

**UNIVERSITY OF NAIROBI**

**SCHOOL OF LAW**

**MASTER OF LAWS PROGRAMME 2014/2015**

**RESEARCH PROJECT:**

**AN ANALYSIS OF THE ADEQUACY OF THE LEGAL FRAMEWORK  
IN PROTECTING THE RIGHTS OF CHILD OFFENDERS IN KENYA**

**THESIS SUBMITTED IN FULFILMENT OF THE REQUIREMENT OF  
MASTERS OF LAWS, SCHOOL OF LAW, UNIVERSITY OF NAIROBI**

**SUBMITTED BY: KINUU JOYCE NKIROTE**

**REGISTRATION NO: G62/76017/2014**

**SUPERVISOR: DR. SCHOLASTICA OMONDI**

**NOVEMBER 2016**

## DECLARATION

I declare that this thesis is my original work and has not been presented before for a degree in this or any other university.

Signature : \_\_\_\_\_

Date : \_\_\_\_\_

Kinuu Joyce Nkirote

This thesis has been submitted for examination with my approval as university supervisor.

Dr. Scholastica Omondi

Lecturer,

School of Law,

University of Nairobi.

Signature : \_\_\_\_\_

Date : \_\_\_\_\_

## **DEDICATION**

To my family who have been my cornerstone in my pursuit of higher learning.

## **ACKNOWLEDGEMENT**

I wish to acknowledge the support and inspiration of those who contributed to the successful completion of this thesis. I thank God for His abundant blessings that saw me through the period of carrying out the research. I am grateful to my family for their unending support and encouragement during the study. I thank my supervisor Dr. Scholastica Omondi for her insightful guidance and invaluable input that put into perspective the essence of the research topic. I acknowledge the interviewees for their invaluable contribution to this thesis. Lastly, I am grateful to persons who contributed to this study in one way or another. Thank you and God bless you.

## **LIST OF INTERNATIONAL INSTRUMENTS**

The United Nations Convention on the Rights of the Child (CRC)

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice  
(Beijing Rules)

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (The JDLs  
Rules)

The United Nations Rules for the Protection of Juveniles Deprived of Liberty (Riyadh  
Principles)

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

## **LIST OF STATUTES**

### **KENYAN STATUTES**

The Constitution of Kenya, 2010

The Children Act, Cap 141 Laws of Kenya

Borstal Institutions Act, Cap 92 Laws of Kenya

The Probation of Offenders Act, Cap 64 Laws of Kenya

The Penal Code, Cap 63 Laws of Kenya

The Sexual Offences Act, Cap 62A Laws of Kenya

### **SOUTH AFRICA STATUTE**

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

Child Justice Act, 75 of 2008

## **LIST OF CITED CASES**

### **KENYAN CASES**

*Kazungu Kasiwa Mkunzo and Another v Republic Mombasa High Court Criminal Appeal No. 238 of 2004 eKLR*

*C.K.W v Attorney General and Another Eldoret High Court Petition No. 6 of 2013 eKLR*

*J.M.K v Republic In the Court of Appeal at Nyeri Criminal Appeal No. 552 of 2010 eKLR*

*Republic v Nzaro Chai Karisa and 3 others Mombasa High Court Criminal Case No. 5 of 2011 eKLR*

*Republic v Dorine Aoko Mbogo and Another Nakuru High Court Criminal Case No. 36 of 2010 eKLR*

### **FOREIGN CASE**

*Re Gault 387 U S 1 1967*

## **LIST OF ABBREVIATIONS**

ACRWC	African Charter on the Rights and Welfare of the Child
Beijing Rules	United Nations Standard Minimum Rules for the Administration of Juvenile Justice
CRC	United Nations Convention on the Rights of the Child
JDLs Rules	United Nations Rules for the Protection of Juveniles Deprived of their Liberty
Riyadh Guidelines	United Nations Guidelines for the Prevention of Juvenile Delinquency



## TABLE OF CONTENTS

DECLARATION.....	i
DEDICATION .....	ii
ACKNOWLEDGEMENT.....	iii
LIST OF INTERNATIONAL INSTRUMENTS .....	iv
LIST OF STATUTES .....	v
LIST OF CITED CASES .....	vi
LIST OF ABBREVIATIONS .....	vii
CHAPTER 1: GENERAL OUTLINE AND OVERVIEW .....	1
1.1 Introduction .....	1
1.2 Statement of the Problem .....	4
1.3 Research Question.....	4
1.4 Statement of Objectives.....	5
1.5 Justification of the Study .....	5
1.6 Hypothesis.....	5
1.7 Theoretical Framework .....	6
1.8 Research Methodology .....	7
1.9 Literature Review .....	8
1.10 Limitation of the Study.....	18
1.11 Chapter Breakdown.....	18
CHAPTER 2: INTERNATIONAL LEGAL FRAMEWORK ON CHILDREN IN CONFLICT WITH THE LAW .....	20
2.1 Introduction .....	20
2.2 International Legal Framework on Children in Conflict with the Law .....	20
2.2.1 United Nations Convention on the Right of the Child (CRC).....	20
2.2.2 The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) .....	23
2.2.3 The United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) .....	24
2.2.4 The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLs Rules).....	25
2.2.5 The African Charter on the Rights and Welfare of the Child (ACRWC) .....	26

2.3 The Ideal Framework on the Rights of Children in Conflict with the Law.....	27
2.3.1 Non - Discrimination.....	27
2.3.2 The Best Interests of the Child.....	29
2.3.3 The Right to Life, Survival and Development.....	29
2.3.4 Dignity.....	30
2.3.5 Proportionality.....	31
2.3.6 Primacy of Alternative Measures to Judicial Proceedings.....	31
2.3.7 Participation.....	32
2.3.8 Proceedings without delay.....	32
2.3.9 Presumption of Innocence.....	32
2.3.10 Detention as a Measure of Last Resort.....	33
2.3.11 Separate and Specialized Criminal Justice System.....	33
2.3.12 Crime Prevention Initiatives.....	33
2.4 Conclusion.....	34
<b>CHAPTER 3: THE EVALUATION OF THE KENYAN LEGISLATION ON CHILDREN IN CONFLICT WITH THE LAW.....</b>	<b>35</b>
3.1 Introduction.....	35
3.2 Development of Juvenile Justice in Kenya.....	35
3.3 An Analysis of the Legal Framework in Kenya.....	37
3.3.1 The Constitution of Kenya.....	38
3.3.2 The Children Act.....	40
3.3.3 The Penal Code.....	53
3.3.5 The Sexual Offences Act.....	54
3.4 Conclusion.....	57
<b>CHAPTER 4: AN ANALYSIS OF THE SOUTH AFRICAN CHILD JUSTICE ACT.....</b>	<b>59</b>
4.1 Introduction.....	59
4.2 Provisions of the Child Justice Act.....	60
4.2.1 The Best Interests of the Child.....	60
4.2.2 Primacy of Alternative Measures to Judicial Proceedings.....	61
4.2.3 Proceedings without Delay.....	66
4.2.4 Detention as a Measure of Last Resort.....	67
4.2.5 Proportionality, Participation and Dignity.....	68
4.2.6 Presumption of Innocence.....	69
4.3 Conclusion.....	69

CHAPTER 5: CONCLUSION, SUMMARY AND RECOMMENDATIONS .....	71
5.1 Conclusion.....	71
5.2 Summary and Recommendations .....	71
BIBLIOGRAPHY .....	75
APPENDICES.....	78

## CHAPTER 1: GENERAL OUTLINE AND OVERVIEW

### 1.1 Introduction

One half of the Kenyan total population is below 18 years of age.<sup>1</sup> In tandem to this is the fact that 45 % of the Kenyan population is living below the poverty line.<sup>2</sup> Coupled with the challenges of modernity amongst them being rapid population growth, poverty, overcrowding in poor informal urban settlements, the disintegration of the family and inefficient education system puts children<sup>3</sup> who are a vulnerable group in a precarious situation. More often than not children receive inadequate care and protection from their primary care givers and in the quest for survival they end up engaging in criminal activities.<sup>4</sup> However, no allowance is made to the fact that it is often the law that is in conflict with their survival behaviour and the harsh realities in their lives.<sup>5</sup> The end results are that children in need of care and protection who come into contact with the law find themselves entangled in the adult criminal justice system. They are arrested and detained by police, tried through the formal and rigid judicial system, sent to correctional institutions including prison.<sup>6</sup> The process of arrest, trial and custody for children in conflict with the law destroys their childhood as they are denied their right to family life, care, protection, socialization, play and education. In effect the children's growth and development is adversely affected noting that as recognized by the African Charter on the Rights and Welfare of the Child (ACRWC),<sup>7</sup> "a child occupies a unique and privileged position in the African Society and that for a full and harmonious development in his personality, the child should grow up in a family environment of happiness, love and

---

<sup>1</sup> KNBS 'Highlights of the Socio-Economic Atlas of Kenya' (KNBS 2009)

<sup>2</sup> Katindi Sivi Njonjo , *Exploring Kenya's Inequalities: Pulling Apart or Pooling Together* (KNBS and SID 2013)

<sup>3</sup> Adoption of the definition of a child as under Article 2 of the African Charter on the Rights and Welfare of the Child (ACRWC) and Children Act Chapter 141 Laws of Kenya " human being below the age of 18"

<sup>4</sup> Nikhil Roy, Mabel Wong, 'Juvenile Justice-Modern Concepts of Working with Children in Conflict with the Law' (Save the Children UK 2012)

<sup>5</sup> *ibid*

<sup>6</sup> *ibid*

<sup>7</sup> African Charter on the Rights and Welfare of the Child (ACRWC) Ratified by Kenya on 25<sup>th</sup> July 2000

understanding.”<sup>8</sup> Commission of crime by children to a large extent is a reflection of society’s failure to provide a protective and conducive environment for its children as a large number of children in conflict with the law are socio-economic victims, denied their rights to shelter, care, protection, health and education.<sup>9</sup> Thus, safeguarding the rights of children who come in contact with the law whether as children in conflict with the law<sup>10</sup> or children in need of care and protection<sup>11</sup> becomes a primary concern.

Affirmation that children are bearers of certain minimum universally agreed standards crystallized as children human rights is evidenced by the United Nations Convention on the Rights of the Child (CRC)<sup>12</sup> being the mostly widely ratified international human rights treaty in history.<sup>13</sup> The African Charter on the Rights and Welfare of the Child (ACRWC) the first regional treaty to address children rights<sup>14</sup> retains the spirit and the letter of the CRC whilst capturing the unique situation facing the African child. These instruments provide a broad range of children rights which can be classified into developmental, participation and protection rights. Provisions for the rights of children in conflict with the law cut across the spectrum. There are international standards and norms tailored for child justice, they include: United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules),<sup>15</sup> United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines)<sup>16</sup> and the United Nations Rules for the Protection of Juveniles Deprived of their

---

<sup>8</sup>Preamble of the ACRWC ratified by Kenya on 25<sup>th</sup> July 2000

<sup>9</sup>Roy and Wong (n 4)

<sup>10</sup> Term that also refers to child offenders referring to anyone under the age of 18 years who comes into contact with the justice system as a result of being suspected or accused of committing an offence as defined by United Nations Children’s Fund, ‘Child Protection Information Sheet: Children in Conflict with the Law’ 2006 UNICEF

<sup>11</sup> Adoption of the definition as under Section 119 (1) Children Act Cap 141 Laws of Kenya

<sup>12</sup>Ratified by Kenya on 30<sup>th</sup> July 1990

<sup>13</sup>The CRC has been ratified by 195 countries

<sup>14</sup>UNICEF, ‘Eastern and Southern Africa: For Children & Youth’ [http://www.unicef.org/esaro/children\\_youth\\_5930.html](http://www.unicef.org/esaro/children_youth_5930.html) < accessed 7 January 2016>

<sup>15</sup> United Nations General Assembly, ‘United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)’ adopted by the General Assembly on 29 November 1985 (A/RES/40/33)

<sup>16</sup> United Nations General Assembly, ‘United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines)’ adopted by the General Assembly on 14 December 1990 (A/RES/45/112)

Liberty (JDLs Rules).<sup>17</sup> The international guidelines and rules though generally considered to be non binding take on a strongly persuasive quality akin to law when read together with other related instruments.<sup>18</sup> In addition several provisions of the Beijing Rules, the Riyadh Guidelines and the JDLs Rules have been incorporated in the CRC. The principles that run through the international instruments include: the best interest of the child, non – discrimination, dignity, participation, right to life, survival and development, detention as the last resort, and primacy of alternative measures to the juvenile justice system.

The domestication of the instruments by countries including Kenya through comprehensive law reforms is laudable as it promotes children rights in the respective countries. The Children Act of 2001 Cap 141 Laws of Kenya is a comprehensive legislation promoting the rights of children.<sup>19</sup> The Constitution of Kenya 2010 further strengthens the commitment to upholding the interests of the child.<sup>20</sup> A child’s best interest being paramount in every matter that concerns the child is the underlying theme in the Constitution, the Children Act, international and regional instruments.

It is evident that Kenya has adopted and legislated best practices in respect to children rights in the civil, political, social, economic, cultural and justice spheres. The issue which then arises is whether the said adoption is holistic in all the spheres of children rights or whether it is skewed by laying more emphasis in specific children rights fields. In focus in this study is the child justice field, the extent to which Kenya’s legislation protects the rights of children in conflict with the law.

---

<sup>17</sup> United Nations General Assembly, ‘United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (JDLs Rules)’ adopted by the General Assembly on 14 December 1990 (A/RES/45/113)

<sup>18</sup> Daniel O’Donnell, ‘The Convention on the Rights of the Child of the Child and Other International Standards Concerning Juvenile Justice’[1993] Atheneo Human Rights Law Journal

<sup>19</sup>Brought into effect by Legal Notice no. 23/2002, herein after referred to as the Children Act

<sup>20</sup>Brought into effect by Legal Notice No. 113 of 2010, herein after referred to as the Constitution

## 1.2 Statement of the Problem

The legal framework in Kenya does not adequately protect the rights of children in conflict with the law. Despite the children rights advancement, reform on legislation touching on child offenders is the most marginalised, disregarded and unwanted issue.<sup>21</sup> This is because children rights are advanced on child protection, child education and health care but minimally on children in conflict with the law as they are viewed in the narrow perception as law breakers and a threat to the public. In consequence legislative regimes on child offenders have been described as the unwanted child of state responsibilities.<sup>22</sup> The United Nations Committee on the Rights of the Child report of 2007 concluded that, “many state parties have a long way to go in achieving full compliance with the Convention on the Rights of the Child, for example in areas of procedural rights, the development and implementation of measures for dealing with children in conflict with the law without resorting to judicial proceedings, and the use of deprivation of liberty only as a measure of last resort.”<sup>23</sup>

The problem this study seeks to address is whether the Kenyan legal framework adequately protects the rights of child offenders and identify where the legal framework falls short.

## 1.3 Research Question

This research seeks to answer the following questions:

- i. How adequate is the legal framework in protecting the rights of children in conflict with the law in Kenya?
- ii. What gaps exist in the legal framework in protecting the rights of children in conflict with the law?

---

<sup>21</sup> John Muncie, ‘ The United Nations, children’s rights and juvenile justice’ in Taylor Wayne, Earle Rod and Hester Richard (eds), *Youth Justice Handbook: Theory, policy and practice* (Cullompton Willan 2009)

<sup>22</sup> Abramson B, ‘Juvenile Justice, "the Unwanted Child" of State Responsibilities : an Analysis of the Concluding Observations on the UN Committee on the Rights of the Child in Regard to Juvenile Justice 1993-2000’ (Defence for Children International 2000)

<sup>23</sup> United Nations, ‘General Comment No. 10 (2007) Children’s Rights in Juvenile Justice’ (2008) 41 General Assembly Official Records 53

- iii. What measures can be taken to enhance the protection of the rights of children in conflict with the law in Kenya?

#### **1.4 Statement of Objectives**

The following are the aims my study seeks to achieve:

- i. To examine the adequacy of the legal framework in protecting the rights of children in conflict with the law.
- ii. To identify gaps in the legal framework in protecting the rights of children in conflict with the law.
- iii. To make recommendations on measures to enhance the protection of the rights of children in conflict with the law.

#### **1.5 Justification of the Study**

The research will aid in disseminating information to child rights advocates and stakeholders on the Kenyan legal status on the rights of children in conflict with the law. The study will also add to the scholarly materials in respect to the rights of children in conflict with the law.

The findings of the research will be important in the formulation of legislation and policy reform on the rights of children in conflict with the law.

Programme development that enhances effectiveness and efficiency in the implementation of the legal framework on the rights of children in conflict with the law will also benefit on the findings of this study.

#### **1.6 Hypothesis**

The study is based in the following hypothesis;

The inadequacy of the legal framework has led to the violation of the rights of children.



## 1.7 Theoretical Framework

### Sociological School of Thought

This is the use of various social sciences to study the role of law as a living force in the society and seeks to control this force for the betterment of the society.<sup>24</sup> Essentially, law takes up a functional approach. Law is viewed as ‘an instrument of social control backed by the authority of the State, and the ends towards which it is directed and the methods for achieving these ends may be enlarged and improved through a consciously deliberate effort.’<sup>25</sup> Law in effect is a tool to serve society. The sanctions of law lies in social ends which law is intended to serve as law is examined in connection with some specific problem of the everyday work of the legal order.<sup>26</sup>

Roscoe Pound, the main proponent of sociological jurisprudence formulated practical objectives in this regard. The objective of ascertaining “the means by which legal rules can be made more effective in the existing conditions of life”<sup>27</sup> is apt in the analysis on how the legal regime on children in conflict with the law complements the present narrative on children matters whose underlying theme is a child rights approach.

Roscoe Pound further propounds that the working of law should be considered rather than its abstract content.<sup>28</sup> He argues that law should be regarded as a social institution which may be improved by human effort and endeavour to discover and effect such improvement.<sup>29</sup> Emphasises should be on social ends of law as opposed to sanctions and that emphasise should be on use of legal precepts as guides to socially desirable results rather than inflexible molds.<sup>30</sup>

---

<sup>24</sup> James A. Gardner, *The Sociological Jurisprudence of Roscoe Pound (Part I)*, 7 Vill L Rev 1 (1961)

<sup>25</sup> *ibid*

<sup>26</sup> *ibid*

<sup>27</sup> *ibid*

<sup>28</sup> *ibid*

<sup>29</sup> *ibid*

<sup>30</sup> *ibid*

As law is viewed as a means to further the ends of society, the conscious improvement of law as a means to address societal problems should take into account the type of law which is desirable to particular issues and most importantly which the society will willingly embrace.<sup>31</sup> In this regard, the sociological school of thought will be employed in analysing the legal framework on children in conflict with the law; on whether the law is adequate in protecting the rights of child offenders in Kenya.

### **1.8 Research Methodology**

This study applies both primary and secondary sources of data. Primary data was collected through face to face interviews with individuals selected in a sample. The individuals interviewed were based in Nairobi County noting that the city is the administrative capital where all the government institutions are stationed which can arguably be said to have the best practice in their respective fields. The purposive sampling technique was used where the stakeholders who come into contact with child offenders of a sample size of 30 were identified. The rationale being that individuals who are part and parcel of the judicial process the child offenders are processed thorough would be best placed to address the relevant issues this study seeks to address. The persons to be interviewed included: 2 judicial officers and 4 prosecuting counsel stationed at Children Courts, 4 legal practitioners, 5 police officers handling child offenders, 5 children officers, 5 probation officers and 5 child offenders. The study managed to interview the targeted number of respondents.

The purpose of the study was explained to the interviewees upon which their consent was sought. In respect to the child offenders, consent was sought from their parents or guardians before conducting the interviews. Only individuals who consented to the interviews were

---

<sup>31</sup> ibid

interviewed. The interviews were guided by open ended interview questions thus allowing further interrogation. The data was recorded through note taking.

Secondary source of data was used to supplement the primary data. Information was sourced through the use books, journals, reports and internet sources.

The data was analysed and presented in a narrative format.

### **1.9 Literature Review**

A critical analysis has been given by Janet E. Ainsworth in her journal article on the courts effectiveness in protecting the rights of children in conflict with the law.<sup>32</sup> The correlation between the evolution of the juvenile justice system and its impact on the effectiveness in protecting the rights of children in conflict with the law is pointed out.

Ainsworth traces the juvenile justice system to the doctrine of *parens patriae* where parental authority is subjected to government authority by the state intervening to secure the welfare of children who lacked proper parental care and thus engage in criminal activities.<sup>33</sup> In *parens patriae* emphasis was laid on the courts determination of moral and social condition of the offender and how best to reform his behaviour rather than the hearing focusing on whether the child has violated the law.<sup>34</sup> Thus significant discretion and latitude was given to the judges in adjudicatory practices and sentencing making the system prone to abuse.

Ainsworth notes that the *re Gault*<sup>35</sup> decision Supreme Court in 1967 imposed procedural requirements on juvenile court adjudication.<sup>36</sup> Gerald Gault, a boy aged fifteen years was taken into custody following an allegation that he had made lewd telephone calls.<sup>37</sup> The

---

<sup>32</sup> Janet E. Ainsworth, 'The Courts Effectiveness in Protecting the Rights of Juveniles in Delinquency Cases' (1996) 6 The Future of Children 64 <[http://www.princeton.edu/futureofchildren/publication/docs/06\\_03\\_04.pdf](http://www.princeton.edu/futureofchildren/publication/docs/06_03_04.pdf)> accessed 7 February 2016

<sup>33</sup> *ibid*

<sup>34</sup> *ibid*

<sup>35</sup> 387 U S 1 (1967)

<sup>36</sup> above n 32

<sup>37</sup> Above n 35

Juvenile Court Judge heard the matter without observing the procedural due process rights. Upon determination of the matter, the child offender was committed to the State Industrial School until he reaches the age of majority. An appeal was lodged on the ground of denial of procedural due process. The State Supreme Court agreed that there is constitutional guarantee of due process applicable to juvenile proceedings. The due process introduced included; the right to notice of the charges, the right to counsel and the right to cross examine the witnesses against the accused. As a result the adjudication process came to resemble the ordinary criminal justice system. The dissenting judge Justice Harlan was of the view that rigid due process requirements could do disservice to the purpose of juvenile justice, he argued that:

“quite unlike notice, counsel, and a record, these requirements might radically alter the character of juvenile court proceedings. The evidence from which the Court reasons that they would not is inconclusive, and other available evidence suggests that they very likely would. At the least, it is plain that these additional requirements would contribute materially to the creation in these proceedings of the atmosphere of an ordinary criminal trial, and would, even if they do no more, thereby largely frustrate a central purpose of these specialized courts.”<sup>38</sup>

The article then propounds Justice Harlan arguments by assessing the due process evolution since the *In re Gault* case. Ainsworth notes that empirical, evaluative as well as survey research indicate that the procedural reforms of the *re Gault* have not been effective in guaranteeing children in conflict with the law fair trials on the same terms as those accorded

---

<sup>38</sup>Franklin E. Zimring, ‘The Common Thread: Diversion in Juvenile Justice’ [2000] Cal. L. Rev. 2477

to adult offenders and that the rigorous procedural system and sentencing curtailed the reform process of the children's behaviour.<sup>39</sup>

As a result of the stringent criminal justice system, the article notes that a renewed interest has developed in the use of diversion as a way of providing an informal alternative to the formal criminal formal processing of children in conflict with the law.<sup>40</sup> Ainsworth is however critical of diversion as she states that the very strength of diversion that is; informality, flexibility raises pressing questions of accountability, fairness and has potential for arbitrariness and abuse.<sup>41</sup> The article concludes that the future of the juvenile court is uncertain given its continued procedural shortcomings thus there is need to rethink the nature of the juvenile justice system.<sup>42</sup>

Ainsworth's study analyses the efficiency of the judicial process child offenders are processed through under the American justice system. The fairness and adequacy of the system on the rights of child offenders was put into question. Whereas the article focuses on the adequacy of the procedural process in upholding the rights of the child offender, this study focuses on the judicial process as well as other provisions of law in Kenya that affect the rights of the child offender.

David J. Smith articulates the many facets that contribute to the effectiveness of the juvenile justice system.<sup>43</sup> He opines that the juvenile justice system exists at a point of collision between competing principles; mature adults are treated as moral beings that make choices and are held responsible for the consequences of their actions, whereas children are regarded as a force of nature and not as independent moral agents.<sup>44</sup> Despite the progressive reforms

---

<sup>39</sup> Janet E. Ainsworth (n 32)

<sup>40</sup> *ibid*

<sup>41</sup> *ibid*

<sup>42</sup> *ibid*

<sup>43</sup> David J Smith, 'The Effectiveness if the Juvenile Justice System ' [2005] SAGE Publications 181

<sup>44</sup> *ibid*

made in respect to child participation, parents and guardians make choices for children where they explain and justify their choices as being in the best interest of the child.<sup>45</sup> The children are restrained, trained, supervised and prepared to assume the status of independent moral agents when they reach maturity.<sup>46</sup> The article acknowledges that juvenile justice is the site of conflict between these two principles.<sup>47</sup> There is uncertainty on whether to treat children in conflict with the law as children requiring help and guidance or as morally responsible agents who deserve to be punished. Smith adds that each juvenile justice system represents a specific accommodation to this tension and as the system is an attempt to reconcile opposing principles, the question as to how effective the juvenile justice system is, is bound to be contested.<sup>48</sup>

The article enumerates various interpretations of what an effective juvenile justice system entails: it could mean providing a legally and morally appropriate response to criminal behaviour by children in conflict with the law whose main objective is delivering a justice response to the offence committed regardless of any change in the behaviour of the children in conflict with the law who have been sanctioned;<sup>49</sup> an effective juvenile justice system could mean satisfying the victims of the crimes committed through among others, mediation, restoration or apology - the restorative justice approach provides for benefits to the victims as well as influencing the behaviour of children in conflict with the law;<sup>50</sup> an effective juvenile justice system could be when the primary goal is meeting the needs of children in conflict with the law in contrast to punitive responses to youth crimes geared towards behavioural change;<sup>51</sup> an effective juvenile justice system entails communicating to the general public through appropriate symbolic gestures that the juvenile justice system in place is capable of

---

<sup>45</sup> *ibid*

<sup>46</sup> *ibid*

<sup>47</sup> *ibid*

<sup>48</sup> *ibid*

<sup>49</sup> *ibid*

<sup>50</sup> *ibid*

<sup>51</sup> *ibid*

delivering the right message in response to crimes committed by children;<sup>52</sup> an effective juvenile justice system deters majority of children from getting involved in crime - the influence of the system is stressed to the young people in that they should not be allowed to think that they can get away with anything;<sup>53</sup> additionally, an effective juvenile justice system entails keeping troublesome young people out of trouble by closely controlling and supervising them while they remain with their own families by use of measures such as being under supervision, electronic tagging;<sup>54</sup> lastly, an effective juvenile justice system could mean changing the way children in conflict with the law will behave when they are not under direct control or supervision by use of various approaches including addressing the root cause of the deviant behaviour, by addressing needs that increase the risk of offending and negating them through provision of vocational training, social skill teachings and by meting out punishment to deter the individual child offender from offending in future.<sup>55</sup>

The article opines that conflict and tension arise both within the juvenile justice system and in public debate because the system is expected to accomplish many different things that at times are incompatible or hard to reconcile.<sup>56</sup> The argument of what works then comes into focus. The article postulates that in reality, the juvenile justice system is aimed at punishing the offender, to deter others from offending, to satisfy victims, to communicate a symbolic rejection of the offender's behaviour, to meet the offender's needs and to address their problems.<sup>57</sup> Smith is critical of the reformers and the progressives who he notes advance the idea that the only function of the juvenile justice system is to change the future behaviour of the children in conflict with the law and deliberately repress or overlook the pressures of

---

<sup>52</sup> *ibid*

<sup>53</sup> *ibid*

<sup>54</sup> *ibid*

<sup>55</sup> *ibid*

<sup>56</sup> *ibid*

<sup>57</sup> *ibid*

retribution, condemnation and victim satisfaction.<sup>58</sup> He notes that this is a mistaken strategy on many levels and asserts that behavioural change should not be the principle justification for intervening in the lives of children in conflict with the law.<sup>59</sup> He gives weight to punishment and deterrence but acknowledges that the process is damaging to the child offender.<sup>60</sup> The justification for constructive programmes of treatment, training and rehabilitation in this context is therefore to undo the damage.<sup>61</sup>

An analysis on the type of juvenile justice system that efficiently addresses child offenders is undertaken in this article. That is, whether the legal framework which is punitive and removed from the child's right approach is ideal as opposed to one which leans on rehabilitating and re-integration of the child offenders. The rights of child offenders in the justice process are evaluated on the angle of the process 'that works'. The rights of the child offender are relegated and prominence given to the justice process. This study will give prominence to the rights of the child offenders in the justice system by examining whether the legal framework protects the rights of the child offenders.

Julia Sloth – Nielsen and Benyam D. Mazmur's article focuses on identifying research themes and topics of special relevance to the furtherance of children rights in the African context aimed at sharpening and strengthening Africa's capacity to promote good practice and promising solutions.<sup>62</sup> It is acknowledged that under the CRC child rights are regarded as part and parcel of international human rights.<sup>63</sup> The article asserts that children cannot be merely regarded as only subject to their own national laws.<sup>64</sup> Due to their vulnerability and in their

---

<sup>58</sup> *ibid*

<sup>59</sup> *ibid*

<sup>60</sup> *ibid*

<sup>61</sup> *ibid*

<sup>62</sup> Julia Sloth-Nielsen and Benyam D. Mazmur, 'Surveying the Research Landscape to Promote Children's Legal Rights in An African Context' (2007 7(2) AHRJ 1

<sup>63</sup> *ibid*

<sup>64</sup> *ibid*



need for care, protection and justice, children have a place on the international platform.<sup>65</sup> The African context in regard to child rights is captured by the ACRWC.<sup>66</sup> The ACRWC upholds all the universal standards outlined in the CRC whilst outlining the unique and specific issues that African children confront.<sup>67</sup> It is argued that although the concept of children's rights is widely accepted, it has not fully obtained primary societal value informing social policy in the African countries.<sup>68</sup>

However, it is noted that the field of juvenile justice is a priority area internationally.<sup>69</sup> The article recommends further research and capacity building seeking to expand the pan – Africa's collaborative best practice approach to children in conflict with the law.<sup>70</sup> The article asserts that the African perception of human rights manifests itself by acknowledging that children are valuable in society and thus require special protection due to their special, precarious and fragile state.<sup>71</sup>

This study therefore seeks to research on the Kenyan legal framework in protecting the rights of child offenders. The study seeks to examine whether Kenyan legal framework on children in conflict with the law has adopted the child rights approach.

An analysis of the criminal justice legal framework and the restorative justice legal framework is presented in this review. Does the model adopted impact upon the rights of child offenders? Don John O. Omale makes a case on rebuilding African restorative traditions and examines its influence and contribution in the emergence of restorative justice as a global paradigm.<sup>72</sup> The article asserts that traditional and cultural restorative practices which were

---

<sup>65</sup> *ibid*

<sup>66</sup> *ibid*

<sup>67</sup> *ibid*

<sup>68</sup> *ibid*

<sup>69</sup> *ibid*

<sup>70</sup> *ibid*

<sup>71</sup> *ibid*

<sup>72</sup> Don John O. Omale, 'Justice in History: An Examination of African Restorative Traditions and the Emerging Restorative Justice Paradigm'(2006) 2 AJCJS 33

timid and weak in asserting their dominance to imported retributive cultures were wiped out.<sup>73</sup> Omale further makes a review of restorative justice in order to understand factors that contributed to the abandonment of restorative justice to criminal justice model and the subsequent re emergence of interest in restorative justice in the current social context globally.<sup>74</sup> Definition of restorative justice is given as “a problem-solving approach to crime which involves the parties themselves and the community generally, in an active relationship with statutory agencies”<sup>75</sup> This definition recognises the supervisory role of statutory criminal justice and government agencies. This is contrasted with a definition which does not recognise the supervisory role of statutory criminal justice and government agencies which states that restorative justice is “a process whereby victims, offenders, and communities are collectively involved in resolving how to deal with the aftermath of an offence and its implications for the future.”<sup>76</sup> Further, the concept of restorative justice is defined thus;

“Restorative justice (should) seek to balance the concerns of the victim and the community with the need to reintegrate the offender into the society. It (should) seek to assist the recovery of the victim and enables all parties with a stake in the justice process to participate fruitfully in it.”<sup>77</sup>

It is therefore contented that restorative justice should be seen as humanising criminal justice and combined with legal justice it could create a holistic justice.<sup>78</sup> That is, justice not limited to the judge’s point of view but inclusive of the victim, offender and the community.<sup>79</sup>

---

<sup>73</sup> *ibid*

<sup>74</sup> *ibid*

<sup>75</sup> Tony F Marshall, ‘Restorative Justice: An Overview’ [1999] Home Office Research Development and Statistics Directorate 5

<sup>76</sup> Mediation UK, ‘Restorative Justice: A Brief Introduction’ (2002)

<sup>77</sup> Restorative Justice Consortium, ‘Principles of Restorative Justice’(2002)RJC

<sup>78</sup> Above n 72

<sup>79</sup> *ibid*

The article notes the move from restorative justice to retributive justice as explained by Howard Zehr.<sup>80</sup> Zehr states that retributive justice gained prominence in the nineteenth century and this was in part motivated by the desire for political power both in religious and secular spheres.<sup>81</sup> This resulted to a legal revolution which resulted in a re conceptualization of the nature of disputes.<sup>82</sup> To this end, the crown proclaimed itself keeper of peace and was be the victim whenever peace was violated.<sup>83</sup> The courts role was no longer to referee between disputing parties requesting their involvement but “courts now took up the role of defending the crown and began to play an active role in prosecution, taking ownership over those cases in which the crown was deemed victim...justice came to mean applying rules, establishing guilt, and fixing penalties”<sup>84</sup> The real victims harmed by wrongful acts were no longer parties in their own cases as their disputes had been ‘stolen’ from them. It is asserted that the situation remains the same in the contemporary criminal justice system; “victims have little or no power in regard to their case and cannot initiate or stop or settle a prosecution without permission of the State, and can often be locked out of the process altogether if they are not useful as a witness in the case.”<sup>85</sup>

The article points out the narrative that the restorative justice concept is grounded in Greek, Roman and Asian civilizations.<sup>86</sup> A restorative justice conception has its roots in both western and non western traditions.<sup>87</sup> To this end, the article deconstructs the assertions that relegate African law to a form of custom and primitive practices which predate law though the article notes, it would take a great deal of convincing to change the held opinion of anything good

---

<sup>80</sup> Howard Zehr, *Changing Lenses: A new focus for crime and justice*, (Scottsdale, PA: Herald press 1990)

<sup>81</sup> *ibid*

<sup>82</sup> *ibid*

<sup>83</sup> *ibid*

<sup>84</sup> *ibid*

<sup>85</sup> Don John O. Omale (n 72)

<sup>86</sup> *ibid*

<sup>87</sup> *ibid*

coming out of Africa.<sup>88</sup> It is argued that restorative justice is part and parcel of the African tradition and a word which exemplifies this is *ubuntu*; organic wholeness of personhood or the natural connectedness of the humanity of persons.<sup>89</sup>

In pre- colonial Africa, African people resolved their disputes using traditional justice forums but the colonialist regarded the forums as obstacles to development.<sup>90</sup> Omale in the article supports the averments of Christiaan Keulder who states that “Those who have criticised the African traditional justice system as being too traditional to promote development are often too simplistic in their arguments.”<sup>91</sup> It is asserted that the argument that development only occurs within a ‘modern’ framework is misguided.<sup>92</sup> This view is based on simplistic and very static view of tradition because the fact that tradition is often invented and thus very modern in context is ignored.<sup>93</sup> The critics of African traditions, the article notes, thought that as Africa develops and modernises the African traditional justice model would eventually die out.<sup>94</sup> The converse is true as the African traditional justice model is receiving international recognition and attention in the form of restorative justice paradigm.<sup>95</sup> Parallels are drawn in that regard as the two justice models aim is to restore social harmony and reconcile the parties and justice is about restitution as the penalty usually focuses compensation rather than punishment.<sup>96</sup> Imprisonment is labelled a foreign concept as in African tradition it never existed as a penalty for any offence.<sup>97</sup> The author therefore argues that in respect to the

---

<sup>88</sup> *ibid*

<sup>89</sup> *ibid*

<sup>90</sup> *ibid*

<sup>91</sup> Christiaan Keulder, ‘Traditional leaders and rural development’ in Marina D’Engelbronner-Kolff, Manfred O. Hinz, J. L. Sindano (eds), *Traditional Authority and Democracy in Southern Africa* (New Namibia Books 1998)

<sup>92</sup> Above n 85

<sup>93</sup> *ibid*

<sup>94</sup> *ibid*

<sup>95</sup> *ibid*

<sup>96</sup> *ibid*

<sup>97</sup> *ibid*

restorative justice paradigm, both the West and Africans have to reciprocally learn from each other.<sup>98</sup>

The article examines the criminal justice model and the restorative justice model highlighting their evolution and the present global shift in embracing the restorative justice model. This study examines the Kenyan legal framework on child offender rights which is anchored on the criminal justice model. The question then becomes, are the rights of child offenders adequately protected in criminal justice model? Is the restorative justice model more amenable in protecting the rights of the child offenders? This study seeks to examine the Kenyan legal framework in protecting the rights of child offenders basing it on international instruments and their underlying principles which propounds the restorative justice model. This will be contrasted with the South African Child Justice Act which encapsulates the *ubuntu* principle and the restorative justice model.

#### **1.10 Limitation of the Study**

The research does not delve into the theories and causes of juvenile delinquency, rather emphasis will be on understanding the Kenyan legal framework on children in conflict with the law and whether it underpins the child rights concept as enunciated in the international legal framework on children in conflict with the law and the underlying principles. The study does not focus on the broad spectrum of laws on the juvenile justice system but rather on specific legal framework on children in conflict with the law.

#### **1.11 Chapter Breakdown**

The context and outline of the research is brought out in chapter 1. Statement of the problem, research question and the statement of objectives are given. The justification of the study and the hypothesis are spelt out. The theory supporting the research is given together with the research methodology. Limitations of the study are explained.

---

<sup>98</sup> *ibid*

Chapter 2 examines specific international and regional instruments legal instruments on children in conflict with the law. They include: the United Nations Convention on the Right of the Child (CRC), the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLs Rules) and the African Charter on the Rights and Welfare of the Child (ACRWC). The underlying principles enunciating the rights of child offenders that run through the legal framework are highlighted. The study uses these principles as the ideal framework for children in conflict with the law.

An in depth examination of specific legislation in respect to child offenders in Kenya is undertaken in chapter 3. The legal framework analysed include: the Constitution, the Children Act, the Penal Code and the Sexual Offences Act. The evaluation as to whether the legislation adequately protects the rights of children in conflict with the law against the background of the ideal framework examined in chapter 2 will be undertaken.

Chapter 4 makes a comparative analysis on the South Africa's Child Justice Act 75 of 2008 which established a criminal justice system for children who are in conflict with the law. The best practices enunciated in the Child Justice Act which capture the ideal framework examined in chapter 2 are analysed.

The final chapter gives a summary, makes a conclusion, states the findings as pertains the adequacy of Kenyan legal framework adequacy in protecting the rights of children in conflict with the law as analysed against the identified ideal framework. Recommendations based on the findings are given.

## **CHAPTER 2: INTERNATIONAL LEGAL FRAMEWORK ON CHILDREN IN CONFLICT WITH THE LAW**

### **2.1 Introduction**

This chapter analyses international instruments and standards on the principles that set the standard for the protection of child offenders. These are the principles that are recognized as best practice in protecting the rights of children in conflict with the law.

This analysis will form a basis for evaluating the Kenyan legal framework in protecting the rights of children in conflict with the law against the backdrop of the international principles enunciated in the international instruments and standards.

### **2.2 International Legal Framework on Children in Conflict with the Law**

A historic document, The Geneva Declaration of the Rights of the Child adopted by the 5<sup>th</sup> Assembly of the League of Nations in 1924 was the founding instrument for the recognition of the rights of the child. However, its implementation failed following the dissolution of the League of Nations. Despite the lack of implementation, it was an affirmation for the first time of rights specific to children noting that children occupy a special place in society. Following the formulation of the United Nations, the Declaration of the Rights of the Child was adopted in 1959. The ultimate culmination of the recognition of the right of the child was the adoption by the United Nations General Assembly in 1989 of the most comprehensive human rights document targeting a specific group, Convention on the Rights of the Child.

#### **2.2.1 United Nations Convention on the Right of the Child (CRC)**

The CRC addresses a wide range of child rights including, social, cultural, civil, political and economic. It is the only internationally legally binding instrument addressing the rights of children in conflict with the law; it provides a framework within which the rights of children in conflict with the law are to be understood. Article 40 (3) provides:

“States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:-

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings providing that human rights and legal safeguards are fully respected.”

The CRC imposes progressive requirements on State parties to establish juvenile justice system that provides human rights and legal safeguards as well the establishment of alternatives to judicial proceedings.

Article 40(1) of CRC sets out the purpose of the juvenile justice system, that is, promoting the reintegration of the child into the society and helping the child assume a constructive role in the society. It provides that:

“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 takes into account the child’s age and the desirability of promoting the child’s re integration and a child’s assuming a constructive role in society.”

The provision lays emphasize on “promoting the child’s re integration and a child’s assuming a constructive role in society” which is inclined towards restorative justice. It is contended that re integration of a child to the community is given prominence over rehabilitation of the child because; rehabilitation is prone to abuse as an undesirable form of social control of child offenders and it places responsibility solely with the child offender who is treated, cured and placed back in the society, whilst re integration focuses on the child’s social environment and



the role of the community in helping the child become a responsible member of the society.<sup>99</sup>

Thus, the purpose of the juvenile justice system should not be punitive but should promote the well being of child offender and address the offending behaviour in a manner appropriate to the growth and development of the child offender.

Additionally institutional care of child offenders is discouraged by the CRC as Article 40 (4) provides for alternative sanctions such as probation, foster care, education and vocational training and other alternatives to institutional care.

Article 37 provides for the due process of an accused child offender. It is central to the rights of children in conflict with the law. It obligates state parties to ensure that;

“(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) 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;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

---

<sup>99</sup> Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff 1998)

(d) 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 or other competent, independent and impartial authority, and to a prompt decision on any such action.”

### **2.2.2 The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)**

The Beijing Rules were the first international legal instrument to comprehensively deal with the administration of juvenile justice from a child rights viewpoint. They predate the CRC as they were adopted by the United Nations in 1985. The Rules have heavily influenced the CRC, they are expressly mentioned in the preamble of the CRC and some of the fundamental provisions of the Rules are incorporated in the Convention.

The Rules provide a guideline for States in protecting child rights and providing for the child’s needs in the creation of separate and specialized infrastructure for children in conflict with the law. The Rules general principles require that the minimum age of criminal responsibility should not be fixed too low bearing in mind the emotional, mental and intellectual maturity of a child. The Rules further provide for the proportionality principle being the aim of juvenile justice in that juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be proportionate to the circumstances of both the offender and the offence.<sup>100</sup>

Additionally, the Beijing Rules centralize the principle of diversion, noting that the mechanism of diverting children away from the criminal justice system lie at the heart of any good juvenile justice system. Rule 11.1 of the Rules provide that:

---

<sup>100</sup> Ann Skelton and Boyane Tshehla, ‘Child Justice in South Africa’( 2008) Institute of Security Studies Monograph 150, 1

“Consideration shall be given where appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority.”

Rule 11.2 of the Rules render diversion an important instrument as it is not limited to petty offences and that it may be used at any stage of decision making by the police, the prosecution, the courts, tribunals and other agencies within the confines of the laid down criteria in the respective legal system. Rule 11.3 of the Rules stress the importance of securing the consent of the child offender or the parent or guardian to the recommended diversionary programme. The restorative justice approach is brought forth by Rule 11.4 which emphasizes on community based diversionary programmes such as “temporary supervision and guidance, restitution and compensation of victims.”

### **2.2.3 The United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines)**

The Riyadh Guidelines were adopted in 1990. The Guidelines are concerned with prevention as they provide guidance to States for measures necessary to the prevention of children from committing crimes. The Guideline’s principles and provisions address the need for healthy well rounded development of children in a protective environment to enable them develop to the best of their abilities; the same principles apply to the rehabilitation and reintegration of child offenders through diversion.<sup>101</sup> The Guidelines are aimed at addressing the root causes of offending and thereby help in highlighting the types of background circumstances often faced by children who come into contact with the law.<sup>102</sup> In turn, this awareness can “promote understanding and empathy, influencing justice officers to use their discretion to promote diversion and alternative programmes which address these causes and which can help to prevent re-offending.”<sup>103</sup> Additionally, the community programmes which cater for children

---

<sup>101</sup> UNICEF, ‘UNICEF Toolkit on Diversion and Alternatives to Detention’(UNICEF 2009) <[www.unicef.org/tdad/instrumentsummary\(2\).doc](http://www.unicef.org/tdad/instrumentsummary(2).doc) > accessed 7 February 2016

<sup>102</sup> *ibid*

<sup>103</sup> *ibid*

at risk of coming into contact with the law can also cater for children who have already crossed that line.<sup>104</sup>

The Guidelines take a proactive approach to the prevention of commission of crimes by children and view a child as a full - fledged member of the society emphasizing their participation on the prevention process.<sup>105</sup> This is by advancing a social policy focusing on the centrality of the child, the family and the involvement of the community.<sup>106</sup>

The socialization process as provided by the Riyadh Guidelines looks at the involvement of the family, education, the central role of the community and community based prevention programmes. Additionally, Guidelines 45 to 51 set out the social policy within which governments should strive to prevent child offenders; sufficient funds should be provided for medical services, nutrition, housing, counseling and substance abuse prevention.

The Riyadh Guidelines advocate for equal treatment under the law for children and adults. In reference to decriminalization of status offences, the Riyadh Guidelines provide:

“In order to prevent further stigmatization, victimization and criminalization of young persons, legislation should be enacted to ensure that any conduct not considered an offence or not penalized if committed by an adult is not considered an offence and not penalized if committed by a young person.”<sup>107</sup>

#### **2.2.4 The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLs Rules)**

The JDLs Rules deal with the child offenders deprived of their liberty including those held in custody at the pre-trial and trial stage as well as those committed to rehabilitation institutions.

Thus the JDLs Rules are primarily concerned with the treatment of child offenders for whom

---

<sup>104</sup> *ibid*

<sup>105</sup> Ann Skelton and Boyane Tshela, ‘Child Justice in South Africa’ (2008) Institute of Security Studies Monograph 150, 1

<sup>106</sup> *ibid*

<sup>107</sup> Riyadh Guidelines, Article 56

diversion and alternative sanctions have not been possible.<sup>108</sup> Nonetheless the JDLs Rules start out by strongly reinforcing the principles of no detention as set out in Article 37 (b) of the CRC.<sup>109</sup> Rule 1 and 2 of the JDLs Rules provide that;

1. “The juvenile justice system should uphold the rights and safety and promote the physical and mental wellbeing of juveniles. Imprisonment should be used as a last resort.”
2. “Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release.”

The underlying principle therein is 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. Where it occurs, every child offender must be dealt with as an individual, having his needs met as far as possible. Emphasis is placed on preparing the child offender for his return to society from the moment of entry into the detention facility.

Among the fundamental principles of the Rules is that the ideal legal framework for children in conflict with the law should uphold the rights and safety and promote the physical and mental wellbeing of the child offenders.

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

African countries felt the need to have an instrument specifically tailored to cater for the needs of the African child, thus the ACRWC which was adopted on 11 July 1990 by the Organization of African Unity now the African Union. The African Charter is the first

---

<sup>108</sup> UNICEF, ‘UNICEF Toolkit on Diversion and Alternatives to Detention’(UNICEF 2009) <[www.unicef.org/tdad/instrumentsummary\(2\).doc](http://www.unicef.org/tdad/instrumentsummary(2).doc)> accessed 7 February 2016

<sup>109</sup> *ibid*

regional treaty on children's rights. It is derived from the realization that the CRC did not capture the social - cultural and economic realities in Africa.

The Charter makes extensive provisions for the protection of the rights of the child but does not adequately provide for the rights of the child offender. For instance, the Charter does not state the recurrent theme in all international instruments on children in conflict with the law; that detention shall be the last resort and that no child shall be deprived of their liberty in an arbitrary and unlawful manner. Nonetheless, Article 17 of the Charter outlines the broad aims of a child justice system with which diversion and alternative sanctions, particularly with a restorative justice approach are highly compatible.<sup>110</sup> Article 17 (1) and (3) provide;

1. "Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others."

3. "The essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation."

### **2.3 The Ideal Framework on the Rights of Children in Conflict with the Law**

The principles that flow from the international instruments, standards and norms on the rights of children in conflict can be termed as the ideal framework on the rights of children in the law. The principles are discussed below:

#### **2.3.1 Non - Discrimination**

Article 2 of the CRC requires that "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parents' or legal guardian's race, colour, sex,

---

<sup>110</sup> *ibid*

language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status”.<sup>111</sup>

Children in need of care and protection more so street children, children facing social problems, homeless children or poor children are treated more harshly by the juvenile justice system.<sup>112</sup> The CRC Committee requires State Parties to take the necessary measures to ensure that children in conflict with the law are treated equally.<sup>113</sup>

Discrimination is evident in the criminalization of behavioural problems of children which are often as a result of socio-economic and psychological problems. Examples of the behavioural problems include: “curfew violations, school truancy, running away, begging, anti-social behaviour, gang association, and even simple disobedience or bad behaviour”.<sup>114</sup> Such acts constitute status offences. Status offences constitute acts and omissions that are not considered criminal offences if committed by an adult but are criminal offences when committed by a child.<sup>115</sup> Article 56 of the Riyadh Guidelines prevents the criminalization of status offences. It states “legislation should be enacted to ensure that any conduct not considered an offence or not penalized if committed by an adult, is not considered an offence and not penalized if committed by a young person”.<sup>116</sup> This is considered essential to prevent “further stigmatization, victimization and criminalization of young people.”<sup>117</sup> The CRC Committee in General Comment No. 10 recommends all State parties to abolish provisions of status offences and to establish equal treatment of adults and children under the law.<sup>118</sup>

---

<sup>111</sup> CRC, Article 2

<sup>112</sup> Committee on the Rights of the Child, General Comment No. 10, Children’s Rights in Juvenile Justice, 25 April 2007(CRC/C/GC/10), para 6

<sup>113</sup> *ibid*

<sup>114</sup> Child Rights Information Network, ‘Global Report on Status Offences’[2009] Child Rights Information Network 3

<sup>115</sup> United Nations, ‘Justice in Matters Involving Children in Conflict with the Law: Model Law on Juvenile Justice and Related Commentary’ United Nations New York 2013

<sup>116</sup> United Nations General Assembly, *United Nations Guidelines for the Prevention of Juvenile Delinquency*, (the Riyadh Guidelines) adopted by the General Assembly on 14 December 1990 (A/RES/45/112) Guideline 56

<sup>117</sup> *ibid*

<sup>118</sup> Committee on the Rights of the Child, General Comment No. 10, para 8

### **2.3.2 The Best Interests of the Child**

The best interests of the child should be the primary consideration in all decisions taken within the framework of the juvenile justice system. Children are different from adults in their physical and psychological development and in their emotional and educational needs and as such these differences constitute the basis for the lesser culpability of children in conflict with the law.<sup>119</sup> These and other differences are the reason for a separate and specialized system and infrastructure for children in conflict with the law as they require different treatment. The protection of the best interests of the child means that the traditional objectives of the criminal justice such as retribution must give way to rehabilitative and restorative justice when dealing with children in conflict with the law.<sup>120</sup>

Article 3(1) of the CRC 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”<sup>121</sup> The ACRWC also echoes the same principle.<sup>122</sup> The CRC Committee in General Comment No. 10 has implied that in the area of juvenile justice, the best interests of a child are served when the child is dealt with by a juvenile justice system that complies with the CRC and the standards and norms of juvenile justice instruments.<sup>123</sup>

### **2.3.3 The Right to Life, Survival and Development**

The legal framework on juvenile justice should be anchored on supporting the child’s development. Article 37(a) of the CRC explicitly prohibits capital punishment and life imprisonment. Article 37(b) of the CRC provides that deprivation of liberty including arrest, detention or imprisonment should only be used as a measure of last resort and for the shortest appropriate period of time. The CRC Committee in General Comment No. 10 observed that

---

<sup>119</sup> Committee on the Rights of the Child, General Comment No. 10, para 10

<sup>120</sup> *ibid*

<sup>121</sup> CRC, Article 3

<sup>122</sup> ACRWC

<sup>123</sup> Committee on the Rights of the Child, General Comment No. 10, para 10



“the use of deprivation of liberty has very negative consequences for the child’s harmonious development and seriously hampers his/her reintegration in society”<sup>124</sup> thus depriving a child liberty should be a measure of last resort so that a child’s right to development is fully respected and ensured.<sup>125</sup> Additionally, the right to life and survival guarantees the most basic needs, that is, shelter, nutrition, safety, access to healthcare and protection and health care.

#### **2.3.4 Dignity**

The treatment to be accorded to children in conflict with the law should be consistent with the children’s sense of dignity and worth. This is in consonant with the fundamental human right enshrined in Article 1 of the Universal Declaration on Human Rights which states that all human beings are born equal in dignity and in rights. The preamble of the CRC makes specific reference to this inherent right to dignity and worth which “has to be respected and protected throughout the entire process of dealing with the child, from the first contact with law enforcement agencies and all the way to the implementation of all measures for dealing with the child.”<sup>126</sup>

The treatment to be accorded to children in conflict with the law should also take into account the child’s age and and the child’s reintegration and the child assuming a constructive role in society as stipulated in Article 40(1) of the CRC. The CRC Committe in General Comment No. 10 states that “this principle must be applied, observed and respected throughout the entire process of dealing with the child, from the first contact with law enforcement agencies all the way to the implementation of all measures for dealing with the child.”<sup>127</sup> It is further recommended that all professionals involved in the administration of juvenile justice are

---

<sup>124</sup> Committee on the Rights of the Child, General Comment No. 10, para 11

<sup>125</sup> *ibid*

<sup>126</sup> Committee on the Rights of the Child, General Comment No. 10, para 13

<sup>127</sup> *ibid*

required to be knowledgeable on child development, the dynamic and continuing growth of children and what is appropriate for the children's wellbeing.<sup>128</sup>

Additionally, the CRC Committee in General Comment No. 10 states that respect for the dignity of the child requires that all forms of violence in the treatment of children in conflict with the law must be prohibited and protected.<sup>129</sup> State parties are urged by the Committee to take effective measures to prevent any violence from occurring in any sphere of the juvenile justice process.<sup>130</sup>

### **2.3.5 Proportionality**

Beijing Rule 5 provides that "any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence". Further, Beijing Rule 17(1)(a) states that "the reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society."

### **2.3.6 Primacy of Alternative Measures to Judicial Proceedings**

Children in conflict with the law have a right to be treated in ways that promote their reintegration and the child assuming a constructive role in society.<sup>131</sup> Article 40(3)(b) of the CRC requires for State Parties that: "Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings providing that human rights and legal safeguards are fully respected." The Beijing Rules provide that consideration should be given to dealing with child offenders without resorting to formal trial by the competent authority, wherever appropriate.<sup>132</sup>

CRC Committee opines that the obligation of States to promote measures for dealing with children in conflict with the law without resorting to judicial proceedings should not be

---

<sup>128</sup> *ibid*

<sup>129</sup> *ibid*

<sup>130</sup> *ibid*

<sup>131</sup> CRC, Article 40(1)

<sup>132</sup> Beijing Rules, Rule 11(1)

limited to children who commit minor offences or to first-time child offenders.<sup>133</sup> Rather, the appropriate approach is to gauge whether a child's offending could be handled more appropriately without resorting to judicial proceedings.

### **2.3.7 Participation**

Article 12 of the CRC provides that all children who are capable of forming their own views have the right to express those views in all matters that affect them, and that these views should be given due weight in accordance with the child's age and maturity. Consequently, when a child is subject to judicial proceedings, he has a right to be heard directly or through a representative. The CRC Committee recommends that whenever possible, the child be granted the right to be heard directly.<sup>134</sup> This right should be observed at all stages of the process, that is, from the pretrial stage to the right to be heard by the police, the prosecutor and the magistrate/judge, to the trial stage and during sentencing.

### **2.3.8 Proceedings without delay**

Article 40(2)(b)(ii) provides that every alleged child offender shall be informed promptly and directly of the charges against him. Additionally, the matter should be heard without delay by a competent, independent and impartial authority.<sup>135</sup> Article 17(2)(c)(iv) of the ACRWC also make provision for the expeditious handling of children cases without unnecessary delay.

### **2.3.9 Presumption of Innocence**

This is a fundamental principle of criminal justice. Thus every child in conflict with the law has a right to be presumed innocent until proved guilty. Article 40(2)(b)(i) of the CRC guarantee the presumption of innocence of a child offender until proven guilty by a court of law. The CRC Committee in General Comment No. 10, explains that "the child alleged as or accused of having infringed the criminal law has the benefit of doubt and is only guilty if

---

<sup>133</sup> Committee on the Rights of the Child, General Comment No. 10, para 10

<sup>134</sup> Committee on the Rights of the Child, General Comment No. 12, *The right of the child to be heard*, 20 July 2009 (CRC/C/GC/12), paras 35-37

<sup>135</sup> CRC, Article 40(2)(b)(iii)

these charges have been proven beyond reasonable doubt ... the authorities must not assume that the child is guilty without proof of guilt beyond reasonable doubt”.<sup>136</sup>

### **2.3.10 Detention as a Measure of Last Resort**

The restriction of personal liberty of a child should be imposed only as a measure of last resort and for the shortest period of time. Article 37(b) provides that “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.” Beijing Rule 17 (1) (b) provides that there should be careful consideration before limiting the personal liberty of a child offender and this should be limited for the possible minimum.

### **2.3.11 Separate and Specialized Criminal Justice System**

Article 40(3) of the CRC provides that:

“States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law”

The Beijing Rules provides guidelines for provision of child’s needs in the creation of separate and specialized infrastructure for children in conflict with the law.

### **2.3.12 Crime Prevention Initiatives**

The promotion of a full and harmonious development of a child’s personality, talents, mental and physical abilities is one of the most important goals of the implementation of the CRC.<sup>137</sup>

It is therefore not in the best interest of the child to grow in circumstances which may cause an increased risk of the child getting involved in criminal activities. To safeguard children, measures should be taken for the protection from all forms of physical or mental violence, injury or abuse (art. 19), to the highest attainable standard of health and access to health care

---

<sup>136</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007(CRC/C/GC/10), para 42

<sup>137</sup> CRC Preamble, Article 6 and 29

(art. 24) the full and equal implementation of the rights to an adequate standard of living (art. 27), , to education (arts. 28 and 29), and from economic or sexual exploitation (arts. 32 and 34), and to other appropriate services for the care and protection of children.<sup>138</sup> The CRC Committee in General Comment No. 10 recommends all State Parties to integrate the Riyadh Guidelines in their comprehensive legal framework on children in conflict with the law.<sup>139</sup>

## **2.4 Conclusion**

Any adequate legal framework on children in conflict with the law must incorporate the principles identified above, namely: non-discrimination, the best interest of the child, the right to life, survival and development, dignity, principle of proportionality, primacy to alternative measures to judicial proceedings, participation, proceedings without delay, presumption of innocence and detention as a measure of last resort. The principles set a benchmark as to the rights of a child offender. The principles set an ideal framework for children in conflict with the law and as such in the next chapter the Kenyan legal framework will be analysed against this backdrop.

---

<sup>138</sup> CRC, Articles 19, 24,27,29, 29, 32, 34

<sup>139</sup> Committee on the Rights of the Child, General Comment No. 10, *Children's Rights in Juvenile Justice*, 25 April 2007(CRC/C/GC/10), para 17

## **CHAPTER 3: THE EVALUATION OF THE KENYAN LEGISLATION ON CHILDREN IN CONFLICT WITH THE LAW**

### **3.1 Introduction**

This chapter uses the ideal framework identified in chapter 2 to examine the Kenyan legal framework. The laws examined are: the Constitution of Kenya, the Children Act, the Penal Code and the Sexual Offences Act. Firstly, the background of Kenyan legal framework on children in conflict with the law is discussed.

### **3.2 Development of Juvenile Justice in Kenya**

Colonial import of western concept of juvenile justice to African countries holds true to Kenya. In the 1930's a modified version of the British borstal system was introduced in Kenya.<sup>140</sup> The colonial inference on racial supremacy extended to the formulation of policies and treatment of child offenders as the issue of juvenile criminal behaviour became linked to “debates about urban growth and eugenic discourse on the African capacity to development.”<sup>141</sup> Two strands of the social school of thought which influenced juvenile justice was; the need for the separation, protection and rehabilitation of child offenders and the other school of thought was shaped by eugenic ideas in respect to innate racial and criminal characteristics.<sup>142</sup> At the time, Kabete Reformatory was the only institution that exclusively detained child offenders until 1937.<sup>143</sup>

The Sydney Hubert La Fontaine's 'Report on the applicability to Kenya of methods pursued in borstal and other reformatory schools in England' commissioned in 1932 contributed to the passing of the Juvenile Offenders Ordinance in 1933. Through the Act, childhood and adolescence became legally defined in Kenya as being distinct stages needing particular legal protection. A child was defined as being under fourteen and a young person as being under

---

<sup>140</sup> Chloe Campbell, 'Juvenile Delinquency in Colonial Kenya, 1900-1939' (2002) 45 *The Historical Journal* 129

<sup>141</sup> *ibid*

<sup>142</sup> *ibid*

<sup>143</sup> *ibid*

sixteen years of age.<sup>144</sup> The Act further recommended that children should have separate court hearings, children and young people should be protected by the Commissioner of Police from associating with adult offenders, the court procedure should be more appropriate to children and young people and if a sentence of imprisonment was passed industrial schools and reformatories were the designated institutions and the sentence should not be less than three years and not more than seven years.<sup>145</sup> The report further observed that child offenders as being amenable to rehabilitation programme though this was viewed through racial lens, it stated:

“Officers with close personal acquaintances of the African will agree that he possess in undevelopment form many of the qualities which go to make up of the average European lad, and that where he lacks the qualities, his plastic nature is such that they can be grafted on to him provided that good influence is continuously and intelligently exerted...there are good grounds for believing that in the case of the more malleable African results should be even more gratifying.”<sup>146</sup>

Thus is the bedrock on juvenile justice that contributed to the trajectory the juvenile justice system post independent Kenya would follow. The western approach on the welfare of children including juvenile justice was fully adopted dispensing with the then prevailing African methods of dealing with the interests of children. The pre-colonial African society was a stark contrast with the western ideologies. The British colonial law contributed to the reformulation of culture and consciousness creating new conceptions of space, time, property, work, marriage and family.<sup>147</sup> Prior to colonization, traditional societies had strong kinship, social operations were communal and evolved around the community, thus social economic

---

<sup>144</sup> *ibid*

<sup>145</sup> *ibid*

<sup>146</sup> La Fontaine, 'Report on the applicability to Kenya of methods pursued in borstal and other reformatory schools in England' [1933] KNA, AP/1/701

<sup>147</sup> Wambugu N. Beth and others, ' Juvenile Delinquency: A Legacy of Developmental Logic in Kenyan Government' (2015) 4 IJSR 1174

institutions were well established with each child's future development well secured.<sup>148</sup> A child essentially belonged to the community so the issue of neglect, deprivation and abandonment hardly arose. It can therefore be rightly argued that the colonial government created juvenile delinquents of the African children.<sup>149</sup> This is because the colonialists created an environment fertile for children to degenerate into delinquents; the cohesive social fabric of the African community was torn right in the middle and the social and economic changes associated with urbanization "led to the disintegration of the previously well established pre capitalist social economic and political institutions that ensured the well being of the African child."<sup>150</sup>

The dawn of children rights arrived when the wheels of legal reforms on the welfare of the child were set in motion by Kenya's ratification of the CRC and the ACRWC on 30<sup>th</sup> July 1990 and 25<sup>th</sup> July 2000 respectively. The Attorney General at the behest of the civil society called upon the Law Reform Commission to review the existing laws in respect to the interests of children and make recommendations for improvement so as to give effect to the CRC.<sup>151</sup> The Law Reform Commission sought to develop schemes which departed from inherited colonial laws and address juvenile justice in a comprehensive manner. This culminated with the enactment of the Children Act. The Act codified and replaced three statutes; The Children's and Young Person's Act (Cap 141), The Adoption Act (Cap 143) and The Guardianship of Infants' Act (Cap 144).

### **3.3 An Analysis of the Legal Framework in Kenya**

The evaluation of the adequacy of Kenyan legislation in protecting the rights of children in conflict with the law is undertaken against the background of the ideal framework discussed in chapter 2.

---

<sup>148</sup> *ibid*

<sup>149</sup> *ibid*

<sup>150</sup> *ibid*

<sup>151</sup> Odongo O Godfrey, 'Child Justice Legislation' (2006) 90 CYC-Net



### 3.3.1 The Constitution of Kenya

The Constitution of Kenya provides for a progressive bill of rights which guarantees economic, social, cultural, education, equality, social security rights and freedom from discrimination, political and civil rights for all citizens. Specific provisions are made on the rights of minorities, order members in society, persons with disability, youth and children.

Article 53 of the Constitution makes provision for the protection of the child.

“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.”

The Constitution also provides for the overarching principle of the best interests of the child to be considered in all matters concerning the child. Article 53(2) of the Constitution states: “A child's best interests are of paramount importance in every matter concerning the child.”

152

---

<sup>152</sup> The Constitution of Kenya, Article 53 (2)

The Constitution provides that every accused person has a right to a fair trial, to have the trial begin and conclude without unreasonable delay.<sup>153</sup>

Right to legal representation is also guaranteed by the Constitution, Article 50(2)(h) provides that every accused person has a 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.”<sup>154</sup>

A Senior Programme Officer, Probation Service interviewed had this to say respect to the adequacy of the Constitution in protecting the rights of child offenders:

I'd have to say yes. Yes, the Constitution is detailed. It provides a progressive bill of rights for all which is in consonant with human rights international instruments. Specific provisions of the Constitution in respect to child offenders are provided. Though I wish to point out that legislation is not static as the realization of rights is a progressive journey. So there is room to improve the rights of child offenders.<sup>155</sup>

From the interviews conducted, 80% (24 out of 30 interviewees) stated that the Constitution is progressive in making provisions for child offenders.

However the implementation of the Constitution is wanting, as evidentially, majority of child offenders in custody in police and court cells are mixed with adults. A survey on violence against children in the Kenyan juvenile justice system<sup>156</sup> observed that out of 509 children respondents, 57.2% of the respondents were held with adults in police cells and 60.2% of the respondents were held with adults in court cells. Despite the Constitutional guarantee to legal representation, in a total of 568 children respondents, 76.8% reported lack of representation in court.<sup>157</sup>

---

<sup>153</sup> The Constitution of Kenya, Article 50(2)(e)

<sup>154</sup> The Constitution of Kenya, Article 50(2)(h)

<sup>155</sup> Respondent No. 3 in Appendix I

<sup>156</sup> CESVI Nairobi, *'Violence Does not Fall on One Roof Alone: Baseline Survey on Violence Against Children in the Kenya Juvenile Justice System'* (CESVI, Nairobi: Kolbe Press 2016) 48

<sup>157</sup> Ibid at 51

### **3.3.2 The Children Act**

The Children Act is the most comprehensive legal framework on children rights providing a catalogue of rights on welfare of the child, parental responsibility, custody and maintenance, guardianship, children in need of care and protection and children in conflict with the law. The provisions of the Children Act on children in conflict with the law are the most comprehensive law having incorporated the tenets of the CRC and the ACRWC. Section 4 of the Act states 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.”<sup>158</sup>

As the Children Act amalgamates various fields of children rights including Part XIII in respect to child offenders and the Fifth Schedule on Child Offender Rules, there is no distinct legislation on child justice. 80% of the respondents (24 out of 30) supported a separate legislation on child justice.

#### **3.3.2.1 A Specialized Court**

Provision is made for separate courts to deal with children matters and the general principles to be observed in proceedings in Children’s courts in Part VI of the Children Act. Section 73 of the Act provides for special courts for children to handle all matters related to children apart from hearing of a charge of murder or a charge in which the child is charged together with person (s) of or above the age of eighteen years. Section 74 of the Act states that “a Children’s Court shall sit in a different building or room, or at different times, from those in which sittings of courts other than Children’s Courts are held.” Additionally, the Children’s Court shall have a setting friendly to the child offender as provided by Section 188 of the Act. In the absence of a specific Children’s Court, Section 185 (5) of the Children Act provides that a court shall comply with the provisions of the Act in respect to safeguards to be accorded a child offender.

---

<sup>158</sup> Children Act, s 4

It was observed at the Milimani Courts that the Children Court is situated on the third floor of the Court's building and that it embraces a child friendly atmosphere through its low level setting arrangement for a participants. A Resident Magistrate stationed at the Children Court stated that:

The Children's Court ought to be set in a distinct building as is the case in Nakuru's Children's Court. Additionally, the Children's Court in Nakuru has a child friendly ambience as the low magistrate's seat and the benches reduce the feeling of intimidation and the walls are decorated with cartoon characters paintings.<sup>159</sup>

The proceedings in respect to offences committed by a child are governed by section 194(1) of the Children Act which provides:

“Proceedings in respect of a child accused of having infringed any law shall be conducted with the rules set out in the Fifth Schedule.”

Though specialised procedure of carrying out proceedings in respect offences committed by child, the system remains adversarial in nature.

An interviewee who is a Senior Programme Officer, Probation Services had this to say in respect to processing of child offenders through the adversarial justice process:

The system is adversarial in nature which works against the child offender. The child offender may not participate due to fear, intimidation or lack of knowledge and this can lead to an injustice being committed upon the child. Either a child justice procedural code can be adopted as is the case in Canada or adopt an inquisitorial system and principles in respect to the child offenders.<sup>160</sup>

---

<sup>159</sup> Respondent No. 1 in Appendix I

<sup>160</sup> Respondent No. 3 in Appendix I

50% of the respondents (15 out of 30 interviewees) affirmed that the adversarial justice process does not protect the rights of the child offenders.

### **3.3.2.2 Arrest Procedure**

The recurrent ideal framework to be observed include: the best interest of the child, dignity, primacy of alternative measures to judicial proceedings and detention as a measure of last resort. Arrest, detention or imprisonment should only be used as a measure of last resort and for the shortest appropriate period of time.<sup>161</sup> The Fifth Schedule of the Children Act lays down the rules to be observed in respect to court proceedings of a child offender. Rule 4 (1) of the Child Offenders Rules of the Children Act state that:

“Where a child is apprehended with or without a warrant on suspicion of having committed a criminal offence he shall be brought before the court as soon as practicable:

Provided that no child shall be held in custody for a period exceeding twenty four hours from the time of his apprehension, without the leave of court.”

When a child offender is apprehended and cannot be brought forth before a court, he may be released by a police officer upon his inquiry into the case on recognition being entered into by his parent or guardian or other responsible person with or without sureties.<sup>162</sup>

The Children Act does not make any provision for alternative measures of diverting children in conflict with the law from judicial procedure and processes. 80% of the respondents (24 out of 30 interviewees) supported the provision of legislation of diverting child offenders from the judicial process.

In this regard, a police officer stated:

---

<sup>161</sup> CRC Article 37(b) ; Beijing Rules Rule 13.3 and 19; JDLs Rules Rule 2

<sup>162</sup> Fifth Schedule Child Offender Rules Rule 5

The criminal justice process can be traumatizing to the child offenders. The procedures are not child friendly as they are complicated and abstract. There should be a system where parents are involved throughout the process because parenting problems fuel majority of the offences like stealing, drug related offences and burning of schools which we have witnessed recently.<sup>163</sup>

In the wake of school arson attacks perpetrated by high school students around the country, the alleged child offenders were processed through the criminal justice system. Though there was a call for an out of court settlement in the instance of eight Sunshine Secondary School students accused of committing a felony and arson, the High Court overruled a lower court's decision upholding an out of court settlement. There was request by the school to give dialogue a chance in resolving the student's arson case. Chief Magistrate Lucy Gitari granted the request of an out of court settlement giving the students seven days to settle the case with the school administration. However a review of the decision was requested by the Director of Public Prosecution stating that there was sufficient evidence to charge the students. Upon review, the High Court overruled the decision of the Magistrate's Court allowing the out of court settlement ruling that the magistrate erred in her ruling and that the students should be charged as required by law. The students were ordered to appear before the Magistrate's Court and take a plea.<sup>164</sup> The Constitution of Kenya recognises and encourages mediation as a form of dispute resolution to be applied by the courts.<sup>165</sup> Though the court annexed mediation is under implementation on a pilot basis within High Courts at the Family and Commercial Divisions, Milimani Law Courts in Nairobi, criminal matters are precluded.

---

<sup>163</sup> Respondent No. 5 in Appendix I

<sup>164</sup> Maureen Kakah , 'Judge Overrules Out-of Court Talks for Sunshine Students in Arson Case' *Daily Nation* ( Nairobi, 28 July 2016) 4

<sup>165</sup> The Constitution of Kenya, Article 159(2)(c)

The Child Offender Rules prevents a child offender from being detained in a police station, or be detained with or be allowed to associate with an adult who is not related to a child.<sup>166</sup> A child offender should be detained in a separate institution or a separate part of a police cell.<sup>167</sup>

As earlier noted, the survey on violence against children in the Kenyan juvenile justice system<sup>168</sup> observed that children in conflict with the law in custody in police and court cells were mixed with adults, 57.2% in police cells and 60.2% in court cells, further observed that the legal limit of holding child offenders for 24 hours was hardly observed. Out of a total of 580 children respondents only 14.8% of the respondents had been brought before a court within the legal limit. 85.2% reported being held longer than the statutory 24 hours.<sup>169</sup> The survey further observed that child offenders experienced diverse forms of violence: 57.4% were denied basic needs, that is, food, water, shelter and medical care, 45.5% experienced forced labour, 40.8% faced mistreatment, 30.9% deprived of freedom, 24.8% experienced verbal abuse, 24.0% were humiliated and shamed, 23.8% experienced physical abuse, 22.0% were subjected to mental stress and 19.7% experienced sexual abuse.<sup>170</sup>

### **3.3.2.3 The Trial Process**

A Children's court tries a child of any offence except for the offence of murder or an offence with which the child is charged together with a person or persons of or above the age of eighteen years.<sup>171</sup> Safeguards have been guaranteed to a child offender during the court proceedings, they include; be informed promptly and directly of the charges against him, to be provided legal assistance by the Government, to have the matter determined without delay, not compelled to give testimony or to confess guilt, right to an appeal, to have his privacy

---

<sup>166</sup> Fifth Schedule Child Offender Rules Rule 6(1)

<sup>167</sup> Fifth Schedule Child Offender Rules Rule 6(2)

<sup>168</sup> CESVI Nairobi, '*Violence Does not Fall on One Roof Alone: Baseline Survey on Violence Against Children in the Kenya Juvenile Justice System*' (CESVI, Nairobi : Kolbe Press 2016) 48

<sup>169</sup> *ibid*

<sup>170</sup> *Ibid* at 40

<sup>171</sup> Children Act, s 184

respected in all the proceedings.<sup>172</sup> The Court may release a child brought before the court and charged with an offence on such terms as the Court deems appropriate.<sup>173</sup> Failure to be released on bail results to the child offender being remanded in custody<sup>174</sup> and the remand period shall not exceed six months in case of an offence punishable by death or three months in case of any other offence.<sup>175</sup> The Court is mandated to observe the best interests of the child offender are at all times and “take steps for removing him from undesirable surroundings and for securing that proper provision be made for his maintenance, education and training.”<sup>176</sup> A child offender in remand or custodial care has a right to medical care in case of ill health.<sup>177</sup> The duration of the child offender’s case has been set by the Fifth Schedule Child Offender Rules. All cases are to be handled expeditiously and without unnecessary delay,<sup>178</sup> and where a case is not completed within three months after his plea has been taken, the case shall be dismissed and the child shall not be liable to any further proceedings of the same offence.<sup>179</sup> Where a court superior to The Children’s Court is handling the case, a child offender is to be held in remand for a maximum of six months after which the child shall be released on bail<sup>180</sup> and if the case is not completed within twelve months after the plea has been taken, the case shall be dismissed and the child discharged and shall not be liable to further proceedings for the same offence.<sup>181</sup>

The provisions of Rule 10 (4) Child Offender Rules are not absolute. In *Republic v Nzaro Chai Karisa and three others*<sup>182</sup> it was stated that Article 49 (1) (h) of the Constitution provides that every accused person is entitled to bond or bail on reasonable conditions

---

<sup>172</sup> Children Act, s 186

<sup>173</sup> Fifth Schedule Child Offender Rules Rule 9

<sup>174</sup> Fifth Schedule Child Offender Rules Rule 10 (1)

<sup>175</sup> Fifth Schedule Child Offender Rules Rule 10 (4)

<sup>176</sup> Children Act, s 187 (1)

<sup>177</sup> Children Act, s 187 (2)

<sup>178</sup> Fifth Schedule Child Offender Rules Rule 12 (1)

<sup>179</sup> Fifth Schedule Child Offender Rules Rule 12 (2)

<sup>180</sup> Fifth Schedule Child Offender Rules Rule 12 (3)

<sup>181</sup> Fifth Schedule Child Offender Rules Rule 12 (4)

<sup>182</sup> Mombasa High Court Criminal Case No. 5 of 2011 eKLR



pending a charge or trial, unless there are compelling reasons not to released, therefore “where for compelling reasons a child has been remanded in custody, a child cannot insist on automatic release after the end of either three months or six months as provided by Rule 10 (4) of the Child Offender Rules where those reasons persist.”<sup>183</sup> The Court further stated “In this way there will be instances where the provisions of Rule 10 (4) must give way to the provisions of Article 49 (1) (h) of The Constitution.”<sup>184</sup>

In *Republic v Dorine Aoko Mbogo and Another*<sup>185</sup> the Court observed that under the Child Offender Rules the maximum period of remand for a child is six months after which a child be granted bail as a matter of right, except where there are compelling reasons for denial of bail under Article 49 (1) (h) of the Constitution.<sup>186</sup>

It is worth noting that though the law protects the child from being detained for a long duration, the implementation falls short.

An interviewee child offender on trial jointly with another child offender for handling stolen property stated:

I have been in remand since October last year when I was arrested together with my friend for handling stolen property. I am glad that today my father has posted bail and am awaiting my release.<sup>187</sup>

The survey on violence against children in the Kenya juvenile justice system<sup>188</sup> illustrated that in a total of 277 children respondents surveyed in remand homes; 49% of the respondents

---

<sup>183</sup> *ibid*

<sup>184</sup> *ibid*

<sup>185</sup> Nakuru High Court Criminal Case No. 36 of 2010 eKLR

<sup>186</sup> *ibid*

<sup>187</sup> Respondent No. 10 in Appendix I

<sup>188</sup> CESVI Nairobi ‘*Violence Does not Fall on One Roof Alone: Baseline Survey on Violence Against Children in the Kenya Juvenile Justice System*’ (CESVI, Nairobi : Kolbe Press 2016) 50

were held in remand for three months while 50.5% exceeded the three months statutory period.

The child offenders are presumed innocent and should be treated as such and have a right to legal counsel. However in the survey on violence against children in the Kenya juvenile justice system<sup>189</sup> in a total of 568 children respondents, 76.8% of the child offenders reported that they were not represented in court. The situation is exasperated by the fact that majority of the child offenders are not informed of the court process and procedures in order for them to fully understand their rights and responsibilities. Out of the 521 children respondents surveyed, 75% reported that they had not been informed of the judicial process.<sup>190</sup>

Additionally, the time limits stipulated in Rule 12 of the Fifth Schedule of the Child Offender Rules were considered a violation of the Children Act itself and unconstitutional in respect to the then Constitution in *Kazungu Kasiwa Mkunzo and Another v Republic*.<sup>191</sup> It was argued that Section 186(c) of the Children Act does not set the time limits within which trials must be completed nor does it purport to define the period which would qualify as amounting to ‘without delay’. Section 31(b) of the Interpretation and General Provisions Act provides that: “no subsidiary legislation shall be inconsistent with the provisions of an Act.”<sup>192</sup> Thus Rule 12 of the Fifth Schedule of the Child Offender cannot override Section 186(c) of the Children Act. It was further stated that Article 77(1) of the then constitution did not define what ‘reasonable time’ would be.

A prosecuting counsel agreed that indeed there is a delay in the determination of matters. He noted that:

---

<sup>189</sup> *ibid* at 51

<sup>190</sup> *Ibid* at 57

<sup>191</sup> Mombasa High Court Criminal Appeal 239 of 2004 eKLR

<sup>192</sup> Interpretation and General Provisions Act Chapter 2 Laws of Kenya, s 31(b)

Owing to the huge backlog and delay in resolving cases, the Milimani Children Court has adopted plea bargaining. The plea bargaining system was highlighted here during the inaugural Judiciary Children Court Service Week in April 2016. This is to fast track cases and to ensure that the child offenders spend the least amount of time in custody. So far around 20 cases have been determined through the plea bargaining process.<sup>193</sup>

#### **3.3.2.4 Sentencing**

Where Children's Court is satisfied as to the guilt of the child offender, it is mandated to deliver the verdict without the use of the words "conviction" or 'sentencing" rather the term a finding of guilt or an order upon such finding may be used.<sup>194</sup> Section 191(1) of the Children Act provides for methods of dealing with child offenders upon the court's satisfaction of his guilt:

- “(a) By discharging the offender under Section 35(1) of the Penal Code (Cap 63);
- (b) by discharging the offender on his entering into a recognisance, with or without sureties;
- (c) by making a probation order against the offender under the provisions of the Probation of Offenders Act (Cap 64);
- (d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;
- (e) if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;
- (f) by ordering the offender to pay a fine, compensation or costs, or any or all of them;

---

<sup>193</sup> Respondent No. 11 in Appendix I

<sup>194</sup> Children Act, s 189

(g) in case the child has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;

(h) by placing the offender under the care of a qualified counsellor;

(i) by ordering him to be placed in an educational institution or a vocational training programme;

(j) by ordering him to be placed in a probation hostel under the provisions of the Probation of Offenders Act (Cap 64);

(k) by making a community service order; or

(l) in any other lawful manner.”<sup>195</sup>

Additionally, corporal punishment is prohibited.<sup>196</sup>

Though the provisions of alternative sentencing are progressive and in tandem international instruments, there has been criticism in that regard as Ann Skelton states:

“It was found that 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 in the criminal justice system for children. The danger in this is that in reality the system may be far

---

<sup>195</sup> Children Act, s 191(1)

<sup>196</sup> Children Act, s 191 (2)

less benign than it seems on paper. Children are not sent to prisons - but alternatives to imprisonment may also be damaging.”<sup>197</sup>

In this regard, the Resident Magistrate interviewed noted:

The courts favour institutional sentencing as opposed to say for example issuing of probation orders. This is because probation officers take advantage of the child offenders who are placed under them. The child offenders are forced to do domestic chores for the probation officers where they are usually humiliated and overworked.<sup>198</sup>

Another interviewee who is a Senior Programme Officer, Probation Services observed:

The laws in this respect are very vague and the roles of various officers having a mandate on child offenders intertwined due to various departments, that is, the Prison’s Department, the Children Services and the Probation Service playing a role. There is lack of synergy and at times duplicity of roles occur. For instance Rule 11 of the Fifth schedule of the Children Act requires for a report to be made by both the children officer and the probation officer before the Court makes an order.<sup>199</sup>

The interviewee further added:

As at June this year, there are 1,220 boy child offenders under probation while there are 219 girls under probation. The probation period ranges from 6 months to 3 years. In the same period, 9 girls and 65 boys are serving community service orders.<sup>200</sup>

The Children Act further provides for committing child offenders to custody. A restriction on the punishment of child offenders is provided by the Children Act which prohibits

---

<sup>197</sup> Ann Skelton, ‘Juvenile Justice in Kenya’ (1999) issue 8 CTY-Net < [www.cyc.net.org/cyc-online/cycol-0999-youthjusticekenya.html](http://www.cyc.net.org/cyc-online/cycol-0999-youthjusticekenya.html) > accessed 7 July 2016

<sup>198</sup> Respondent No. 1 in Appendix I

<sup>199</sup> Respondent No. 3 in Appendix I

<sup>200</sup> *ibid*

imprisonment and the death sentence<sup>201</sup>. A child offender is committed to a rehabilitation school if he is above the age of ten years and under the age of fifteen years whilst if the child has attained the age of sixteen years, he is committed to borstal institutions.<sup>202</sup>

A probation officer who was interviewed had this to say:

Shimo la Tewa and Shikutsa are the only borstal institutions in the Country serving the boy child offenders. Secondary education was introduced at Shikutsa 3 years ago as only primary education was being offered in both institutions. Until recently, there was no borstal institution catering for girl child offenders. This was long overdue. The Kamae Girls Borstal Institution which is at Kamiti Maximum Prison can now absolve these girls who were previously sent to rehabilitation centres or temporarily held in prison with adults. This definitely did not augur well with their intended rehabilitation.<sup>203</sup>

There is lack of legal consistency in various legislations on provisions on corporal punishment. Though Section 191(2) of the Children Act prohibits corporal punishment, Section 55(1) of the Prisons Act authorises for corporal punishment:

“Where corporal punishment is awarded the number of strokes shall be limited to a maximum of ten strokes in the case of persons of or under the apparent age of sixteen years, and in all other cases to eighteen strokes, and shall be inflicted with such type of cane as may be prescribed.”<sup>204</sup>

---

<sup>201</sup> Children Act, s 190 (1) (2) and (3)

<sup>202</sup> Children Act, s 191 (e) and (g)

<sup>203</sup> Respondent No. 4 in Appendix I

<sup>204</sup> Prisons Act Chapter 90 Laws of Kenya, s 55(1)

In addition, Section 36(3) of the Borstal Institutions Act provides that no sentence of corporal punishment shall be carried out until the lapse of a period of 24 hours from the time of the order.<sup>205</sup> Female inmates are however exempted from corporal punishment.<sup>206</sup>

In a total of 34 and 38 respondents surveyed in Shikutsa Borstal in Kakamega and Shimo La Tewa Borstal respectively 82.6 percent stated that they have been subjected to caning.<sup>207</sup>

Further, varied interpretation of the law gives credence to imprisonment of child offenders. Though section 191(1) provides for methods of dealing with a child offender who is tried of an offence, section 25(2) of the Penal Code Chapter 63 Laws of Kenya provides that a court shall sentence the child offender to be detained at the President's pleasure. It states:

“Sentence of death shall not be pronounced on or recorded against any person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of eighteen years, but in lieu thereof the court shall sentence such a person to be detained during the President's pleasure and if so sentenced he shall be liable to be detained in such place and under such conditions as the President may direct whilst so detained shall be deemed to be in legal custody.”<sup>208</sup>

In *J.M.K. versus Republic*<sup>209</sup> the Court of Appeal determined that the sentence of detaining the accused child offenders in prison at President's pleasure imposed by the trial court was lawful. The Court of Appeal alluded to section 191 of the Children Act which provides for several methods of dealing with a child offender in particular section 191(1) which is all embracing as it states:

---

<sup>205</sup> Borstal Institutions Act Cap 92 Laws of Kenya, s 36(1)

<sup>206</sup> Borstal Institutions Act, s 36(3)

<sup>207</sup> CESVI Nairobi, *Violence Does not Fall on One Roof Alone: Baseline Survey on Violence Against Children in the Kenya Juvenile Justice System* (CESVI Nairobi : Kolbe Press 2016) 127

<sup>208</sup> The Penal Code, s 25 (2)

<sup>209</sup> Court of Appeal at Nyeri, Criminal Appeal No. 552 of 2010 both the accused were convicted by the trial court of two counts of robbery with violence contrary with section 296(2) of the Penal Code and sentenced to imprisonment to be detained during the President's pleasure. The Court of appeal upheld the conviction.

...or;

(l) in any other lawful manner.

It was further observed in *Dennis Motanya Mokua and Another v Republic*<sup>210</sup> that, “...section 191(1) is not mandatory and the court has the discretion to deal with the child in any other lawful manner as section 191(1) (l) specifically provides. It follows that section 25 (2) of the Penal Code and section 191(1) of the Act are not mutually exclusive but rather complementary.”<sup>211</sup>

### **3.3.3 The Penal Code**

The Penal Code<sup>212</sup> outlines criminal offences and their respective penalties. The Code prescribes the minimum age of criminal responsibility.

#### **3.3.3.1 Age of Criminal Responsibility**

In Kenya, a person under the age of eight years is not criminally responsible for any acts or omission<sup>213</sup> whilst “a person under the age of twelve years is not criminally responsible for acts or omissions, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.”<sup>214</sup> The CRC does not explicitly set the age of criminal responsibility, the obligation is left to State Parties to establish the minimum age of criminal responsibility.<sup>215</sup> The ACRWC echo the same obligation to State Parties.<sup>216</sup> Rule 4 of the Beijing Rules recommends that any minimum age of criminal responsibility “shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity”.<sup>217</sup> However, the Kenyan current age of

---

<sup>210</sup> Kisumu Criminal Appeal Case No. 94 of 2011 eKLR

<sup>211</sup> *ibid*

<sup>212</sup> The Penal Code, Cap 63 Laws of Kenya

<sup>213</sup> The Penal Code, s 14 (1)

<sup>214</sup> The Penal Code, s 14(2)

<sup>215</sup> CRC, Article 40 (3)(a)

<sup>216</sup> ACRWC, Article 17(4)

<sup>217</sup> United Nations General Assembly, ‘United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)’ adopted by the General Assembly on 29 November 1985 (A/RES/40/33), Rule 4



criminal responsibility has been criticized as being too low. The Committee on the Rights of the Child upon observation of the Initial Report by Kenya under the CRC concluded in its concluding observations that “the minimum age of eight years is too low.”<sup>218</sup> Additionally, In General Comment No. 10, the CRC Committee recommends that States “shall increase the existing low minimum age of criminal responsibility to an internationally acceptable level” concluding that “a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable”.<sup>219</sup> The Committee strongly encourages States to increase the minimum age of criminal responsibility to for instance fourteen or sixteen years of age.<sup>220</sup> This argument is anchored on advancements made in medical science on the development of the human brain.<sup>221</sup> This can be argued to provide a protective mantle to children below the age of 12 years to afford them a holistic development in their crucial formative years.

From the interviews conducted, 60% (18 out of the 30 respondents) supported the increment of the minimum age of criminal responsibility.

### **3.3.5 The Sexual Offences Act**

The Sexual Offences Act Chapter 62A Laws of Kenya provides for description and penalties of sexual offences.

Section 8 of the Act makes provision for defilement. Section 8(1) of the Act provides: “A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.” The provision has been challenged as being discriminatory against the male child. In *C.K.W v Attorney General and another*,<sup>222</sup> the petitioner a minor aged sixteen years at the material time was charged in Criminal Case No. 1901 with the offence of

---

<sup>218</sup> Committee on the Rights of the Child, *Concluding Observations-Kenya* (CRC/C/15/Add 160) para 22

<sup>219</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para 32

<sup>220</sup> *ibid* para 33

<sup>221</sup> Jacqui Gallinetti, *Getting to Know the Child Justice Act* (Child Justice Alliance 2009) 21

<sup>222</sup> Eldoret High Court Petition No. 6 of 2013 eKLR

defilement contrary with Section 8(1) as read with Section 8(4) of the Sexual Offences Act. The petition at the High Court was challenging the constitutional validity of Section 8(1) as read with Section 8(4) of the Sexual Offences Act to the extent that they are inconsistent with the rights of children under the Constitution. Section 8(4) of the Act states: “A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.” The validity of the Sections was put into question as they criminalise consensual sexual relationships between adolescents. The petitioner contended that the sexual act between him and the complainant *J* was consensual, he emphasized that *j* was indeed his girlfriend. It was argued before the Court that the law was applied in a discriminatory manner as it was only the boy who was charged. Though the petition was unsuccessful, it raised a number of pertinent issues as observed in the ruling by Justice Fred A. Ochieng: the need to consider other measures which are more appropriate and desirable for children without resorting to judicial proceedings; the relevant professionals in matters related to children to explore mechanisms and procedures that protect children whilst simultaneously being proportionate to the circumstances of the child and the offence; the need to strive to live up to the provisions of Article 40 of the CRC while providing the optimum systems of protecting the Kenyan child in a sensitive manner on matters of sexual conduct.

In addition, other pertinent issues that arise from the case include: need to decriminalize status offenses as consensual sexual acts between minors is criminalized while adults are not subjected to criminal proceedings for similar acts and the need to protect the child offender as much as the victim.

Out of the 30 respondents interviewed 21 (70%) were in agreement that there is need review section 8(1) of the Sexual Offences Act.

An interviewee who is a prosecuting counsel spoke in support of the review stating:

I have encountered several cases where a boy is charged with defilement at the insistence of the girl's parents while all the while both the boy and the girl in the matter maintain that they are in a relationship. Alternative ways of handling such scenarios need to be explored.<sup>223</sup>

Other Judicial officers have added to the calls to have a review of the Sexual Offences Act. During the interviews for the position of Chief Justice and Deputy Chief Justice before the Judicial Service Commission, Chief Justice Justice David Maraga empathised with male child offenders stating that the law was unfair to them.<sup>224</sup> Justice Maraga stated that societal problems contributed to child sex offenders and the same cannot be adequately addressed by meting long jail sentences on the child offenders, rather special institutions should be established.<sup>225</sup> Justice Maraga further stated: "We must understand that the young boys who are punished as a result of the Sexual Offences Act are our children who are trying to discover themselves and if we continue to punish them that way, then we are doing injustice. We need to relook into that law and amend it."<sup>226</sup> Lady Justice Abida Ali – Aroni further empathised with the male child offender informing the Judicial Service Commission that the Sexual Offences Act was unfair to the male child sexual offenders.<sup>227</sup> Justice Aroni defended her decision to release a 19 year old boy who had been convicted of the offence of defiling a 16 year old girl who at the age of 16 years was sentenced to 20 years in jail. She stated, "There is a problem with the law when it comes to young offenders. I wondered why the boy was

---

<sup>223</sup> Respondent No. 11 in Appendix I

<sup>224</sup> Paul Ogemba, Judges in Kenya Root for Review of Sexual Offences Act to End Unfair Penalties <http://www.standardmedia.co.ke/article/2000218183/judges-in-kenya-root-for-review-of-sexual-offences-act-to-end-unfair-penalties> < accessed 3 October 2016 >

<sup>225</sup> ibid

<sup>226</sup> ibid

<sup>227</sup> Paul Ogemba, 'Judges in Kenya Root for Review of Sexual Offences Act to End Unfair Penalties' <http://www.standardmedia.co.ke/article/2000218183/judges-in-kenya-root-for-review-of-sexual-offences-act-to-end-unfair-penalties/?pageNo=2> <accessed 3 October 2016 >

punished and not the girl when they were both underage. Those are some of the things I considered before releasing the boy."<sup>228</sup> Court of Appeal Judge Patrick Kiage stated during the Annual Judicial Officers' Conference that it was important to have an open discussion in respect to the Sexual Offences Act.<sup>229</sup> Justice Kiage stated that there are many judgements by superior courts that have expressed problems with the Sexual Offences Act and he therefore urged the Attorney General Githu Muigai to consider a total review of the law.<sup>230</sup>

### **3.4 Conclusion**

Kenya has made great strides in the enactment of legislation in respect to child offender's rights as propagated by international treaties, standards and norms in that regard. However, as analysed, the present legal framework does not fully protect the rights of children in conflict with the law. Guided by the ideal framework articulated in chapter 2, it has been deduced that the following areas fall short of the benchmark: Lack of a separate legislation for child justice; lack of alternative measures to judicial proceedings; ambiguity and inconsistencies in various legal provisions; lack of separate and specialised infrastructure for children in conflict with the law; a low minimum age of criminal responsibility and in specific instances, discrimination and absence of proportionality on the part of the male child offender in defilement cases.

This shortfall on the ideal framework in protecting the rights of child offenders is further compounded by lack of implementation of the legislation in place protecting the rights of the child offender. As analysed in this chapter, though there is legislation on: detention as a measure of last resort; proceedings without delay; participation; right to legal representation; right to dignity and right to development, there is lack of implementation.

---

<sup>228</sup> *ibid*

<sup>229</sup> Philip Muyanga, 'Judges Seek a Review of Law on Sexual Offences' *Daily Nation* (Nairobi, 24 August 2016)

10

<sup>230</sup> *ibid*

The next chapter analyses the provisions of the South Africa's Child Justice Act to establish the best practices Kenya can learn from South Africa.

## **CHAPTER 4: AN ANALYSIS OF THE SOUTH AFRICAN CHILD JUSTICE ACT**

### **4.1 Introduction**

The South African Child Justice Act 75 of 2008 establishes a criminal justice system for dealing with children in conflict with the law. The right based approach on dealing with children in conflict with the law is exemplified, advancing the values propagated by the South African Constitution and upholds its international treaty obligations in particular reference to the CRC and the ACRWC. The Child Justice Act is a detailed procedural framework capturing progressive and novel provisions of dealing with children in conflict with the law. The detailed preamble of the Child Justice Act states the aim of the Act which include: provision of the minimum age of criminal capacity; provision of a mechanism for dealing with children who lack criminal capacity outside the criminal justice system; provision for the assessment of children; provision for holding a preliminary inquiry and incorporating as a central figure the prospects of diverting matter away from the formal criminal justice system; provision for child justice courts to conduct trials for children matters which have not been diverted; outlines the sentencing options available for children who have been convicted and entrenches the notion of restorative justice in the criminal justice system in respect to children in conflict with the law.<sup>231</sup> The objectives set out by the Child Justice Act include: protecting the rights of children as provided in the South African Constitution; promoting the spirit of Ubuntu in the child justice system; providing special treatment of children in the criminal justice system designed at breaking the cycle of crime and preventing children from being exposed to the adverse effects of the criminal justice system by provision of options more suitable to the needs of children.<sup>232</sup> Additionally, the Child Justice Act outlines the guiding principles to be taken into account in the application of the Act. Principles of non-discrimination, proportionality, participation, right to be heard, equality, expeditious

---

<sup>231</sup> Child Justice Act 75 of 2008, Preamble, herein after referred to as the Child Justice Act

<sup>232</sup> Child Justice Act, Objectives

determination of matters and the observation of the rights and obligations of children contained in international and regional instrument in particular reference to the CRC and the ACRWC are provided by the Act.<sup>233</sup>

## **4.2 Provisions of the Child Justice Act**

This is an analysis of the provisions of the Child Justice Act that encapsulate the ideal framework which the child justice system ought to represent as discussed in chapter 2.

### **4.2.1 The Best Interests of the Child**

The preamble of the Child Justice Act acknowledges that the then statutory law did not “effectively approach the plight of children in conflict with the law in a comprehensive and integrated manner that takes into account their vulnerability and special needs.”<sup>234</sup> Establishing a criminal justice system for children in conflict with the law underpins the uniqueness of children and the fact that they require different treatment from adults.

The Child Justice Act provides 10 years as the minimum age of criminal capacity.<sup>235</sup> A child who is below the age of 10 years cannot be prosecuted. The Act raises the minimum age of criminal capacity from the previous seven years. Section 7(2) of the Act provides that a child who is 10 years or older but younger than 14 at the time of the alleged commission of the offence is presumed not to have criminal capacity unless it is subsequently proved beyond reasonable doubt that the child had such capacity at the time of the alleged commission of the offence.<sup>236</sup> Children who are older than 14 years of age have full criminal capacity. There are factors to be considered when dealing with a child offender who is 10 years or older but below 14 years: the nature and seriousness of the offence; education level, age and maturity of the child, cognitive ability, domestic and environmental circumstances; probation officer’s

---

<sup>233</sup> Child Justice Act, Guiding Principles

<sup>234</sup> Child Justice Act, Preamble

<sup>235</sup> Child Justice Act, Section 7(1)

<sup>236</sup> Child Justice Act, Section 7(2)

assessment report; the impact of the alleged offence on any victim; the interests of the community; the prospects of establishing criminal capacity and the appropriateness of diversion.<sup>237</sup> This prevents the automatic processing of the child through the trial process.

Provision for dealing with children below the age of 10 years has been provided by Section 9 of the Child Justice Act. This is not to be construed that the child is criminally liable rather, it is acknowledging that children who get involved in crime are at risk and as such action should be taken. The interventions are civil law measures of education, welfare or non punitive measures rather than criminal sanctions.<sup>238</sup> Section 9(3)(a) of the Act states that a child offender must be assessed by a probation officer and either refer the child for counseling or therapy, to children's court, to an accredited programme or that no action should be taken.

Section 8 of the Child Justice Act provides for the review of the minimum age of criminal capacity.

#### **4.2.2 Primacy of Alternative Measures to Judicial Proceedings**

One of the aims of the Child Justice Act articulated in the preamble is to create “an informal, inquisitorial, pre-trial procedure designed to facilitate the disposal of cases in the best interests of children by allowing for the diversion of matters involving children away from formal criminal proceedings in appropriate cases.”<sup>239</sup> The inquisitorial processes that lead to diversion and the diversion process are discussed.

##### **4.2.2.1 Assessment**

The Child Justice Act makes provision for pre-trial assessment. This is against the backdrop of focusing on the child's abilities and strengths rather than the aspects of the offence or the child's family environment. Section 34 of the Child Justice Act states that: “every child who is alleged to have committed an offence must be assessed by a probation officer unless the

---

<sup>237</sup> Child Justice Act, Section 10

<sup>238</sup> Jacqui Gallinetti, *Getting to Know the Child Justice Act* (Child Justice Alliance 2009) 17

<sup>239</sup> Child Justice Act, Preamble



assessment is dispensed with.” The purpose of assessment as outlined in the Act include: to establish the probable age of the child; to determine whether the child is in need of care and protection and should be transferred to children’s court; to establish the prospects of diversion; to gather any information of previous diversion, previous conviction or pending charge in respect to the child; formulate recommendations regarding the release, placement or detention of the child; to determine measures to be taken if dealing with a child below 10 years of age.<sup>240</sup> The information obtained during an assessment is confidential and only used for purpose authorized by the Act and for preliminary inquiry and is inadmissible as evidence during plea taking, bail application, trial or sentencing proceedings in which the child offender appears.<sup>241</sup> The assessment may take place at a suitable place identified by the probation officer which may include the magistrate’s court, a room at the police station, the offices of the Department of Social Development or a One-Stop Child Justice Centre.<sup>242</sup>

#### **4.2.2.2 Preliminary Inquiry**

This is an innovative procedure created by the Child Justice Act. It is in compliance with Article 40(3) of the CRC which states that:

“States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law.”

The preliminary inquiry is essentially, the child offender’s first appearance in court. Section 43 of the Child Justice Act makes provision for preliminary inquiry which is explained as an informal pretrial procedure which may be held in court or any other suitable place. The process is chaired by a magistrate. This procedure is to ensure an individualized response is

---

<sup>240</sup> Child Justice Act, Section 35

<sup>241</sup> Child Justice Act, Section 36(1)

<sup>242</sup> Child Justice Act, Section 37(1)

used of every child offender to avoid the child getting ‘lost’ in the system. Section 43 of the Child Justice Act stipulates the purpose of the preliminary inquiry: consider the assessment report and the recommendations made by the probation officer; establish from the prosecutor whether the matter can be diverted; identify a suitable diversion option; decide on the referral of a matter to children’s court in case of a matter of a child in need of care and protection; ensure the views of all concerned are taken into account; encourage the participation of the child offender and his parents or appropriate guardian in making decisions concerning the child; determine the release or placement of the child.

The Child Justice Act provides that every child accused of committing an offence must appear before a preliminary inquiry unless the child is below the age of 10 years, the child has already been diverted by the prosecutor or the prosecutor has withdrawn the charges against the child.<sup>243</sup> The methods of securing the attendance of a child offender to a preliminary inquiry are: a written notice, summons and arrest.<sup>244</sup> Section 43(3)(b)(i) states that a preliminary inquiry must be held within 48 hours of the child’s arrest.

The orders made at the preliminary inquiry are diversion order and referral of the matter to the child justice court for plea taking and trial.<sup>245</sup>

#### **4.2.2.4 Diversion**

The Child Justice Act by providing a regulatory framework for diversion makes it the first time diversion has been regulated in the criminal justice system. Diversion involves the referral of matters away from the formal criminal court process. Diversion is achieved by way of prosecutorial diversion of minor offences committed, at the preliminary inquiry though an

---

<sup>243</sup> Child Justice Act, s 40

<sup>244</sup> Child Justice Act, s 17(1)

<sup>245</sup> Child Justice Act, s 40

order by the inquiry magistrate or through an order of the court during the trial in the child justice court.<sup>246</sup>

Section 51 of the Child Justice Act states the objectives of diversion:

- “(a) deal with a child outside the formal criminal justice system in appropriate cases;
- (b) encourage the child to be accountable for the harm caused by him or her;
- (c) meet the particular needs of the individual child;
- (d) promote the reintegration of the child into his or her family and community;
- (e) provide an opportunity to those affected by the harm to express their views on its impact on them;
- (f) encourage the rendering to the victim of some symbolic benefit or the delivery of some object as compensation for the harm;
- (g) promote reconciliation between the child and the person or community affected by the harm caused by the child;
- (h) prevent stigmatising the child and prevent the adverse consequences flowing from being subject to the criminal justice system;
- (i) reduce the potential for re-offending;
- (j) prevent the child from having a criminal record; and
- (k) promote the dignity and well-being of the child, and the development of his or her sense of self-worth and ability to contribute to society.”<sup>247</sup>

Two levels of diversion options are provided by the Child Justice Act. The options are linked to the schedule of offences classified by the Act in order of the seriousness of the offence.

---

<sup>246</sup> Child Justice Act, s 42

<sup>247</sup> Child Justice Act, s 51

Schedule 1 contains minor offences, schedule 3 consists of more serious offences and schedule 3 consists of the most serious offences. Level one applies to offences listed in schedule 1 while level two applies to all other offences as listed in schedule 2 and schedule 3 of the Act.<sup>248</sup> Some of the diversion options available in level one include: an oral or written apology to a specific person, persons or institution; a formal caution with or without conditions; a family time order; a good behavior order; referral to counseling or therapy; restitution of a specific object to a specific victim or victims; community service and payment of compensation. The diversion options available in level two include: “compulsory attendance at a specified centre or place for a specified vocational, educational or therapeutic purpose, which may include a period or periods of temporary residence; referral to intensive therapy to treat or manage problems that have been identified as a cause of the child coming into conflict with the law, which may include a period or periods of temporary residence; and placement under the supervision of a probation officer on conditions which may include restriction of the child's movement outside the magisterial district in which the child usually resides without the prior written approval of the probation officer.”<sup>249</sup>

The time frame for level one diversion option may not exceed 12 months for children under the age of 14 years and 24 months for children of 14 years and older. The time period applicable for level two diversion may not exceed 24 months for children aged 14 years or older and 48 months for children aged 14 years or older.<sup>250</sup>

The minimum standards applicable to diversion have been set by section 55 of the Child Justice Act. Section 55(1) provides that “in keeping with the objectives of diversion must be structured in a way so as to strike a balance between the circumstances of the child, the nature

---

<sup>248</sup> Child Justice Act, s 53(2)(a) and (b)

<sup>249</sup> Child Justice Act, s 53(4)(b)(c) and (d)

<sup>250</sup> Child Justice Act, s 53(5)(a)(i) and (ii) and s 53(6)(a)(i) and (ii)

of the offence and the interests of society.”<sup>251</sup> Additionally, the diversion options must be appropriate to the age and maturity of the child, must be sensitive to the circumstances of the victim, may not be exploitative, harmful to the child’s physical and mental health and may not interfere with the child’s schooling.<sup>252</sup> In furtherance to diversion, the informal procedures of family group conference and victim offender mediation are provided by the Act.<sup>253</sup>

#### **4.2.3 Proceedings without Delay**

The Child Justice Court is not a separate court rather it is any court which deals with a child who is alleged to have committed an offence and applies the provisions of the Child Justice Act to the case relating to the child offender.<sup>254</sup> The plea and the trial proceedings are conducted at the Child Justice Court. Section 66 of the Act makes provision for a speedy trial, it provides that:

“A child justice court must conclude all trials of children as speedily as possible and must ensure that postponements in terms of this Act are limited in number and in duration.”<sup>255</sup>

If a child is detained in prison prior to the commencement of the trial, the proceedings cannot be postponed for longer than 14 days at a time, the proceedings cannot be postponed for 30 days at a time if a child is detained in a child or youth care center and if a child has been released the proceedings cannot be postponed for 60 days at a time.<sup>256</sup>

In an instance where a child offender has not been diverted at preliminary inquiry, the Child Justice Court can divert the child offender during the trial. Section 67 of the Child Justice Act provides that at any time before the conclusion of the case for the prosecution, the Child Justice Court may make an order for diversion. Following the diversion order, the proceeding

---

<sup>251</sup> Child Justice Act, s 55(1)

<sup>252</sup> *ibid*

<sup>253</sup> Child Justice Act, s 61 and s 62

<sup>254</sup> Jacqui Gallinetti, *Getting to Know the Child Justice Act* (Child Justice Alliance 2009) 51

<sup>255</sup> Child Justice Act, s 66

<sup>256</sup> Child Justice Act, s 66(2)

at the Child Justice Court must be postponed pending the child's compliance with the diversion order.<sup>257</sup> Upon the probation officer's submission of a report to the Child Justice Court that the child has successfully complied with the diversion order and the Court is satisfied, the proceedings at the Child Justice Court are stopped.<sup>258</sup> This means that the child offender has not been found guilty and the proceedings cannot be re instated in court. Whereas, if the child offender has not complied with the diversion order, the proceedings at the Child Justice Court continue and an acknowledgement of responsibility may be recorded as an admission for purpose of the trial.<sup>259</sup>

#### **4.2.4 Detention as a Measure of Last Resort**

The sentences imposed by the Child Justice Court must be in accordance with the Child Justice Act and several objectives and factors in regard to the sentencing are to be considered. Section 69 of the Child Justice Act provides that the objectives and factors in sentencing are to:

- “(a) encourage the child to understand the implications of and be accountable for the harm caused;
- (b) promote an individualised response which strikes a balance between the circumstances of the child, the nature of the offence and the interests of society;
- (c) promote the reintegration of the child into the family and community;
- (d) ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration; and
- (e) use imprisonment only as a measure of last resort and only for the shortest appropriate period of time.”<sup>260</sup>

---

<sup>257</sup> Child Justice Act, s 67(1)(a)

<sup>258</sup> Child Justice Act, s 67(2)

<sup>259</sup> Child Justice Act, s 67(1)(b)

<sup>260</sup> Child Justice Act, s 69(1)(a)(b)(c)(d)(e)

There are two categories of sentencing, non-custodial and custodial sentencing. The sentencing options provided by the Child Justice Act include: community based sentences such as diversion; restorative justice sentences such as victim offender mediation and family group conferences; fine or alternative to fine; correctional supervision; compulsory residence in child or youth care center; sentence of imprisonment though a child below the age of 14 is exempted; suspended sentences and penalties in lieu of imprisonment such as compensation and restitution.<sup>261</sup>

#### **4.2.5 Proportionality, Participation and Dignity**

The guiding principles of the Child Justice Act provide that:

- “(a) All consequences arising from the commission of an offence by a child should be proportionate to the circumstances of the child, the nature of the offence and the interests of society.
- (b) A child must not be treated more severely than an adult would have been treated in the same circumstances.
- (c) Every child should, as far as possible, be given an opportunity to participate in any proceedings, particularly the informal and inquisitorial proceedings in terms of this Act, where decisions affecting him or her might be taken.”
- (d) Every child should be addressed in a manner appropriate to his or her age and intellectual development and should be spoken to and be allowed to speak in his or her language of choice, through an interpreter, if necessary.
- (e) Every child should be treated in a manner which takes into account his or her cultural values and beliefs.

---

<sup>261</sup> Child Justice Act, s 72-78

(h) A child lacking in family support or educational or employment opportunities must have equal access to available services and every effort should be made to ensure that children receive similar treatment when having committed similar offences.”<sup>262</sup>

#### **4.2.6 Presumption of Innocence**

It is a constitutional right for every accused person to have a legal representative.<sup>263</sup> Several requirements must be observed by a legal representative while representing a child offender: allow the child to give independent instructions concerning the case; explain the child’s rights and duties to any proceeding under the Act; promote diversion whilst not unduly influencing the child to acknowledge responsibility; ensure that all the proceedings under the Act in which the child is involved are concluded without delay and in a manner to ensure the best interests of the child are of paramount importance; to uphold the highest standard of ethical behaviour and professional conduct.<sup>264</sup>

Where there is no legal representation when a child appears before the Child Justice Court, the matter must be referred to Legal Aid South Africa for evaluation.<sup>265</sup> No plea may be taken until a child has been afforded a reasonable opportunity to obtain a legal representative.<sup>266</sup>

#### **4.3 Conclusion**

The best interest of the Child principle runs through the Child Justice Act. The minimum age of criminal responsibility is 10 years. Acknowledging that child offenders below the age of 10 are at risk, provision of civil law measures of education, welfare and non punitive measures are provided by the Act. Novel provisions on pre trial assessment, preliminary inquiry and diversion that advance alternative measures to judicial proceedings are provided. To ensure a speedy trial, the duration of the trial process is provided. Detention as a measure of last resort

---

<sup>262</sup> Child Justice Act, Guiding Principles

<sup>263</sup> Constitution of the Republic of South Africa No 108 of 1996, Article 35(2) and (3)

<sup>264</sup> Child Justice Act, s 80

<sup>265</sup> Child Justice Act, s 82(1)

<sup>266</sup> Child Justice Act, s 82(2)



is emphasized by the provision of community based sentencing and restorative justice sentences.

## **CHAPTER 5: CONCLUSION, SUMMARY AND RECOMMENDATIONS**

### **5.1 Conclusion**

Progress has been had in the recognition and advancement of children rights. In Socio-economic, cultural, religious, political and administration of justice spheres, child rights have been herald with the CRC crystallizing these rights. Kenya in this regard has ratified and domesticated both the CRC and the ACRWC, made progressive provisions on children rights in the Constitution and the Children Act. The study's purview was on the rights of children in conflict with the law. This study sought to examine the adequacy of the legal framework in protecting the rights of children in conflict with the law and to identify gaps in the legal framework in protecting the rights of children in conflict with the law. This was done by examining the international instruments, norms and standards on children in conflict with the law and deducing from these instruments the ideal framework for children in conflict with the law. The study used the ideal framework as the yardstick in assessing the adequacy of the Kenyan legal framework in protecting the rights of child offenders. The Kenyan legal framework analysed included: the Constitution, the Children Act, the Penal code, the Criminal Procedure Code and the Sexual Offences Act. An analysis of the best practice in this regard was sought from the South African Child Justice Act.

### **5.2 Summary and Recommendations**

The study has brought to the fore pertinent issues.

It was noted that the Constitution protect the rights of child offenders. 80% of the respondents stated that the Constitution adequately provides for the rights of the child offender. The progressive Bill of Rights guarantees the rights of all persons. Article 53(f) of the Constitution provides for detention as a measure of last resort and for the shortest period; Article 53(2) enunciates the best interest of the child principle; Article 50(2) (e) provides for a

right to a fair trial to begin and conclude without unreasonable delay and Article 50(2) (h) provides for the right to legal representation.

The Children Act makes provision for specialized children courts that have settings friendly to the child offender, where it was evidenced in Nairobi, Thika and Nakuru Children Courts. It is recommended that the special children courts be replicated in all children courts across the country. Alternative measures of diverting children in conflict with the law from the judicial process have not been provided for. 80% of the interviewees were in support of an alternative to the judicial process. It is recommended that diversion and other alternative restorative justice measures ought to be legislated as a measure of channeling child offenders away from the judicial process. The Children Act guarantees a child offender that the matter is determined without delay while the Fifth Schedule of the Child Offender Rules provides for the duration a child offender may be remanded in custody and the duration of cases. It is recommended that the said provisions ought to be incorporated in the main legislation, that is, the Children Act. The Children Act provides for alternative sentencing of child offenders though as highlighted in the study sentencing preference is on institutional sentencing due to abuse of the system by probation officers. The development of code of conduct highlighting ethical rules and child protection rules is recommended. The study further noted the inconsistencies in the provisions of the Children Act, the Prison Act and the Borstal Act in respect to corporal punishment. Whilst the Children Act prohibits corporal punishment, the Prison Act and the Borstal Act provide for corporal punishment. Uniform legislation that advances the rights of the child offender is recommended, thus necessary amendment on legislation that provide for corporal punishment is required. The study noted that varied interpretation of legal provisions may lead to violation of the rights of the child offender. Section 191(1) provides for methods of dealing with child offenders upon the determination of guilt and imprisonment is exempted. Section 191(1) (l) which provides “in any other lawful

manner” gives leeway to varied interpretation. Section 25(2) of the Penal Code provides that the court shall sentence a child offender to be detained during the President’s pleasure. A child offender is therefore lawfully detained at President’s pleasure. The ambiguity in the provisions needs to be addressed. There is need for the various entities and departments having the mandate in respect to child offenders to work in synergy as opposed to at cross purposes. In addition, the various roles played by various departments need to be clearly outlined. Further recommendation is made for the enactment of separate legislation in respect to children in need of care and protection and children in conflict with the law.

The Penal Code provides for the minimum age of criminal responsibility. It was noted in Chapter 3 that the age of eight years as stipulated in Section 14(1) of the Penal Code is low viewed against the backdrop of international rules and standards. 60% of the respondents recommended the increment of the minimum age of criminal responsibility. It is recommended that the minimum age of criminal responsibility be raised to internationally acceptable standards.

It has been deduced that the Criminal Procedure Code is not tailored with the child offender in mind. The best interests of the child, non discrimination, proportionality and participation principles articulated in Chapter 2 are not enunciated in the criminal justice processes and procedure. 50 per cent of the respondents stated that the criminal justice process is adversarial to the child offender. An inquisitorial system is recommended for child offenders. Additionally, an Act is proposed for establishing a separate criminal justice system for children in conflict with the law.

Further enunciated in Chapter 3 is the Sexual Offences Act provision on defilement. The lack of proportionality and discriminatory nature in respect to the offence, the sentence and male child offender in specific instances has been brought forth. In such specific instances, the

male child offender faces the wrath of the law in respect to consensual sex between minors where harsh penalties are meted out. A review and amendment of the Sexual offences Act is recommended in this regard. 70% of the respondents were in favour of the review of section 8 (1) of Sexual Offences Act. The issue of status offences then arises where the study noted that international instruments and standards advocate for the decriminalization of status offences. It is recommended that criminal response to status offences be dispensed with and the focus directed on addressing the socio-economic and developmental and behavioral problems of child offenders. Additionally, parents, the community and other players ought to be brought in the fold when addressing such concerns.

A holistic approach needs to be fostered amongst all role players in the child justice system through corroboration by the role players who include: government departments and agencies, legal practitioners, nongovernmental organizations and community based organizations.

## **BIBLIOGRAPHY**

### **Books**

K Heseltine and K Howells , 'Community-based corrections' in Marmo M, De Lint W and Palmer D (eds) *Crime and Justice: A Guide to Criminology* (4th Edition. Sydney: Thomson Reuters 2012)

KIE, *Child Rights and Child Protection in Kenya* (KIE 2002)

J Gerry, *Restorative Justice: Ideas, Values, Debates*, (Cullompton, Devon: Willan Publishing 2002)

B Claire, *The Standard of the Best Interests of the Child: A Western Tradition in International and Comparative Law* ( Dordrecht: Martinus Nijhoff 2002 )

K Christiaan, 'Traditional leaders and rural development' in Marina D'Engelbronner-Kolff, Manfred O. Hinz, J. L. Sindano (eds), *Traditional Authority and Democracy in Southern Africa* (New Namibia Books 1998)

Z Howard, *Changing Lenses: A new focus for crime and justice*, (Scottsdale, PA: Herald press 1990)

### **Articles**

Godfrey Odongo, 'Caught between progress, stagnation and reversal of some gains: Reflections on Kenya's record in implementing children's rights norms' [2012] *African Human Rights Law Journal* 112

Wambugu N. Beth and others, 'Juvenile Delinquency: A Legacy of Developmental Logic in Kenyan Government' (2015) 4 *IJSR* 1174

Chloe Campbell, 'Juvenile Delinquency in Colonial Kenya, 1900-1939' (2002) 45 *The Historical Journal* 129

Ann Skelton and Boyane Tshehla, 'Child Justice in South Africa' (2008) *Institute of Security Studies Monograph* 150, 1

John Muncie, 'The United Nations, children's rights and juvenile justice' in Taylor Wayne, Earle Rod and Hester Richard (eds), *Youth Justice Handbook: Theory, policy and practice* (Cullompton Willan 2009)

Abramson B, 'Juvenile Justice, "the Unwanted Child" of State Responsibilities : an Analysis of the Concluding Observations on the UN Committee on the Rights of the Child in Regard to Juvenile Justice 1993-2000'(Defence for Children International 2000)

Franklin E. Zimring, 'The Common Thread: Diversion in Juvenile Justice' [2000] Cal. L. Rev. 2477

Catherine Wood, 'Diversion in South Africa: A Review of Policy and Practice, 1990-2003' [2003] ISS Paper 79 Institute for Security Studies Pretoria 1

Terry Hutchinson and Russell Smandych, 'Juvenile Justice in Queensland and Canada: New Legislation Reflecting New Directions (2005) 22(2) Australasian Canadian Studies 101

Daniel O'Donnell, 'The Convention on the Rights of the Child of the Child and Other International Standards Concerning Juvenile Justice' [1993] Atheneo Human Rights Law Journal

Thomas Uche Onyemachi, 'Children, Status and the Law in Nigeria' (2010) 4(3a) African Research Review 378

Apollo Mboya, 'Juvenile Justice System in Urgent need of Reforms' Standard Newspaper 16<sup>th</sup> January 2014

Ministry of Devolution and Planning, 'Launch of the State of World Population Report 2014' Daily Nation 19<sup>th</sup> November 2014

### **Online Journals**

Godfey Odongo, 'The domestication of international law standards on the rights of the child with specific reference to juvenile justice in the African context'  
<http://www.ahrlj.ip.ac.za/ondongo.g>

Sloth – Nielsen Julia, ‘Child justice in Africa A Guide to Good Practice Community Law Center’ <http://www.communitylawcentre.org/za>

UNICEF, ‘UNICEF Toolkit on Diversion and Alternatives to Detention’ (UNICEF 2009) <[www.unicef.org/tdad/instrumentssummary\(2\).doc](http://www.unicef.org/tdad/instrumentssummary(2).doc)

International Team on Juvenile Justice Defence, ‘Defence for Children International Children in Conflict with the law’ <http://www.kidsbehindbars.org>

Ann Skelton, ‘Juvenile Justice in Kenya’ (1999) issue 8 CTY-Net [www.cyc.net.org/cyc-online/cycol-0999-youthjusticekenya.html](http://www.cyc.net.org/cyc-online/cycol-0999-youthjusticekenya.html)

Janet E. Ainsworth, ‘The Courts Effectiveness in Protecting the Rights of Juveniles in Delinquency Cases’(1996)6TheFutureofChildren64<[http://www.princeton.edu/futureofchildren/publication/docs/06\\_03\\_04.pdf](http://www.princeton.edu/futureofchildren/publication/docs/06_03_04.pdf)>



## APPENDICES

### APPENDIX I

#### SCHEDULE OF INTERVIEWS

<b>Interview Participant No.</b>	<b>Sex</b>	<b>Occupation of the Participant</b>	<b>Date of the Interview</b>
1.	Female	Resident Magistrate	30 <sup>th</sup> September 2016
2.	Female	Prosecuting Counsel	30 <sup>th</sup> September 2016
3.	Male	Probation Officer	5 <sup>th</sup> October 2016
4.	Male	Probation Officer	5 <sup>th</sup> October 2016
5.	Male	Police Officer	7 <sup>th</sup> October 2016
6.	Male	Police Officer	7 <sup>th</sup> October 2016
7.	Female	Police Officer	7 <sup>th</sup> October 2016
8.	Female	Police Officer	10 <sup>th</sup> October 2016
9.	Female	Children's Officer	10 <sup>th</sup> October 2016
10.	Male	Child Offender	10 <sup>th</sup> October 2016
11.	Male	Prosecuting Counsel	11 <sup>th</sup> October 2016
12.	Female	Prosecuting Counsel	11 <sup>th</sup> October 2016
13.	Female	Legal Practitioner	12 <sup>th</sup> October 2016
14.	Female	Prosecuting Counsel	12 <sup>th</sup> October 2016
15.	Female	Children's Officer	12 <sup>th</sup> October 2016
16.	Male	Probation Officer	13 <sup>th</sup> October 2016
17.	Female	Probation Officer	13 <sup>th</sup> October 2016
18.	Female	Legal Practitioner	14 <sup>th</sup> October 2016
19.	Male	Child Offender	14 <sup>th</sup> October 2016
20.	Male	Legal Practitioner	14 <sup>th</sup> October 2016
21.	Female	Children's Officer	17 <sup>th</sup> October 2016

22.	Female	Children's Officer	17 <sup>th</sup> October 2016
23.	Male	Child Offender	17 <sup>th</sup> October 2016
24.	Male	Child Offender	17 <sup>th</sup> October 2016
25.	Male	Child Offender	17 <sup>th</sup> October 2016
26.	Male	Probation Officer	18 <sup>th</sup> October 2016
27.	Male	Legal Practitioner	19 <sup>th</sup> October 2016
28.	Female	Police Officer	19 <sup>th</sup> October 2016
29.	Female	Children's Officer	19 <sup>th</sup> October 2016
30.	Female	Resident Magistrate	19 <sup>th</sup> October 2016

**APPENDIX II**  
**CONSENT FORM**

Research Title: An Analysis of the Adequacy of the Legal Framework in Protecting the Rights of Child Offenders in Kenya.

Researcher: Joyce Nkirote Kinuu ( LLM Candidate School of Law, University of Nairobi.)

Supervisor: Dr. Scholastica Omondi

Please read (listen) to the following information.

1. The purpose of the research is to fulfill the requirements of the University of Nairobi, School of Law for the award of a degree of Master of Laws.
2. The aim of the research is to find out whether the legal framework applicable to child offenders adequately protects their rights in Kenya.
3. The findings of the research will be used to make recommendations that may inform law makers in drafting, amending, legislating laws that advocate and advance the rights of child offenders.
4. The research will be carried out by interviewing selected judicial officers, police officers, children officers, probation officers and prosecuting counsel and legal practitioners.
5. The views of child offenders arraigned in court will also be sought.
6. Participation in this research is voluntary, and participants can withdraw from the study at any time without any consequences to them.
7. There are no risks whatsoever associated with the research.
8. There is no material benefit for participating in this research, but the contributions by the respondents will inform and act as a reference point to the law makers in drafting, amending and enacting laws that promote the rights of child offenders.

9. Participants' responses, views and opinion will be received and held in strict confidence for the purposes of the research only.
10. In the event that any question administered during the interview is not clear, feel free to ask for clarification.
11. The respondents will not be linked to the data collected in any way and their identities will not be revealed in any way at all. You will not be named in any study reports, presentations or publications.
1. A subject number will be assigned to the respondents and only that number will be used in the data collection forms, which will only be known to the researcher.

If you consent to participate, you will be interviewed by the researcher who will ask your views on laws and procedures, authorities and institutions specifically applicable to child offenders, their resultant effect and your recommendations therein.

You may now ask any questions concerning the above points for clarification.

I HAVE READ & UNDERSTOOD THE NATURE AND PURPOSE OF THE RESEARCH AND VOLUNTARILY ACCEPT TO TAKE PART IN THE STUDY.

-----

(Signature of subject/respondent)

-----

Date

-----

(NAME OF RESPONDENT/SUBJECT GUARDIAN/PARENT)

## INTERVIEW GUIDE

Name/Serial No. \_\_\_\_\_

(Name to remain confidential if provided)

Age: \_\_\_\_\_ Sex: (Male/Female)

Occupation \_\_\_\_\_

Date of interview: \_\_\_\_\_

Language of interview, if not English \_\_\_\_\_

- I. Does the legal framework applicable to child offenders adequately protect their rights?
- II. How do you gauge the rights of child offenders in light of the Constitution of Kenya 2010?
- III. Identify the gaps in the legal framework applicable to child offenders.
- IV. What is your opinion on the criminal justice procedures and processes vis a vis the child offender?
- V. What is the effect of these laws and procedures on child offenders?
- VI. Should there be an alternative to the criminal justice system in respect to children in conflict with the law? Kindly, state the alternative(s).
- VII. What measures do you recommend to promote and protect the rights of children in conflict with the law?
- VIII. Kindly, add any further information if any.

Thank you very much for sparing your time to participate in this interview.

