution which is a superior law cannot be ousted by an Act of parliament and we need no authority in support of that trite legal position. Section 185(1) of the Children Act cannot, therefore, take away the High Court's jurisdiction to deal with the matter simply because the charge before it is no longer murder but manslaughter. We are satisfied the superior court was perfectly right in dealing with the matter after the charge of murder was reduced to manslaughter... Different considerations would apply if the plea was being taken in a subordinate court.

¹¹⁴ *Kakamega High Court Misc. Application No. 105 of 2004* the learned judge was tasked with the duty of balancing the rights of the child and the rights of the respondent who had denied paternity. The applicant who was

of the Act to issue order to compel determination of the child's paternity by DNA. This is a matter that falls within the purview of this court's jurisdiction. To ascribe a contrary interpretation would be to render meaningless both the protection of the child under section 70 of the Constitution and the rights of the child enshrined in the Act and in the articles of the international covenants to which Kenya is privy. I refuse to render such rights a pipe dream."

The High court from the foregoing has emphasized its authority with regard to Jurisdiction in hearing matters that pertain children both as offenders and as victims.

the mother to JN (child) filed an application in the Kakamega's Children's court seeking orders of custody and maintenance from the respondent whom she claimed was the father of the child. The respondent denied paternity. While the matter was still pending in court the applicant filed an application in the High court seeking to compel the respondent to undergo a DNA test. The respondent objected the application by claiming that the application infringed on his rights and of most fundamental importance was that the court did not have jurisdiction to hear the matter. The court guided by the principle of the best interest arrived at the decision and stated in part that; "Protection of the law in my view includes the rights of the child to realize the benefits conferred by the Act which are specifically set out in part II (of the Act). If the child cannot enjoy proper parental upbringing, healthcare and good education because the child was born out of wedlock, and because the putative father has denied paternity (even where he parties have lived together in a "come we stay relationship" and is therefore not legally bound to meet his parental responsibility) then the provisions of the Act affording the child protections become a dead letter **unless courts are prepared to compel putative fathers to undergo a DNA test to determine paternity....**

CHAPTER 4- CHALLENGES FACED BY COURTS IN THE ENFORCEMENT PROCESS

4.1 Introduction

In its monitoring role, the Committee on the Rights of the Child has identified structural and procedural gaps that seriously hamper implementation of child rights, including the enforcement of the same throughout the States Parties to the CRC. Children are deprived of services that include support for self-advocacy, access to legal aid challenges in accessing courts due to complex procedures and rules and lack of legal assistance. On top of that, majority of States Parties lack efficient services for rehabilitation, recovery and reintegration of children victims of violations of their rights.¹¹⁵

The identified gaps by the Committee are closely related to insufficient organizational, financial and legal capacities. But the gaps can also be attributed to levels of awareness, attitudes, stereotypes and prejudices. Additional constrain is lack of appropriate training of legislators, judiciary and enforcement structures. In many States Parties, parliamentarians, judiciary and law enforcement representatives now undertake some training, which, however, often proves to be insufficient.

Many children in Kenya do suffer violations as they seek to address these harms through established judicial mechanisms.¹¹⁶ The criminal judicial process suffers several challenges that prevent children from full enjoyment of their rights. A highlight of the challenges examined below in detail, are quite similar to those identified by the Committee on the Rights of children above, and include but are not limited to jurisdictional and procedural challenges, securing

¹¹⁵ From Moral Imperatives to Legal Obligations accessed through www.crin.org/resources/ last accessed on the November 14, 2013

¹¹⁶ General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, Para. 6), CRC/GC/2003/5, 2003., paragraph 67.

lawyers/access to legal aid that would train the children in self-advocacy problems of funding and resources, unenforceability of the court's judgments, inhibitions of individual access to the courts, the preparation of the applications to be filed before the courts, budgetary constraints of the complainant, securing lawyers, location of the judicial body, attendance at the hearing, the length of time to reach judgment, and follow-up with the implementation of a decision at local level and the confidentiality of courts proceedings challenges which are addressed in detail below.¹¹⁷ Critics have also argued that lack of a state-wide child support system in Kenya means that the children's rights guaranteed under the Children Act and the new Constitution "remain paper rights and pipe dreams for the hundreds of thousands of children in Kenya.

4.2 Legal Representation and Legal Aid

There is an expectation to receive legal aid where the court deems it necessary¹¹⁸, and that the legal aid should be granted under a system set out and paid for by funds allocated by parliament. The expectation to receive legal aid concerns itself with expectations of fair procedures meant to create and sustain a fair system of justice. By failing to lay such a system in place, the National Council for Children's services has provided a ground for judicial review related to the fairness of decision(s).¹¹⁹ Children are often convicted for crimes without a satisfactory adversarial trial to show whether the child is guilty or innocent of the crime, or whether there are any defences or mitigating circumstances. Further, children who appear in court as victims/complainants often have their cases dismissed because they do not have sufficient legal knowledge of the evidence they must provide to prove their cases, resulting in child abusers going unpunished and often re-

¹¹⁷ Enforcing Child Rights in Inefficient National Systems assessed through www.crin.org last assessed 20th June 2013

¹¹⁸ Section 77 of the Children Act 2001

¹¹⁹ There is an expectation to receive legal aid where the court deems it necessary, and that the legal aid should be granted under a system set out and paid for by funds allocated by parliament. The expectation to receive legal aid concerns itself with expectations of fair procedures meant to create and sustain a fair system of justice.

offending. Furthermore, children may be condemned to an institution for an unduly long period of time without a fair trial to establish guilt or innocence.¹²⁰ The effect of placing children in institutions manifests itself negatively in their later lives.

A study¹²¹ done in Eldoret, Kenya illustrates that the absence of legal representation resulted in many instances children being taken to the ordinary courts for taking of plea. It was only when they appeared before the sitting magistrate that they were referred to the children's courts. As a result of this children were missed with adult offenders.¹²²

The right to have a case determined without delay is also not observed by the courts in the absence of legal representation. The prosecution obtained adjournments of matters on grounds such as 'witnesses were not bonded' and 'police file missing'. Last adjournments were never final. The fate of the minor was still left to the discretion of the magistrate notwithstanding the mandatory provision of Rule 12 of the Child offender Rules.¹²³

It was also seen in the study that there was a pattern relating to children pleading guilty to charges without fully understanding the weight of the charges. On first appearance in court the child will plead not guilty and be remanded at the remand center. At his next court appearance At

¹²⁰ Hayes, K. & Nyaundi, K. 'African Human Rights and Access to Justice Programme' *Legal Opinion Case No. 116*

¹²¹ Year 2002: 15 Cases of which none of the children were represented. 2003: 61 cases of which only 39 were given pro bono aid by CHILAC. 2004: 61 cases at 28th July. In none of the cases did the Magistrate inquire from the accused whether they required legal representation.

¹²² Children Act 2001 Sec18(3) Children Act and Rule 6 Child Offender Rules

¹²³ Which provides: (1) Every case involving a child shall be handled expeditiously and without unnecessary delay. (2) Where the case of a child appearing before a Children's Court is not completed within 3 months after his plea has been taken he case shall be dismissed and the child shall not be liable to any further proceedings for the same offence.

(3) Where, owing to its seriousness, a case is heard by a court superior to the Children's Court the maximum period of remand for a child shall be six months, after which the child shall be released on bail.

(4) Where a case to which paragraph (3) of this rule applies is not completed within twelve months after the plea has been taken the case shall be dismissed and the child shall be discharged and shall not be liable to any further proceedings for the same offence."

his next court appearance the child tends to change his plea¹²⁴ under the misguided “legal” advice of the other remanded children.

The International Covenant on Civil and Political Rights ensures the right to a fair trial, which Kenya is a signatory to.¹²⁵ Article 14 ICCPR also guarantees the right to a fair and public hearing.

On this basis alone it would seem that Kenya violates international law. It is evident that the interests of justice require that a child be represented in legal proceedings. Article 186(b) of the Children Act governs a child’s access to legal representation or assistance in the preparation and presentation of his defense.¹²⁶ The Act does not describe what “assistance” entails. Nevertheless, “assistance” must be distinct from the “legal assistance” that the child has been unable to obtain in the preceding sentence of article 186(b). Thus, this form of “assistance” raises questions, such as whether the assistance is independent of other institutional players within the court and whether it gives the requisite voice to accused children. This “assistance” also lacks assurance of minimum child sensitivity training standards. Without more specific standards for this “assistance” it is not clear that the “assistance” is adequate from the perspective.

¹²⁴ Example case No 26/03. the accused was aged 16 years, charged with possession of narcotics. He pleaded guilty. He was finally sentenced on 22/7/2004. he pleaded guilty to the charge, however the conviction can be challenged as there were no exhibits presented before the court neither the government analysis report in such a charge

¹²⁵ Pursuant to Article 14.3 (d): In the determination of any criminal charge against him, everyone shall be entitled to... Be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, assigned to him in any case here the interests of justice so require, and without payment by him in any case if he does not have sufficient means to pay for it.

¹²⁶ “[e]very child accused of having infringed any law shall if he is unable to obtain legal assistance be provided by the Government with assistance in the preparation and presentation of his defence.”

4.3 Untrained Magistrates in the field of Children Rights

Instances where children are wrongful convicted are not so foreign in the Judicial Process. These cases are often contributed by either the lack of knowledge by the presiding magistrates or by errors often not detected due to the very high workload and need of results that is often measured by the successful completion of the huge number of cases one is assigned to. While the constitution sets out the minimum qualifications for judges, no legislation provides criteria for magistrates.¹²⁷

New magistrates undergo a two-week induction training course, which is insufficient to prepare them for their new positions or to enable them to eventually manage cases and deliver decisions with adequate judicial reasoning. There is no clear policy or legal requirement for continuing judicial education of both judges and magistrates. There are efforts being made currently by the judiciary to institute continuing judicial education. The establishment of the Judiciary Training Institute as noted above signals a move towards institutionalized judicial education for both induction purposes as well as performance enhancement through continuing education.¹²⁸

The impact of untrained magistrates is found in their decisions and or judgments that are appealed or revised at the High court; a case in point being in the case of *Bakari Leaky Oyoo –V- R*¹²⁹ in this matter the accused had been charged with the offence of defilement contrary to Section 8 (1) as read together with Section 8 (3) of the Sexual Offences Act 2006 (No. 3 of 2006). At one of the hearings of the matter where the victim did not attend court, the prosecution informed the trial court that the victim, was missing and accused the mother, of playing mischief

¹²⁷ ICJ-Kenya,(2003)Strengthening Judicial Reforms in Kenya Volume V, Public Perceptions of the Magistrates

¹²⁸ ICJ-Kenya, (2001) Strengthening Judicial Reforms: Performance Indicators – Public Perceptions of the Judiciary

¹²⁹ Nakuru High Court Cr. Rev 11 of 2013

in conjunction with the accused; and ordered the detention of the mother for a period of 4 days, and also ordered the attendance of the father, and sister in court. On the fourth day the sister of the victim indicated that she (victim) was in school and could not attend. The court being dissatisfied with this position now ordered the remanding of both the accused person and the victim of the mother for a further 7 days. In revision of this decision the Judge in the High court noted "...I agree with Counsel for the mother, and say that the procedure adopted by the trial court is unusual. The zeal is understandable to ensure that ends of justice for the victim are not defeated. The procedure adopted is however contrary to law, courts do not order the detention of innocent people arbitrarily. There has to be due process." The court went ahead and restored the terms of the accused as they were before he was detained.

The case of *Peter Nakale Lugulai Vs Republic*¹³⁰ also exhibits this position where, the appellant was charged with attempted robbery with violence contrary to section 297(2) of the Penal Code. The facts of offence were that on January 10, 2002, at Nakuru Town, the accused, jointly with others not before the court attempted to rob one Evans Odera Okello of his luggage and at or immediately before or immediately after the time of such attempted robbery wounded the said Evans Odera Okello. After the hearing the appellant was convicted and sentenced to death. The appellant aggrieved by the said decision of the Magistrate appealed to the High Court. The High Court overturned the conviction on the merits but went ahead to express concerns over the issue of the appellant's age. The court noted that at the time of his trial the appellant was 16 years and, therefore, a child by virtue of the provisions of the Children Act. The court noted further that section 190(2) of the Act clearly stipulates that a child offender cannot be sentenced to death

¹³⁰ Nakuru High Court Criminal Appeal No. 236 of 2002

even if he was found guilty and that section 191 of the Act sets out the various methods of dealing with a child offender. The court, therefore, found that in principle, it was wrong for the trial magistrate to pronounce sentence against the appellant even if he were to have found him guilty.

This was the same principle used in the case of *CKL Vs Republic*¹³¹ where the appellant had been charged with two offences under the Penal Code. He was charged with assault causing actual bodily harm contrary to section 251 and Arson contrary to section 332(a) of the Penal Code. The appellant pleaded guilty to both counts and was sentenced to serve eighteen months and three years respectively for the two offences. The sentences were to run concurrently. The appellant, appealed against both conviction and sentence on the grounds that he had been tricked by his step brother to plead guilty to the charges as he was made to believe that he would be forgiven. The appellant was, in essence arguing that his plea of guilty was not unequivocal. The court dismissed this argument. The court was, however, concerned by the issue that the trial magistrate had sentenced the accused without establishing his age. Indeed, the appellant was seventeen years old at the time he committed the offence. Being a seventeen year old, the appellant was a child within the meaning of section 2 of the Children Act. The court found that under section 191 of the Act, a child found guilty of an offence cannot be sentenced to serve custodial sentence. The court, therefore, found the sentence meted out to the appellant had been illegal.

4.4 Legal Challenges

Many a times the court has been held in the muddle that is procedural while handling matters that concern the rights of the child. This is so especially in the Criminal arena where there are a multiplicity of codes and rules that govern this area i.e. the Penal Code, the Evidence Act Cap 80

¹³¹ Kericho High Court Criminal Appeal No. 104 of 2004

Laws of Kenya and the Criminal Procedure Code.¹³² The Penal Code does not give a definition of who a child is as the Children Act endeavors to define “child” means any human being under the age of eighteen years and child of tender years” means a child under the age of ten years. Provisions of Section 14(1) of the Penal Code hold only children under 8 years not to be criminally responsible for acts or omissions. Similarly under the Penal Code a child under the age of 12 years is not responsible criminally if he does not have the capacity to know that he ought not to do the act or omission and also that male children under the age of 12 years is incapable of having carnal knowledge. Thus under the Children Act a child of tender years is under 10 years while the Penal Code has different provisions.

Section 146 of the Penal Code was amended to read 18 years in respect of boys from 14 years but the same was not done in respect of girls. The choice of ages in the two statutes appears to be random and inconsistent.

The trial in respect of the offence of murder implicating a child before the High Court is provided for in Section 184 of the Children Act, Section 190 (2) of the same Act prohibits a death sentence to the child although death is a mandatory punishment under section 204 of the Penal Code. However Section 25 (2) provides for different sentence in respect of a child under 18 years which even though corresponds with the provision of the Section 190(2) provides another dilemma as it appears to promote infinite detention contrary to the provisions of Rule 12 of the Children Offenders Rules.

¹³² Penal Reform Int’l Conference on Legal Aid in Criminal Justice: The Role of Lawyers, Non-Lawyers, and Other Service Providers in Africa, Nov.22–24, 2004, *The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa*, pmb. (Nov. 24, 2004) available at www.penalreform.org accessed in 12th June 2013

The Children Offenders Rules¹³³ when read in a whole appears to compliment or provisions of the Criminal Procedure Code in the criminal process of children in conflict with the law in which the Criminal Act would appear to be silent on. The Child Offender Rules makes provision for instances like the process of arrest and charge of a child¹³⁴, the application of bail for an arrested child,¹³⁵ and duration of cases advocating for expeditious trials.¹³⁶

In arriving at a decision the court together with the other officers of the court (to include Advocates, Police officers and Children officers) must find its way through the procedure that is laid down in the Acts and in some instances there emerges conflicts as between what one law provides as against the other. This conflict has caused there to be an evolution of various jurisprudence in matters that concern themselves with children.

The court was faced with the question of whether to grant bail or not in a case where the accused had been charged with the offence of murder. In *R-V- Dorine Aoko Mbogo & Anr*¹³⁷ the court was faced with the question of granting bail to the accused a minor and charged alongside an adult. In the arguments that were presented before the court, counsel for the state vehemently opposed the application, he argued that bail was not available for capital offences under Section 72(5) of the Constitution, and Section 123 of the Criminal Procedure Code, (Cap 75, Laws of Kenya), as the applicant was charged with the offence of murder and these were arguments presented despite the fact Kenya had promulgated the Constitution 2010.

¹³³ Child Offenders Rules provides in Section 3 “3. These Rules shall apply to the proceedings with respect to a child who is charged with an offence”.

¹³⁴ Rule 4 of the Child Offenders Rules

¹³⁵ Rule 5 of the Child Offenders Rules

¹³⁶ Rule 12 of the Child Offenders Rules

¹³⁷ High Court Nakuru Criminal Case No. 36 of 2010

Nevertheless the court on arriving at its decision was guided by the provisions of the Article 49 (1) of the Constitution 2010, Section 123 of the Criminal Procedure Code¹³⁸ and the provisions of the Section 187 (1) of the Children Act, 2001, Rules 9(1) and 12 (b) of the Fifth Schedule of the Child Offenders Rules and granted the minor bail.

In *Republic –V- S.A.O*¹³⁹ a 13 year old had allegedly committed the offence of murder while she was 12 years the question that arose was whether or not she was entitled to bail. In dealing with the question the court noted the provisions of Section 4(3) of the Children Act which enjoined all judicial institutions to take the interest of the child as the first and paramount consideration and to safeguard and promote the rights and welfare of the child. In giving its decision and in now what is considered as a heavy blow to the jurisprudence of the rights of the child the court stated “In view the above mentioned provisions as well as those in Section 4(2) and 4(3) of the Act, the submission that the provisions of the Act do not apply to murder trials falls by the way and has to be firmly rejected. The court in the ruling further noted “The Act makes special provisions in respect of children as has been mentioned hereinbefore. The Penal Code is a general Act dealing with all offenders. Furthermore, the Act is enacted on a later date than the Penal Code. With these two factors before the court, the well principles of interpretation, that is, the specific overrides the general and the latter Act is presumed to have amended an earlier one unless specifically stated must take effect. In this case, in my view, it is irrelevant who is responsible for the delay occasioned. What matters is that the accused has been in remand for longer time than prescribed by law. Her rights have been violated are violated and the same should be redressed. The child in this case has been charged with serious offence (sic)and hence looking at all circumstances of this case I shall not deem it right to discharge her even though very

¹³⁸ Criminal Procedure Code Cap 75

¹³⁹ Nairobi High Court Criminal Case No. 236 of 2003

passionately urged by Mr. Onyango. I may add here that in an appropriate case this court would not have hesitated to do so. I also find that rule 12(4)¹⁴⁰ of the Child Offender Rules which is relied on by Mr. Onyango is not applicable to the case just yet as twelve months have not elapsed since plea was taken. ... I direct that the accused be released on free bond with two sureties. Even though on the face of it the court managed to uphold the grant of bail to a child alleged to have committed a serious offence; the setback emerged from the reason advanced by the court for failing to discharge the child as had been applied. The reason advanced being that the child had been charged with a serious offence and in the circumstances of the case she ought not to be discharged. By so doing the court took and purported to wield a discretion that it did not have. The court however at the conclusion of the case, invited the Hon. Attorney General and the Law Reform Commission to looking into the apparent conflict between Section 18(2) and 190 (2) of the Children Act on one hand and Section 204 of the Penal Code on the other hand.

In contrast to the above decision the court in the case of *R-V- Matano Katana*¹⁴¹ while faced with arguments on the provisions of Rule 12 of the Children offenders Rules went ahead to find and state that "...It is clear to me that parliament intended just as they stated that a child offender trials shall not be unduly delayed beyond the period of twelve months. This is also in keeping with the Constitution...From the record; the twelvemonths shall expire on October 30, 2004. I

¹⁴⁰ (1) Every case involving a child shall be handled expeditiously and without unnecessary delay.

(2) Where the case of a child appearing before a Children's Court is not completed within 3 months after his plea has been taken he case shall be dismissed and the child shall not be liable to any further proceedings for the same offence.

(3) Where, owing to its seriousness, a case is heard by a court superior to the Children's Court the maximum period of remand for a child shall be six months, after which the child shall be released on bail.

(4) Where a case to which paragraph (3) of this rule applies is not completed within twelve months after the plea has been taken the case shall be dismissed and the child shall be discharged and shall not be liable to any further proceedings for the same offence

¹⁴¹ Mombasa High Court Criminal Case No. 33 of 2004

allow this application and order that if the accused's trial shall not have been completed on that day he shall be discharged and set at liberty immediately.”

Another case that demonstrates this procedural conflict thus impeding the full realization of the rights of the child in all spheres is the case of *Kazungu Kasiwa Mkunzo & Another V Republic*¹⁴² in considering the provisions of Rule 12 of the Child offender Rules the court inter alia found that “We have anxiously gone through the Act and we do not find any provision authorizing the Minister to set time limits within which trials are to be held. The power to “generally make regulations for the better carrying out of the provisions of this Act” does not appear to us to give the Minister the power to set time limits within which trials are to be held. Such power would fly in the face of various laws including the constitution itself...” This decision was not only received as a major upset of the progress that had so far been made by child welfare and child right practitioners, but also threw the legal field in a limbo as far as the provisions of Rule 12 of the Child Offenders Rules were concerned.

4.5 Access to Courts

The 2010 Report¹⁴³ on the task force on Judicial Reforms noted that in some parts of the country courts were scarce. In Northern Kenya the task force established that courts were situated as far as 500 kilometers from the users providing a big challenge to women and children as well as other users of the court and in such marginal areas there was a dearth of legal service providers.

¹⁴² Mombasa, Court of Appeal Criminal Appeal No. 239 of 2004

¹⁴³ Mbote, P & Migai, A. ‘Kenya Justice Sector & the Rule of Law’ Johannes burg; Open Society Initiative for East Africa. Accessed through www.ielrc.org (last assessed on 19th June 2013)

The report stated that once access is made so difficult then it becomes a challenge to individuals seeking justice to progressively follow up their own cases eventually denying them justice. The courts infrastructures in these marginalized areas were found to be unfriendly in terms of accommodating women with children or persons with disability.¹⁴⁴

4.6 Criminal Responsibility

One way Kenya deviates from best practices in juvenile justice is its minimum age of criminal responsibility. While the Children Act establishes most aspects of the juvenile justice system in Kenya, the age at which one becomes subject to the formal justice system is set by the Penal Code. The Penal Code establishes eight years old as the minimum age of criminal responsibility in Kenya.¹⁴⁵ It also states that children under the age of twelve are not criminally responsible for their acts or omissions “unless it is proved at the time of doing the act or making the omission [they] had capacity to know that [they] ought not to do the act or make the omission.”¹⁴⁶ However, the Committee on the Rights of the Child has noted that provisions that allow the court to assess the capacity of the child in order to determine his criminal responsibility Generally result “in practice in the use of the lower minimum age in serious crimes”¹⁴⁷ Therefore, in Kenya, it is possible for children as young as eight years old to appear in court. The

¹⁴⁴ *ibid*

¹⁴⁵ The Penal Code Cap. 63, Sec 14(1) (Kenya). A minimum age of criminal responsibility, is the “age below which children shall be presumed not to have the capacity to infringe the penal law.”

¹⁴⁶ The Penal Code, Cap. 63 Sec 14(2) (Kenya).

¹⁴⁷ Comm. on the Rights of the Child, General Comment No. 10 (2007): Children’s Rights in Juvenile Justice, 44th Sess., Jan. 15–Feb. 2, 2007, ¶ 30, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007) [hereinafter General Comment No. 10] (“Quite a few States parties use two minimum ages of criminal responsibility. Children in conflict with the law who at the time of the commission of the crime are at or above the lower minimum age but below the higher minimum age are assumed to be criminally responsible only if they have the required maturity in that regard. The assessment of this maturity is left to the court/judge, often without the requirement of involving a psychological expert, and results in practice in the use of the lower minimum age in cases of serious crimes.”).

Committee on the Rights of the Child considers the minimum age to be- low the age of twelve years “not to be internationally acceptable.”¹⁴⁸ As a result, juvenile justice is one area in which Children in Kenya are particularly vulnerable by international standards. Nevertheless, the upper age limit for juvenile justice in Kenya is in line with the provisions of the CRC and the Committee’s comments. This upper age limit is set by the Children Act, which defines a child as “any human being under the age of eighteen years.”¹⁴⁹

4.7 Budgetary Provision

The lack of judiciary independence has historically been one of the greatest threats to the rule of law in Kenya. This independence is further threatened by its poor performance due to poor conditions of service, poor funding and severe shortage of qualified personnel.¹⁵⁰ These problems contribute to both poor quality in decision making and also to backlog of cases in the court room.

Another challenge cited in the judicial enforcement process is limited budgetary allocation. Kenya’s severe economy and social difficulties have prevented the full realization of the rights of the child. Lack of resources greatly impedes the capacity of the system to work.¹⁵¹ This limited allocation has forced courts more often than not to find themselves ill equipped to handle the number of children accessing the courts or brought before the courts. Not only does this affect courts but other government based offices dealing with children. A classic case study would be

¹⁴⁸ African Union, African Comm. of Experts on the Rights and Welfare of the Child, *Recommendations and Observations to the Government of Kenya by the African Committee of Experts on the Rights and Welfare of the Child Concerning the Initial Report on the Implementation of the African Charter on the Rights and Welfare of the Child*, at 1, SA2590 (“It is . . . imperative and urgent to raise the criminal liability age to 12 years.”).

¹⁴⁹ Section 2 The Children Act 2001

¹⁵⁰ Mbote, P & Migai, A. ‘Kenya Justice Sector & the Rule of Law’ Johannes burg; Open Society Initiative for East Africa. Accessed through www.ielrc.org (last assessed on 19th June 2013)

¹⁵¹ Ibid P 31

that of Cooper¹⁵² who found that e a quarterly allocation of Kshs. 20,000/ was made to a Remand Center in Kisumu which made it impossible for the Remand Center to ferry the children to court for hearing of their cases due to lack of fuel. ¹⁵³

¹⁵² Ibid P 67

¹⁵³ Such children who missed out on their hearings or placements would spontaneously be shut out from implementing or enforcing their rights as provided for in the law.

CHAPTER 5- RECOMMENDATIONS & CONCLUSION

5.1 Recommendations

The Problems around the enforcement of children rights in Kenya have been pointed out in chapter four of this study. They range from inadequate legislative framework, lack of appropriate implementation mechanisms, lack of funds, bureaucracies and to existing traditions and customs that do not conform to the spirit of the law. All these need to be dealt with if the Kenya children's rights are to be guaranteed. It is important, therefore, that all legal frameworks be brought into conformity with the spirit and purpose of the Children Act 2001 and the Constitution of Kenya.

The study has established that to a large extent, the laws in Kenya governing children the rights of the children are a representative of best practice save that these laws and policies have not been implemented in practice. These laws also lean towards the best interest of the child principle thereby being aligned with the best practice principle.

First, it is vital that all personnel; police, children officers, probation officers and magistrates and or judges involved in child protection be carefully trained and sensitized, not just about the rhetoric of child rights and protection, but about their personal and professional responsibilities as the adults charged with particular children's care and protection both during their temporary guardianship and in their placement recommendations. A culture that valorizes accountability to

children's well-being, rather than bureaucratic efficiency, needs to be distinguished as the strength of the system.¹⁵⁴

There is need for capacity development of various institutions and role players involved in dealing with children i.e. the police officers, probation officers, children officers and judicial officers. There is need for the standards of recruitment and practice and the code of conduct of the key role players above to be focused on the rights based approach with child offenders. Given the gap between law and practice the role players need to be trained to understand these laws. This training needs to be on a regular basis and incorporated in the government schedule to ensure sustainability by funding of the process through government ownership.

It is also important to note that the problems concerning the enforcement of children's rights are not confined to state institutions only but extends to communities as well. It is trite knowledge that culture and lack of knowledge of the Children Act and Constitution as major obstacles to enforcement of children rights. This is because the communities in which children live do not always observe the relevant legislative prescriptions for the protection of children rights. The result is that although the legal system may make extensive provision for the rights of the child and institutions may exist to promote and protect children's rights, in reality all these efforts may prove futile if the community as a whole does not become part of the process. Lack of knowledge of these rights also down play their enforcement. Educating adults, the children and their care givers can be of advantage in actualizing the enforcement of the rights of the child. This can be done by offering National legal aid services to communities in the country. Most free legal aid clinics are provided by non-governmental organizations to disadvantaged groups but

¹⁵⁴ International Humanist & Ethical Union 'Rights of a child in Kenya' assessed through <http://www://iheu.org> on 13 June 2013

they lack a country wide presence and especially so in the rural areas where they are mostly required. The government can establish a national legal aid scheme to enable more of Kenyans to access justice. In these legal aid clinics there should be established a special help desk manned by trained officers that specifically deal with the issues that concern themselves with the rights of children.¹⁵⁵

The Law Society of Kenya can encourage members to sign up and offer *pro bono* services to children when the need arises and as an incentive the Judiciary can come up with free trainings to equip these advocates and further Continuous Legal Education¹⁵⁶ points can be awarded to advocates who offer their services.

The recognition of a categorical right to counsel at state expense for children in Kenya is an important rights-protective procedural safeguard. The Children Act establishes a strong rights-respecting background for the adjudication of juvenile cases in Kenya as such it should be

¹⁵⁵ U.N. E.S.C. Comm'n on Crime Prevention and Criminal Justice, U.N. Draft Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Annex, ¶ 1, U.N. Doc. E/CN.15/2012/L.14/Rev.1 (Apr. 25, 2012) [hereinafter Draft Principles and Guidelines]. The international community has recently devoted considerable attention to access to legal aid. For instance, in 2004 the Malawi Paralegal Advisory Service hosted a conference in Lilongwe, Malawi, that included “heads of national legal aid boards, lawyers, academics and civil society representatives” who adopted the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa. Kersty McCourt, *How Malawi Put Access to Justice on the UN's Agenda*, OPEN SOCIETY FOUNDATIONS (May 23, 2012), <http://www.soros.org/voices/howmalawi-put-access-justice-un-s-agenda> (last visited Sept. 24, 2012). The Lilongwe Declaration was “endorsed by the African Commission on Human and Peoples’ Rights” in 2006, *id.*, and recognized by the United Nations Economic and Social Council (ECOSOC) in 2007. E.S.C. Res. 2007/24, U.N. Doc. E/RES/2007/24 (July 26, 2007). ECOSOC then requested that the U.N. Office on Drugs and Crime develop guiding principles for access to legal aid at the global level. *Id.*

¹⁵⁶ The Law Society of Kenya is the nation’s bar association that regulates and serves Kenya’s lawyers. There are more than 10,000 lawyers and advocates in Kenya, who are all members of the LSK. You must be a member in order to practice law. Besides being the regulatory body for lawyers, the Law Society also runs a Continuing Legal Education program, to help keep members informed of the ongoing changes and developments in the Kenyan legal field.

mandatory that for every proceedings brought in court that concern a child legal presentation be availed at the state's expense.¹⁵⁷

Other practical steps that seem feasible in protecting children include recruiting the government-appointed chiefs and assistant chiefs for local areas, as well as children's school heads or committees, into child protection strategies. Setting up systems of communication and cooperation between the Children's Department, the Provincial Administrations' network of chiefs, local police officers, local school officials, and the community-based committees.¹⁵⁸

Ensure that police and magistrates make diligent efforts to properly identify young persons as children and determine their age, to ensure that children are accorded the special protections they are entitled to before the law; including separation from adults in detention, and the right to appear in special juvenile courts, rather than in regular courts.

Devote resources for the training of magistrates on how to handle children's cases and establish additional permanent children courts in Kenya. At present, children's cases are often heard in children courts where magistrates have little experience or training on how to handle children's cases.¹⁵⁹ A harmonization and reconciliation of the law governing the rights of children can tremendously assist the courts and officers appearing before it as this will solve the challenges of multiplicity of codes governing these rights

¹⁵⁷ W Wasilczuk, M.K (2012) 'Substantial Injustice Why Kenyan Children are entitled to Counsel at State Expense' 45 N.Y.U. *Journal of International Law & Politics* 291

¹⁵⁸ The UN Committee has called on the Kenyan government to "ensure that the principle of the best interests of the child is systematically taken into account in all programmes, policies and decisions that concern children, and especially aiming at addressing vulnerable and disadvantaged children, inter alia by sensitizing and training all involved officials and other professionals". Concluding Observations on Kenya's Second Periodic Report, 19 June 2007, CRC/C/KEN/CO/2, para 27. Assessed through www.africanchildinfo.net (assessed on April 2 2013)

¹⁵⁹ Harmonization of Laws in Kenya Country Brief; The African Policy Forum <http://www.africanpolicyforum.org> assessed last on 14 June 2013

Court rules and procedures should be reviewed regularly to ensure that they are efficient and simple in matters that concern themselves with children. For example instead of having a party draft a plaint and or defence standard forms ought to be drawn up and given free of charge at the children courts civil registry where matters of custody and maintenance are concerned. Such forms should be provided in both English and Kiswahili where parents or legal guardians of minors seeking custody or maintenance of a minor can move the court.

The court also needs to borrow a leaf from some constitutions e.g. the Bosnia and Herzegovina Constitutions and ensure that children can access these courts that were created for them easily and without complications and that they can be heard by these courts and that their opinions matter. The constitution of Bosnia and Herzegovina¹⁶⁰ guarantees freedom of opinion and expression for every child and adult. This principle is particularly applied in divorce matters where the child's opinion is considered on which parent a child wishes to live with. In Andorra¹⁶¹ when a minor attains the age of 12 years then their consent is necessary for agreement to adoption. This principle of giving the child a voice to be heard is also mirrored in the South African Children Act 2005.¹⁶² In Canada an order for Adoption of a person who is 7 years of age or more shall not be made without the person's written consent.¹⁶³

Ensure that all children deprived of their liberty receive an education suited to their needs and abilities, and designed to prepare them for return to society. For girls deprived of their liberty in

¹⁶⁰ Committee on the Rights of Children States Party Report, Bosnia & Herzegovina CRC/C/11/Adu.28 assessed through www.unhchr.ch (assessed on June 10 2013)

¹⁶¹ Committee on the Rights of Children States Party Report, Andorra CRC/C/6/Adu.3

¹⁶² See Section 233 Children Act 2005 (SA) which provides "(1) A child may be adopted only if consent for the adoption has been given by- (a) each parent of the child, regardless of whether the parents are married or not: ... (b) any other person who holds guardianship ... ; and (c) the child, if the child is- (i) 10 years of age or older; or (ii) under the age of 10 years, but is of an age, maturity and stage of development to understand the implications of such consent."

¹⁶³ Section 137 (d) Child & Family Services Act R.S.O 1990, Ontario Canada

approved schools, provide access to secondary level education, as is provided for boys. For boys in borstal institutions, primary level education should be provided for all boys, not just for boys in Standards 7 and 8.

The diversion program which seeks to prevent children in conflict with the law coming into contact with the formal justice system should be implemented in all police stations in the country. Diversion is "an attempt to divert, or channel out, youthful offenders from the juvenile justice system" The concept of diversion is based on the theory that processing certain youth through the juvenile justice system may do more harm than good. The basis of the diversion argument is that courts may inadvertently stigmatize some youth for having committed relatively petty acts that might best be handled outside the formal system. In part, diversion programs are also designed to ameliorate the problem of overburdened juvenile courts and overcrowded corrections institutions (including detention facilities), so that courts and institutions can focus on more serious offenders.¹⁶⁴ Diversion program is a program designed to enable criminal offenders to community programs. The purpose of a diversion program is to effect rehabilitation without the stigma of guilt. This program facilitates the offender to avoid prosecution by completing various requirements for the program. These requirements may include; education aimed at preventing future offenses by the offender, Restitution to victims of the offense, completion of community service hours; and or avoiding situations for a specified period of time in the future that may lead to committing another such offense.¹⁶⁵

Diversions are designed to remove the children away from the formal criminal justice proceedings and direct them towards community support. Diversions can only be used where the

¹⁶⁴ Bortner, M.A., Sunderland, M.L., and Winn, R. 1985. Race And the Impact of Juvenile Deinstitutionalization. *Crime and Delinquency* 31(1):35-46.

¹⁶⁵ *Daher v. City of Cleveland*, 1985 Ohio App. LEXIS 7511 Ohio Ct. App., Cuyahoga County Mar. 28, 1985

child admits to an offence or is found guilty of an offence and at no stage should children be pressurized either into an admission of guilt or accepting diversion.¹⁶⁶ The UN National Guidelines for the prevention of Juvenile Delinquency (the Riyadh guidelines) emphasizes on that the young person should have an active role and partnership within society and should not be considered as mere objects of socialization or control.¹⁶⁷

The Diversion Program was started as a pilot in March 2001.¹⁶⁸ The Program aimed at addressing the diverse and emerging issues affecting, particularly children in conflict with the law. It recognizes that all children belong to the community and therefore the community holds the primary responsibility to care and protect all children. As such, the model supports reintegration of welfare children and those who have been in conflict with the law back into the community. The problems of a child are seen as emanating from the community and therefore the community is an important stakeholder responsible for working with child offenders on understanding the consequences of their actions, discouraging them from re-offending and providing them with an atmosphere of reconciliation and social acceptance as they reintegrate into the community.¹⁶⁹

¹⁶⁶ See Article 40 paragraph 3(b) and 4 of the Convention on the Rights of Children (1989)

¹⁶⁷ 14 diversion desks existed in May 2006 according to NCCS figures

¹⁶⁸ Rutere, S.K & Kiura, C.M. The diversion program in Kenya, Sida Review, accessed through www.sida.se on 20th September 2013.

¹⁶⁹ Odongo, G.O “The Domestication of International Standards on the Rights of the Child: A Critical and Comparative Evaluation of the Kenyan example” (2004) 12(4) *The International Journal of Children's Rights* 425.

5.2 Conclusion

The importance of effective implementation of children's rights need not be overemphasized. The near universal ratification of the CRC is a clear indication of the need for children's rights protection as exploitation, abuse and neglect of children in any form is detrimental to development. Such practices affect children's ability to learn as well as their evolving capacities as parents, citizens, and productive members of society. Therefore, to build a strong and responsible future generation, children's rights must be effectively implemented at all levels, community, national and international.

The existence of laws and international protocols cannot be trusted as indicators of success in protecting vulnerable children in any given society including Kenya. Rather than being praised for having a legal framework in place, a government's care and protection of children must be judged according to the empirical evidence of children's well-being or vulnerability. This requires looking carefully within the protection system at what is being practiced and how, as well as beyond the protection system at the key challenges those children and their families and wider communities face in trying to live securely and well. To protect and care for the best interests of children, both efforts must be pursued in a spirit of accountability to children.

The thesis set out to research if the rights of the children in Kenya are only "paper rights" or actual rights that can be actualized through enforcement. In pursuit of the true actualization of the rights of the child and with the implementation of the recommendations above then the rights of the children in Kenya elaborately so provided for in can be an actual achievable dream.

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